FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 10 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2011-1054 A.C. No. 11-02752-265355
v.	Docket No. LAKE 2011-1055 A.C. No. 11-02752-265355
AMERICAN COAL COMPANY, Respondent	Mine: The American Coal Company New Era Mine

DECISION AND ORDER

Appearances: Ryan L. Pardue, Esq., Department of Labor, Office of the Solicitor, Denver, Colorado 80202, on behalf of the Petitioner,

Jason W. Hardin, Esq. and Mark Kittrell, Salt Lake City, UT, on behalf of the Respondent.

Before: Judge L. Zane Gill

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves nine (9) section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to American Coal Company ("AmCoal") at its New Era Mine. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana on February 26 and 27, 2013.

Prior to trial, the parties came to an agreement on two of the citations from docket number LAKE 2011-1055 – Nos. 8424631 and 8427551.[1] Thus, the trial concerned only the six citations from LAKE 2011-1054 – Nos. 8427482, 8424603, 8432076, 8432085, 8432106, and 8432151– and one (1) citation from LAKE 2011-1055 – No. 8427550.

I find that for Citation No. 8432076, AmCoal violated § 75.1403 of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in lost workdays

[1] The Secretary filed a Motion to Approve Settlement, wherein AmCoal agreed to withdraw the penalty contest and agreed to pay the citation fines as proposed by the Secretary. I have approved the Motion in a Partial Settlement Decision dated September 3, 2014, and directed AmCoal to pay the citations as issued for a total amount of $942.00.

or restricted duty, and I find that the citation was properly designated as significant and substantial. I assess a penalty in the amount of $1,842.00.

I find that for Citation No. 8432085, AmCoal violated § 75.202(a) of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in lost workdays or restricted duty, and I find that the citation was not properly designated as significant and substantial. I assess a penalty in the amount of $541.00.

I find that for Citation No. 8427482, AmCoal violated § 75.202(a) of the Mine Act, AmCoal's negligence was low, the injury was reasonably likely to result in lost workdays or restricted duty, and I find that the citation was not properly designated as significant and substantial. I assess a penalty in the amount of $264.00.

I find that for Citation No. 8432106, AmCoal violated § 75.202(a) of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in no lost workdays, and I find that the citation was properly designated as non-significant and substantial. I assess a penalty in the amount of $586.00.

I find that for Citation No. 8432151, AmCoal violated § 75.370(a)(1) of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in lost workdays or restricted duty, and I find that the citation was properly designated as significant and substantial. I assess a penalty in the amount of $2,902.00.

I find that for Citation No. 8424603, AmCoal violated § 75.202(a) of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in be lost workdays or restricted duty, and I find that the citation was properly designated as significant and substantial. I assess a penalty in the amount of $2,902.00.

I find that for Citation No. 8427550, AmCoal violated § 75.400 of the Mine Act, AmCoal's negligence was moderate, the injury was reasonably likely to result in be lost workdays or restricted duty, and I find that the citation was not properly designated as significant and substantial. I assess a penalty in the amount of $745.00.

I. Stipulations:

The parties submitted the following stipulations at the hearing: (Tr. 452:10 – 453:1)

1. At all relevant times, AmCoal was engaged in mining operation in the United States, and its mining operations affected interstate commerce.

2. Prior to September 24, 2010, AmCoal was the owner and operator of the Galatia Mine, I.D. No. 11-02752, which encompassed multiple operations and mines (i.e., the New Era, New Future, and Galatia North mines). The Galatia North mine closed prior to September 24, 2010, and on that date, the New Future Mine began operating under Mine ID No. 11-03232, and the New Era Mine continued operating under Mine ID No. 11-02752. AmCoal remained the owner and operator of both mines. The citations at issue in the aforementioned dockets all were issued after September 24, 2010 and concern the New Era Mine operated by AmCoal.

3. AmCoal is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§801 *et seq.*

4. The Administrative Law Judge and Federal Mine Safety Health Review Commission have jurisdiction in this matter.

5. In addition to the aforementioned paragraph, the other exhibits offered by the parties were stipulated to be authentic, but no stipulation was made as to the relevancy or truthfulness of the matters or statements asserted therein or for any other purpose other than establishing their authenticity.

6. The citations at issue herein were properly served by a duly authorized representative of the Secretary upon an agent of AmCoal 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 relevancy of any statements asserted therein for any other purpose other than establishing their issuance.

7. AmCoal demonstrated good faith in abating the violations.

II. Basic Legal Principals

A. Significant and Substantial

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

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

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a

> reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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

B. Negligence

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

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

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

> and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

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

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

C. Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (*citing Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

D. Penalty

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

Under Section 110(i) of the Mine Act, the Commission is to consider the following when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C § 820(i). Thus, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties ... we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *See American Coal Co.*, 35 FMSHRC 1774, 1819 (July 2013)(ALJ).

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

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section of 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate higher penalty assessments. *See 30 C.F.R. Part 100 Final Rule*, 72 Fed. Reg. at 13,621.

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

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

1. Special Assessment

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

The regulations also provide that MSHA may elect to waive the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.[2] Nor do they identify how the amount of a special assessment will be determined, other than to state that "the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form." *Id.* The narrative findings for special assessments are typically brief and conclusory.

AmCoal argued that the Secretary's secretive special assessment process arbitrarily subjects it to substantially enhanced penalties, and deprives it of due process. The lack of transparency in the Secretary's special assessment process coupled with the Secretary's refusal to disclose the bases for specially assessing a penalty, can frustrate attempted explanations. However, whether the Secretary proposes a regularly or a specially assessed penalty is not relevant to the Commission's determination of a penalty amount because the Commission imposes civil penalties *de novo*. While AmCoal's arbitrariness and due process arguments are unavailing,[3] its concerns about the practical implications of the Secretary's determination to specially assess a violation, especially when the assessment is not based upon extreme gravity and/or gross negligence, are well founded, as evidenced by these proceedings. In AmCoal's words, "the large disparity between the proposed special assessments and what would have resulted under the regular assessment guidelines, make informal resolution of such matters almost impossible and make time consuming and costly trials much more likely." (Rsp. Br. at 3).

AmCoal also argued that the "Rule To Live By" initiative as applied constitutes a substantive, mandatory rule, requiring notice-and-comment rulemaking, citing *Drummond Company, Inc.*, 14 FMSHRC 661 (May 5, 1992). I find this argument to also be unavailing.[4]

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[2] In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations "that would be reviewed to determine whether a special assessment is appropriate," including, "[v] iolations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances." Ex. R-36; *30 C.F.R. Part 100 Final Rule*, 72 Fed. Reg. 13,592, 13,621 (March 22, 2007).

