

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 21 2015

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

v.

WEST RIDGE RESOURCES,  
INCORPORATED,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2013-232  
A.C. No. 42-02233-306321

Docket No. WEST 2013-722  
A.C. No. 42-02233-317947

Mine: West Ridge Mine

DECISION

Appearances: Sean J. Allen, Esq., U.S. Dept. of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Jason W. Hardin, Esq., and Artemis D. Vamianakis, Esq., Fabian & Clendenin, Salt Lake City, Utah, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA"), against West Ridge Resources, Incorporated ("West Ridge"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary seeks a total civil penalty in the amount of \$82,642.00 for eleven alleged violations of his mandatory safety standards.<sup>1</sup>

A hearing was held in Salt Lake City, Utah. The issues before me are: (1) whether Respondent violated 30 C.F.R. §§ 75.362(a)(2) and 48.7; (2) whether the violations were significant and substantial; (3) whether the violations were a result of West Ridge's reckless disregard; and (4) whether the violations were attributable to West Ridge's unwarrantable failure to comply with the standard, where alleged. The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** one order, as issued, **VACATE** one order, assess a penalty against Respondent, and approve the parties' Partial Settlement.

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<sup>1</sup> The parties reached a settlement on nine of the eleven contested citations and orders. The total civil penalty proposed for the two remaining orders is \$71,242.00.

## **I. Stipulations**

The parties stipulated as follows:

1. West Ridge is engaged in mining operations in the United States and these mining operations affect interstate commerce;
2. West Ridge is the owner and operator of the West Ridge Mine, Mine I.D. No. 42-02233;
3. West Ridge is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801;
4. The Administrative Law Judge has jurisdiction in this matter;
5. The orders at issue herein are properly served by a duly authorized representative of the Secretary upon an agent of West Ridge on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, but not for the truthfulness or relevance of any statements asserted therein, or for any other purpose other than establishing their issuance;
6. The exhibits offered by the parties are stipulated to be authentic, but no stipulation is made as to the relevance or truth of the matters asserted therein.

Tr. 6.

## **II. Factual Background**

West Ridge owns and operates the West Ridge Mine, an underground coal mine in Carbon County, Utah. On September 14, 2012, MSHA Inspector William Vetter, as part of a five-person inspection team, traveled to the mine to conduct a health impact inspection on the day shift. Tr. 12-13, 81. After arriving that morning, Vetter, MSHA Inspector James Martin, and company representative Val Udovich traveled to the 10 East working section. Tr. 15, 22, 118; Ex. P-3 at 5. Upon reaching the section, Vetter observed continuous miner operator Daniel Espino standing near a continuous miner that had been taken out of service due to a broken water hose. Tr. 16. Vetter then asked Espino whether he had taken certain air measurements, although the actual exchange between the parties is disputed. Tr. 17-19, 169-71, 193-94. After that conversation, section foreman Jeff Failor arrived on the scene, and also engaged in a conversation with Vetter about the scrubber air reading on the continuous miner.<sup>2</sup> Tr. 18-20, 205-08. Thereafter, Vetter issued an order to West Ridge for its failure to measure the scrubber velocity on the continuous miner as part of the on-shift examination, and another for its failure to train Espino on taking the scrubber velocity measurement. Tr. 23; Exs. P-3, P-8.

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<sup>2</sup> A scrubber is a high-velocity fan attached to a continuous miner which draws air from the front of the miner through a screen. The screen captures dust, and clean air is discharged. Tr. 36-37.

### III. Findings of Fact and Conclusions of Law

#### A. Order No. 8481679

##### 1. Fact of Violation

Vetter issued 104(d)(2) Order No. 8481679, alleging a “significant and substantial” violation of section 75.362(a)(2) that was “reasonably likely” to cause an injury that could reasonably be expected to be “permanently disabling,” and was caused by West Ridge’s “reckless disregard” and “unwarrantable failure” to comply with the standard.<sup>3</sup> The “Condition or Practice” is described as follows:

An inadequate on-shift examination was conducted in 10 east working section (MMU-004) in regard to compliance with the respirable dust control parameters specified in the approved ventilation plan. The person designated by the operator to conduct the examination completed a portion of the examination but failed to measure the scrubber velocity on continuous miner JM 5062, unit #11-07. A 30-foot cut had been made in the No. 1 bleeder entry working face without the examination being completed.

