FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 1, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2013-960 A.C. No. 15-17691-325489-02
v.	Mine: #3
ALDEN RESOURCES, LLC, Respondent	

DECISION AND ORDER

Appearances: Ryan L. Pardue, Esq., Office of the Solicitor, Department of Labor, Denver, Colorado for Secretary of Labor

Billy R. Shelton, Esq., Jones, Walters, Turner, & Shelton, PLLC, Lexington, Kentucky for Alden Resources, LLC

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).[1] The parties stipulated to, inter alia, jurisdictional issues, interstate commerce, operator and authorized representative status, authenticity of exhibits, and that the proposed penalties will not affect Respondent's ability to remain in business. Tr. I. 8, Jt. Ex. 1.

An evidentiary hearing was held in London, Kentucky at which witnesses were sequestered. The parties presented testimony and documentary evidence and filed post-hearing

[1] Prior to hearing, the parties agreed to settle six of the eleven citations at issue in Docket No. KENT 2013-960 and the single citation in Docket No. KENT-2013-959. I left the record open for receipt of the partial settlement as Joint Exhibit 2 (Jt. Ex. 2). On September 30, 2014, the undersigned issued Decision Approving Partial Settlement, Order to Modify, and Order to Pay a total civil penalty of $1,740 for those settled citations. That Decision has now become final. Citation Nos. 8378378, 8378379, 8378383, 8378384, and 8407725 in Docket No. KENT 2013-960 were left for hearing.

briefs.[2]

The primary issues presented are whether the five contested 104(a) citations at issue were properly written with appropriate proposed assessments. After careful review of the record, I affirm, Citation No. 8378378, as written, and assess a $1,026 civil penalty, as proposed, for the significant and substantial (S&S) violation of 30 C.F.R. § 75.310(a)(3) because the automatic fan signal on Fan No. 2 was de-energized and not working. I vacate Citation No. 8378379 alleging a violation of 30 C.F.R. 75.312(g)(1) because there was no record in the ventilation book that Fan No. 2 was examined on May 6 or 7, 2013. I modify amended Citation No. 8378383, alleging high negligence for a significant and substantial (S&S) violation of 30 C.F.R. § 75.380(d)(7)(vi) due to missing spheres and other components on the primary escapeway lifeline, to reduce the number of miners affected from 13 to 10. I assess a civil penalty of $3405, as proposed. I modify Citation No. 8378384, alleging that Respondent violated 30 C.F.R. § 75.360(b)(1) because its examiners were failing to perform adequate examinations, to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely, to reduce the injury or illness that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty," and to reduce the number of miners affected from 13 to 10. I reduce the penalty from the $25,163 proposed and assess a civil penalty of $3,406. I affirm Citation No. 8407725, as written, and assess a $425 civil penalty, as proposed, for the S&S violation of 30 C.F.R. 72.630(b) for failure to maintain the dry dust-collection system on the twin-head, roof-bolting machine in permissible and safe operating condition. I assess a total civil penalty of $8,262 against Respondent for the five litigated citations.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the post-hearing briefs, I make the following:

II. Findings of Fact

A. Background

Respondent operates Mine #3, a deep, underground, bituminous coal mine in Knox County, Kentucky. Coal is extracted through room-and-pillar mining below the water drainage

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[2] Joint Exhibits (Jt. Exs.) 1- 6 were received into evidence. Petitioner Exhibits (P. Exs.) 1, 2, 5, 7-16, were received into evidence, but P. Ex. 15 (MSHA's Certified Assessed Violation History) was received only for the 15 months prior to the citation at issue. Tr. 290-92. Respondent's Exhibits (R. Exs.) 1-3 were received into evidence.

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

level from the blue gem seam of coal, which is usually about 24-27 inches in height. Tr. I, 20. The pillar entries are no more than 20 feet wide and about 40 inches high. Tr. I , 20-21, 114.

The #3 intake entry and primary escapeway is a sloped road that serves as the main travelway for miners in and out of the mine. The road is rough, wet, and well-traveled by equipment and it extends from the portal to the loading point at crosscut #68, just outby the last open crosscut, where the lifeline begins. Tr. I, 109, 112-113, 121-22, 128; P. Ex. 10. The mine has several pumps for water control because a little bit of water can be a big problem for the small mine. Tr. II, 14. Miners can't walk and must crawl through the travelways, or use battery-powered vehicles. Tr. I, 113-14.

There are two ventilation fans. Tr. I, 21-22. Both fans are loud. Tr. I, 58. The No. 1 fan ventilates the active section of the mine where the miners are working and has the capacity to deliver 93,430 cubic feet per minute of air. Tr. I, 52-53. The No. 2 fan provides a maximum of 16,500 cubic feet per minute of fresh intake air from the surface to crosscut 32, where it splits off from the main intake to travel across the sealed entries, outby, and back out the mine. Tr. I, 25-26, 54-55. Respondent's underground mine manager, Fred Shannon, testified that the No. 2 fan does not assist the No. 1 fan in ventilating the face areas at the mine, and is used to pull air across the sealed areas on a separate split of air. Tr. II, 19-20. Although the air from the No. 2 fan does not sweep across the working face, the pressure between the two fans allows the No. 2 fan to pull air from the face entry out of the mine. Tr. I, 55-57. Therefore, if the No. 2 fan is de-energized and no longer providing return air across the sealed areas, it would allow the No. 1 fan to pull air up through and across the sealed areas and pull it onto the working sections. Tr. I, 27. Accordingly, when the No. 2 fan is not functioning, air from the sealed areas is pulled onto the working section and mixes with other air going up the entry. Tr. I, 55-56, 70-71.

On April 18, 2013, a rock fall at crosscut 25 blocked the #3 intake entry and primary escapeway. Tr. II, 12-14; R. Ex. 3, p. 2; P. Ex. 16 (map depicting rock fall). On April 19, 2013, Respondent requested a temporary revision to the MSHA-approved ventilation plan to cleanup the rock fall. The extant ventilation plan required Respondent to have the Nos. 1 and 2 ventilation fans running at all times. Tr. II, 90. Respondent's proposed revision and action plan provided that Fan No. 2 would be temporarily idled during cleanup of the rock fall to allow the following: two common intakes on the No. 1 belt mains, relocation of the primary escapeway into the adjacent entry from break 26 to break 22, and examination of the entire intake air course prior to anyone else entering the area. Once the rock fall was cleaned, the escapeway and ventilation was to be returned to normal. On April 19, 2013, MSHA approved the ventilation plan revision, as requested. R. Ex. 3. Fan No. 2 was shut down during the cleanup period and no coal production occurred. Tr. II 84, 92, 95.

An automatic fan signal is a mechanical device that monitors ventilation force and provides an audible and visual warning signal if a fan slows or stops providing ventilation. Tr. I, 28-29. When air pressure from a fan is insufficient to keep the fan's paddle raised, the paddle falls and activates a visual and audio signal. *Id.* The triggered signal activates a buzzer and light

to alert a responsible person on the surface that the fan has slowed or stopped. Tr. I, 29-30.

After the No. 2 fan was turned off on April 19, 2013, the disconnect for the fan signal was pulled so that the signal would not activate during the stoppage. Tr. II, 27. When production resumed on May 7, 2013 and the No. 2 fan was turned back on, no one re-engaged the disconnect to allow the automatic fan signal to start working again. Tr. II, 26-28.

B. Citation Nos. 8378378

On May 7, 2013, inspector Scott Mullis[4] issued Citation 8378378 alleging a Section 104(a) violation of 30 C.F.R. § 75.310(a)(3) because the automatic fan signal on the No. 2 fan was de-energized and not working. P. Ex. 7. Section 75. 310(a)(3) mandates:

> (a) Each mine fan shall be -- . . . (3) Equipped with an automatic device that gives a signal at the mine when the fan either slows or stops. A responsible person designated by the operator shall always be at a surface location at the mine where the signal can be seen or heard while anyone is underground. This person shall be provided with two-way communication with the working sections and work stations where persons are routinely assigned to work for the majority of a shift.

The responsible person at this mine is located in a metal-roofed, office building about 150 feet from Fan No. 2's automatic fan signal. Tr. I, 35, 58-59.

At the time the citation issued, 12 men were working underground. Tr. I, 34. Inspector Mullis determined that the violation was significant and substantial (S&S) because an injury was reasonably likely to occur and result in lost workdays or restricted duty.[5] Further, Mullis

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[4] Mullis completed training at the Beckley Mine Academy and became a certified mine inspector in 2012. Tr. I, 16, 19, 44. Before that, Mullis worked in underground mines for 17 years as either a general laborer, face boss, or section boss. Tr. I , 17, 43. Mullis visited Mine #3 about five or six times before issuing four of the five litigated citations. Tr. I, 19-20.

[5] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that "[t]he test

determined that the operator's negligence was moderate, and 12 persons were affected. The Secretary proposed a penalty of $1,026.