[3] AmCoal argued that the absence of criteria specifying what violations would be specially assessed, and how special assessments would be determined, renders the special assessment process impermissibly vague in violation of the due process clause, citing *FCC v. Fox Television Station, Inc.*, 132 S.Ct. 2307, 2317 (2012). It also argued that the process cannot pass muster under the Commission's reasonably prudent person test, described in *Lanham Coal Co.*, 13 FMSHRC 1341, 1343-44 (Sept. 1994). However, the *FCC* and *Lanham* cases involved substantive standards, not penalties, and AmCoal did not challenge the language of any of the mandatory standards.

[4] A substantive rule is one "issued by an agency pursuant to statutory authority and which implement[s] the statute.... Such rules have the force and effect of law." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1009 (D.C.Cir.1993) (quoting *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)) Here, AmCoal argues that according to Inspector Ramsey, one district manager imposed the Rule To Live By initiative as a requirement and not a discretionary act by each inspector, thereby making the

III. The Citations

A. Citation No. 8432076 (LAKE 2011-1054)

On January 24, 2011, at 8:45am, MSHA Inspector Edward W. Law[5] issued Citation No. 8432076 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. § 75.1403, specifically Safeguard No. 7568565, pursuant to Section 104(a)[6] of the Mine Act. The regulation states that "all mine travelways be kept as free as practicable of bottom irregularities, debris, and wet and muddy conditions that could affect the control of mobile equipment traveling these areas." 30 C.F.R. § 75.1403. Section 75.1403 regulates a mandatory safety standard. The citation alleges:

> The Intake/Primary Escape way/ Travelway at cross cut #47 on the Main North travelway is not being kept free of bottom irregularities and muddy conditions that could affect control of mobile equipment. The area is rutted up and a mantrap has become stuck in the intersection when it bottomed out in the mud. The area was flagged off to prevent travel in the area of the ruts.

Ex. S-1.

1. The Violation

The citation also alleges the injury is reasonably likely to occur, the injury could reasonably be expected to result in lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the negligence standard level was characterized as moderate. *Id.* Additionally, as of the date the citation was issued, Section 75.1403 was cited 57 times in the two years preceding the issuance of the citation. *Id.*

AmCoal argues that the citation should be vacated because it does not strictly conform to the requirements of Safeguard 7568565. Safeguard No. 7568565 states:

> Bottom irregularities, debris in the form of rock that had fallen from the roof, and wet and muddy conditions were present on the mine travelways ... [at several] locations.... This Notice to Provide

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initiative subject to notice-and-comment rulemaking. However, AmCoal does not make the argument that Inspector Ramsey was following the initiative of the Department of Labor. Additionally, AmCoal admitted that both Inspector Law and Inspector Rusher were not under an obligation to enforce the Rule To Live By Standard as a mandatory rule. (*See* Resp. Br. at 12; Tr. 74:19 -75:23; 308:14-19; 313:9-20) Therefore, AmCoal did not prove that a non-discretionary initiative existed under the direction of the Department of Labor.

[5] Inspector Law works for MSHA out of the Benton field office as a coal mine inspector. He has been an MSHA inspector since 2005. (Tr. 272:5-10) Before joining MSHA, he worked for Consol Mine for a year and a half and Galatia Mine for approximately 21 years. He worked mainly in maintenance for 19 of the 21 years. (Tr. 272:13-18)

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

> Safeguards requires that all mine travelways be kept as free as practicable of bottom irregularities, debris and wet and muddy conditions that could affect the control of mobile equipment.

Ex. R- 47, at 6.

Pursuant to section 314(b) of the Mine Act, and the Secretary's regulations, authorized representatives of the Secretary may issue orders, or safeguards, to address hazards related to the transportation of men and materials at a particular mine. 30 U.S.C. § 874(b); 30 C.F.R. § 75.1403. The mine operator is obligated to comply with a safeguard, and if it is violated, the operator may be subject to citations or orders issued pursuant to section 104 of the Act. *Cyprus Cumberland Res. Corp*, 19 FMSHRC 1781 (Nov. 1997).

Safeguards are issued by MSHA inspectors, who do not follow a notice and comment rulemaking procedure. Because this procedure is an "unusually broad grant of regulatory power" granted to MSHA, the Commission in *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) ("*SOCCO I*"), held that "safeguards must be drafted with specificity, so that operators receive adequate notice of the conduct required and the conditions covered by the safeguard." *American Coal Co.*, 34 FMSHRC 1963, 1967 (Aug. 2012). Thus, the language of a safeguard, which may be issued without consulting with representatives of the operator, must be narrowly construed. *Cyprus Cumberland*, 19 FMSHRC at 1785; *SOCCO I*, 7 FMSHRC at 512.

The validity of Safeguard No. 7568565 was recently upheld by the Commission, noting that it has "consistently treated safeguards that *specify hazardous conditions and specify a remedy* as valid safeguards." *American Coal Co.* at 1974 (emphasis in original). The Commission concluded that the safeguard specifies the nature of the hazard, "i.e., bottom irregularities, debris, and muddy conditions in a travelway that could affect the control of mobile equipment[,]" and specifies a remedy, "i.e., all mine travelways are to be kept as free as practicable of bottom irregularities, debris, and muddy conditions that could affect the control of mobile equipment." *Id.*

Here, AmCoal challenged Citation No. 8432076 and argued that a narrow interpretation of the safeguard, under *Cyprus Cumberland* and *SOCCO I*, requires that all three of the conditions identified in the safeguard be present before a violation can be established, i.e., that there must be bottom irregularities *and* debris *and* muddy conditions. (Resp. Br. at 61-63) Since there is no evidence that all three conditions were present, AmCoal argued that the citation must be vacated.

Any of the conditions addressed by the Safeguard could threaten the loss of control of mobile equipment. Under the Safeguard, AmCoal was obligated to keep its travelways as free as practicable from any and all of the three hazardous conditions. AmCoal's strict interpretation argument is rejected.

Inspector Law testified that the Safeguard requires the road should be maintained without ruts and irregularities so that the vehicles can travel and not affect their handling of the vehicle. (Tr. 273:25 – 274:1-3) Inspector Law testified that he wrote the citation because when traveling into the mine there was a piece of mobile equipment – a mantrip – stuck in the road in

the primary entranceway. (Tr. 273:16-18) At the time of his inspection, the area was rutted, damp, and wet, which caused a loaded mantrip to bottom out. (Tr. 276:6-8; 277:16-22; 278:1-9) Inspector Law observed groundwater on the floor and noticed the ground was damp. (Tr. 276:1-9) Matt Mortis,[7] AmCoal's safety director, testified that the condition of the area was muddy at the time the citation was issued. (Tr. 322:4-7) For the reasons stated above, I find that AmCoal violated § 75.1403 of the Mine Act.

