FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933
FAX: 202-434-9949

November 3, 2014

BRODY MINING, LLC, Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2014-82-R[1]
v.	:	Order No. 9003242; 10/28/2013
	:	
	:	Docket No. WEVA 2014-83-R
	:	Order No. 7166788; 10/28/2013
	:	
	:	Docket No. WEVA 2014-86-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH	:	Order No. 4208892; 10/29/2013
	:	
ADMINISTRATION (MSHA), Respondent.	:	Docket No. WEVA 2014-87-R
	:	Order No. 4208893; 10/29/2013
	:	
	:	Docket No. WEVA 2014-97-R
	:	Order No. 7166790; 11/04/2013
	:	
	:	Docket No. WEVA 2014-151-R
	:	Order No. 9003246; 11/07/2013
	:	
	:	Docket No. WEVA 2014-161-R
	:	Order No. 9004638; 11/12/2013
	:	
	:	Docket No. WEVA 2014-190-R
	:	Order No. 4208898; 11/14/2013
	:	
	:	Docket No. WEVA 2014-191-R
	:	Order No. 7166793; 11/18/2013
	:	
	:	Docket No. WEVA 2014-192-R
	:	Order No. 4208899; 11/19/2013
	:	
	:	Docket No. WEVA 2014-193-R
	:	Order No. 9005720; 11/20/2013
	:	

[1] While this case has been before the Commission, MSHA has issued numerous section 104(e) withdrawal orders pursuant to Pattern of Violations Notice No. 7219154. Brody has contested each of the orders. As Chief Judge Lesnick noted in his Order dated January 30, 2014, all such notices of contest have been consolidated in this proceeding.

: Docket No. WEVA 2014-221-R
: Order No. 8155306; 11/26/2013
:
: Docket No. WEVA 2014-244-R
: Order No. 9005722; 12/03/2013
:
: Docket No. WEVA 2014-284-R
: Order No. 8154092; 12/05/2013
:
: Docket No. WEVA 2014-285-R
: Order No. 7166798; 12/09/2013
:
: Docket No. WEVA 2014-447-R
: Order No. 7166805; 01/15/2014
:
: Docket No. WEVA 2014-448-R
: Order No. 7166806; 01/15/2014
:
: Docket No. WEVA 2014-449-R
: Order No. 7166807; 01/15/2014
:
: Docket No. WEVA 2014-450-R
: Order No. 7166808; 01/15/2014
:
: Docket No. WEVA 2014-451-R
: Order No. 8154104; 01/15/2014
:
: Docket No. WEVA 2014-452-R
: Order No. 9005729; 01/13/2014
:
: Docket No. WEVA 2014-453-R
: Order No. 9005731; 01/13/2014
:
: Docket No. WEVA 2014-454-R
: Order No. 9005732; 01/14/2014
:
: Docket No. WEVA 2014-455-R
: Order No. 9005733; 01/14/2014
:
: Docket No. WEVA 2014-456-R
: Order No. 9005735; 01/15/2014
:
: Docket No. WEVA 2014-457-R
: Order No. 9005736; 01/15/2014
:
: Docket No. WEVA 2014-479-R

: Order No. 7166815; 01/23/2014
:
: Docket No. WEVA 2014-480-R
: Order No. 7166816; 01/23/2014
:
: Docket No. WEVA 2014-529-R
: Order No. 7166817; 01/27/2014
:
: Docket No. WEVA 2014-530-R
: Order No. 9005739; 01/27/2014
:
: Docket No. WEVA 2014-531-R
: Order No. 9005747; 02/10/2014
:
: Docket No. WEVA 2014-537-R
: Order No. 9007544; 02/04/2014
:
: Docket No. WEVA 2014-539-R
: Order No. 7166822; 01/28/2014
:
: Docket No. WEVA 2014-561-R
: Order No. 9005740; 01/27/2014
:
: Docket No. WEVA 2014-562-R
: Order No. 9005742; 01/29/2014
:
: Docket No. WEVA 2014-563-R
: Order No. 7166826; 02/04/2014
:
: Docket No. WEVA 2014-570-R
: Order No. 9005750; 02/19/2014
:
: Docket No. WEVA 2014-571-R
: Order No. 7166824; 01/29/2014
:
: Docket No. WEVA 2014-572-R
: Order No. 9005741; 01/29/2014
:
: Docket No. WEVA 2014-593-R
: Order No. 9005753; 02/20/2014
:
: Docket No. WEVA 2014-594-R
: Order No. 7166831; 02/11/2014
:
: Docket No. WEVA 2014-638-R
: Order No. 9005754; 02/24/2014

:
: Docket No. WEVA 2014-639-R
: Order No. 9005762; 03/04/2014
:
: Docket No. WEVA 2014-640-R
: Order No. 9003274; 03/04/2014
:
: Docket No. WEVA 2014-641-R
: Order No. 9005763; 03/04/2014
:
: Docket No. WEVA 2014-672-R
: Order No. 9005758; 02/25/2014
:
: Docket No. WEVA 2014-673-R
: Order No. 9005756; 02/25/2014
:
: Docket No. WEVA 2014-674-R
: Order No. 7166838; 02/24/2014
:
: Docket No. WEVA 2014-675-R
: Order No. 7166839; 02/24/2014
:
: Docket No. WEVA 2014-676-R
: Order No. 8166840; 02/24/2014
:
: Docket No. WEVA 2014-678-R
: Order No. 7166837; 02/24/2014
:
: Docket No. WEVA 2014-679-R
: Order No. 9005755; 02/24/2014
:
: Docket No. WEVA 2014-680-R
: Order No. 9005757; 02/25/2014
:
: Docket No. WEVA 2014-681-R
: Order No. 9005759; 02/25/2014
:
: Docket No. WEVA 2014-715-R
: Order No. 8135796; 03/11/2014
:
: Docket No. WEVA 2014-716-R
: Order No. 8135797; 03/12/2014
:
: Docket No. WEVA 2014-717-R
: Order No. 9001091; 03/11/2014
:

: Docket No. WEVA 2014-718-R
: Order No. 9001095; 03/19/2014
:
: Docket No. WEVA 2014-719-R
: Order No. 9001096; 03/11/2014
:
: Docket No. WEVA 2014-720-R
: Order No. 9005764; 03/05/2014
:
: Docket No. WEVA 2014-722-R
: Order No. 9007123; 03/23/2014
:
: Docket No. WEVA 2014-745-R
: Order No. 9969627; 03/24/2014
:
: Docket No. WEVA 2014-804-R
: Order No. 9005343; 04/03/2014
:
: Docket No. WEVA 2014-805-R
: Order No. 9005768; 04/03/2014
:
: Docket No. WEVA 2014-806-R
: Order No. 9005769; 04/07/2014
:
: Docket No. WEVA 2014-807-R
: Order No. 9005770; 04/07/2014
:
: Docket No. WEVA 2014-811-R
: Order No. 9005344; 04/09/2014
:
: Docket No. WEVA 2014-813-R
: Order No. 9005772; 04/09/2014
:
: Docket No. WEVA 2014-814-R
: Order No. 9005773; 04/09/2014
:
: Docket No. WEVA 2014-819-R
: Order No. 9005774; 04/15/2014
:
: Docket No. WEVA 2014-854-R
: Order No. 9005778; 04/21/2014
:
: Docket No. WEVA 2014-855-R
: Order No. 9005779; 04/22/2014
:
: Docket No. WEVA 2014-856-R

: Order No. 9005780; 04/22/2014
:
: Docket No. WEVA 2014-909-R
: Order No. 9005347; 05/01/2014
:
: Docket No. WEVA 2014-974-R
: Order No. 9005349; 05/13/2014
:
: Docket No. WEVA 2014-975-R
: Order No. 9005350; 05/13/2014
:
: Docket No. WEVA 2014-976-R
: Order No. 9007426; 05/13/2014
:
: Docket No. WEVA 2014-1012-R
: Order No. 9005786; 05/29/2014
:
: Docket No. WEVA 2014-1013-R
: Order No. 9005787; 05/29/2014
:
: Docket No. WEVA 2014-1035-R
: Citation No. 9005792; 06/12/2014
:
: Docket No. WEVA 2014-1036-R
: Citation No. 9005362; 06/11/2014
:
: Docket No. WEVA 2014-1037-R
: Citation No. 9005360; 06/04/2014
:
: Docket No. WEVA 2014-1038-R
: Citation No. 9005361; 06/11/2014
:
: Docket No. WEVA 2014-1135-R
: Order No. 9905374; 07/15/2014
:
: Docket No. WEVA 2014-1138-R
: Order No. 9005376; 07/16/2014
:
: Docket No. WEVA 2014-1157-R
: Order No. 9009660; 07/22/2014
:
: Docket No. WEVA 2014-1993-R
: Order No. 9005384; 07/30/2014
:
: Docket No. WEVA 2014-1994-R
: Order No. 9005383; 07/30/2014

:
: Docket No. WEVA 2014-1995-R
: Order No. 9005382; 07/30/2014
:
: Docket No. WEVA 2014-1996-R
: Order No. 9005380; 07/30/2014
:
: Docket No. WEVA 2014-2172-R
: Order No. 9003948; 09/08/2014
:
: Docket No. WEVA 2014-2173-R
: Order No. 9005393; 09/09/2014
:
: Docket No. WEVA 2014-2174-R
: Order No. 9005398; 09/10/2014
:
: Docket No. WEVA 2014-2175-R
: Order No. 9005400; 09/10/2014
:
: Docket No. WEVA 2014-2221-R
: Order No. 9007439; 09/17/2014
:
: Docket No. WEVA 2015-59-R
: Order No. 7272454; 10/07/2014
:
: Docket No. WEVA 2015-60-R
: Order No. 7272462; 10/07/2014
:
: Docket No. WEVA 2015-61-R
: Order No. 7272494; 10/07/2014
:
: Docket No. WEVA 2015-63-R
: Order No. 9005704; 10/14/2014
:
: Docket No. WEVA 2015-66-R
: Order No. 9005705; 10/14/2014
:
: Docket No. WEVA 2015-67-R
: Order No. 9006768; 10/14/2014
:
: Docket No. WEVA 2015-68-R
: Order No. 9006769; 10/14/2014
:
: Docket No. WEVA 2015-121-R
: Order No. 7219154; 10/24/2014
:

	:	Mine: Brody Mine No. 1
	:	Mine ID: 46-09086
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-370
Petitioner,	:	A.C. No. 46-09086-308309
	:	
v.	:	Docket No. WEVA 2013-564
	:	A.C. No. 46-09086-310927
	:	
	:	Docket No. WEVA 2013-997
	:	A.C. No. 46-09086-321030
	:	
	:	Docket No. WEVA 2013-1055
	:	A.C. No. 46-09086-323691
	:	
	:	Docket No. WEVA 2013-1189
	:	A.C. No. 46-09086-326531
	:	
	:	Docket No. WEVA 2013-619
	:	A.C. No. 46-09086-342759
	:	
	:	Docket No. WEVA 2013-620
	:	A.C. No. 46-09086-342759
	:	
	:	Docket No. WEVA 2014-702
	:	A.C. No. 46-09086-344708
	:	
	:	Docket No. WEVA 2014-842
	:	A.C. No. 46-09086-347271
BRODY MINING, LLC,	:	
Respondent.	:	Mine: Brody Mine No. 1

ORDER DISMISSING PATTERN CHARGES

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary
Lauren Marino, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary
Dana Ferguson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary

Jason Grover, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary
Ronald Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary

Michael T. Cimino, Esq., Jackson Kelly, PLLC, Charleston, WV, for Brody Mining, LLC
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, PA, for Brody Mining, LLC
Benjamin M. McFarland, Esq., Jackson Kelly, PLLC, Wheeling, WV, for Brody Mining, LLC
K. Brad Oakley, Esq., Jackson Kelly PLLC, Lexington, KY, for Brody Mining, LLC
Adam J. Schwendeman, Esq., Jackson Kelly PLLC, Charleston, WV, for Brody Mining, LLC

Before: Judge William B. Moran

ORDER DISMISSING THE PATTERN CHARGE AS VIOLATIVE OF DUE PROCESS

Introduction

Imagine, if you will, a contest of any sort. It could be a board game or a card game or, as in this instance, a contest to determine if a pattern of violations exists. One would expect that, before beginning such a contest, the rules would be announced in advance; a flush in a poker game, for example, being established as all five cards being of the same suit, or in a board game, a requirement of owning all the properties on a given street before installing houses. But what if the rules were announced only after the game had been played, after the hand had been played so to speak, and that one party then announced the basis for a winning hand? Perhaps a two or three, not an Ace, King or Queen, was anointed as the superior card, a determination made by the one then announcing the rules and according to the hand that player then had. For most people, one would hope, such a contest would seem patently unfair, almost rigged.

In the field of law, one could assert that such an arrangement violates procedural due process, lacking fundamental fairness. Yet, for the reasons which follow, in this Court's view the Secretary of Labor's procedure for charging a mine operator with a pattern of violations smacks of such after-the-fact rules. Here, not only does the Secretary's elaborate and lengthy regulation, involving a pattern notice, fail to identify what constitutes a pattern, even after the pattern notice was issued and the litigation challenging that notice instituted, the Secretary still did not identify, beyond general and vague statements, the basis for his pattern claim. Despite the Court's requirement that the Secretary identify the basis for this claim before the hearing commenced, it declined to do so. Like the unfair card game, the Secretary advised that he would be announcing the "rules," not simply after the hearings were concluded, but that he would also

wait until after the Court made its determinations as to which of the litigated citations and orders were found to have the significant and substantial finding associated with them. Only then, knowing which violations were identified as "significant and substantial" would the Secretary then announce the basis for his claim of a pattern of violations. Such rules are antithetical to procedural due process.

The Pattern of Violations Provisions

The Mine Act, at 30 U.S.C. § 814(e), provides:

> If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The Pattern of Violations regulations applicable to this litigation were issued as a final rule on January 23, 2013, with an effective date of March 25, 2013. Pattern of Violations, 78 Fed. Reg. 5056 (Jan. 23, 2013). The present version replaced an earlier regulatory version, issued in 1990, addressing the subject of patterns. The process of creating that earlier version began in 1980, and, a decade later, on July 31, 1990, a final rule was issued. Pattern of Violations, 55 Fed. Reg. 31,128 (July 31, 1990). Thus, from the time of enactment of the Mine Act, it took more than 12 years for the first regulation addressing a pattern of violations to be issued and then more than another 22 years for the latest iteration.

The present Pattern of Violations regulation contains 20,108 words, but only 628 of those are devoted to the text of the rule itself and only 182 of those speak to the "Pattern criteria."[2]

[2] 30 C.F.R. § 104.2 provides:

> Pattern criteria.
>
> (a) At least once each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any mines meet the pattern of violations criteria. MSHA's review to identify mines with a pattern of S&S violations will include:
>
> (1) Citations for S&S violations;
>
> (2) Orders under section 104(b) of the Mine Act for not abating S&S

While seven criteria are listed, none of them define what constitutes a pattern, nor does any other provision in the rule provide such a definition. Instead, the provision sets out the types of enforcement actions that will be included in the pattern criteria.

Background of this litigation

Brody was issued a pattern of violations notice. Thereafter, upon Brody's challenge to the Pattern regulations, an administrative law judge upheld the facial validity of those rules, and the Commission, on interlocutory appeal, affirmed that ruling, in a decision issued on August 28, 2014. *Brody Mining, LLC*, 36 FMSHRC 2027 (Aug. 28, 2014). Following the Commission's decision, the posture of the case before this Court was to determine if a pattern of violations had been established and, integral to that determination, which citations/orders, among the 54 constituting the basis for the pattern of violations notice, were established as violations and, among those, which were also shown to significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. The Court analogized the distinction between the decision made by the Commission and the present posture of this litigation as comparable to the indictment phase and a trial phase, with the Commission having concluded that the pattern regulation passed facial validity but that at the trial phase it was now time for the Secretary to establish that a pattern of violations existed. To achieve this, the Court determined that MSHA would need to identify the basis for its claim that the 54 citations/orders formed a pattern of violations and then establish that those matters were violations and that they had the "significant and substantial," or "S&S," aspect to them.

Consistent with this evidentiary burden upon the Secretary, the Court directed that, prehearing, the Secretary was to set forth the basis for its contention that those violations created a pattern of violations. This direction was brought about by Brody's filing of a Motion in Limine prior to the hearing concerning the Secretary's definition of a pattern. In that motion, Brody sought to compel the Secretary to identify: (1) what constituted a pattern violations; (2) what number of S&S designations Brody had to prevail upon to defeat the pattern of violations designation; and (3) how the grouping of citations in the pattern notice constituted a pattern of violations. The Court agreed that each of these were reasonable and necessary inquiries, essential for a Respondent to be able to defend against the charge.

---

violations;

(3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;

(4) Imminent danger orders under section 107(a) of the Mine Act;

(5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;

(6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;

(7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and

(8) Mitigating circumstances.

(b) MSHA will post the specific pattern criteria on its Web site.

Other than expressing generalities about patterns, however, the Secretary failed to set forth the basis for his charge. As noted by Brody, the Secretary only relied upon the same dictionary definition and case law concerning sex crimes and Racketeer Influenced and Corrupt Organizations Act ("RICO") violations (18 U.S.C. §§ 1961–1968), asserting that the determination of whether there exists a pattern of violations at Brody can only be resolved by the administrative law judge following the admission of evidence and determination of whether violations were S&S.[3] Brody's Mem. of Law in Supp. Of Vacating the Notice of a Pattern of Violations at 6 [hereinafter Brody Memorandum] (citing Sec'y's Resp. to Contestant's Mot. in Limine Concerning Definition of a Pattern at 3).

As a consequence of the Secretary's failure to comply with the Court's direction, the Court announced that it would be dismissing the pattern notice.[4] At the hearing which ensued, the Court elaborated on its reasoning, explaining that its dismissal of the pattern notice rested on two grounds: the Secretary's process is inconsistent with procedural due process, and it is also inconsistent with the expeditious resolution of pattern matters. The Court added that one could also view the Mine Act's legislative history as requiring, as an element that the Secretary has to prove for pattern charges, that the other enforcement mechanisms under the Mine Act have been insufficient to deal with the mine's safety and health issues. Tr. 649-650.

[3] The Court also directed the Secretary to identify, at the beginning of the September 23, 2014, hearing, his definition of a pattern and especially as to the 54 citations in this case, advising that the pattern notice would be dismissed if the Secretary failed to provide that information. When the hearing commenced on September 23, 2014, the Secretary spoke only in generalities, reiterating that a pattern of violations could be as few as two citations, citing the same cases as in his Response to Brody's Motion in Limine. Tr. 44-45. The Secretary did not address how the 40 citations that remained of those identified in the notice of pattern of violations constituted a pattern of violations or how Brody could defeat such designation. Tr. 45-48. Instead the Secretary indicated that a determination of a pattern could not be made until the Court determined which citations were properly designated S&S and upon such determinations, it would then be up to the Court to determine whether those constituted a pattern. Tr. 49-50.

[4] This did not mean that the hearing was cancelled. The Court directed that the hearing would proceed as scheduled so that the 54 citations/orders comprising the basis for the pattern notice would be heard. This decision was made for purposes of efficiency and the promise that challenges to pattern charges would be promptly heard. By hearing the evidence for the underlying alleged violations and determining which of those were established as violations in fact and by further determining which among those were also significant and substantial ("S&S"), the Commission, if it were to disagree with the Court's decision to dismiss the pattern notice, would have all the information before it to determine if those established S&S violations constituted a pattern of violations under 30 U.S.C. § 814(e). Therefore, over a period of three weeks, the evidence relating to the 54 alleged violations was heard by the Court. The Court's findings relating to those 54 matters are contained in this decision.

Thus, the Court expressed that, on procedural due process grounds, it was an obligation on the Secretary's part to identify, in advance of the hearing,[5] the road map explaining the basis for his claim that the mine has shown a pattern of violations. The Court stated that the Secretary's approach of essentially putting it in the lap of the Commission to determine, on a case-by-case basis and over a period of years, the grounds for a pattern would also be inconsistent with an expeditious resolution of the matter. Tr. 345.

Brody's contentions regarding dismissal of the pattern notice

Brody submitted a Memorandum of Law in support of vacating the notice of a pattern of violations. Preliminarily, Brody notes that on August 28, 2014, the Commission issued its decision on the interlocutory appeal in this matter but that it did not directly address the issue of what constitutes a pattern of violations. Brody Mem. at 3. It observes that the regulations promulgated by MSHA do not define what constitutes a pattern of violations. *Id.* Instead,

> Section 104.2 [of those regulations] only sets out the types of enforcement actions that will be included in MSHA's website criteria, *not the criteria* used to place Brody or any operator on a POV, according to the Secretary. The criteria that MSHA used to place Brody on a pattern of violations are, according to the Secretary, only a "general statement [of] policy." If that is the case (which Brody does not concede), the Secretary does not identify any criteria that can be construed as an interpretation of "pattern of violations."

Id. at 3-4 (citing *Brody*, 36 FMSHRC at 2062 n.8 (Althen, Comm'r, dissenting)).

"From the very beginning, Brody has sought in this matter to get the Secretary to identify in what way the 54 citations constitute a pattern and how many Brody must successfully defend in order to prevail." *Id.* at 5. It states that, "[b]efore the Commission, the Secretary again asserted that according to the agency, there is no specific number that it has to prove." *Id.* (citing Comm'n Oral Argument Tr. 57). "Rather, the Secretary pointed to the general definition of 'pattern' in *Black's Law Dictionary*. The Secretary asserted that as few as two citations may constitute a pattern." *Id.* (citing Comm'n Oral Argument Tr. 75; 36 FMSHRC at 2061 n.7 (Althen, Comm'r, dissenting)). "In a less than specific comment at oral argument, the Secretary said that Brody could litigate the 54 citations, without explanation as to how Brody could defend itself against the allegation of a pattern." *Id.* at 5-6 (citing Comm'n Oral Argument Tr. 73). "The Secretary also asserted that he has defined pattern as a 'mode of behavior or series of acts that are recognizably consistent.'" *Id.* at 6 (quoting 36 FMSHRC at 2061 (Althen, Comm'r, dissenting)). That vague "definition," Brody observes, "fails to explain how the 54 citations at issue then evidence a pattern." *Id.* As noted above, Brody also observes that the Secretary

[5] The Court reiterated its view that the government made a fatal flaw in proceeding without informing Brody of the basis for its pattern charge and that such an approach is fundamentally unfair on due process grounds. This failure was compounded by not only failing to announce its basis prehearing but also by asserting that, even post-hearing, it would not express the grounds. Instead the Secretary asserted that it would wait until *after* the Court ruled on which violations were proven and were S&S. Tr. 439-442.

"relied upon the same dictionary definition and case law concerning sex crimes and RICO violations and asserted that the determination of whether there exists a pattern of violations at Brody 'can only be resolved by the administrative law judge following the admission of evidence' and determination of whether violations were S&S." *Id.* (quoting Sec'y's Resp. to Mot. in Limine at 3).

"Instead of explaining how the current citations in the POV notice constitutes a pattern or giving any indication of how many citations Brody had to defeat," Brody further notes in its Memorandum, "the Secretary asserted that pattern determinations needed to be made on a case-by-case basis once the ALJ made a determination of whether the S&S allegations were valid:

> Now, that recognizes that, even though the Secretary is charging one group of violations as establishing a pattern, what may be left after adjudication may be a different group of violations. And we are not going to know that until after you hear the evidence and you rule on those citations. So I can't tell you a precise number of violations that is going to establish a pattern."

Id. at 7-8 (quoting Tr. 55).

Given the foregoing, Brody notes that "[t]he Secretary apparently believes that once the administrative law judge makes his S&S decisions, *then* the Secretary will decide in what way that constitutes a pattern, possibly after additional briefing." Brody Mem. at 8 (emphasis added). In that regard, Brody observes that "the Secretary even asked that the hearing be bifurcated to that effect." *Id.*

Under such an arrangement, Brody asserts that the Secretary's failure to define a pattern in this case precludes it from presenting a defense. *Id.* According to the Secretary's approach, Brody cannot be informed of the basis for the pattern charge, and therefore the defense it must muster against it, until after the hearing. *Id.*

As a general proposition Brody maintains that the administrative law judge has the authority to vacate or dismiss the pattern of violations notice. *Id.* It notes that, under Rules 53 and 55 of the Commission's Rules of Procedure, the judge has the authority to require the Secretary to provide the information sought here, and if not provided, the power to vacate the pattern notice. *Id.* In addition, under Federal Rule of Civil Procedure 41(b), also applicable under the Commission Rules, dismissal (in this case vacating) is available if a party fails to comply with an order of the ALJ, as the Secretary has done here. *Id.* at 8-9; s*ee Marfork Coal Co., Inc.*, 29 FMSHRC 626, 634 (Aug. 2007) (affirming the principle that judge's possess the authority to order dismissals).

Brody also maintains that the failure to provide a definition of a pattern of violations is contrary to law. Brody Mem. at 9. In this regard it asserts that "even in issuing the pattern notice, the Secretary did not actually have a clear concept of what constituted a pattern in this case. Otherwise, the Secretary would have set it out long ago." *Id.* Nonetheless, the agency is obligated to act in accordance with "ascertainable standards." *Id.* (citing *Morton v. Ruiz*, 415 U.S. 199 (1974); *Patchogue Nursing Ctr. v. Bowen*, 797 F.2d 1137, 1143 (2d Cir. 1986); *White*

v. Roughton, 530 F.2d 750 (7th Cir. 1976); *Holmes v. N.Y.C. Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968); *Burke v. U.S. Dep't of Justice*, 968 F. Supp. 672, 681 (M.D. Ala. 1997)).

As the foregoing illustrates, "the Secretary does not have a definition of a pattern of violations and instead is relying solely on the ALJ to make a determination." Brody Mem. at 10. However, it is important to note that "[t]he issue here is not some evaluation of a single citation or order, but [rather] an evaluation of how a group of citations fit together, in the context of the Act's enforcement scheme and in recognition of the purpose of Section 104(e) to serve as an enforcement tool when other tools have failed." *Id.* In these special enforcement circumstances Brody submits that "something more is needed than what the Secretary has offered."[6] *Id.*

Brody also notes that "Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554 provides that '[p]ersons entitled to notice of any agency hearing shall be timely informed of . . . the matters of fact and law asserted.'" Brody Mem. at 11. As the Court of Appeals stated in *Bendix Corp v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971), "an administrative agency must give clear statement of the theory on which a case will be tried." In this case, Brody asserts,

> the theory of the case includes an explanation of what constitutes a pattern and how the remaining 40 citations meet that definition. It is basic to any hearing for Brody to have such information and the lack of it supports vacation of the pattern of violations notice. Brody does not know what evidence to present concerning a pattern of violations in its defense. It does not even know the basic information of how the Secretary believes the 40 remaining citations constitute a pattern.

Brody Mem. at 12.

As an independent basis, Brody contends that as an operator under the Mine Act,

> [w]here the imposition of sanctions is at issue in a proceeding brought by an enforcing administrative agency, the due process clause of the United States

[6] Brody notes, by comparison:

> In other proceedings before the Commission, an operator knows what the Secretary needs to prove to prevail. The words of the specific standard or regulation cited in the citation or order sets out what the Secretary must prove. Here, nothing sets out what the Secretary must prove or intends to prove. The promulgated regulation is not specific and is general in nature. . . . The Secretary has offered no indication of the criteria for a pattern that the Administrator of Coal Mine Safety and Health applied once Brody purportedly met MSHA's published criteria [nor offered] specific information, other than generalities, as to why he believes the remaining 40 citations form a pattern. No party subject to regulation should be required to go to hearing without a clear understanding of what the government must prove to prevail.

Brody Mem. at 10-11.

> Constitution requires that the regulation sought to be enforced give fair warning to Brody of the conduct it prohibits or requires. If it does not, it is unenforceable.

Id. (citing *Indus. Co. of Wyo.*, 12 FMSHRC 2463, 2471 (Nov. 1990) (ALJ) (citing *United States v. L. Cohen Grocery Co*., 255 U.S. 81 (1921))). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Under these precepts, the Secretary's failure to state what about this grouping of citations constitutes a pattern of violations cognizable under the Act "is contrary to the basic principles of fundamental fairness." *Id.* at 13 (citing *In re Conn. Yankee Power Co.*, No. 50-213-OLA, 2003 WL 21314058 (Atomic Safety and Licensing Board Panel, Nuclear Regulatory Commission, May 20, 2003); *U.S. Procter & Gamble Co*., 356 U.S. 677, 682 (1958)). Thus, Brody asserts that the failure to define a pattern deprives it of due process.

The Secretary has taken the position that such reliance is mitigated by the fact that an operator will have available expedited review of the POV notice upon a contest of the initial Section 104(e) order by an inspector. But this assertion does not square with fundamental fairness, because the process envisioned by the Secretary is a months' (if not years) long process, considering the likelihood of appeals. Brody Mem. at 13. Therefore,

> it hardly constitutes an 'expedited' process to resolve the issues raised by the pattern of violations notice in this fashion. Moreover, it places Brody in a position that it cannot know what evidence, other than the basic defenses to each citation, to counter whatever arguments the Secretary might come up with after he knows which of the 40 remaining citations are designated S&S by the ALJ (and which end up so designated after an appeal process).

Id. at 13-14.

Brody also makes the point that it is not simply about the right to a hearing, such hearing must be meaningful as well. In this regard it observes that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner." *Id.* at 15 (emphasis omitted) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (internal quotation marks omitted). "The fundamental right to notice and a meaningful hearing at a meaningful time has been recognized in various scenarios." *Id.* (citing *James Daniel Good Real Prop*., 510 U.S. 43 (1993) (seizure of real property under federal forfeiture law)).[7] Accordingly, Brody seeks to have the pattern of violations notice vacated.

[7] Other cases were also cited by Brody: *Connecticut v. Doehr*, 501 U.S. 1 (1991) (state ex parte attachment procedures); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (termination of municipal utility service); *N. Ga. Finishing, Inc. v. Di-Chem, Inc*., 419 U.S. 601 (1975) (prejudgment garnishment of bank account); *Fuentes v. Shevin*, 407 U.S. at 67 (1972) (state prejudgment replevin statutes); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. at 337 (1969) (state wage-garnishment procedure).

Further Discussion

The Commission has affirmed the principle that "[b]efore a civil penalty may be imposed, due process considerations preclude the adoption of an agency's interpretation which 'fails to give fair warning of the conduct it prohibits or requires.'" *LaFarge N. Am.*, 35 FMSHRC 3497, 3500 (Dec. 2013) (quoting *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)). It has also observed that "a statute or standard . . . cannot be 'so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Ala. By-Products Corp*., 4 FMSHRC 2128, 2129 (Dec. 1982) (quoting *Connolly v. Gerald Constr. Co*., 269 U.S. 385, 391 (1926)).

Here, the Secretary has failed to define what constitutes a "pattern" of violations. From his response to Brody's Motion to Compel, the Secretary only offered that a pattern can be as little as two violations that are, in some way, related. As the Supreme Court stated in *Martin v. OSHRC*, 499 U.S. 144, 158 (1991), "the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties." So, too, the D.C. Circuit has given guidance on how to approach situations where an agency provides no pre-enforcement warning. An agency provides adequate notice in such a situation when, whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform."[8] *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

In this case, the Secretary has provided only the broadest possible hint of what constitutes a pattern of violations, and even at that, his offering is one which is partially incompatible with the legislative history insofar as that history suggests that § 104(e) pattern notices are to be reserved as a last resort against mine operators, when other enforcement mechanisms under the Mine Act have failed.