Respondent stipulated that it violated mandatory safety standard 30 C.F.R. § 75.310(a)(3), but contests the S&S designation and the appropriateness of the $1,026 proposed penalty. Tr. 267; R. Br. 8, 10, 11. For the reasons set forth below, I affirm the citation, as written, and assess a $1,026 civil penalty.

1. S&S, Moderate Negligence, and Civil Penalty Analysis

The stipulated violation contributed to a discrete safety hazard or measure of danger to safety. Without a functional fan signal alerting the responsible person on the surface that Fan No. 2 had stopped, it is likely that miners underground would not know that air from Fan No. 2 had been reduced or stopped, and take timely corrective action to fix the fan or evacuate the mine within 15 minutes after fan stoppage. See 30 C.F.R. §75.313. The violation contributes to potential ventilation hazards underground, such as low oxygen or contaminated, toxic air emitted from the sealed areas ventilated by Fan No. 2. Tr. I, 63. Accordingly, the absence of a functional warning signal on Fan No. 2 contributed to a discrete safety hazard or measure of danger to safety.

Further, substantial evidence in the record establishes a reasonable likelihood that the ventilation hazards of low oxygen or contaminated, toxic air contributed to by the non-functioning automatic fan signal on Fan No. 2 would result in an injury during normal, continued mining operations. It is axiomatic that ventilation and atmospheric conditions in underground mining are dynamic, not static, and change quickly. Without a functional fan signal alerting the responsible person on the surface that Fan No. 2 had slowed or stopped, the person designated by the operator to be on the surface where the signal can be heard or seen would not be alerted to the change in ventilation in order to get word to the 12 miners working underground that the fan had slowed or stopped.[6] Those miners would likely be unaware of the dangers posed by the changing

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under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury." *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

[6] Respondent argues that the sound of the fan going off is louder than the signal itself and therefore miners will know when Fan No. 2 slows or stops, even without a functioning automatic fan signal. Further, Respondent notes that the Secretary was hard pressed to offer instances when mine surface personnel would not be able to hear the fan shutting down, although both inspector Mullis and underground mine manager Shannon agreed that in the event of heavy rainfall striking the metal roof of the mine office building about 150 feet from the fan, the responsible person might not be able to hear the fan shutting down. R. Br. 11. I agree with the Secretary that it is highly speculative to assume that underground miners concentrating on their particular tasks, would hear or notice changes in the surface fan's functionality because that

atmosphere and their potential exposure to low oxygen, or to harmful, toxic gases emitted from the sealed areas ventilated by Fan No. 2, which would impact the air quality of miners working inby.

Mullis testified that clean air from the No. 1 fan that was sweeping across the working area "could possibly be contaminated, because it would start pulling air back up the entry marked in green, up by those seals and pull it across the working face." Tr. I, 63. When asked on cross what would it pull, Mullis testified "[i]f you had a leaking seal, it could be methane. It could be low air, black damp, numerous different -- it could be explosive gases. It could be toxic gases." Tr. I, 63.[7] Mullis further testified on cross that "[t]here was an issue prior to that, their production going down, they had an issue with a seal, and it had a water issue and that was one of the purposes for this fan being in place. And I'm not sure that it [methane] was 3 percent, but I remember seeing something in the old records of the mine." Tr. I, 65-66.

The following colloquy on redirect examination of inspector Mullis bolsters my finding that the discrete ventilation hazards contributed to by the non-functioning automatic fan signal made it reasonably likely that the 12 miners working underground would suffer injury under normal continued mining operations.

> Q. Now, Mr. Shelton asked you about personal air-reading devices. Would one of those devices mitigate the hazard you were concerned about?
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> A. They should if they're calibrated and working properly.

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assumption is dependent on a variety of factors such as the miner's routine, the nature and location of the task, other work taking place at the mine, and personal protective or hearing equipment worn. P. Br. 13; Tr. I, 58. Further, other circumstances, including a thunderstorm, would prevent the designated person on the surface from hearing the fan shutdown without a functional automatic fan signal that could be both heard and seen. *Id.*; Tr. I, 59-60.

[7] Although miners are required to wear multi-gas detectors to monitor air quality and alert them to ventilation hazards (Tr. I, 63-64), oxygen-deficient air and toxic gases can have an immediate and serious impact on their safety and health before appropriate precautions and corrective actions can take place. Furthermore, the Commission interprets safety standards to take into consideration ordinary human carelessness and the vagaries of human conduct, including the fact that not all miners wear multi-gas detectors, as required. *See Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984); c*f.*, *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981).

Q. Why was the hazard you were concerned about then reasonably likely to result in injury?

A. Toxic gases more than explosive. The seam that they're working is not known to produce that much methane, but the gases themselves from the sealed area, the low oxygen levels and toxic, make them nauseated. And if there was enough of low oxygen, then, you know, it could be worse.

Q. Now, there was a lot of discussion about which fan has intake air towards the face. Does the #2 fan impact the working section at all?

A. It provides additional intake air going up the intake, yes. It provides more volume up that entry.

Q. Just so I understand, why is the #2 fan vital then for the ventilation system?

THE COURT: Well, vital is kind of a leading term. But it's out of the bag. Go ahead.

A. That fan, as its purpose is shown on this ventilation map, was it was being used to withdraw the air from those sealed areas, keeping it from going onto the working section.

Q. If the #2 fan was shut down, where would the hazards be located that you were worried about?

A. From -- it would draw air from across all those sealed entries shown on that ventilation map and would mix in with the other air going up the intake.

Q. Was the only hazard you were concerned about at the working face?

A. No. Anyone inby crosscut #32 where that air was mixed with the other air would be exposed.

Tr. 1, 70-71.

While Respondent argues that MSHA allowed miners to work underground during the rock fall cleanup when Fan No. 2 was shut down, no production was occurring at this time and an additional examination requirement was implemented under the revised ventilation plan for

the entire air course, including the sealed areas, to ensure that ventilation was safe. Tr. 73-74; R. Ex. 3, p. 2. Such would not be the case if Fan No. 2 stopped or slowed unexpectedly. Thus, due to the discrete ventilation hazards contributed to by the deactivated warning signal on Fan No. 2, miners faced a reasonable likelihood of injury.

Without a functional warning signal, the 12 miners working underground would also face delays in leaving the mine within the 15- minute mandate established by MSHA if the fan stopped and could not be restarted, thereby heightening their risk of injury from exposure to ventilation hazards such as low oxygen, or harmful, noxious and/or toxic gases emitted and pulled from the sealed areas ventilated by Fan No. 2 toward the working face. Tr. I, 32-33.[8] Accordingly, during continuous underground mining operations, I find that it is reasonably likely that the hazards of low oxygen or contaminated, toxic air contributed by the non-functioning automatic fan signal on Fan No. 2 would result in an injury from miners' exposure to improper ventilation. Tr. I, 40.

Finally, with respect to the fourth *Mathies* factor, I credit Mullis' testimony that the exposure to improper ventilation would result in a reasonably serious injury. Mullis testified that black damp or low oxygen has been known to kill miners, but that lost workdays or restricted duty was the most likely injury from exposure to improper ventilation because the miners "would become nauseated before they knew what was going on with them and they would become ill from oxygen deprivation." Tr. I, 39-40, 70; P. Ex. 7.

Accordingly, having found that all four elements of the *Mathies* test are satisfied, the undersigned affirms the S&S and gravity designations for Citation No. 8378379.

On brief, and at the hearing, Respondent did not specifically challenge the moderate negligence designation for Citation No. 8378379, although Respondent's answer generally denies the gravity and negligence designations for all citations at issue.

When assessing penalties, section 110(i) of the Mine Act requires the Commission to consider, *inter alia*, whether the operator was negligent. 30 U.S.C. § 820(i). Each mandatory standard carries with it an accompanying duty of care to avoid violations of the standard. If a violation of the standard occurs, an operator's failure to meet the appropriate duty of care can lead to a finding of negligence. *A.H. Smith Stone Co.*, 5 FMSHRC 13 (1983).

For purposes of assessing a proposed penalty, the Secretary, by regulation, defines conduct that constitutes negligence under the Mine Act as follows:

> Negligence is conduct, either by commission or omission, which falls

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[8] If the fan has stopped, it must be restarted within 15 minutes. Otherwise, all electrically powered and mechanized equipment in each working section must be de-energized or shut off and all miners must be withdrawn from the mine. See 30 C.F.R. §75.313.

> 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. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. This criterion accounts for a maximum of 50 penalty points, based on conduct evaluated according to Table X.

30 C.F.R. § 100.3(d). Moderate negligence occurs when "[t]he operator knew of should have known of the violative condition or practice, but there are mitigating circumstances." *Id.*

In designating Respondent's negligence as moderate, Mullis determined that there were mitigating circumstances because the signal was in place, but the switch had been installed inline with the signal and had been turned off and never turned back on when Fan No. 2 was restarted. Tr. I, 41-42. I agree with the Secretary that Respondent should have known that the automatic fan signal was off and was not turned back on when Fan 2 was restarted, and that Respondent should have had a system in place to ensure that the automatic fan signal was switched on each time Fan No. 2 was restarted. P. Br. 15. In these circumstances, I affirm the moderate negligence designation.