2. Negligence

Inspector Law assessed the violation as arising from moderate negligence. As stated above, moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). AmCoal argued that the inspector did not investigate if management was on the mantrip that was stuck (Tr. 298:22); the mantrip could have been carrying a crew of hourly employees (Tr. 298:13-17); the citation was issued at 8:45am, but the crews did not leave until 9:00am (Ex. R-45; Tr.325:2 – 326:8); and Inspector Law's notes indicate that it was unknown who knew of the conditions (Tr. 295:16-19; Ex. R-2). Mr. Mortis testified that AmCoal built a sump area near the crosscut and used PVC pipe and a staged pneumatic pump to pump out excess water because the area is under an aquifer. (Tr. 322:6-23; 331:12-23) Mr. Mortis also testified that the road was maintained at first every shift, but then after they put the PVC pipe and the gravel they just maintain it "daily if they needed more work, they would do it; if not, it was okay." (Tr. 329:4-7).

Inspector Law testified that the citation was marked as moderate negligence, as opposed to a higher negligence standard, because mine managers travel the road where the violation occurred and could have noticed the ruts, and that the area where the violation occurred can get rutted pretty quickly. (Tr. 286:9-18) He also testified that the negligence standard was cited as moderate because the mantrip in question sits lower to the ground than most models. *Id.* Mr. Mortis admitted that the area in question where the violative condition occurred is traditionally wet, is a travelway, and is an escapeway. (Tr. 327:17-24) Mr. Mortis also testified that the condition of the area at the time of the citation was muddy. (Tr. 322:4-7) From Inspector Law's vantage point coming into the mine, you could see the wet and rutted conditions "pretty easily" and it was "fairly obvious." (Tr. 284:19-25) He also testified that he had previously issued citations in this area for this issue. (Tr. 281:4-6) Based on the above, I find AmCoal's negligence to be moderate.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Law testified that the Safeguard covers road irregularities, so anywhere in the mine where a road becomes hazardous to travel or someone can get injured traveling in and out, the operator has to rehabilitate. (Tr.

[7] At the time of trial, Mr. Mortis was the AmCoal New Era Mine Safety Director since July of 2010. (Tr. 88:15-19) Mr. Mortis previously worked for KVR for two years and Peabody Coal as a Safety Director. (Tr. 89:5-19) Mr. Mortis worked in safety for Alliance Coal Company before that for four years. (Tr. 89:23 – 90:2) Before that Mr. Mortis worked for Ken American Resources as a miner for six years. (Tr. 90:6-14)

287:14-19) He designated the citation as reasonably likely because he believed the mantrip would come to a sudden stop or would lose control in the muddied ruts in the travelway. (Tr. 282:7-12) He also testified that he listed lost work days due to the potential broken bones in the hands from the impact with the steel areas inside the mantrip. (Tr. 283:3-6) The mantrip in this case was all steel, so the miners would hit the steel if an accident occurred. (Tr. 282:15-17) These injuries were likely to occur if there was a sudden stop or loss of control of the mantrip. (Tr. 283:3-7) Breaking the bones in your hand or breaking your wrist from a vehicle accident caused by bottom irregularities is serious in nature. The fact that Inspector Law did not know how the mantrip bottomed out, or whether they slowed down or stopped suddenly is of no consequence to the gravity determination. (Tr. 280:16-20). I agree that the injury could reasonably likely result in lost workdays or restricted duty.

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature, i.e. broken bones in the hand or broken wrists. A measure of danger to safety, a discrete safety hazard, was contributed to by the wet, muddy conditions that caused rutting on the ground, and thus can impair an operators ability to control a piece of mobile equipment, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

The area in question is a travelway that is used continually. (Tr. 288:3-6) Everyone coming in and out of the mine with a piece of equipment uses this entry. *Id.* It is also the primary escapeway from the mine and it was obvious to Inspector Law that the operator was not maintaining the roads. (Tr. 317:5-7)

Inspector Law testified that the hazards he was thinking about when he wrote the citation included people getting jostled around and thrown around inside the vehicles they were traveling in, hitting the corners, or hitting something solid while driving in a vehicle. (Tr. 281:9-20) The one person affected designation could be the operator or the person in the front passenger seat because he is sitting adjacent to the steel frames and he is going to be jostled or thrown in those areas. (Tr. 283:11-16)

AmCoal argued that there was no standing water in the area affected, it was just damp (Tr. 286:5-6); the travelway was straight and relatively level (Tr. 288:23-25; 306:20); the travelway was wide enough to have two-way traffic, and that after the mantrip was stuck, there was room for foot traffic. (Tr. 275:22-23; 285:6-7) However, these proffered reasons for the Secretary not meeting his burden of proving S&S is unavailing. A loss of vehicle control would be reasonably likely to result in impact injuries to passengers who would not expect or brace themselves for sudden impacts. Inspector Law testified that he was aware of even more serious injuries from mantrip accidents in rough, wet, and muddy conditions. (Tr. 303:4-13) I find that the Secretary properly designated this citation as S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation as $5,600.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, as of the date the citation was issued, Section 75.1403 was cited 57 times in the two years preceding the issuance of the citation. As I found above, AmCoal was moderately negligent. At even the assessed penalty of $5,600.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation to be S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the magnitude of the gravity of the violation, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of $1,842.00.

B. Citation 8432085 (LAKE 2011-1054)

On February 3, 2011, at 11:45am, MSHA Inspector Law issued Citation No. 8432085 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. § 75.202(a) pursuant to Section 104(a) of the Mine Act. The regulation states that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The citation is a violation of a mandatory safety standard. The citation alleges:

> The ribs on the inby side of cross cut #119, from the man door to the belt is not being adequately supported or controlled where the miners normally work or travel to protect miners from the hazards related to falls of the roof and ribs. The rib on the inby side is cracked and leaning out toward the walkway. The rib is approximately 20 feet long, 4 to 6 feet high and 1 to 8 inched thick. The rib is gapped open from 3-6 inches between the rib and coal pillar.

Ex. S-4.

1. The Violation

The citation also alleges the injury as reasonably likely to occur, said injury could reasonably be expected to be lost workdays or restricted duty, the violation was significant and substantial, one person would be affected, and the negligence standard was cited as moderate. *Id.* Section 75.202(a) was cited 98 times in the two years preceding the issuance of the citation.

Inspector Law testified that there was an area of the rib, inby crosscut 119 adjacent to a mandoor that was bad, broken, cracked open, leaning, and hazardous. (Tr. 333:11-13) AmCoal does not dispute the existence of the hazardous condition, i.e., the loose rib on the inby side of crosscut 19 near a mandoor. (Resp. Br. at 73) Inspector Law testified that the area is used by people accessing the back of the belt for things such as, cleaning, shoveling, or carrying materials through it. (Tr. 334:10-17; 335:3-6). For these reasons, I find that AmCoal violated Section 75.202(a) of the Mine Act.