Though given several opportunities to explain the basis for his pattern of violation charges, an opportunity extended even up to the start of the hearings, the Secretary remained steadfast in its stance that it did not have to comply with the Court's instructions. Further, even

[8] In what may be considered a useful comparison, in *Wolf Run Mining Co*., 32 FMSHRC 1669 (Dec. 2010), the Commission considered the meaning of the term "exposed," and whether ambiguity of the term violated due process. There it recognized that "[a]n agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty." *Id.* at 1681. In applying the reasonably prudent person test, the Commission stated that a "wide variety of factors is relevant, including . . . whether MSHA has published noticed informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *Id.* (citations omitted). Also, as noted above and illustrative of this duty to provide notice, in *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995), the Court of Appeals found that the EPA did not provide G.E. with fair notice because the regulations and other policy statements were unclear, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished.

at the conclusion of the hearing, a point in time this Court considered to be too late in any event, the Secretary still asserted that he would wait until the Court issued its rulings on the disputed S&S citations/orders and only then would it announce the basis for its claim of a pattern of violations. This approach is, at bottom, no different than the card or board game analogy made at that outset of this Order, with a predestined outcome.

Yet, inconsistent with his stated position, at times during the hearing the Secretary would suddenly announce that one thing or another was a "pattern," but again without a definition or explanation attached to the claim. The Secretary apparently believed that announcing the conclusion that something is a pattern is equivalent to defining it. A few examples highlight this misconception of the Secretary's due process obligations. At one point, spontaneously, on the second day of the first week of the hearings, Counsel for the Secretary asserted, "There's a pattern there." Tr. 372. The Court noted that "you could have identified it before the hearing began." Counsel for the Secretary replied, "I thought we did." Tr. 372. Further, the Court would note that announcing *a conclusion* that some thing or other is a pattern does not establish such a claim.

At another point during the same week, perhaps sensing the deficiency in its approach, the Secretary made an attempt to introduce notes from a settled citation, for the purpose, as stated by Counsel for the Secretary, of establishing a pattern. *See* Tr. 691-693. The Court noted that such claims should have been cited in advance of this hearing as part of its basis for the contention that a pattern was present. Tr. 691-692. The Court observed that the respondent is put at a due process disadvantage in not knowing of such a claim in advance. Tr. 692. Importantly, the Court added that, at this point in time, with the hearing underway, it was too late to attempt to repair the due process deficiencies. Tr. 692. It added that the "last stop," so to speak, for that train to have established the basis for the Secretary's theory that there's a pattern, was passed at the beginning of the hearings on Tuesday morning. Tr. 692. By not setting forth the basis for its claim of a pattern of violations, Brody was put at a great disadvantage to defend itself from that charge. Not being forearmed with the knowledge of the theory of the Secretary's pattern of violations, facing the unknown as it were, Brody could not know how to defend itself. It could not, for example, anticipate nor ask questions during the hearing if it has not been informed of the basis for the alleged pattern. In fact, under the Secretary's approach, Brody would not know of the grounds for the pattern charge until *after* the Court made its findings as to which of the citations/orders were affirmed and among those, which were significant and substantial.

The Court's explanation did not deter the Secretary, when in the mood, from lifting the curtain and continuing to make the claim, *but only as a conclusion without explanation*, that it had demonstrated a pattern. As counsel for the Secretary stated at the conclusion of the first week of the hearing:

> [The Secretary] would, for the record, . . . just state that we've now heard—we've heard testimony on 12 violations. There were three others that were submitted and stipulated to as S&S. That makes 15 possible significant and substantial citations. [The Secretary] believe[s] that the 12, including the one [the Court] already announced [its] decision on, were properly designated as S&S. [The

> Secretary] believe[s] that those 15 violations establish a pattern of violations of these cit[ations] and standards, and [the Secretary] would assert that, based on that alone, the notice of the pattern of violation should be affirmed.

Tr. 814-15. Apparently, the Secretary believes that merely announcing, after the evidence has been presented at a hearing for some citations, even in advance of findings of the significant and substantial element for those by the Court, is sufficient to meet its burden. The Court does not agree.

A last point needs to be made about the pattern of violations charge. The Court is aware that legitimate pressure was placed upon the Secretary to arise from its slumber and utilize the pattern provision after its virtual quietude of some 35 years. However, this can be viewed from another perspective, too. Given that it took MSHA and the Secretary 12 years following the enactment of the Federal Mine Safety & Health Act of 1977 to develop its first effort to produce a regulation addressing a pattern of significant and substantial violations and another 22 years to produce an iteration of a pattern of violations, now 35 years in all, it can hardly be argued that there is now a rush to implement this important provision apart from fairness to those charged with such violations. In this Court's estimation it is more important that the process be fair, and consistent with the principles of procedural due process.

Accordingly, the Secretary's Brody Pattern of Violations Claim is hereby DISMISSED.

FINDINGS OF FACT AND LEGAL CONCLUSIONS RELATING TO THE UNDERLYING CITATIONS AND ORDERS ASSOCIATED WITH THE PATTERN CHARGE[9]

Before addressing the individual matters litigated here, it is important to note the long-established elements to demonstrate that an established violation is also significant and substantial ("S&S").

As recently noted in *Secretary of Labor, Mine Safety and Health Administration, (MSHA) v. Wolf Run Mining Company* 2014 WL 4273427, August 19, 2014, "The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a

[9] The parties entered into a number of stipulations. These appear in Appendix I of this decision. It is also noted that the listed dockets includes citations that are non-pattern related. A motion to sever those non-pattern related citations was suggested. For example, regarding Docket No. WEVA 2013-997, that docket contains citations in it which are not part of the POV notice. The Court concluded that severing those citations and creating a separate docket would create a potential for additional confusion and therefor it rejected the suggestion to sever those. The Secretary was directed to provide a list of all those non-POV matters. Tr. 826-827. Finally, without objection, the violation history for each of the contested violations was admitted. Tr. 828-830. Gov. Exhibits 25 C, 26 C, 33 C and 34 C.

reasonably serious nature. See Cement Div., Nat'l Gypsum Co., 3 FMSHRC 822, 825 (Apr. 1981). In Mathies Coal Co., 6 FMSHRC 1 (Jan. 1984), the Commission further explained:
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. . . . Under the Commission's *Mathies* test, it is the contribution of the violation at issue to the cause and effect of a hazard must be significant and substantial." *Id.* at *2.
The Secretary has conceded that the following citations, originally claimed to be S&S, now are to have that designation deleted:

1. Citation No. 7167412
2. Citation No. 7167474
3. Citation No. 9000309
4. Citation No. 7167473
5. Citation No. 8155925
6. Citation No. 8155936
7. Citation No. 8155926
8. Citation No. 8155937
9. Citation No. 9000282
10. Citation No. 9002292
11. Citation No. 8139621
12. Citation No. 8125045

In a similar, ostensibly coincidental, fashion, Brody Mining accepted the following citations, as issued, including the S&S designation attached to them:

1. Citation No. 7165680
2. Citation No. 9000305
3. Citation No. 9000286
4. Citation No. 8151320
5. Citation No. 7168801
6. Citation No. 7168899
7. Citation No. 9000277
8. Citation No. 9000278
9. Citation No. 3577965
10. Citation No. 3578036
11. Citation No. 9000312
12. Citation No. 9000311

The alleged violations comprising the Secretary's pattern of violation charge were grouped into three categories: Twenty (20) pertained to emergency preparedness and escapeway hazards; Nine (9) involved conditions and/or practices contributing to roof and rib hazards;

Eighteen (18) of these pertained to Ventilation and/or Methane hazards. They are discussed in that order.

I. Alleged Escapeway/Emergency Preparedness Violations; Conditions and/or Practices contributing to Escapeway/Emergency hazards

Before addressing the particular citations/orders involving Emergency Preparedness and Escapeway Hazards as they relate to S&S determinations, the Commission's decision in *Cumberland Coal Resources, LP*, 33 FMSHRC 2357 (Oct. 2011), aff'd by the D.C. Circuit, 717 F.3d 1020 (D.C. Cir. 2013), needs to be mentioned. There, beyond establishing the violation, the second *Mathies* element was identified in the context of escapeways as the hazard of miners not being able to escape quickly in an emergency with the related increased risk of injuries due to such a delay. Under this second element the test is whether the violation would contribute to the hazard of miners not being able to escape quickly in an emergency. The S&S analysis in such matters must be evaluated in the context of an emergency but also, with regard to the third *Mathies* element, the test is whether there is a reasonable likelihood that the identified hazard contributed to by the violation will cause injury, *and not* that the violation itself will cause injury. In the D.C. Circuit's affirmance of the Commission, that Court rejected the mine's argument that "the phrase 'could significantly and substantially contribute,' which calls to mind an evaluation of chance, properly accounts for all probability variables in any given significant and substantial evaluation, including the probability of an emergency occurring." *Id.* at *1026.

Citation 8153617 from Docket No. WEVA 2013-370

Brody admitted to the fact of violation for this, but contests the significant and substantial finding. Jack Hatfield, MSHA Coal Mine Inspector, testified for the Secretary. Inspector Hatfield has an extensive coal mining background, both in private mining and with MSHA.[10] Brody employs the room and pillar mining method. Tr. 92. By stipulation, and the Court considers this fact to be important for each of the alleged violations, it is noted that the Brody mine liberates in excess of 1 million cubic feet of methane for a 24 hour period. Stipulation No. 24. During the period covered by the citations in this litigation, September 1, 2012 through August 31, 2013, the mine was on a five day 103 spot inspection cycle. *Id.* Tr. 94. Gov. Exhibits 1A, 1B, 1C, and 54.

On October 9, 2012, Inspector Hatfield, citing 30 C.F.R. §75.1504(a)(2), stated in his section 104(a) citation that "[t]he foreman assigned by mine management to supervise the working crew of the 5 Section Panel (008/011 MMU ["mechanized mining unit" Tr. 202.]) has not traveled the primary intake escapeway from the section to the intake air shaft. During an interview with the foreman it is determined that the foreman has partially traveled the escapeway but not to the air shaft, the primary intake escapeway it's [sic] entirety. In the event of an emergency requiring escape from the section to the shaft, this condition would contribute to the workers being led in a direction other than directly to the intake air shaft." Citation No. 8153617. The cited provision of the standard, acknowledged by the Respondent as being

[10] This is an appropriate point to take note that all of the witnesses in these proceedings have a significant mining experience background.

violated here, succinctly provides: "Prior to assuming duties on a section or outby work location, a foreman shall travel both escapeways in their entirety." It was during the course of his inspection that day that the Inspector met Eddie Halstead, who was the section boss on that [5] section. Tr. 102-103. Inspector Hatfield asked Mr. Halstead if he had traveled his primary intake escapeway to the intake air shaft, and Halstead admitted that he had not done that.

The Inspector considered the requirement to be important because Halstead, "in his role as the supervisor over those workers . . . [involved] two sections . . . [and there are] two MMUs and probably 13, 14 men. [Therefore, Hatfield] wanted to be sure that [Halstead] knew how to get to that intake air shaft." Tr. 104. Inspector Hatfield has had experience "in smoke as a section boss. . . . [and has] been there when everybody is hollering and screaming [at him]." Tr. 104-105. Therefore, he has learned firsthand that it is important to know that the foreman has traveled the escapeway. The preamble to this standard notes this too, providing "[t]he foreman is in a leadership position and, in the event of an emergency, is entrusted with the responsibility for leading miners out of the mine safely. To do this, the foreman must have the necessary skills, including complete familiarity with both the primary and the alternate escapeways." Tr. 106.

Inspector Hatfield seconded that expression from that preamble, noting that the foreman will be "the man in charge . . . the leader to get those workers outside and to [ ] safety." Tr. 107. By traveling the escapeway, the foreman will establish landmarks in his mind, noting things such as overcast walls and cribs, and thereby making him familiar with it. In order to get his men out, to travel the escapeway, the foreman must travel it. This knowledge is needed aforehand because of the emergency conditions themselves and because the situation may well be complicated by having injured workers. The foreman has other responsibilities at that time as well, such as insuring that those within his charge have properly donned their breathing apparatus. A fire, explosion, water inundation and methane gas can all bring about the need to use the primary intake escapeway.

Hatfield then proceeded to identify on Brody's escapeway map, dated October 23, 2012, the Number 5 section, and that the primary escapeway for this, which is in the Number 6 entry. He marked its location on the exhibit. Aiding this, Inspector Hatfield, also marked the areas that the foreman *did not* travel, a failure which brought about the issuance of the citation. Six turns are required in traveling that escapeway route. Broadly characterizing the shortcomings of the foreman, but not distorting it, Inspector Hatfield summed up that the foreman had not traveled about four-fifths of the escapeway.[11] Tr. 119. For emphasis, the Inspector summed up that the importance of complying with the standard is so that the foreman "knows where he's going and [ ] develops familiarity of where that escapeway is in relation to the sections of the intake air shaft to get to the surface." Tr. 122.

The Inspector then spoke to his significant and substantial ("S&S") designation, beginning with the second *Mathies* element, as the first element, violation of the standard, was conceded. Hatfield identified the discrete safety hazard as "being exposed to smoke, carbon monoxide, not being familiar with the turns [along the escapeway route] [and lacking familiarity necessary to] lead [his] crew out [,] in smoke and CO gas." Tr. 122. The contribution to the

[11] A point of clarification, the cited violation was not for failing to "examine" the escapeway, but rather for failing to travel it. Tr. 121.

hazard presented by the violation, was not being familiar with landmarks in the escapeway to get miners safely out. That failure contributed to the risk of exposure to smoke and CO. Tr. 123. The lack of familiarity is heightened by the length of the escapeway itself, about 2 miles, and by the turns and overcasts in that route. Without that familiarity, gained by compliance with the standard, one traveling in smoke may mistake an overcast for a stopping and miss the steps. Further, the lack of familiarity makes it easier to get lost or turned around. Conversely, by knowing the presence and location of overcasts, that knowledge informs where walls are and provides a reference point, which can reassure that one is going in the right direction, towards exiting the mine. The Inspector confirmed that the lack of familiarity, in his opinion and experience, acts to increase the likelihood of an injury occurring. Tr. 125. One may go in the wrong direction as a consequence and that lack of familiarity can lead to panic with the men under his charge perhaps losing confidence in him.

Inspector Hatfield also listed the injury as reasonably likely to be of a reasonably serious nature, marking that as "fatal" on his citation. In this regard, he noted that a short exposure to carbon monoxide ("CO") will kill and all of this is heightened if, as a consequence of lack of familiarity, the foreman makes bad choices, such as leaving the primary escapeway and taking alternate entries, or taking the return, with the effect that the risk of succumbing to CO gas is increased. Tr. 126. While there are things such as a lifeline and reflectors, those are not failsafe devices, as they may only be present in a best-case scenario. He noted that an explosion, for example, may disrupt those things. In terms of injuries, the Inspector expressed that one could succumb to carbon monoxide and smoke exposure.

For negligence, marked as moderate, the Inspector noted that the standard is not complicated and that the operator, through its upper management, should have known that the foreman, who is also part of management, had not traveled the primary intake escapeway. Tr. 130.

Upon cross-examination, it was brought out that miners could use their lifeline in the event of smoke or CO in the escapeway. That miners would also have SCSRs (self-contained self-rescuers), and that reflectors are every 25 feet in the escapeway, was also noted. The Inspector agreed that the foreman had traveled the alternate escapeway, but that was due to the fact that it was the section roadway too.[12] It was also asserted that Mr. Halstead had considerable mining experience. However the Inspector did not buy into the claim that not having traveled the intake escapeway would have no bearing on a foreman's ability to lead miners to safety. In this regard, Hatfield noted that the purpose of the standard is to familiarize oneself with that escapeway, learning for example to recognize turns and landmarks in addition to the condition of the top, where cribs have been built and other conditions such as muddy areas. Tr. 138. The Court concurs with Inspector Hatfield's analysis.

Brody called Mr. Barry Browning in connection with this citation. Browning has been in the mining industry since 1992 and this experience includes acting as a foreman. Tr. 158.

---

[12] One should not conflate the primary escapeway with the alternate. The former is isolated and a fresh air intake. The latter, in contrast, has belt transformers, pumps and high-volt cable in it. Tr. 150-151. Besides, the standard's requirement pertains to the primary escapeway.

Though not presently employed by Brody, he was working at that mine when this citation was issued and the citation was issued to him. Tr. 160. Conceding the violation, Browning countered with the assertion that Halstead had worked in various locations up the intake, had been to the fan, and had been trained on use of the fan and hoist. Tr. 161. Halstead was, however, a new employee, having worked at the Brody mine for only about a month.[13] Browning marked the areas of the escapeway that Halstead traveled. Tr. 164. Browning also referred to SCSR cache signs, signs posted in every entry adjacent to a refuge chamber, reflectors[14] and lifelines, all apparently presented as factors impacting the S&S designation. Tr. 176-177.

Browning was of the opinion that the violation did not present a safety hazard. Tr. 185. This was based upon Halstead's familiarity with *some parts* of the escapeway along with the fact that it was "well marked and everything."[15] Tr. 186. On cross-examination, Mr. Browning conceded that familiarity with directions makes it easier to go from one location to another and that the foreman is the one charged with getting his crew out to safety in the event of an emergency. He also agreed that not being able to escape a mine quickly in an emergency would be a hazard and that such a hazard would be likely to result in serious injuries. [16] Tr. 188.

Upon review of the testimony, the Court concludes that the violation was S&S and the negligence moderate. The testimony from Inspector Hatfield established the three disputed S&S factors, as the first factor, the violation was conceded. The safety hazard, the risk of miners being unable to escape the mine in the event of an emergency, contributed to by the violation was obvious. Knowing *some parts* of the escapeway route is not a substitute for compliance, nor does it reduce the hazard in an emergency. While the Respondent pointed to a number of other safety provisions, with the idea that those provisions reduced the likelihood of an injury and its seriousness, the focus must remain on whether the hazard contributed to by the violation increases the likelihood of an injury. As the inspector's testimony confirmed, in an emergency situation, the lack of familiarity with the escape route in those conditions could spell disaster.

A few other points need to made. These points, which will be made only once in this decision, but which apply to the other S&S disputes here, speak to two aspects of S&S determinations.

---

[13] In fact, the Court noted that, in its estimation, Halstead's recent employment at the mine heightened the importance of compliance with the standard. Tr. 166.

[14] Browning admitted that, for reflectors, in a smoke-filled atmosphere, one would have to be close to them. Otherwise, in those conditions, one wouldn't see them. Tr. 184.

[15] However, it is noted by the Court that Browning had earlier conceded that smoky conditions impacted such markings.

[16] Mr. Kevin Webb also was presented to testify for the Respondent on this matter, but his testimony was only about a subsequent event, the following year, involving a similar violation, but for which MSHA did not mark it as S&S. The Court, upon objection by the Secretary, ruled that the proposed testimony was not material and not relevant and therefore could not be presented. To preserve the issue and the Court's adverse ruling against the Respondent, an offer of proof was permitted. Tr. 192-194.

First, a mine operator's raising of putatively ameliorating safety measures, is not part of the appropriate S&S analysis. As the Commission held in *Secretary of Labor v. Consolidation Coal*, 2013 WL 4648491, August 14, 2013, ("*Consolidation Coal*") redundant safety measures have nothing to do with the violation, and they are irrelevant to the significant and substantial inquiry.

More particularly, the Commission there noted that it "categorically reject[ed] Consol's argument that its other safety measures, including rock dusting, carbon monoxide monitors, and fire-fighting equipment reduced the degree of danger and rendered the violation non-S&S. In *Buck Creek*, 52 F.3d at 136, the Seventh Circuit rejected the operator's contention that other fire prevention safety measures mitigated the S&S nature of an accumulation. It stated that the fact that the operator "has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners." 52 F.3d at 136; see also *Amax Coal Co*., 18 FMSHRC 1355, 1359 n.8 (Aug. 1996) (rejecting operator's contention that its redundant fire suppression system reduced the likelihood of serious injury); *Cumberland Coal Res. Inc*., 33 FMSHRC 2357, 2369 (Oct. 2011) (reasoning that adopting the position that redundant, mandatory safety protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made), aff'd sub nom., *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020, 1029 (D.C. Cir. 2013) (stating "because redundant safety measures have nothing to do with the violation, they are irrelevant to the significant and substantial inquiry"). We agree with the judge that "[w]hile extra precautions may help reduce some risks, they do not … make accumulations violations non-S&S." 32 FMSHRC at 935 at *4.

The second observation, which also has general applicability, is that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co*., 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d. 133, 135-136 (7th Cr. 1995).

Finally, when the Commission considers whether a violation is S&S, and, more specifically, when it evaluates the reasonable likelihood of injury under the *Mathies* test, it "considers circumstances assuming that normal mining operations continue without the intervention of an inspector." *Consolidation Coal Co.*, 35 FMSHRC 2326, 2337 (Aug. 2013); *See also, U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (finding that a poorly ventilated face could be reasonably likely to cause injury even if methane accumulation at the time of the citation was nonhazardous); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984) (stating approvingly that the ALJ below, when considering whether a violation was S&S, did not make "any assumptions as to abatement" and instead assumed continued normal mining operations).

This assumes in each instance that a court finds the inspector to have been credible. In this instance the Court finds that Inspector Hatfield was credible and that it is appropriate to afford substantial weight to his opinion. Apart from the determination however, the Court independently finds that the violation was S&S. Familiarity with the escapeway is the key aspect.

The proposed penalty for this was assessed at $4,329. Upon consideration of the evidence and each of the statutory penalty factors, the Court agrees that the assessed amount is appropriate and that amount is hereby imposed.

Citation 7167386 from Docket No. WEVA 2013-370

This citation, issued October 22, 2012, alleges that "[t]he number 5 section primary escape way [sic] life line [sic] is not being maintained as required. The life line was equipped with 2 consecutively installed cones to indicate an up coming [sic] branch line. There is no branch line in this area. This condition exist[s] where two primary life lines connect near the mine fan. Standard 75.380(d)(7)(vii) was cited 5 times in two years at mine 4609086 (5 to the operator, 0 to a contractor)." Gov. Ex 2A, 2B.

MSHA Coal Mine Inspector James A. Jackson, Jr. testified with regard to this section 104(a) citation. As with Inspector Hatfield, Mr. Jackson has a work background of significant mining experience. In the cited provision, there is a requirement for two indicator cones to be equipped consecutively with the tapered end pointing inby. Tr. 203. This is to indicate to miners during an escape situation that there is an upcoming branch line. *Id.* The Inspector helpfully referred to Gov. Ex 2C, which illustrates the signs and signals on a lifeline and a branch line. As suggested by the term, a lifeline is "a continuous line leading from a working section to the surface or escapeway, . . . [t]hey're used for escape during a mine emergency." Tr. 205.

Although depicted in the standard itself and copied for Gov. Ex. 2C, at the Court's request the Inspector drew a sketch of the problem he encountered. This sketch is Gov. Ex. 2E, and it shows the two consecutively installed cones along the sole horizontal line in that sketch. Tr. 207. The vertical line in the sketch represents another primary escapeway lifeline to which that the horizontal line was attached. The problem was that this was an escapeway lifeline and not a branch line. Tr. 208. In short, the two consecutively installed cones conveyed misleading information, signifying that there was an upcoming branch line. Such a branch line would have SCSRs or a refuge chamber. That is, the cones advised, incorrectly, that "some type of safety equipment or a safe haven" would be there for miners during an escape. Instead, despite the information conveyed by the cones, miners would come up to a primary escapeway lifeline. Simply stated, the standard requires that the two cones on a lifeline are to indicate a branch line coming up, but here there was no such branch line. Here again, as with the citation next above, Brody stipulated to the fact of violation. Tr. 212, Stipulation 29.

Inspector Jackson then spoke to the hazard this admitted violation presented. The hazard, he stated, was "miners not being able to escape the mine during an emergency in a timely manner." Tr. 212-213. The violation contributed to that hazard by informing miners that they were coming up to a branch line, where they would find SCSRs or a shelter. When they don't find that, confusion and panic can ensue and this will operate to delay their escape, exposing them to smoke and CO. Tr. 213. By thinking, when they come to the vertical line depicted in the Inspector's sketch, that they would be coming to a branch line, they would be traveling about a 100 feet in the wrong direction before discovering that the expected SCSRs or a shelter are not there. This mine, the Inspector noted, has a history of ignitions and methane inundations, a fact which is not in dispute. Thus, taking all this together, the Inspector concluded that it was

reasonably likely that this misleading information would cause an injury due to miners panicking and not being able to find their way out of the mine. Tr. 213-214. The Court agrees.

Because of the information they convey, cones play significant roles. Even a cone by itself, with its conical shape, conveys information to an escaping miner. Feeling the tapered end first tells the miner he is heading in the right direction. That tapered end widens on the other end of the cone, so a miner knows that by moving from the narrow end to the wide end, he is proceeding in the correct direction, out to safety. Tr. 215. The safety hazard attendant with this violation is miners not being able to escape during an emergency, as the false indicators would lead them to believe that safety equipment was nearby, when it was not. Tr. 221. Not being able to find that expected equipment would be disruptive to say the least. The Inspector also concluded that this misleading information increased the likelihood of an injury, as by traveling in the wrong direction, and thereby delaying their escape, this would cause panic and confusion. The need for miners to then change direction delays the 12 to 15 men that would be involved in these circumstances. Being tethered, with SCSRs in their mouth preventing oral communication, and not being able to see one another when in smoke, is another complication attendant to moving in the wrong direction. Fatal injuries could result due to smoke exposure, CO and fire. Tr. 223.

The Inspector marked the negligence as "moderate" for this citation because he concluded that it was an obvious condition. The mine's weekly examiner is to check the lifeline as part of those duties. The moderate designation included consideration that there was some mitigation. Tr. 220.

Upon cross-examination, it was pointed out that the condition existed where two primary lifelines connect near the mine fan and that the mine fan is where one exits the mine. Tr. 224. Brody's counsel asserted that the cited condition was one break, only about 100 feet from the exit. The Inspector agreed that the proximity of the condition to the fan meant that one would feel a lot of air when walking in this area. Tr. 225. However, while conceding that the air would be blowing, that would be true in ideal conditions, and one cannot assume that the fan will be running in an emergency situation. Tr. 225. He added that the fan itself could be an ignition source. Thus, in the Inspector's S&S analysis, it was considered that the fan itself could possibly be on fire, asserting that he considered that to be a reasonable likelihood. Tr. 226. Rather than the branch line foretold to be coming, incorrectly, by the cones, the miners were actually coming up to two lifelines. (See the vertical line in Gov. Ex. 2E). This misinformation caused the inspector to be concerned that the miners could proceed toward the number 2 section instead of going to the exit. Tr. 229. However, the Inspector agreed that within 100 feet of such a wrong turn, escaping miners would come upon the flat end of a cone and then be alerted that they were going in the wrong direction. As noted by Brody's Counsel, if *it were assumed that* the miners came to the same intersection and there had been *no* cones present, there is no requirement for an indicator to direct the miners to the exit. Tr. 230. Thus, under that scenario, miners could take the wrong turn at that intersection. However, the Court notes that the hypothetical falls short in at least two regards. First, the hypothetical presents a situation which *did not exist.* Second, having the wrong information at the point of intersection is worse than having no information at that point and therefore the point attempted to be made by the hypothetical is rejected.

The cross-examination continued with the now-familiar but, as discussed above, rejected, theme of noting other existing safety measures. Escapeway drills were presented as one example of this approach in attempting to show that the violation was not S&S. The inspector agreed that such drills, which are done quarterly, would pass the cited area. Tr. 231. The inspector also agreed that when a miner feels the cited cones, he should then be able to feel another indicator, namely a rigid coil, when arriving at the branch line, which signals that there is a refuge alternative there. His notes did not indicate whether any rigid coil or SCSR indicator was also there as additional misinformation. Tr. 236. Redirect brought forward that in an emergency, if the fan was down, smoke could be traveling in an outby direction and an explosion can cause air direction to reverse. Tr. 237. Further, if the fan was down and miners were in a smoke-filled environment, miners would not necessarily know that they were close to the fan. Tr. 237. Upon inquiry by the Court, the inspector confirmed that in an emergency situation, with smoke and an inability to see, miners faced with those conditions will be in a tense, near-panic, state of mind. The inspector also concurred that it is impossible to predict how individual miners will react upon coming upon cones which mislead them.

In its defense, Brody called Mr. Anthony Gibson Jr. Gibson is presently an outby foreman at the mine. Tr. 243. He also has long coal mining experience. The citation in issue was issued to Mr. Gibson. He confirmed what had been suggested during cross-examination; that the fan cited lifeline portion was about 100 feet from the fan. The slope was approximately 400 feet away. Tr. 247. R Ex. 26.[17] Gibson confirmed what was not disputed, if running, the fan will be producing a lot of air. Tr. 253. Exhibit R 2C, a record of the mine's fire drill, was also identified by this witness. The cited drill occurred on October 18th and this compares with the citation's issuance date of October 22nd of that same year. Gibson also confirmed what the citation notes: there were no refuge alternatives nor SCSRs at the location where the 2 consecutively installed cones indicated an upcoming branch line, and he commented that it would make no sense to have those at that location because it is so close to the fan. The Court would observe however that this absence could heighten the potential for confusion and/or panic, because the cones would be telling the miners something which was at odds with the fan volume, assuming of course that the fan was not down. It is true that there was no spiral coil, another indicator of a rescuer cache or a shelter, but as with the comment just made, that could bring about further confusion. Miners would need to have the presence of mind in an emergency to either ignore the information signaled by the cones or having relied upon them, then disregard what the cones indicated when no spiral coil was located. In the Court's view this is asking a lot for miners to do in the face of an emergency.

Mr. Gibson did not believe the violation was S&S, asserting that, "even in a smoky environment – if the fan was off and I was in a smoky environment that close to the fan, if I had even been there once before, I will know where I was. And . . . even if I did take the wrong direction - - going the wrong direction on the other lifeline, there would be reflectors on the other one. There would be a another cone, with a hundred feet, that I would run into that would show me I was going the wrong way . . . there would be no way that I could - - I could see any confusion." Tr. 258. However, on cross-examination, Gibson conceded that lifelines and indicators, such as cones, have to be accurate so that miners can get out of the mine. Tr. 259.

[17] Note: This exhibit is out of order in the Respondent's exhibit notebook and therefore may be hard to locate. It is numbered however, as R 26.

He also agreed that the indicators need to be "dummy proof" so that miners are sure they can escape and that it is a simple matter to be sure that the proper indicators are on the lifeline. Tr. 259-260. In response to a question from the Court, Mr. Gibson acknowledged that in the course of conducting the fire drills, just a few days before this violation was detected, people would have traveled through that area and that, despite the fire drill occurring on three separate shifts, no one for Brody noted the misdirecting cones. Tr. 263-264.

The Court has determined that this violation was S&S. While it is true that, as Brody's Counsel pointed out, no cones were required at the area where the violation was cited, the key is that cones *were* there and that they provided false information. Whether near the exit or not, misleading information, installed by Brody at that location, is inherently dangerous in the context of a mine emergency. That context, a mine emergency, is the means for evaluating whether a violation is S&S. A major deficiency with the Respondent's S&S outlook is that it does not sufficiently account for the conditions when the standard comes into play, and the aspect of panic. Thus, upon review of all the evidence, the Court concludes that there was a discrete safety hazard contributed to by the violation and a reasonable likelihood that the hazard contributed to will result in an injury. That there would be a reasonable likelihood that the injury would be of a reasonably serious nature cannot be disputed.