The section foreman was aware of the incomplete examination and reportedly instructed the miner operator to commence mining coal and the examination would be completed later. This is aggravated conduct constituting more than ordinary negligence.

The MMU-004 working section is on a reduced standard of 0.9 mg/m<sup>3</sup> and over the last 12 months there have been five respirable dust samples revealing over exposure. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-3. The Order was terminated after the scrubber velocity reading was taken.

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<sup>3</sup> 30 C.F.R. § 75.362(a)(2), “On-shift examination,” provides that “[a] person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan. In those instances when a shift change is accomplished without an interruption in production on a section, the examination shall be made anytime within 1 hour of the shift change. In those instances when there is an interruption in production during the shift change, the examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and control device placement, and any other dust suppression measures required by the ventilation plan. Measurements of the air velocity and quantity, water pressure and flow rates are not required if continuous monitoring of these controls is used and indicates that the dust controls are functioning properly.”

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred “by a preponderance of credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

The Secretary argues that West Ridge failed to take the scrubber velocity reading on the continuous miner as part of the on-shift examination, which was required to be conducted prior to commencement of mining on the shift. Sec’y Br. at 6-7.

In response, West Ridge contends that the scrubber velocity must have been checked, because all of the other dust parameter checks had been performed on the continuous miner, and mining would not have begun without the reading having been taken. Resp’t Br. at 5-7. It further argues that Espino did not understand that Vetter was asking him whether he had taken the scrubber reading; Espino’s unresponsive answer mistakenly led Vetter to believe that Espino had not taken the reading. Resp’t Br. at 3-4. The confusion continued, it argues, when Failor indicated that he had not received the scrubber reading and Vetter, once again, drew an erroneous conclusion, believing Failor’s statement to mean that he had instructed Espino to begin mining and had told him that he, Failor, would check the scrubber later. Resp’t Br. at 4-5. West Ridge also points out that it had not been cited for excess respirable dust in the two-year period preceding issuance of this Order. Resp’t Br. at 9-12.

Vetter had worked for MSHA for approximately 23 years, including 17 years as a regular inspector.<sup>4</sup> Tr. 8-11. He testified that when he came upon the out-of-service continuous miner, Espino informed him that the water hose had been damaged and was being fixed. Tr. 15-16. Espino continued that the crew had cut 30 feet of coal at the face, and had used the scrubber up until the hose ruptured. Tr. 17. Vetter then asked Espino for the scrubber reading and, receiving no response, asked about the hydrogen sulfide reading, which Espino offered.<sup>5</sup> Tr. 17-18. Vetter asked again about the scrubber reading and, according to Vetter, Espino lowered his voice and replied “I don’t know, I didn’t take it.” Tr. 18; Ex. P-3 at 4. Espino added that no one else had taken the reading because the section foreman had directed him to start mining, and had stated that he, the foreman, would take the reading later. Tr. 18-19. Espino then explained that the regular miner operator takes the reading, that he was just the miner helper filling in, and that he did not know how to take the scrubber reading. Tr. 19. According to Vetter, Failor then arrived on the scene and, in an apologetic tone, stated that he had, indeed, told Espino to start mining, and that he would check the scrubber later. Tr. 19-20; Ex. P-3 at 4. Failor allegedly also told Vetter that he had not taken the scrubber measurement because he had had other things to do on the section. Tr. 19-20; Ex. P-3 at 5. Vetter then informed Failor that the respirable dust parameters were required to be checked before cutting coal, and that he would be issuing a 104(d) order. Tr. 20-21.

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<sup>4</sup> At the time of the hearing, Vetter served as a health specialist. Tr. 11.

<sup>5</sup> Vetter explained that the scrubber velocity check is performed by inserting a Pitot tube into a scrubber duct port directed toward the air path, and the velocity pressure then registers on a Magnehelic gauge. Tr. 135-39.