2. Negligence

Inspector Law assessed the violation as moderate negligence. As stated above, moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Inspector Law designated the citation as moderate negligence because of the location of the violative condition, and because it might be hard for an examiner to see the damaged area because of the rock dusting. (Tr. 341: 24 – 342:15) Inspector Law testified that he wrote it was unknown who knew of the violative condition at the time the citation was issued, but did notice the rib was rock dusted. (Tr. 337:7-17) In fact, it had been gapped open long enough that the rock dust present did not appear to be fresh. *Id.* Inspector Law also observed that there were no warning flags on the rib. (Tr. 339:2-3)

AmCoal argued that the mandoor was small – measuring three (3) feet by three (3) feet. (Tr. 345:17-18) Charles Thome,[8] AmCoal's mine examiner, testified that while he was responsible for examining the cited area, he "never" used this mandoor and did not know of anyone else who had ever used the mandoor. (Tr. 353:22-24; 360:12-25) Mr. Thome, during his inspections, did look down to inspect crosscuts with doors, but he did not walk each crosscut and did not see the cracked and leaning rib. (Tr. 364:17-25) AmCoal should have known of the hazard because, as Mr. Thome testified, on the date of the citation he performed the pre-shift examination of the belt line and in that immediate area of 119 and 102. (Tr. 353:17-24) There were no mitigating factors shown. For the reasons stated above, I agree with the designation that was cited, and find the negligence to be moderate.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Law testified that the hazard was that at any given time, any vibration, or if the rib continued taking weight it could not handle, the rib could fall over and badly injure someone. (Tr. 339:4-11) A miner's right side coming through the mandoor would be exposed up to six feet, depending on how close he was to the rib. (Tr. 340:18-24) A miner would likely be struck because the rib gives no warning when it falls. The rib was already separated, hazardous, and leaning. (Tr. 341:2-7) So it was ready to fall at any given time and it was likely to fall. *Id.* Inspector Law testified that it was a matter of when, not if, the rib was going to fall. (Tr. 341:8-9) He also testified that the injury cited was lost work day injuries from broken bones – leg or arm– or getting trapped with rubble on top of the miner. (Tr. 339:13-19) The injury sustained from being struck from a falling rib is serious in nature. I agree with the designation of lost work days or restricted duty as Inspector Law assessed.

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[8] Mr. Thome works for American Coal Company New Era Mine as a mine examiner. (Tr. 351:13-15) He travels all over the mine examining all areas of the mine, belt lines, units, heads, drives, and tails, return escapeways, and primary and secondary escapeways, examining for safety issues and hazards. (Tr. 351:17-24) Before working at American Coal, he worked at Zeigler Coal Company for thirty years as a roof bolter, general inside laborer, scoop operator, and he filled in on hoisting engineer and examining. (Tr. 352:14-23) Mr. Thome has thirty-nine years' experience in coal mining. (Tr. 353:1-2)

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature, i.e. broken bones. A measure of danger to safety, a discrete safety hazard, was contributed to by the cracked, leaning, and unsupported rib, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Law indicated one person affected because typically only one person would be behind the belt shoveling or inspecting the belt. (Tr. 341:15-21) The rib did not have any support – it was freestanding and leaning. (Tr. 338:16-19) Indeed, it appeared to Inspector Law that the cracked and leaning rib was in a condition to fall at any time. (Tr. 339:10-11) However, only the miner's right side coming through the door would be exposed up to six feet, depending on how close he was to the rib. (Tr. 340:18-24) Additionally, Mr. Thome's testimony that he never used the 3x3 mandoor and that he never knew of anyone using the mandoor near the cracked rib, decreases the likelihood that an injury was reasonably likely to occur. (Tr. 360:12-25) Additionally, Inspector Law also testified that the mandoor and the area near the cracked rib was not used day-to-day. (Tr. 335:7-8) I find that the Secretary did not meet his burden to prove the violation was reasonably likely to result in serious injury, and therefore the citation should not be designated as S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation at $9,100.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.202(a) was cited 98 times in the two years preceding the issuance of the citation.[9] As I found above, AmCoal was moderately negligent. At even the assessed penalty of $9,100.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was not S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the magnitude of the gravity of the violation, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of $541.00.

C. Citation 8427482 (LAKE 2011-1054)

On February 14, 2011, at 11:50am, MSHA Inspector James D. Rusher,[10] issued Citation No. 8427482 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. § 75.202(a) pursuant

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[9] The Secretary asserts that one of the reasons that all of the Section 75.202(a) citations were specially assessed was that AmCoal was put on notice of enhanced enforcement. This alone does not warrant a special assessment.

[10] James Rusher had worked for MSHA for approximately thirty-three years as a federal health and safety inspector at the time of trial. (Tr. 11:5-8) At one point Inspector Rusher was a

to Section 104(a) of the Mine Act. The regulation states that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The citation cites a violation of a mandatory safety standard. The citation alleges:

> The roof of areas where persons work or travel was no longer adequately supported or otherwise controlled to protect persons from hazards related to falls of the roof. There are two installed pattern roof bolts that had been dislodged in the No. 3 entry at approximately tag No. 8250' on the 8th West Unit, MMU 009-0.

Ex. S-6.

1. The Violation

The citation also alleges the injury is reasonably likely to occur, the injury could reasonably be expected to be lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the negligence level was moderate. *Id.* Section 75.202(a) was cited 99 times in the two years preceding the issuance of the citation.

Upon inspection of the mine, Inspector Rusher discovered two pattern roof bolts that had been dislodged by mobile equipment, with bearing plates that were no longer connecting the roof as designed and no longer adequately supporting the roof. (Tr. 14:13-15) Inspector Rusher testified that the bearing plate, coupled with intact fully grouted roof bolts, are what give the roof its support, and when those bolts are bent, the bolts no longer provide the support necessary for the roof. (Tr. 84:15-21) The roof bolts were dislodged in a haulage road area. (Tr. 14:16-19) Mr. Morris agreed that the two bolts were damaged. (Tr. 100:16-24) Inspector Rusher testified that the people who use the entry where the dislodged bolts were located were the continuous miner, the supervisor, coal haulers, roof bolter operators, possibly a mechanic, and mine examiners. (Tr. 16:10-14) He also testified that the conditions of the bolts were in violation of AmCoal's roof control plan. (Tr. 13:7-12) For the reasons stated above, I find that AmCoal violated 30 C.F.R. § 75.202(a).

2. Negligence

Inspector Rusher assessed the violation as moderate negligence. As stated above, moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Inspector Rusher indicated that the violative condition was obvious, and stated that he noticed the damaged bolts 50 to 60 feet away. (Tr. 20:12-15) However, I find that the Secretary failed to prove by a preponderance of evidence that AmCoal knew or should have known that the violative condition existed. The Secretary produced no evidence at trial that any AmCoal management or any personnel "knew" of the two damaged bolts. Inspector Rusher did not identify or notice any management or hourly personnel in entry No. 3 where the violative

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district training manager. (Tr. 11:9) He also worked for Freeman United Coal Company in Sesser, IL for about eleven years. (Tr. 11:14-18)

condition was located. (Tr. 20:16-18; 50:9-14) Additionally, the only evidence produced at trial that AmCoal "should have known" that the violative condition existed was: (1) that the supervisor would have to have conducted gas checks at the No. 3 face and thus would have been in the proximity of the damaged bolts, and (2) that the bolts were damaged by equipment being operated in the section.