The proposed penalty for this was assessed at $16,867. Taking into account all of the evidence, the Court concludes that a penalty of $12,650 is appropriate in this instance.

Citation 7167387 from Docket No. WEVA 2013-370

Inspector James Jackson also testified about this citation. The section 104(a) citation, alleging a violation of 30 C.F.R. § 75.380(d)(7)(vii) states: "The number 2 section primary escape way (sic) life line (sic) is not being maintained as required. The life line was equipped with 2 consecutively installed cones to indicate an up coming (sic) branch line. There is no branch lines (sic) or connecting life lines in this area. This condition exist (sic) at 2-B belt break 7 in the primary escape way. Standard 75.380(d)(7)(vii) was cited 5 times in two years at mine 4609086 (5 to the operator, 0 to a contractor)." Gov. Ex. 3A.

The Inspector issued this citation on October 23, 2012. There was no stipulation to the fact of violation for this citation. Tr. 278. As with the previous citation for which this inspector provided testimony, he created a simple drawing to depict the violation in this instance. Gov. Ex. 3 F. In this instance, like the previous one, there were 2 consecutively placed cones, but here there was no connecting lifeline or branch line. Tr. 279. The drawing included a dotted line to depict what one *should* expect to find, an upcoming lifeline or a branch line, but no such line was there. Tr. 280. Thus, had the cones been properly placed, that line would have been present. Thus, like the earlier matter testified to by this Inspector, this was another situation where the cones conveyed false information. As two miners were working in that area, the Inspector marked that as the number affected. In the same fashion as the earlier cone violation, the Inspector's concern was miners encountering information, information they are trained to rely upon, but that information was false. Tr. 282-283. This is serious business because the cones tell the escaping miners to start looking for an upcoming lifeline or branch line, but neither was

present. It bears repeating that the Inspector believed that this condition was reasonably likely to cause an injury because when the standard applies miners will be in smoke, unable to speak with one another because they are wearing SCSRs, and at risk for panicking. The cones, as noted, will tell them to start looking for something, but they will find nothing is there and this will operate to delay their escape. Tr. 283. The negligence was marked as moderate because this condition was obvious and the operator is required to travel and examine this area weekly. As a mitigating factor, he did take into account the mine's assertion that there used to be a branch line at that location.

Upon cross-examination, it was suggested that there were caches of SCSRs inby of the cited location, but the Inspector could not state the number of such caches, whether one or more. For refuge alternatives, the Inspector could not state if there was more than one. Tr. 288. It was also contended that there was a "space" between the 2 consecutively installed cones, the import of that being that, if such a space was present, that space would indicate that there was no branch line coming up. Tr. 289. The issue of the extent of the space between the cones was part of Brody's defense, although in later testimony from the Inspector he stated that Mr. Gibson never raised any contention about the presence of a space between the cones.[18] Inspector Jackson stated that a small space, for example ¼ of an inch, would still announce to miners that a branch line a life line was in this area, but a space of 6 inches would be sufficiently apart so as to not mislead miners. Tr. 290. Presented as a mitigating factor, the Inspector could not recall any other conditions outby the cited problem that would tell miners that they were going the wrong way. Tr. 294. Further, the cones were facing in the correct direction. The issue was not one of direction, rather it was of misinformation. Miners coming upon the two cones would expect that a branch line would be present and they would try to find that branch line, an impossible task as it did not exist there. While Brody's Counsel suggested that miners in that circumstance would simply proceed on, the Inspector did not agree. He expressed that the false indicators would slow the miners down and thereby delay their escape, looking for the non-existent branch line. Tr. 295-296. As before, Brody referred to considerations which it viewed as countering the S&S designation, such as that escapeway maps were present at different locations and that the inspector found no deficiency with them.

On redirect, the Inspector noted that *miners are trained* to look for a branch line once they come upon such indicator cones. And this is significant because they will be looking for that branch line and the SCSRs there. Finding them, they might switch out to a fresh SCSR or carry one as a spare as they continue their escape. Tr. 299.

Anthony Gibson testified for Brody on this matter as well. It was his contention that the cones were close but that there was space between them. Later, he stated that the space was about six to eight inches and then added that there was "a little bit of space between them." Tr. 312. A point being made through this witness was that the cones were the only misinformation, in that there were no other indicators, beyond the cited cones, telling miners that a SCSR cache or a refuge alternative ahead. In this instance, Gibson stated, the exit to the slope

[18] It is noted that the contention that there was a space is at odds with Brody's excuse that there used to be a branch line there. If in fact that was the case, the cones *would not* have been spaced. Also, as stated by the Inspector, in response to a question from the Court, these cones *stay put*. That is, they are locked in place on the line. Tr. 300.

or to the elevator was around 3500 feet. Considerations similar to those raised with the earlier cone issue were then brought up. These involved things like the presence of up-to-date mine maps. It was Brody's contention that the miners' knowledge of maps shows that those miners would have known about things like the actual location of the SCSRs.[19] Thus, Brody was asserting that the miners would know better and ignore the erroneous information conveyed by the cited cones. The Court is not convinced. In an emergency, especially with limited or no visibility due to smoke, it is more than a stretch to believe that miners would rely upon their knowledge of the mine maps to tell them where the SCSR caches are, and ignore what the cones told them.

Despite all the other ancillary matters raised, the defense ultimately rested upon the idea that there was a space between the cones and for that reason, the space, miners would not think there was a nearby branch line. Gibson's perspective went further, however, because he did not believe that there was any safety hazard *even if* the cones had no break between them. Tr. 324. His reasoning was that, because just inby the cited area there was a SCSR cache and therefore the miners would realize there would not be another cache so close by. In response to questions from the Court, Mr. Gibson stated that he did not know why the cones were present at the cited location. Tr. 326. Although not mentioned during his direct examination, Mr. Gibson, in response to a question from the Court, stated that he did tell the inspector that there was a space between the cones. He further related that the inspector responded that the cones were too close together. Tr. 328. Gibson agreed that the inspector's notes make no mention that Gibson claimed there was a space between the cones. He also agreed that coming upon the cones, even if six to eight inches apart, would be out of the ordinary. Tr. 331. Also, he agreed that the cones are tactile sensors needed when visibility is limited and that if a miner is confused during an escape that will cause delay. Tr. 342. Diminishing his objectivity, Mr. Gibson maintained that, because of their training, during an emergency situation, even though dealing with poor visibility from a smoke-filled environment, and with the possibility of injuries, miners will not be under stress or duress. Tr. 342-343.

The Court concludes that this violation is also significant and substantial, a conclusion largely based on the reasoning presented in the other cone violation. Missing information is one thing, but imparting incorrect information is, in the Court's estimation, worse. Did the incorrect information present a contribution to the discrete safety hazard and was there a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious injury? Based on the credible evidence, the Court concludes that the answer is "yes." The violation clearly would operate to make matters worse, when evaluated in the proper context: a mine emergency escape.

The proposed penalty for this was assessed at $4,689.00. Taking into account all of the evidence, and applying the statutory criteria, the Court concludes that penalty remains appropriate and it is so imposed.

---

[19] In this regard, with Mr. Gibson noting that there were SCSRs some 10 to 11 breaks inby of the cited location, he agree that was over 1,000 feet away. Tr. 333. Gibson also backed away from the usefulness of maps in an emergency situation with a smoke-filled environment. Tr. 334. Thus, he conceded that the cones, as tactile indicators notify miners of where life-saving materials are located along a lifeline and that coming upon such cones, a miner will be looking for the branch line to SCSRs. Tr. 334-335.

Citation 7167388 from Docket No. WEVA 2013-370

Inspector Jackson testified for this violation also. For this matter, Brody has conceded the fact of violation and that the violation was correctly determined to be of moderate negligence. Tr. 345-346. The Citation stated that the "primary escape way (sic) life line (sic) for the number one section is not being maintained in a safe condition. The life line along the number 2 belt was equipped with 5 directional cones at intervals not exceeding 100 feet with the tapered section pointing outby. This would give miners the indication that they are traveling in the wrong direction during a mine emergency." Gov. Ex. 4A. Issued on October 29, 2012, the citation listed 30 C.F.R. § 75.380(d)(7)(v) as having been violated. As before, the Inspector made a sketch of the cited condition, as a visual aid. The drawing, Gov. Ex. 4D shows a line, depicting the lifeline and the inby and outby direction references and the 5 cones, each with the blunt or wide, flat end first, as one would encounter if moving in an outby direction. The cones were therefore facing in the wrong direction, a condition Brody has conceded. To be clear, the flat end should not be encountered first; a miner escaping should feel the narrow end first.

The cones' direction is important, as noted earlier, because a miner trying to escape from a mine in an emergency would encounter the base end of the cone first, not the tapered end. Tr. 349-350. Gov. Ex. 4C. The mine was operating at the time of the citation's issuance, engaged in second, or retreat, mining. Tr. 350-351. As with the other violations of this nature, the Inspector was concerned over the impact of false indicators on the lifeline. In this instance, the cones direction would tell the miners, by their training, that they were moving in the wrong direction, when in fact they were not. Tr. 352. For each of these lifeline citations, one must assume that they are, by their purpose and design, being employed in an emergency. Under such circumstances it must be presumed that there is smoke, making visibility poor to nonexistent, with miners wearing SCSR's and lacking any real ability to communicate orally with one another. In this instance with the five cones facing in the wrong direction, miners would travel nearly two football fields (600 feet) before coming upon a cone telling them that they were in fact traveling in the right direction after all. Tr. 352. Although Counsel for Brody agreed that the assumption in this situation is the presence of an emergency, there was an objection to the fact that this is a gassy mine. The Court overruled the objection however because the mine's gassy nature was raised in the context of the inspector's view that there was a reasonable likelihood of an injury. The Brody Mine is classified in the highest category of methane liberation and for that reason it is on a five-day spot inspection. This means the mine has a methane inspection every five days. The mine has a history both of ignitions and methane inundations. It was the Inspector's view miners not being able to escape in an emergency if they have delays will cause fatalities. Tr. 353.

Of course the Inspector could not predict how each miner would react when coming upon a cone telling that miner he is going in the wrong direction, but he considered an escape to be panic situation and if he came upon such a cone, he would try to find the right direction. In this instance it would tell him to turn around. Doing so, relying upon the cones which are to be relied

upon, would send him in the wrong direction. If miners then can't escape due to false indicators on the lifeline and the delays resulting from that, death due to CO poisoning, smoke and fire could be the outcome. Tr. 354.

Upon cross-examination, Brody's Counsel tried to make inroads upon noting that, while the citation refers to five cones facing the wrong direction, that number was not mentioned in the inspector's notes. Tr. 360. However, upon consideration, the Court credits the Inspector's testimony that he found five (5) such cones with the wrong direction indications.[20] Another point made was that escaping miners would have come upon a number of cones correctly indicating the direction to escape. Tr. 356. However, the Inspector did not adopt the suggestion that one would rely upon the previous cones' information and proceed in the same direction, noting that one would need to travel some 200 feet before encountering the next cone. Tr. 366.

This violation was clearly established as S&S. 5 cones in the wrong direction is a major shortcoming. The Court's previously explained rationale in support of the S&S finding fully applies in this instance.

Upon consideration of all the evidence, and each of the statutory criteria, the Court concludes that the proposed penalty amount of $12,248.00 remains appropriate and it is so imposed.

Citation 7167389 from Docket No. WEVA 2013-370

In this instance, Brody again stipulated to the fact of violation. Tr. 373. The issuing inspector, Inspector Jackson, again testified regarding this citation. The Citation, No. 7167389, issued October 29, 2012, listed the condition or practice as: "[t]he primary escape way (sic) life line (sic) along 2 belt is not being maintained in a safe condition. The up coming (sic) branch line for the SCSR's was not properly identified by the two consecutively installed cones with the tapered ends pointing inby. The primary escape way life line was equipped with four cones with the base sections in contact to form a diamond shape. Standard 75.380(d)(7)(vii) was cited 7 times in two years at mine 4609086 (7 to the operator, 0 to a contractor). Gov. Ex. 5A.

As with the previous citations he addressed, Inspector Jackson again drew a sketch to illustrate the violative condition. Tr. 375. Gov. Ex. 5D. Jackson drew a single horizontal line, depicting the primary escapeway lifeline, with the inby and outby ends marked and four cones, comprising two diamond shapes on that lifeline. Such an arrangement, the dual diamond configuration indicates to miners that they are *on a branch line*, coming up on SCSRs. Tr. 376. Instead, there should have been two directional cones there, not the double diamond arrangement. Tr. 386.

[20] This is an opportune moment to note that the Court reviewed the transcript carefully and considered all contentions made in connection with this case. That a particular contention may not be expressly this decision does not mean that it was not considered. Instead it indicates that the Court decided that it was unnecessary to speak to some matters.

The hazard associated with this is "miners not being able to find their proper safety equipment during a mine emergency for escape." By miners being misled, thinking that they were on a branch line and coming up to SCSRs, confusion and delay would ensue. Such miners' escape would be delayed as they looked for the expected equipment, equipment which they have been trained to look for, upon coming upon the double diamond cones. Tr. 378. Injuries that could occur from such a delay would be CO exposure and smoke inhalation. The negligence was marked as "moderate" because Inspector Jackson considered the condition to be obvious. It occurred on the primary escapeway lifeline and this is required to be examined weekly. Moderate negligence was marked because there was a branch line in the area and the operator had put the diamond cones on the wrong line.

Upon cross-examination, the Inspector agreed that there was a branch line right after the double diamond indicator and that there was a double diamond indicator on that branch line. Tr. 384. However, the Inspector did not agree that if an escaping miner comes upon a double diamond indicator, signaling that there is a SCSR cache, and then, within an arm's length, comes upon another double diamond indicator, such miner would assume he was at the SCSR cache line. Tr. 386-387. The Inspector reasoned that once a miner comes upon the double diamonds, that miner will conclude that he is on a branch line and that such branch line is connected to SCSRs. In such an event, the Inspector believed that a miner will not reach out for a branch line, they will conclude that they are already on one. This reaction, the Inspector maintained, is how the miners are trained to react. Again, the Inspector's point was that, upon feeling the double diamond, they will think that they are on the branch line itself. That is what the double diamond cone arrangement signifies and what the miners are trained to conclude upon coming to that arrangement. Accordingly, they would not be expecting *another* line connected to that.

In its defense to the S&S designation, Brody again called Anthony Gibson. He was traveling with the Inspector and the citation was issued to him. Gibson agreed with the described diamond configuration of the cones on the lifeline, but added that there was a branch line there, which led to the SCSRs. Further, there was a proper SCSR indicator on that branch line and the line was within an arm's length of the lifeline. While admitting to the problem with the misleading diamond cones on the lifeline, Gibson did not believe the condition presented a hazard. His opinion stemmed from the view that the cones wouldn't tell miners to turn around nor to go in another direction. Tr. 404. Instead, he believed the miners would reach for the branch line that was there. The branch itself, Gibson added, was immediately after the double diamond cones on the lifeline. Further, he stated that a miner, keeping his hand on the lifeline, would immediately feel the branch line. When miners feel a branch line, signified by the double diamond cones, one would then run one's hand along that line to see if the coil is present. Tr. 405. Reflective signs would also be present. Gibson was of the view that the acknowledged violation did not present a hazard because "it wouldn't interfere with anything." Tr. 408.

The Court then asked some questions of the witness. Mr. Gibson agreed that cones serve but a single purpose: to convey information and to convey that information in the context of an emergency. Tr. 408-409. Gibson then agreed that it is essential that cones provide *accurate* information and if cones provide misinformation or inaccurate information, they are not serving their sole purpose. Tr. 409-410.

On cross-examination by the Secretary, Mr. Gibson acknowledged that the foreman for the section is required to examine the area where the condition was found on a weekly basis. Tr. 410. This examination responsibility includes checking to make sure that the lifeline is intact and the indicators accurate. Surprisingly, when asked what the double diamond configuration means to him when encountering cones in that arrangement, Gibson stated that if he "had already traveled a long ways on a primary lifeline, that would not mean nothing to me." Tr. 411.

The Court finds that this citation, along the reasoning presented above, and upon the evidence pertaining to this particular violation, was also S&S.

Upon consideration of the statutory criteria as applied to the credible evidence of record, the Court concludes that the proposed penalty amount of $12,248.00 remains appropriate and that amount is so imposed.

Citation No. 7167393 from Docket No. WEVA 2013-370.

Here also, the fact of violation was stipulated. A section 104(a) citation, issued November 1, 2012, it listed the condition or practice as "[t]he branch line from the secondary escape way (sic) life line (sic) to the number 1 section refuge alternative is not identified. A rigid spiral coil at least 8 inches in length was not provided for the branch line leading to the refuge alternative on the number one section. Standard 75.380(d)(7)(vii)(B) [the standard cited in the citation as having been violated] was cited 3 times in two years at mine 4609086 (3 to the operator, 0 to a contractor)." Gov. Ex. 6A.

As he done before, Inspector Jackson drew a sketch of the violative condition. Gov. Ex. 6D. The horizontal line depicts the secondary escapeway lifeline; an arrow on each end of the line shows the inby and outby directions for that lifeline. The vertical line on the sketch depicts the branch line in the cited area; the words "branch line" were added to make that clear. It was the branch line that did not have the rigid spiral coil. Tr. 415. The coil was to be on the branch line within an arm's length reach of the lifeline. The hazard is miners not being able to find the rescue alternative for safe haven in a mine emergency. Tr. 417. A branch line can lead to a SCSR cache or a refuge alternative. Tr. 434. Miners are trained that, upon coming upon the two consecutive directional cones, they are to look for the branch line. The branch line was present, but the spiral indicator, telling them that was not present. Tr. 417. The spiral indicator, or coil, tells the miners that there's a refuge alternative at the end of the branch line. That refuge alternative will have air, food, water, sufficient to allow the miners to survive for 96 hours. Tr. 419. The Inspector marked the violation as reasonably likely for an injury as the missing coil will cause confusion and along with that, delay in finding it. This can lead to fatal injuries with the miners being exposed to CO, smoke inhalation or simply delay in exiting the mine, which delay itself can have adverse consequences. The negligence was marked as moderate because the Inspector concluded that the condition was obvious. The area is to be examined at least every eight hours. There was a mitigating circumstance, however, as the refuge chamber recently had been moved up with the section. Tr. 420. The refuge alternative and the branch line had been moved up with the section, but the mine did not install the coil back on the branch line after doing that. Tr. 421.

Upon cross-examination, it was noted that refuge alternatives came into existence around 2007, following the Sago and Aracoma mine disasters. Tr. 424. Following the approach taken in earlier cross-examinations, Brody noted that the miners' first goal, if possible, is to get out of the mine. That is to say, being able to exit the mine is a better alternative than resorting to a refuge alternative. It was also noted that the double, diamond shape, cones were present at the branch line and that a miner, feeling those cones, will know that he is coming to a branch line. The Inspector could not agree, however, that if the miners know that the first branch line is for a refuge alternative, then they will know that, regardless of whether the rigid spiral coil is present. Tr. 427. The Inspector responded that he could not assume what miners will think in a panicked environment in that circumstance and that it's been his experience that miners do panic in an emergency. Tr. 427. Brody's attorney suggested that miners might not panic but rather "rise above the situation and behave in an admir[able] fashion." Tr. 429. However, the Court would observe that safety standards, including the one in issue for this admitted violation, are not designed, nor is it their purpose, to assume that miners will act with wisdom and valor in emergencies. Rising above the situation is certainly not part of the S&S analysis either.

As mentioned, Brody's cross-examination focused on what the court considered to be ancillary matters: that this was the secondary escapeway and miners are trained to go out the primary escapeway, that some miners will have CO detectors on them and, by that reasoning, "that addresses that" (i.e. the hazard of CO). Tr. 430. A theme of Brody's cross-exam was that miners would know better even without a coil present. That is, if the miners knew that the first branch line on the way out was a refuge alternative, coil or not, they would know the refuge was there. However, the Inspector responded that, with no coil, he could not claim to know what the miners would think. Tr. 435.

In its defense, Brody called Derek Morrison, a former employee at the mine. Tr. 436. At that time he was the mine's assistant safety director. Tr. 444. He was issued the citation and agreed the safety coil was not present. Tr. 445. The branch line involved was for a refuge alternative. Through miners' training, Morrison asserted that miners knew there was no other branch line between the section and that branch line. Tr. 445. As before, Brody offered, through this witness, that there is a sign where this branch line connects to the lifeline. Morrison stated that the double cones inform the miners that there is a branch line equipped with either a refuge shelter or a cache of SCSRs. Tr. 447. In effect, Morrison asserted that the absence of the coil would have no effect because the miners were trained that upon coming upon the double cones, they knew there was a shelter. In fact, he agreed that the miners would know this even without any training because they ride by that area every day. Tr. 447.

The Court concludes that this violation is the factors raised by Brody are not pertinent to the *Mathies* analysis. The absence of the spiral coil presents a measure of danger contributed to by the violation, and it certainly contributes to the likelihood of an injury. The absence of the coil cannot be dismissed as a negligible matter, especially when measured by the circumstances, a mine emergency evacuation, to have the expected coil absent. The Court concludes that the violation is S&S.

Upon consideration of all the evidence in this matter and application of the statutory criteria and that the refuge chamber recently had been moved up with the section, the Court concludes that $13,703.00 is an appropriate penalty in this instance and it is so imposed.

Citation 7167405 from Docket No. WEVA 2013-564

Inspector James Jackson also testified regarding this citation, which was issued by him on December 4, 2012. The condition or practice identified in that section 104(a) citation stated that the "secondary escape way (sic) life line (sic) to the number 3 section is not being maintained as required. The life line is equipped with two consecutively installed cones to signify an up coming (sic) branch line. There is no branch line in this area. This location is where the number 3 section secondary connects to the number 2 section secondary life line. Standard 75.380(d)(7)(vii) was cited 6 times in two years at mine 4609086 (6 to the operator, 0 to a contractor). Gov. Ex. 7A. Brody stipulated to the fact of violation.

Inspector Jackson explained that the standard requires two directional cones consecutively installed on the escapeway lifeline to indicate an upcoming branch line. Here, the cones were present, but they should *not* have been there, as there was no upcoming branch line. The Inspector also drew a sketch of the violative condition to help the Court visualize the situation. Per the sketch and his testimony, the cones were present on the secondary escapeway lifeline, and this appears as the horizontal (and labeled) line on the sketch. A vertical line, also representing the secondary escapeway is also part of this drawing. Thus, the two lifelines connect at that intersection but it is all part of the same lifeline. Tr. 458. Gov. Ex. 7D. As noted earlier, a branch line is to lead to either SCSRs or a refuge alternative. Tr. 460. Gov. Ex 7C is also helpful to understanding this admitted violation. At its top, the drawing at Gov. Ex. 7C shows two gloves around the lifeline and the two indicator cones right next to those gloves. The inspector observed the cones, but *unlike* the drawing at Gov. Ex 7C, there was no branch line immediately thereafter. Tr. 460.

Again, the Inspector's safety concern was confusion occurring during an emergency from the false indicators. The indicators, falsely, would tell miners there was a branch line coming up and as a consequence they will be looking for either SCSRs or a refuge alternative. Not finding that will create confusion and delay in escaping the mine. Tr. 461. In this instance, instead of a branch line, the miners would come upon a secondary escapeway lifeline. In the Inspector's opinion the misinformation will cause miners to become confused and thereby delay their escape by diverting time looking for emergency equipment. Tr. 462. Such a delay can result in fatal injuries from smoke inhalation and CO poisoning. It needs to be remembered that, coming to the cones, the miners, not finding the expected branch line, will be confused and they will stop. That is not all. In an emergency situation, when a lifeline is being used, miners are not going to be able to see and the misinformation will cause them to lose their orientation. They will be uncertain which way to proceed. If they take out their mouthpieces to try to communicate with other miners in that situation, they will die. Tr. 462.

The Inspector marked the negligence as moderate because the condition was obvious and in an area required to be examined every eight hours. Examining the lifeline is one of those responsibilities.

Upon cross-examination, the Inspector agreed that this condition was very similar to the violation he found for Citation 7167386. One distinction is that this citation, 7167405, involves a secondary escapeway. Tr. 463. Again, the approach of Brody's Counsel was to consider circumstances that were different from those cited. For example, it was pointed out that if *no cones* had been present, there would not have been a violation issued. Tr. 464. Of course, this ignores what *was* present and the misinformation being imparted by the cones' presence. Consistent with this observation, the Inspector did not agree with the assertion that the presence of the cones did not increase the hazard. Instead the Inspector stated that the cones would cause more confusion brought about by miners looking for a branch line. Tr. 465.

Mr. Scotty Watkins was called by Brody in its defense of the S&S designation. At the time of the citation's issuance Watkins was employed at the mine as an outby electrician. Tr. 471. Mr. Watkins was the individual to whom the citation was issued. Examining Gov. Ex. 7D, after noting an inconsequential error in the sketch, Watkins stated that both lines, the vertical and horizontal, depicted, were secondary escapeways, an undisputed observation. He agreed that miners working on that section would travel the cited area two times per shift. As with other witnesses for Brody, Mr. Watkins did not believe that the misinformation conveyed by the cones presented a discrete safety hazard *because of the miners' training.* Miners are taught, he said, that if they don't come up to what is expected, they are taught to proceed on. Tr. 477. At the intersection, there is no indicator which way to proceed, right or left. Instead, if the wrong direction is chosen, one will continue until *a cone* informs the miners they are going the wrong way. Tr. 477.

During Mr. Watkins's cross-examination, he agreed that in an emergency escape, the only indicator miners have is the lifeline with the indicators. Tr. 479. He also agreed that delay, that is, the longer one is in a mine during an escape, the more likely it will be that one will be injured. Tr. 479. Nevertheless, it was Watkins position that false indicators would not slow down miners during an escape because of their training. Tr. 480. In response to questions from the Court, Watkins reiterated that if one comes upon false indicators, false information from the cones, miners can ignore what the cones tell them because of their training. Tr. 481. He further agreed that one of the reasons to ignore the cones is because a miner will come up against additional cones and that *those* cones will tell the miner if he is going the correct way or not. This, as the Court pointed out to the witness, creates a contradiction because Watkins was simultaneously asserting *ignoring* the information from the cones in one instance *but to then follow* the information from the subsequent cones. Tr.482-483. To this, the witness asserted that one would be able to rely upon signs and reflectors to orient oneself. Tr. 483. He further agreed that indicators in the mine, other than the cones, are more reliable sources of information. Tr. 483.

For the reasons, rationale and bases already articulated above, the Court finds that this lifeline violation is also S&S and of moderate negligence. Upon consideration of the statutory

criteria as applied to the credible evidence of record, the Court concludes that the proposed penalty amount of $18,271.00 remains appropriate and that amount is so imposed.

Citation 7168854 from Docket No. WEVA 2013-997

Inspector Joshua A. McNeely testified for the Secretary regarding this citation. The condition or practice section stated that the "lifeline in the active Beaver Mains primary escapeway is not equipped with two securely attached cones, installed consecutively with the tapered section pointing inby, to signify an attached branch line is immediately ahead for the refuge shelter. 15 miners are working on the inby section. This condition would delay miners trying to escape quickly in an emergency. Standard 75.380(d)(7)(vii) was cited 7 times in two years at mine 4609086 (7 to the operator, 0 to a contractor)." Gov. Ex. 9A.

Brody stipulated to the fact or violation and to the designation of moderate negligence.

The Inspector explained the value of lifelines in getting miners safely out of a mine in an emergency, stating "it's touch. It's -- in an emergency situation, you're probably not going to be able to see good, smoke. You're not going to be able to communicate if there's smoke and dust because you have your SCSR on. And it provides them the feedback, the comfort of knowing that I've got ahold of this, and it's got the required stuff that I've been trained about, then I can get to the surface. Or get to a safe location safely." Tr. 499.

The section cited by the Inspector requires double indicator cones before branch lines. These serve to make the miners aware that there is a branch line, where there will be refuge alternatives or SCSRs. Tr. 500. On Gov. Ex. 9C the Inspector highlighted, in pink, the required double cones. Similarly, he marked the branch line using the pink highlighting. The spiral coil, having a snake-like appearance, is also depicted on that pink branch line. The same diagram shows another branch line, located right above the word "exit" on Gov. Ex. 9C, and the inspector highlighted that line in blue, adding that it shows the two diamond-shaped cones, indicating a SCSR cache. Tr. 502. The double indicators alert miners that there is a branch line coming up. Therefore, the blue highlighting identifies both the directional cones and the diamond indicators, alerting miners of the nearby SCSR cache. Tr. 504. Referring again to Gov. Ex 9C, the cited violation pertains to the pink highlighted cones on that exhibit. Those cones were not present and, as noted, Brody has stipulated to the violation. This area was about three cross cuts outby the loading point of the section, which was approximately 300 feet. Again, the refuge chamber is intended to provide a short term safe harbor for miners if they are unable to exit the mine. Tr. 507.

Inspector McNeely stated that the missing double cones could cause delay in miners trying to escape or seeking refuge. The hazard is miners not being able to locate the refuge chamber quickly in an emergency. Under such emergency conditions, with smoke and dust, confusion, panic and disorientation can occur. The lack of the equipment, cones here, that miners are trained to rely upon, can cause confusion. The Inspector expressed that if miners using the lifeline don't come upon the double cone indicator, they will simply keep traveling. Tr. 510. There is no guarantee that, with no double cone indicator present, miners will still reach

out and feel for a spiral coil. The point made by the Inspector was that *with the double cone indicators present*, as they are supposed to be, a miner will know there is a branch line, and that will tell him there is either a refuge alternative or a SCSR cache present. Tr. 511. Thus the cones alert the miner that nearby he will find the spiral coil and then the refuge or the SCSRs.

On cross-examination, the Inspector acknowledged that the coil was present on the branch line. Tr. 516. The sign indicating the location of the refuge was present as well and the mine maps were up to date, all matters which have a familiar ring to Brody's defense in these matters. However, the inspector could not agree with the conclusion suggested by those things, that in an emergency it was reasonably likely that miners would have passed this first refuge alternative as part of an attempt to get out of the section and the mine. Tr. 519. Panic or injuries might cause miners to go to the refuge shelter first.

Another theme of Brody was that miners would employ judgment in an emergency situation. In this case, it contended that the miners would still feel the branch line and their good judgment would tell them to "at least feel to the right to see what the branch line led to, especially if they were looking for a refuge alternative [ ]." However again the Inspector couldn't predict what feeling the branch line would tell miners to do if they are panicked, scared and can't see. Tr. 521. The directional cone indicators, on the other hand, tells them without any doubt and therefore they don't have to think about it; they will know that there is something present which will help them. Tr. 521. Later, the Inspector added that in an emergency situation, and with no cone indicators present, it was his view that miners could go right past and not realize there was a branch line. Tr. 531. The Court would add that Brody's theme that miners, because of their training, will think beyond the missing cones may or may not be the case in a given situation, but in neither event is such a consideration a proper part of the S&S analysis. It is worth noting, as confirmed by the Inspector, that the requirement is for both coils and cones. Tr. 533. It should not be lost that these are not alternative requirements.

Brody presented testimony in defense of its contention that the violation was not S&S, calling Kevin Webb, Sr. Tr. 539. The citation, 7168854, was issued to him. Mr. Webb thought there was one directional cone on the lifeline, just before the branch line. He believed that a miner would still know he had come upon the branch line, despite the missing cone, or cones, because he would feel that branch line. Such a miner would then reach over and learn the type of branch line that was there; a coil indicating the presence of a refuge chamber; two diamond cones indicating SCSRs. Tr. 543. In this instance, it would be a refuge chamber and it would be about 400 feet off the section. With some initial hesitancy, he did not believe that the absence of a cone would contribute to a safety hazard, meaning that he did not believe that the violation was S&S, stating: "No. It could - - well, I don't think so." Tr. 545-546. This view was based on the view that "Well, you're always going to escape. I mean, the cone was there to keep you going to the outside." Tr. 546. Nor, did he feel that the violation would create delay, again "because you're going to the outside. Tr. 546.