I have evaluated the Secretary's proposed penalty in light of my findings and the principles announced in my final *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary of $1,026 is consistent with the statutory criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Accordingly, I assess a $1,026 civil penalty against Respondent for Citation No. 8378378.

C. Citation 8378379

On May 7, 2013, after issuing Citation No. 8378378, Mullis also issued 104(a) Citation No. 8378379 during the first shift at 11:10 a.m. Citation No. 8378379 alleged a violation of 30 C.F.R. 75.312(g)(1) because there was no record in the ventilation record book that Fan No. 2 was examined on May 6 or 7, 2013. Tr. I, 76, 78; P. Ex. 9. Citation 8378379 further alleged that the violation was unlikely to cause a no-lost-workdays injury, that 12 persons were affected, and that the violation resulted from Respondent's high negligence. P. Ex. 9. The Secretary proposed a penalty of $460. The citation was terminated after the results of the examination

were recorded in the ventilation record book on May 7, 2013 at 11:20 a.m., before the end of the first shift. Tr. I, 90; P. Ex. 9.

30 C.F.R § 75.312 provides, in pertinent part:

> Main mine fan examinations and records.
> (a) To assure electrical and mechanical reliability of main mine fans, each main mine fan and its associated components, including devices for measuring or recording mine ventilation pressure, shall be examined for proper operation by a trained person designated by the operator. Examinations of main mine fans shall be made at least once each day that the fan operates, unless a fan monitoring system is used. No examination is required on any day when no one, including certified persons, goes underground, except that an examination shall be completed prior to anyone entering the mine. . .
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> (c) At least every 31 days, the automatic fan signal device for each main mine fan shall be tested by stopping the fan. Only persons necessary to evaluate the effect of the fan stoppage or restart, or to perform maintenance or repair work that cannot otherwise be made while the fan is operating, shall be permitted underground. Notwithstanding the requirement of §75.311(b)(3), underground power may remain energized during this test provided no one, including persons identified in §75.311(b)(1), is underground. If the fan is not restarted within 15 minutes, underground power shall be deenergized and no one shall enter any underground area of the mine until the fan is restarted and an examination of the mine is conducted as described in §75.360(b) through (e) and the mine has been determined to be safe. . .
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> (f) Certification. Persons making main mine fan examinations shall certify by initials and date at the fan or another location specified by the operator that the examinations were made. Each certification shall identify the main mine fan examined. . . .
>
> (g) Recordkeeping. By the end of the shift on which the examination is made, persons making main mine fan examinations shall record all uncorrected defects that may affect the operation of the fan that are not corrected by the end of that shift. Records shall be maintained in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

When asked whether Fan No. 2 was operating on May 6, 2013, Mullis testified, "[e]vidently

be examined for proper operation at least once each day that the fan operates. See Tr. I, 106-07.[9] §75.312(g) requires that "[b]y the end of the shift on which the examination is made, persons making main mine fan examinations shall record all uncorrected defects that may affect the operation of the fan that are not corrected by the end of that shift. . . ."

The Secretary failed to establish by a preponderance of evidence that Fan No. 2 was operating on May 6, 2013 such that a §75.312(a) examination was required or the deenergized fan signal needed to be recorded. Although miners were underground that day finishing the roof fall cleanup and re-support, the Secretary failed to establish that Fan No. 2 was operating. Mullis conceded that if Fan No. 2 was not operating, no examination was required. Tr. I, 104. Shannon credibly testified that Fan No. 2 was not turned back on until May 7, 2013, after the rockfall cleanup was completed and the area re-supported on May 6, 2013. Tr. 94-95, 98. Since no examination was required on May 6, 2013 under §75.312(a), the failure to record the non-functional automatic fan signal on Fan No. 2 by the end of the shift on May 6, 2013 was not a violation of §75.312(g). In addition, Fan No. 2 was not operating on May 6 so there was not yet any recordable event for a non-functioning fan signal.

An examination of the Fan No. 2 automatic signal was required on May 7, 2013 when Fan No. 2 was turned back on and production resumed on the first shift. By the end of that shift, the mine examiner was required to record all uncorrected defects that may affect the operation of the fan that had not been corrected by the end of that shift. The automatic fan signal violation in Citation 8378378 was terminated at 11:00 a.m. when the operator energized the automatic fan signal switch and it operated properly. P. Ex. 7. The alleged record-keeping violation described in Citation 8378379 was terminated on the first shift on May 7, 2013 at 11:20 a.m. when the examiner recorded his findings. P. Ex. 9. I find no record-keeping violation under §75.312(g) for May 7, 2013 because by the end of the shift on which the examination was made, there was no longer any uncorrected defect that affected the operation of Fan No. 2. Accordingly, I vacate Citation 8378378.

D. Citation No. 8378383

The body of Citation No. 8378383 focuses on missing spheres on the primary escapeway lifeline and tracks the language of § 75.380(d)(7)(vi) rather than § 75.380(d)(7)(vii), as alleged. The Secretary did not seek to amend the citation at hearing to reflect an alleged violation of § 75.380(d)(7)(vi). On post-hearing brief, however, the Secretary belatedly moved for

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[9] I reject Respondent's argument that 30 C.F.R. § 75.312(c) only requires that the fan signal device to be examined every 31 days and not daily as required by 30 C.F.R. § 75.312(a) when the fans operate. R. Br. 12, citing Tr. I ,99. Rather, I agree with the Secretary that 30 C.F.R. § 75.312(c) requires that the fan signal device be tested everyone 31 days, not examined. Thus, the daily examination requirement in 30 C.F.R. § 75.312(a) is separate and distinct from the testing requirement in 30 C.F.R. § 75.312(c) .

conformance of the pleadings to the evidence adduced at trial. P. Br. 20-21.

Fed. R. Civ. Proc. 15(b), applicable under Commission Procedural Rule (1)(b), provides for conformance of pleadings to the evidence adduced at trial, and permits adjudication of issues that were actually litigated by the parties irrespective of pleading defects. Moreover, mere delay, regardless of length, does not bar a proposed amendment, absent prejudice. *See, e.g.*, 3 J. Moore, Moore's Federal Practice Par. 15.08[4] (2d ed. 1989).

The record indicates that Respondent understood the nature of the violation charged, i.e., that spheres were missing from the lifeline, and litigated the case on that basis. Tr. I, 279. At hearing, Respondent conceded that there was a violation of § 75.380 because of the missing spheres and limited its defense to issues concerning the gravity, negligence and S&S designations, the 13 miners allegedly affected, and the appropriateness of the $3,405 proposed penalty. Tr. I, 118-19; 279. Thereafter, on post-hearing brief, Respondent conceded the S&S nature of the litigated violation and only challenged the high negligence designation, the allegation that all 13 miners underground were affected, and the appropriateness of the proposed penalty. R. Br. 16-18. In these circumstances, I find that Respondent suffered no prejudice because it fully understood the gravamen of the violation charged and knowingly litigated the citation on that basis. Accordingly, I grant the Secretary's belated request to amend Citation 8378383 to reflect an alleged violation of 30 C.F.R. § 75.380(d)(7)(vi). *See Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997).

On or about May 22, 2013, Mullis issued section 104(a) Citation No. 8378383 alleging a violation of 30 C.F.R. 75.380(d)(7)(vii) because the lifeline located in the Mine's #3 Intake Entry, which serves as the primary escapeway and main travelway from the portal to the loading point at crosscut 68 (just outby the last open crosscut), did not have the required spheres to indicate the location where personnel doors were present. P. Ex. 10; Tr. I, 109, 112, 121-22. The spheres indicate intersections where personnel doors, about 30-square inches large, are installed in adjacent crosscuts. The personnel doors lead from the primary escapeway to a secondary escapeway in the adjacent entry about 60-80 feet away. Tr. I, 111, 129, 146. The citation was abated when Respondent installed the spheres to indicate the location of all existing personnel doors. P. Ex. 10.

Mullis testified that as he traveled underground towards the working section in a two-person vehicle, he noticed several locations along the main intake and primary escapeway where the required spheres were missing from the nearby lifeline, which was required to be readily accessible for the length of the entry. Tr. I, 109, 126, 129. The spheres used to identify the man doors are the only lifeline components without a branch line. Tr. II, 134. Mullis noticed that four spheres were missing from cross-cut 12 to 31, and that all required spheres were missing between cross-cut 32 and 68. Tr. I, 114. Also, between cross-cut 32 and 68, Mullis noticed that there were no lifeline indicators for refuge alternative and SCSR locations, although Mullis' notes make no mention of these missing components. Tr. I, 115, 140-41. Mullis found no violations or hazards in the secondary escapeway located in an adjacent entry. Tr. I, 111-12.

