

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001-2021

March 28, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-309
Petitioner,	:	A.C. No. 15-17165-117359
	:	
v.	:	
	:	
STILLHOUSE MINING, LLC,	:	
Respondent.	:	Mine: Mine No. 1

DECISION

Appearances: Thomas A. Grooms, Esq., and Willow E. Fort, Esq.; U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner.

John M. Williams, Esq., and Marco J. Rajkovich, Esq.; Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Paez

This case is before me upon the Secretary’s Petition for the Assessment of Civil Penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815 (2006).¹ In dispute are a single section 104(d)(1) citation and three section 104(d)(1) orders issued to Respondent, Stillhouse Mining, LLC (“Stillhouse”), on December 3, 2006, at its Mine No. 1 operation.

I. Statement of the Case

Citation No. 6665036 charges Stillhouse with violating 30 C.F.R. § 75.313 for failing to follow mandated procedures after the shutoff of its mine fan.² Order No. 6665037 charges

¹ In this decision, Volume One of the hearing transcript, Volume Two of the hearing transcript, Petitioner’s exhibits, and Respondent’s exhibits are abbreviated as “Tr1.,” “Tr2.,” “Ex. P-#,” and “Ex. R-#,” respectively.

² After issuing the citation and orders at dispute in this case. the Secretary amended 30 C.F.R. § 75.313. *See* Refuge Alternatives for Underground Coal Mines, 73 Fed. Reg. 80,656, 80,697 (Dec. 31, 2008) (implementing section 13 of the Mine Improvement and New Emergency Response Act of 2006). Accordingly, unless otherwise indicated, all citations are to the 2007 edition of the Code of Federal Regulations, the provisions of which were in effect at the time of the alleged violations.

Stillhouse with violating 30 C.F.R. § 75.324 for failing to follow specified procedures in intentionally changing its mine's ventilation by shutting off and turning back on its mine fan. Order No. 6665038 charges Stillhouse with violating 30 C.F.R. § 75.220(a)(1) for failing to follow its roof control plan. And Order No. 6665039 charges Stillhouse with violating 30 C.F.R. § 75.360 for failing to conduct an adequate preshift examination of its mine. The Secretary submits that all four alleged violations should be assessed as "flagrant violations" under 30 U.S.C. § 820(b)(2) and proposes a total civil penalty of \$761,000.

The consolidated cases, including Docket No. KENT 2007-309 as well as Docket Nos. KENT 2006-121-R, KENT 2006-122-R, KENT 2006-123-R, KENT 2006-124-R, KENT 2006-125-R, KENT 2006-126-R, KENT 2006-128, and KENT 2006-488, were assigned to me on September 11, 2009. All but Docket No. KENT 2007-309 settled. I held a hearing in Big Stone Gap, Virginia, on July 27 and 28, 2010.³ The Secretary presented the testimony of two officials from the Mine Safety and Health Administration ("MSHA")—Daniel Lynn Johnson, a field office supervisor at MSHA's District 7 office in Harlan, Kentucky, at the time of the issuance of the citation and orders (Tr1. 37:18–39:7), and William Craig Clark, a coal mine inspector (Tr2. 18:18–20, 22:6–9). Stillhouse called no witnesses and rested its case after the Secretary presented her witnesses. (Tr2. 88:9–16.) The parties submitted their post-hearing briefs on September 17, 2010. Stillhouse submitted a reply brief on October 4, 2010.

For the reasons set forth below, Citation No. 6665036 and Order Nos. 6665037, 6665038, and 6665039 are AFFIRMED as flagrant violations.

II. Background and Findings of Fact

A. The Operation at Mine No. 1

1. Coal Extraction at the Mine

Stillhouse operates Mine No. 1, an underground coal mine located near Cumberland, Kentucky.⁴ (Ex. R-3.) Mine No. 1 is known as a "drift mine" because it was created by digging straight into the side of the mountain via coal exposed at the surface in an area known as an "outcrop." (Tr1. 176:1–16, Tr2. 63:24–64:17.) Stillhouse uses a large machine called a

³ The parties stipulated that I have jurisdiction over this matter under the Mine Act. (Tr1. 5:6–8; Resp't Prehr'g Report 1.) Specifically, the parties agreed that Stillhouse was the operator of Mine No. 1, that Mine No. 1 is a mine, and that Mine No. 1's production affected commerce, as defined by the Mine Act. (*Id.*)

⁴ Appendix A at the end of this decision is a digitally scaled down reproduction of Respondent's Exhibit 3, the map of Mine No. 1. (Ex. R-3.) The parties stipulated that this map represents the post-inspection condition of the mine on December 3, 2006. (Tr1. 111:8–12.) The Secretary's witnesses made marks on the map during the hearing. I have inserted boxes around the areas of the mine at issue in this case and labeled them accordingly.

continuous miner to dig through the mountain and extract coal. (Tr1. 30:6–7.) A continuous miner makes long cuts through the mountain, some of which are known as “entries.” (Tr1. 185:5–13.) Entries function like the main streets of a city (*id.*), as they allow miners, extracted coal, and ventilating air to pass through the mine (*e.g.*, Tr1. 89:16–18, 113:4–15, 114:19–115:9). Entries are identified by number, *e.g.*, “Entry No. 1,” which are assigned from left to right across the mine’s entrance, looking into the mine toward the area where miners are extracting coal. (Tr1. 124:24–125:7.) The continuous miner also makes cuts perpendicular to the entries, known as “crosscuts.” Crosscuts are similar to city cross streets in that they provide access to the mine’s different entries. (Tr1. 185:5–13.) Crosscuts are also identified by number, *e.g.*, “Crosscut No. 30,” which are assigned in ascending order, starting at the mine entrance where entryways to the surface called “portals” are located. (Ex. R-3.) The coal and rock that remain between the entries and crosscuts form pillars that help support the mine’s roof. (Tr1. 185:15–17.)

The front of the continuous miner features a rotating drum with metal bits, called a ripper, which removes coal from the layer of earth containing it, known as the seam. (Tr1. 44:14–24.) The continuous miner works at the last open crosscut in an area known as the “face.” (Tr1. 36:15–17.) This machine is operated by a miner who stands approximately thirty to thirty-five feet behind the ripper and uses a remote control to advance the apparatus through the mine. (Tr1. 237:18–238:5.) Once the continuous miner has moved approximately ten to thirty feet and the area behind it has been cleared, other miners working as roof bolters secure the roof. (Tr1. 57:24–58:7.) Stillhouse uses double-headed roof bolters in Mine No. 1, which are operated by two miners. (Tr1. 50:6–11.)

Coal extracted by the continuous miner is loaded into a shuttle car, a piece of transportation equipment that takes the coal to the belt feeder and dumps it into the belt feeder’s hopper. (Tr1. 29:10–17, 131:5–15.) Miners use another piece of equipment, a scoop, to remove loose coal from the mine floor and mine ribs and take it back to the face where it is swept up by the continuous miner’s ripper. (Tr1. 50:19–51:7.) Collectively, the set of equipment mining coal at the face is known as the mechanized mining unit, or “MMU.” (Tr. 41:20–42:3.) MMU’s are designated by number, such as “002 MMU,” and are often referred to by section, such as “002 section.” (Tr. 41:5–10, 41:23–42:3, 122:6–8.) On the day the citation and orders in this case were issued, Stillhouse was operating a continuous miner, two or three shuttle cars, a double-headed roof bolter, two scoops, a belt feeder, and belt lines at the 002 MMU. (Tr1. 42:10–15.)

The belt haulage system at Mine No. 1 delivers coal out of the mine where it exits through the belt portals to the surface. (Tr1. 114:16–115:9.) Each flap of belt along the belt haulage system consists of a head drive and tailpiece. (Tr1. 194:18–23.) The belt runs across the top of the head drive and tailpiece and comes around the bottom of the unit. (*Id.*) The head drive is an electrical installation featuring a motor operated by a controller and a power center that delivers the appropriate amount of electrical voltage to the head drive. (Tr1. 195:4–10.)

The top belt upon which the coal sits has three “top rollers” along every six feet of belt. (Tr1. 195:11–13.) These groups of rollers form a “V” or “U” shape in the belt and prevent coal from falling off by keeping the coal in the middle of the belt. (Tr1. 195:22–196:1.) The belt line also features single “bottom rollers” located every twelve feet. (Tr1. 195:13–15, 196:1–2.)

The belts run through Entry No. 4 through most of the mine. (Ex. R-3.) However, they do not exit at the main entrance. At Crosscut No. 30, the belts turn, head through a different section of the mine, and exit at the belt portals across from the main entrance.⁵ (Tr1. 114:16–23; Ex. R-3.)

2. Ventilation System

Stillhouse uses a mine fan to circulate fresh air through Mine No. 1. (Tr1. 86:14–17.) The mine fan sits at the mine entrance in the portal to Entry No. 1. (Tr1. 87:12–13, 88:1–23.) The fan blows air out of, rather than into, the mine and is therefore known as an exhausting fan. (Tr1. 86:18–21.) The fan creates suction that pulls fresh air into the mine (Tr1. 86:22–25), circulating it past the places where the miners are working (Tr1. 123:17–19), provided that appropriate controls are in place to direct the air through the mine (Tr1. 87:15–23, 133:4–136:3). The fan moves approximately 230,000 cubic feet of air per minute (“CFM”). (Tr1. 88:4–6.)

Entry Nos. 1 and 2 at the entrance to Mine No. 1 serve as courses for air to exit the mine, which is known as “return air.” (Tr1. 87:15–16.) Return air is air that has passed the last working place in the mine and is accordingly directed out of the mine to remove contaminants such as dust and methane gas. (Tr1. 123:20–124:13.) This air cannot be used to ventilate areas where miners are working or where equipment operates that can spark mine fires, such as the belt haulage system. (Tr1. 123:20–124:2.) To prevent return air from reentering the mine, a tube brings the return air directly to the mechanical fan, and another tube diverts the return air away from the mine portals so the contaminated air does not get circulated through the mine again. (Tr1. 88:1–89:6.) Permanent block stoppings separate Entry Nos. 2 and 3 to ensure that return air and fresh air do not comingle. (Tr1. 87:16–18.)

Entry Nos. 3 and 4 are ventilated by the same current of air. (Tr1. 113:10–114:3.) The fan draws fresh air through these entries, but this air is not used to ventilate the face. (Tr1. 87:18–20, 113:11–22.) Entry No. 3 serves as the path for the man trip roadway miners use to enter and exit the mine. (Tr1. 113:11–22.) The belts run through Entry No. 4 until they turn at Crosscut No. 30 and run toward belt portals in a separate area of the mine. (Tr1. 114:16–23; Ex. R-3.)

The remaining entries at the mine entrance provide intake courses for the air drawn in by the mine fan for use at the face and other areas where the miners are working. (Tr1. 87:20–21; Ex. R-3.) This air is known as “intake air.” (Tr1. 123:17–19.) Intake air enters the mine through the No. 4 main intake portal and the No. 5 main intake portal at the mine entrance. (Tr2. 26:10–27:21; Ex. P-15, at 3; Ex. R-3.)

⁵ Appendix B at the end of this decision shows the location of the belt portals. The Secretary’s witness Daniel Johnson, who inspected Mine No. 1 on December 3, 2006, drew the arrow shown in the upper left-hand corner of the diagram identifying the belt portals, the location where the conveyor belt delivers coal out of the mine. (Tr1. 114:7–115:14.) The location of the belt turn at Crosscut No. 30 is shown in Appendix C at the end of this decision. Johnson circled the location of the belt turn and marked it with his initials. (Tr1. 118:6–17.)

At the time of the alleged violations, the ventilation system at Mine No. 1 was set up to ventilate two MMU's located in separate areas of the mine. The main current of air drawn in by fan was supposed to split at the location of the 003 MMU. (Tr1. 134:14–15.) Part of the air was to flow to the 003 MMU, and the remaining air was to flow to the 002 MMU. (Tr1. 134:15–16.) The 002 MMU, the furthest MMU from the mine entrance, was located approximately 27,000 feet, or about five miles, away from the mine entrance. (Tr1. 116:21–24; Ex. P-15, at 10.) As a result, air circulating through the 002 section was to travel approximately ten miles—five miles to the section and another five miles to exit the mine. (Tr1. 134:7–135:4.)

Maintaining proper ventilation is vital to ensuring a safe environment in the mine. Circulating fresh air provides oxygen to miners. (Tr1. 147:23–148:1.) The fresh air flow dilutes methane gas, rendering it harmless, and carries it out of the mine. (Tr1. 153:13–15.) Methane is explosive if its concentration is between five to fifteen percent of a given volume of air. (Tr1. 47:7–20.) Consequently, operators are required to take precautionary measures when methane concentrations of at least one percent are detected. 30 C.F.R. § 75.323. Methane enters Mine No. 1 through a variety of sources. Methane is released when the continuous miner extracts coal from the seam. (147:14–19.) Methane also naturally seeps out of the coal seam, which is exposed throughout the interior of the mine. (Tr1. 146:4–15.) Another coal seam, the Imboden seam, lies 100 to 120 feet below the Mine No. 1 operation and provides another source of methane. (Tr1. 146:18–147:13.) Additionally, water has a tendency to trap methane and not allow it to escape aboveground. (Tr1. 201:25–202:4.) Mine areas below the water table have an increased susceptibility to methane accumulations. The three quarterly measurements of Mine No. 1's methane emission rate taken prior to December 2006 ranged between 128,455 and 187,006 cubic feet of methane per day.⁶ (Tr1. 105:14–106:22; Ex. P-8.)

The ventilation system also removes dust from the mine. (Tr1. 147:23–148:6.) Dust is generated by Stillhouse's mining activities as well as by the belts that deliver coal out of the mine. (*Id.*) Concentrated quantities of methane and airborne coal dust ("float coal dust") can be explosive. (Tr1. 47:7–20, 155:15–156:1.) The presence of float coal dust lowers the concentration of methane necessary to create an explosive mixture of air. (*Id.*)

Air contaminated with float coal dust and methane cannot be used to ventilate areas with non-permissible equipment. (Tr1. 123:20–124:2.) Non-permissible equipment lacks safeguards to contain sparks generated by its electrical components. (Tr1. 35:24–36:14.) Exposing non-permissible machinery to air contaminated with coal dust and methane can cause deadly mine explosions. (Tr1. 30:21–31:10.) In contrast, permissible equipment is designed to contain sparks generated by its electrical components. (Tr1. 34:1–35:23.)

To prevent these hazards and ensure proper ventilation, each underground mine operator must develop and follow a ventilation plan that has been approved by MSHA. 30 C.F.R. § 75.370; (Tr1. 95:1–7.) Whenever an operator plans to change its mine's ventilation, such as by digging new

⁶ Those measurements were 187,006 cubic feet on March 6, 2006; 159,646 cubic feet on June 19, 2006; and 128,455 cubic feet on September 12, 2006. (Ex. P-8.)

cutouts from an underground area to the surface, it must submit an amendment to its ventilation plan and receive MSHA's approval. (Tr1. 93:20–95:13); 30 C.F.R. § 75.370(d). At the time of the alleged violations, Stillhouse had an MSHA-approved ventilation plan in place at Mine No. 1. (Tr1. 95:8–10.)