On cross-examination, Mr. Webb agreed that if miners are in need of a refuge chamber, that is because they are unable to escape and that this could be due to a blocked escapeway or because there are injured miners who cannot be carried out at that time. He also agreed that cones provide tactile feedback and are meant for conditions when miners can't see during an

escape. Tr. 548. While repeating that they are trained to go to the outside as quickly as possible, delay in accessing the refuge alternative, when exiting the mine is not an option, can mean the difference between life and death. Tr. 549-550. He also conceded that panic may attend an emergency situation in a mine in the event of fire or an explosion. Tr. 550. The two cones, he agreed, if present, tell escaping miners that there is a branch line ahead. Tr. 551.

The essence of the defense is that miners will be holding onto the lifeline as they escape and even without the cones or with just one cone, they will still *feel* the branch line and therefore they will be informed and no delay will occur. The problem with Brody's defense is that it asks not only that these other safety considerations be taken into account in the S&S analysis, it effectively seeks to negate the purpose of the cones or coil, as the case may be, in the analysis, as if those safety requirements are superfluous. But, in the Court's view, such an analysis sidesteps that the test for S&S is whether the violation *contributes* to the hazard and the Court concludes that by the escapeway not being equipped with two securely attached cones, installed consecutively with the tapered section pointing inby to signify an attached branch line is immediately ahead for the refuge shelter, does so contribute and that there is a reasonable likelihood that the hazard contributed to will result in an injury.

Accordingly, the Court concludes that upon consideration of all the evidence in this matter and application of the statutory criteria, that $5,683.00 is an appropriate penalty in this instance and it is so imposed.

Citation No, 8155914 from Docket No. WEVA 2013-1055.

Inspector Jack Hatfield was recalled for this matter. Issued on April 8 2013 and served to Kevin Webb, Brody mine foreman, the condition or practice section of the section 104(a) citation provided that the "Strata Life Shelter[21] provided for the 1 Section Panel is not being maintained for the miners to safely use during an emergency. Fallen, broken and sharp edged mine roof material measuring 8'[feet] long by 4.5'[feet] wide is found 29'[feet] away from the access door of the shelter. This area of deployment has to be kept clear, according to the clearly observed sign stating, 42' [feet] to be kept clear on the deployment side of the shelter. In a smoke filled entry, the workers would deploy the tent and then rupture the bottom of the tent while trying to enter the shelter without seeing the fallen slate. Standard 75.1506(g) [the standard cited in this instance] was cited 1 time in two years at mine 4609086 (1 to the operator, 0 to a contractor)." Gov. Ex. 11A. There were no stipulations for this matter.

The Inspector's concern was a rupture of the shelter tent. Depending on the size of a rupture, the conditions when it was being deployed, and other factors during an emergency, the shelter may not function effectively, defeating its purpose. Tr. 564. The manufacturer-supplied instructions advise that "where the fresh air bay is positioned should be kept clean and free of any debris that could hinder the unit's deployment." Tr. 565. Inspector Jackson stated that he "observed fallen, sharp-edged mine roof material that had fallen on the deployment end of the

[21] A life shelter, also referred to as "refuge alternative," is a large life-saving piece of equipment, which contains oxygen, food, carbon dioxide scrubbers to scrub out exhaled carbon dioxide, and water, all sufficient to sustain workers' lives for a minimum of 96 hours. Tr. 558.

refuge alternative." Tr. 567. He found those sharp materials at a location 29 feet back from the initial deployment point, meaning that the tent was exposed to such sharp materials for 13 feet, the remaining length of the tent deployment length. Tr. 569. It was his opinion that when dragging the tent over the sharp materials they would cut the tent floor material as miners in the tent would walk over those materials and, in his view, such sharp rocks would then come up through the bottom of the tent. Tr. 570. The cited condition was abated by Kevin Webb's direction to have a scoop clean up the area.

The Inspector viewed the alleged violation as S&S because it contributed to the hazard of men being exposed to carbon monoxide gas and would delay workers from entering the shelter. The need to remove the sharp rock before deploying the tent and, in doing that, exposing themselves to cuts to hands and wrists in that effort, were other factors of concern. Tr. 572. He marked the injury severity as fatal, on the theory that, unaware that the tent had been cut, miners, having removed their SCSRs once inside the tent, would be subject to CO entering it. In sum, the Inspector considered the violation to be reasonably likely because "there was a confluence of factors, . . . having to pull the tent out over top of the rocks. You're in smoke. I'm looking at it from the standpoint that it's - -you know, it's more than possible . . . [with] that rock left there . . . that they would slice their tent . . . dragging a tent over top of [the sharp rock] . . . and then walking inside the tent and stepping on the unseen rock." Tr. 575.

Inspector Hatfield considered the negligence to be moderate, as examining the shelter is part of the preshift check and this includes checking for fallen roof rock. He could not determine exactly how long the condition had existed, but believed it had been longer than since the last preshift and he believed that it may or may not have been something noted in a preshift examination. However, he believed it should have observed. Tr. 578. According to his account, Mr. Webb was eager to get the rock out from in front of the shelter. Tr. 580. The Court inquired as to whether the Inspector noted the number of sharp rocks that were of present concern. He made no count but suffice it to say that there was more than one sharp rock present. Tr. 581.

Upon cross-examination, Brody's Counsel inquired about the inspector's objectivity and the corollary to that, the absence of bias. In that connection, Brody's Counsel directed the Inspector to his notes for that day. *See* Ex. R 9B. This inquiry was met with rapid and intense objection by the Secretary's Counsel. Tr. 584-587. The reason for the Secretary's objections became immediately clear, as those notes included these remarks: "Review of Judge Miller's decision. i.e. erotica. Very satisfied." Tr. 587. The Court then took the opportunity to inform the Secretary's counsel about the very legitimate ground of bias during cross-examination, explaining that bias can be explored apart from the particulars of a given citation. General bias is fair game in cross-examination. Tr. 587- 588.

The Inspector maintained that he was not describing Judge Miller's decision as erotica, rather he asserted that "[t]his had to do with a CLR. And I couldn't spell her name. I mean, her name - - she's got an odd name that - - she had tried to get some respirable dust cases settled, where another operator had tried to settle some S&S determinations on a respirable dust case. And Judge Miller admonished her and wouldn't accept the settlement. . . . ." Tr. 588. The Court stopped the meandering answer, and directed the Inspector to explain what he meant when he wrote "erotica, very satisfied." The Inspector responded, "I meant - - it was regarding in

regard to the CLR Hrotica - - Hrotic." Tr. 589. The Court asked, "That was her name?" The Inspector responded "No. . . . Her last name - - her last name R - - HROTICA. Her - - that was her last name. But it was - - it was the decision regarding her - - her determination that the S&S was going to be reviewed - - be thrown out on respirable dust samples. That's what that was about, sir." Tr. 589.

Perplexed by the answer, the Court inquired of the Inspector why that was part of his notes. Inspector Hatfield responded, "I don't have a clue. . . . I don't know why I wrote that in there." Tr. 589-590. He then agreed with the Court's inquiry whether he was just noting his satisfaction that the judge was not willing to eliminate the S&S designations. Tr. 590. The Court observed that "it's odd to find this in the middle of your notes on the day you're doing an inspection." Tr. 590. Understandably, and appropriately, Brody's Counsel pursued the remark further, inquiring of the Inspector if his reference was to the *Marfork Coal* decision at 35 FMSHRC 738, in which Judge Miller chastised a CLR for agreeing to settle several S&S citations, modifying them to non-S&S. Tr. 592. Brody's Counsel argue that this shows bias on the part of Inspector Hatfield towards writing violations as S&S. Tr. 593. That particular inquiry ended, for the time being, [22] with the Court's observation that it was up to the Court to determine if this demonstrated whether the Inspector was predisposed to find S&S violations wherever possible.[23] Tr. 593-594. However, that was not the end of the exploration of bias regarding this inspector as he was then asked if he wears a hat with Judge Miller's name embroidered on it when he inspects coal mines such as Brody. Again, the Secretary objected and the Court, again, overruled the objection. Tr. 594. Inspector Hatfield acknowledged that he has a hat and that it has the words "WVU" on it. He then added that "it's got Judge Miller on the side." Tr. 594-595. To stop the Inspector from a rambling answer, the Court directed him to simply answer the question about Judge Miller's name on his hat, to which he then answered, "Yes." Tr. 595.

[22] Remaining troubled by the remark in the Inspector's notes, the Court later revisited the matter.

[23] The Court revisited this rather troubling revelation when the hearing resumed the following week, on September 29th. The Secretary again objected on the basis that it was not relevant to the issue of bias. As the Court patiently explained the week before, the subject was very legitimately an area for exploration of witness bias as a well-recognized area of cross-examination. The Court believes that it was the harmful nature of the testimony which motivated the Secretary to attempt to keep it out of the record. The Court began by directing Inspector Hatfield to Ex. R 9B, expressing that, while it considered the Inspector to be a decent man, it nevertheless considered having a judge's name on his hat to be an example of bad judgment. The Court acknowledged that the Inspector was no doubt dedicated to his work but that he and all mine inspectors still have an obligation to be objective in carrying out their duties and not become zealots. Moving to the question which caused the Court to raise the matter again, it directed the Inspector to his notes where he wrote "i.e. erotica." The Inspector stated that he was not referring to a person from his office but rather to a CLR, explaining, "[s]he has an odd spelling for her name." Tr. 1002. The Court then asked for the name of the CLR he was alluding to. The Inspector then retreated from the claim about the odd spelling for the CLR's name and instead stated "[t]hat's a nickname I gave her myself, sir." Tr. 1003. He offered that the CLR's name was spelled something like HROVOTIC." The Inspector could not offer why he so nicknamed the CLR. Tr. 1004.

Quite legitimately, Brody's Counsel pressed on with the following exchange:

Q. And you wear the hat with Judge Miller's name embroidered on the side to coal mines like Brody because you want the mine to know that if you write an S&S citation, you're going to beat them; right?

THE WITNESS: A. No, sir.

Q. Well, why do you wear that hat -- . . . -- with Judge Miller's name on it?

THE WITNESS: I like the hat. I like the hat. It's a good feeling. It's a 47. It's a cotton hat. I like the hat.

THE COURT: Well, that's nice. Did the hat come with Judge Miller's name already on it?

THE WITNESS: No, sir.

THE COURT: Okay. Well, then, come on. What is -- why do you have Judge Miller's name on the side of your hat?

THE WITNESS: I just had Judge Miller's name put on the side of my hat because she

ruled in the favor of -- on the S&S. But it's just a hat.

THE COURT: Well, it's not just a hat.[24]

Tr. 595-596.

Brody's Counsel then returned to the particulars of the citation. While the cross-examination explored various aspects of the conditions surrounding the citation, the Court considered the questions directed to the tent floor material to be of particular importance. The upshot of this is that the Inspector could not speak with regard to the construction or durability of that material. Tr. 604-606.

In its defense, Brody called Kevin Webb back to the witness stand. Mr. Webb was familiar with the Strata Life Shelter, including the rugged composition of the tent's floor. Tr. 619-622. He also maintained that the fallen pieces of top were "kind of flat." It was his opinion that the tent could have been deployed right over the rock that concerned the inspector. Tr. 624. Upon cross-examination, Mr. Webb conceded that the instructions for the shelter states that foreign material or sharp objects that could damage the tent are to be removed. Tr. 626. It is fair to state that there was a fundamental difference between the Inspector and Mr. Webb on the issue of whether the rock presented a puncture risk if the shelter needed to be deployed. Upon

[24] It was also noted without contradiction that Inspector Hatfield issued approximately half of the citations in the pattern notice litigated in this proceeding. Tr. 598.

questioning by the Court, Mr. Webb did concede that some of the rocks may have been sharp, but were positioned flat and none of them were sticking straight up, as he recalled. Tr. 630. The Court also inquired, why, if the conditions were as harmless as he represented, was there a need to bring in a scoop to abate them. Tr. 631. Webb maintained it was simply faster to use a scoop although he then conceded that there could have been "somewhat, you know, [of a] potential for puncture." Tr. 632. However, although he still believed that the tent could've been deployed over the rocks, he then spoke of a "big hump in the middle of the tent" but that the miners would probably stay away from the area. Tr. 633. He admitted that the hump did present a possibility of a rupture to the shelter. Tr. 634. In fact, Mr. Webb, to his credit in testifying truthfully, agreed that if he had seen the cited materials on the mine floor, he would've had them removed. Tr. 636.

The Court concludes that the violation was established, but the government did not prove the alleged S&S nature of it. Upon consideration of the evidence of record and the statutory criteria, the Court imposes a civil penalty of $1,000.00.

Citation No. 9000313, from Docket No. WEVA 2014-0620

Brody stipulated to the fact of violation but the S&S designation and negligence remained in dispute. Tr. 648. Inspector Jack Hatfield was recalled to the witness stand for this matter.[25] The condition or practice section of the section 104(a) citation stated that "[d]uring an inspection of the 4 Section Panel (001/008 MMUs), it is determined that the section foreman assigned the task of supervising this coal crew by mine management has not traveled the primary intake escapeway in it's (sic) entirety. In the event of an emergency requiring escape using the primary intake escapeway, there would be unnecessary delays by this crew of workers while traveling the escapeway and reaching the surface. Standard 75.1504(a)(2) [the standard cited in Citation No. 9000313] was cited 1 time in two years at mine 4609086 (1 to the operator, 0 to a contractor)." Gov. Ex 16A. The citation was issued on July 30, 2013.

The section foreman, Mr. Elkins, admitted to the Inspector that he had not traveled the escapeway in its entirety. Tr. 659. As with the similar violation cited by this Inspector, earlier in the testimony for this proceeding, the Inspector stated that the standard's purpose is because the foreman needs to familiarize himself with the escapeways in order to know the safe routes out, and to become aware of landmarks, turns, and other areas in the event of an escape. For this citation too, the Inspector drew on the escapeway map the route for the primary route. Tr. 662-668, 671-673. Upon completing his markings on Gov. Ex. 16C, the Inspector agreed with the

[25] The Inspector began his testimony with the first day of his E01 inspection at the mine, which was about July 17, 2013, a date two weeks before the citation to be discussed. An objection, on materiality grounds, was made. The Secretary advised that the testimony was offered as "go[ing] to the larger issue [ ] of pattern." Tr. 653. The objection was sustained with the Secretary directed to focus on the particular citation. The Secretary then asserted that it wanted the testimony of the earlier meeting for the purpose of establishing negligence associated with Citation No. 9000313. Tr. 655. A single question was permitted as to whether the individual to whom the citation was served was present on July 17, 2013 and advised by Inspector Hatfield about the S&S nature of violations of 30 C.F.R. §75.1504(a)(2). The Inspector stated that the individual *was not* present, ending that line of questioning. Tr. 656. Subsequently, Ex 14B, which was offered but, per the Court's ruling not admitted, was included in the record, in a separate envelope, for purposes of appeal only. Tr. 689.

Court's characterization that the foreman had not examined approximately half of the primary escapeway, which translated into a distance of approximately a half mile to a mile.[26] Tr. 668-670.

Inspector Hatfield stated that the lack of familiarity would contribute to delays during an escape. The foreman, per the standard's aim, must know of landmarks along the route and know of things such as turns and overcasts, and stoppings with doors, the lack of knowing all of those particulars can create delays during an emergency. Tr. 673. He marked the injuries as permanently disabling because if panic ensues, miners might try to talk and succumb to the smoke and CO. Tr. 673-674.

Upon cross-examination, Counsel for Brody noted that in an emergency miners are to use the lifeline, the point apparently being that knowing the route is superfluous, as one holds the lifeline during that entirety of an escape. Tr. 680-681. Questioning then explored whether, during an escape, sometimes a miner other than the foreman may take charge and that such an individual may in fact *be* familiar with the escapeway.[27] Tr. 683-684.

In its defense of the S&S charge, Brody called Justin Elkins. Elkins is an experienced miner. Tr. 693-695. He testified that he had traveled the intake escapeway at a time *before* became the foreman for that section, when he was part of the section crew. Tr. 698, 700. The escapeway had become longer since then, but he could not state exactly how much longer. On cross-examination, the point was made that when one assumes the duty of foreman, one takes on a leadership position. Elkins could not remember exactly when he had walked the escapeway from the No. 4 unit. Tr. 702. The Court observed that the cross-exam aptly noted that a foreman has a different role and responsibility as compared to one is employed as a roof bolter. Tr. 704. Elkins later agreed that the last time he would have traveled the escapeway, albeit not as a foreman, was in October 2012, some nine months before this citation was issued. Thus, it is fair to state that the escapeway would not have remained static during that considerable period of time. Further, the standard does not speak in terms of equivalencies, where familiarity may have been acquired in segments over time and before one assumed the duties of the section foreman.

The Court finds that this violation, as with the similar violation, is also S&S. Testimony supports the conclusion that there was a measure of danger contributed to by the violation and there is a reasonable likelihood that the hazard contributed to will result in an injury. There can be little doubt that if an injury were to occur in the circumstances of an emergency, it would be of a reasonably serious nature. Brody's various hypotheticals were found to be unpersuasive. Although repeated often during its defense, the Court does not find that the presented putative ameliorating factors, such as mine maps, are not an appropriate part of the S&S analysis.

---

[26] There is no need to precisely determine the distance not traveled. Whatever its exact length, it was significant, not inconsequential. Tr. 669-670.

[27] The Court observes that this was no more than another variant of the theme that other safety procedures operate to diminish the S&S characterization and it too is rejected as an inappropriate consideration in that analysis. In the same vein, the existence of multi-gas detectors and maps showing the location of SCSRs and the refuge chamber was raised. Tr. 685-687.

Nor does the contention that Mr. Elkins examined the escapeway, through piecemeal observations, at times before he assumed the role of foreman, diminish the conclusion that the violation was S&S, as that is not the equivalent of the standard's requirements. Once becoming a foreman, very different responsibilities attach.

The proposed penalty for this was assessed at $3,405.00. Upon consideration of the evidence and each of the statutory penalty factors, the Court agrees that the assessed amount is appropriate and that amount is hereby imposed.

Citation No. 7165694 from Docket No. WEVA 2014-620

Brody did not stipulate to any matters for this section 104(a) citation. Issued on August 14, 2013, the condition or practice section stated that "[t]he lifeline provided for the #4 Super Section is not located in a manner for miners to use to effectively escape. At crosscut 2 on #2G Belt, directly below the lifeline there is (sic) two broken pallets, rock dust bags, a small wire spool, [The spool was later identified by Brody's witness as measuring about 18 inches tall and 16 inches wide. Tr. 750] and plastic. The pallets measure 5 1/2' [feet] wide and 15″ [inches] high. This condition would hinder/impede miners attempting to utilize the lifeline in a mine emergency and is likely to result in fatal injuries. Standard 75.380(d)(7)(iv) was cited 2 times in two years at mine 4609086 (2 to operator, 0 to a contractor)." Gov. Ex. 17A.

The issuing inspector, Timothy Crawford testified. On that day, the Inspector was travelling with Brody foreman Dave Petry. Inspector Crawford had been about other inspection duties when he noticed the cited materials directly beneath the lifeline. Tr. 715. This lifeline was in the alternate escapeway. In explaining the obvious hazard presented, with miners escaping using a lifeline where visibility would be nil and communication precluded because they would be wearing SCSRs, obstacles with attendant slip and fall hazards cannot be allowed. Tr. 718. As noted in the Citation, the materials were directly below the lifeline. Tr. 718. As the Inspector stated: "Miners attempting to utilize the lifeline being hindered or impaired through the slip, trip hazards with the materials directly below it" was the hazard which he considered to be reasonably likely to cause an injury that could be fatal. Tr. 719. Eleven miners were so put at risk, as they were working inby on the No. 4 super section. Tr. 720-721. With some effort on the Court's part, the Inspector eventually stated that the moderate negligence he marked applies to obvious conditions, such as the slip and fall debris he found in this instance. Tr. 725. The Inspector also stated that in an emergency situation with miners using a lifeline, walking around such materials is not a feasible option.[28] Tr. 727.

Cross-examination suggested that the material had only been there a short time, as the Inspector did not note it on his trip into the mine, and his notes remarked that the condition had likely only existed for 20 minutes. Tr. 732. From this, Brody's Counsel suggested that under normal mining conditions, the obstacles would have been cleared in a short time. Tr. 734.

[28] The Court did have an inquiry, perhaps misplaced, about the applicability of the standard, because it requires that lifelines be located in such a manner to use effectively to escape, but that the Inspector did not require that the lifeline be relocated. Tr. 728. The Inspector believed that it remained the applicable standard to cite in such circumstances. Tr. 729.

The Inspector could not speak to whether a miner was then on his way to clean up the material, although he did allow that miners might place such material in a travelway if they know it is about to be picked up. Tr. 735. He did not waiver however that the pallets were in a crosscut and below the lifeline. In response to more questions about its exact location, he added that it was located at the junction of the entry and the crosscut. The intersection is part of the crosscut and the entry. Tr. 737, 744. Further, the Inspector stated that it is not normal practice to put trash directly below a lifeline. Tr. 742. Also, the Inspector denied that it was his view that all escapeway or lifeline violations are S&S. Tr. 739.

In its defense to this matter, Brody first called Dave Petry, the foreman to whom the citation was issued. Tr. 746. He has long experience in coal mining. He advised that when the citation was issued he "moved it out from underneath the lifeline," a task that simply required him to pull it to a better location. Tr. 750. Mr. Petry stated that the materials had only been at the inappropriate location cited by the Inspector, for about 10 minutes. Tr. 751. Mr. Petry conceded that there was a violation. However, the Court finds, per his testimony at Tr. 752, that Mr. Petry's testimony regarding the short duration of this trash under the lifeline and that it was about to be picked up by a scoop, to be credible. Tr. 753. Mr. Petry disagreed with the Inspector's S&S and negligence determinations for the same reasons; it was about to be picked up and had been there for only a short time. Tr. 756.

Roger, "Dusty," Cook, Brody section foreman, was also called by the Respondent. Mr. Cook stated that he was the individual who put the material in the location identified in the citation and therefore he had first-hand knowledge of the matter. Tr. 767. He then explained the circumstances that led to the material being placed at that location and that it was done in anticipation of it being promptly removed by the scoopman. Tr. 768. Later, he clarified that he anticipated that the material would be removed sometime that day. Tr. 773. He went further however, by asserting that the material was not directly under the lifeline and that he did not believe they presented a hazard. Tr. 769. Upon cross-examination, he admitted that he was not present when the citation was issued and so could not speak to its placement at that time. Tr. 770. He also conceded that the pallets, in a smoke-filled environment, could present a tripping hazard. Tr. 771.

Testimony about the recency of the violation was not pertinent to the S&S analysis but it is relevant to the degree of negligence. Though the continued normal mining operations test typically presumes that the violative condition will continue, in this instance, the credible testimony demonstrated that in fact the trash was to be picked up in a short time. The Court announced at the conclusion of the testimony that the violation had been established **but that it was not S&S.** Tr. 774.

For the above reasons, Citation No. 7165694, was established, but upon review of the evidence of record, and application of the statutory criteria, the appropriate penalty to be imposed is $500.00**.**

Citation No. 7166781 from Docket No. WEVA 2014-842

For this matter, Brody stipulated to the fact of violation. The section 104(a) citation, No. 7166781, issued by MSHA Coal Mine Inspector James Crawford, states in the condition or practice that "[t]he directional cones for the alternate escape way (sic) on 2 D Belt, in by (sic) the SCSR Cache at 20 XC exceed the 100 foot maximum spacing. An area from 20XC to 23 XC has no cones. This is 81 rows of bolts @ 4.0 feet per row, 324 feet total. This presents hazards of delay in an emergency escape attempt. Conditions such as inability to communicate, low or no visibility and disorientation are reasonably likely in a mine emergency. Miners receive tactile feedback and information from the cones and their configuration. This mine is on a 5 day methane spot rotation for methane liberation. This area of the mine is far from the slope portal and is a difficult, time consuming walk to the surface in clear visibility. The No. 2 section crew is in by at time of citation. Standard 75.380(d)(7)(v) [the cited standard for this citation] was cited 1 time in two years at mine 4609086." Gov. Ex. 18A.

Inspector Crawford also has long experience in coal mining. His testimony supported the underlying facts identified in his citation for this admitted violation. Brody's Kevin Webb was with him at that time. Working with the 324 foot measure meant that two or three of the required cones were missing. He listed 14 miners as affected by this, a number derived by asking how many people are on the section. The mine was running at the time of the citation. The Inspector stated that the missing cones could bring about a delay in an escape situation. Tr. 787. The cones are installed to give the miners information. When not present, neither is the information they provide. Here, also, the section was about 5 ½ miles from the mine portal. Although he personally expressed that he might not panic if there was no cone when his step count told him to be expecting one, but when he went another full distance and there was still no cone, he would have to re-evaluate his circumstance, wondering if something had gone wrong: "Do we - - do [we] get off somewhere?" That is to say, miners would at that point stop and inquire "Are you sure we're going the right way?" Tr. 788. He reminded however that the miners in that emergency situation can't talk with one another, as they will be wearing their SCSRs.

The Inspector also referenced that miners in other mine disasters have gone the wrong way during an escape, although lifelines were not present in those past incidents. (However, it should be noted that the Court made it clear that references to what occurred in other mine emergencies would not be considered in deciding the S&S and negligence issues in this matter. Tr. 801-802) He considered the likelihood of an injury in such circumstances as reasonably likely. Although he frequently encounters the response that a given deficiency is not of great consequence and that it can be fixed, his response is that in an emergency there is no time to make such fixes. Tr. 789. As with the testimony of other inspectors in this proceeding, the Inspector marked the negligence as moderate because it was an obvious condition. Tr. 790. The Inspector also stated that the term "secondary" escapeway is a misnomer, because it "is used about 99 percent of the time [at this mine]."

The Court concludes that on the core issues, S&S and the moderate negligence determinations, the cross-examination did not undermine the Inspector's testimony. Tr. 791-805.

Kevin Webb testified for Brody in defense of the issues remaining for this citation. He stated that there was a cone at crosscut 23 and double cones at crosscut 20, the latter indicating a branch line where SCSRs were located. Tr. 806. The area without cones was "basically level." He did not believe the violation was S&S because the length without cones was "a straight piece of roadway" and because the first thing miners want to do is to get all the way out of the mine. That exit strategy is what the miners are trained to do. Tr. 807-808. He believed that miners would continue traveling straight ahead and he added that the reflectors along would indicate to them that are going the right way. Tr. 808. However, the Court would note that this speculative and in any event it is not the test for determining S&S. The issue is whether the undenied absence of the cones would contribute to the hazard and based on the Inspector's testimony, it clearly would. Mr. Webb also did not believe that the absent cones would cause delay in escaping. On cross-examination, Webb agreed that the purpose of the cones is to provide reassurance, every 100 feet, that miners are heading in the correct direction, that is, out of the mine. Tr. 812-813.

The Court finds that this violation was S&S. The arguments that other considerations[29] diminished the S&S aspect are rejected. The Court also sensed that Brody discounted problems with the cones, at least in the context of any S&S analysis, regarding their presence, whether they were directionally accurate and the information they are to convey. The test is whether the discrete safety hazard was contributed to by the violation and the Court finds that is clearly the case. As an overall observation, though not controlling in determining any given citation, as each was assessed on its own merit, it did appear to the Court that Brody seemed to discount the significance of cones, the importance of their presence, that they indicate the right direction for escape and, more generally, the importance of the information they are expected to convey.

Upon consideration of the evidence of record and the statutory criteria, the Court concludes that Citation No. 7166781 is affirmed and that the proposed penalty amount of $29,529.00 remains appropriate.

[29] One such example is that as the roadway was essentially straight, it was claimed that miners in an emergency would keep going in the correct direction despite the misinformation.

II. Alleged Roof and Rib Control and Examination Violations: Conditions and/or Practices contributing to roof and rib hazards[30]

WEVA 2013-997 Citation No. 8151320. For this, Brody stipulated to the S&S finding and all other findings and agrees to pay the assessed penalty of $9,634.00. Tr. 832.

WEVA 2014-620, Citation No. 7168801 For this too, Brody stipulated to the S&S finding and all other findings and agrees to pay the assessed penalty of $4,329.00. Tr. 832.

WEVA 2014-620, Citation No. 7168899 For this too, Brody stipulated to the S&S finding and all other findings and agrees to pay the assessed penalty of $15,570.00. Tr. 833.

WEVA 2014-620, Citation No. 7167471. This matter was contested.[31] MSHA Inspector James Jackson was called for this citation. Issued March 6, 2013, this section 104(a) citation stated that "[a]dditional roof support is needed at the MCI D-Box (S.N. 35966-99895-1-210), located at cross cut (sic) 39 on number 1 belt line. Roof bolts were found to be missing and damaged in this area. Due to the damaged and missing roof bolts areas were found 6 feet to 13 feet 3 inches between roof bolts. This condition exposes miners to hazards related to unsupported top. Miners are required to work and travel in this area. Standard 75.202(a) was cited 9 times in two years at mine 4609086 (9 to operator, 0 to a contractor)."

The "D-Box" referenced in the citation is a power distribution box. Damaged roof bolts referred to conditions where plates were not firmly against the mine roof and some of the plates and bolt heads were snapped off. Tr. 836. This was an area where miners work or travel and they were exposed to unsupported roof. This presented the risk of rock falling and hitting miners, exposing the workers to the risk of a fatality. The unsupported area between the bolts presented the risk of a fatality and the Inspector stated that it has been his experience that even smaller rock falls can have fatal consequences. Tr. 837. Inspector Jackson marked one person as potentially affected as one person would be examining that area each shift and there is also exposure with the weekly electrical examination requirement. People also travel through the area. Tr. 840. A need for maintenance of the D-box in that area or to reset breakers there would also present exposure. Tr. 840. Thus, the hazard was the unsupported area with rock falling, a condition he deemed to be reasonably likely to occur. The Court asked the Inspector to elaborate his view of this hazard. The Inspector advised that the "area was unsupported. The damaged bolts, there's no way to tell how much of the bolt in the hole and the glue were still bonded. I felt that the area was unsupported and unstable, just from my experience in dealing with unsupported top." Tr. 839. The Inspector added that the area's location in or near an

[30] These matters were addressed during the second week of hearings with all matters for this group heard on September 29, 2014.

[31] Later, Counsel for Brody explained that had the violation been cited as a 75.220 violation, it may have conceded the violation, while still challenging the special findings. However, as section 75.202 was cited, they challenged the violation itself. Tr. 883. On that basis it believed there is case law to support the view that there is no violation where the evidence establishes that the roof is stable. Tr. 883-884.

intersection added to his conclusion that the violation was S&S. The area had not been dangered off. Negligence was marked as "moderate" because the Inspector considered the condition to be obvious and the examiner should have seen it. Tr. 841. Further, due to the presence of rock dust and rust over the damaged bolts, the Inspector concluded that the condition had existed for some time. Tr. 841. Later, he expressed that the condition had existed for longer than that week. Tr. 850. The violation was abated by setting timbers in the area.