The gas check requiring methane tests to be conducted every twenty (20) minutes "during the operation of equipment in the working place" but "[w]hen mining has stopped for more than 20 minutes, methane tests shall be conducted prior to the startup of equipment." 30 C.F.R. § 362(d). Inspector Rusher based his gas check requirement on his notes stating that the unit was active. (Tr. 60:3-7; Ex. R-6, at 3) However, according to the production and delay report for that shift, and the testimony of Mr. Mortis, the area was idle from 8:55am until 2:00pm (Tr. 105:7-9), and the workers did not began loading until 2:50 pm. (Tr. 107:1-4) The citation was issued at 11:50am. Additionally, the Secretary produced no evidence at trial that the personnel operating the equipment would or should have known that their equipment hit two roof bolts.

As such, the Secretary failed to meet his burden to prove moderate negligence. Because Section75.202(a) was cited 99 times in the two years preceding the issuance of the citation, I find that there was low negligence.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Rusher was concerned about the roof falling and hitting miners traveling in the area. (Tr. 22:14-17) A roof fall would usually result in lost-time injuries, or worse, possibility a fatality. (Tr. 22:20-22) The potential injuries from a roof fall are serious. I agree that if a roof fall were to occur, the injury could reasonably be expected to be lost workdays or restricted duty.

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. A measure of danger to safety, a discrete safety hazard, was contributed to by the damaged roof bolts, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to would result in an injury.

It was apparent at trial that there was a question of fact whether limestone was present where the violative condition was located. Inspector Rusher testified that the roof sounded "drummy" when tested with a sounding rod. (Tr. 85:14-18) To Inspector Rusher, the "drummy" sound indicated that the beam was not solid. *Id.* He also testified that limestone thickness varied through the mine roof. (Tr. 39:24)

Gary Vancil, Jr.,[11] witness for AmCoal, testified that limestone is the best possible roof because it is very hard. (Tr. 134:8-15) Inspector Rusher testified that limestone is like concrete. (Tr.35:8-9) Mr. Vancil testified that he was personally familiar with the 8th west gate where the two bolts were dislodged because he was mapping, looking at limestone thickness, and looking for any geological hazards in the area. (Tr. 130:9-16) Mr. Vancil testified that the immediate roof at the location had very good limestone – non-jointed and no shale in it whatsoever. (Tr. 142:4-9) Additionally, he testified that there was limestone four feet to five feet up where the violative condition was located. (Tr. 142:10-15)

Mr. Vancil did not think there was a likelihood of a roof fall in the violative area even if the two roof bolts were damaged because of the strength of the limestone. (Tr. 144:10-22) He testified that the roof bolts were only in place because AmCoal was required to put them there and the roof bolts did not offer more strength than what the limestone already had. *Id.*

Inspector Rusher testified that due to the nature of the fully grouted resin bolts, the resin (glue) would spread into the cracks and strengthen the roof (Tr. 31:2-24), and would still provide some roof support if the bolts were dislodged. (Tr. 32:18-22) Additionally, neither the inspector's notes nor the citation states that there was a "drummy" sound in the violative area. (Tr. 34:3-11)

Based on the foregoing, I find that the Secretary failed to prove by a preponderance of evidence that there was a reasonable likelihood that the hazard contributed to will result in an injury. Therefore, I find that the S&S designation was unwarranted for this citation.

5. Penalty

The Secretary specially assessed the penalty for this citation at $9,800.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.202(a) was cited 99 times in the two years preceding the issuance of the citation. As I found above, AmCoal's negligence was low. At even the assessed penalty of $9,800.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was not S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove elevated gravity of the violation, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of $264.00.

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[11] Mr. Vancil is a senior geologist at AmCoal in the Galatia mine. He handles Utah, western Kentucky, and Illinois. (Tr. 128:23-25) He started working at AmCoal two and a half years before testifying at trial. (Tr. 129:3) After getting his Master's degree, he worked in the oil fields of west Texas, and he also worked out in the Thunder River basin in Wyoming for Triton Coal Company. (Tr. 129:9-12) Mr. Vancil has a master's and undergraduate degree, both in geology. (Tr. 129:14-16)

D. Citation No. 8432106 (LAKE 2014-1054)

On February 16, 2011, at 1:30pm, MSHA Inspector Law issued Citation No. 8432106 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. § 75.202(a) pursuant to Section 104(a) of the Mine Act. The regulation states that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The citation cites a violation of a mandatory safety standard. The citation alleges:

> The roof on 5 seam at survey station #225 West and #225 South is not being adequately supported or controlled where miners work or travel to protect miners from the hazards related to falls of the roof and ribs. The corners on both sides of the travelway have rashed away. The East corner is 8 feet from the roof bolt to the coal pillar for 3 bolts and approximately 12 feet in length. The West corner is 7 feet from the roof bolt to the coal pillar for approximately 10 feet. The corners have been particularly loaded out by the end loader. The area was flagged out by the operator at the time of the issuance of the citation to prevent travel in the area.

Ex. S-8.

1. The Violation

The citation alleges the injury is unlikely, the injury could reasonably be expected to result in lost workdays or restricted duty, the violation was not significant and substantial, one (1) person could be affected, and the negligence standard was cited as moderate. *Id.* AmCoal is not contesting the citation as written; they are contesting the penalty amount. (Tr. 367:3-8) Additionally, at trial the parties stipulated to the designations alleged in the citation. (Tr. 367:1 – 369:15; 378:21-23) Further, AmCoal's attorney stated that they agree with the statutory criteria that would justify a regular assessment. (Tr. 368:7-9)

The citation was issued under 75.202(a). Inspector Law testified that a miner was doing some rehabilitation work, cleaning up the violative area with an end loader. (Tr. 370:8-20) He further testified that there was an area about 12 feet by seven feet that was unsupported where they had been cleaning under and around. *Id.* The violative condition occurred because the more the miner cleaned, the more the ribs rashed, and the ribs became wider from the bolts. (Tr. 372:3-6) Inspector Law testified that it is not unusual to do the rehabilitation work like what was occurring, but AmCoal had to go back and re-bolt or set timbers because of the expanded the size of the area. (Tr. 372:21-25) He cited Section 202(a) because the conditions and rehabilitation work caused the area to become unsupported. (Tr. 378:15-19) I find that AmCoal violated Section 75.202(a).