Vetter explained that West Ridge's ventilation plan requires that the scrubber be used when cutting coal further than 20 feet, and that the reading be taken before the start of the shift. Tr. 25-30; Ex. P-4 at 3. According to Vetter, because West Ridge had not been actively mining on the section during the previous shift, section 75.362(a)(2) requires that the scrubber velocity check be performed before cutting coal. Tr. 32. He added that if West Ridge were to continue mining without checking the scrubber velocity, the continuous miner operator could become exposed to excess respirable dust and develop pneumoconiosis or silicosis. Tr. 39-42, 52-54. He opined that the danger of contracting respiratory disease was heightened because the section was on a reduced standard for quartz, and had had five reported dust overexposures prior to issuance of his Order.<sup>6</sup> Tr. 40-41, 47-51 ; Ex. P-6. On cross-examination, Vetter conceded that the overexposures were not in violation of section 70.101, because compliance is determined by comparing the average of five samples to the applicable dust standard. Tr. 91-92, 112-14.

Espino gave a different account of his conversation with Vetter. He testified that Vetter began the discussion by asking him for the velocity measurement which, Espino believed, referred to the air velocity at the face; he responded that he had to have 12,000 cfm in the face and 22,000 cfm in the last open crosscut to run the miner, but that that reading was usually taken by a foreman. Tr. 169-70. Vetter then allegedly replied, "that's not your face, what's your velocity?" Tr. 170. Espino stated that he believed Vetter to be referring to the air velocity in the last open crosscut but, after a minute or two of other conversation about which Espino did not elaborate, Vetter left him and began talking to Failor. Tr. 170-71. Espino testified that he had "no clue" that Vetter was referring to the scrubber velocity, because Vetter did not specifically use that term; he, Espino, refers to it as the "mag reading," or "mag velocity." Tr. 164-65, 171. According to Espino, when Vetter asked about the velocity, "[t]hat's when it all went bad, you know, and I didn't know if I was in trouble." Tr. 194.

Espino clearly remembered some events surrounding Vetter's inspection, but could not remember others. During direct examination, Espino testified to the position of the face, entries, last open crosscut, continuous miner, ventilation tubes, mine fan, and where he was stationed when he encountered Vetter; and he drew a corresponding diagram. Tr. 174-181; Ex. R-25. Espino also remembered checking the bits and sprays as part of his parameter checks. Tr. 182. However, he testified that he could not remember whether the mechanic or Failor took the scrubber reading, the mechanic's name, the total distance of the cut, or any conversation with Vetter before or after he was asked about the air velocity. Tr. 182, 184-85, 189-92. Initially, Espino testified that he could not remember whether Failor told him to begin mining and that he would check the scrubber velocity later; then he did an about-face and declared that Failor had not said that. Tr. 172-73. Espino admitted, however, that, as the miner operator, he was the person designated to conduct the on-shift examination. Tr. 190.

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<sup>6</sup> 30 C.F.R § 70.101, "Respirable dust standard when quartz is present," provides that "[w]hen the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust . . . in terms of an equivalent concentration . . . computed by dividing the percent of quartz into the number 10."

Failor testified that he first encountered Vetter while coming down the Number 2 Entry toward the last open crosscut. Tr. 205-06. According to Failor, upon identifying himself as the section foreman, Vetter informed him that he would be issuing an order to West Ridge; then, as they walked toward the continuous miner, Vetter talked about the dangers of respirable dust exposure. Tr. 206. Initially, Failor testified that he could not recall any other conversation with Vetter but, when confronted with the statement in Vetter's notes, that he "indicated that he had other things to attend to before he could measure the scrubber air," Failor stated that he actually said "I had things to attend to; I hadn't received the scrubber reading yet." Tr. 206-08; Ex. P-3 at 5. Failor also denied directing Espino to begin mining before the scrubber reading was taken, but admitted that he never saw Espino or the mechanic, who he identified as Chris Walkingshaw, check the scrubber velocity. Tr. 208-09.