The cross-examination noted that the area was sandstone and the Inspector agreed that generally speaking, such rock is solid. However, the Inspector advised that he has seen sandstone fall. Tr. 843. The Inspector did not retreat from his statement that bolts were missing, even though advised that witnesses for Brody would assert that only plates, not bolts, were missing. Tr. 846. He did allow that it was possible that the bolt *heads* had been snapped off. Tr. 847. However, there is no way of telling how much of a bolt may remain in the roof. The bolts, Inspector Jackson reasserted, were to be on 4 foot centers at the cited location. Tr. 849. Part of the cross-examination contended that the area had been bolted seven years earlier and that the D-Box had been located there for four years. Tr. 850-851. This led to the assertion that in all that time no citation for this had been issued previously. Tr. 852. The point of this was to contend that the area was quite stable and therefore a roof fall unlikely. The Inspector's response was that he didn't "have the privilege of knowing when a roof is going to fall, when it's going to fail." Tr. 853, 855. He added that the roof was unsupported. Exposure, he agreed, would not be from miners using the travelway, as the cited area was not in a travelway. However, those examining the D-box would be exposed. On re-direct, it was brought out that the roof control plan still applies, sandstone or not and that roof falls can happen even where there is no obvious adverse roof conditions. Tr. 860. Upon questioning by the Court, the Inspector, referencing the drawing he created at page 12, stated that he found eight missing bolts. Further, the Inspector confirmed that he found two areas of discrete problems. Tr. 862.

Brody presented Milton Aliff in defense of this matter. Mr. Aliff has long mining experience. He identified the relevant preshift examiner's report relating to this matter, and that his signature appears on it. It was his testimony that exposure to the unsupported roof would be very limited while conducting the pre-shift exam. Tr. 873-876. Mr. Aliff also took issue with the Inspector's assertion of "missing" bolts, asserting that they were only "wide." He also stated that only the bolt plates were missing. Tr. 877. It was his position that such bolts still provide support. He also stated that the roof in this area was sandstone and that it is solid, and that "[t]he top [there] was quite nice." Tr. 880. To his knowledge, no other inspector had raised issues with the roof in this area. However, Mr. Aliff revealed his perspective, when asked if he believed "that the missing and/or damaged bolts constituted a roof-fall hazard that was reasonably likely to injure anyone?" "No," he responded, "[b]ecause of the conditions that were there. [T]he top was still as solid as it was the day it was mined. There's no visible warnings; there's no sounding warnings there to indicate any type of failure in the roof." Tr. 883.

On cross-examination, Mr. Aliff agreed that preshift examiners, weekly examiners and electricians performing maintenance would go to the D-box. And though, for a time miners would be in a man bus, they would not be in the man bus while at the D-box itself. Tr. 884. Aliff also conceded that the missing plates are required to be present and that an unsupported

roof presents a hazard. Tr. 885-886. Nor did Mr. Aliff like to go under unsupported roof, even if that roof is sandstone. Tr. 886.

Based upon the credible evidence of record, the Court finds that this violation was established and that it was S&S. The Court finds that the roof bolts were missing and damaged in this area as described by the Inspector. The condition exposed miners to hazards related to unsupported top and as the Inspector noted, he didn't "have the privilege of knowing when a roof is going to fall, when it's going to fail."

Still, notwithstanding the above, when the entirety of the record is considered, and applied to the statutory criteria, the Court finds that $4,000.00 is an appropriate penalty and that amount is so imposed.

WEVA 2014-620, Citation No. 7167473

For this violation, the Secretary announced that it was removing the S&S designation. The parties stipulated to all other aspects of that matter and that the penalty would be derived by application of the Part 100 formula. Tr. 888. The Secretary states that amount is $3,144.00. Accordingly, that amount is imposed.

WEVA 2014-620, Citation No. 7165683

This section 104(a) citation, issued by MSHA Inspector Timothy H. Crawford on July 24, 2013, and citing 30 C.F.R. §75.202(a), states that: "[t]he ribs where persons work and travel are not being adequately supported or otherwise controlled to protect persons from hazards related to rib falls. On the # 3 Section in the # 6 entry adjacent to the section feeder, a loose rib is found to have separated from the immediate rib and is left suspended. The loose top rock rib is measured to be 3′ [feet] X 105" X 15" thick. This condition exposes the section miners who work and travel through this area to hazards of being struck by the loose rock and is likely to result in fatal injuries. Standard 75.202(a) was cited 13 times in two years at mine 4609086 (13 to the operator, 0 to a contractor)." Gov. Ex. 24 A and 24 B.

The Inspector noted the large, loose piece of top rock which "didn't appear to be held in place by much." Tr. 890. The cited standard requires that the roof and rib where persons work and travel be adequately supported or otherwise controlled to protect persons from falls of roof or ribs. Upon finding the condition, Inspector Crawford he immediately issued the citation and required that the area be dangered off so that no miners could travel through that area. Tr. 891. The Inspector marked the violation as "reasonably likely" and the negligence as moderate. For the former finding he felt that the hazard of miners being struck by roof or ribs and that the violation contributed to was reasonably likely to result in an accident. He added that this was a heavily traveled area of the mine and that the mine had several prior roof and rib injuries. Tr. 892-893. The size of the rock was sufficient that it would result in a fatal crushing injury. Moderate negligence was marked by the Inspector because, while the condition was not so obvious from one direction, it was fairly easy to detect when traveling outby. Tr. 894. A thin

film of dust, where the rock had separated, informed the Inspector that the condition had not just occurred. He also observed two rib bolts in that area but one wasn't holding the loose piece at all and it was located in the separation itself. Only about 1 foot of the other bolt was secured in the mine roof. Neither bolt secured the rib. Tr. 895. Additional bolts were installed in the rib to abate the condition. The Inspector elaborated on the significant number of miners who were exposed to this loose rib. Tr. 897.

During cross-examination the Inspector stated that the rib was in the entry, next to the crosscut. In the Court's estimation, both when it heard the testimony live and again when reviewing the transcript, the cross-examination did not diminish the Inspector's testimony about the condition, as provided during the direct. Tr. 901-922, 924-930, 939-941. The Inspector did allow that the condition may have existed for only a few hours and he considered the negligence to be moderate. Tr. 923. In response to questions from the Court, the Inspector provided additional testimony describing the hazard he found that day. The Court found the Inspector's testimony to be quite detailed and he augmented his testimony by marking on the exhibit the dangerous area. The Court concluded that the Inspector's testimony was very reliable. Tr. 930-93.

In its defense of this citation, Brody called Virgil Hatfield, the individual to whom this citation was served. Tr. 945. He did feel at any point that the rib was in danger of falling. Tr. 947. He held this view because the rib had bolts in it. Tr. 947. Mr. Hatfield also felt that there was very little exposure to miners, expressing that "[n]obody really" travels in that area. Tr. 948. He also believed that shuttle car traffic would be protected because of the canopies on them. Further, he contended that when he and the Inspector took measurements of the loose rib, they were "right at it," thereby suggesting that it really didn't present much of a hazard. Tr. 949. Virgil Hatfield also believed that the two bolts which were present were still supporting the rib and that it wasn't going to fall. Tr. 950. In sum, Mr. Hatfield's testimony presented a very different take on the cited condition, and he didn't feel there was a need to fix anything. The different recounting included the abatement of it. For that, he stated that the Inspector told them to put bolts in it. However, upon questioning by the Court, he advised that installing ribs was the only way to abate it as a slate bar could not pull it down. Tr. 952. Further, according to him, only two bolts, not five were installed to abate the condition. Tr. 953. The Secretary did not cross-examine Mr. Hatfield.

Upon consideration of the entire record and the making of necessary credibility determinations, the Court finds that the violation was established and that it was S&S. The condition exposed the section miners who work and travel through this area to hazards of being struck by the loose rock and was likely to result in fatal injuries. The Court finds that there was a reasonable likelihood that the cited condition presented a reasonable likelihood that the hazard contributed to will result in an injury and that it would be of a reasonably serious nature.

Upon consideration of the evidence of record and the statutory criteria, the Court concludes that Citation No. 7165683 is affirmed and that the proposed penalty amount of $11,306.00 remains appropriate.

WEVA 2014-620, Citation No. 8155908 and WEVA 2014-620, Citation No. 8155909.

The testimony regarding these citations was presented together as they were based on the same facts.

Citation No. 8155908, a 104(a) citation, issued by Inspector Jack Hatfield on April 4, 2013, to Brody foreman Kevin Webb, states that "[t]he mine roof in the alternate escapeway (mantrip roadway) designated by the operator adjacent to the Co. # 4B Belt is not being maintained effectively controlled (sic) to prevent a roof fall hazard to the workers that work and travel in this area each shift. Supplemental roof support in the form of wooden cribs set by the operator in this area has weathered away from the roof and has been dislodged by mobile equipment traveling in this roadway rendering the supplemental roof support ineffective. This condition creates a roof fall hazard and a hazard of the dislodged cribs falling onto a worker travelling through this area. Standard 75.202(a) was cited 12 times in two years at mine 4609086 (12 to the operator, 0 to a contractor). The negligence was marked as moderate. Gov. Ex. 25 A

Citation No. 8155909, the section 104(a) citation related to Citation No. 8155908, next above, also issued on April 4, 2013 to Brody's Mr. Webb by Inspector Hatfield, states that "[a]n inadequate preshift examination has been conducted and entered in a record for that purpose prior to the workers traveling underground along the mantrip roadway (alternate escapeway) adjacent to the Co. #4B Belt. Supplemental roof support in the form of wooden cribs have been dislodged by mobile equipment and in some instances weathered away from the mine roof. This condition contributed to by the inadequate examination creates a roof fall hazard or the wooden cribs falling onto a passing worker. The record entered in the book on the surface shows no hazards nor violation noted. Standard 75.360(b)(11)(i) was cited 1 time in two years at mine 4609086 (1 to operator, 0 to a contractor)." Negligence for this citation was listed as moderate. Gov. Ex 26 A.

Testifying first to **Citation No. 8155908**, Inspector Hatfield stated that while traveling up the mantrip roadway he noticed a dislodged crib. A crib provides supplemental support, installed to assist the primary roof support. Upon examining it, he found that it was leaning and it was not in contact with the roof. He then noted that the roof in that area had cracks in its slate top. In this area, he stated, there had been roof control problems and it was an area of high concern about the roof. Tr. 963. The Inspector stated that he then found three other places with cribs leaning. He pointed out the cracks in the roof to Mr. Webb. These observations led him to conclude that it was reasonably likely that there would be a roof fall from any of those four locations, which fall could injure a miner. The cited conditions were in a travelway, which also serves as the alternate escapeway. Tr.965. Suffice it to say that the Inspector identified various work activities which would occur in this area and thereby create exposure to the cited condition. Tr. 966-967. Thus, he concluded that the violation contributed to the hazard of a roof fall to those who work and travel in that area. The Inspector also listed a permanently disabling injury as expected injury. In terms of his S&S listing, the Inspector noted the confluence of factors: multiple places with cribs leaning and the roof conditions in that area. Tr. 967-968. He added that he observed roof fall material in the areas of the problematic cribs, but his greater concern

was with the cracks in the roof. Tr. 969. Marking the negligence as moderate, the Inspector believed that it was obvious that the cribs had been struck by equipment. He considered the fact that the mine had made efforts to control the roof in this area, including input from MSHA's Tech Support division, as mitigation. However, the Court's reaction to this was that it was generous to consider those efforts as mitigation. Instead, the problems in the area could be viewed as requiring heightened vigilance. As reflected in his notes, the Inspector provided details about the location of the problematic cribs. Tr. 971-973. To abate the conditions, some cribs were repaired but some required replacement.

On cross-examination, it was asserted that there were a lot of cribs in this area but the Inspector could not affirm that there 80 sets of cribs in that area.[32] The cribs cited by the Inspector were at breaks 9, 12,13,and 17. Although the Inspector testified about broken roof over the cribs and rock on the ground, he did not include that in his notes, asserting that he would not normally include such information. Tr. 981. Clarifying his earlier testimony, the Inspector stated that three of the cribs had been hit with mobile equipment and one had simply deteriorated over time. Tr. 982. Among the three leaning cribs, a portion, one corner, of them was tight against the roof but they were leaning and he believed that if they were hit again they would come down. Tr. 982. The Inspector could not recall if he had been in the same area the day before. Tr. 984. Evidence consisting of notes from Brody's Mr. Webb tends to support that the Inspector was in that area the day before he noted the problem with the cribs but the Inspector could not recall if he observed the cited conditions on the previous day.[33] Tr. 985-987.

A separate challenge to the Inspector's recounting involved why he permitted four days to abate the condition, if it was as serious as he contended. The Inspector speculated that the four days could be attributable to the end of his 40 hour work week. Tr. 989. The Inspector agreed that a large number of miners used the roadway where he cited the condition. Given that abatement time he allotted, he was asked how he concluded that the condition was S&S. The Inspector responded that he did not consider it to be an imminent danger. Tr. 991. The Court interceded, noting that the question posed by Brody's Counsel was fair and basic, given that many miners would be traveling in the cited area and given that he considered it to be S&S, how was it that he allowed four days for abatement. Tr. 993. The Inspector responded that a big percentage of those exposed would be on mantrips and he thought that the mine had begun steps to correct the problems right away. Tr. 993-995. The Court observes that the Inspector's response did not explain the inconsistency between the conditions he observed, their severity and the response time he allowed. As the Court stated at that time, "[the inspector] has not come up with a good answer for this." Tr. 995.

Inspector Hatfield then testified with regard to the second, related, citation, **No. 8155909.** The Inspector stated that the same conditions he noted with regard to Citation No, 8155908 led him to issue the second citation. As noted above, this second citation deals with the preshift examination requirement and the Inspector believed that the examiner should have noted the

---

[32] The cross-examination point being that problems with 4 cribs in an area with 80 cribs is a small number of problematic cribs. Tr. 979-980.

[33] The Inspector denied telling Mr. Webb that he had indeed seen the conditions the previous day and wanted to see if the mine would notice them. Tr. 988.

condition. In this regard, the Inspector referenced the "rules of nine" which pertains to nine standards that should be included in preshift exams, as those standards were often linked to fatalities. Tr. 1007. After finding the alleged violative conditions, the Inspector later checked the preshift exams but found no listing of those conditions. Tr. 1009. The Inspector believed that the inadequate roof exam contributed to a roof fall hazard that the preshift examiner should have detected and recorded in the record book. He marked the violation as S&S because it contributed to the exposure to the hazard of falling roof in the area where the cribs were dislodged. Tr. 1010. He also considered the obvious nature of the cribs warranted a moderate negligence finding.

As noted, as the citations were discussed together, the cross-examination pertained to both matters as well. When asked the basis for concluding that the cribs were dislodged at the time of the preshift exam, the Inspector stated it did not look to be recent and that, more likely, it had existed for a couple of days. He again stated that he did not observe the condition the day before or he would have cited it at that time. He did not agree with the contention that an examiner could have simply missed three or four cribs among 80 in that area, though he did not observe the problem the day before. His explanation for this was that he would've been focusing on other concerns the day before, such as looking at ventilation controls. Tr. 1014.

In its defense to these matters, Brody called Kevin Webb back to the stand. Stating that the cited conditions were in an area of about 800 feet, Mr. Webb described the cribs as "weathered." Tr. 1020. They were located next to the travelway, but he maintained that only one of them was dislodged. Tr. 1021. Importantly, from his perspective, three of the four points of the crib were still supporting the top. Tr. 1022. He estimated that there were between 60 to 80 cribs in this eight break span where the problems were found. The cribs were part of supplemental roof support installed in this area.[34] Tr. 1023. Mr. Webb then proceeded to identify a number of supplemental roof supports that were installed in the cited area. This prompted the Court to inquire whether this line of inquiry was helping, *or actually hurting*, the Respondent's defense. After all, those supplemental supports, in the Court's view, tended to show how problematic things were in the cited area. Tr. 1029.

Questioning then turned to Mr. Webb's notes of April 3, 2013. Ex. R 16 D. The notes were offered to show that the Inspector had been in the area the day before he issued these citations. Tr. 1031. The Inspector made no mention of any problems in that area on that day prior to issuing the citations. Webb also stated that it was possible that the one dislodged crib could have occurred after the preshift was done. As for the three cribs he described as "weathered," Webb asserted that it would be easy to miss those conditions. Tr. 1035. Importantly, Mr. Webb stated that the Inspector advised him that he had noticed the problematic cribs the day before he issued the citations and that this was the reason he stopped that day to check on their condition. Tr. 1036. The cited conditions were abated in about a half hour and Webb confirmed that four days were given to abate them. In that interval the area was not required to be dangered off. Webb agreed that the cited area was in fact heavily traveled. Tr. 1038. Mr. Webb did not feel that the conditions were S&S because there were so many other

[34] Although photographs, taken by Mr. Webb, per Exhibit R 15C were introduced, showing some of the cribs along the 4B belt line, they were not admitted into the record because they were taken only two months before the hearing and consequently long after the citations involved here were issued. Tr. 1023.

things there to support the roof. Tr. 1039. He also stated that there was no loose rock present. Tr. 1040.

On cross-examination, Mr. Webb was directed to Ex. R 16 E and its notation that states: "see cribs, need cribs . . . recapped, 4B." Tr. 1041. Webb acknowledged this was noted once he and Inspector Hatfield had gone outside the mine. Upon further questioning, this time by the Court, Mr. Webb agreed that the reference in that exhibit to "need cribs" was written after the citation for an inadequate preshift. Tr. 1043. However, Webb maintained that this was written *after* the inadequate preshift citation was issued and that it did not reflect that the condition had been noted before it. Tr. 1044.

Brody then presented a second witness regarding these two citations. Mr. Jay Heiss, a fire boss at Brody testified. Heiss was the individual who made the relevant preshift examinations for these citations. He stated that examining the cribs is part of his responsibility for a preshift. Tr. 1051. Heiss stated that he did not observe any weathered cribs at the time he did his preshift exam on April 4th. He also did not agree there was a dislodged crib. Tr. 1052. Heiss stated that he saw no hazardous roof conditions during that preshift exam. Tr. 1053. Upon cross-examination Mr. Heiss stated that he was not with the Inspector nor Mr. Webb when the citations were issued.

At the conclusion of the testimony for **Citation No. 8155909**, the Court announced that it was dismissing that citation alleging an inadequate preshift examination. Tr. 1055.

As for Citation No. 8155908, the Court finds that the violation was established but that the S&S characteristic was not demonstrated. This necessarily involved credibility determinations as well. Upon consideration of the entire record, the Court also finds the negligence to be low, and taking into account the statutory criteria, a civil penalty of $800.00 is imposed.

The proceeding then moved to other matters. Citation No. 8155925, pertaining to WEVA 2014-620, Gov. Ex. 27, was announced as settled. The citation was modified to a **non-S&S** matter and accordingly to "unlikely" with the penalty adjusted per the Part 100 formula. Tr. 1056. Pursuant to that Brody has agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $ 1304.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2014-620.

Citation No. 8155926, also within WEVA 2014-620, was also modified to a **non-S&S** violation, with the penalty to again be calculated per the Part 100 formula. Gov. Ex. 28. Tr. 1056. Brody has agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $ 688.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2014-620.

Citation No. 8155936, again within WEVA 2014-620, Gov. Ex. 29, was also modified to **non-S&S**, with the penalty to again be calculated per the Part 100 formula. Tr. 1057. Brody has

agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $ 3144.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2014-620.

Citation No. 8155937, within WEVA 2013-1189, Gov. Ex. 30, was also modified to **non-S&S**, with the penalty to again be calculated per the Part 100 formula. Tr. 1058. Brody has agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $ 1658.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2013-1189.

Order No. 9000277, within WEVA 2014-0619, Gov. Ex. 31, a section 104(d)(2) order, alleging an unwarrantable failure, was settled, and affirmed in all respects, but with a penalty reduction from $66,142.00 to $52,913.60. Although initially accepting the proposed reduction, the Court later instructed that additional information would have to be provided to justify the proposed reduction. Tr. 1060. The Secretary has complied with the Court's direction, supplying sufficient additional information so that the Court can meet its statutory obligations pursuant to Section 110(k) of the Mine Act. The settlement is therefore approved.

Order No. 9000278, within WEVA 2014-0619, is the related preshift to **Order** No. 9000277 and was also settled. The original proposed penalty was $18,742 and the agreed penalty is $14,993.00.[35] Tr. 1061. The parties have agreed to resolve this Order for the same reasons and based on the same circumstances as set forth in the settlement of Order No. 9000277. Accordingly, the Secretary has complied with the Court's direction, supplying sufficient additional information so that the Court can meet its statutory obligations pursuant to Section 110(k) of the Mine Act. The settlement is therefore approved.

[35] Settled Order No. 9000278, issued June 5, 2013, states: "[a]n inadequate preshift examination has been conducted and recorded in a book for that purpose on the 3 Section Panel. The approved roof control plan is found on this day not being followed on the 3 Section Panel. The bolt spacing for installed primary support (6´ resin rods and 6´ torque tension rods) and supplemental roof support (10´cable bolts) is not as required. Numerous areas measured greater than the 36" with cable bolts installed in the intersections or the cable bolts being installed further than every other row of roof bolts. The mine roof on this section is found broken laminated slate and sandstone with a coal rider seam within 7´. This area, although not a high stress area, is West of Pond Fork with a coal rider seam present contributing to a hazardous roof condition. This examination is conducted by an agent of the operator is exhibited by the record.

Order No. 9000304, within WEVA 2014-0619, Gov. Ex 33, and Citation No. 9000307, within WEVA 2014-620, Gov. Ex. 34, were disputed matters. MSHA Inspector Jack Hatfield testified regarding these matters.

A section 104(d)(2) order, No. 9000304, issued July 24,2013, stated: "An inadequate preshift examination has been conducted and recorded on the surface prior to the workers traveling underground to the new 1 Section Panel where workers are observed performing work on this day. The record of the examination states that 'section moving under construction'. On this day hazards of loose unsupported slate and broken rock/coal brows are found on the new 1 Section Panel. These adverse roof conditions are obvious and required dangered off or correction immediately. Equipment has been moved to this new panel and work was being performed for the beginning of second mining. This panel has set for an extended time with no evidence of rehabilitation prior to moving mining equipment to the new section. This inadequate examination exposes the workers to roof and rib falls while performing work. Four of the thirteen disabling accidents reported to MSHA from this mine this year have been from roof falling onto the workers. This action exhibits conduct which falls below a standard of care established by the Mine Act to protect the workers against the risks of harm. This mine operator has engaged in aggravated conduct constituting more than ordinary negligence by not conducting an adequate examination and correcting these roof and rib fall hazards. This citation is unwarrantable failure to comply with a mandatory standard. Standard 75.360(b)(11)(i) was cited 5 times in two years at mine 4609086 (5 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard." Gov. Ex. 33A.

The Order marked the negligence as "High," with the gravity as S&S and fatal, with one person affected. Inspector Hatfield issued the Order to Brody foreman Jamie Lester. Tr. 1063. The Inspector stated that, during the course of his E01 inspection he could not find anything to show that a preshift examination had been conducted for the area where they were moving, called the new 1 section. He found information for July 23rd, but nothing for July 24th. In this area, as the mine started pillaring back, they decided to put belt in that panel and pull pillars there. Tr. 1064. Hatfield, upon checking on the surface, found no record that a preshift had been done for that area. Tr. 1064-1065. The Inspector then traveled to that section and found that they had produced coal there on the day shift. This conflicted with the preshift report which only indicated that the section was moving. Tr. 1065. Jamie Lester, evening shift foreman, accompanied the Inspector. Upon arriving at what the Inspector called the new 1 section, which was located third right off of 4 south, he found problems with the roof. He observed broken ribs, and the roof was broken. He found bad roof conditions, loose, broken roof, slate and a "monster" rock brow[36] at the No. 8 entry. The Inspector expressed that the mine failed to do rehab work before moving up there but just went ahead. Tr. 1066. The Inspector stated that the broken roof was "just about everywhere." Tr. 1070. It was his opinion that the mine had done nothing to try to scale the rock and no spot bolting had been done either. In terms of the size of the cited area, the Inspector said it covered approximately eight entries. He observed miners working in the cited area. Tr. 1073-1074. He did not observe workers at the monster brow however. While Inspector Hatfield had quite a tendency to ramble in his answers, his point was that the mining activity he observed and the problems with the roof he found were not recorded in the preshift

[36] A brow is part of coal or rock that has broken from the coal pillar. It is loose, but self-supporting, standing by itself. Tr. 1069.

examination. In terms of the evidence that mining was ongoing, the Inspector stated that the miners were hanging cables and the continuous miner had been moved from the move up box to where it was positioned to start mining coal. Tr. 1076. He explained his S&S finding as based on a confluence of factors, with so many things wrong on the section that it was reasonably likely that an accident would occur. Tr. 1076-1077. He added that the problems he found went beyond the roof conditions. Tr. 1077. He believed that the preshift exam should have noted ventilation problems. Although the Order doesn't include it, when asked if the preshift should have included issues regarding emergency access, such as a first aid kit or shelter, the Inspector responded: "The shelter should have been noted in the - - in there. And the escapeway, the alternate and primary escapeway, markings, your lifeline and that, should have been in [the preshift examination book]." Tr. 1079. Despite the detours to other issues, the Inspector returned to the roof conditions as his primary concern. Tr. 1079-1080. He considered the failures to list the problems to be unwarrantable failure, aggravated conduct with no mitigating factors. The matter was abated by moving the workers off of the panel and by marking the areas needing scaling.

The direct examination then proceeded to the related violation so that the cross-examination could cover both issues together. Accordingly, Inspector Hatfield was next directed to Gov. Ex 34. The related Citation, citing 30 C.F.R. §75.202(a), requires that roof and ribs be adequately supported to protect miners from rib or roof falls. Inspector Hatfield believed that the roof conditions he observed presented a roof fall hazard for those working on that section that evening and that a fatal accident could reasonably be expected. Tr. 1084. It was noted that the Inspector issued this alleged violation five days after the related preshift violation. Though hard to follow, the Inspector essentially stated that he would have issued the 75.202 violation sooner but that the situation was "so ugly" that he "brain locked" and that this accounted for his delay. Tr. 1088. Regrettably, the Court finds that this explanation dubious. In attempting to better understand his testimony, the Court learned from the Inspector that when he issued the 9000307 citation some of the roof problems had been corrected when it was issued. Tr. 1089. By 1530 on July 29, 2013, all of the roof issues had been abated. Tr. 1090.

In the cross-examination, it was revealed that, at least in part, the decision to issue the Citation No. 9000307 roof violation was the product of a discussion between the Inspector and his supervisor. Tr. 1095-1096. However, the Court views this as a non-issue. The citation either stands or falls based on the Inspector's testimony of the conditions he observed and the Court's evaluation of that testimony along with the testimony of other witnesses regarding that matter. In other cross-examination matters, regarding the alleged preshift exam violation, Brody noted that the section was being moved. An issue was whether work was being done in what was referred to as the old No. 1 section or the new No. 1 section. It was Inspector Hatfield's position that the preshift exam documents were confusing and that Brody could not show him where the workers were at the time of that exam. Tr. 1100. Directed to that preshift exam, dated July 24, 2013, Respondent's Exhibit 17 D, performed by Brody's John Pauley, Inspector Hatfield agreed that was the preshift exam he deemed to be inadequate. Tr. 1101-1102. Hatfield did not speak with Pauley before issuing the alleged preshift violation. Tr. 1104. The point Brody was urging was that, in the process of a section move, areas where miners work or travel is constantly changing and that a preshift examiner might not, in such circumstances, be able to anticipate all the areas the miners might be in that process. Inspector Hatfield, somewhat hesitantly, agreed.

Tr. 1106. However, it was the Inspector's position all the equipment involved used the same pathway from the old to the new section, and that Brody could not show him the dates, times, and initials to establish that a preshift was done prior to the miners coming up to the new section. Tr. 1106. The Inspector agreed that the move to the new section had not been completed. Tr. 1109. He asserted that the continuous miner was at the new section and the belt was installed, and that 4 MRS units, a roof bolter and three shuttle cars were there but there was no power center yet. Tr. 1109, 1113. Hatfield maintained that the broken roof and broken rock brows where in the area where the equipment had been moved. Tr. 1114. While the continuous miner might have been parked in a safe location, the Inspector maintained that it had to past the hazardous area to arrive at the safe location. Tr. 1114-1115.

Inspector Hatfield acknowledged that Brody's Dave Morris told him that he was making an exam of the area where the order was issued. Morris agreed with the Inspector that the area needed some work. Tr. 1116. He agreed that Morris was using red spray paint, marking off dangerous areas. Tr. 1118. Hatfield was of the view that Mr. Morris was not conducting a supplemental examination of the area, but rather was conducting an on-shift exam. Tr. 1119.

In response to the suggestion of Brody's Counsel that not was going to be performed yet up on the new part of the panel, the Inspector disagreed, stating that they "were hanging cables with anticipation of moving the feeder and the transformer up onto the section, and the equipment had already been moved up there." Tr. 1121. Miners told the Inspector that they were hanging cables and moving equipment. Tr. 1123. To the suggestion that Mr. Morris had already performed an examination of the areas where the miners had been working, the Inspector responded that if that was the case there was no evidence of such an exam by his certification with dates, times and initials. Tr. 1124. Hatfield stated that if work has been planned, you can't do a supplemental exam; a preshift exam is required in such circumstances.

Brody called James Allen Lester, shift foreman, in its defense of these matters. He recalled the events associated with them and he traveled with Inspector Hatfield at that time. Tr. 1136. Mr. Lester maintained that he saw dates, times and initials to show that the area, the new No. 1 section, had in fact been examined prior to miners entering it and that they were the initials of Eddie Puckett. Tr. 1137. He then added seeing the initials of Willis Dickens in the area before one turned up on the new section. Tr. 1137. The Secretary posed no questions of the witness.

The Court finds that these violations were established, but that neither was S&S, nor was there an unwarrantable failure established. It must be remembered that the burden of proof is on the Secretary. It is found that, under the preponderance standard, matters were unclear as to the state of mining, whether a preshift was done and as things evolved whether a supplemental shift was underway. Credibility determinations, partially adverse to the Secretary, played a role in the Court's determinations too.

For Order No. 9000304, within WEVA 2014-0619, the alleged inadequate preshift examination, the Court finds that the preponderance of the evidence supports that this Order was properly issued but that the findings of unwarrantable failure, high negligence, S&S, reasonably

likely, fatal and one person affected are supported were not. A civil penalty of $5,000.00 is assessed. As a further consequence, the citation is modified to a section 104(a) citation.

As for Citation No. 9000307, within WEVA 2014-620, a section 104(a) citation, which is based on the same essential facts, a $4,000.00 penalty is assessed.

Additional matters which were settled by the parties:

Citation No 7167412, Gov. Ex. 8A was settled, with the Secretary agreeing to delete the S&S designation. The citation was accepted as otherwise written and the penalty agreed to be the amount derived from application of the Part 100 regulations. Tr. 488. That amount is $5,080.00.

Citation No 7167474 from WEVA 2013-997, with the Secretary agreeing to delete the S&S designation. The citation was accepted as otherwise written and the penalty agreed to be the amount derived from application of the Part 100 regulations. Tr. 553.

Citation No. 9000286 from WEVA 2014-0620, a section 104(a) citation, relating to an intake escapeway not being properly maintained, was settled as issued, including accepting the S&S finding and paid at the proposed amount of $3,405.00. Tr. 643.

Citation No. 7165680, WEVA 2014-0620. Brody accepts this citation, as issued, including the S&S finding. This includes agreeing to pay the proposed penalty of $29,529.00. Tr. 644.