Mullis was told by third-shift foreman, George Saylor, that the continuous miner trammed the entry to clean up the roof fall, and because of low clearance, the miner destroyed the old lifeline and the replacement lifeline did not have indicators on it. Rather, the indicators had to be manually installed. Tr. I, 122. While Mullis could not determine precisely when the lifeline was replaced, Mullis testified that foreman Saylor told Mullis that the portion of the lifeline from crosscut 32 to 68 was replaced "a couple of days" prior to Mullis' May 22, 2013 inspection. Tr. I, 179-180. Saylor did not testify, and no Respondent witness established when the lifeline was replaced. Although it is unclear precisely how long the lifeline was defective, it is apparent that the lifeline was damaged during cleanup of the rockfall, and the defective lifeline should have been noted in the pre-shift examination books once the mine resumed production on May 7, 2013. In these circumstances, I credit Mullis' testimony that since the rock fall was cleaned up and production resumed on May 7, 2013, at least nine days had been worked without any documentation in the pre-shift examination book that the required components were missing from the lifeline. Tr. I, 171-72; see also P. Ex. 13 ("The conditions cited in (cit. #8378383) has [sic] existed for 9 days, that was when the new lifeline was installed.").[10]

Mine manager Shannon testified that from cross-cut 12 thru 31, which was about 1150-1200 feet, MSHA required approximately four man doors or one man door every 300 feet. Respondent, however, actually had nine man doors in that area. This was so miners would not have to travel 300 feet to a man door, since the height in the No. 1 Main was very low. Tr. II, 43-44. The lifeline had spheres for five of those nine man doors, but not the other four. Tr. II, 45.

Between cross-cut 32 and 68, which was about 2160 feet, seven or eight man doors were required, but the mine actually had 11 man doors. Tr. II, 47, 53-54. The lifeline did not have any spheres for any of those 11 man doors, nor were there any indicators for SCSR caches or refuge alternatives. Tr. I, 114-115; P. Ex. 10. Mine manager Shannon testified, however, that in locations where spheres were missing, there were two types of signage: a reflector with "man door" written vertically on it, and a reflective sign with "man door" written horizontally with a directional arrow. Tr. II, 40. Mullis acknowledged that reflective signs identifying the location of the man doors were present at the mine, but they were not attached to the lifeline. Tr. I, 141-42.

Mullis determined that the violation was S&S because it contributed to a hazard that was reasonably likely to cause a lost workday or restricted duty injury, that 13 miners were affected, and that the violation resulted from Respondent's high negligence. The Secretary proposed a penalty of $3,405. P. Ex. 10. Mullis designated the violation as reasonably likely to result in a serious injury because in the event of a fire or heavy smoke hazard in the small confined area,

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[10] Although Mullis' notes (P. Ex. 11, p. A-1) indicate that this condition has existed for at least six shifts, Mullis credibly explained on cross-examination regarding related Citation 8379384 (inadequate pre-shifts) that his notes for Citation 8379383 were made before he examined the pre-shift examination records for Citation 8379384. Tr. I, 171.

miners would not be able to locate the man doors to travel from the primary escapeway to the secondary escapeway. Tr. I, 132-33.

Mullis determined that Respondent's negligence was high because no examiner had recognized the hazard during the previous nine shifts. Tr. I, 133-34. On cross examination, however, Mullis conceded that the amount of spheres that were missing compared to the amount of spheres that were present could have been considered a mitigating factor. Tr. I, 152. On further redirect, however, Mullis testified that he still considered the violation to result from Respondent's high negligence because miners needed access to all components of emergency equipment, and the citation could have been written as an unwarrantable failure because all of Respondent's examiners missed the defective lifeline components. Tr. I, 153-54. Regarding the number of persons affected, Mullis testified on cross examination that *some* of the 13 persons underground might choose to exit the mine in an emergency using the secondary escapeway, depending on their location at the time of the emergency. Tr. I, 148. As noted, Respondent concedes on brief that the violation was S&S, and only challenges the high negligence designation, the determination that 13 miners were affected, and the proposed penalty. R. Br. 16-18.

1. Discussion and Analysis

I find that the S&S violation resulted from Respondent's high negligence because Respondent knew or should have known of the violation, and there are no mitigating circumstances. 30 C.F.R. § 100.3(d). Mullis' unrebutted testimony establishes that third-shift foreman Saylor told Mullis that the continuous miner used to clean up the roof fall destroyed the old lifeline and the replacement lifeline did not have the missing spheres or other indicators on it. Tr. I, 22. In fact, Respondent concedes that when the lifeline was replaced, several of the spheres were not re-attached to the lifeline. R. Br. 17. Mullis' testimony also established that these missing components were not identified or documented in the examination books during at least nine shifts prior to the May 22, 2013 issuance of the citation. Tr. I, 130. Any examiner agent or foreman entering or exiting the mine needed to use the travelway that had the defective lifeline. Tr. I, 133. Because of the primary travelway's low height and an agent's close proximity to the lifeline while traveling through the mine, foreman and examiners should have discovered the missing spheres after production resumed on May 7 and certainly before May 22, 2013.

Respondent argues that it raised numerous mitigating circumstances that should reduce its negligence to moderate. Specifically, Respondent argues that although the mine had nine man doors from cross-cut 12 thru 31, only four were required by law, and spheres were missing on the lifeline for only four of the nine man doors. R. Br. 17.[11] Although Mullis conceded on cross

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[11] I note that the number of man doors is typically governed by the MSHA-approved ventilation plan and § 75.380(d)(7)(vi) provides that the continuous directional lifeline shall be equipped with one sphere securely attached to the lifeline at each intersection where personnel doors are installed in adjacent crosscuts.

examination that the amount of spheres that were missing compared to the amount of spheres that were present *could* be considered a mitigating factor (Tr. I, 152), in the circumstances of this case, I find no mitigation. Respondent's argument ignores the fact that all required spheres were missing between cross-cut 32 and 68 for a total of about 2160 feet, and this defect was not documented for nine shifts. Tr. I, 114; Tr. II, 53-54. In these circumstances, I agree with the Secretary that given the large number of spheres missing in an extensive area of the lifeline, *partial* compliance with the standard in a more limited area of the lifeline should not be considered a mitigating factor. P. Br. 26.

Respondent fails to argue on brief that the reflective signs that identified the location of the man doors, but were not attached to the lifeline, are a mitigating factor. *But see* Tr. I, 141-42, Tr. II, 40. I reject any such argument. I agree with the Secretary that visibility is likely to be reduced in an emergency situation, particularly in smoky conditions from a fire outby, and the spheres are meant to serve as a tactile guide to an alternative escape route when there is reduced or no visibility for miners. P. Br. 24. The reflective man door signs were typically hung away from the middle of the entry off to the side of the entry next to the crosscut. Tr. I, 142. Therefore, miners traveling the lifeline to escape in a low visibility emergency are unlikely to see such signs as they feel their way along the lifeline to find a sphere or spheres indicating the presence of man doors.

Respondent also fails to argue on brief that because the spheres have no branch lines to the man doors, miners are not likely to leave the security of the lifeline to find a door. *But see* Tr. I, 143-48. Any such argument ignores the fact that spheres are required for a purpose, i.e., to aid miners in desperate emergency situations where they have no choice but to leave the lifeline in order to escape through a man door to the secondary escapeway. In this regard, the following testimony from Mullis is persuasive.

> THE COURT: So how likely is it in your view that a miner who left the lifeline in smoke, crawling through the 40 foot height, would become confused or disoriented or maybe bump into something and stumble and fall trying to get to the man door?
>
> THE WITNESS: It could happen. They generally are taught that if you leave the lifeline for a man door, which the spheres are to indicate like if they -- like where the rock fall occurred, and say it cut their cable, their cable that bought their power underground, and caused a smoke. When they got to that rock fall, holding that line and got to that rock fall, they couldn't go any further. They would not be able to go anywhere. So that's what the spheres are for. They would come back to the next sphere and they would know that they could find a door to go through. They would turn loose of that line because they know what entry they're in. They would turn loose of the line and continue over into that crosscut. They're taught to feel their way to the

> bratti[ce], go across the bratti[ce] until you feel the door if you can't see it, go through it.

Tr. I ,147-48. Consequently, even without a branch line, spheres serve a vital and required purpose by signaling an alternative means of escape in an emergency through a man door into an adjacent escapeway when the lifeline in the primary escapeway is blocked outby.

In sum, I find no mitigating circumstance that would reduce Respondent's negligence from high to moderate. The violation remained undocumented for at least nine shifts and Respondent knew or should have known about it and failed to explain why foreman and examiners traveling the primary escapeway on a daily basis ignored the obviously defective lifeline for an extended period of time.