I fully credit the Secretary's version of events, based on Vetter's testimony and his contemporaneous notes, that Espino told Vetter that he did not take the reading, that Failor had directed Espino to start mining, and that Failor had told Espino that he would take the scrubber reading later. Consistent with this finding, the evidence supports a finding that Espino told Vetter that he did not know how to perform the scrubber check, especially in light of his admission that he was concerned about whether he was "in trouble." This statement was probably a knee-jerk reaction to the stressful probability of being cited since, as will be more fully discussed, it was not at all true. Failor's account of events is simply implausible based on the record, and I do not find credible his denial of having directed Espino to start mining without having performed the check. Notably, West Ridge only urges that performance of the check be inferred, rather than advancing an argument that it actually had been performed.

The purpose of requiring that parameter checks be performed on a continuous miner prior to commencement of mining, or within an hour of a shift change where no break in production has occurred, is made clear by the language of the standard - - so that deficiencies in dust suppression equipment can be detected and corrected prior to active mining or fairly early in a mining cycle - - a goal obviously intended to limit miners' overexposure to respirable dust. It is equally clear that Failor's conduct amounted to gambling with the health of his crew. I find as fact that the scrubber check was required prior to cutting coal on the shift, a contention advanced by the Secretary that is unchallenged. Therefore, because the operator failed to ensure that the on-shift examination of the continuous miner was completed by checking the scrubber velocity prior to commencement of mining, I find that West Ridge violated section 75.362(a)(2).

## **2. Significant and Substantial**

To prove that a violation is "significant and substantial" ("S&S") under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981), the Secretary must establish the four criteria set forth by the Commission in *Mathies Coal Company*, 6 FMSHRC 1 (Jan. 1984). The Secretary bears the burden of proving: 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 injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC 1, 3-4; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133,135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC

2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding that violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014). The Commission and its judges have found violations for inadequate pre-shift and on-shift examinations to be S&S regardless of whether hazards were detected. See *Buck Creek Coal Co.*, 17 FMSHRC 8 (Jan. 1995); *ICG Knott County, LLC*, 33 FMSHRC 402, 411-12 (Feb. 2011) (ALJ); *ICG Hazard, LLC*, Unpub. Dec., slip op. at 17-20 (Oct. 2012) (ALJ) (finding that lack of an adequate on-shift examination of a continuous miner contributes to the hazard of miners failing to be on guard against exposure to respirable dust).

The fact of violation has been established. The second criterion of the *Mathies* test has been met, in that the inadequate on-shift examination, deficient in completion of parameter checks on the continuous miner, increased the odds of miners’ overexposure to hazardous concentrations of respirable dust. Inhalation of respirable dust would be reasonably likely to result in permanently disabling pneumoconiosis or silicosis. Therefore, I find that the violation was S&S.

### **3. Negligence and Unwarrantable Failure**

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is “aggravated” in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, whether the violation posed a high degree of danger, whether the violation was obvious, the operator’s knowledge of the existence of the violation, the operator’s efforts in abating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. See *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2330 (Aug. 2013); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013). Each case must be examined on its own facts to determine whether an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Although some factors may be irrelevant to a particular scenario, all relevant factors must be examined. *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637-38 (Oct. 2014) (citing *IO Coal*, 31 FMSHRC 1346, 1351 (Dec. 2009)).

In arguing that West Ridge’s conduct was characterized by a reckless disregard of the standard that rose to the level of an unwarrantable failure to comply with its terms, the Secretary

points out that the violation was extensive, since West Ridge had mined 30 feet of coal before conducting the check, and highly dangerous, because miners were unaware of possible exposure to hazardous concentrations of respirable dust. Sec’y Br. at 13-14.

West Ridge counters that its negligence was mitigated by its check of the other parameters on the continuous miner, maintenance of adequate ventilation at the face and in the last open crosscut, and idling of the continuous miner after the water-line break. Resp’t Br. at 14-15. It also notes that the scrubber had been used on the shift during the morning cut and, when checked by Vetter, had a compliant velocity. Resp’t Br. at 15. Specifically addressing the unwarrantable failure allegation, West Ridge points out that the cut lasted only between 45 minutes and an hour and 15 minutes, that the condition was isolated to a single continuous miner on one shift, that West Ridge had no prior citations for violations of the standard, that it had trained Espino on the on-shift examination requirements, and that Failor believed that the scrubber velocity had been measured. Resp’t Br. at 15-18.