2. Negligence

Inspector Law assessed the violation as moderate negligence. As stated above, moderate negligence is when "[t]he operator knew or should have known of the violative condition or

practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Section 75.202(a) was cited 99 times in the two years preceding the issuance of the citation. Inspector Law testified that he cited moderate negligence because when he was in the violative area, only an operator was working and there was no foreman, and there is no way to know if the operator knew or should have known that something needed to be done about the roof. (Tr. 374:6-22) Inspector Law further testified that the foreman could have come and checked the area, but there was no way of knowing if he did so before or after or if he saw the damage. (Tr. 374: 25 – 375: 7) However, Inspector Rusher testified that someone should have been paying attention to make sure that the exposed area was supported. (Tr. 385:19-25) For the reasons stated above, I find that AmCoal was moderately negligent.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Law assessed the violation as lost workdays or restricted duty. He testified that there were no people on foot in the area, and there was only an operator who was driving in a cab of a piece of equipment. (Tr. 377:22-25) He further stated that the machine operator would be protected by the cab and canopy if the roof were to collapse. *Id.* A roof fall could result in serious injury, however, the facts presented at trial indicate that the gravity determination should be lower. The Secretary failed to prove by a preponderance of evidence that there would be lost work days or restricted duty. As such, I find that the injury could be reasonably expected to be no lost work days.

4. Significant and Substantial

Inspector Law testified that there were no people on foot in the area, and there was only one operator who was driving in a cab of a piece of equipment who would be protected by the cab and canopy. (Tr. 377:22-25) The gravity designation was cited as unlikely by Inspector Law because the area was not hanging, or cracked, or hazardous, there was just a corner missing. (Tr. 377:2-8) I agree and find that the likelihood of injury is unlikely and that Inspector Law was correct in making the citation non-S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation as $9,100.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.202(a) was cited 98 times in the two years preceding the issuance of the citation. As I found above, AmCoal was moderately negligent. At even the assessed penalty of $9,100.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was not S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the gravity of the violation was elevated, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of $586.00.

E. Citation No. 8432151 (LAKE 2014-1054)

On March 21, 2011, at 10:15am, MSHA Inspector Law issued Citation No. 8432151 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. §75.370(a)(1) pursuant to Section 104(a) of the Mine Act. The regulation states that "[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine..." 30 C.F.R. §75.370(a)(1). The citation is a violation of a mandatory safety standard. (Tr. 395:19-21) The citation alleges:

> The approved ventilation plan for this mine is not being complied with in the Intake/ Primary Escape Way/ Travelway from the 6th West Airshaft to the mouth of the 6th West Head gate is extremely dusty. Heavy concentrations of air born dust can be seen throughout the entry and is limiting the visibility of equipment operators in the area. A large plum of dust is also being created by the exhaust discharge of a supply tractor also creating visibility hazards. The dry roads had a layer of powdery dust that was getting suspended when driving through the area.

Ex. S-21.

1. The Violation

The citation alleges that an injury is reasonably likely to occur, the injury could reasonably be expected to result in lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the violation arose from moderate negligence. *Id.* Section 75.370(a)(1) was cited 66 times in the two years preceding issuance of the citation. Inspector Law testified that from the 6 west headgate, where they were still developing the area as a longwall entry, examiners, mine managers, crew, and belt workers would be traveling in the violative area. (Tr. 393:9-15) That is because the 6 west air shaft is on the main travelway and primary escapeway. (Tr. 393:16-20)

Inspector Law testified that as he was traveling on a golf cart, he ran into visible airborne dust, the roads were very dry, and the roads had not been watered. (Tr. 393:23 – 394:2) The closer he got to the mouth, the dustier it became. *Id.* AmCoal was running Fairchild scoops on which the exhaust dumps downwards. Because the roads were not watered, this caused plumes of dust in the air. (Tr. 394:9-12) Keith Violett,[12] witness for AmCoal, testified that Inspector Law told him to pull the golf cart over so that he could see how long it would take for the dust to settle – it took about 30 to 45 seconds. (Tr. 431:22 – 432:5) Mr. Violett also testified that it was fairly dusty, but not to the point where you couldn't see. (Tr. 432:17-18) Based on the foregoing, I find the AmCoal violated Section 75.370(a)(1).

[12] Mr. Violett is a safety specialist for AmCoal, and worked as both an examiner and now is in the safety department. (Tr. 430:22-23; 431:13-14) He had worked at AmCoal for six years prior to the time of trial. (Tr. 431:2-4) He has about 37 years in the mines, both underground and surface. He has been an examiner, mechanic, and pretty must everything else. (Tr. 431:7-10)

2. Negligence

Inspector Law assessed the violation as moderate negligence. As stated above, moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). The undisputed evidence at trial showed that the cited area is extremely dry during the winter months. (Tr. 396:13-19; 434:10-11) Inspector Law testified that this is a problem area of the mine for dry conditions, and AmCoal is required to keep the travelway watered. (Tr. 396:19-25) He was aware of the travelway watering program and admitted it usually does a pretty good job controlling the dust. (Tr. 401:14-23) He also testified that in the winter, the time it takes to dry depends on the temperature, so it could take as little as a shift for it to become dusty with low visibility. (Tr. 397:17-25) Inspector Law testified that the violative condition was obvious because the dust was visible as he was traveling through it. (Tr. 396:5-10)

Inspector Law testified that he designated the citation as arising from moderate negligence partly due to the time factor, because it can get dry very quickly, however, he said that he could have made the designation high just the same. (Tr. 400:14-17) Marvin Webb,[13] witness for AmCoal, testified that if they had not been cited, they would have watered the area anyway in an hour or less. (Tr. 446:9-11) Mr. Webb testified that AmCoal has a road watering program that uses a modified ram car with installed water tanks to water the roadways. (Tr. 440:7-16) Mr. Webb testified that the area would be watered once or twice a shift, depending on how dry it was. (Tr. 446:20-22; Tr.447:18) This watering program is evidence that AmCoal knew of the dry and dusty condition of the area and should have been more vigilant to meet the ventilation plan and water the area. While the roads were watered every shift (Tr. 443:2-3), AmCoal's ventilation plan requires AmCoal to water the roadways *as required* before conditions deteriorate to dust clouds. For the reasons stated above, I find that AmCoal was moderately negligent.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Law was concerned about the visibility hazard for people traveling through the area. (Tr. 398:4-10) He testified that there was equipment and people in the violative area and all you could see was the dim headlights and nothing else, and you couldn't tell if something was coming at you other than by sound. *Id.* Inspector Law testified that he could barely keep his eyes open at times because the dust was coming at him at a high volume. (Tr. 399:7-9) Inspector Law classified the citation as lost work days or restricted duty, but he could have easily classified it as fatal because he could have easily been run over in his golf cart by the machinery working in the mine. (Tr. 398:13-15) I find that there was a reasonably likelihood of a serious injury and agree with the lost workdays or restricted duty determination.