With regard to the number of miners affected by the violation, the Secretary argues that 13 miners worked on the section, and any emergency outby the section would require the entire crew to escape. P. Br. 14, citing Tr. I, 133. Both Mullis and Shannon testified, however, that *some* of the 13 miners underground might choose to exit the mine in an emergency using the secondary escapeway, depending on their location at the time of the emergency. Tr. I, 148; Tr. II, 50. The secondary escapeway is in the belt entry at the #3 mine. Tr. II, 49-50. Shannon testified that at any given time, there are two to four miners on that belt entry shoveling, cleaning or pumping water. Shannon opined that in an emergency requiring exit from the mine, those two to four miners would come out the belt entry unless something was preventing them from traveling that way. Tr. II, 50. Thus, out of the 13 miners underground, anywhere from 9-11 would likely be affected by the violation. Shannon, however, also conceded on cross examination that he would prefer to be in the intake air course rather than the secondary escapeway along the belt entry when trying to escape in the event of an emergency. Tr. II, 114. In these circumstances, it is reasonable to conclude that 10 miners would potentially be affected by the violation, i.e., the maximum number for penalty calculations purposes. See 30 C.F.R. § 100.3(e), Table XIII. Based on the foregoing, I modify Citation 8378383 to reduce the number of miners affected from 13 to 10.

I have evaluated the Secretary's proposed penalty in light of the principles announced in my final *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary of $3,405 is consistent with the statutory criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Accordingly, I assess a $3,405 civil penalty against Respondent for Citation No. 8378383.

E. Citation No. 8378384

On May 22, 2013, after issuing Citation No. 8378383 for the defective lifeline, Mullis issued 104(a) Citation No. 8378384 alleging that Respondent violated 30 C.F.R. § 75.360(b)(1) because its examiners were failing to perform adequate examinations that would identify the defective lifeline cited in Citation No. 8378383, a condition that existed for nine days. P. Ex.

13. Mullis determined that the violation was highly likely to cause a fatal injury, that 13 persons were affected, and that the violation resulted from Respondent's high negligence. The Secretary proposed a penalty of $25,163. P. Ex. 13.

30 C.F.R. § 75.360(b)(1) requires that:

> "[t]he person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the follow locations:
>
> (1) Roadways, travelways, and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift."

30 C.F.R. § 75.360(b)(1).

Mullis examined the pre-shift record book for the prior nine days and found no hazardous condition associated with the missing spheres on the defective lifeline noted in the pre-shift book. Tr. I, 162-163, 171. Although the pre-shift examinations had occurred, Mullis determined that they were inadequate because the examiner failed to notice the missing spheres on the lifeline. Tr. I, 164. Mullis explained, "They missed these. They missed [these] lifeline components. That's inadequate. And it was very - - you're only this far away from it . . . . As you're traveling that entry, its right in your face." Tr. I, 164-65.

Unlike the underlying defective lifeline Citation No. 8378383, which Mullis issued as "reasonably likely" and "lost workdays or restricted duty," Mullis issued this inadequate examination Citation No. 8378384 as "highly likely" and "fatal" because he was concerned that if all the examiners failed to recognize something as simple as the missing spheres on the lifeline, they could miss other hazards throughout the mine, such as inadequate support or ventilation. Tr. I, 166-69. Respondent points out, however, that Mullis only issued three citations on May 21 and 22, 2013, suggesting that Respondent was not missing a lot of things on its pre-shift examinations. R. Br. 19; Tr. I, 169. Respondent also emphasizes that as the pre-shift examiner travels through the mine, he is looking for a lot of things, including pump locations and existence of water, rib sloughage, floor conditions and other hazards, which could affect miners traveling in and out of the mine. Tr. II, 63-64.

Mine manager Shannon testified that Dave Faulkner, who had over 30 years of coal mine experience, was the outby examiner for the section. Shannon testified that he has traveled with Faulkner while Faulkner performed examinations, and that Faulkner is very thorough. Tr. II, 71-

72.[12] Faulkner did not testify.

1. Respondent's Arguments

Respondent argues that Citation 8378384 should be vacated because the pre-shift examination conducted on May 22, 2013 was adequate. R. Br. 20-21.[13] In an effort to show that the alleged violation was not obvious, Respondent relies on Shannon's testimony that the pre-shift examiner doesn't just lay on his back and stare at the lifeline on the roof about four inches from his head. Rather, the examiner may drive on his side and look off to the sides of the buggy, dodging pumps and other objects on the mine floor, and looking for signs of adverse roof, rib, and floor conditions. R. Br. 20; Tr. II, 66-68.

Respondent argues that if the pre-shift examiner conducts a thorough examination of the working areas, but does not see a potential hazard, a violation for an inadequate pre-shift is improper. Respondent emphasizes that even MSHA inspector Fuson, who wrote Citation No. 8407725 discussed below, testified that if the pre-shift examiner does not see a violation or hazard, it can't be reported on the pre-shift and no citation for an inadequate pre-shift should be issued. R. Br. 20, citing Tr. I, 261-63. Fuson testified as follows on re-cross examination:

> Q. Well, Mr. Fuson, I'm a little bit confused now. You told me that there were hazardous conditions on equipment that you don't have to look at or write down on a pre-shift examination.
>
> A. I didn't mean to say it that way, if that's the way you took it.
>
> Q. Yeah, that's the way I took it. You tell me where I've made a mistake there.
>
> A. Anytime you see a hazard anywhere, on anything, it has to be reported.
>
> Q. What if you don't see it?
>
> A. If you don't see it, you can't report it.

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[12] Shannon received pre-shift examination training from MSHA's Hazard, Kentucky field office. Although Shannon testified that this training never indicated that a pre-shift examiner should be looking for spheres on a lifeline, Shannon admitted that the training did mention that a lifeline should extend up to the dumping point of the section. Tr. II, 74-75.

[13] Respondent first argues that the violation did not exist for 9 days because Mullis' notes for Citation No. 8378383 indicate that the spheres had been missing from the lifeline for six shifts (two days). R. Br. 20. I have specifically rejected this argument at n.10, *supra*.

Q. Somebody comes in after you and says, hey, I found something but you didn't see it, is that an inadequate pre-shift?

A. No, but if there's multiple and multiple obvious conditions, then it would be considered.

Q. Well, the Judge asked you about a lifeline. What about one component on a lifeline, a sphere on a lifeline?

MR. PARDUE: Your Honor, this is -- well, I'll withdraw it.

BY MR. SHELTON:
Q. What about a missing sphere on a lifeline when you have a sign --

A. That's an inspector judgment I mean.

MR. SHELTON: That's all I have for him, your Honor.

Tr. I, 261-62. In sum, Respondent argues that the citation should be vacated because Respondent did conduct a pre-shift examination, and the lack of several spheres on the lifeline was not so obvious as to make the pre-shift examination inadequate. R. Br. 20-21.

Additionally, Respondent argues that the plain language of 30 C.F.R. 75.360 does not cover the hazardous condition cited, i.e., missing spheres on the lifeline, because this is not a hazardous condition referenced in paragraph (b)(11), and it is not a test for methane and oxygen deficiency, or a determination or whether air is moving in the proper direction at specifically identified locations. R. Br. 21.

Finally, Respondent argues that MSHA does not consistently enforce what hazards need to be covered by a pre-shift examination. Respondent relies on testimony from both inspectors Mullis and Fuson that some potential hazards need not be checked on a pre-shift examination. R. Br. 21. For example, Mullis testified on cross examination in response to a hypothetical that an energized cable with a gash and exposed copper on a working section would be a hazardous condition, but "I don't think that [pre-shift examiner is] required to check every inch of cable." Tr. I, 174. Fuson testified that issues with the dust parameters on a bolting machine pose a hazard to miners, but dust parameters do not have to be checked on a pre-shift exam, only during a pre-operational check of the equipment. Tr. I, 293-94, 317. Respondent concludes that a pre-shift examiner must report a noted hazard, but need not be counting spheres on the lifeline as he conducts his examination. R. Br. 21

2. Discussion and Analysis

30 C.F.R. § 75.360(b) requires that pre-shift examinations be conducted to identify

hazardous conditions at certain locations, including roadways and travelways and other areas where persons will work or travel during the oncoming shift. The purpose of the examination requirement is to identify and document the hazardous condition in these areas where persons are expected to work and travel. The Commission has determined that pre-shift examinations are fundamental for assuring a safe work environment for miners working underground . *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). "The preshift examination is intended to prevent hazardous conditions from developing." 19 FMSHRC at 15. The examiner must look for all conditions that present a hazard. *Id.* at 14. Conducting careful pre-shift examinations are critical because "[m]iners rely upon the preshift examiner to find and correct conditions that can be a hazard. When an examiner fails to do so, it creates in miners a false sense of working in a safe environment." *Big Ridge, Inc.*, 33 FMSHRC 689, 713 (Mar. 2011) (ALJ).