3. Roof Support

The prevention of roof collapses at Stillhouse's mining operation is governed by its roof control plan. (Ex. P-21.) As with Stillhouse's ventilation plan, its roof control plan must be approved by MSHA. 30 C.F.R. § 75.220. The roof control plan in place at Mine No. 1 at the time of the alleged violations was MSHA-approved. (Ex. P-21.)

Stillhouse installs roof bolts to secure the ceiling of Mine No. 1. (Tr1. 48:24–49:3.) To install roof bolts, a miner uses a roof bolting machine to drill a hole into the mine roof. (Tr1. 54:22–23.) The miner then inserts pre-measured packaged resin, basically glue, into the hole, followed by the actual roof bolt. (Tr1. 54:22–25.) As the miner slides the roof bolt into the hole, he or she checks for "seep back," a small amount of resin flowing out of the hole that lets him or her know that the hole is completely full of resin. (Tr1. 54:25–55:4.) Completely filling the hole with resin ensures that the roof bolts are entirely surrounded by glue, which provides anchorage along the full length of the bolt. (Tr1. 55:7–25.) Stillhouse also used cable bolts at Mine No. 1, which are roof bolts made out of stranded steel cable like the kind used to support bridges. (Tr1. 75:20–76:3.)

The amount of support necessary to secure the mine roof varies with its strength, as measured by the roof's hardness. (Tr1. 56:5–18.) A roof's hardness is evaluated by how often the roof bolt operator must change the drilling machine's drill bit; the material comprising harder roofs wears out the drill bit at a faster rate than the material comprising softer roofs. (Tr1. 56:6–15.) Because soft roofs have a less stable composition, they are more likely to collapse than hard roofs. (Tr2. 72:24–25.) To secure soft roofs, miners must use roof bolts longer than the ones used in hard roofs in order to reach through the softer layer of roof material into harder material. (Tr1. 75:2–8.) If the roof conditions are especially poor and the layers of rock comprising the ceiling are cracked and separated, then crossbars or steel beams are required to lend additional strength to the roof. (Tr1. 181:22–182:9.) These standing supports feature horizontal bars spanning across the width of the mine ceiling that contribute to the prevention of roof falls. (Tr. 182:5–9.)

The width of the entries in Mine No. 1 also influences the mine roof's strength. The narrower the entries, the stronger the roof, as smaller entry widths reduce the area of the mine roof needing support. (Tr1. 185:25–186:7.) Underground areas near where the coal is exposed to the surface, called the outcrop, are known to have much weaker roofs than areas in other parts of the mine. (Tr1. 186:17–22.) Developing an area for the miners to cut out to the surface from underground requires drilling and blasting to expose the coal seam to the surface. (Tr. 186:17–187:2.) These man-made stressors, as well as the natural erosion of the mountain's outside surface, weaken the mine roof at the outcrop. (*Id.*) Many times no roof falls occur when making cuts to the outside. (Tr1. 236:25–5.) However, it is not uncommon for the roof to collapse when cutting from underground to the surface. (Tr1. 237:6–10.) Narrowing the entries reduces the risk

of roof falls. The deaths of most underground miners are caused by roof falls, so maintaining proper roof control is vital to ensuring the health and safety of miners. (Tr1. 187:10–18.)

B. MSHA’s Inspection on December 3, 2006

1. Complaint Prompting the Inspection

At approximately 10:40 p.m. on Saturday, December 2, 2006, the other field supervisor at MSHA District 7, Robert Rhea, called fellow field supervisor Daniel Johnson with a report from a miner concerning the roof conditions at Mine No. 1. (Tr1. 52:1–16.) The miner had contacted Rhea at his home, and Rhea recorded the following complaint: “(1) Mine cutting to surface. Roof broken up and glue running away from rods in holes. Roof very soft and hazardous. Mining all weekend. Please check tomorrow (Sunday) Dec. 3, 2006.” (Ex. P-17.) Johnson was alarmed at the news that Stillhouse was cutting to the surface, that is, digging from the underground area out to the surface. (Tr1. 58:22–59:1.) At the time, Johnson did not know how far from the surface Stillhouse was. (Tr1. 212:9–12.)

Johnson planned to inspect the mine first thing the next morning on Sunday. (Tr1. 59:15–19.) As an MSHA supervisor responsible for overseeing Mine No. 1 (Tr1. 39:22–40:8), Johnson had not known Mine No. 1 to produce coal during the third-shift, which ran between midnight and 7 a.m. (Tr1. 59:13–14, 212:5–6). Johnson was aware that miners often perform tasks other than coal mining during third-shift at Mine No. 1, such as roof bolting. (Tr1. 212:13–213:2.) Based on the time of the call, Johnson concluded that the miner had contacted Rhea at the end of second-shift, so Johnson thought that the miner wanted the mine inspected before he returned to work the next day. (Tr1. 59:11–19.) Johnson did not believe the call raised concerns of an imminent danger warranting immediate attention, such as a falling mine roof or gassed off sections of the mine. (Tr. 59:21–60:10.) Following his conversation with Rhea, Johnson called Coal Mine Inspector William Craig Clark and requested that Clark inspect Mine No. 1 with him on Sunday morning.⁷ (Tr1. 67:14–16; Tr2. 68:11–69:7.)

At about the same time as Rhea’s call to Johnson, the second-shift crew at Mine No. 1 was preparing to leave. (Ex. P-15, at 9–10.) When the second-shift section foreman left the mine at about 10:45 p.m., the third-shift crew had yet to go underground. (*Id.*) At Entry Nos. 1 and 2 in the 002 section, where Stillhouse was cutting to the surface, the miners were approximately fourteen to twenty-two feet from breaking through to the outside of the mountain. (Ex. P-15, at 9.)

2. The Inspectors’ Arrival – Mine Fan Status

Johnson arrived at Mine No. 1 at approximately 6:10 a.m. on Sunday, prior to the start of first-shift. (Tr1. 91:5–8; Ex. P-16, at 1.) Johnson spoke with Ray Young, a roof bolt operator

⁷ Clark was not the inspector assigned to Mine No. 1 but he had been previously assigned to the mine and was very familiar with it. (Tr1. 67:8–17.) The then-current inspector assigned to Mine No. 1 was out of town at the time. (Tr1. 67:8–14.)

whom Johnson had known for a number of years. (Tr1. 74:9–13.) Young explained to Johnson that he had been a roof bolt operator on the 002 section during the first-shift and that the roof on this section was soft. (Tr1. 74:13–17.) Rather than standard four-foot roof bolts, Stillhouse had been installing six-foot bolts and cable bolts, and Young believed that adequate roof support was being provided. (Tr1. 74:17–20. *See* Ex. P-21, at 5 (setting forth the minimum roof bolt lengths).)

After speaking with Young, Johnson approached the mine office and realized he did not hear the loud noise of the mine fan. (Tr1. 76:4–14.) Noticing that the mine fan was off, Johnson went to it and checked the fan chart documenting the fan’s operational activity. (Tr1. 76:15–17.) Johnson’s examination of the chart revealed the fan had been off for several hours. (Tr1. 76:16–18.)

Clark, who arrived a short time after Johnson (Tr1. 67:23–25; Tr2. 23:2–3), immediately noticed the mine fan was off as well (Tr2. 22:14–18). Clark also checked the fan chart and noted that the mine fan had been shut off. (Tr1. 80:9–15; Tr2. 23:22–24:1; Ex. P-15, at 1.) Clark observed that the fan blades were still.⁸ (Tr2. 47:10–16.) Moreover, Clark did not see anything blowing in the portals, though he speculated on cross-examination that wind outside the portals could have been blowing an object hanging in one of them. (Tr2. 47:17–48:1.)

The fan chart was admitted at the hearing as Petitioner’s Exhibit 7. (Tr1. 12:8–10.) The chart tracks the operational status of the mine fan by plotting the pressure of the fan over time along a rotating circular graph. (Tr1. 78:2–10; Ex. P-7.) The chart reveals the fan had been shut off for six hours while miners were underground (Tr1. 78:18–19), and the parties stipulated to this fact (Tr1. 5:21–23; Resp’t Prehr’g Report 2). The parties further stipulated that the fan was turned off at some point between midnight and 12:30 a.m., Sunday, December 3, 2006, after the miners had made their first cut to the surface at the 002 section. (Tr2. 17:2–21.)

Remembering that the mine fan sounds an alarm when turned off, Johnson questioned the security guard, who said the fan was shut off at about 12:30 a.m. by Eugene Johnson. (Tr1.

⁸ It is unclear from Clark’s testimony whether he was at the mine portals while the mine fan was off. In explaining why he did not measure the air movement at the mine fan prior to the fan being turned back on, Clark testified “I was actually going over to check the intake portals, to see if there was any type of air movement at all.” (Tr2. 24:13–18.) However, Clark also testified that he left the portals after he heard the fan start back up: “Then I heard the fan start, and I went back, left the portals and went back to see [who turned on the fan] . . .” (Tr2. 24:21–25:1.) Because Clark was at the portals when the fan came back on, he had to be at the portals for some period of time before the fan restarted.

Further evidence helps resolve Clark’s testimony. As noted above, the evidence establishes Clark checked the mine fan chart when he realized that the fan was off, the mine chart was located at the fan, and the fan was located at the mine entrance. Furthermore, Johnson testified that the fan chart was not changed out of the fan until after the fan was restarted. (Tr1. 78:10–12.) Because Clark checked the mine fan chart while the fan was off and the chart was located at the fan at that time, Clark visited both the portals and the fan while the fan was off.

78:20–79:14.) Daniel Johnson asked the security guard as to who instructed Eugene Johnson to turn off the fan, but the guard did not know. (Ex. P-16, at 3.) At the hearing, Daniel Johnson stated that someone in Stillhouse’s management instructed Eugene Johnson to turn off the mine fan. (Tr1. 149:6–11.) Through their interviews with Stillhouse’s miners, MSHA’s Daniel Johnson and Clark were told that Eugene Johnson had brought his children to watch the miners cut to the surface from underground. (Tr1. 149:1–5; Ex. P-15, at 10, 16.)

After discovering that the fan was off, Daniel Johnson asked a miner standing outside the mine to telephone the miners working underground. (Tr1. 79:22–80:7.) The miner requested to speak with the foreman, and Johnny Osborne answered. (Tr1. 80:25–81:3.) At the hearing, Johnson recalled saying, “Johnny, do you know the fan’s off?” (Tr1. 81:17.) Johnson testified that Osborne said, “I’ve got good air coming in [from the cutout]” to which Johnson replied, “Well, Johnny, the fan’s off, the fan’s been off for a long time. Get your mine—, get your men and come out of the mines.” (Tr1. 81:18–21.) Osborne also told Johnson that the miners had been cutting out to the surface. (Tr1. 82:12–13; Ex. P-15, at 1.) Johnson asked where he could find Ira Sergent, the third-shift foreman. (Tr1. 82:18–24.) Osborne told Johnson that Sergent had been working on the 002 section and was on his way out of the mine. (Tr1. 82:24–83:12.) Osborne also said Sergent had been gone for a couple of hours, which did not surprise Johnson, who thought Sergent might be conducting a preshift inspection. (Tr1. 82:24–83:6.)

After speaking with Osborne, MSHA Field Office Supervisor Daniel Johnson called his supervisor at MSHA, John Pyles, from the mine office based on what he perceived to be the serious nature of the situation. (Tr1. 82:3–6, 83:24–84:1.) During that conversation and about ten to twenty minutes after speaking with Osborne, Johnson noticed a man trip, a diesel powered personal transportation device, emerge from the mine carrying Sergent. (Tr1. 84:3–85:17; 100:6–9.) Johnson then heard the mine fan start. (Tr1. 85:10–11.) Following his conversation with Pyles, Johnson spoke with Sergent, who had turned on the fan. (Tr1. 85:14–17; Tr2. 24:10–12.) Johnson testified that he remembered asking, “Ira, did you know the fan was off?” (Tr1. 85:19–20.) Johnson believed that Sergent reacted evasively to his question, stating something to the effect of, “Well, I, I didn’t turn it off, and I wouldn’t have turned it off. I would have just opened the doors.” (Tr1. 85:21–23.) Opening the fan doors “short circuits” the air flow by allowing the fan to draw air from the area surrounding it rather than allowing the fan to pull air through its usual circuitous course through the mine. (Tr1. 85:25–86:7.) The result of opening the fan doors is lower airflow through the mine. (Tr1. 85:25–86:7.) Had Stillhouse been running the fan at full capacity when it cut through to the surface, it would have created improper airflow in the mine, as discussed below. *See* discussion *infra* Part II.B.4.

Clark’s notes from the inspection also document statements made by Sergent when he emerged from the mine. (Ex. P-15, at 4–5.) Sergent said he did not know who turned off the fan. (*Id.* at 4.) Sergent also said he was going to open the fan doors, but the miners on the section said it had been taken care of. (*Id.*) According to Sergent, the ventilation had not been hurt. (*Id.*) As noted by Clark, Sergent stated that when he checked the ventilation on the 002 section he found an airflow rate of 40,000 CFM. (*Id.* at 5.) Sergent also told Clark that he had gone to the 003 section and found plenty of air movement from natural ventilation. (*Id.*)

Minutes after Johnson's conversation with Sergeant, Mine Superintendent Lonnie Moore arrived to work at the mine. (Tr1. 90:10–25.) Moore asked Johnson whether anyone was hurt. (Tr1. 91:9–11.) Johnson said “No, there, there's no one hurt. . . . Did you know your mine fan was off all night?” (Tr1. 91:12–13.) According to Johnson, Moore replied along the lines of “[w]ell, they turned it back on after they cut, after they cut through, didn't they?” (Tr1. 91:14–16.) Johnson told Moore that was not the case, and the fan had been off for six hours. (Tr1. 91:16–18.) Moore offered no further explanation of the miners' activity at the cutout. (Tr1. 97:4–9.) Johnson testified that Moore did not seem surprised by the fan shutoff. (Tr1. 96:25–97:3.) Moore stopped talking to Johnson after this exchange. (Tr1. 91:21–22.)

Approximately fifteen to thirty minutes after Sergeant had restarted the fan, Clark took measurements of the airflow at the intakes. (Tr2. 25:5–16.) Clark found that air was flowing into the No. 4 main intake portal at 54,180 CFM and into the No. 5 main intake portal at 41,625 CFM, for a total rate at the two intake portals of approximately 96,000 CFM. (Tr2. 27:14–21, 28:7–11; Ex. P-15, at 3.) Clark's review of the weekly examiner's record showed that over the prior few weeks, the total rate of air flowing into the two intake portals had been between 203,000 and 213,000 CFM. (Tr2. 28:3–6.) Additionally, Clark found that air was flowing into the entry for the neutral roadway at a rate of 30,523 CFM. (Tr2. 29:14–19; Ex. P-15, at 3.) Clark did not factor this air current into the 96,000 CFM intake rate because the neutral roadway is a complete, separate entry under Stillhouse's MSHA-approved ventilation plan (Tr2. 29:20–25), and air flowing through it does not ventilate the face (Tr1. 113:10–22). Rather, this air current ventilates the man trip roadway and the belt entries. (Tr1. 113:10–114:3.) Clark also took bottle samples at the mine fan to check for methane. (Tr2. 48:16–19; Ex. P-16, at 6.) The samples were sent for analysis, but the resulting report indicated that the bottles were empty. (Tr2. 49:15–18.)