Order No. 9000305, WEVA 2014-0619. Brody accepts this violation as issued, including the S&S finding but with mitigating factors, the penalty was reduced from $53,858 to $43,086. That violation cited section 75.1506(c)(1) requires refuge alternatives to be maintained within a thousand feet of the face and that the section was being moved at the time of the Order's issuance and the mine had not resumed production. Tr. 646. The Secretary presented adequate justification to the Court for the reduction in the proposed penalty.[37]

[37] The Secretary explained the basis for the penalty reduction: MR. WILSON: Yes, your Honor. The standard cited requires that refuge alternatives be maint[ained] within 1,000 feet of the face or areas where mechanized equipment are being installed. The section was moving from one location to another. They hadn't started production yet. So the company would argue that those were mitigating circumstances. Taking that into account, taking into account that the company has agreed to accept the violation as issue including the S&S finding, we've agreed to the modest penalty reduction.

THE COURT: Okay. And -- and this is not giving you a poke -- maybe a little. I would just note on the record how easy that was for the [S]ecretary to provide the court with the information that is required under the statute. It was not onerous, as I read in some filings in other matters. Very easy to provide the minimal information, as opposed to just saying, we've looked at this [Federal Mine Review] [C]ommission and it's good. Now it's your [i.e. the Commission's] job to bring out the stamp. Okay? So that -- I don't want to -- I don't want you to offer a rebuttal to that.

MR. WILSON: I wasn't planning on it.

Citation No. 9000309, WEVA 2014-620. For this 104(a) citation the Secretary agreed to delete the S&S finding. Brody otherwise accepted the citation as issued and the parties agreed that the penalty will be the amount derived Part 100. Tr. 647.

The following citations/orders were presented during October 7th through October 9th, the third week of the hearings in these matters.[38] Several of the citations/orders set for the third week of the hearings were settled and the terms of those settlements were later stated on the record.

Also addressed were settled matters from the first two weeks of the hearing: They are as follows:

First is Citation No. 7167412. That is contained in docket No. WEVA 2013-997. The parties agree to modify that **to delete the S&S finding**.

The next is Government Exhibit 10, in citation No. 7167474 contained in docket No. WEVA 2013-997. The parties agree **to delete the S&S finding** for that one.

The next is Government Exhibit 12, in citation No. 9000286. That is part of penalty docket WEVA 2014-620. Brody agreed to accept that one as issued, including the S&S finding.

The next is Government Exhibit 13, in citation No. 7165680, contained in docket No. WEVA 2014-620. Brody agreed to accept that one as issued.

Next is Government Exhibit 14, citation No. 9000305, contained in docket No. WEVA 2014-619. And the company agreed to accept that one as issued.

Government Exhibit 15, citation 9000309, contained in docket WEVA 2014-620. The Secretary agreed **to delete the S&S finding** on that one.

Government Exhibit 19, citation No. 8151320, contained in docket No. 2013-997. The company agreed to accept that as issued.

Government Exhibit 20, citation No. 7168801, docket No. WEVA 2013-370. The company agreed to accept that as issued.

Government Exhibit 21, citation No. 7168899, contained in docket No. WEVA 2014-620. The company agreed to accept that as issued.

THE COURT: And I just wanted to note for the record, it took you less than 30 seconds to justify the reasons for the reduction. Tr. 645-646.

[38] At the outset of the third week, the Court ruled on Brody's Motion to enforcement a claimed settlement, pertaining to matters in this litigation, denying the Motion. The reasons for the denial are set forth at transcript pages 1155-1156.

Government Exhibit 23, No. 7167473, contained in docket WEVA 2014-620. The Secretary agreed to **delete the S&S finding.**

Government Exhibit 27, citation No. 8155925, contained in docket WEVA 2014-620. The Secretary agreed **to delete the S&S finding**.

Government Exhibit 28, citation No. 8155926, contained in docket WEVA 2014-620. The Secretary agreed **to delete the S&S finding**.

Government Exhibit 29, citation 8155936, contained in docket WEVA 2014-620. The Secretary agreed to **delete the S&S**.

Government Exhibit 30, No. 8155937, contained in docket WEVA 2013-1189. And that is to be modified to **delete the S&S**.

Government Exhibit 31, citation 9000277, contained in WEVA 2014-619. The company agreed to accept that as issued.

Government Exhibit 32, citation No. 9000278, contained in docket WEVA 2014-619. The company agreed to accept that one as issued.

In terms of penalty assessments, Brody has stipulated that it is a very large mine and the government has submitted R 17 reports for each of the matters litigated. Tr. 1166.

All of the following exhibits pertain to assessed violation histories:

Government Exhibit 1-D, pertaining to citation 8153617

Government Exhibit 2-F, pertaining to citation 7167386.

Government Exhibit 3-G, pertaining to citation 7167387.

Government Exhibit 4-E, applies to two citations, 7167388 and 7167389, which were both issued on the same day, so the same history applies to both.

Government Exhibit 6-E, relating to citation 7167393.

Government Exhibit 7-E, pertaining to citation 7167405.

Government Exhibit 9-D, relating to citation 7168854.

Government Exhibit 11-E, pertaining to citation No. 8155914.

Government Exhibit 16-D, pertaining to citation No. 9000313.

Government Exhibit 17-C, pertaining to citation No. 7165694.

Government Exhibit 18-C, relating to citation No. 7166781.

(Government Exhibits 1-D, 2-F, 3-G, 4-E, 6-E, 7-E, 9-D, 11-E, 16-D, 17-C, and 18-C, were all admitted. Tr. 1168.)

III. Alleged Ventilation and Methane Violations; Conditions and/or Practices contributing to Ventilation and Methane Hazards

For the third week of the hearings, the citations/orders all involved alleged ventilation hazards. It was noted that in some instances a given inspector may have marked an alleged violation as a safety hazard but that health issues may attend those as well, as reflected in the inspectors' notes. The Secretary moved to amend those citations to conform to the evidence. In response, the Court expressed that it did not intend for a clerical omission to override the attendant facts, but that any final ruling would have to await consideration of any objections that Brody may raise. Tr. 1172.

The proceeding then addressed settlements reached by the parties for some matters as follows:

Citation No. 8125045 in Docket No. WEVA 2013-997. Government Exhibit 35, was settled. The Secretary has agreed **to drop the S&S**, to modify the gravity from reasonably likely to unlikely, to reduce the penalty from 21,442 to 4,329. That penalty was calculated on the gravity, if you reduce the gravity from reasonably likely to unlikely, that knocks 20 penalty points off the regular assessment, which this was. Brody agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $4,329.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2013-997.

Citation No. 8139621 in penalty docket No. WEVA 2014-620. Government Exhibit 36 was also settled with the Secretary agreeing to **drop the S&S** and reduce the gravity from reasonably likely to unlikely. Tr. 1173-1177. Brody agreed to accept the citation as modified and as otherwise issued and has agreed to pay a penalty of $1,944.00, as calculated under Part 100 assuming a gravity finding of unlikely and using the penalty points as set forth in penalty docket WEVA 2014-620.

Order No. 8154782, from Docket No. WEVA 2014-619

The first contested **Alleged Ventilation and Methane Violation** matter for week 3 was Order No. 8154782, issued June 5, 2013, from Docket No. WEVA 2014-619. Gov. Ex. 37A. MSHA Inspector Timothy Workman, the issuing inspector for this matter, testified. The condition or practice listed for this states: "The Approved methane dust control portion of the ventilation plan was not followed on the 004-0 MMU Section. The plan requires 8500 cfm of air to be maintained behind the exhausting line curtain where the continuous miner is operated in the face, when checked by the inspection party the 216 continuous miner was mining in the #2 entry

and only 3259 cfm of air was present behind the exhausting curtain. The distance from the face to the last row of bolts measured approximately 27 feet. This violation of a mandatory standard contributes to hazards of methane ignitions, explosions, and hazards associated with exposure to dust that is reasonably likely to result in fatal injuries. The exposure to this measure of danger includes but may not be limited to: The 13 persons that worked on the section this shift when the violation was observed. This is a 5 day, 103i, methane spot mine. The operator was also cited for failure to maintain cutter drum bits (reference citation 8154784). This violation is an unwarrantable failure to comply with a mandatory standard. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence in that the violative condition existed for a period of time. The section foreman had reason to know of the condition in that, the foreman was aware that ventilation controls had been altered on the section approximately 20 minutes prior to MSHA arriving on the section, by removing a solid curtain between the # 5 and # 6 entries, short circuiting the air on the dual MMU #3 Section where the 005-0 and 004-0 MMU's operate. The foreman did not notify the continuous miner operator to turn off the equipment when the ventilation controls were altered and did not ensure that proper ventilation was maintained in the # 2 entry during and after the alteration to the ventilation curtain. The mine has been cited 63 times in two years for violation of 75.370(a)(1) and should be on heightened alert for this type condition. Standard 75.370(a)(1) was cited 63 times in two years at mine 4609086 (63 to the operator, 0 to a contractor)." Gov. Ex 37A.

Inspector Workman was at the mine on that date during a section 103(i) spot or "impact" inspection. Such inspections are designed to be intensified with the idea of trying to see the actual mining conditions. Tr. 1183. The primary purpose of a spot inspection is to check things associated with methane liberation and ventilation. Tre. 1185. This mine is on a 5 day spot because it liberates more than 1 million cubic feet of methane in a 24 hour period. The Inspector stated: "As I approached the No. 2 entry, where I could hear a continuous miner operating, I observed dust coming back into the intersection of the entry as the continuous miner was leading the shuttle car. And when I viewed the dust, I approached the miner, and the shuttle car left. I told the continuous miner operator I wanted to take an air reading." Tr. 1186. Elaborating, the Inspector stated that he "was traveling across the section, through the crosscut, and observed that dust [was] coming out on the entry w[here] the continuous miner was loading." Tr. 1187. He saw "dust traveling out of the entry back into the intersection. And the dust was about the consistency of fog." The fog of dust covered an area between the curtain and the rib, where the shuttle car and the continuous miner operator was." Tr. 1187

Upon viewing the dusty conditions, the Inspector approached the continuous miner operator, who turned off his machine. He advised that he was going to take an air reading. Tr. 1188. The methane monitor on the machine had a readout of 0.4 at that time. Tr. 1189-1190. He found the continuous miner towards the working face and the curtain was with the outspacing towards the curtain and the rib. This meant that the continuous miner was to the Inspector's right, towards the face and the curtain was hung on the left rib. Tr. 1190. The curtain was 35 inches away from the left rib. Twenty-seven feet had been taken out of the cut. Tr. 1191. By his estimation, they were approximately two-thirds done with that cut. Tr. 1192. The Inspector's "air reading was taken between the curtain and the rib on the exhausting side of the curtain, at the end of the line curtain." Tr. 1192. He described in detail the method he employed

in taking his anemometer reading. The readings are reflected in his Order, No. 8154782, which is quoted above.

Once he had taken his reading, the Inspector informed Brody's Shannon Dolin of the results, who then began taking his own air reading. Tr. 1200. At the same time, he saw that some miners began taking corrective actions on the curtain, by tightening it up and extending it. Tr. 1200. Even with those actions, Dolin's reading was 5723, which was still low. The Inspector made it clear that the corrective actions, undertaken as Dolin was taking his own reading, would have helped increase the air reading he obtained. Tr. 1201.

Inspector Workman stated that he had several hazard concerns associated with the condition he observed: accumulations of methane due to the diminished ventilation and exposure to dust, which presented health and safety issues. Tr. 1201-1202. With low air, the ability to sweep out methane is diminished. Tr. 1205. If methane levels reach 1 % the operator is required to take additional steps. Tr. 1205-1206. Those levels were not present, but a point of the ventilation requirements is to prevent them from developing. Methane liberations, he explained, are not consistent and one can't predict how quickly accumulations of methane can develop. Tr. 1207. It was mentioned again that the Brody mine is a high methane liberating mine. Spot inspections, intended to deal with such issues, can be at 15, 10 or 5 day intervals. As noted, the Brody mine inspections occur with the highest frequency, at 5 day intervals.[39] Tr. 1210.

The Inspector stated that when he came to the entry, immediately before he issued Order No. 8154782, the continuous miner was operating in the No. 2 entry in the location where he found the low air. Tr. 1216. That low air was traveling up into the cut where the continuous miner was working and then being exhausted behind the line curtain. There were ignition sources identified by the Inspector: electrical equipment, the continuous miner itself, and the shuttle car were named. The condition of the cutter drum bits on the continuous miner were of concern too, as an additional ignition source and a citation was issued for that. Tr. 1218-1220. Citation No. 8154784, Gov. Ex. 37 E, Tr. 1222. (The cutter bit issue, while related and admitted to the record as part of the broader picture for Order No. 8154782, is not part of the Secretary's pattern claim. Tr. 1223.) Among the approximate 81 bits, because there is some bit redundancy in the cutting drum, not every one of them has to be perfect, but in this instance several bits were missing in a general location and such a condition increases the likelihood of an ignition, if methane was encountered. Tr. 1220-1221. Thus, a concern was, with the low air, and the issue with the bits, matters were made worse. Tr. 1221-1222.

Regarding the Inspector's marking the Order as S&S, he expressed that the low air he found contributed to the measure of danger related to the methane hazard. A methane ignition would be reasonably likely to result in an injury and such injury would be of a reasonably serious nature. Tr. 1231. Thirteen miners, as noted in the Order, were exposed to that risk in the cited

[39] Although not directly part of this Order but worth noting, the Inspector issued another citation at the same time because the methane gas detector used by the continuous miner equipment operator wasn't functioning properly, to the point that it was useless. That methane detector is apart from the detector on the continuous miner itself. Such readings are done within 5 feet of the face and must be done every 20 minutes. Tr. 1211-1213. Gov. Ex. 37 D. Thus, methane is such a concern, with its potential for an explosion, that backup measurements, such as this are required to be taken.

area. Tr. 1232. Under certain, limited, situations, namely at a shift change, that number could double. In sum, the Inspector found, within the same general time frame, the low air, the 0.4 (i.e. one half of one percent) percent methane, the defective methane detector, and the cutter bit issue. Those were the factors which the Inspector considered to be in confluence. Tr. 1234-1235. However, the Court expressed that the defective methane detector, while an important concern, was not properly part of the S&S analysis for this matter. Tr. 1236. Continuing with the Inspector's testimony, Workman stated that the dust he encountered itself contributed to the hazard of a methane ignition, as coal dust itself can ignite or explode. The hazard is only increased with the presence of methane. Tr. 1237. Further, an explosion can occur in such circumstances, even where the methane has not reached the explosive level range. Tr. 1237. There was also, in the Inspector's estimation, a visibility hazard present. Here, there was dust coming into the area where the shuttle car and the continuous miner operator were working. The dust created a visibility issue and increased the risk that the miner operator could be struck by the shuttle car operator.[40] Tr.1241-1242.

The Inspector affirmed that his S&S finding was based on two, independent, grounds: safety and health concerns. Tr.1243. For the latter, he was concerned about the exposure to respirable dust and how such dust can lead to lung diseases. Tr. 1243-1244. Both the continuous miner and the shuttle car operators were exposed to that dust. This mine is also subject to a reduced dust standard. The usual dust standard is 2.0 but the reduced dust standard in that area is set at 0.9. This lower standard is used where quartz silica is present. Quartz makes respirable dust significantly more hazardous to inhale. The concern is lung disease from such exposure, silicosis and pneumoconiosis, disabling and fatal consequences. Tr. 1244-1248.

To abate the low air problem, several steps were required, as adjustments to the line curtain did not solve the issue and other ventilation controls were required. Tr. 1248-1249. It was discovered that ventilation controls had been moved in order to move equipment in the area but that it had not been reestablished. Tr. 1250. The Inspector marked the violation as an unwarrantable failure because the mine failed to install the fly pads properly and the condition had not just occurred. The ventilation controls had been knowingly removed by the section boss. Production should have been shut down until the controls had been reestablished. Further, it was not a simple fix; it took an hour to get things right. Tr. 1251-1252.

Upon review of the cross-examination, addressing things such as that continuous miner methane monitor was working properly, that no issues were encountered during the inspector's imminent danger run, the location of the continuous miner to the right rib, that about two-thirds of the cut had been completed, that a shuttle car was being loaded when he entered the area,

---

[40] Inspector Workman noted that the continuous miner operator does his job remotely. He is not physically on the continuous miner. However, as he is standing apart from the machine he is remotely operating, he is subject to being struck by other equipment, such as the shuttle car operator, a risk heightened by the dust reducing the visibility. It is fair to state that the dust impaired the visibility but that there was not a complete impairment; one could from 20 feet away, at least make out the presence of things at that distance. The Inspector's analogy to fog was reasonable. Tr. 1240-1241. Importantly, one must remember that, in a coal mine such as this, visibility is not great to start. It is limited under the best of circumstances. The dust, when struck by a cap lamp or the light on machinery, also has a reflective effect and that too diminishes visibility. Tr. 1242.

attempts to claim that the face was idle at the moment the inspector observed the problem, subsequent air readings, the suggestion that the low air existed for no more than 20 minutes, that the inspector did not actually see the bits striking the face when he issued the citation for that problem, and the communication between the continuous miner operator and the shuttle car operator, among other topics, it is the Court's opinion that such questioning did not diminish the Inspector's testimony on direct examination. (Tr. 1254-1291). The subsequent redirect and the re-cross examination did not alter the Court's view of the testimony. Tr. 1291-1301.

In its defense of this matter, Brody called Shannon Dolin, shift foreman. He was present with the inspector at that time. Dolin stated that the miner was backing out of the No. 2 entry at the time and was not cutting coal at that moment they arrived, nor was the shuttle car being loaded. Tr. 1305. Instead, he maintained that the miner was preparing to go to another entry. Thus, there was a direct conflict in the testimony on this point. The difference in the accounts matters, as the air need only be 3,000 when not cutting or loading. Dolin considered such circumstances to be an idle face. Tr. 1307. He also stated that the odd manner in which the Inspector took his air reading caused him to act as if he were a regulator, albeit a human regulator, but with the effect of blocking the air. Tr. 1309. Dolin also stated that the continuous miner's position was not sitting straight as it would be if it were mining and loading. Tr. 1310. Thus, Dolin's testimony was that because they weren't cutting coal and because the measurement itself was compromised in the way it was taken, there was no violation. Tr. 1311. In addition, Dolin's own measurement, taken right after, and with no ventilation changes yet made, was 5500. Tr. 1312. The air reading taken before any coal was cut that day was 9,310. R's 19 C. Tr. 1314. A production sheet report for June 5th reflects that coal was mined from 8:40 to 10:00 a.m. that day, with the next cut occurring from 12:20 to 1:20 p.m. R 19 E. Dolin stated that, though permitted, no deep cuts were being made on that day. He stated that the cuts had been shortened to control the top better. Tr. 1316. The shorter cuts allowed them to get in faster so that bolting could occur sooner. Further displaying the divergent testimony between the Mr. Dolin and the Inspector, Dolin stated that there was no dust in the area when the Order was issued. Tr. 1318. To address the Order, Dolin stated that they "just hung a check curtain - - a couple check curtains across the fly pads." Tr. 1319. That had to be done, he stated, because of the way the continuous miner was positioned. Once that was done, the air issue was resolved. Tr. 1320. Dolin stated that it is easy for a fly pad to become torn down on a corner by a shuttle car or other equipment or even by a person walking on it. Tr. 1320. Consistent with the thrust of his testimony, Mr. Dolin didn't know anything about ventilation changes occurring 20 minutes before the Order was issued nor about any curtain being taken down between the No. 5 and 6 entry. Tr. 1321. As for the damaged drum bits and the contention about water sprays, Mr. Dolin agreed that those are routine maintenance items. Tr. 1322.

On cross-examination, Mr. Dolin, agreed that Ex. R 19E reflects that coal was being produced between 12:20 and 1:20 that day, but that the record of the times "may not have been correct" because he insisted the mining was done. Tr. 1323. Dolin then agreed that the continuous miner would still have been in the entry at 1:20. Tr. 1324. Dolin repeated that the mining was completed and that the miner was backing out of the entry, not producing coal, a status that he viewed as idle, not active mining. Even if miners are still in the entry, and even if the miner is not de-energized, Mr. Dolin considered the face to be idle, as coal was not being produced. Tr. 1325-1327. He did acknowledge that some bits on the cutter needed to be

replaced, but this was done to make the coal cutting faster. He did not know if the worn bits increased the risk of sparking or arcing. Tr. 1334. In terms of the different air readings between the Inspector and his reading, Mr. Dolin didn't know how to explain the difference, other than perhaps that they were positioned differently when taking the measurements. Tr. 1336. As for any notes he may have taken, Dolin was sure that he did take notes, but could not recall the person to whom he gave them. Tr. 1339. Brody, he stated, asks that its employees take notes when they travel with inspectors. Tr. 1340.

The Court concludes that the Order is affirmed in all respects. The violation was clearly S&S and the proposed penalty of $70,000.00 is appropriate when measured by application of the statutory criteria and it is so imposed. The Court's determinations necessarily involved credibility determinations which are reflected in the Court's findings and penalty imposition.

Citation No. 8146352, from Docket No. WEVA 2013-997

For this matter, Brody admits to the fact of violation but disputes the S&S finding. The stipulation included the inspector's air readings, including the manner in which it was taken and the mean air velocity. Tr. 1348-1349. So too, the degree of negligence (low), and the number of persons affected (2), were part of Brody's stipulation, leaving only the S&S issue. Tr. 1350.

MSHA Inspector James Jackson testified about this matter. The citation for which the S&S issue is involved is found in Gov. Ex. 38A. The condition or practice section of this 104(a) citation states that "[t]he operator is not following the approved methane dust control portion of the ventilation plan on the 011-0 MMU on the number 5 section. The Fletcher roof bolter was bolting in the number 2 entry without the required 45 MEAV air. ["MEAV" stands for mean entry air velocity. Tr. 1354, 1356] The number 2 entry was found to have only 35.6 MEAV air while the bolt machine was in operation. Standard 75.370(a)(1) was cited 57 times in two years at mine 4609086 (57 times to the operator, 0 to a contractor)."

The Inspector walked into the number 2 entry and noted that the air didn't feel right. He took a reading and found that the air was low. MEAV refers to the velocity on the wide side of the curtain. Tr. 1354. Brody's methane dust control plan requires an MEAV of 45. When asked if he still believed that the violation was serious, given that the reading he obtained was 80% of the required amount, the Inspector affirmed that he did consider it to be serious because the equipment is operating on that wide side. The velocity is important because it is removing the gas and dust away from the miners and putting it behind the curtain, all with the purpose of preventing prolonged exposure to that gas and dust. Tr. 1359-1360. The Inspector, at the Court's suggestion, drew a sketch to help with the understanding of the cited condition. Gov. Ex. 38 D. Tr. 1360-1369. Brody's Barry Browning was with the Inspector at that time and a roof bolting crew of two men was then installing bolts there. Tr. 1372. The Inspector's concerns were methane and respirable dust. Thus, his concerns had two aspects. The low air moving through the entry being insufficient to get rid of the methane should a methane pocket be encountered. Tr. 1373. Though he found no methane at that time, he noted that the mine is on the 5 day spot inspection regime, reserved for the highest methane producing mines. Methane

can arise all at once or levels can slowly increase. The roof bolting machine, in the process of performing that task, provides an ignition source. Tr. 1375.

The Inspector considered the violation to be S&S because the required level of 45 represents the *minimum* safe level, as per the Mine's plan. Tr. 1378. Here, the level was "well below" that minimum. He did state that not every level below the minimum would be S&S, but at least here, with a reading 20% below the minimum, he considered it to be that. Tr. 1379. Should a methane ignition occur, burns and possibly fractures could result. Tr. 1379.

Inspector Jackson did state that the foreman and the roof bolt operators told him that there was sufficient air when they started. However, he could not account for anything that would cause the claimed reduction after they started. Tr. 1381.

Turning to his other concern, that of dust, the Inspector stated that with the low air, the roof bolt operators will be exposed to the dust as they perform their task. This dust is right above where the roof bolt operators are doing their work, though it is not constant during that work, occurring when the hole is started and if the drill steel gets clogged. Tr. 1383. While he did not actually see dust when he found the violation, his knowledge of dust occurring during such work is based his experience in operating a roof bolting machine. Such dust creates the hazard of black lung silica being inhaled. Tr. 1385. The Court commented at the conclusion of the direct testimony that it could be viewed as a situation where the Secretary, concerned about the S&S quality of the alleged violation, decided to add the health S&S claim. Tr. 1388-1389. Although there was an oblique reference in his notes that "encountering methane, prolonged exposure to dust with low visibility" (Tr. 1388), the Inspector did not mark it as a health violation, marking only "safety" for the citation.

Upon cross-examination, it was noted that Brody employees asserted that they had 6,195 CFM at the start of the bolting and if that were accurate, the condition found by the Inspector would have existed for less than 30 minutes. Tr. 1389-1390. The Inspector's notes themselves reflect "[t]his condition just happened" and the Inspector stated that was why he marked the matter as low negligence. Tr. 1390. A factor beyond simply the low reading in the Inspector's decision to mark the violation as S&S was that the miners were not done with the face; they were continuing to advance. As they continue to advance, more air will be lost as they cut further. Tr. 1396. However, the Inspector admitted that he did not know how much work remained for them to finish bolting that entry. Tr. 1397.

On re-direct, elaborating on his S&S determination, the Inspector reaffirmed that the gassy nature of the mine was a factor. Tr. 1399. Also, roof bolters can encounter pockets of methane and an explosive level could occur. Tr. 1400. The Inspector did acknowledge to the Court that he was not suspicious of the operator's claim that the air reading was fine thirty minutes earlier. Tr. 1401.

At the conclusion of the testimony, the Court expressed reservations about whether this violation was S&S. Upon further review, it adheres to that view. In the Court's estimation, the third *Mathies* element was not established. The Court concludes that safety, not health concerns, were the basis for this citation. Given the short duration both of the condition and the time it

would continue, the third element was not established. The proposed penalty was $1,657.00 and upon consideration of the statutory criteria and the absence of the S&S element, the Court imposes a civil penalty of $1,000.00.

Citation No. 7167400, from Docket No. WEVA 2013-1055

As with the citation just addressed, Brody challenges only the S&S finding associated with this. Tr. 1409-1410. For this admitted violation the condition or practice section states that "[t]he operator is not following the approved ventilation plan on the number 3 section (006-0 MMU). The air was found to be reversed in the number 1 and 2 return entries. The air was moving Inby (sic) into the gob area. Standard 75.370(a)(1) was cited 57 times in two years at mine 4609086 (57 to the operator, 0 to a contractor)." Gov. Ex. 39A. The 104(a) citation was issued by Inspector James Jackson to Kevin Webb, Brody foreman.

The Inspector stated that he was at the mine on an E02 spot inspection and had started his imminent danger run when he discovered that the air was reversed in the return. Tr. 1411. Gov. Ex. 39 B, is a drawing depicting the air reversal found by the Inspector. Tr. 1413-1424. The Inspector marked the exhibit to reflect the violation, again which Brody does not dispute, where he took his readings, and the incorrect air flow location. The Court then asked the Inspector to explain the significance of the incorrect flow. He stated that "[t]he air flowing in the wrong direction is putting all the methane from the return back over the top of the miners and back over the top of the equipment while it's running, while they're pillaring." Tr. 1426. Elaborating, he stated that "[t]he return air would be coming onto the section with methane [and that] was my concern, bringing the methane over the top of the miners and the equipment." Tr. 1428. Inspector Jackson confirmed that there was an active continuous miner up on the pillar line at the time he was present, that is to say, it was taking out pillars and producing coal. Tr. 1428. Methane was the hazard about which the Inspector was concerned. Tr. 1429. With his handheld methane detector, he had a reading of .05 percent methane. He also took bottle samples at that time. Lab results from those samples showed .11 percent methane. Tr. 1430. Gov. Ex. 39 D. The Inspector had no concern with the return air going out through the gob, nor with any methane ignition back at the gob. Tr. 1431. However, a methane ignition could potentially affect any miners working on the section. Tr. 1432.

Upon cross-examination, the Inspector acknowledged that his notes reflected that "[t]his condition could expose eight miners to hazards of the return air course reversing back to the gob area" and that "[i]t is reasonably likely that this condition would cause an accident if it were allowed to exist" and that ".05 percent [i.e. one half of .1 percent, per Tr. 1452.] CH4 was detected in the return at citation time" and that "[t]his condition would cause a permanently disabling injury if an accident were to occur. This would be from the return reversing and leading [ ] up the gob area with methane and having an ignition." Tr. 1436-1437. It was then noted that the Inspector's notes make no mention of air leaving the return entries and migrating over to the section. Tr. 1437. Instead, his notes reflect only a concern of air going backward in the return entry and then to the gob. Tr. 1439. Although the Inspector conceded that, by its nature, there is no equipment in the gob, he still stated that there can be ignition sources there. This can occur when a roof collapses and roof bolts can spark when they break off during such

an event. Tr. 1440. The Inspector agreed that he could not dispute testimony that air will go into the gob in this location and exit through the return air shaft at the old Jupiter mine. Tr. 1441. Again, the Inspector conceded that his notes only refer to air exiting into the gob. Tr. 1442. In Gov. Ex. 39 B, the shaded area represents the gob. (The words "positive pressure" appear over that shaded area; the area above that, with the L's represents the bleeder system itself.) The Inspector agreed that, at least based on his notes, there is no mention of air leaving the returns and migrating over to where miners were working. Tr. 1450. He never checked to determine if the air was flowing over towards the miner but with the air reversed it will make its way towards the strongest pull. Tr. 1451. The Inspector then agreed that the area where he found the air reversed is examined every four hours. Tr. 1453. However, it was the Inspector's contention that in order for the reversed air to get into the gob, it will travel through the working section. Tr. 1456, 1463.

When questioned by the Court and relying upon R's Ex. 21 C, and assuming that the preshift exam reflected there is accurate, and its indication that the condition cited by the Inspector did not then exist, the Inspector agreed that the reversed air existed for 3 ½ hours at most. Tr. 1459.

Though prolonged in the examinations, the essence of the violation was that being return air, which by definition is air that has been used and therefore is no longer fresh air, such air is supposed to go away from the miners, but with the reversal he found, and which reversal the operator acknowledged was present, the bad air goes back to the miners. Tr. 1466. Upon questioning by the Court, the Inspector agreed that the discrete hazard was used air with methane going back over the miners working at the face and then onto the gob. Tr. 1470-1471. The Court then inquired what the reasonable likelihood was. Inspector Jackson responded that, but for his finding the reverse air problem, "that condition would continue to exist and continue to allow methane to come up - - up those entries and over on the miners. [He could not] say that [the methane is] always going to be .05 or .11 percent methane. It may increase; it may decrease [but he has] got to look at the worst. And to me, it was reasonably likely at this mine, since they are on methane spot for liberating a lot of methane, that the methane is going to continue to accumulate in that return and come up over top of the[] miners. And the [continuous] miner itself is an ignition source. When they're cutting the rock, you know, cutting the sandstone, th bits cause sparks and that we have had ignitions from [continuous] miners recently." Tr. 1471-1472. In further redirect, the Inspector restated that the discrete safety hazard was the air reversal bringing methane across the section and back into the gob. Tr. 1474.