Respondent argued on pre-trial motion for partial summary decision that it is only required to search for the specific hazardous conditions listed in subsection (b)(11) of the 30 C.F.R. § 75.360(b) because the "and" instead of a comma after "hazardous conditions" means that only hazardous conditions related to the standards in (b)(11) need to be identified. Tr. I, 271-22. I rejected this argument by Order dated May 13, 2014. *See Alden Resources, Inc.*, 36 FMSHRC 1486 (May 13, 2014) (ALJ) (Order Denying Respondent's Motion for Summary Decision).[14]

Respondent does not renew its argument on post-hearing brief. There is good reason. Respondent's argument is inconsistent with the clear and plain language of the standard, flouts its purpose to ensure a safe working environment, and ignores its legislative history. The standard plainly requires that "The person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction . . ." As the Secretary points out, Respondent's argument ignores the fact that the commas in the standard separate distinct things that Respondent is required to examine for during a pre-shift examination to comply with the standard. P. Br. 29. The clear language of the standard requires Respondent to examine for hazardous conditions ***and***

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[14] I reject Respondent's argument that a separate and distinct standard, 30 C.F.R. § 75.364(b)(5), requires a weekly examination of escapeways at least every seven days, and, therefore, since Respondent was not required to conduct a daily pre-shift examination of the escapeway, no violation of 30 C.F.R. § 75.360(b)(1) occurred. The issue here is whether an adequate pre-shift examination occurred in the No. 3 intake, which is the primary travelway and primary escapeway. The Commission has held that unless the text of the standard itself specifies a limitation, strict liability cannot be limited by extra-textual considerations, including requirements under other standards. *Wake Stone Co.*, 35 FMSHRC 825 (Apr. 2014). For the reasons explained herein, I find a violation of 30 C.F.R. § 75.360(b)(1) because the pre-shift examiner failed to identify an obvious hazardous condition, the defective lifeline, during numerous pre-shift examinations of the primary travelway in and out of the mine.

violations of the mandatory health or safety standards referenced in paragraph (b)(11) of the section. The "and" connects hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of the section because both need to be examined. The commas indicate that Respondent must also test for methane and oxygen deficiency, and determine if the air is moving in the proper direction.

The legislative history of the standard supports this plain meaning. 30 C.F.R. § 75.360(b) was amended on December 31, 2008. Before amendment, the standard only required that "[t]he person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction" for roadways, travelways and track haulageways where miners are scheduled to work or travel during the oncoming shift. Thus, the standard always required pre-shift examiners to examine for hazardous conditions in a travelway. The amended standard added additional examination responsibilities regarding violations of specific standards in addition to hazardous conditions, consistent with Rules to Live By. The amended standard requires operators to conduct more thorough pre-shift examinations of underground coal mines to check for violations of the nine standards identified in MSHA's Rules to Live By initiatives, in addition to checking for general hazardous conditions. See 77 Fed. Reg. 20703-20705 (Apr. 6, 2012).

I conclude that the amended standard was intended to expand the examination requirements beyond hazardous conditions to include certain limited violations. Respondent's argument to the contrary fails to distinguish hazardous conditions from distinct violations of specific standards, particularly since not all violations are hazardous conditions. It would contravene the underlying safety purpose of the standard to limit the pre-shift examination responsibilities to hazardous conditions that are also violations of the Rules to Live By when the standard always required examination for hazardous conditions in certain areas such as travelways to ensure a safe working environment where miners were scheduled to work or travel.

In addition, Commission precedent treats hazardous conditions as a separate and distinct category of conditions that pre-shift examiners are required to identify. The term "hazard" denotes a measure of danger to safety or health." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (1997), *citing Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 827 & n. 7 (April 1981). The Commission has described "hazard" as "a possible source of peril, danger, duress or difficulty," or "a condition that tends to create or increase the possibility of loss." *Id.* I find persuasive the reasoning of Judge Zielinski that "Section 75.360(b)(1) requires that persons conducting required preshift examinations "examine for hazardous conditions" in "[r]oadways, travelways and track haulageways where persons are scheduled . . ." *The American Coal Company*, 36 FMSHRC 1311, 1338 (May 2014)(ALJ).

The defective lifeline was clearly a hazardous condition in a travelway because it increased the likelihood that miners could not find their way out of the mine, particularly during a smoky or other low-visibility emergency. Tr. I, 143, 147-48. The violation was obvious because the replacement lifeline was bare and had no spheres indicating the existence of man

doors or any other lifeline indicators from crosscuts 32 to 68 (about 2160 feet), and Respondent knew that the replacement lifeline needed to have indicators manually installed before production resumed. Tr. I, 114-115, 122-23; Tr. II, 47, 53-54; P. Ex. 10. Further, I have credited Mullis's testimony that the violation existed throughout daily pre-shift examinations over the course of nine days. In these circumstances, and given the lifeline's vital importance, Respondent should have discovered the defective lifeline during its pre-shift examinations of the No. 3 intake entry, i.e., the primary travelway in and out of the mine. Accordingly, I find the violation.

I further find that Respondent's violation was S&S because reasonably likely to result in injuries to the 10 affected miners. Mullis testified that the failure to conduct adequate pre-shift examinations to document the defective lifeline resulted in the same discrete safety hazard as the underlying violation in Citation 8378383, which Respondent concedes was S&S, miners not being able to find their way out of the mine in the event of an emergency. Tr. I, 163. Therefore, the second *Mathies* element is satisfied.

Regarding the third and fourth *Mathies* elements, I remain unconvinced that the inadequate pre-shift exam was highly likely to cause serious injury as opposed to reasonably likely to result in serious injuries to the affected miners. Mullis increased the gravity for this citation based largely on speculation and assumption that was not supported by record evidence. See specifically Tr. I, 164-170, 173. In essence, Mullis testified, "if [the examiner's] missing something as big as this ball on this line that has reflectors on it, what else, you know, is he" missing. Tr. I, 164. Based on this testimony, the Secretary argues as follows:

> Regarding the third *Mathies* element, the inadequate pre-shift exam was highly likley to cause fatal injuries to miners because, as Mullis explains. "[I]f he's (the examiner) missing something as big as this ball on this line that has reflectors on it, what else, you know, is he" missing. Tr. at 164. Thus, without proper examinations, miners would unknowingly come into contact with any number of hazardous conditions. Miners rely on an effective pre-shift examination as the initial and most effective tool to make sure that their environment is safe. If hazardous conditions are not being identified and corrected as miners start their shifts, they are being immediately and directly exposed to peril. Once Mullis discovered the inadequate pre-shift examination he determined that the thirteen miners underground were in greater danger than he previously designated related to the defective lifeline because no hazards were being identified as "there was no mention of anything found in those prior days." Tr. at 167. Mullis testified, "The hazard, if they're missing something as simple as this, what else are they missing . . ." Tr. at 166. Mullis was concerned with safety throughout the mine and, thus, push[ed] up his gravity designation. Tr. at 168. While other hazardous conditions were not cited, continuing mining operations suggest that if

> hazardous conditions as obvious as the conditions cited in Citation 8378383 go unnoticed then the same would apply to other, less obvious hazardous conditions that are bound to develop. . . .

P. Br. 32.

The Secretary's arguments might be more persuasive had he put on evidence of several other hazardous conditions that were not being identified and corrected during pre-shift examinations after production resumed. But the Secretary's proof that other hazardous conditions were not being identified during pre-shift examinations after production resumed was flimsy and inadequate. Mullis merely opined that the inadequate examinations would cause any number of other safety hazards to go undetected and uncorrected. I have found an S&S violation of 30 C.F.R. § 75.310(a)(3) because someone forgot to switch the automatic fan signal for the No. 2 fan back on when production resumed on May 7, 2013. I have vacated the alleged non-S&S violation of 30 C.F.R. § 75.312(g)(1) because there was no record in the ventilation record book that Fan No. 2 was examined on May 6 or May 7, 2013. Below, I have affirmed Citation No. 8407725 finding an S&S violation of 30 C.F.R. 72.630(b) for failure to maintain the dry dust-collection system on the twin-head, roof-bolting machine in permissible and safe operating condition. But, as noted, that violation did not have to be recorded during a pre-shift exam, only during a pre-operational check of the equipment. Tr. I, 293-94, 317. In these circumstances, it was incumbent on the Secretary to rely on more than speculation to establish that the inadequate examinations would cause any number of other safety hazards to go undetected and uncorrected, and to show more than just the defective lifeline and failure to switch on the automatic signal on the No. 2 fan to heighten the gravity for Respondent's failure to do adequate pre-shift examinations under 30 C.F.R. § 75.360(b)(1). Accordingly, I find that the failure to conduct adequate pre-shift examinations was S&S, but I reduce the likelihood of injury or illness from "highly likely" to "reasonably likely, and reduce the injury or illness that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty."