Johnson and Clark determined that seven miners were underground when Sergeant turned the fan back on. (Tr1. 97:17–100:4; Ex. P-15, at 2.) The miners exited the mine about an hour after Johnson ordered Osborne to evacuate. (Tr1. 100:21–24, 101:11–13; Ex. P-15, at 3–4.) In order to clear any gases that may have accumulated in the mine while the fan was off, Johnson let the mine fan run for about an hour after it had been turned on and the miners had exited the mine. (Tr1. 102:2–16.) Johnson was to accompany first-shift Section Foreman Philip Gilbert while Gilbert performed a preshift examination from the mouth of the 003 section to the 002 section. (Tr1. 109:19–21, 248:20–25.) Clark was to accompany miner Earl Gilliam while Gilliam conducted a preshift examination from the portals to the 003 section. (Tr1. 109:17–19, 248:20–25.) These preshift examinations were necessary in light of the fact that the fan had been shut off for six hours. (Tr1. 109:22–110:1.) Johnson, Clark, Gilbert, and Gilliam traveled through the mine via the main man trip roadway in Entry No. 3.⁹ (Tr1. 112:23–113:15.)

3. Preshift of the Wet Area

⁹ Appendix B at the end of this decision identifies the location where the events discussed in this section took place. (Ex. R-3.) Entry No. 1 is on the far right of the illustration, Entry No. 2 is to the left of it, and so on. Entry No. 3 is identified on the map as “Travelway Neutral.” (*Id.*)

The preshift investigation at issue in this case concerns a part of the mine known as the “Wet Area.”¹⁰ (Tr1. 189:15–16.) A creek passes over this location (Tr1. 201:23), and the Wet Area’s name derives from the fact that it is very wet there, as it lies under the water table (Tr1. 196:14–16, 202:5–12). The Wet Area spans from Crosscut No. 30 in the main entryway—the thirtieth crosscut from the mine entrance—up through an area separate from the main entries that goes toward the belt portals. (Tr1. 189:16–20.) At Crosscut No. 30, the belts turn from Entry No. 4 and head out toward the belt portals through a separate area of the mine. (Tr1. 189:17–20.)

Four coal belts pass through the Wet Area on the way to delivering coal to the belt portals. (Tr1. 191:22–25.) As the belts go from Crosscut No. 30 and up through the Wet Area, they keep turning. (Tr1. 192:5–7.) Because the belts must lie straight, a transfer point is located at each place where the direction of the belts shifts. (Tr1. 192:7–9.) Coal is moved from one belt to another at these points. (Tr1. 192:11–15.) Each transfer point features a belt drive unit with one or two motors that pull the belt. (Tr1. 192:18–25.) The transfer points also have a belt controller with a circuit breaker that allows the belt to go at different speeds and directions. (Tr1. 192:25–193:4.) These areas have transformers that adjust the voltage to deliver the appropriate amount of power to the equipment. (Tr1. 193:4–17.) This equipment was non-permissible and had the capability to spark a mine explosion should it have been exposed to air contaminated with methane or float coal dust. (Tr1. 191:9–194:17.)

When Clark and Gilliam arrived at the Wet Area, Clark found no dates, times, or initials at the belt power centers for the No. 1, No. 2, No. 3, or No. 4 belts or for the electrical distribution boxes. (Tr2. 32:13–19, 33:4–9.) Clark determined that no preshift examination had been performed in these areas. (*Id.*) Clark noted that the last date, times, and initials were from December 1, meaning that preshift examinations were not performed prior to all three shifts on December 2. (Tr2. 33:11–18, 33:24–34:7.) When Clark entered the mine, he thought that the power was off, as he was not able to hear the mine’s underground electrical equipment from the surface. (Tr2. 57:15–19.) However, as Clark inspected the belt line in the Wet Area, he discovered that the power was still on (Tr2. 57:20–23) and noted that the belts were still running (Ex. P-15, at 5).¹¹ Clark continued his examination of the area and did not turn off the power, in spite of the regulation forbidding the restoration of electrical power to areas affected by a ventilation change, because he believed that any methane in the mine had been cleared out, as he had let the fan run for an hour before entering the mine. (Tr2. 57:2–58:7.)

¹⁰ The portion of the mine map in Appendix C at the end of this decision shows the location of the Wet Area along with Johnson’s notations from the hearing. Johnson identified the Wet Area by marking the mine map with an arrow and writing the last four digits of the order concerning the preshift examination, 5039. (Tr1. 189:21–190:6; Ex. R-3.)

¹¹ Johnson testified that he was unsure whether the belts were running between the time he entered the mine and the time he ordered the power to be shut off. (Tr1. 203:5–9.) Clark’s notes from the inspection, however, noted that the belts were running. (Ex. P-15, at 5.) Because Clark’s notes were written during the inspection itself, I find that the belts were running when Clark and Johnson entered the mine.

After the completion of the preshift examination, Clark and Gilliam returned to the main entries and traveled to the 002 section, stopping at the 003 section along the way. (Tr2. 34:16–20, 35:3–8.) At the 003 section, Clark issued a citation for coal accumulations. (Ex. P-15, at 6.) He found float coal dust on the mine roof and the mine floor. (*Id.*) The mine floor had accumulations of loose coal of up to ten inches thick. (*Id.*) Clark found that air was moving in the proper direction in the 003 section, and he detected no methane. (*Id.*) Proper preshift examinations had been conducted in the 003 section, as well. (*Id.*)

4. Air Reversal at the Intake/Return Split

Meanwhile, as Johnson and Gilbert traveled to the 002 section, their man trip experienced mechanical difficulties at the mouth of the 003 section, near Crosscut Nos. 167 and 168, where the preshift examination was going to begin anyway. (Tr1. 119:22–23, 121:4–23.) At the time, Johnson had been informed by Sergeant that the 003 section was not being mined. (Tr1. 122:9–14.) As the preshift examination began, Johnson noticed that the air was coming the wrong way. (Tr1. 122:25–123:3.) Instead of blowing at his back toward the 002 section, the air was blowing directly in Johnson’s face. (Tr1. 123:3–6.) The ventilation had reversed. (Tr1. 123:9.)

Specifically, in this part of the mine, fresh air was supposed to course through Entry Nos. 3 through 6 toward the face, and Entry Nos. 1 and 2 were to function as courses for return air. (Tr1. 125:11–18.) Instead, return air from the 002 section was blowing through the man trip roadways in Entry No. 3 and the belt lines in Entry No. 4 at a rate of 15,000 CFM toward the mine entrance. (Tr1. 127:14–128:1.) Fresh air should have been coursing through Entry Nos. 3 and 4 toward the 002 section. Moreover, the fresh air that should have been flowing through the entries for use at the working faces had come to a standstill. (Tr1. 127:8–13.) Johnson did not find any methane in this area. (Tr1. 128:2–6.) Johnson called Moore and told him to cut the power going to the 002 section because the air was reversed. (Tr1. 128:7–15.) Cutting the power required sending a certified person underground to Crosscut No. 77. (Tr1. 128:19–129:4.) Once Johnson reached the 002 section, he confirmed that the power had been shut off.¹² (Tr1. 129:5–19.)

5. 002 Section – Air Flow and Mining Activity

When Johnson arrived at the 002 section with Gilbert, in an area known as the Maggard Branch (Tr1. 115:23–116:5), Johnson discovered that Entry No. 1 was cut out to the surface but the mine roof was not bolted back, and Entry No. 2 was cut out to the surface but the roof had fallen in. (Tr1. 129:22–130:3.) The continuous miner was located in Entry No. 3, which was partially cut. (Tr1. 130:14–23.) Johnson observed a double-headed roof bolter, two or three shuttle cars, some of which were loaded, two scoops, the belt feeder, which was partially loaded, and the belt lines. (Tr1.

¹² Appendix D at the end of this decision shows the mouth of the 003 section where Johnson first determined the air flow had reversed. (Tr1. 119:20–120:7.) During the hearing, Johnson circled the location where he stopped and marked it with his initials. (*Id.*) Johnson also marked the location of the 003 MMU. (Tr1. 136:4–15.)

42:12–15, 130:24–131:4.) The belt feeder was located approximately four or five crosscuts from the face. (Tr1. 131:19–22.) Stillhouse had been extracting coal in the section. (Tr1. 130:6–7.) The belt scale report, which measures the output of Mine No. 1, shows that Stillhouse mined nearly seven hundred tons of coal and other material while the fan was off.¹³ (Tr1. 107:24–108:19; Ex. P-9.) That coal came exclusively from the 002 section, as the 003 section was inactive during that time period. (Tr1. 122:9–14.)

As for the ventilation conditions, Johnson found that air was flowing into the mine from the cutouts to the surface in Entry Nos. 1 and 2 of the 002 section. (Tr1. 132:24–133:3.) Johnson testified that the air coming from outside the mine was insufficient to ventilate the mine. (Tr1. 133:4–7.) The air current from these entries reversed the air flow in the belt entries, which prevented air from moving in the proper direction. (Tr1. 133:9–14.) Rather than flowing from the main portals to the 002 section and back, air was entering the cutouts and going toward the 003 section. (Tr1. 135:20–24.) Johnson explained that the air traveled in this direction because the distance from “the cutouts to the 003 MMU is much shorter than the distance from the original portals to the 003 MMU.” (Tr1. 135:25–136:2.) In other words, the exhaust current generated by the fan at the entrance was pulling air from the cutouts at the 002 section straight to the main portals, instead of from the main portals to the 002 section and back. (Tr1. 175:22–25.) The mine was insufficiently ventilated because air was uncontrollably flowing from the cutouts through the 002 section in the wrong direction. (Tr1. 133:9–15.)

Clark and Gilliam arrived at the 002 section after Johnson and Gilbert. (Tr2. 35:2–8, 35:15–20.) Clark measured the direction of the airflow in the entries using chemical smoke. (Tr2. 36:1–4; Ex. P-15, at 6–7.) Clark determined that return air was flowing from the 002 section back toward the mine entrance through the man trip roadway entry, the belt entry, and the intake entries. (*Id.*) Indeed, the airflow had reversed so that potentially contaminated air passed through areas where miners worked and equipment operated. Intake air should have been flowing toward the working face, sweeping across the area, and then exiting out the return air course. (Tr2. 38:19–23.) Clark detected no methane in the area.¹⁴ (Tr2. 39:10–15.)

6. 002 Section – Roof Control

¹³ The time period of the report actually spans from 12 a.m. to 7 a.m. (Ex. P-9.) The fan was turned off at some point between midnight and 12:30 a.m. (Tr2. 17:2–21), and mining without the fan continued until Johnson discovered the fan was off and ordered Osborne and his crew out of the mine (Tr1. 79:22–81:21). Thus, virtually all of the coal shown on the belt scale report had to have been produced while the fan was off.

¹⁴ Appendix E at the end of this decision shows the area of the Maggard Branch cutouts and the 002 section. At the hearing, Clark circled the location of the 002 section and marked it with his initials. (Tr2. 36:5–37:8.) Clark drew an arrow to the last open crosscut, labeling it “Air Measurements,” and testified that he took the chemical smoke measurements across the area to detect the direction of the airflow. (*Id.*)

In addition to investigating the mining activity and air flow at the 002 section, MSHA's Johnson and Clark analyzed the roof conditions. They observed the roof to ensure nothing would fall as they worked. (Tr1. 132:18–21; Tr2. 41:24–42:4.) Their observations corroborated those in the miner's telephone complaint prompting the investigation. (Tr1. 179:14–18.) The mine roof was soft. (Tr1. 179:16–17.) Glue was "running away from the . . . rods" (Tr1. 179:17–18), meaning that the roof bolts were not fully anchored into the mine ceiling (Tr1. 55:8–25). Roof fractures were discovered, and a roof fall had occurred in Entry No. 2, spanning the entire width of the entry and measuring about four-feet thick. (Tr1. 180:1–5; Ex. P-15, at 9.) The roof had sagged in numerous places (Tr1. 180:6), and water was coming from the mine roof in several locations (Ex. P-15, at 9). Stillhouse had installed roof bolts in the entries of the 002 section, and Johnson testified that Stillhouse's installation of the roof bolts was in compliance with the roof control plan, in that the bolts were of the proper length and were properly spaced. (Tr1. 244:7–14.) The roof bolt installations on the 002 section included ten-foot cable bolts in all five entries. (Tr2. 74:17–75:6; Ex. P-15, at 9.)

Johnson and Clark found cracks at twenty-four and forty-nine inches in Entry No. 3. (Tr1. 180:6–12; Ex. P-15, at 9.) Johnson and Clark measured the cracks by inserting a standard metal measuring tape into a test hole and checking where the lip at the edge of the tape caught on the rock. (Tr1. 180:6–12.) Johnson acknowledged that the cable bolts supporting the cracks appeared to be functioning properly. (Tr1. 245:15–246:11.)

Additionally, Johnson and Clark observed "hill seams" in Entry No. 3. (Tr1. 180:22–24; Ex. P-15, at 9.) Hill seams are natural vertical cracks in the layers of rock, or "strata," above the mine, which create free areas where the roof can fall. (Tr1. 181:1–7.) Stillhouse had used thin metal straps to support the hill seams rather than the minimum T2 steel channel dictated by its MSHA-approved roof control plan. (Tr2. 45:5–18.) Clark issued a citation for insufficiently supported hill seams in Entry No. 3, which is not at issue in this case. (*Id.*) At the hearing, Johnson noted that because Stillhouse used straps to secure the hill seams, it actually should have narrowed the width of Entry No. 3 to sixteen feet. (Tr1. 244:23–245:14, 261:4–14.)

Johnson and Clark checked the width of the entries near the "outcrop," the area Stillhouse had created for the cutouts where coal was exposed to the surface. (Tr1. 258:15–259:11; Tr2. 43:25–44:6, 64:5–13.) Johnson and Clark testified that Stillhouse's roof control plan required the widths of the entries to be no wider than 18 feet within 150 feet of the outcrop. (Tr1. 258:9–14; Tr2. 43:9–44:4.) Prior to measuring the entries, Johnson could tell by naked eye that the entries exceeded eighteen feet. (Tr1. 241:12–24.) Johnson and Clark measured the width of the entries at the Maggard Branch cutouts between the last open crosscut and the end of those entries. (Tr1. 187:19–188:8; Tr2. 41:14–18; Ex. P-15, at 11.) Clark used the foreman's mount, a device showing distances underground, to confirm that this area was within 150 feet of the outcrop. (Tr2. 44:14–18.) Clark further noted that Philip Gilbert's mine map showed the distance from the last open crosscut to the surface was 110 feet. (Ex. P-15, at 11.)

Clark recorded in his notes the measurements of the entry widths in the outcrop area. (Tr1. 188:3–5; Tr2. 42:7–43:8; Ex. P-15, at 11.) He and Johnson determined that Entry No. 1 was between 17.5 feet and 20 feet wide; Entry No. 2 was between 18.5 feet and 19.5 feet wide; Entry

No. 3 was between 19.1 feet and 20 feet wide; Entry No. 4 was between 17.1 feet and 19.6 feet wide; and Entry No. 5 was between 18.3 feet and 18.9 feet wide. (Ex. P-15, at 11.)