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[13] Mr. Webb is a shift foreman at AmCoal. (Tr. 437:21-23) He has worked for American Coal for fourteen years. (Tr. 438:5) At the time of trial, he had been in the mining industry for 39 years (Tr. 438:8), and he had been a supervisor at American Coal for six or seven years. Before joining AmCoal he was a supervisor at Old Ben Coal Company for about 17 years. (Tr. 438:20-22)

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. A measure of danger to safety, a discrete safety hazard, was contributed to by the dusty conditions in violation of the ventilation plan, which cause visibility issues, and could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Law testified that he designated the citation as one person affected, but it could have easily been two. (Tr. 400:9-12) He stated that he hoped someone would be able to get out of the way if a machine was going to hit him. *Id.* The dusty conditions made it difficult to determine the direction of travel of other vehicles. (Tr. 426:3-9) Mr. Violett testified that although it was dusty, he could still see the scoop. (Tr. 431:22 – 432:3) Based on the dusty conditions that negatively affected visibility, there was a reasonable likelihood that the hazard contributed to would result in an injury. I find that the Secretary met his burden to prove S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation as $9,800.00. The AmCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.370(a)(1) was cited 66 times in the two years preceding issuance of the citation. As I found above, AmCoal was moderately negligent. At even the assessed penalty of $9,800.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the gravity of the violation was elevated, that the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of $2,902.00.

F. Citation No. 8424603 (LAKE 2014-1054)

On March 28, 2011, at 9:30am, MSHA Inspector Danny R. Ramsey,[14] issued Citation No. 8424603 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. § 75.202(a) pursuant

[14] Mr. Ramsey had worked for MSHA for the past nine and a half years as a roof control specialist inspector at the time of trial. (Tr. 226:15-20) He started working in mines in 1972. He worked for UMWA for five years, then worked for ten years as either a face boss or section foreman, then for a year and half worked as assistant mine manager. Then he was promoted to mine manager for six years. Then worked as a general underground mine manager for two years then superintendent for two years. Then he worked for Galatia (purchased by American Coal) for six and a half years as a longwall foreman then longwall coordinator, and had been the superintendent for three years. Then he went to Zeigler 11 as a section foreman for 11 months. Then he started working for MSHA as a coal mine inspector for four years. Then he

to Section 104(a) of the Mine Act. The regulation states that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The citation cites a violation of a mandatory safety standard. The citation alleges:

> A loose rib, measuring 9 feet long, 7.5 feet high and 3 inches to 6 inches wide, was present on the South side of the 8th West Headgate unit breaker feeder. A visible crack, measuring 1 inch to 3 inches in width was observed between the loose rib and the solid block. This are is routinely traveled by miners.

Ex. S-13.

1. The Violation

The citation alleges that an injury was reasonably likely to occur, the injury could reasonably be expected to be lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the negligence standard was cited as moderate. *Id.* Section 75.202(a) was cited 103 times in the two years preceding the issuance of the citation.

Inspector Ramsey testified that as he was walking in the violative area he observed a lose rib in the feeder area of the 8th west headgate where the shuttle cars dump coal that they haul coal from the face area onto the belt. (Tr. 229:10-19) He testified that shuttle car operators, belt cleaners, examiners, and mechanics work in this area. (Tr. 229:21-25) AmCoal did not flag the loose rib as a hazard. (Tr. 231:7-9) AmCoal does not dispute the existence of the hazardous condition, i.e. the loose rib. (Resp. Br. at 51) For the reasons stated above, I find that AmCoal violated Section 75.202(a).

2. Negligence

Inspector Ramsey assessed the violation as involving moderate negligence. As stated above, moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Inspector Ramsey testified that he designated the citation as moderate negligence because the violative condition was not in the examiner's book, and he did not designate the negligence as high because it looked like a fresh crack so it had not been there for an extended period of time. (Tr. 235-236:21-2) He also testified the loose rib was obvious and easily seen. (Tr. 230:20)

Despite the fact that Inspector Ramsey could not tell how long the condition existed or who knew of the violative condition (Tr. 250:15-251:5), belt examiners walk the entire belt on both sides and should have seen the cracked rib. (Tr. 249:15-16) However, the unit was idle (Tr. 255:9) and the crack in the rib appeared recent. (230:24 – 231:6; 250:15 – 251:5) The inspector had no personal knowledge that any mechanics or workers on the feeder had been working or when they were to start working. (Tr. 255:20 – 256:4)

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was a ventilation specialist for four years. And he has been a roof control specialist for about two years. (Tr. 266:24 –227:24)

Despite the fact that the unit was idle, due to the obvious nature of the cracked rib and the fact that belt examiners would be in the vicinity and should have seen the violative condition, I agree that the citation was properly designated as moderate negligence.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Ramsey anticipated lost work days, which probably could have been designated as permanently disabling. (Tr. 232:25 – 233:3) He testified that the hazard was the rib falling on the people in the area causing injury. (Tr. 232:11-12) An injury could include broken bones, contusions, cuts, and scrapes. *Id.* It appeared recent because there was no visible rock dust behind it. (Tr. 231:1-6) I find that there is a reasonable likelihood that the injury in question will be of a reasonably serious nature and agree with the determination that the injury could reasonably be expected to be lost workdays or restricted duty.

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. A measure of danger to safety, a discrete safety hazard, was contributed to by the damaged rib, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Ramsey testified that in the process of normal mining, people are going to travel the area routinely. This rib was loose, big, and cracked; it was going to fall. (Tr. 253:4-7) He testified that there was also machinery running that could vibrate and cause the rib to fall. (Tr. 232:18-22) He also testified that he designated it as potentially affecting one person because there is usually no more than one person traveling through the area at a time. (Tr. 235:17-20) Additionally, Inspector Ramsey testified that the rib was pried down easily, which indicated to him that it was loose and could have easily fallen. (Tr. 23317-25)

Inspector Ramsey testified that people traveled in the violative area routinely (Tr. 253:4-7), for example, examiners, belt cleaners, belt mechanics, and greasers (Ex. R-12). However, the unit was idle (Tr. 255:9), and the crack in the rib appeared recent. (Tr. 230:24 – 231:6; 250:15 – 251:5) Nonetheless, I find that the Secretary met his burden to prove that the S&S designation was warranted for this citation.

5. Penalty

The Secretary specially assessed the penalty for this citation at $9,800.00. The AMCoal New Era Mine operates a 5,774,752 tonnage mine. Additionally, Section 75.202(a) was cited 103 times in the two years preceding the issuance of the citation. As I found above, AmCoal was moderately negligent. At even the assessed penalty of $9,800.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was S&S.

According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the magnitude of the gravity or the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of $2,902.00.