I further find that Respondent's failure to perform an adequate pre-shift examination under 30 C.F.R. § 75.360(b)(1) was the result of high negligence because Respondent knew or should have known of the violation, and there are no mitigating circumstances. Mullis inspected the pre-shift examination book for the nine days prior to issuance of Citation No. 8378384 and no hazardous conditions were documented in the books, not even for the clearly defective lifeline that I have previously found resulted from high negligence. Respondent knew or should have known that the replacement lifeline needed manual installation of indicator components, which were not installed, and that the defective lifeline hazard, which was located in the primary travelway where examiners and foreman travel frequently, should be documented in the pre-shift examination book during the installation process. Respondent has proffered no mitigating circumstances, and raises none on brief. In these circumstances, I affirm the high negligence designation.

For the reasons set forth with regard to the underlying defective lifeline (Citation 8378383), it is reasonable to conclude that at least 10 of the 13 underground miners would potentially be affected by the failure to conduct an adequate pre-shift examination in the primary travelway, i.e., the maximum number for penalty calculations purposes. See 30 C.F.R. § 100.3(e), Table XIII.

Based on the foregoing, I modify Citation 8378384 to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely, to reduce the injury or illness that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty," and to reduce the number of miners affected from 13 to 10.

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 (July 19, 2014) (ALJ). Applying the statutory criteria set forth in section 110(i) of the Mine Act, and guided by the regular assessment criteria set forth in § 100.3 as applied to my findings above, I assess a $3,406 civil penalty against Respondent for Citation No. 8378384.

F. Citation No. 8407725

On May 24, 2013, MSHA inspector Wendill Fuson[15] issued 104(a) Citation No. 8407725 alleging a violation of 30 C.F.R. 72.630(b) for failure to maintain the dry dust-collection system on its twin-head, roof-bolting machine in permissible and safe operating condition. P. Ex. 1; Tr. I, 189.[16] MSHA had previously set up a sampling program on this bolter, designated area 907,

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[15] Fuson has about 8 years of experience with MSHA as a health specialist. Tr. I, 187. Before joining MSHA, Fuson had been employed in the coal mining industry and had operated roof bolting machines for 10 to 12 years. Tr. I 182.

[16] 30 C.F.R. § 72.630(b) provides:

> (b) *Dust collectors.* Dust collectors shall be maintained in permissible and operating condition. Dust Collectors approved under Part 33 -Dust Collectors for Use in Connection with Rock Drilling in Coal Mines of this title or under Bureau of Mines Schedule 25B are permissible dust collectors for the purpose of this section.

30 C.F.R. § 33.2(a) defines permissible:

> (a) *Permissible*, as applied to a dust collector, means that it conforms to the requirements of this part, and that a certificate of approval to that effect has been issued.

because of excessive respirable dust and quartz. Tr. I, 209-15. Accordingly, the roof bolting machine was on a reduced respirable dust standard of 1.0 instead of 2.0. Fuson could not point to any violations where the machine had exceeded the reduced standard, although it had a prior history of exceeding the prior standard on quartz. Tr. I, 241-42.

The dust collection system on the bolter consists of a box, hoses, and a pump motor that functions like a huge vacuum cleaner, with the filters and box used to catch dust exiting drill holes as the bit penetrates the roof. Tr. I, 195. After testing, Fuson determined that the vacuum suction for each drill head was less than the minimum pressure requirement of twelve mercury inches. P. Ex. 1; Tr. I, 190, 196-199. The left head measured 11 inches of mercury (although the citation incorrectly stated 9 inches of mercury), and the right head measured 10 inches of mercury. Tr. II, 198. Fuson also determined that the suction hose coupling nipples for both drill heads were loose and leaking. One hose was broken, and an attempted repair of dust holes had been made with electrical tape. Fuson heard air seeping through its loose nipple. P. Ex. 1; Tr. I, 193, 196, 199-200. Further, the dust hoses connecting the drill heads to the dust boxes were not approved by MSHA. P. Ex. 1. Finally, Fuson observed drill dust piled on top of one of the dust boxes, which was used to seal leaks in the gaskets. Tr. I, 193-94, 196, 215. Although Fuson failed to mention the attempted repair of the broken hose or the dust piled on top of one of the dust boxes within the body of this citation, I credit his specific recollection that these conditions were present. P. Ex. 1; Tr. I, 193, 196.

Fuson testified that vibration from operation of the machine will place the respirable drill dust located on the box into the operator's breathable air. Tr. I, 215. Fuson subsequently testified, "[f]rom industry history of this district, I mean, anytime you've got drill dust in this district, there's a percentage of respirable dust present and always a danger if not protected against the miner breathing it that they will breathe in this." Tr. I, 252.

The citation alleged that the violation was reasonably likely to cause a permanently disabling injury, that 2 persons were affected, and that the violation resulted from Respondent's moderate negligence. MSHA proposed a penalty of $425 for the alleged S&S violation. P. Ex. 1. When the citation was terminated by replacing parts on the machine, the vacuum pressure "drastically increased" over 50 percent. Tr. I, 224.

The citation was written at 7:10 a.m. P. Ex. 1. Fuson could not recall if any roof bolter operators were in the area. Tr. I, 202. The day shift was not present and a pre-operational examination of the bolter had not yet been conducted, although the bolter was not locked and tagged out. Tr. I, 207-09. The continuous miner had been cited an hour earlier for a dust parameter violation, although no coal production had taken place. Tr. I, 204.

Fuson determined that the conditions should have been repaired prior to operation of the machine and that the machine had already been operated with the cited conditions and was set up to operate again. Tr. I, 201, 206; P. Ex 2. He testified, that "[t]he dust parameters -- the dust collection system of the machine has to be maintained at all times . . . Anytime there's a

deficiency in the system, it should be shut down and repaired immediately." Tr. I, 208. Fuson also determined that the operator had "already used this machine with this many conditions." P. Ex. 2; Tr. I, 197. Fuson could not specifically remember whether he heard or saw the roof bolter actually bolting during his inspection, but in contemporaneous notes recorded during his inspection, he wrote roof bolter "has been bolting in 4 right, set up to bolt, ATRS is set, booms are ready. So the machine was siting with the boom and support ready to drill." P. Ex. 2; Tr. I, 201, 204-05, 234-35. As noted, the bolter was not locked or tagged out. Tr. I, 209.

Fuson testified unconvincingly, "I wouldn't have wrote has been bolting down if I hadn't heard it or seen it." Tr. I, 201, 204-05. On cross examination, Fuson acknowledged that he did not have any independent recollection that the roof bolter had been operating that morning. He also acknowledged that his notes could reflect the fact that the third shift set the bolting machine in the 4 right entry so that the first shift could begin operation when they came underground. Tr. I, 228. Fuson did not know whether the third shift had actually conducted any roof bolting the evening before the citation was issued. Tr. I, 256. "No sir, we don't know if it was on third shift or first shift, but in my notes I've got in there they had been bolting." *Id.*

I find that Fuson did not see or hear the bolter on May 24 because the day-shift had not yet begun work. As Fuson acknowledged, "[t]he day shift hadn't come in yet when I went underground. Tr. I, 206. Rather, based on the following testimony, I find that Fuson reasonably inferred, based on his experience, that the conditions observed had developed while the roof bolter was being operated previously for at least a shift and had not been fixed, and the machine was already set up and about to be used again.

> BY MR. PARDUE:
> Q. For each of the conditions you cited, the vacuum suction, the couplings, and the hoses, could you tell how long those conditions had existed?
>
> A. Well, from experience, hoses don't loosen on their own just sitting, so, you know, I'm safe -- it's safe to say that they had been bolting in that condition or it wouldn't be in that condition. They don't drive or move the machine around in the mines unless it's going from one place that needs bolted to the other. So without a doubt in my mind, they had been bolting with this condition.
>
> Q. Can you say that about each of the conditions that's listed in the body of the citation?
>
> A. Yes. Especially, you know, the tape, I mean, they know they had a busted hose or they wouldn't have taped it up.

Tr. I, 205-06. Although Fuson could not determine exactly how long the conditions had existed, he credibly testified that they were present for at least one shift.

Q. Based on your experience, how long were the -- the conditions cited, how long were they -- did they exist on this equipment?

A. I couldn't tell you how long. At least a shift, because it takes more than a shift for it to get -- the hoses to get that loose. If vacuum pressure drops like that, usually if you don't lose all of your vacuum -- them machines usually typically goes 15 to 20 mercury inches when you test them, and they generally gradually lose their suction. But with leaking hoses, you know, with loose hoses on both sides, it would be easily determined it would be greater than a shift.

Tr. I, 223.