During cross examination, Johnson commented on whether the roof fall in Entry No. 2 could have been prevented had Stillhouse complied with its roof control plan's eighteen-foot width requirement. According to Johnson, the roof fall would have occurred even if the width of Entry No. 2 was eighteen feet. (Tr1. 236:8–16.) Once Johnson and Clark measured the width of the entries in the 002 section, they required Stillhouse to install posts to supplement the roof in the outcrop area of the 002 section to abate the violation. (Tr1. 240:12–21.)

C. MSHA's Other Communications With Stillhouse

At the hearing, Johnson and Clark recalled conversations with Stillhouse's management about the company's intent to cut out to the surface prior to December 3, 2006. Johnson became aware of Stillhouse's intent sometime in January or February 2006. (Tr1. 92:12–23.) Johnson reviewed Stillhouse's mining activity and mine maps, and asked Lonnie Moore, the mine superintendent, whether he planned to cut out to the surface. (Tr1. 93:2–13.) Moore confirmed that he planned to do so. (Tr1. 93:12–13.) Johnson told Moore that he needed to submit a ventilation plan for the cutouts because, in his opinion, making the cutouts would "destroy" the mine's ventilation and cut the mine's intake by half. (Tr1. 96:1–18.) Johnson predicted that the cutouts would short-circuit the airflow through the mine by allowing the fan to pull air through the cutouts in the 002 section instead of through the main intake portals at the mine entrance. (Tr1. 104:6–17.) At that time, Johnson did not believe that the cutouts would send air from the 002 section in the wrong direction toward the 003 section. (Tr1. 104:17–18.) Johnson did not recall how Moore replied to his statement about the ventilation plan. (Tr1. 96:19–22.) Prior to the December 3, 2006, Stillhouse never filed with MSHA an amendment to its ventilation plan describing how it would ventilate the mine after cutting to the surface in the 002 section. (Tr1. 95:14–16.)

Clark also testified about Stillhouse's plans to cut to the surface at the 002 section. Clark was aware that Stillhouse had dug an area called a "box cut" on the surface of the Maggard Branch for the 002 section continuous miner to emerge from the underground. (Tr2. 62:13–23.) As early as September 2006, Clark spoke with Moore about Stillhouse's intent to cut to the surface at that location. (Tr2. 62:25–63:7.)

D. Citation and Orders at Issue in this Proceeding

1. Citation No. 6665036 – Failure to Follow Mandated Procedures After Shutoff of Mine Fan

Clark issued Citation No. 6665036 under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.313.¹⁵ (Ex. P-11.) The citation's narrative states:

¹⁵ The parties stipulated that the citation and orders in dispute were issued on the dates indicated on each of the forms generated by Clark. (Tr1. 5:6–9; Resp't Prehr'g Report 1.)

Evidence from the fan recording chart and witness statement indicates that the main mine fan had been turned off for over 6 hours while miners were underground running coal making a cut through to the surface. When I arrived on site at 06:20 the fan was off and 8 miners were underground. Evidence underground indicated they were producing coal from the 002 section located 26,900 feet underground from the main portal. This mine often produces 100,000 plus cubic feet of methane in 24 hours. The main mine fan had been stopped so the 002 section could cut out side [sic] because when the cut through was made the ventilation system was interrupted causing the ventilation current in the intake airway entries, belt entry, and neutral roadway entry to reverse direction of travel after the fan was restarted. The main mine fan had been intentionally stopped at 00:30 on Sunday morning.

(*Id.* at 1–2.) Clark asserted that eight people were affected by this condition and that fatal injuries were highly likely. (*Id.* at 1.) Clark charged Stillhouse with reckless disregard in violating § 75.313 and determined that the alleged violation was significant and substantial (“S&S”).¹⁶ (*Id.*)

2. Order No. 6665037 – Failure to Follow Mandated Procedures in Intentionally Changing Mine’s Ventilation by Shutting Off Mine Fan

Clark issued Order No. 6665037 under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.324. (Ex. P-12.) The order’s narrative states:

The operator made a major change in ventilation on the 002-0 MMU while miners were underground and power was on underground. The operator stopped the main mine fan for over 6 hours while miners were underground and cut the 002-0 MMU to the surface. Two entries were mined to the surface and the main mine fan was restarted with power underground and 7 miners were left underground when 1 miner exited the mine and restarted the fan. The 002-0 MMU intake airway entries, belt entry, and neutral roadway entry experienced a reversal of the direction of the ventilation current when the main mine fan was restarted. This mine is 26,900 feet deep to the point of the cut through and often produces 100,000 plus cubic feet of methane in 24 hours as indicated by air bottle samples. The operator did not submit a plan to the District Manager for the cut out [sic] to the surface and made the cut out [sic] between midnight and 06:20 Sunday morning.

(*Id.* at 1–2.) Clark asserted that eight people were affected by this condition and that fatal injuries were highly likely. (*Id.* at 1.) Clark charged Stillhouse with reckless disregard in violating § 75.324 and determined that the alleged violation was S&S. (*Id.*)

3. Order No. 6665038 – Failure to Follow Roof Control Plan in 002 Section

¹⁶ The S&S terminology is taken from section 104(d)(1) of the Mine Act, which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d)(1).

Clark issued Order No. 6665038 under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.220(a)(1). (Ex. P-13.) The order's narrative states:

The mine operator is not following the approved roof control plan for the 002-0 MMU. The 002-0 MMU had cut out to the surface in #1 and #2 entries and had mined #3, #4, and #5 entries to within 40 feet of the surface and had not followed the initial development part of the approved roof control plan. The initial development part requires when mining within 150 feet of the out crop [sic] the entry widths be limited to 18 feet. Entries were measured to be 18.5 feet to 20.5 feet wide in all 5 headings and the last open cross cut. This area also had hill seams and cracks in the mine roof at 24 inches and 49 inches in the #3 entry, and water coming out of the mine roof in several locations. The #2 entry had a roof fall approximately 4 feet thick when cut to the surface.

(*Id.* at 1.) Clark asserted that two people were affected by this condition and that fatal injuries were highly likely. (*Id.*) Clark charged Stillhouse with reckless disregard in violating § 75.220(a)(1) and determined that the alleged violation was S&S. (*Id.*)

4. Order No. 6665039 – Failure to Conduct Adequate Preshift of Wet Area

Clark issued Order No. 6665039 under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.360. (Ex. P-14.) The order's narrative states:

An adequate pre-shift examination was not made of the entire mine before miners entered the mine to run coal. The last date[,] time and initials found on the main line belt power boxes number 1, 2, 3, and 4 was 12/1/2006 at 11:05 am. The mine ran coal both sections on 12/2/2006 1st and 2nd shifts and 12/3/2006 on 002 MMU on 3rd shift. This is a [sic] isolated part of the mine where the main line belts run away from the rest of the mine toward the prep plant. Time[,] date and initials were found at the outby power centers through the regularly traveled part of the mine.

(*Id.*) Clark asserted that eight people were affected by this condition and that permanently disabling injuries were highly likely. (*Id.*) Clark charged Stillhouse with reckless disregard in violating § 75.360 and determined that the alleged violation was S&S. (*Id.*)

E. Criminal Pleas of Stillhouse Employees for Violation of Mandatory Safety Standard

Three Stillhouse supervisory employees—Ira Sergent, Johnny Osborne, and Reggie Raleigh—each pled guilty to one criminal count under 30 U.S.C. § 820(c), for knowingly authorizing, ordering or carrying out a violation of a mandatory health or safety standard for underground coal mines under federal mining laws, and 18 U.S.C. § 2, for aiding and abetting. (Ex. P-4; P-5; P-6.) The elements of the offense admitted by the defendants that are relevant to this decision are:

- (a) That at all times relevant to this Indictment, the Defendant was an agent of Stillhouse Mining LLC, operator of Stillhouse Mining No. 1 Mine, in Harlan County, Kentucky, in that the Defendant was charged with responsibility for the operation of all or a part of the mine, and (being a foreman) he supervised the miners at the mine;
- (b) That on or about December 3, 2006, the main mine fan was stopped in excess of 15 minutes (approximately six hours) and the miners were not withdrawn from the mine, and the Defendant authorized, ordered or carried out such violation, or aided and abetted his co-defendants in so doing;
- (c) That in committing the charged mine safety violation the Defendant's actions were deliberate and intentional (which is to say not accidental), or that he recklessly disregarded the requirements of the mine safety standard;

(Ex. P-4, at 2; Ex. P-5, at 2; Ex. P-6, at 2.) These facts underlie a violation of 30 C.F.R. § 75.313(c)(1), stating: "If ventilation is not restored within 15 minutes after a main mine fan stops—(1) Everyone shall be withdrawn from the mine." (Ex. P-1, at 2.) The parties stipulated to the fact that Sergeant, Osborne, and Raleigh were indicted and entered the above-noted guilty pleas and that the pleas pertained to Citation No. 6665036. (Tr1. 5:9–21; Resp't Prehr'g Report 2.)

F. Credibility of the Secretary's Witnesses

1. Daniel Johnson, Field Office Supervisor, MSHA District 7 Field Office

The Secretary's witness Daniel Johnson was the field office supervisor of MSHA's District 7 field office in Harlan, Kentucky, at the time of the issuance of the citation and orders in this case. (Tr1. 37:18–39:7.) Johnson entered the underground coal mining industry immediately after high school when he began working at the Blue Diamond Coal Company's Scotia Mines in 1970. (Tr1. 27:2–6.) Starting out as an apprentice, Johnson eventually became a section foreman. (Tr1. 27:6–8.) As a section foreman, Johnson supervised a crew of men on underground coal production and was responsible for ensuring their health and safety. (Tr1. 28:5–8, 25:18–20.) Johnson was charged with instituting the ventilation plan in his area of the mine, which meant ensuring that the proper amount of air was being delivered to where his crew was producing coal. (Tr1. 28:20–25.) Johnson was a section foreman at Blue Diamond from 1974 to 1978. (Tr1. 30:10–13.) Besides a short seven-month stint as a miner at U.S. Steel following the explosion at the Scotia Mines, Johnson remained at Blue Diamond until 1982 when he took a position with MSHA. (Tr1. 37:4–17.)

As an employee of MSHA, Johnson worked as a regular inspector for ten years. (Tr1. 38:1–4.) Johnson then served as a roof control specialist for five years. (Tr1. 38:4–6.) As a roof control specialist, Johnson evaluated roof control plans, followed up on roof fall accidents, and investigated accidents. (Tr1. 38:10–17.) Additionally, Johnson evaluated mining conditions to ensure that an operator's roof control plan was adequate. (Tr1. 38:15–17.) After working as a roof control specialist, Johnson was promoted to be a field office supervisor, a position he held for ten years. (Tr1. 38:6–9.) As supervisor, Johnson was charged with ensuring that inspections were

carried out properly in all of the mines assigned to his work group. (Tr1. 38:18–39:3.) In addition to these qualifications, Johnson is a certified electrician. (Tr1. 193:17–194:1.)

At the hearing, Johnson acknowledged that he was not an expert in “flames and forces,” the cause and effect of fire (Tr1. 49:21–24, 205:3–10), a fact highlighted by Stillhouse (Resp’t Br 8–9). Nor did Johnson work as a ventilation supervisor or specialist at MSHA. (Tr1. 204:22–25.) Although he lacked these credentials, Johnson testified that through his experience in the industry and at MSHA, he has dealt with ventilation plans and ventilation systems. (Tr1. 205:11–21.) Johnson underwent the same training given to ventilation specialists. (Tr1. 205:17–19.) While working in the coal mining industry and at MSHA, Johnson aided in the recovery efforts at three different mines following explosions at those operations, gaining an understanding of the causes of those disasters. (Tr1. 156:5–157:25.) Despite the fact that Johnson did not work as a ventilation specialist, I still credit his testimony on ventilation issues based on the significant experience he gained working on these issues in the coal mining industry and at MSHA.

Based on Johnson’s candid demeanor at the hearing and on his extensive experience in underground coal mining, particularly with regard to roof control and ventilation issues, I afford great weight to his testimony.

2. William Clark, Coal Mine Inspector

The Secretary’s other witness was William Clark, the coal mine inspector who issued the citation and orders in this case. (Tr2. 18:18–20, 22:6–9; Exs. P-11, P-12, P-13, P-14.) Clark worked nine years in the underground coal mining industry, mainly for smaller operators. (Tr2. 21:15–22:2.) He held the positions of general laborer, equipment operator, maintenance man, and foreman. (Tr2. 22:3–5.) During the time that Clark worked in private industry, he took courses at Southeast Community College on underground coal mining concerning mining laws, electricity, roof control, ventilation, and maintenance. (Tr2. 20:24–21:14.) Clark joined MSHA in 1999 and had approximately seven years of experience working for the agency at the time the citation and orders were issued in this case. (Tr2. 19:5–10.)

Compared to Johnson, Clark has fewer years of experience working in the coal mining industry and MSHA. At the same time, Clark has an educational background in ventilation and roof control issues and experience in evaluating them as a coal mine inspector. Moreover, at the time the citation and orders were issued in this case, Clark had been the inspector previously assigned to Mine No. 1 and was very familiar with the operation. (Tr1. 67:9–17.) Clark also had a candid demeanor at the hearing, and based on his educational background and experience in the coal mine industry and MSHA, I afford significant weight to his testimony.

III. Principles of Law and Statutory Analysis

- A. General Principles Governing Interpretation of the Statutory Definition of a Flagrant Violation

The Secretary argues that all four alleged violations at issue in this case should be assessed as “flagrant.” (Pet’r Br. 22–23, 32, 40, 50–51.) Section 110(b)(2) of the Mine Act sets forth the parameters for concluding that a violation is flagrant and provides for the assessment of enhanced civil penalties:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

The question of whether an alleged violation is “flagrant” under section 110 of the Mine Act presents a case of first impression for this Administrative Law Judge and the Commission. The threshold issue in any case involving statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984); *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, then the court “must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842–43; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). In analyzing whether Congress expressed a specific intent on a particular issue, “courts utilize traditional tools of construction, including an examination of the ‘particular statutory language at issue, as well as the language and design of the statute as a whole.’” *Twentymile Coal Co.*, 30 FMSHRC at 750 (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). The statute’s legislative history and purpose, as well as related judicial precedent are also relevant to this analysis. *Twentymile Coal Co.*, 30 FMSHRC at 750–52; *Emery Mining Corp.*, 9 FMSHRC 1997, 2001–04 (Dec. 1987).

The examination of whether the statute expresses such a clear congressional intent is commonly referred to as a “*Chevron* Step One” analysis. *Coal Emp’t Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989); *Thunder Basin Coal*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). If the statute is ambiguous or silent on the point in question, a second inquiry, commonly referred to as a “*Chevron* Step Two” analysis, is required to determine whether an agency’s interpretation of the statute is a reasonable one. *Coal Emp’t Project*, 889 F.2d at 1131; *Thunder Basin Coal*, 18 FMSHRC at 584 n.2; *Keystone Coal Mining*, 16 FMSHRC at 13. In conducting a *Chevron* Step Two analysis, a court may impose its own interpretation of a statute only in the absence of an administrative interpretation. *Chevron*, 467 U.S. at 843.