Failor’s instruction to Espino to begin mining prior to completion of the on-shift examination of the continuous miner, demonstrates his reckless disregard of the standard’s requirements and, as an agent of the operator, his negligence is imputable to West Ridge. *See Nelson Quarries, Inc.*, 31 FMSHRC 318, 329 (Mar. 2009). Furthermore, I find that West Ridge’s use of the scrubber during the shift’s 30 foot cut, prior to having taken the reading, aggravates, rather than mitigates, its negligence. The fact that the untimely scrubber reading turned out to be compliant by no means lessens the uncertain outcome of rolling the dice - - an impermissible gamble with the miners’ health and safety. Respecting the unwarrantable failure charge, the Commission has recently recognized that knowledge of an obvious violation clearly constitutes aggravated conduct in support of an unwarrantable failure determination. *Wolf Run*, 35 FMSHRC at 3521. Given that the section was subject to a reduced standard due to excess quartz, and had registered overexposures of respirable dust, the deliberateness of the operator’s failure to timely complete the scrubber check on the continuous miner was highly dangerous, and far outweighs other factors, such as extensiveness, efforts to abate, duration of violation, and notice of the need for greater compliance. Therefore, I find that the Secretary has met his burden of establishing that West Ridge displayed a reckless disregard of the standard, and aggravated conduct that constitutes unwarrantable failure.

## **B. Order No. 8481680**

### **1. Fact of Violation**

Vetter issued 104(g)(1) Order No. 8481680, alleging a “significant and substantial” violation of section 48.7 that was “reasonably likely” to cause an injury that could reasonably be expected to be “permanently disabling,” and was attributable to West Ridge’s “reckless disregard.”<sup>7</sup>

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<sup>7</sup> 30 C.F.R. § 48.7, “Training of miners assigned to a task in which they have had no previous experience; minimum courses of instruction,” provides that “[m]iners assigned to new work tasks . . . shall not perform new work tasks . . . until training . . . has been completed. This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This



The “Condition or Practice” is described as follows:

Daniel Espino, continuous miner operator, was designated by the operator to conduct the on-shift examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan as required by 30 C.F.R. 75.362(a)(2). Mr. Espino indicated he was unfamiliar with the procedures for measuring the scrubber velocity on continuous miner JM 5062, unit 11-07 on working section 10 East, MMU-004. The scrubber velocity was not measured prior to a 30-foot cut being made. The section foreman was aware of the incomplete examination and instructed Mr. Espino to commence mining coal from the No. 1 working face. The Federal Mine Safety and Health Act of 1977 declares an untrained miner a hazard to himself and others.

Ex. P-8. The Order was terminated when Espino was trained.

The Secretary argues, based on Espino’s statement to Vetter that he did not know how to perform the scrubber check, that Espino was not trained to take the scrubber velocity reading on the continuous miner. Sec’y Br. at 19.

Here, again, West Ridge claims that Espino was confused by Vetter’s inquiry, leading to Vetter’s mistaken belief that Espino had not been trained to conduct the scrubber check. Resp’t Br. at 3, 22. It argues that, indeed, Espino had been trained to conduct the on-shift examination of the continuous miner, initially by foreman Tyler Norton in July of 2011; since becoming a regular continuous miner operator in April of 2012, Espino had been performing the parameter checks on his equipment. Resp’t Br. 22-23.

Vetter explained that the standard requires equipment operators to receive training before running unfamiliar equipment, and that Espino had told him that he did not know how to perform the scrubber check. Tr. 69-70; Ex. P-8 at 3, 5. In reviewing Espino’s July 27, 2011 training record, Vetter observed that while the record notes that Espino received training as a “miner operator/helper,” it does not indicate that Espino was trained as a designated person to conduct on-shift examinations of the continuous miner. Tr. 72-73; Ex. P-9 at 2.