In its defense, Brody called Kevin Webb to the stand again. As noted, he was with Inspector Jackson at the time this citation was issued. Mr. Webb stated that there was no equipment in the gob, nor ignition sources, nor power sources. Air which enters the gob goes into a bleeder system and then exits to the outside. Tr. 1478. Webb agreed that Exhibit 39 B basically shows the way air would be moving in the No. 3 section at the time of the citation. Regarding the central controversy, Mr. Webb stated "not to [his] knowledge" would any return air be migrating over to the section on that day. Tr. 1483. He asserted that it was not possible for the reversed air in the 1 and 2 entries to migrate over to the working sections. Tr. 1484. He based this view upon the 1 and 2 entries being separated from the pillar section by permanent stoppings. Because of this, he maintained that the air, however it was flowing, would either go

out one return shaft or the other return, which was the main return. Tr. 1485. He also stated that those entries would be examined ever four hours. With that statement, Webb was then directed to the on-shift records for that day, with the implication that an exam would have occurred shortly thereafter, and that the reverse air problem would have been noted and corrected. Tr. 1486. Speaking to the S&S issue, Mr. Webb did not feel that the reverse air was reasonably likely to result in a reasonably serious injury because it was return air which was separated and would exit, as he stated earlier, through one of the two returns. Tr. 1488.

On cross-examination, Webb did not agree with the assertion that that were genuine ignition sources in the gob. Tr. 1489. Subsequent cross-examination did not shed light on the S&S issue. Tr. 1490-1503. As Mr. Webb characterized the admitted violation as a "paper" violation, the Court inquired about the basis for that opinion. Webb agreed that, because of the presence of the permanent stoppings, the violation was technical only, as the air was still return air and would exit as he previously explained. Tr. 1507-1508. Thus, he asserted that, "it would be impossible for the air to go back toward the section because of the intake air pressure." Tr. 1508.

At the conclusion of the testimony for this citation, the Court noted that if it were to find Mr. Webb's testimony credible it would be difficult to find that the violation was S&S. Tr. 1517. Having reviewed the record and the contentions of the parties, the Court does find Mr. Webb to have been a credible and persuasive witness for this citation. The admitted violation was not S&S, as the second, third and fourth elements were not established per the burden of proof on the Secretary. Given the Respondent's credible testimony, and upon application of the statutory criteria, a civil penalty of $2,000.00 is imposed.

Citation No. 8155960, from Docket No. WEVA 2014-620.

Inspector Jack Hatfield testified for the Secretary. That Inspector issued the section 104(a) citation on May 29, 2013 to Brody foreman Virgil Hatfield. The condition or practice section of the citation stated: "The Approved Ventilation Plan is not being followed on the 005 MMU. When measured with a calibrated anemometer, the blades of the anemometer would only barely turn behind the end of the line curtain in the #7 entry where the scoop is found. Four tenths of one percent methane is found in the working place where the scoop has cleaned one rib. This condition would contribute to an ignition of methane while operating the scoop in the working place. This mine is on a 103(i) five day spot inspection for excessive methane liberation. Standard 75.370(a)(1) was cited 63 times in two years at mine 4609086 (63 to the operator, 0 to a contractor)." Gov. Ex. 48 A.

Inspector Hatfield stated that he was on the 005 MMU that day, traveling up into the No. 7 entry up to the face where he found 4/10ths of a percent methane. Tr. 1526. That reading was taken within 12 inches of the face. The area was roof bolted to the face and a scoop was present, preparing to scoop the right rib, as it had just scooped the left rib. Virgil Hatfield got the same methane reading on his own device. Tr. 1529. The Inspector then took an air reading of the air flow behind the end of the line curtain, and found that the anemometer blades would just barely turn. Tr. 1530 and the Inspector's sketch of the scene he encountered. Gov. Ex. 48 D.

Virgil Hatfield then began yelling to the scoopman about the ventilation issue. He did not challenge the accuracy of the Inspector's attempt to measure the air flow, or more accurately, the lack of air flow. Tr. 1531. The minimum required air is 3,000 cfm. Gov. Ex. 48 B and Tr. 1532. As for the cause of the air shortage, the Inspector learned that the curtain was pinched against the rib, blocking air. In tacking up the curtain so that the scoop can clean, one must do that in a manner so that air will still flow. This is done by creating a tunnel in the curtain for the air to travel. In this instance the tunnel was incorrectly done, causing it to be pinched and blocking the air. Tr. 1542.

The Inspector believed that with the pinched curtain, and the 4/10ths of 1 percent methane present, this indicated that methane was starting to accumulate. Yet, the scoop still had to clean the right rib and he was concerned about that machine's continued operation under those conditions. Tr. 1542. Thus, the scoop itself, with its battery terminals, the wiring, a light on a scoop, and batteries themselves, all presented an ignition source, according to the Inspector. However, he did not find any safety issues with the scoop then being used. Tr. 1543. Yet, the Inspector still believed that scoops, by their nature and through their normal operation duties, present possible problems and by those, ignition sources. Tr. 1544-1545. Methane was the hazard that worried the Inspector. Tr. 1545. While the 4/10ths of 1 percent was not an explosive level, he was concerned that the methane level would rise, given the lack of ventilation. Tr. 1549. Inspector Hatfield stated that he couldn't know how long it would take for an explosive level of methane to develop. Tr. 1550. He then stated that it could develop in a short while from as little as 20 minutes. The Inspector then estimated that the scoop would need to remain in that area for another 30 minutes to clean the right rib and then to apply rock dust. Tr. 1552. He stated that it was reasonably likely that sufficient methane could accumulate during that period of time to cause an electrical arc, which, at a minimum could result in burns. He added that an explosion was reasonably likely by the time the scoop finished cleaning the area. Tr. 1552. That the area had not been rock dusted and the accumulation of materials on the rib's right side, also contributed to that hazard's occurrence. The Inspector marked the negligence as moderate because he had discussions with mine employees, including foreman Virgil Hatfield, about how to ventilate and because the mine operator was in the best position to make sure the ventilation was proper. Tr. 1554. This involved making sure that the ventilation "tunnel" was properly installed to ventilate the face. Tr. 1555. In response to a question from the Court, the Inspector ultimately agreed that once the scoop had finished the cleanup and the area had been rock dusted, the risk was over. This entailed a period of about 30 minutes. Tr. 1558-1559.

During cross-examination, the inspector agreed that after the scoop finished its task, a new air reading would be required before cutting resumed. Tr. 1560-1561. The abatement required that the curtain be pulled away from the rib and re-tacked properly to it. No defects were found on the scoop that day, though the Inspector stated that he did not inspect it either. Tr. 1564. The face was considered to be idle at the time of the citation, with the consequence that 3,000 cfm was required at that time. Thus, the Inspector could not state that the air remained insufficient once the continuous miner resumed its work. Tr. 1565. The Inspector also agreed that the continuous miner in the process of cutting coal sprays water and that accounted for the Inspector's acknowledgment that the coal along the rib was damp. Tr. 1567. As a consequence, at least sometimes the coal spillage from the shuttle car will also be damp from that earlier spraying. Tr. 1568.

The Court concluded that this matter came down to an analysis of S&S in the context of 30 minutes of time, and after hearing the testimony from the government, announced that it found that it was not shown to be S&S. Tr. 1571-1572. Given the short duration of the window of concern, the dampness of the coal, the minimal amount of methane found, the absence of any problem with the scoop, the S&S characteristic was not established by the government. Upon consideration of the evidence, a civil penalty of $3,000.00 is imposed.

Citation 8155954 from Docket No. WEVA 2014-620

Citation No. 8155954, a section 104(a) citation, was issued on May 21, 2013, by Inspector Jack Hatfield and served to Brody foreman Kevin Webb. The condition or practice section of that citation states: "The Approved Ventilation Plan is not being followed on the 005 MMU. When measured with a calibrated anemometer, a mean air velocity [i.e. mean entry air velocity or MEAV. Tr. 1579] of 40 is found in the #5 right break where the roof bolt crew is observed installing roof bolts. This condition contributes to the exposure of excessive dust, including respirable dust while drilling the mine roof and coal ribs. The Approved Plan requires minimum mean air velocity of 45 to be maintained at the end of the line curtain. This active MMU is on a reduced standard of 1.2 mgm3 due to excessive quartz. Standard 75.370(a)(1) [the standard cited for this citation] was cited 62 times in two years at mine 4609086 (62 to the operator, 0 to a contractor)." Gov. Ex. 47A. In preparation for his testimony, the Inspector drew a sketch of the condition he cited in order to aid in the understanding of the violation. Gov. Ex. 47D. Brody admitted to the violation, challenging only the S&S designation. Tr. 1576-1577.

A factor in the Inspector's S&S determination rested upon the mine being on a reduced dust standard due to its excessive quartz. No dust sampling was done that day but the key finding for the Inspector was the lack of the required mean air velocity. The mine's ventilation plan requires a MEAV of 45 and that is the minimum requirement. Tr.1579-1580. The Inspector stated that without the minimum required air, miners are exposed to dust from bolting and he stated that there is also a hazard of methane accumulation. Tr. 1583. For the methane issue, the Inspector stated that the mine bolts ribs and that process creates sparks as they drill. When he arrived at the scene, there was still more bolting required to be done, a tasks that he estimated would take another 30 minutes or so. The entire task of bolting the area would take, he estimated, about 50 minutes to an hour. Tr. 1584. The Inspector took his air reading and that number is not challenged by Brody. However, he also took a methane reading, but found no methane at that time. He believed there was still a methane hazard however because the bolting process was not finished and the mine is on the 5 day, high methane, spot inspection regime. Tr. 1585. The air reading below the minimum contributed to the risk of a methane ignition. This factor was coupled with the bolter drilling process which creates an ignition source. Tr. 1586-1587. The risk of encountering methane is chiefly during drilling ribs than the roof. Tr. 1593.

When asked if the fact that since the minimum air at 45 and his reading at 40 were close, was a factor in determining the S&S characteristic, Inspector Hatfield responded, "No." Tr. 1586. Hatfield believed that there was a reasonable likelihood that the violation, when considered with the hazard of methane, would contribute to an injury. He added that severe

burns would be the expected injury to result. He did not see any dust at the time he noted the violation, though normally dust is created during the roof bolting process. Tr. 1588-1589. However, the drill has a vacuum component to capture dust, though it does not capture all dust. Tr. 1589-1590.

Upon cross-examination, the Inspector went over the procedure he employed in taking his air reading and also agreed that he found no methane at that time. Tr. 1595-1597. The CFM behind the end of the line curtain was 4,473, which amount exceeded the plan minimum. Tr. 1597. Hatfield did not know, as represented by Brody's Counsel, whether his velocity reading of 40 translated into a 12 percent insufficiency. Tr. 1598. He disagreed with the suggestion that, as there was no methane found, that there was no likelihood that methane could accumulate in the 30 minutes remaining for the bolting process to be completed. He based this view upon one never knowing when methane will be encountered. Tr. 1600. Though he didn't observe any dust, the Inspector noted that the bolters had stopped their work when he arrived and he stated that there was dust on the mine floor, though his notes did not record that. Tr. 1602. He did not believe that the mean air was sufficient to remove any dust the drillers could encounter. Tr. 1602. He acknowledged that he did not know if there was any impermissible amount of dust in the air at that time. Also, he did not know what the air level was before he arrived at the location. Tr. 1604. He did agree that the bolting in that area would have been completed in 25 to 30 minutes. Tr. 1606. To the suggestion that a new air reading would be taken when the bolter goes to the next entry, the Inspector stated that he did not know if that was a requirement at the Brody mine but could not dispute it. Tr. 1607.

In response to the Court's inquiry, the Inspector stated that if he had found a reading of 44 he would also have concluded that the violation was S&S. Tr. 1609. Anything below the minimum, because of the quartz, would be S&S, as far as the Inspector was concerned. Also, as noted by the Court and acknowledged by the Inspector, when the citation was issued, the Inspector did not list any safety concerns. Tr. 1613. Though later contradicted in testimony by another inspector in these proceedings, Inspector Hatfield asserted that his computer program did not allow him to check both safety *and* health concerns when filling out the citation. However, he stated that glitch had since been corrected. Tr. 1614. The Court noted that there was no barrier to the inspector including *both* safety and health concerns in the body of the condition or practice section of the citation. Tr. 1615.

In its defense, Brody recalled foreman Kevin Webb, the individual to whom the citation was issued. Mr. Webb stated that before a cut is made with the miner in place, an air reading is taken behind the line curtain and also the mean air reading is done before a cut and before bolting. This is done by the section foreman. Tr. 1618. Webb also stated that he did not observe any dust when the citation was issued that day. Air readings are taken every time a roof bolter moves into a different entry or crosscut and this occurs before bolting starts. Mr. Webb also identified the pertinent on shift report, which reflects no methane was present that day. Tr. 1621.

On cross-examination, Mr. Webb acknowledged that he doesn't personally know that these air readings are always done and that he presumes that the foreman will be doing those

readings as it is part of that person's job.[41] He also stated that the low MEAV was caused by a line curtain which needed to be tightened up. Tr. 1623. He acknowledged that it is possible that the line curtain became loose right after the on-shift exam occurred. Therefore it was at least possible that the low air existed the entire time the roof bolters were in that area. Webb also agreed that the roof bolting machine generates dust and that if there is inadequate ventilation in the area, that would contribute to the hazard of dust exposure and that the same inadequacy can contribute to a methane accumulation. Tr. 1624. Mr. Webb also agreed that a roof bolter could encounter a pocket of methane as he is working. However, he also pointed out that, in his view, there was still sufficient air behind the line curtain to keep the methane out. Tr. 1625. Upon further questioning, Mr. Webb did agree that any amount below the required air *contributes* to the hazard of a methane accumulation. Tr. 1626. He also agreed that the normal roof bolting process creates ignition sources, and sparking, arcing, friction and heat. Tr. 1629.

This violation was originally assessed at a proposed $8,893.00. The Court notes that the Inspector did agree that the bolting in that area would have been completed in 25 to 30 minutes. Also, as noted by the Court and acknowledged by the Inspector, when the citation was issued, the Inspector did not list any safety concerns. On the basis of the evidence, only the health concern was genuinely in issue. Given that the drill has a vacuum component to capture dust, and even though it does not capture all dust, when coupled with the unrefuted insufficiency of 12 percent and the short period of possible exposure, the Court concludes that the S&S element was not established in that the third and fourth *Mathies*' elements were not established according to the burden of proof required of the Secretary. Given this finding, the Court has determined that a $4,000.00 is appropriate upon consideration of the statutory criteria and it so imposed.

Citation 9000282 from Docket No. WEVA 2014-620

This Citation, per Gov. Ex. 49A, was settled. **The Secretary has dropped the S&S designation** and modified the gravity from reasonably likely to occur to unlikely.

Citation 9000311 from Docket No. WEVA 2014-620

This Citation, per Gov. Ex. 50A, was settled. Brody has agreed to accept the citation, as issued, including the S&S designation and to pay the proposed penalty assessment.

Citation 9000312 from Docket No. WEVA 2014-620

This Citation, per Gov. Ex. 51A, was settled. Brody has agreed to accept the citation, as issued, including the S&S designation and to pay the proposed penalty assessment.

[41] The Court asked additional questions about this because it was concerned that if Brody had no requirement to write the information about the air velocity and the mean air velocity, it had no means to be sure that people were complying with the requirement. Mr. Webb could only respond that it is part of such individuals job duties to take those air measurements. Tr. 1627-1628.

Citation 9002292 from Docket No. WEVA 2014-702

This Citation, per Gov. Ex. 52A, was settled. The Secretary has **dropped the S&S designation** and modified the gravity from reasonably likely to occur to unlikely.

Citation 8137713 from Docket No. WEVA 2013-997

The Secretary called Inspector Timothy Crawford for this section 104(a) citation. Issued October 9, 2012, to Brody foreman Willard Bourne, the condition or practice section of the citation stated: "The Approved Methane and Dust Control Plan is not being complied with on the 005-0 MMU at this mine. When checked with an approved calibrated anemometer, the quantity of air at the end of the line curtain in the #7 Entry where the roof bolter is operating is found to be 561 cfm. This condition exposes the roof bolter operator's (sic) to hazards associated with excessive dust which can result in permanently disabling illnesses and crushing injuries due to limited visibility and can also result in a methane build-up in the working face, etc. This mine is on a 5 day 103(i) spot for methane liberation. Standard 75.370(a)(1) was cited 57 times in two years at mine 4609086 (57 to the operator, 0 to a contractor)." Gov. Ex. 40A.

Both the safety and health boxes were marked by Inspector Crawford on this citation. Upon arriving at the 005MMU, the Inspector heard the roof bolter running. As he did so, he noticed air in the intersection blowing and the fly pads were blowing. Tr. 1641. Those fly pads, designed to direct air to the working face, were blowing straight up, and this allowed air to bypass the No. 7 face. To help explain the condition he encountered, the Inspector drew a sketch. Gov. Ex. 40E. The Inspector took his air reading behind the curtain. The end of the line curtain was marked on the sketch. Tr. 1647.

The Inspector explained why he wrote the citation: "After I noticed that the air was moving through the fly pads, I decided to take an air reading. The -- both bolter operators were around their drill pots. They weren't actively drilling holes or in the process of bolting while I was there. So I went up and took the air reading behind the curtain." Tr. 1648. He added that the air was bypassing the No. 7 entry. The fly pads are to direct the air towards the working face. As a result, the air was directing the fly pads, whereas the purpose is for the flypads to direct the air. Tr. 1650. While the roof bolters were not bolting at that moment, the machine was running and its pump motor was running. As he recalled, one rib bolt had been installed and this location was marked on Exhibit 40 E. While the Inspector's citation is listed as served to Willard Bourne, he did not believe that Mr. Bourne was present when he took his air reading nor when he issued the citation. He thought that Mr. Bourne arrived after that. The Inspector then went into some detail about his air measurement, and how and where he took it. Tr. 1654-1657. Upon doing so, he had a reading of 34 feet per minute. This was used in making his calculation which yielded a quantity of 561 cfm (cubic feet per minute). Tr. 1657. In contrast, the ventilation plan requires 4,000 cfm during roof bolting operations. Gov. Ex. 40B, Tr. 1658.

Upon his reading, he told the roof bolters of the results and that he was issuing a citation. It was about that time that foreman Bourne arrived and the Inspector repeated the same

information. The foreman's response was to challenge the citation because he contended that the bolting had not started. Tr. 1662. At that point the Inspector showed the foreman the clean bolt the crew had just installed. Once Bourne saw that he dropped his challenge. Tr. 1662.

In terms of his concerns over hazards associated with this violation, the Inspector stated he was concerned about methane ignitions. It is common, he stated, for sparks to occur in the bolting process. He also was concerned about respiratory problems and reduced visibility. While he found no methane at that time, it can arise at any moment. Also, right after a cut is mined, methane will often leak from the ribs and floor and in a situation as this, involving 30 to 40 feet with no ventilation, methane could build up. Tr. 1664. He estimated the time for the miners to bolt the area to be from 45 minutes to an hour and fifteen. He believed that, all things considered, it was reasonably likely for an explosive accumulation of methane to have developed. In part, this view was based on the observation that one never knows when one will hit methane. Tr. 1665. The Inspector also identified multiple ignition sources on the roof bolter itself, though he did not examine the bolter that day. Asked how the low air contributed to the hazard of methane accumulation, the Inspector summed up his concern: "The 561 CFM was, in my eyes, substantially lower than 4,000. If you don't have the air that's required to sweep out the methane -- I mean, that's the routine of the system. The ventilation system is to sweep the methane and dust from the working places." Tr. 1666-1667.

The Inspector also spoke to the likelihood of the contribution to an injury. "Q. Now, the hazard of a methane accumulation, is it reasonably likely that would contribute to an injury? A. Yes. Q. How would it contribute to an injury and what kind of injuries? A. If you have an ignition, best case scenario, I mean, is -- I hate to refer to it as a best case, but you would only get burns sustained in the miner or is likely to -- you'd only get burns. If it ignited the coal dust, it could be quite a bit more catastrophic." Tr. 1667.

Though he didn't observe dust at the time of the violation, normally roof bolters do encounter dust when installing bolts. As the roof bolting is done at the top, there will be more silica and "stuff" from the rock. With the dust not being swept away as required by the plan, the dust will linger longer around the bolt operators. He did not believe that 561 cfm was sufficient to sweep away the dust. Tr. 1669. Additionally, normally dust is generated during bolting, and inadequate ventilation would make matters worse. The scoop operator may also have reduced visibility in such circumstances of substantially reduced air levels and possibly hit a bolter. With the inadequate air, he also had health concerns, as the bolters would have prolonged exposure to the dust. Such exposure subjects miners to the risk of developing pneumoconiosis, silicosis, or as it is commonly called, black lung. The Inspector's marking the negligence as moderate was primarily based on the standard having been cited 57 times in two years. Another factor was the obviousness of the violation. Also the fly pads issue was obvious. The foreman should have noticed the issue. Tr. 1673. The condition was abated to deal with the problem of the air not being directed to the working face.

The cross-examination covered the usual bill of fare with matters such as that there was no methane detected by the Inspector at the time he found the violation, that his imminent danger run found no issues; that no continuous miners were running at the time of the violation; and that the inspector was not running dust sampling that day. Tr. 1675-1685.

In response to the Court's question whether the Inspector considered the health concern or the safety concern to be S&S, he responded that it was both, with the stronger of the two being the safety hazard. Tr. 1685.

In its defense, Brody called Willard Baxter Bourne, the foreman who was served the citation in issue. Mr. Bourne is presently employed by Brody, working as a fire boss. His mining work history is extensive, covering some 44 years. At the time of this citation's issuance, Mr. Bourne was a section foreman. Though his name appears on the citation, he stated that he was not the person served with the citation. He stated that he did take an air reading before the continuous miner went into the No. 7 entry and that there was sufficient air at that time. Tr. 1693. He then went on to other duties but upon returning to the right side, he was told by the miner operator that he had damaged a rib bolt. Tr. 1694-1695. He then ordered repairs but again took an air reading and found, again, sufficient air. Tr. 1695. Mr. Bourne contended that "everything looked good" and that the air he measured was okay as well. Tr. 1697. However the Inspector stated that the air was insufficient but Bourne's contention was that the workers were replacing the damaged rib bolt, the implication being that the section was down at that time. Tr. 1698. Bourne also stated that he saw no dust in the area and that there was no hazardous methane level present either. He further contended that the inspector wouldn't let them lower the curtain, at least that is what his operators told him, and that to abate the condition all they had to do was lower that curtain. Tr. 1704.

Upon cross-examination, Mr. Bourne stated that he took notes of the incident and turned them in to Mr. Morrison with the mine's safety department. The notes were to be returned to Bourne, but they never were. Tr. 1706-1707. Even without his notes, Mr. Bourne seemed to be able to recall the events with great detail, including air measurements. Tr. 1708-1711. He maintained that he ordered the rib bolt to be replaced and then, once that was completed, they would re-establish the air. Tr. 1714. To make the repair, the curtain had to be rolled up. Tr. 1714. In fact, Bourne stated that he helped them roll up the curtain. Tr. 1715.

However, Mr. Bourne agreed that the ventilation plan requires 4,000 cfm of air behind the curtain when installing the rib bolt. Tr. 1720. In response to questions from the Court, Mr. Bourne initially acknowledged that he did not dispute that the Inspector got an air reading of 561 cfm and that such a reading is below the required amount, but he then stated that the reading was not in fact right. Tr. 1721-1723. There were moments of confusion as to what the witness was contending about the matter, though the confusion may have been on the Court's part. Still, pursuing the matter further, Mr. Bourne stated that the fix he ordered for the rib bolt would not have caused any reduced air flow. Tr. 1724. In sum, Mr. Bourne stated that he could not account for any reason to explain the reduced air flow claimed to exist by the Inspector. Tr. 1725.

In further cross-examination by the Secretary, Mr. Bourne acknowledged that something could have happened in the interval of time between 6:25 and 7:45 to account for the diminished air reading. Tr. 1727. Thus, to restate Mr. Bourne's position, the curtain had to be raised up to deal with the rib bolt problem and then to abate the citation, the curtain needed to be rolled back down. Tr. 1727. Bourne also contended that there was no work site established where the

Inspector took his reading and he denied that there was any issue with the fly pads. Tr. 1731-1732. He did methane could suddenly arise during a roof bolt installation but that it could reach an explosive level only if there is no ventilation. He also agreed that roof bolters generate ignition sources when they are installing bolts and that having only 561 cfm would contribute to the hazard of a methane accumulation and that the injuries of an ignition would include burns. R. 1732-1734. He did not feel that dust could be an issue because the roof bolting machine has a vacuum to draw in such dust. Mr. Bourne summed up his perspective of the citation by stating if the inspectors had not shown up, the roof bolters still would have dropped the curtain after the repair, checked the methane and taken an air reading and then re-established themselves 15 feet inby to start a new work site. It is fair to state that his remarks were supported with his additional testimony concerning his view.[42] Tr. 1735-1736. Sensing perhaps that Mr. Bourne's testimony had been damaging to the Secretary's contentions,[43] Counsel for the Secretary then raised objections about not being provided with Mr. Bourne's notes, which the witness had referenced as having been taken near the time of the citation but that he no longer knew of their whereabouts, though he turned them in to Brody. Suffice it to say that the Court addressed this concern but that the entire issue of notes and the parties' obligations to deliver them to each other, was disputed. Thus, the late-raised issue *did not* lead to the conclusion that Brody had behaved improperly. Tr. 1739-1741. The Court directed Brody to look for any and all notes related to these citations and, subsequent to the hearing it did so. However, the Court was not about to have the delivered notes turn into a new subset of disputes over interpretations about remarks in those notes.[44]

The Court has concluded that, based on all of the testimony, the Secretary did not establish this alleged violation, **Citation 8137713,** and therefore it is **DISMISSED**.

---

[42] During additional testimony on redirect, Mr. Bourne explained the basis for his view that the Inspector took his reading from an incorrect location in that it was not taken at the established workplace. Tr. 1743-1746. Bourne's position was that the established workplace was the location where the rib bolt repair was being done and that there was 4,000 cfm at that location. Further cross-examination, at Tr. 1746. The Secretary opted not to provide testimony in rebuttal. Tr. 1748.

[43] In fact, the Court later commented openly and favorably about its view of Mr. Bourne's testimony, remarking that it found it both credible and honest. Tr. 1742.

[44] In an email response to this issue, dated October 16, 2014, the Court advised the parties as follows: "Here is what the parties should know: I have, presently, more than sufficient information to decide each of the contested matters. Absent a "smoking gun" passage from the notes, and by that I mean to include a note which is not capable of argument as to its meaning and effect, the whole business of the notes will not impact my decisions. Pick any citation, as a hypothetical example. To be considered beyond what I already have from the testimony and exhibits, (again I am offering this as a hypothetical example) a note would have to say something on the order of Brody saying "they got us on this one, as it is clearly S&S" in order for me to reevaluate what I have. So, absent something of that order, let's not go down a "cul-de-sac" if you remember my analogy using that term at the hearing. Consistent with the above, and with the briefs due as scheduled, I will give the Secretary until next Tuesday to, as Attorney Moore suggested, "argue that specific notes should be added to the record . . . then they should have to make a showing why any set of notes are relevant." But again, I ask the Secretary to step back and make sure that in the frenzy he is not engaging in what ultimately may be a waste of time and effort."

Citation 7165682 from Docket No. WEVA 2014-620

For this matter, Brody admits to the fact of violation and all other aspects except for the S&S issue. Tr. 1749. This section 104(a) citation, No. 7165682, issued July 24, 2013 by MSHA Inspector Timothy Crawford states, in the condition or practice section that: "[t]he Approved Ventilation Plan is not being followed on the 005-0 MMU at this mine. The Methane and Dust Control portion of the plan states that a minimum of 8,500 CFM will be maintained at the end of the line curtain and a minimum of 85 MEAV will be maintained during the mining cycle. When checked with an approved calibrated anemometer, the air quantity in the #6 Face, where the C/M is cutting/loading, is measured to be 6,840 CFM and 50 MEAV. This condition exposes miners on this section to hazards associated with inadequate ventilation such as methane ignitions, silicosis, CWP, etc. This mine is on a 5 day 103(i) Spot Inspection for methane liberation. Standard 75.370(a)(1) was cited 68 times in two years at mine 4609086 (68 to the operator, 0 to a contractor)." Gov. Ex. 41A.

In testimony about the citation he issued, Inspector Crawford stated that when in the cited area he notice dust suspended in the air, rolling back from the miner in the No. 6 entry and this prompted him to determine if there was sufficient air to the face. Tr. 1751. For this conceded violation, the Inspector drew a sketch to illustrate the conditions he found. Gov. Ex. 41 D. The Inspector stated that the hazards that concerned him for this violation were the methane ignitions, silicosis, health issues, and impaired visibility from the dust, risking miners being struck by mobile equipment. Tr. 1753-1754. The citation marked both health and safety concerns for the violation. While Crawford did not record any methane, the miner loading in the No. 3 face detected .3 percent methane. However, the violation was found in the No. 6 face. Tr. 1754. The miner had just started his cut and the time to finish it would be about an hour and forty-five minutes. Tr. 1755. Contributing to the violation, the Inspector stated that the miner, when cutting or loading, will throw sparks. Also, typically, methane will be liberated from the ribs and floors during the mining cut. If a methane ignition were to occur, burns to the miner man and the shuttle car operator would be likely. Tr. 1757. The Inspector also spoke to the dust hazard he perceived. He analogized the dust level to driving into fog. The ventilation plan's design is to sweep away methane and dust generated during the mining cycle. One will not typically see dust he observed when the ventilation is sufficient. The low visibility created by the dust posed the risk of individuals being struck by mobile equipment. Tr. 1759-1763. While the fog was not so thick as to block all visibility, the Inspector did state that it was sufficient to hinder it. Tr. 1763. With 8,500 cfm being the required minimum air, the Inspector asserted that the 6,840 he found was low enough to create the visibility reduction he observed. Tr. 1763. Injuries from such a machine to person impact would include severe crushing and amputation. The dust also presented a health hazard from silica by increased exposure. Further, the dust compounds the methane hazard with the analogy of the methane being the wick and the dust serving as the dynamite. Tr. 1765. He added that while the dust doesn't add to the likelihood of a methane ignition, it would contribute to the severity of one, should that occur. Tr. 1765.

During cross-examination the Inspector stated that the dust he observed was likely the product of the shale rock that had fallen from the top that was being cut up at that time. In the Court's estimation, the cross-examination did little to dispel the Inspector's testimony concerning the basis for his S&S finding. Tr. 1767-1780.

In its defense, Brody called Virgil Hatfield, the foreman who was issued the citation. Mr. Hatfield acknowledged that the Inspector had an air reading of 6840 but that his own reading was 8768. Tr. 1787. However, Mr. Hatfield *could not recall* if his measurement was taken after abatement measures had been done. Tr. 1789. In attempting to rehabilitate that response, Mr. Hatfield stated that very small changes, such as the way one holds one's wrist, can impact the air readings. Tr. 1790-1791.

During cross-examination, Mr. Hatfield acknowledge that his own notes reflect a mean air reading of 64 but that 85 is the required amount, confirming that there was a violation, as Brody admitted. Tr. 1799-1800. To abate the condition, Hatfield stated that they "fixed the line curtain." Tr. 1803. He also agreed that they stopped the continuous miner from operating because the air was low and he didn't want them operating in the hazard of low air. Tr. 1804-1805. He also acknowledged that no one can know when methane issues can arise and that continuous miners create sparks sometimes as they work. Hatfield also stated that the miner's scrubber hose will suck up the methane, along with dust, if a miner is run long enough. Tr. 1807-1808. However, Mr. Hatfield did not agree with the required air CFM. He felt that 6,840 was sufficient, noting that *used to be* the required level. The change was prompted because Brody "got a little bit on the dust pumps. When we [were] out of compliance on our dust pumps." Tr. 1810. He did not agree that the admittedly low air contributed to the hazards of dust and methane. Tr. 1812.