Third-shift foreman, Bryan Lewis, testified that pre-operational checks are conducted on roof bolting machines, which would include the vacuum suction on each side of the bolter. Tr. 292-94. Lewis testified that at the time that Fuson wrote the citation, the first-shift miners had not yet had time to conduct a pre-operational inspection or start bolting. Tr. I, 295, 302. Lewis opined that the bolting machine was in operation during the May 23rd second shift, a production shift. Further, Lewis did not recall any mention of any problems with the bolting machine at the start of the third shift. Tr. I, 298. He testified that a hole in a hose or the loosening of a clamp can occur at any time and cause the bolter to lose suction. Tr. I, 299. Lewis further testified that when the bolters are drilling top, they stand outby the drill pipe and dust box where the control levers are located, and any material that is on the dust box would be blowing inby. Tr. I, 300-01.

1. S&S, Moderate Negligence, and Civil Penalty Analysis

I find that Respondent violated 30 C.F.R. § 72.630(b) by failing to maintain the dry dust collection system on its twin-head, roof-bolting machine. In fact, Respondent concedes the violation on brief (R. Br. 6), but argues that it was not significant and substantial (S&S) because not reasonably likely to lead to a permanently disabling injury. R. Br. 5. I find that Respondent's violation of 30 C.F.R. § 75.630(b) was S&S.

The first element of *Mathies* is satisfied by my finding of the violation 30 C.F.R. § 75.650(b), a mandatory safety standard.

The second *Mathies* element was satisfied because the cited conditions created a discrete safety hazard or measure of danger to safety, inhalation of excessive respirable dust that would contribute to the development of black lung disease.

The third *Mathies* element was also satisfied. Respondent argues, inter alia, that at the time the citation was written, the first shift miners did not have an opportunity to conduct a pre-operational check on the machine and that the machine would have been checked before being placed into operation at which time the decreased head suction would have been found and

repaired prior to placing the machine into service. R. Br. 6; see also Tr. I, 232, 255. I reject this argument for two reasons. First, I have credited Fuson's reasonable inference based on the cited conditions that the bolter had already been used with the extant defects for at least a shift and thus two miners were exposed to the respirable hazard. Fuson reasonably determined that the conditions existed at least for one shift because "it takes more than a shift for it to get -- the hoses to get that loose . . . with loose hoses on both sides, it would be easily determined it would be greater than a shift." Tr. 223. Second, the Commission specifically rejected such argument in *Wake Stone Co.*, 36 FMSHRC 825, 828-29 (Apr. 2014), and reinforced the rule that equipment that is not locked and tagged out of operation and parked for repairs must be maintained in functional condition.

Having credited inspector Fuson's testimony that the conditions observed had developed while the roof bolter was being operated previously for at least a shift and had not been fixed, I conclude that two roof bolt operators on the twin-head machine were exposed to increased respirable dust due to improper dust collection. Tr. I, 218, 222. "Because of the lack of vacuum, hose leaking, dust on top of the box. That's about a guarantee these guys drilling in them conditions, they're going to be exposed to respirable dust." Tr. I, 218. The bolters operated within arm's reach of the drill steel bit on each side of the roof bolter, with controls outby the drill bit. Tr. I, 330-32. With regard to exposure, Fuson credibly testified, "You've got 3,000 feet of air at the bumper of the machine. The places that's been developed is 30 to 32-foot deep. By the time they're up in there, all you're going to have is a swirling motion, so anything - you know, you're not going to be ventilating the place. All your air is just swirling around in there . . ." Tr. I, 322. Fuson further credibly explained that "[t]he dust control suction collection box is to get the respirable dust away from them. If there's a breach in the system, the 3,000 feet of air at the bumper of the machine . . . So we depend on the dust collection system itself. And if there's any breach in air or dust, it's just going to swirl around in the place for them." Tr. I, 325-26. Fuson explained that "[a]nything that's spinning in the air is potential breathable atmosphere for those miners." Tr. 326.

I conclude that the two bolter operators on the prior production shift were exposed to increased respirable dust no matter where they were located on the machine. I credit Fuson's testimony that air swirls in the whole cut exposing the operators to respirable dust and silica. Tr. I, 218-219, 322, 325-26. I further conclude that bolters' exposure to respirable dust due to improper dust collection was reasonably likely to result in injury. In this regard, vibrations from the roof bolter would put fine respirable dust into the operators' breathable air. Tr. I, 215. The dust boxes were located on the booms of the machine about 8-10 feet from the operators, who move around the machine. Tr. I, 217. Further, Fuson credibly testified:

> With low vacuum, -- you know, especially with a hose leaking, the machine's vacuum is not going to pull that dust out of the steel, and you'll have a lot of dust coming back out of the hole right in -- I mean, and the hole is within probably a couple feet from their -- two to three feet at most from their mouth, from breathing, at this

> height. This is a low seam coal, three to four foot high. So they're right there next to the drill head.

Tr. 218-19.

With respect to the fourth *Mathies* element, I find a reasonable likelihood that the violation will contribute to development of an illness of a reasonably serious nature, including black lung disease. It is beyond dispute that respirable coal mine dust can cause lung diseases such as coal workers pneumoconiosis (CWP), emphysema, silicosis, and bronchitis, collectively known as black lung. Black lung can lead to lung impairment, permanent disability, and even death. There is no cure. Judge Simonton recently recognized the connection between excessive exposure to respirable dust and serious respiratory illness in the roof bolter context when finding that "there is a reasonable likelihood that [this] over-exposure to respirable dust will result in injury as respirable dust has been consistently linked to respiratory illnesses such as black lung and silicosis. Additionally, black lung and silicosis far exceed the definition of an injury of a reasonably serious nature, as they are irreversible illnesses that result in debilitating respiratory complications and even death." *Webster County Coal*, 36 FMSHRC 382, 391 (Feb. 2014) (ALJ).

On this record, Fuson credibly testified that the roof and strata contained quartz content such that respirable dust exposure would lead to silicosis. Tr. I, 219-20. Fuson lost his father to silicosis and persuasively explained that "[o]nce complications of respirable dust do take affect (sic) on these miners, there's no cure to it and it is a horrible death." Tr. I, 220. I conclude that the unabated exposure of the roof bolters to respirable dust by failing to maintain the dry dust collection system on the cited twin-head, roof-bolting machine during continuous normal mining operations was reasonably likely to contribute to the development of serious lung disease, including a permanently disabling respiratory illness. *See White Buck Coal*, 30 FMSHRC 535, 542 (June 2008) (ALJ); *Genwal Resources, Inc.*, 27 FMSHRC 580, 589 (Aug. 2005) (ALJ).

For the foregoing reasons, I conclude that the Secretary has established that this violation meets the four-element *Mathies* test for S&S violations. Accordingly, the S&S and associated gravity designations for Citation No. 8407725 are affirmed.

I further find that Respondent's failure to maintain the dry dust collection system on the roof bolter was the result of moderate negligence. As noted *supra*, moderate negligence occurs when an operator knew or should have known of the violation, but there are mitigating circumstances. Based on the numerous defective conditions and their apparent obvious nature, Respondent should have known about and corrected the conditions. The machine was not locked and tagged out and was set up for the oncoming first shift on May 24. Even Respondent's witness, former section foreman Lewis, confirmed that if a prior shift operates a piece of equipment, it has to be checked, and if anything is wrong, it should be fixed or shut down. Tr. I, 316. Fuson persuasively testified that the machine was run in its defective condition for at least one shift sometime prior to his discovery of the cited conditions. Tr. I, 206, 223. Respondent

provided no mitigating circumstances about why the conditions existed other than to suggest that they could have happened at any time and would have been discovered and corrected. In these circumstances, I conclude that the moderate negligence designation is appropriate.

I have evaluated the Secretary's proposed penalty in light of the principles announced in my final *Big Ridge* decision. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 19, 2014) (ALJ). I find that the penalty proposed by the Secretary of $425 is consistent with my findings and the statutory criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. 820(i). Accordingly, I assess a $425 civil penalty against Respondent for Citation No. 8407725.

V. Order

Wherefore, it is **ORDERED** that Citation No. 8378378 be **AFFIRMED**, as written.

It is **ORDERED** that Citation No. 8378379 be **VACATED**.

It is **ORDERED** that Citation No. 8378383 be **MODIFIED** to reduce the number of miners affected from 13 to 10.

It is **ORDERED** that Citation No. 8378384 be **MODIFIED** to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely, to reduce the injury or illness that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty," and to reduce the number of miners affected from 13 to 10.

It is further **ORDERED** that Citation No. 8407725 be **AFFIRMED**, as written.

To the extent Respondent has not already done so, within 40 days of the date of this decision, Respondent, Alden Resources, LLC, is **ORDERED TO PAY** a total civil penalty of $8,262 for the five litigated citations that were not part of the final settlement referenced in footnote 1.[17]

Thomas P. McCarthy
Administrative Law Judge

Distribution:

Ryan L. Pardue, Esq., Office of the Solicitor, Department of Labor, 1999 Broadway, Suite 800, Denver, Colorado 80202

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[17] 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.

Billy R. Shelton, Esq., Jones, Walters, Turner, & Shelton, PLLC, 151 Eagle Creek Dr., Suite 310, Lexington, Kentucky 40509