B. Whether Congress Has Expressed a Clear Intent on the Definition of a Flagrant Violation

1. Whether the Mine Act Demonstrates Congress’s Clear Intent

Chevron Step One analysis requires an evaluation of whether Congress has expressed a clear intent concerning the meaning of a flagrant violation. *Chevron*, 467 U.S. at 842. The flagrant violation statutory provision uses words such as “reckless,” “repeated,” “failure,” and “reasonable efforts to eliminate.” 30 U.S.C. § 820(b)(2). Given the subjective nature of these terms, an analysis of whether a flagrant violation exists raises threshold questions such as, what standard should govern the determination of reckless conduct? What actions constitute “reasonable efforts to eliminate?” Application of these terms also requires a fact-intensive analysis of the operator’s conduct to resolve issues such as whether an operator committed a “reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard” under 30 U.S.C. § 820(b)(2). The statutory provision does not provide any guidelines for interpreting or applying these terms. *Id.*

Sections 3 and 318 of the Mine Act set forth definitions relevant to underground coal mining. 30 U.S.C. §§ 802, 878. Neither of these sections defines any of the terms in the definition of a flagrant violation. *Id.* Nonetheless, the portion of the definition of an “imminent danger” concerning the risk of harm is similar to the language used in the flagrant violation provision: “‘imminent danger’ means the existence of any condition or practice in a coal or other mine which *could reasonably be expected to cause death or serious physical harm* before such condition or practice can be abated.” § 802(j) (emphasis added). However, unlike the definition of a flagrant violation, the expected level of harm of an imminent danger is qualified by the caveat that such harm must be reasonably expected “before such condition or practice can be abated.” *Id.* A flagrant violation is concerned with harms already resulting from the violation, as well as reasonably expected ones. § 820(b)(2). The definitional sections of the Mine Act do not clarify the inherent ambiguity of the definition of a flagrant violation.

Section 104(d)(1) of the Mine Act directs the Secretary to make certain findings of negligence and gravity, where warranted. 30 U.S.C. § 814(d)(1). Citations issued under section 104(d)(1) shall include a negligence finding that the operator committed an “unwarrantable failure to comply with [a] mandatory health or safety standard[.]” *Id.* Such citations shall also include a gravity finding that the “violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard [S&S].” *Id.* The quoted statutory language is quite different from the language that defines a flagrant violation. *Compare id. with* 30 U.S.C. § 820(b)(2) (requiring, for example, a “reckless or repeated failure to make reasonable efforts to eliminate a known violation”). The unwarrantable failure and S&S language of section 104(d)(1) of the Mine Act does not elucidate Congress’s intent on the meaning of a flagrant violation.

Finally, section 110 of the Mine Act provides for the imposition of sanctions for certain violations involving conduct that has been committed “knowingly.” 30 U.S.C. § 820(c), (d), (f), (h). These subsections describe “knowing” conduct in the commission of the violation, which is somewhat different than the conduct described by the flagrant violation, which involves a reckless failure to make reasonable efforts to eliminate a “known” violation. *Compare id. with* 30 U.S.C. § 820(b)(2) (concerning the “failure to make reasonable efforts to eliminate a known violation”). Although these subsections may help illuminate the meaning of “known” in the definition of a flagrant violation, they do not illuminate the other legal terms in the definition. These sections

cannot support the conclusion that Congress has definitively spoken on the definition of a flagrant violation, either.

Based on the above considerations, I determine that neither the definition of the flagrant violation itself nor the other parts of the Mine Act demonstrate Congress's clear intent on the definition of a flagrant violation.

2. Whether the Legislative History of the Statutory Provision Demonstrates Congress's Clear Intent

Congress created the "flagrant" violation, providing for enhanced civil penalties, when it passed the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"). MINER Act, Pub. L. No. 109-236, § 8, 120 Stat. 493, 501 (codified as amended at 30 U.S.C. § 820(b)(2)). According to the Senate Report accompanying the MINER Act, Congress passed this law "to further the goals set out in the [Mine Act] and to enhance worker safety in our nation's mines." S. Rep. No. 109-365, at 1 (2006). Congress intended to accomplish several objectives, including "increase[ing] enforcement and compliance to improve mine safety." *Id.* The MINER Act came in response to the unusually high number of mining fatalities that occurred in the first half of 2006 at the Sago, Alma, and Darby mines. *Id.* at 2. Based on those incidents and a concurrent rise in coal production, Congress was concerned that mining accidents could become more frequent. *Id.*

The Senate Report accompanying the MINER Act simply restates the definition of a flagrant violation and the statutory cap on the civil penalty amount for that violation. S. Rep. No. 109-365, at 14. That information does not clarify how a flagrant violation should be determined. Nonetheless, the comments of the law's sponsors offer some perspective on the purpose of the flagrant violation penalty. The penalty targets "'bad actors,'" who fail to take their safety responsibilities seriously by providing an increased maximum penalty for flagrant violators. 152 Cong. Rec. S4619 (daily ed. May 16, 2006) (statement of Sen. Michael Enzi). *See also* 152 Cong. Rec. E1071 (daily ed. June 8, 2006) (statement of Rep. Jerry F. Costello) (supporting "stiffer penalties for flagrant violations of the law"). Upon signing the MINER Act into law, President George W. Bush stated: "[T]o ensure compliance with the law, the MINER Act will increase the maximum penalty for flagrant violations of mine safety regulations nearly four-fold." Presidential Statement on Signing the Mine Improvement and New Emergency Response Act of 2006, 2006 U.S.C.C.A.N. S27 (June 15, 2006).

The legislative history of the MINER Act yields no specifics on the meaning of the language of section 110(b)(2). The only thing that is apparent from the legislative history is that Congress and the President intended flagrant violations to target particularly severe violations of the mine safety and health regulations in order to promote regulatory compliance and miner safety. That general intent, however, is not sufficient to constitute a clear statement by Congress as to the specific definition of a flagrant violation.

Because neither the statutory flagrant violation provision, the Mine Act, nor the legislative

history of the MINER Act offers a clear statement on the specific meaning of a flagrant violation, I determine that the statute is ambiguous and that analysis under *Chevron* Step Two is required.

C. Whether the Secretary Has Provided an Interpretation of a Flagrant Violation

No regulatory guidance dictates how the statute should be applied to this case.¹⁷ In arguing that the citation and orders at issue are flagrant, the Secretary quotes the statutory definition of a flagrant violation and proceeds to argue how the facts support her position. (Pet'r Br. 22–23, 32, 40, 50–51.) The Secretary does not advance a particular interpretation of the flagrant violation provision. (*Id.*) If neither congressional intent nor an administrative interpretation bears on the meaning of a statutory provision, its interpretation is reserved for the courts. *Chevron*, 467 U.S. at 843.

Here, “[i]n the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term.” *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)); *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008) (citing *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987–88 (Dec. 2006)). The statute’s plain meaning is the linchpin of this analysis. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992); *Emery Mining*, 9 FMSHRC at 2001 (citing *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 643 (1978)). As noted above, other considerations, such as the statute’s purpose, are relevant to statutory interpretation as well. *Twentymile Coal*, 30 FMSHRC at 750–52; *Emery Mining*, 9 FMSHRC at 2001.

The interrelationship of the flagrant violation provision with the other sections of the Mine Act is also an important consideration. In setting forth its interpretation of the unwarrantable failure language, the Commission observed that the Mine Act’s enforcement scheme promotes mining operators’ compliance with its requirements by providing “‘increasingly severe sanctions for increasingly serious violations or operator behavior.’” *Emery Mining*, 9 FMSHRC at 2000 (quoting *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981)). In *Emery Mining*, the Commission interpreted the unwarrantable failure language of section 104(d) citations and orders in light of this scheme of escalating sanctions. *Emery Mining*, 9 FMSHRC at 2000–04.

¹⁷ The Secretary implemented the flagrant statutory provision at 30 C.F.R. § 100.5(e), which did not become effective until April 23, 2007, after the issuance of the citation and orders in this case. *Criteria and Procedures for Proposed Assessment of Civil Penalties*, 72 Fed. Reg. 13,592 (Mar. 22, 2007). The Commission has expressed reservations over the retroactive application of the Secretary’s regulations. *Drummond Co.*, 14 FMSHRC 661, 691–92 (May 1992) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Neither party cites § 100.5(e) in briefing whether the citation and orders in this case constitute flagrant violations. (Pet'r Br.; Resp't Br.; Resp't Reply Br.) Even if these considerations did not weigh against application of the regulation, the regulation merely restates the statutory definition of a flagrant violation. *Compare* 30 C.F.R. § 100.5(e) *with* 30 U.S.C. § 820(b)(2) (containing same language in statutory provision as in regulatory provision). Accordingly, my analysis is restricted to consideration of the statutory language.

Here, if a violation is determined to be flagrant, then the Commission is authorized to impose the highest amount of civil penalties available under the Mine Act, up to \$220,000 per violation. 30 U.S.C. § 815, 820(b)(2). Because the flagrant violation provision's context in the Mine Act is relevant to its interpretation, application of the provision should comport with the other sections of the Mine Act and the case law interpreting those sections.

D. Plain Meaning of the Definition of a Flagrant Violation

Based on the plain language of the statutory provision, the following four elements comprise a flagrant violation:

- (1) Reckless or repeated failure to make reasonable efforts to eliminate
- (2) A known violation of a mandatory health or safety standard
- (3)(a) That substantially and proximately caused or
- (3)(b) Reasonably could have been expected to cause
- (4) Death or serious bodily injury

30 U.S.C. § 820(b)(2).

Here, I credit Stillhouse's argument that the alleged violations were isolated incidents, as opposed to repeated occurrences of similar past conduct. (Resp't Br. 6–7.) The Secretary does not dispute this contention. This case also does not involve any injuries. Therefore, in analyzing whether the violation was flagrant, I consider only whether Stillhouse committed a "reckless failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that reasonably could have been expected to cause death or serious bodily injury." 30 U.S.C. § 820(b)(2). I now turn to determining the plain meaning of the statutory terms at issue in this case.

1. Reckless Failure to Make Reasonable Efforts to Eliminate a Known Violation of a Mandatory Health or Safety Standard
 - a. Reckless

In the absence of clear congressional intent on the meaning of the statute or an administrative interpretation, application of the statute must begin with the plain meaning of its terms. *Meyer*, 510 U.S. at 476; *Twentymile Coal*, 30 FMSHRC at 750. "Reckless" is commonly understood as "without thinking or caring about the consequences of an action." *The New Oxford American Dictionary* 1414 (Erin McKean ed., 2d ed. 2005). As a legal term, "reckless" has been described as conduct—

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

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

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

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

Based on the common meaning of the word "reckless," an operator is "reckless" for the purposes of a flagrant violation when it consciously or deliberately disregards an unjustifiable risk of harm arising from its failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard.¹⁸ The risk of harm is "unjustifiable" if the burdens of ameliorating the risk are so slight relative to the risk that the operator's failure to take precautions demonstrates indifference to the risk. Restatement (Third) of Torts § 2.

The term "reckless" should not be interpreted in isolation from the remaining elements of the violation. "It is a tenet of statutory interpretation that [words should be interpreted] 'in their aggregate [to] take their purport from the setting in which they are used.'" *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 155 (2d Cir. 1999) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). In interpreting the term "unwarrantable failure," the Commission explained:

With regard to the phrases "lack of due diligence" and "lack of reasonable care" also appearing in these sources [defining the term "failure"], we recognize that the phrases, if considered in isolation, can be viewed as referring to an ordinary negligence test. However, ascribing such a meaning to "unwarrantable failure" cannot be reconciled with either the purpose of unwarrantable failure sanctions or with the ordinary meaning of the term unwarrantable failure itself.

Emery Mining, 9 FMSHRC at 2004.

¹⁸ In their arguments, the parties rely on the definition of "reckless disregard" at 30 C.F.R. § 100.3, Table X, which is described as "conduct which exhibits the absence of the slightest degree of care." (Pet'r Br. 21, 30, 38, 49; Resp't Br. 7, 15.) The parties' focus on § 100.3 is misplaced, as the purpose of 30 C.F.R. part 100 is to enable the Secretary to arrive at the civil penalty amount she believes is appropriate. The Commission, not the Secretary, is charged with the authority of assessing all civil penalties under the Act. 30 U.S.C. § 820(i). The Commission may assess penalties by operation of law or in the cases brought before it. *E.g.*, 30 U.S.C. § 815(a), (d). Given that the regulatory term "reckless disregard" is used in the context of the Secretary's own formulation of proposed penalties, rather than the Commission's disposition of her proposals, the term bears limited relevance to interpreting the statutory definition of a flagrant violation.

A flagrant violation involves an operator's reckless failure to eliminate the violation "substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). The statute's text plainly states that the risk involved in a flagrant violation is the reasonable risk of death or serious bodily injury. Therefore, an operator is reckless for the purposes of a flagrant violation when it consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury in failing to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard.

b. Failure to Make Reasonable Efforts to Eliminate

"Failure" is commonly understood as "lack of success" and "the omission of expected or required action." *The New Oxford American Dictionary, supra*, at 604. In the legal context, the definition of failure is nearly identical, meaning "1. Deficiency; lack; want. 2. An omission of an expected action, occurrence, or performance." *Black's Law Dictionary, supra*, at 631. "Reasonable" has been understood by laypersons and lawyers as "having sound judgment; fair and sensible" or "as much is appropriate or fair [under the circumstances]; moderate." *Black's Law Dictionary, supra*, at 1293; *The New Oxford American Dictionary, supra*, at 1411. "Effort" means a "vigorous or determined attempt." *The New Oxford American Dictionary, supra*, at 540. And "eliminate" means to "completely remove or get rid of (something)." *Id.* at 548.

The term "reasonable efforts" necessarily refers to some standard by which the operator's conduct is measured. The law of torts has thoroughly explored the concept of the reasonableness of an actor's conduct and evaluates it according to the standard of care followed by the reasonably prudent person. Restatement (Third) of Torts § 3 cmt. a. For the purposes of imposing civil penalties, the Commission uses the reasonably prudent person test to determine whether, in light of the facts and circumstances surrounding the operator's conduct, a reasonably prudent person would have recognized a legal duty to take certain actions to comply with an ambiguously worded mandatory health and safety standard. *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 656 (Aug. 2008) (quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)).

In a case involving an alleged flagrant violation, the question is whether the operator failed "to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard." This question is analogous to a case involving the reasonably prudent person test. Both types of cases require analysis of whether the operator was subject to a legal duty to take certain actions in operating its mine. In applying the reasonably prudent person test to the flagrant violation provision, the question becomes "whether, in light of the facts and circumstances surrounding the operator's conduct, a reasonably prudent person would have recognized a legal duty to take certain actions to eliminate the known violation." *Phelps Dodge*, 30 FMSHRC at 656. If an operator had a legal duty to take certain steps to eliminate the known violation, then the next step in establishing a flagrant violation is to show that the operator's failure to eliminate the known violation was reckless.

Under the commonly accepted definitions of the terms of the flagrant violation provision, an operator commits a "failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard" when, in light of all the facts and circumstances of the

violation, it does not take the steps a reasonably prudent person would have taken to correct the violation. As stated by the Commission, a reasonably prudent person is “familiar with the mining industry and the protective purposes of [a given health or safety] standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). The reasonably prudent person test is objective and accounts for all of the facts and circumstances surrounding the operator’s conduct. *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC at 656 (quoting *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983)); *Alabama By-Products Corp.*, 4 FMSHRC at 2129 .