Espino testified assertively that he knew how to take the scrubber velocity reading, and vehemently denied telling Vetter that he did not know how to do it. Tr. 167, 183. He explained that he had first received continuous miner training while serving on foreman Norton’s crew as a roof bolter, in preparation for substituting for the regular miner operator. Tr. 156-59. Referring to his training records, Espino testified that on July 27, 2011, Norton had trained him to change bits and serve as a miner helper and, five months before the inspection, he had become a full-time miner operator on foreman Bill Anderson’s crew. Tr. 159, 160-62; Ex. P-9 at 2. Espino stated that he had gotten into an argument with supervisor Scott Jones, who administered

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training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment . . . .”

the training to abate the violation, because he thought that it was “dumb” that he be required to be trained in a task that he already knew how to perform. Tr. 172.

Tyler Norton testified that he had been a section foreman at West Ridge for almost five years, and that he had trained Espino to operate the continuous miner when his regular miner operator took a vacation. Tr. 213-14. Norton explained that he had begun task training Espino on July 27, teaching him how to conduct all parameter checks on the continuous miner. Tr. 215-19; Exs. P-9 at 2, R-18 at 1. He recalled that on that day he had taken the scrubber reading, and shown Espino how to take the measurement; he estimated that he had supervised Espino for approximately 85 percent of that day’s ten-hour shift. Tr. 220-22. Espino’s training continued on July 28, when Espino took the scrubber reading under Norton’s supervision, and did likewise on the following day. Tr. 222; Ex. R-18 at 2, 3. Failor also testified that Espino had been trained to perform the check, and that he had seen him take the reading. Tr. 204.

As has been discussed, the evidence establishes that sufficient conversation had transpired between Vetter and Espino for Espino to have understood Vetter’s inquiry about the scrubber velocity, and that Espino told Vetter that he did not know how to take the measurement. It is also clear, based on Espino’s training records and credible testimony of foremen Norton and Failor, that Espino had been task trained to take the scrubber reading and had, in fact, done so on previous occasions. A reasonable analysis of the facts leads to an obvious conclusion that Espino attempted to avoid the consequences of his incomplete on-shift examination of the continuous miner by misleading Vetter. Given the outcome of the lie, suffice it to say that lying to the inspector was a bad idea. Moreover, it is highly implausible that Espino would have served as a continuous miner operator for five months without knowing how to perform all essential dust control checks on the equipment that he operated; according to the record, the scrubber velocity check is not difficult to perform. Indeed, on the witness stand, Espino appeared insulted by the suggestion that he was somehow lacking in all aspects of operating his equipment. Therefore, while it was reasonable for Vetter to have concluded that Espino had not been task trained, the facts bear out the opposite conclusion, and I find that the Secretary has failed to prove a violation of section 48.7.

#### **IV. Penalty**

While the Secretary has proposed a civil penalty of \$52,500.00 for Order No. 8481679, the Judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff’d* 736 F.2d 1147 (7th Cir. 1984).

West Ridge’s Assessed Violation History Report for the two-year period preceding the subject inspection indicates that 646 violations had become final orders of the Commission. None of these violations, however, was of section 75.362(a)(2) or section 70.101, the standard governing respirable dust when quartz is present. Ex. P-1. Therefore, I do not find West Ridge’s violations history to be an aggravating factor in assessing a penalty. I also find that West Ridge is a large operator, that the proposed penalty will not affect its ability to continue in business, and that it demonstrated good faith in achieving rapid compliance after notice of the violation. Ex. P-13 at 1. The remaining criteria involve consideration of the gravity of the violation, and

West Ridge's negligence in committing it. These factors have been discussed fully, and it has been established that this S&S violation of section 75.362(a)(2) was reasonably likely to cause permanently disabling injuries, and that West Ridge displayed a reckless disregard that constituted unwarrantable failure to comply with the standard.