Although the Court concludes that the safety basis for the S&S claim was not established, the health basis was established, based upon the Court's determination that the Inspector's testimony was more persuasive and credible. Accordingly, the Court concludes that that S&S element was proven for each of the two disputed elements. The proposed assessment for this was $8,893.00 and the Court concludes that, upon application of the statutory criteria, that amount remains appropriate and is so imposed.

Citation 7168841 from Docket No. WEVA 2013-1055.

Citation 7168841, a section 104(a) citation, issued November 26, 2012 by Inspector Joshua A. McNeely to Brody's Aubrey Hartman, foreman, states: "The approved ventilation plan is not being complied with. The continuous miners being operated in the #5 entry of the Beaver Mains section does not have the required amount of ventilation. The miner is loading the shuttle car and only 4,620 cfm is provided. The plan requires 8,500 cfm . Dust is visible in the entry around both operators. This condition exposes miners to hazards related to respirable dust and other hazards related to dust. This is a 5 day 103i spot inspection mine due to CH4 liberation. Standard 75.370(a)(1) was cited 57 times in two years at mine 4609086 (57 to the operator, O to a contractor)." The Inspector marked "safety" in the box next to violation, box 9. Gov. Ex. 42A. For this violation, Brody stipulated to the fact of violation and the moderate negligence designation, and all other aspects, including items such as the air readings, leaving only the S&S designation in dispute. Tr. 1814-1817.

Inspector McNeely stated that when he came upon the scene in the entry, the continuous miner was loading the shuttle car and "there was visible dust around it, kind of stagnant looking air . . ." Tr. 1819. The miner was at that time at the end of its cut, with cut taking approximately 30 minutes to an hour. He observed dust in the area where the men were working and it was "all around them." Tr. 1820. The dust was sufficient to affect visibility. Tr. 1820. He stated that multiple hazards are associated with this. The less air one has, the more dust will be present and there is a greater chance for methane buildup. Equipment operators have a greater risk of hitting personnel under such conditions too. He did take a methane reading at that time and it did not detect any methane then but the continuous miner's display did read 0.1 percent methane. Tr. 1822. However, he noted that this mine liberates great quantities of methane, which is the reason it is on a five day spot inspection. At this mine a pocket of methane can arise at any time and an explosive level can develop in seconds. Tr. 1823. Related to this, the continuous miner itself is an ignition source itself. The low air and methane risk go hand in hand as the less air, the greater chance for a methane buildup. A methane ignition can result in burns and if coal dust is added, fatalities may occur too. Tr. 1825. The dust he observed was either dust from mine rock or coal dust and occurs in the cutting process. Dust doesn't make a methane ignition more likely but it could contribute to the damage if an ignition occurred. The dust also creates a safety hazard of an accident occurring between the shuttle car operator and the continuous miner operator. Tr. 1829. The Court takes note that other witnesses for MSHA testified during the course of these hearings to the same effect about the safety hazards attendant to dust reducing visibility. The Inspector affirmed that the level of dust he observed was consistent with those safety concerns. As he expressed it, "It was a pretty good bit of dust." Tr. 1830. The related dust issues on health were also part of previous testimony from MSHA witnesses and this Inspector's testimony echoed those expressions. Tr. 1833-1835. Ventilation controls were repaired and installed and five men and two foremen were involved in that effort. Tr. 1836.

The cross-examination again reviewed familiar territory: that an imminent danger run had been conducted previously; that no methane was then encountered; etc. The Inspector acknowledged that the cut was almost finished and that the miner would then move to another entry. Tr. 1838. After that, the bolting crew would move in and take an air reading to determine if there was sufficient air. The Inspector had no indication that the miner's scrubber was not working, however, he added that he couldn't say it was working properly given the amount of dust. His concern was not over the miner's scrubber; his focus was on the amount of dust he encountered. Tr. 1840. The Inspector, in his notes, marked that Shanon [Dolin] the section foreman, told him that he had an air reading of 10,000 CFM *prior* to the cut. Tr. 1841, 1850. Still, while not directly challenging that assertion, the Inspector focused instead on the fact that it took 55 minutes to make the corrections and provide the required amount of air. Tr. 1842. The Inspector did not assert that the dust was so thick that the miner operator or the shuttle car operator could not be seen. Tr. 1846.

Brody did not call any witnesses in its defense of this citation.

Upon review of the record and arguments, the Court finds that this admitted violation was S&S. The Court finds that the Inspector's credible testimony about the safety hazard attendant to the scene he encountered for this admitted violation, established the remaining three *Mathies* elements. Given the nature of this mine's high methane liberation characteristic, an additional,

independent, basis for concluding that the violation was S&S exists on the record evidence. On those twin safety-related bases, it is unnecessary to reach a conclusion about a health basis for an S&S finding, though such a finding, if it were needed to be made, would not be unreasonable. The proposed penalty for this was $7,578.00 and upon review of the record, the Court concludes that upon application of the statutory criteria, that penalty amount remains appropriate penalty and is so imposed.

Citation 7168866 from Docket No.WEVA 2014-620

Inspector Joshua A. McNeely again testified for the Secretary regarding Citation No. 7168866, issued January 14, 2013 and served to Brody's Derek Morrison. The Citation states: "The approved ventilation plan is not being complied with on the active #4 section 011-0 MMU. The roof bolter is installing primary roof supports in the #4 entry without the minimum amount of air. Only 3,276 cfm with a MEAV of 24 is being supplied to the end of the line curtain. This condition exposes miners to respirable dust, and methane build up hazards. Standard 75.370(a)(1) was cited 60 times at mine 4609086 (60 to the operator, 0 to a contractor)." Gov. Ex. 43A.

Brody admitted to this violation and stipulated to all related facts, including items such as the air reading obtained by the Inspector, except for the S&S designation. Tr. 1855-1856.

Inspector McNeely stated that in traveling on the active No. 4 section he found that the ventilation plan requirements weren't met at the roof bolting machine. Tr. 1857. At that time, the roof bolter was installing roof supports. The bolter was then at about 110 feet deep, so he was near the end of that, leaving about 20 to 40 feet remaining before moving to another section. The minimum amount of air required is 4,000 CFM, and an MEAV of 45, but the Inspector found only 3,276 cfm with a MEAV of 24. Tr. 1859. The Inspector revisited the same safety concerns which he expressed in the citation just discussed, next above. Essentially that concern is that with less air comes more dust and the opportunity for methane buildup. Reduced visibility, a safety concern, and respirable dust, a health concern, were again the hazards identified by the Inspector. Tr. 1860. No methane was detected but in the adjacent entry the miner displayed 0.3 percent methane. Tr. 1860. Given this mine's enormous liberation of methane every 24 hours, the Inspector noted that there is "always a chance for methane liberation with any piece of equipment in any face." Tr. 1861. The roof bolter presents an ignition source and the Court notes that this essentially an undisputed fact, based on the testimony during these hearings from both sides. The expected injuries, also as previously testified to numerous times, were the same as well. The Inspector also stated that "there was some pretty good dust in the area." This dust covered the area of the roof bolter and "past it a little." Tr. 1864. As noted before too, a methane ignition could propagate a dust explosion, as the dust would ignite. A safety concern related to the dust, the scoop would come within 3 feet of the roof bolters and this again would present the risk of crushing-type injuries. The violation was abated in about 20 to 24 minutes, but the Inspector expressed that the repairs were "fairly extensive" with five miners participating in the corrections. Tr. 1870.

During cross-examination, the Inspector stated he was working under the assumption that the miners were exposed to the low air for the entire time they were bolting that area, a time period for which he made an approximation. Tr. 1883-1884. He agreed that when the bolting was done, the bolters would move to the next entry and that another air reading would then be done in that next entry. In terms of the concern that a scoop might strike a bolter operator, the Inspector agreed that the scoop would stop about 10 feet from the bolters' physical location at their machine. Tr. 1893. When it was suggested that as the air was only 724 CFM below the required amount, the Inspector responded that was an amount below the minimum. Tr. 1897. He did not agree that he would deem 1 CFM below that minimum as significant but only that 724 was.

Brody did not present any witnesses of its own for this citation.

The Court concludes that the violation was established as S&S, and that while both safety and health concerns were S&S, the stronger of the two claims in this instance was the health concern. The proposed assessment was $8,209.00 and the Court concludes that amount remains appropriate upon application of the statutory criteria and it is so imposed.

Citation 7168913 from Docket No. WEVA 2014-620

This section 104(a) citation, No. 7168913, which was also issued by Inspector Joshua A. McNeely, and issued on February 13, 2013 to Brody foreman Josh Anderson, states: "The approved ventilation plan is not being complied with. The energized continuous miner on the active #1 section is in the #2 face without the minimum required ventilation for the 001-0 MMU. When checked, the air behind the line curtain measured 6,648 cfm. The plan requires at least 8,500 cfm for this miner. This is a 103i 5 day methane spot inspection mine. The condition exposes miners to hazards related to methane build-up and dust hazards. Standard 75.370(a)(1) was cited 61 times in two years at mine 4609086 (61 to the operator, 0 to a contractor)." Gov. Ex. 44A. The Inspector marked "safety" in the section 9 of the citation.

The Inspector stated that he came upon the area and observed the continuous miner operator cutting coal. Tr. 1903. He added seeing embers, that is to say, sparks, coming from the miner's cutter, when rock is cut. Tr. 1904-1905. Arcs were seen coming from the bits. Tr. 1911. Brody then stated that it was not disputing that the Inspector found 6648 cfm behind the curtain. Tr. 1909. The air requirement of 8,500 minimum applies when mining or loading. Tr. 1911. The same concerns expressed by the Inspector for the similar violation he testified about, obtained here and there is no need to repeat those. To abate the violation, loose parts of the curtain had to be tightened up to the mine roof or to the seams of curtain that were together and some holes in the curtain were patched. This took about 40 minutes to accomplish. Tr. 1929. The negligence was marked as moderate because the condition was obvious and foremen were in the area and they were required to do preshift exams. Tr. 1929.

The Court asked the Inspector to explain his reasoning regarding his testimony for a similar violation, where he observed dust and considered the violation to be S&S, and for this violation, where he did *not* observe dust, but still marked it as S&S. The Inspector stated that it

was his view that, had he not found the violation, the mining would have continued just as it was, with no tending to the diminished air and so the air would not have gotten better, but for his citation. Tr. 1933. As he saw it, with continued normal mining operations, the air would have worsened, but for his intervention, issuing the citation. Tr. 1934. The Court agrees with the Inspector's analysis.

As with each of the citations, the entire transcript was reviewed by the Court. The absence of specific comment to every point raised, either on direct or cross-examination, does not suggest to the contrary, but rather reflects that many points were made repeatedly for like violations and in other instances the Court made the judgment that a point did not rise to a level that warranted comment. Though multiple attempts were made to suggest that the miner was not actually mining but merely set up to mine, the Inspector was adamant that they were mining. See, Tr. 1941, 1943, among other examples on this point. The Court finds the Inspector entirely credible on this issue.

In its defense for this matter, Brody called Joshua Anderson, the section foreman to whom the citation was issued. Mr. Anderson stated that the citation was issued on the No. 1 section. The Inspector either was in front of or behind him that day as they traveled into the mine, but the Inspector arrived at the face before he did. Tr. 1955. Anderson maintained that there was no mining going on, no cutting coal at that time at the number 2 entry. Tr. 1955-1956. "Preop" activities were going on, not mining. He had not yet taken an air reading. Tr. 1958. The preshift report dealing with the time just before this citation reflected no problems including no problems with the ventilation, nor any methane problems. Tr. 1959-1960. Anderson also completed the on-shift report for that time, and he stated that it reflects there was no mining going on in the No. 2 entry. He acknowledged that the continuous miner was set up there. Tr. 1961. The miner had power on the cable but he maintained that it was not running at that time. Tr. 1962. Anderson offered that while the miner was set to go, his explanation as to why they didn't mine in the number 2 entry, as follows: "I think one reason might have been the kettle bottom we observed on the on-shift exam -- or just the general examination of the area. And No. 1 was -- it's more of a -- it's easier to get your ventilation in No. 1 entry. There's less chance of taking down a back-up curtain. It's a lot easier to get ventilation in No. 1." Tr. 1963.

During cross-examination by the Secretary, Mr. Anderson continued to state that no mining had been done in the No. 2 entry since the face had not been cut. Tr. 1974. However at the time the Inspector was taking his air reading, Anderson deenergized the miner. When asked why he would do that, if there was no mining, he stated that it eliminates any hazard with no power on the machine. Tr. 1975. He did not dispute the Inspector's reading, only the assertion that they were mining. He also contended that because of the kettle bottom, the continuous miner would not have been operating until after that was supported. Tr. 1978. Mr. Anderson did not aid his credibility however when he asserted that the minimum amount of air to safely dilute methane was excessive in that he believed that 6648 cfm was sufficient and in fact that 5,000 would be enough as well. Tr. 1980-1981. Asked if agreed with the mine's ventilation plan, he answered plainly, "No." Tr. 1981.

This citation presented a two-pronged S&S claim of safety and health. The cross-exam was ineffective. The fact that dust sampling did not show a violation does not refute the S&S

nature of this violation. MSHA's central contentions here was that the low air, the ongoing work of the continuous miner, and the extremely gassy nature of this mine, establish the violation's S&S nature. I credit the Inspector's version of the events due in part to the Court's assessment of his credibility and certainty of his recollections, when contrasted with the Court's evaluation of the conflicting testimony.

The proposed assessment for this violation was $8,893.00 and the Court, upon application of the statutory criteria to the record evidence, concludes that amount remains appropriate and is so imposed.

Citation 3577965 from Docket No. WEVA 2014-620

This matter, noted in Gov. Ex. 45A, was settled. Brody accepts the citation, as issued, including the S&S finding and the full amount of the proposed penalty. Tr. 1991.

Citation 3578036 from Docket No. WEVA 2014-620

This matter, noted in Gov. Ex. 46A, was settled. Brody accepts the citation, as issued, including the S&S finding and the full amount of the proposed penalty. Tr. 1992.

CONCLUSION

The matters in this litigation having been addressed, the foregoing constitutes the Court's decision. **So Ordered.**

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

Michael T. Cimino, Esq., Jackson Kelly, PLLC, 500 Lee Street East, Suite 1600, Charleston, WV 25301-3202

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

K. Brad Oakley, Esq., Jackson Kelly PLLC, 175 East Main Street, Suite 500, Lexington, KY 40507

Adam J. Schwendeman, Esq., 500 Lee Street East, Suite 1600, Charleston, WV 25301-3202

Benjamin M. McFarland, Esq., Jackson Kelly, PLLC, 1144 Market Street, Wheeling, WV 26003

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22 Floor West, Arlington, VA 22209-3939

Lauren Marino, Esq. Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2226, Arlington, VA 22209-2296

Jason Grover, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2226, Arlington, VA 22209-2296

Ronald Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2226, Arlington, VA 22209-2296

Dana Ferguson, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2226, Arlington, VA 22209-2296

APPENDIX I

STIPULATIONS

The parties entered into the following stipulations at the hearing:

1. Brody Mining, LLC (hereinafter “Brody”) is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 803(d), at the coal mine at which the Citations/Orders at issue in these proceedings were issued.
2. The Brody Mine No. 1, an underground bituminous coal mine at which the Citations/Orders were issued in this proceeding, is subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
4. The individuals whose signatures appear in Block 22 of the Citations/Orders at issue in these proceedings were acting in their official capacity and as authorized representatives of the Secretary of Labor when the Citations/Orders were issued.
5. True copies of the Citations/Orders at issue in this proceeding were served on Brody as required by the Mine Act.
6. A written notice was issued under Notice No. 7219154 on October 24, 2013, pursuant to section 104(e)(1) of the Act, 30 U.S.C. § 814(e), notifying the operator that MSHA finds that a pattern of violations exists at the Brody Mine No. 1.
7. Under the heading and caption “Condition or Practice” the Notice alleges in relevant part as follows:

Pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act), you are hereby notified that a pattern of violations exists at the Brody Mine No. 1 (ID 46-09086). A review of the S&S violations cited at the mine demonstrates a pattern of violations. As illustrative of this pattern of violations, the following groups of violations are representative of violations which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards:

The following eighteen citations/orders were issued citing conditions and/or practices that contribute to ventilation and/or methane hazards: 8125045 (10/9/12), 8137713 (10/9/2012), 8146352 (10/9/2012), 7167400 (11/26/12), 7168841 (11/26/2012), 7168866 (1/14/2013), 8139621 (1/15/2013), 7168913 (2/13/2013), 3577965 (2/2/7/2013), 3578036 (5/15/2013), 8155954 (5/21/2013), 8155960 (5/29/2013), 8154782 (6/5/2013), 9000282 (6/10/2013), 7165682 (7/24/2013), 9000311 (7/30/2013), 9000312 (7/30/2013), 9002292 (8/27/2013).

The following twenty citations/orders were issued citing conditions and/or practices that contribute to emergency preparedness and escapeway hazards: 8153617 (10/9/2012), 7167386 (10/22/2012), 7167387 (10/23/2012), 7167388 (10/29/2012), 7167389 (10/29/2012), 7167393 (11/1/2012), 7167405 (12/4/2012), 7167412 (12/12/2012), 7168854 (12/17/2012), 7167474 (3/18/2013), 8155914 (4/8/2013), 9000286 (6/19/2013), 7165680 (7/17/2013), 9000305 (7/24/2013), 9000309 (7/29/2013), 9000313 (7/30/2013), 7165694 (8/14/2013), 7166781 (10/3/2013), 7166783 (10/8/2013), 7166784 (10/8/2013).

The following nine citations/orders were issued citing conditions and/or practices that contribute to roof and rib hazards: 8151320 (10/18/2012), 7168899 (2/5/2013), 7167471 (3/6/2013), 8155908 (4/4/2013), 8155925 (4/17/2013), 8155936 (5/6/2013), 9000277 (6/5/2013), 7165683 (7/24/2013), 9000307 (7/29/2013).

The following seven citations/orders were issued citing conditions and/or practices that contribute to inadequate examinations: 7168801 (10/18/2012), 7167473 (3/18/2013), 8155909 (4/4/2013), 8155926 (4/17/2013), 8155937 (5/6/2013), 9000278 (6/5/2013), 9000304 (7/24/2013).

These groups of violations, taken alone or together, constitute a pattern of violations of mandatory health and safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards. **[The Court points out that the reader should not be confused by this stipulation as it only recounts what *the Notice alleges*.]**

> If upon any inspection within 90 days after issuance of this Notice, an Authorized Representative of the Secretary finds any violation of a mandatory health or safety standard that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the Authorized Representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in Section 104(c) of the Mine Act, to be withdrawn from, and to be prohibited from entering such area until an Authorized Representative of the Secretary determines that such violation has been abated. This Notice of Pattern of Violation shall remain posted at the Brody Mine No. 1 until it is terminated by an Authorized Representative.

8. Citation No. 7166783, listed in POV Notice 7219154, was vacated by MSHA subsequent to the issuance of the POV Notice.
9. Citation No. 7166784, listed in POV Notice 7219154, was vacated by MSHA subsequent to the issuance of the POV Notice.
10. The regulations on which MSHA relies to issue the notice of pattern of violations became final on March 25, 2013. See Fed. Reg. § 5056 (January 23, 2013).
11. The POV rule relies upon issued citations/orders regardless of whether they are final orders of the Commission as a basis for determination of the existence of a pattern of violations.
12. MSHA based its POV determination on a 12-month period ending August 31, 2013.
13. The parties disagree as to the effect of MSHA's screening criteria set forth on MSHA's website. Brody believes the effect is that, absent mitigating circumstances, a mine that meets the screening criteria is placed on a pattern of violations. The Secretary, who wrote the rule, submits that such criteria are used to screen mines and identify mines that will be more closely reviewed for the determination of whether a pattern of violations exists.
14. In keeping with the rule, the screening criteria were not subjected to notice-and-comment

procedures. The parties disagree as to whether such notice-and- comment procedures were required by the Administrative Procedure Act.

15. 253 S&S citations/orders were issued to Brody Mine No. 1 over the course of 12 months from September 1, 2012 through August 31, 2013. 108 S&S citations/orders were issued between March 25, 2013 and August 31, 2013.
16. The rate of S&S issuances at the Brody Mine No. 1 was 8.41 per 100 inspection hours during the screening period.
17. None of the S&S citations/orders that were issued at the Brody Mine No. 1 during the screening period are final orders of the Commission.
18. Each of the citations/orders listed in POV Notice 7219154 have been contested by Brody.
19. 24 citations/orders referenced in the pattern notice were issued before March 25, 2013. 28 citations/orders referenced in the pattern notice were issued after March 25, 2013.
20. 16 of the citations were referenced in the pattern notice were issued before January 1, 2013.
21. Brody contends that if the citations referenced in the pattern notice at issue only involve those issued after March 25, 2013, the number of S&S citations per 100 inspection hour would be below the 8.0 S&S per 100-hour criteria. The Secretary contends that the application of the screening criteria is not subject to review and Brody contends that it is. The Secretary further contends that the screening criteria are designed to apply to a twelve month period and applying those criteria to a shorter time frame would not be as representative. It is further the Secretary's position that all S&S citations/orders issued during the period under consideration, not just those listed in the pattern notice, must be considered when applying the screening criteria. It is Brody's contention that based on

the Secretary's arguments in this matter that he is arguing that the citations /orders in the pattern notice establish a pattern of violations.

22. 108 S&S citations or orders were issued to Brody Mine No. 1 between March 25, 2013 and August 31, 2013 with a total of approximately 1468.75 MSHA inspection hours as calculated by MSHA (1506 by Brody's records). The S&S rate using MSHA's number for that period would be 7.35 per 100 inspection hours and 7.17 by Brody's calculation.
23. 12 citations/orders designated as S&S with a negligence finding of high or reckless disregard were issued between March 25, 2013 and August 31, 2013 representing 11% of the 108 S&S citations/orders issued during that period.
24. According to MSHA's sampling, the Brody Mine liberates in excess of 1,000,000 cubic feet of methane per 24-hour period during the time frame from September 1, 2012 through August 31, 2013 and was on a 5-day spot inspection cycle pursuant to Section 103(i) of the Mine Act.
25. Joint Exhibit J-1is an accurate mine map of the Brody No. 1 Mine as of July 31, 2013.
26. Government Exhibit 1-A is an authentic copy of Citation No. 8153617, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
27. Brody admits the fact of the violation cited in citation 8153617 but contests that the violation was properly designated as significant and substantial.
28. Government Exhibit 2-A is an authentic copy of Citation No. 7167386, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any

statements asserted therein.

29. Brody admits the fact of the violation cited in citation 7167386 but contests that the violation was properly designated as significant and substantial.
30. Government Exhibit 3-A is an authentic copy of Citation No. 7167387, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
31. Government Exhibit 4-A is an authentic copy of Citation No. 7167388, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
32. Brody admits the fact of the violation cited in citation 7167388 but contests that the violation was properly designated as significant and substantial.
33. Government Exhibit 5-A is an authentic copy of Citation No. 7167389, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
34. Brody admits the fact of the violation cited in citation 7167389 but contests that the violation was properly designated as significant and substantial.
35. Government Exhibit 6-A is an authentic copy of Citation No. 7167393, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

36. Brody admits the fact of the violation cited in citation 7167393 but contests that the violation was properly designated as significant and substantial.
37. Government Exhibit 7-A is an authentic copy of Citation No. 7167405, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
38. Brody admits the fact of the violation cited in citation 7167405 but contests that the violation was properly designated as significant and substantial.
39. Government Exhibit 8-A is an authentic copy of Citation No. 7167412, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
40. The Government stipulates that Citation No. 7167412 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.
41. Government Exhibit 9-A is an authentic copy of Citation No. 7168854, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
42. Brody admits the fact of the violation cited in citation 7168854 but contests that the violation was properly designated as significant and substantial.
43. Government Exhibit 10-A is an authentic copy of Citation No. 7167474, with all modifications and abatements, and may be admitted into evidence for the purpose of

establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

44. The Government stipulates that Citation No. 7167474 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

45. Government Exhibit 11-A is an authentic copy of Citation No. 8155914, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

46. Government Exhibit 12-A is an authentic copy of Citation No. 9000286, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

47. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000286.

48. Government Exhibit 13-A is an authentic copy of Citation No. 7165680, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

49. Brody stipulates that it will accept the significant and substantial designation for Citation No. 7165680.

50. Government Exhibit 14-A is an authentic copy of Order No. 9000305, with all modifications and abatements, and may be admitted into evidence for the purpose of

establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

51. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000305.
52. Government Exhibit 15-A is an authentic copy of Citation No. 9000309, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
53. Brody admits the fact of the violation cited in citation 9000309 but contests that the violation was properly designated as significant and substantial.
54. The Government stipulates that Citation No. 9000309 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154 issued on October 24, 2013.
55. Government Exhibit 16-A is an authentic copy of Citation No. 9000313, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
56. Brody admits the fact of violation cited in Citation No. 9000313 but contests that the violation was properly designated as significant and substantial.
57. Government Exhibit 17-A is an authentic copy of Citation No. 7165694, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

58. Government Exhibit 18-A is an authentic copy of Citation No. 7166781, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
59. Brody admits the fact of the violation cited in citation 7166781 but contests that the violation was properly designated as significant and substantial.
60. Government Exhibit 19-A is an authentic copy of Citation No. 8151320, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
61. Brody stipulates that it will accept the significant and substantial designation for Citation No. 8151320.
62. Government Exhibit 20-A is an authentic copy of Citation No. 7168801, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
63. Brody stipulates that it will accept the significant and substantial designation for Citation No. 7168801.
64. Government Exhibit 21-A is an authentic copy of Citation No. 7168899, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
65. Brody stipulates that it will accept the significant and substantial designation for Citation

No. 7168899.

66. Government Exhibit 22-A is an authentic copy of Citation No. 7167471, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

67. Government Exhibit 23-A is an authentic copy of Citation No. 7167473, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

68. The Government stipulates that Citation No. 7167473 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

69. Government Exhibit 24-A is an authentic copy of Citation No. 7165683, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

70. Government Exhibit 25-A is an authentic copy of Order No. 8155908, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

71. Government Exhibit 26-A is an authentic copy of Citation No. 8155909, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any

statements asserted therein.

72. Government Exhibit 27-A is an authentic copy of Citation No. 8155925, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

73. Brody admits the fact of the violation cited in citation 8155925 but contests that the violation was properly designated as significant and substantial.

74. The Government stipulates that Citation No. 8155925 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154 issued on October 24, 2013.

75. Government Exhibit 28-A is an authentic copy of Citation No. 8155926, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

76. The Government stipulates that Citation No. 8155926 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

77. Government Exhibit 29-A is an authentic copy of Citation No. 8155936, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

78. Brody admits the fact of the violation cited in citation 8155936 but contests that the violation was properly designated as significant and substantial.

79. The Government stipulates that Citation No. 8155936 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

80. Government Exhibit 30-A is an authentic copy of Citation No. 8155937, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

81. The Government stipulates that Citation No. 8155937 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

82. Government Exhibit 31-A is an authentic copy of Citation No. 9000277, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

83. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000277.

84. Government Exhibit 32-A is an authentic copy of Citation No. 9000278, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

85. Government Exhibit 33-A is an authentic copy of Citation No. 9000278, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any

statements asserted therein.

86. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000278.

87. Government Exhibit 34-A is an authentic copy of Order No. 9000307, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

88. Government Exhibit 35-A is an authentic copy of Citation No. 8125045, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

89. Brody admits the fact of the violation cited in citation 8125045 but contests that the violation was properly designated as significant and substantial.

90. The Government stipulates that Citation No. 8125045 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

91. Government Exhibit 36-A is an authentic copy of Citation No. 8139621, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

92. The Government stipulates that Citation No. 8139621 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

93. Government Exhibit 37-A is an authentic copy of Citation No. 8154782, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
94. Government Exhibit 38-A is an authentic copy of Citation No. 8146352, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
95. Brody admits the fact of the violation cited in citation 8146352 but contests that the violation was properly designated as significant and substantial.
96. Government Exhibit 39-A is an authentic copy of Citation No. 7167400, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
97. Brody admits the fact of the violation cited in citation 7167400 but contests that the violation was properly designated as significant and substantial.
98. Government Exhibit 40-A is an authentic copy of Citation No. 8137713, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
99. Government Exhibit 41-A is an authentic copy of Citation No. 7165682, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any

statements asserted therein.

100. Brody admits the fact of the violation cited in citation 7165682 but contests that the violation was properly designated as significant and substantial.

101. Government Exhibit 42-A is an authentic copy of Citation No. 7168841, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

102. Brody admits the fact of the violation cited in citation 7168841 but contests that the violation was properly designated as significant and substantial.

103. Government Exhibit 43-A is an authentic copy of Citation No. 7168866, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

104. Brody admits the fact of the violation cited in citation 7168866 but contests that the violation was properly designated as significant and substantial.

105. Government Exhibit 44-A is an authentic copy of Citation No.7168913, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

106. Government Exhibit 45-A is an authentic copy of Citation No. 3577965, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

107. Brody stipulates that it will accept the significant and substantial designation for Citation No. 3577965.

108. Government Exhibit 46-A is an authentic copy of Citation No. 3578036, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

109. Brody stipulates that it will accept the significant and substantial designation for Citation No. 3578036.

110. Government Exhibit 47-A is an authentic copy of Order No. 8155954, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

111. Brody admits the fact of the violation cited in citation 8155954 but contests that the violation was properly designated as significant and substantial.

112. Government Exhibit 48-A is an authentic copy of Order No. 8155960, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

113. Government Exhibit 49-A is an authentic copy of Citation No. 9000282, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

114. Brody admits the fact of the violation cited in citation 9000282 but contests that

the violation was properly designated as significant and substantial.

115. The Government stipulates that Citation No. 9000282 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

116. Government Exhibit 50-A is an authentic copy of Citation No. 9000311, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

117. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000311.

118. Government Exhibit 51-A is an authentic copy of Citation No. 9000312, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

119. 117. Brody stipulates that it will accept the significant and substantial designation for Citation No. 9000312.

120. Government Exhibit 52-A is an authentic copy of Citation No. 9002292, with all modifications and abatements, and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.

121. The Government stipulates that Citation No. 9002292 should be modified to non-significant and substantial and hereby withdraws that citation from its Notice of Pattern of Violations, Notice 7219154, issued on October 24, 2013.

122. Government Exhibit 53 is an authentic copy of the POV Notice issued to the operator on October 24, 2013, which may be admitted into evidence for the purpose of establishing its issuance and not for the accuracy of any statements asserted therein.

123. Each of the alleged violations involved in this matter were timely abated in good faith.

124. Brody accepts the negligence, injury/illness, and number of persons affected designations on the twelve (12) citations listed herein that the Government has stipulated were improperly designated as significant and substantial. Likewise, Brody accepts the negligence, injury/illness, and number of persons affected designations on the twelve citations listed herein that Brody has stipulated were properly designated as significant and substantial.

125. For those citations listed herein that the Government has stipulated were improperly designated as significant and substantial, Brody will pay a penalty commensurate with the penalty amount prescribed under Part 100 given the deletion of the significant and substantial designation.

126. For those citations listed herein that Brody has stipulated were properly issued as significant and substantial, with the exception of Citation Nos. 9000305, 9000277 and 9000278, Brody will pay the assessed penalty.

127. Brody will pay a $43,086 penalty for Citation No. 9000305.

128. Brody will pay a $52,913 penalty for Citation No. 9000277.

129. Brody will pay a $14,993 penalty for Citation No. 9000278.