Based on the foregoing analysis of the plain meaning of 30 U.S.C. § 820(b)(2), a “reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard” occurs when, in light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury.

c. Known Violation of a Mandatory Health or Safety Standard

As for the second element of a flagrant violation, the Secretary must show that the operator recklessly failed to make reasonable efforts to eliminate a “known violation of a mandatory health or safety standard.” 30 U.S.C. § 820(b)(2). To “know” means to “be aware of through observation, inquiry, or information.” *The New Oxford American Dictionary, supra*, at 937. In the legal context, “knowledge” may be understood as “actual” or “constructive.” *Black’s Law Dictionary, supra*, at 888. Actual knowledge may be “express,” which is “[d]irect and clear knowledge,” or it may be “implied,” which is “[k]nowledge of such information as would lead a reasonable person to inquire further.” *Id.*

The Commission has interpreted “knowingly” under section 110(c) of the Mine Act. Section 110(c) holds “any director, officer, or agent of [an operator] who *knowingly* authorized, ordered, or carried out such violation, failure, or refusal” liable for “civil penalties, fines, and imprisonment.” 30 U.S.C. § 820(c) (emphasis added). The Commission has explained “[t]he proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition.” *Cougar Coal Co.*, 25 FMSHRC 513, 517 (Sept. 2003) (citing *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff’d on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983)). Under this inquiry, “[a] knowing violation occurs when an individual ‘in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.’” *Cougar Coal*, 25 FMSHRC at 517 (quoting *Kenny Richardson*, 3 FMSHRC at 16). The Commission’s understanding of “knowingly” under section 110(c) embraces the concepts of implied and express actual knowledge. The plain meaning of “known” accords with the commonly understood meaning of “knowingly” under the Mine Act.

The meaning of “known” may even embrace the concept of constructive knowledge, which is “[k]nowledge that one using reasonable care or diligence should have.”¹⁹ *Black’s Law Dictionary, supra*, at 888. However, in this case, the Secretary argues that Stillhouse failed to eliminate violations it actually knew about. (Pet’r Br. 23, 32, 40, 50–51.) The question of whether “known” under 30 U.S.C. § 820(b)(2) embraces constructive knowledge of a violation is not before me. Based on the plain meaning of the statute, the reference to a “known violation” refers to the operator’s express or implied actual knowledge of the violation.

The only adjective modifying “violation” is “known.” 30 U.S.C. § 820(b)(2). The plain text of the statute does not require the violation to have already been cited by MSHA. *Id.* The flagrant violations at issue in this case had not yet been cited by MSHA during the time Stillhouse allegedly committed them.

Before concluding that a prior citation from MSHA is not required, the flagrant violation’s location under section 110(b) of the Mine Act, entitled “Civil penalty for failure to correct violation for which citation has been issued,” must be addressed.²⁰ 30 U.S.C. § 820(b). The Supreme Court has stated that “[t]he caption of a statute . . . ‘cannot undo or limit that which the [statute’s] text makes plain.’” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (quoting *Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947)). Indeed, a statute’s overall construction should be considered. *Twentymile Coal Co.*, 30 FMSHRC at 750. Section 110(a) of the Mine Act provides a civil penalty when an “operator . . . fails to correct a violation for which a citation has been issued . . . within the period permitted for its correction.” 30 U.S.C. § 820(b)(1). Section 110(b) does not expressly require a flagrant violation to have been previously cited by MSHA. *Id.* A court should presume that when Congress includes specific language in one section

¹⁹ In contrast to implied actual knowledge, a person’s constructive knowledge of a particular matter derives solely from his or her duty to have acquired that knowledge. *Black’s Law Dictionary, supra*, at 888. Implied actual knowledge merely concerns a person’s awareness of circumstances that give rise to a duty to inquire about a particular matter. *Id.* Holding an operator responsible for constructive knowledge has been recognized under the Act. *See, e.g., Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 364 (D.C. Cir. 1997) (“The Commission’s interpretation of section 110(c), as we understand it, is a fair interpretation of the statutory language. In essence, the Commission has defined ‘knowledge’ for purposes of section 110(c) to include both actual and constructive knowledge of a violative condition.”); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1767–69 (Nov. 1997) (concluding that to establish an underground coal mine operator’s violation of 30 C.F.R. § 75.323 for failure to take mandated actions in response to a one percent methane concentration in certain areas of the mine, the Secretary needs to establish that the operator had constructive knowledge of the methane concentration).

²⁰ In promulgating the regulation implementing the statutory definition of a flagrant violation, which is not at issue in this case, *supra* note 17, the Secretary explained her position that a flagrant violation need not involve a violation that has been cited by MSHA, Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592, 13,622 (Mar. 22, 2007). Stillhouse did not raise the issue of whether a flagrant violation needs to have been previously cited by MSHA and thus has conceded this point.

of a statute but not in another section, it meant to do so. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16 (1983)). Given that Congress expressly omitted the requirement that section 110(b) involve a cited violation, the known violation at issue in a flagrant case need not have been previously cited by MSHA at the time the operator recklessly failed to eliminate it.

2. Reasonably Could Have Been Expected to Cause Death or Serious Bodily Injury

Finally, the third and fourth elements of a flagrant violation require the Secretary to show that Stillhouse's "reckless . . . failure to make reasonable efforts to eliminate a known violation . . . reasonably could have been expected to cause . . . death or serious bodily injury." 30 U.S.C. § 820(b)(2) (emphasis added). As noted above, "reasonable" is what is fair or sensible under a particular set of circumstances. *Black's Law Dictionary, supra*, at 1293; *The New Oxford American Dictionary, supra*, at 1411. To "expect" means to "regard (something) as likely to happen." *The New Oxford American Dictionary, supra*, at 593. As understood by the legal community, an "expectation" is "[t]he act of looking forward," "anticipation," or "[a] basis on which something is expected to happen." *Black's Law Dictionary, supra*, at 1293. To "cause" is "[t]o bring about or effect." *Id.* at 235; *see The New Oxford American Dictionary, supra*, at 272 (defining cause as to "make (something) happen"). Based on the plain meaning of the statute's terms, for the purposes of establishing a flagrant violation, an operator's conduct "reasonably could have been expected to cause death or serious bodily injury" when, based on all of the facts and circumstances surrounding the operator's reckless failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard, the operator's conduct was likely to bring about death or serious bodily injury.

IV. Legal Analysis, Further Findings of Fact, and Conclusions of Law

A. Citation No. 6665036

1. Issues Presented

Citation No. 6665036 alleges a violation of 30 C.F.R. § 75.313, a mandatory safety standard. Stillhouse stipulated to the fact of the violation in Citation No. 6665036. (Tr1. 5:21–22; Resp't Prehr'g Report 2.) The parties presented the following issues in regard to Citation No. 6665036:

- a. Whether the violation was flagrant, as defined by 30 U.S.C. § 820(b)(2);
- b. Whether Stillhouse acted with reckless disregard in committing the violation;

- c. Whether the violation was caused by Stillhouse's unwarrantable failure to comply with 30 C.F.R. § 75.313;
- d. Whether the violation was highly likely to result in fatal injuries to eight miners; and
- e. Whether the gravity of the violation of 30 C.F.R. § 75.313 was S&S.

(Pet'r Prehr'g Report 2–3; Resp't Prehr'g Report 2.)

2. The Parties' Arguments

a. The Secretary

The Secretary argues that Stillhouse intentionally shut off its mine fan and continued to produce coal underground while it cut to the outside of the mountain at the 002 section. (Pet'r Br. 12–14.) According to the Secretary, when Stillhouse cut to the outside, it destroyed the mine's ventilation system and inhibited the ventilation system's ability to clear methane and coal dust from areas where miners were working. (*Id.* at 19.) She believes these conditions created a high likelihood that eight miners working underground during the fan shutoff would suffer significant injury or death from a mine explosion. (*Id.* at 14–16, 18–21.) She also states these conditions exposed the miners to hazards associated with reduced visibility and black lung disease. (*Id.* at 15–16, 20–21.)

Relying primarily on the guilty pleas of three of Stillhouse's supervisors to criminal charges arising from the facts underlying this violation, the Secretary argues that Stillhouse "exhibited absolutely no care for the health and safety of the eight miners underground when it directed them to continue mining when the mine fan had been turned off." (Pet'r Br. 21.) These guilty pleas underlie the Secretary's assertions that Stillhouse showed reckless disregard in committing this violation and committed an unwarrantable failure to comply with 30 C.F.R. § 75.313. (*Id.* at 20–21.)

As for the Secretary's assertion that Stillhouse's violation was flagrant under 30 U.S.C. § 820(b)(2), she emphasizes her position that Stillhouse intentionally shut down the mine fan, disabled the mine fan alarm, and continued to mine coal. (Pet'r Br. 23.) The Secretary believes that Stillhouse would not have ceased its violation but for the intervention of Johnson and Clark's inspection of the mine. (*Id.* at 23.) Because Stillhouse's violation was highly likely to cause death or serious injury, the Secretary asserts that the violation was flagrant. (*Id.* at 23.)

b. Stillhouse

Stillhouse asserts that the Secretary's case relies on the erroneous assumptions that Mine No. 1 had no ventilation while the fan was off and that the miners were exposed to dangerous levels of dust and methane. (*Id.* at 5, 8–11; Resp't Reply 3–4.) According to Stillhouse, the Secretary has presented no proof on the underground conditions of the mine while the fan was off. (Resp't Br. 7.) Stillhouse highlights the statements of two of its foremen, who asserted that Mine No. 1 had adequate airflow from natural ventilation. (Resp't Br. 7; Resp't Reply 3.) Stillhouse also asserts that the Secretary has not shown why the fan was turned off or who ordered it turned off. (Resp't Br. 7.) Stillhouse argues that none of its management knew that the air had reversed when the mine fan was restarted. (*Id.* at 7.) Stillhouse further criticizes the Secretary's case based on Johnson's and Clark's actions during their inspection. (Resp't Br. 11.)

As for whether this violation is flagrant, Stillhouse notes that little guidance has been provided on this issue. (Resp't Br. 6.) Stillhouse points out that it had not previously violated 30 C.F.R. § 75.313 and that Citation No. 6665036 constituted an isolated incident. (Resp't Br. at 6–7.) It argues that in order to establish a flagrant violation, the Secretary must establish “(1) reckless conduct, and (2) reckless conduct which could reasonably be expected to cause death or serious bodily injury.” (*Id.* at 7.) Based on the preceding considerations, Stillhouse argues that the Secretary has not satisfied her burden as to the gravity and negligence of this violation. (*Id.* at 7–11.)

3. Whether the Violation Was Flagrant

a. Risks of Stillhouse's Violation of § 75.313

At approximately midnight on December 3, 2006, Stillhouse cut to the outside of the 002 section of Mine No. 1 and deliberately shut down its mine fan, disabling the only mechanical device ventilating the mine. (Tr1. 256:11–24.) The fan's voluminous airflow, typically around 230,000 CFM, ceased. (Tr1. 166:17–24.) The lack of air movement was visibly evident—upon Inspector Clark's discovery of the fan shutoff he saw, at most, negligible air movement at the fan. The measurable, significant reduction in air flow resulting from the fan shutoff severely compromised the circulation of fresh air through Mine No. 1.

The mandatory safety standard at 30 C.F.R. § 75.313 required Stillhouse to take several steps following the mine fan shutoff. When the fan stopped, Stillhouse was required to turn off the equipment in the 002 section and to withdraw miners from the area. § 75.313(a). By the time the fan had been shut down for fifteen minutes, Stillhouse was required to have withdrawn all of its miners from the mine and to have turned off all of the underground electrical circuits and equipment, except equipment and electrical circuits necessary to bring miners to the surface. § 75.313(c). Stillhouse followed none of these steps. Rather, Stillhouse continued to mine coal, extracting nearly 700 tons of coal and other materials from the 002 section.

Ample sources of methane were present in the mine during the six hours the mine fan was off, e.g., the coal exposed in the miles of entries in Mine No. 1, the Imboden seam lying under the

mine, and the continuous miner's extraction of coal at the cutouts. Three air samples taken over a nine-month period preceding December 3, 2006, revealed daily emission rates between 128,455 and 187,006 cubic feet per day. (Tr1. 105:14–106:22; Ex. P-8.) The Mine Act requires spot inspections when a mine's methane emissions rate reaches 200,000 cubic feet per day. 30 U.S.C. § 103(i). Although the methane emissions levels at Mine No. 1 did not reach this threshold, they came close and remained quite high. Mine No. 1 had a history of emitting highly significant quantities of methane.²¹

In addition to methane, Stillhouse's mining activities supplied significant sources of float coal dust, the presence of which lowers the concentration of methane necessary to create the risk of a mine explosion. Stillhouse operated a continuous miner. It also delivered coal out of the mine via its extensive belt haulage system, which spans for miles through the mine.

Between January 6, 2006, and December 3, 2006, Stillhouse received twenty section 104(a) citations under 30 C.F.R. § 75.400 for accumulations of combustible materials, such as coal dust. (Ex. P-10, at 4.) Four of these were designated S&S, including the one issued by Clark during his inspection on December 3, 2006, for float coal dust on the mine roof and the mine floor of the 003 section. (*Id.*) On cross-examination, Johnson referenced this citation (Tr1. 223:9–14) in support of his determination that dust was a problem in Mine No. 1 during the fan shutoff (Tr1. 226:9–11). Evidence of past hazards is relevant to assessing the gravity of a violation. See *Peabody Coal Co.*, 14 FMSHRC 1258, 1263–64 (Aug. 1992) (affirming the Administrative Law Judge's decision that the operator committed an unwarrantable failure to comply with a mandatory safety standard, which relied, in part, on the operator's history of past violations); *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988) (affirming the Administrative Law Judge's decision, which relied, in part, on prior mine inspections' findings of non-explosive concentrations of methane). These violations underscore the significant risk of float coal dust accumulations in Mine No. 1.

Numerous sources of methane and float coal dust were present in Mine No. 1 during the fan shutoff on December 3, 2006. With no effective, controlled ventilation system circulating fresh air through Mine No. 1, the six-hour long mine fan shutdown provided a sufficient amount of time for methane to build up in the mine. (Tr1. 227:15–21.) The evidence in this case more than adequately

²¹ The amount of methane released by the extraction of coal at the cutouts was expected to be less than the amount of methane released deeper inside the mine. (Tr1. 222:14–19.) The air measurements taken in Mine No. 1 during the nine-month period prior to December 3, 2006, showed a trend of decreasing methane emissions, a point highlighted by Stillhouse. (Resp't Br. 9.) The amount of methane emitted by a coal mine may indeed vary. (Tr1. 106:23–107:1.) Nonetheless, the mere three data points on Mine No. 1's methane emissions taken over a nine month period do not constitute a preponderance of evidence establishing a definite trend in the methane emissions rate at Mine No. 1. Mine No. 1's methane emissions rate could have been higher or lower than the readings in the record. What is true of all of Mine No. 1's methane emissions readings is their indication that Mine No. 1 released significant volumes of methane. Given the substantial number of methane sources in Mine No. 1 and its history of elevated methane emissions, the evidence establishes a very high likelihood that Stillhouse was emitting a significant amount of methane on December 3, 2006.

establishes the presence of a high risk of explosive accumulations of methane and float coal dust during the early morning hours of December 3, 2006. Indeed, even Stillhouse only goes so far as arguing that “[a]t most, [the gravity of this violation] should have been considered only ‘reasonably likely.’” (Resp’t Reply 4.)