Both parties' arguments concerning this specially assessed penalty focus on the overexposures of respirable dust detected on the cited section. Vetter testified that he made his recommendation for a special assessment based on the five reported dust overexposures, and that an increased penalty would serve as a deterrent. Tr. 68; Ex. P-6. The same justification is given in MSHA's Narrative Findings for a Special Assessment, and the Secretary incorporates this argument in his Brief, along with previous contentions concerning gravity and negligence. Ex. P-13 at 2; Sec'y Br. at 17. West Ridge asserts that it was in compliance with the applicable respirable dust standard and, accordingly, did not receive a single violation of section 70.101 in the two years prior to inspection. Resp't Br. at 9-12, 19-20. I find the Secretary's justification for specially assessing the proposed penalty for this Order somewhat overreaching, given that the average of the samples was in compliance with the applicable standard. The Secretary's Special Assessment Narrative reflects that under a regular assessment applying Part 100 penalty points, this violation would have been assessed at \$18,742.00. Ex. P-13 at 1. While I note that West Ridge had received no prior violations of this on-shift examination standard or the applicable dust standard, I also give consideration to the five overexposures. Therefore, having considered the six *Sellersburg* criteria, I find that a penalty of \$30,000.00 is appropriate.

## V. Approval of Settlement

The parties have filed a Motion to Approve Settlement and Order Payment respecting docket No. WEST 2013-232; and Citation No. 8461981 has been vacated. Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike paragraphs six and seven from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission.<sup>8</sup> The paragraphs incorrectly cite and interpret the case law, and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

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<sup>8</sup> The Secretary's Motion to Approve Settlement and Order Payment reads in pertinent part:

6. In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above.

7. Consistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act. 30 U.S.C. § 820(k)

A reduction in penalty from \$11,400.00 to \$6,161.00 is proposed. The citations, initial assessments, and proposed settlement amounts are as follows:


<u>Citation No.</u>	<u>Initial Assessment</u>	<u>Proposed Settlement</u>
8462038	\$ 2,473.00	\$ 1,500.00
8462088	\$ 1,111.00	\$ 1,111.00
8459239	\$ 1,530.00	\$ 800.00
8459240	\$ 1,530.00	\$ 800.00
8462039	\$ 207.00	\$ 100.00
8461978	\$ 807.00	\$ 450.00
8482037	\$ 1,026.00	\$ 600.00
8461980	\$ 1,304.00	\$ 800.00
8461981	\$ 1,412.00	\$ 0.00
TOTAL:	\$11,400.00	\$ 6,161.00

I have considered the representations and documentation submitted in these matters under section 110(k) of the Act. Specifically, regarding Citation No. 8462038, the Secretary has credited Respondent’s contention that the air velocity was sufficient at the beginning of the shift and, unknown to the operator, a Band-Aid became stuck in the fan, causing the drop in velocity. Regarding Citation Nos. 8469239 and 8469240, the Secretary has credited Respondent’s contentions that it provided two layers of screen guarding over the fan blades, and that this guarding had been in place for previous inspections and not cited. Regarding Citation No. 8462039, the Secretary has credited Respondent’s contention that the cited area was neither a working section nor a permanent oil storage location. Regarding Citation No. 8461978, the Secretary has credited Respondent’s contentions that the ventilation map on the working section was accurate, and that the miners on the section would not be affected by the inaccurate mine manager’s map. Regarding Citation No. 8482037, the Secretary has credited Respondent’s contentions that the gap on the light switch housing on the scoop occurred after the last inspection, and that the inspecting electrician was not an agent of the operator. Regarding Citation No. 8461980, the Secretary has credited Respondent’s contention that the operator ceased mining activity when its monitoring system reached 1.95 percent methane. Accordingly, I conclude that the proffered settlement is appropriate under section 110(i) of the Act.

**ORDER**

**WHEREFORE**, it is **ORDERED** that Order No. 8481680 is **VACATED**; that Citation Nos. 8462038, 8462088, 8462039 and 8461980 and Order No. 8481679 are **AFFIRMED**, as issued; that the Secretary **MODIFY** Citation No. 8461978 to reduce the level of gravity to “2 persons affected;” and Citation Nos. 8459239, 8459240 and 8482037 to reduce the degree of negligence to “low;” and that West Ridge Resources, Incorporated, **PAY** a civil penalty of

\$36,161.00 within 30 days of the date of this Decision.<sup>9</sup>

  
Jacqueline R. Bulluck  
Administrative Law Judge

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/ss

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<sup>9</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of  
Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket  
numbers and A.C. numbers.