G. Citation No. 8427550 (LAKE 2014-1055)

On July 11, 2011, at 11:45am, MSHA Inspector James Rusher, issued Citation No. 8427550 to AmCoal's New Era Mine alleging a violation of 30 C.F.R. § 75.400 pursuant to Section 104(a) of the Mine Act. The regulation states that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel- powered and electric equipment therein." 30 C.F.R. § 75.400. The violation is for a mandatory safety standard. (Tr. 151:13-16) The citation alleges:

> There is an accumulation of spilled loose coal and coal dust (dry) that measured in depths of 4" to 6" deep on the floor of the No. 2 and 3 entries in the 9th West, unit, mmu 008-0. Additionally [,] [t]he roof, left and right coal ribs of both the No. 2 and No. 3 entries has not been rockdusted. This area in the No. 2 entry begins at approximately tag no. 8320" and extends inby to the last row of roof bolts at tag No. 8420". This is a distance of about 100'[.] In the No. 3 entry, the roof, left and right coal ribs need to be rock dusted and the floor scooped to clean up 4" to 6" of loose coal and coal dust. This begins about tag No. [8200]" inby to about tag No. 8300'. No one was observed cleaning or rock dusting until this citation was issued.

Ex. S-15.

1. The Violation

The citation alleges a reasonable likelihood that an injury would occur, the injury could reasonably be expected to be lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the negligence standard was cited as moderate. *Id.*

The violative area had previously been mined by AmCoal and the coal spillage had not been cleaned up. (Tr. 152:8-12) The coal accumulated four to six inches deep in number 2 and number 3 entries. *Id.* Inspector Rusher testified that the direct violation of Section 75.400 went for a distance of 100 feet in the number 3 entry. (Tr. 151:25 –152:1) The principal reason Inspector Rusher issued the citation was because AmCoal chose to move the belt and power before choosing to do the safety work. (Tr. 179:18-22) AmCoal does not dispute the accumulations, but disagrees with its extensiveness. (Tr. 175:12-14) Mike Smith,[15] witness for

[15] At the time of the trial, Michael Smith worked for the University SIU mining engineering department and resource development. (Tr. 195:19-25) He was studying dust

AmCoal, testified that the depth was about two to three inches, and the further you got away from the center it will feather out to less than an inch. (Tr. 203:2-9)

Inspector Rusher testified that the area that had been previously mined had not been rock dusted and appeared black. (Tr. 152: 12-14) Mr. Smith, however, testified that the coal ribs in the number 2 and 3 entry were hand dusted. (Tr. 220:20-22) The weight of evidence supports my conclusion that the Secretary failed to meet his burden to show that the roof and ribs of the entry were not rock dusted.

For the reasons stated above, I find that AmCoal violated Section 75.400 of the Mine Act for the coal spillage, but not for failing to rock dust.

2. Negligence

Inspector Ramsey assessed the violation as involving moderate negligence. As stated above, moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Inspector Rusher testified that he designated the citation as moderate negligence, as opposed to a higher negligence, because it seemed as though AmCoal was hurrying to do the power move, not that it was a modus of operation they would normally do. (Tr. 163-164:22-3) He also testified that the condition was very obvious. (Tr. 158:13-14) The violative condition existed and should have been discovered prior to the power move. (Tr. 164:4-6) Additionally, Inspector Rusher had given prior safety talks about this type of condition before to operators of the mine. (Tr. 164:22-25) Because the coal accumulation was obvious, and because someone of authority made the decision to move the belt before cleaning the coal accumulation, I agree that the negligence determination is moderate.

3. Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Inspector Rusher testified that he believed a fire hazard existed. (Tr. 152:15-19) When giving out the citation, Inspector Rusher testified that he thought the coal spillage and oxygen formed two sides of the fire triangle – all that was left was an ignition source. (Tr. 160:1-8) Inspector Rusher testified that if an ignition did occur resulting in a fire or explosion, miners could get hurt or killed by the initial blast, or the fire could consume all the oxygen in the atmosphere. (Tr. 161: 25 – 162:5) I find that the resulting injury from a fire would be serious and agree that the resulting injury could reasonably be expected to cause lost workdays or restricted duty.

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control and trying to help the different coal mines with compliance with federal regulations with dust and trying to minimize dust exposure to miners. *Id.* He started that job on December 15, 2010. (Tr. 196:2-3) Before that worked for American Coal from 2003-2011. (Tr. 196:4-7). He was in the safety department and traveled with the federal and state mine inspectors, as well as tried to help the mine be in compliance with regulations. (Tr. 196:11-14) He was also part of the mine rescue team for 21 years between both mines. (Tr. 196-197:20-1)

4. Significant and Substantial

As stated above, I have already determined that there was a violation of a mandatory safety standard. Additionally, I determined there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. A measure of danger to safety, a discrete safety hazard, was contributed to by the coal accumulation, which could result in injuries to a miner or miners. What is left to be determined is whether there was a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Rusher believed that there were two sides of a fire triangle in the violative area and all that was left was the ignition source. (Tr. 160:1-8) The diesel equipment in the area being used to bring the power transformer up provided a potential ignition source. (Tr. 160:20 – 161:6; 183:5-7) However, Inspector Rusher admitted that if there was diesel equipment in the area, it would not be allowed to operate above 302 degrees Fahrenheit. (Tr. 176:11-20) The ignition temperature of coal dust is above 400 degrees Fahrenheit. *Id.* He also testified that there was no methane in the section that day (Tr. 182:5-7), and that there was no "float coal dust" mentioned in the cite notes. (Tr. 170:5-8) The Secretary did not prove the existence of an ignition source.

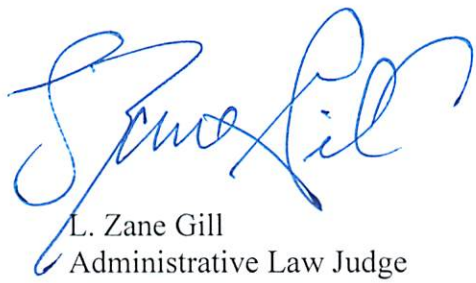
Accordingly, I find that the Secretary failed to meet his burden to prove by a preponderance of evidence that there was a reasonable likelihood that the hazard contributed to will result in an injury. Therefore, I find that the citation was not properly designated as S&S.

5. Penalty

The Secretary specially assessed the penalty for this citation as $9,800.00. The AMCoal New Era Mine operates a 5,774,752 tonnage mine. As I found above, AmCoal was moderately negligent. At even the assessed penalty of $9,800.00, AmCoal's business will not be significantly affected. As to the gravity of the violation, I found the violation was not S&S. According to the stipulations agreed to by the parties, AmCoal demonstrated good faith in abatement of the violative condition.

The Secretary failed to prove that the magnitude of the gravity or the degree of operator negligence was gross or extreme, or any other unique aggravating circumstances to warrant a higher or "special" penalty assessment. Therefore, I assess a penalty in the amount of $745.00.

WHEREFORE, it is **ORDERED** that AmCoal pay a penalty of **$9,782.00** within thirty (30) days of the filing of this decision.[1]



L. Zane Gill
Administrative Law Judge

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[1] 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.