Many potential ignition sources were present in the hazardous underground conditions created by Stillhouse. During the fan shutdown, Stillhouse operated non-permissible equipment throughout Mine No. 1, which has electrical components that can ignite air contaminated with methane and float coal dust. (Tr1. 143:14–22, 144:8–21, 154:15–24.) Stillhouse’s pumping equipment was non-permissible. (Tr1. 154:20–22.) The feeder and belt line, including the drive units at each location where the direction of coal delivery out of the mine changes, were non-permissible pieces of equipment. (Tr1. 132:8–13, 192:1–194:6.) The power centers running the continuous miner and shuttle cars on the 002 section were non-permissible. (Tr1. 46:14–18.) Stillhouse acknowledges that this equipment could have sparked a mine explosion. (Resp’t Br. 9.)

Mine No. 1’s belt haulage system provided another ignition hazard. The belt haulage system has thousands of rollers, and any number of them could have become jammed with coal or mud, creating friction between the belt and stuck roller. (Tr1. 194:16–17, 196:2–8.) These jams are not unusual, and the heat generated by friction between the belt and stuck roller is a potential ignition source. (Tr1. 196:2–9.) Belt haulage systems are a major source of underground coal mine fires. (Tr1. 194:15–16.) The thousands of rollers of Stillhouse’s belt haulage system provided thousands of potential contact points for friction fires.

Finally, Stillhouse mined in the 002 section, and the sparks generated by the continuous miner’s ripper and the roof bolter striking rock could have ignited methane or float coal dust. (Tr1. 45:25–46:4, 49:4–24.) During the mine fan shutoff, Stillhouse ran non-permissible equipment, an extensive belt haulage system, and spark-generating mining equipment, all of which constituted potential ignition sources. Potential ignition sources were abundant throughout Mine No. 1 during the fan shutoff.

The fan shutoff also compromised the carbon monoxide monitoring system at Mine No. 1 used for fire suppression. Normally, should a fire occur in the mine, the air current generated by the fan passes smoke from the fire over the system’s sensors, warning the miners. (Tr1. 197:5–11.) These sensors are located 1000 feet apart. (Tr1. 197:12–13.) Without air moving properly through the mine to blow the mine fire’s smoke over one of the sensors, a significant fire could have developed before the system alerted the miners. (Tr1. 197:11–14.) For example, the man trip roadway passed the Wet Area, the location where the coal belts turn. Each turn of the belts requires separate belt lines and equipment, all of which are potential ignition sources. A fire could have developed in this area and gone undetected until the miners reached it on their way out of the mine at the end of their shift. By impairing the carbon monoxide monitoring system’s ability to detect fires, the fan shutoff further compounded the risk of death or serious injury.

When Stillhouse shut off the mine fan and continued to mine coal, it created a high likelihood that combustible mixtures of methane and coal dust would accumulate in the mine. The mine teemed with potential ignition sources, and the compromised carbon monoxide monitoring

system compounded the chances that miners would encounter a mine fire. Stillhouse's failure to rectify its violation of 30 C.F.R. §75.313 by continuing to mine coal for six hours during the fan shutoff created the high likelihood of a deadly mine explosion and exposed the eight miners working underground to the high risk of death.²²

Stillhouse's main argument is that the Secretary did not show specific evidence of a buildup of combustible methane or dust in the mine on December 3, 2006. (Resp't Br. 8–9.) Clark attempted to take an air sample at the fan to check for methane, but the sample was lost. Neither Johnson nor Clark detected methane during their underground inspection of the mine.

The negative air samples relied upon by Stillhouse do not undercut the high risk of death or serious bodily injury created by its violation. Clark took an air sample at the mine fan, which draws air from the entire mine. Yet Clark did not take this sample until after foreman Ira Sergent had switched the mine fan back on. Even if Clark had successfully taken a sample, it would have revealed the methane concentration of air drawn from all areas of the mine, not any information about localized areas of high methane concentrations that may have formed during the six hours Stillhouse mined without the fan.

Also, Johnson and Clark took their underground methane measurements after Stillhouse had ceased its mining activities and restarted the mine fan. The cessation of mining once the fan restarted reduced the number of methane sources in Mine No. 1, as coal mining releases methane. Johnson and Clark also let the mine fan circulate fresh air through the mine for an hour to clear methane accumulations before conducting their underground inspection. Johnson and Clark did not enter Mine No. 1 until they had determined it was safe to do so. (Tr1. 231:5–14; Tr2. 57:20–58:7.)²³ Through the mitigation of one source of methane and by allowing the mine fan to circulate large volumes of air through the mine, it is not surprising that Johnson and Clark did not

²² The Secretary relies on evidence that mining with the fan off created the risk that float coal dust would impair the miners' ability to see underground, which could have resulted in injuries, such as being struck by equipment. (Tr1. 151:9–153:4; Pet'r Br. 15–16, 20–21, 23.) The Secretary also points to the heightened risk of black lung disease arising from increased coal dust exposure. (Tr1. 176:21–177:23; Pet'r Br. 16, 20–21, 23.) Stillhouse disputes the Secretary's characterization of these particular risks. (Resp't Br. 11.) Given Mine No. 1's compromised ventilation and the numerous sources of float coal dust during the mine fan shutoff, Stillhouse's actions created a reasonable risk of exposure to heightened levels of float dust. This risk, however, stands in contrast to the immediate, serious chance of death or severe bodily injury from a mine explosion created by Stillhouse's conduct. Moreover, the evidence establishing this risk is much less extensive than the evidence establishing the risk of a mine explosion. The risks of impaired vision and black lung disease created by Stillhouse's conduct contribute to, but standing alone are insufficient to satisfy, a finding of a flagrant violation in this case.

²³ Clark testified that once he discovered the underground power was on during his inspection, he remained underground because he had determined that the methane had been cleared from the mine. (Tr2. 57:20–58:7.)

encounter methane during their subsequent inspection. Johnson and Clark's failure to find methane does not obviate the great risks associated with Stillhouse's violation.²⁴

Stillhouse also disputes the fact that the fan shutoff compromised the ventilation in Mine No. 1. (Resp't Br. 9–10.) It points to the hearsay statements of foremen Johnny Osborne and Ira Sergent that the mine had adequate ventilation during the shutoff. (*Id.* at 10.) It argues that the Secretary has not put forth evidence disputing these statements. (*Id.*) Yet Osborne and Sergent reacted evasively to Johnson's inquiries about the fan shutoff, not admitting any involvement with it. Osborne and Sergent subsequently pleaded guilty to criminal violations of the Mine Act resulting from their failure to withdraw miners from Mine No. 1 during the fan shutoff. In so pleading, they admitted that their conduct was at least reckless with regard to the fan shutoff. Osborne's and Sergent's lack of candor about the fan shutoff and felony pleas for their conduct during that event greatly diminish the credibility of their statements about the mine's conditions. Moreover, as discussed above, I have determined that even had air been flowing in through the cutouts, Mine No. 1's ventilation still would have been severely compromised. Consequently, I conclude that Osborne's and Sergent's statements do not undermine the conclusion that the fan shutoff severely compromised Mine No. 1's ventilation system.

Stillhouse points to Johnson's and Clark's acknowledgments that Mine No. 1 could have had "natural ventilation" through air flowing into the mine from the cutouts while the fan was shut off.²⁵ (Tr1. 148:20–21; Tr2. 47:2–9; Resp't Br. 10.) As far as when Johnson and Clark observed the exterior of the mine during the mine shutoff, air was not moving from the 002 section to the entrance, as Clark noticed negligible air movement at the portals, at best.

When the fan was subsequently turned back on, air did flow through the cutouts into the mine. The problem is that the airflow through the cutouts did not follow the carefully prescribed route dictated by Stillhouse's MSHA-approved ventilation plan. Fresh air was supposed to circulate via a specified ten-mile round trip course from the mine's entrance to the 002 section and then back again. Instead, potentially contaminated air passed over numerous possible ignition sources, and the miners' only viable escape route, as it coursed from the 002 section cutouts through the belt and

²⁴ Johnson's and Clark's precautionary measures prior to entering the mine undermine Stillhouse's contention that their actions suggest a lower gravity than that alleged by the citation. Stillhouse also points to Johnson's failure to instruct Stillhouse foreman Osborne to turn off the underground power when Johnson instructed the miners to evacuate. (Resp't Br. 11.) Johnson admitted that the thought of cutting the power had not crossed his mind when he spoke with Osborne. (Tr1. 217:10–12.) However, at the same time, Johnson had observed that nothing happened when the mine fan was switched back on, and he did not want to change the mine's conditions until the miners had safely reached the surface. (Tr1. 216:3–217:12.)

²⁵ Stillhouse criticizes Johnson for contradicting his interrogatory statement that "[n]o other means of ventilating the mine workings were available" because he acknowledged the possibility of natural ventilation in Mine No. 1. (Ex. R-1, at 6; Resp't Br. 10.) As evidenced by Johnson's hearing testimony, he was merely referring to the fact that the only mechanical means of ventilating the mine had been shut down. (Tr1. 256:17–24.)

man trip roadway entries toward the mouth of the 003 section. No fresh air flowed through the intake entries to ventilate the face. Indeed, at the 002 section, potentially contaminated air was flowing through the intake entries toward the mine entrance. The central fallacy of Stillhouse's argument about the possibility of natural ventilation in Mine No. 1 is that air blowing through the cutouts at the 002 section, as it asserts, would have produced the same dangerous breach of Stillhouse's MSHA-approved ventilation plan as it did when it turned the mine fan back on.

A further problem with natural ventilation is that it did not allow Stillhouse to manage airflow through the mine because environmental factors beyond Stillhouse's control, such as the temperature and barometric pressure outside the mine, can affect air movement through the mine. (Tr1. 225:14–22.) Under Stillhouse's MSHA-approved ventilation plan, air was supposed to move through the mine in a controlled fashion. Stillhouse did not amend its ventilation plan to permit the natural ventilation it purportedly used on December 3, 2006. Having cut out to the surface and shut down its mine fan, air could have been flowing in any direction in Mine No. 1. The mere fact that air could have been flowing into Mine No. 1 does not obviate the conclusion that the ventilation in Mine No. 1 was severely compromised during the fan shutoff.

Stillhouse also asserts that Mine No. 1 has no prior history of methane ignitions. Prior to December 3, 2006, Mine No. 1's past operations presumably bore little resemblance to the massive ventilation change and concomitant risk of significant methane and float coal dust accumulations precipitated by mining during the fan shutoff. Stillhouse never sought MSHA's approval to amend its ventilation plan to permit its conduct during the early morning hours of December 3, 2006, so the lack of past ignitions at Mine No. 1 is of limited relevance to this particular case. Based on the evidence before me, Stillhouse's commission of this violation was an isolated aberration yet great deviation from its normal operations. The lack of past ignitions does not detract from the great risks associated with Stillhouse's conduct.

The theme of Stillhouse's arguments is that the Secretary did not show the existence of any immediately harmful conditions, such as the accumulation of an explosive concentration of methane gas. A flagrant violation involves conduct that "reasonably could have been expected to cause . . . death or serious bodily injury." 30 U.S.C. § 820(b)(2). Thus, to establish a flagrant violation the facts and circumstances surrounding the violation must demonstrate that the operator's conduct was likely to bring about death or serious bodily injury. *See* discussion *supra* Part III.D.2. Stillhouse's narrow interpretation of the statutory text ignores the facts in this case demonstrating that Stillhouse subjected eight miners to the high risk of death.

In Russian roulette, the player spins the cartridge of a six-round revolver loaded with a single bullet, holds the gun to his or her head, and pulls the trigger. No reasonable person would look at the mere fact someone has survived a round of this game and conclude that the player did not take a serious risk of death: "Would we not assess the risk associated with playing Russian roulette by considering the potential for harm involved in holding a loaded gun to one's head and pulling the trigger, rather than by considering what happened after the trigger was pulled?" *Manalapan Mining Co. (Manalapan Mining II)*, 18 FMSHRC 1375, 1396 (Aug. 1996) (Jordan & Marks, Comm'rs, concurring). When Stillhouse completely shut down the only device moving air through its extensive mine and extracted coal for six hours, it created an environment ripe for the occurrence

of a fatal explosion. Just because Stillhouse averted disaster does not mean its violation did not create the high risk of such an event.

b. Application of the Elements of a Flagrant Violation and Determination of Reckless Disregard

To satisfy the first and second elements of the flagrant violation, the evidence must demonstrate that Stillhouse committed a reckless failure to make reasonable efforts to eliminate a known violation of the mandatory safety standard at 30 C.F.R. § 75.313. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D. These two elements are met when, in light of all the facts and circumstances surrounding the violation, the Secretary demonstrates that Stillhouse did not take the steps a reasonably prudent operator would have taken to correct the known violation of a mandatory health or safety standard and consciously or deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury. *See* discussion *supra* Part III.D.1.b. Here, a violation is “known” to the operator when it has express or implied actual knowledge of it. *See* discussion *supra* Part III.D.1.c.

Stillhouse had ample notice of the consequences of cutting to the surface at the 002 section. Almost a year before December 3, 2006, Johnson and Clark learned from Stillhouse’s management that Stillhouse intended to cut to the outside of the 002 section. Johnson told Stillhouse’s management that cutting to the surface at the 002 section would destroy Mine No. 1’s ventilation. Johnson reminded Stillhouse’s management of its duty to file a revised ventilation plan with MSHA. Stillhouse never sought approval for an amendment to its ventilation plan, much less informed MSHA of its imminent actions, prior to making the cutouts in the 002 section. Indeed, Stillhouse does not contend its changes to Mine No. 1’s ventilation were approved by MSHA. (Resp’t Br. 9.) Stillhouse also does not dispute that its miners should not have remained underground. (*Id.*)

At the time of the violation, Stillhouse knew the consequences of its conduct. During Johnson and Clark’s investigation, foremen Johnny Osborne and Ira Sergent revealed that they would have “opened the mine fan doors,” reducing the fan’s ability to pull air through the mine. As Johnson and Clark discovered, once the cutouts were made, running the fan at full power pulled air through the belt entry and man trip roadway entry in the wrong direction through the mine and ceased the flow of intake air between the mouth of the 002 section and the 003 section. In light of these consequences and the notice Stillhouse had already received about the cutouts’ potential effect on Mine No.1’s ventilation, Sergent’s and Osborne’s admissions underscored their knowledge that the cutouts would have a detrimental impact on the mine’s ventilation. Subsequently, Osborne and Sergent each pleaded guilty to a criminal violation of the regulation underlying this violation for failing to withdraw miners during the mine fan shutoff. I conclude that Stillhouse shut down its mine fan in a reckless, misguided attempt to correct the cutouts’ destruction of its ventilation plan. In light of this conclusion, the Secretary’s failure to produce evidence explicitly stating Stillhouse’s rationale for the mine fan shutoff is immaterial, contrary to Stillhouse’s assertions otherwise.

Stillhouse demonstrated minimal care for the safety of its miners. At virtually the stroke of midnight on December 3, 2006, Stillhouse secretly cut to the surface of the 002 section, turned off its mine fan, and proceeded to mine coal—all during the third-shift when it normally does not

produce coal. Stillhouse disabled the alarm sounding the shutoff. The miner who turned off the mine fan reportedly brought his children to the Maggard Branch to watch Stillhouse's mining equipment emerge from underground. That this miner felt like it was appropriate to treat the event like a trip to the circus with his children underscores the lack of seriousness Stillhouse paid to its obligation to protect the safety of its miners. Stillhouse mined coal for six hours with its fan shut down, failing to withdraw miners in violation of 30 C.F.R. § 75.313. Three of Stillhouse's supervisory employees pleaded guilty to criminal violations of 30 C.F.R. § 75.313 in relation to this conduct.

The unusual circumstances in which Stillhouse made the cutouts demonstrate a concerted effort to evade the mining regulations. Rather than making any attempt to comply with its obligations to submit an amended mine ventilation plan or to otherwise properly ventilate the mine, Stillhouse forged ahead with its plan to cut to the outside of the 002 section. As evidenced by the fact that Stillhouse disabled the mine fan shutoff alarm, Stillhouse then proceeded to purposely and knowingly disobey its requirements under 30 C.F.R. § 75.313. Stillhouse's conduct only became known to MSHA when at the end of second-shift a concerned miner called an MSHA supervisor at his home to report dangerous roof conditions where Stillhouse was cutting to the surface. Stillhouse grossly deviated from its regulatory obligations gambling that it would not get caught until MSHA's inspection arrived on site at the end of third-shift.

A reasonably prudent mine operator would have submitted an amended ventilation plan or, at the very minimum, taken reasonable precautions to reduce the risks associated with cutting to the surface. If, as in this case, the reasonably prudent operator breached the mine walls to the surface, it would have immediately shut down production and complied with 30 C.F.R. § 75.313 by evacuating its miners from underground and powering down its electrical circuits and equipment. Nothing in the record before me suggests another course of action was appropriate. Stillhouse evaded its obligations under 30 C.F.R. § 75.313 for no immediate benefit other than the revenue generated from 700 tons of coal.²⁶ Stillhouse's violation created the high risk of death to eight miners. *See* discussion *supra* Part IV.A.3.a. Thus, for purposes of this flagrant analysis, Stillhouse did not take the steps a reasonably prudent mine operator would have taken to eliminate its known violation of 30 C.F.R. § 75.313 and deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury. Accordingly, Stillhouse committed a reckless failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard, establishing the first two elements of a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.1. In light of my conclusion that Stillhouse deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury in committing this violation, I also conclude that Stillhouse acted with reckless disregard.

Finally, as discussed above, Stillhouse's conduct in failing to eliminate this violation was highly likely to bring about fatal injuries to eight miners. Accordingly, Stillhouse's reckless failure to make reasonable efforts to eliminate its known violation of 30 C.F.R. § 75.313 reasonably could have been expected to cause death or serious bodily injury, thus establishing the third and fourth

²⁶ Once completed, the cutouts would provide an alternative entrance to Mine No. 1 located far closer to the working face. (Tr2. 63:9–20.)

elements of a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.2. I conclude that all of the elements of a flagrant violation of 30 C.F.R. § 75.313 are established in this case. Citation No. 6665036 is AFFIRMED as a flagrant violation.

4. Conclusions on Other Issues

a. S&S

Though Stillhouse disputed whether this violation was S&S prior to the hearing, it stipulated in its post-hearing brief that this violation was S&S. (Resp't Br. 4.) Nevertheless, in light of the novel nature of this case, it is worth discussing the S&S character of this violation. Section 104(d) of the Mine Act defines an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Nat'l Gypsum Co.*, 3 FMSHRC at 825. To establish an S&S violation under *National Gypsum*, the Secretary must prove:

(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3–4 (Jan. 1984) (citation omitted); *accord* *Buck Creek Coal v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

The parties agree that Stillhouse violated 30 C.F.R. § 75.313, a mandatory safety standard. As discussed above, Stillhouse's decision to shut off its mine fan and extract coal created an environment ripe for the accumulation of explosive mixtures of methane and coal dust. *See* discussion *supra* Part IV.A.3.a. Amidst these conditions, Stillhouse mined coal and failed to shut down its underground electrical circuits and equipment. *See* discussion *supra* Part IV.A.3.a. These activities created the high risk of a mine explosion, a discrete safety hazard. *Id.* Though a mine explosion did not actually occur, should Stillhouse have continued its violation—and there was every indication that the remaining three entries would have been cut out to the surface—and these risks persisted, a mine explosion would have been highly likely. Given the nature of this hazard, fatal injury was highly likely. This violation satisfies all four of the *Mathies* criteria, and Citation No. 6665036 is AFFIRMED as S&S.

b. Unwarrantable Failure

The unwarrantable failure terminology derives from section 104(d) of the Mine Act and refers to more serious conduct by an operator in connection with a violation. 30 U.S.C. § 814(d). In *Emery Mining*, the Commission determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal*, 14 FMSHRC at 1261; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

As discussed above, Stillhouse’s violation created the high risk of fatal injury. *See* discussion *supra* Part IV.A.3.a. Stillhouse’s violation persisted over a period of six hours. It mined coal during the fan shutoff, failed to withdraw its miners, and did not turn off its underground electrical circuits and equipment, all in violation of 30 C.F.R. § 75.313. Its management pleaded guilty to criminal charges of violating 30 C.F.R. § 75.313, and as discussed above, Stillhouse was well aware of this violation. *See* discussion *supra* Part IV.A.3.b. Months prior to committing this violation, Stillhouse knew that it was obligated to submit a ventilation plan to address the cutouts it planned to make at the 002 section because the cutouts would significantly alter Mine No. 1’s ventilation. Stillhouse ignored its obligation to address these risks in violation of 30 C.F.R. § 75.313. Each of the aggravating factors typically considered in determining an unwarrantable failure is present in this case. Citation No. 6665036 is AFFIRMED as an unwarrantable failure to comply with 30 C.F.R. § 75.313.²⁷

²⁷ I reach this conclusion notwithstanding Stillhouse’s general objection that the Secretary failed to allege unwarrantable failure as to the violations in this case. Stillhouse’s reliance on *Cyprus Emerald Resources* is inapposite to this case. (Resp’t Br. 18.) In *Cyprus Emerald Resources*, the Commission vacated the Administrative Law Judge’s unilateral modification of two section 104(a) citations to 104(d) citations. *See id.* at 819 (vacating the Administrative Law Judge’s modifications in *Cyprus Emerald Res. Corp.*, 17 FMSHRC 2086, 2103–04, 2107 (Nov. 1995) (ALJ)). Any violation cited under section 104(d)(1) of the Mine Act must include an allegation of unwarrantable failure. Here, the Secretary issued the citation and orders in this case under section 104(d)(1), thus alleging unwarrantable failure as to every violation in this case.

5. Penalty

Under Section 110(i) of the Mine Act, the Administrative Law Judge must consider six criteria in determining an appropriate civil penalty:

the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The parties stipulated that the penalties proposed in this case are appropriate to the size of Stillhouse's business, that they will not affect Stillhouse's ability to continue its business, and that Stillhouse demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. (Tr1. 6:5-16, 7:15-25.) I have also considered the Assessed Violation History Report. (Ex. P-10.) Generally, Stillhouse does not have an excess history of violations, and it has no previous violations of this particular standard.

Nevertheless, Citation No. 6665036 involves Stillhouse's flagrant violation of 30 C.F.R. § 75.313. Here, Stillhouse acted with reckless disregard, creating the high likelihood that eight miners would suffer death or serious bodily injury. Short of an actual fatality, this violation involves nearly the highest level of negligence and gravity conceivable under the Mine Act. The maximum penalty permitted by the Mine Act is \$220,000. 30 U.S.C. § 820(b)(2). The Secretary has proposed a penalty of \$212,700, and in light of the facts and circumstances in this case, I hereby assess a civil penalty of \$212,700 for this violation.

B. Order No. 6665037

1. Issues Presented

Citation No. 6665037 alleges a violation of 30 C.F.R. § 75.324, a mandatory safety standard. Stillhouse stipulated to the fact of the violation in Citation No. 6665037. (Tr1. 5:21-22; Resp't Prehr'g Report 2.) The parties presented the following issues in regard to Citation No. 6665037:

- a. Whether the violation was flagrant, as defined by 30 U.S.C. § 820(b)(2);
- b. Whether Stillhouse acted with reckless disregard in committing the

Stillhouse's contention has no merit.

violation;

- c. Whether the violation was caused by Stillhouse's unwarrantable failure to comply with 30 C.F.R. § 75.324;
- d. Whether the violation was highly likely to result in fatal injuries to eight miners; and
- e. Whether the violation of 30 C.F.R. § 75.324 was S&S.

2. The Parties' Arguments

a. The Secretary

The Secretary argues that this standard prohibits intentional changes in a mine's ventilation unless certain procedures are followed. (Pet'r Br. 27.) Should such a change take place, it requires the mine's electrical circuits to be shut down and its equipment to be turned off. (*Id.* at 29.) As with Citation No. 6665036, the Secretary reiterates her concern over a mine explosion resulting from Stillhouse's mining operations during the fan shutoff. (*Id.* at 28–29.) The Secretary additionally points to the dangers related to Stillhouse's decision to turn the mine fan back on while its miners were exiting the mine. (*Id.* at 29–30.) Noting that Stillhouse never shut down its electrical circuits or belt haulage system, the Secretary argues that when Stillhouse restarted the mine fan it furthered the risk of a mine explosion. (*Id.*) The cutouts at the 002 section destroyed Mine No. 1's ventilation system and allowed the mine fan to draw contaminated air the wrong way through the mine. (*Id.*) That air could have swept explosive accumulations of dust and methane over energized non-permissible equipment or the belt haulage system, sparking a catastrophic mine explosion. (*Id.*) Because Stillhouse intentionally caused this violation and failed to eliminate it, the Secretary argues that it should be found to be flagrant. (*Id.* at 32.)

b. Stillhouse

Stillhouse points out that the facts and issues underlying this violation essentially track those at issue in Citation No. 6665036. (Resp't Br. 6; Resp't Reply 2.) Both violations involve Stillhouse's mining operations surrounding the initial shutdown and subsequent turning back on of the mine fan. Accordingly, Stillhouse's arguments concerning Citation No. 6665036 apply to Order No. 6665037, as well. (Resp't Br. 6; Resp't Reply 2.) *See* discussion *supra* Part IV.A.2.b.

3. Whether the Violation Was Flagrant

a. Risks of Stillhouse's Violation of § 75.324

The mandatory safety standard at 30 C.F.R. § 75.324, sets forth, in part:

(b) Intentional changes [to mine ventilation] shall be made only under the following conditions:

(1) Electric power shall be removed from areas affected by the ventilation change and mechanized equipment in those areas shall be shut off before the ventilation change begins.

(2) Only persons making the change in ventilation shall be in the mine.

30 C.F.R. § 75.324(b)(1)–(2).

Stillhouse violated this standard by intentionally changing its mine ventilation not once but twice during the same shift. First, in the early morning hours of December 3, 2006, Stillhouse shut down its mine fan for six hours, ceasing the flow of over 200,000 CFM of air through the mine. Stillhouse did not shut down its underground electrical circuits or equipment. Eight miners remained underground, as Stillhouse mined 700 tons of coal for six hours during the fan shutoff. As admitted by Stillhouse, this conduct violated the requirements of 30 C.F.R. § 75.324(b)(1)–(2). I have discussed how Stillhouse’s mine fan shutdown, in conjunction with its mining activities, made it highly likely its eight miners would suffer deadly injuries. *See* discussion *supra* Part IV.A.3.a. Stillhouse did not address the serious risks posed by its conduct. Rather, Stillhouse’s failure to correct its initial violation of § 75.324 exposed eight miners to the high risk of death.

However, shortly after Johnson ordered foreman Osborne and his men to leave the mine, foreman Sergent, who had been underground with the other miners, emerged from underground and turned the mine fan back on. The full force of the mine fan came back online, moving significant quantities of air throughout Mine No. 1’s extensive network of entries and crosscuts. Stillhouse yet again initiated a significant change in its mine ventilation. Again, it did so with miners underground and the electrical power on in contravention of 30 C.F.R. § 75.324.

With two cutouts in place at the end of the mine opposite from the mine fan, the suction of the mine fan drew air directly from the 002 section instead of pulling it from the entrance, out to the 002 section, and back again. Stillhouse’s mining activities during the six-hour mine fan shutoff created the high likelihood of that explosive concentrations of methane and coal dust would come into contact with the many ignition sources in Mine No. 1. *See* discussion *supra* Part IV.A.3.a.

The mine fan was turned on ten to twenty minutes after Johnson ordered the miners to leave the mine, but the miners did not emerge from underground until an hour after they were requested to do so. When Johnson gave the order to evacuate the mine, the miners were working at the cutouts of the 002 section, just a little over five miles from the mine entrance. Foreman Osborne admitted as much when Johnson gave the order to evacuate the mine, as Osborne claimed he had “good air” coming through the cutouts. Given the timing of the sequence of events in this case, had the miners left the 002 section at the exact moment they were ordered to do so, they would have progressed only one- to two-sixths of their way to the mine entrance by the time the fan was turned on. At that rate of travel, the miners would have advanced approximately 1.6 miles from the 002 section, at most, by the time the mine fan was restarted, placing them in the danger zone between the 002 and 003 section. (Ex. R-3.) As noted above, once Sergent turned the fan back on, potentially contaminated air from the 002 section flowed up the man trip roadway in the same direction as the

miners' travel out of the mine. With the belts still running in the mine and the attendant risk of an ignition, the miners, rather than escaping the risk of a mine explosion, instead traveled through potentially combustible air as they made their way toward the mine entrance. This second intentional change in ventilation comprising Stillhouse's violation of 30 C.F.R. § 75.324 also exposed these seven miners remaining underground to the risk of a deadly mine explosion.

b. Application of the Elements of a Flagrant Violation and Determination of Reckless Disregard

Above, I concluded that Stillhouse knew of the implications of cutting to the surface of the 002 section. *See* discussion *supra* Part IV.A.3.b. Stillhouse knew it was obligated to submit an amendment to its ventilation plan prior to making these cutouts. *Id.* While committing this violation, Stillhouse knew the highly detrimental impact its conduct had on its MSHA-approved ventilation plan. *Id.* Rather than attempting to follow the ventilation plan, Stillhouse misguidedly attempted to reduce the danger of its conduct by purposefully shutting down the mine fan. *Id.* Proper ventilation is vital in underground coal mining, so Stillhouse knew that it committed this violation of 30 C.F.R. § 75.324 in turning the mine fan off and back on again. The circumstances surrounding this violation demonstrate a concerted effort by Stillhouse to avoid the safety obligations owed to its miners. *Id.* Stillhouse's knowledge that the cutouts on the 002 section would destroy Mine No. 1's ventilation system, alone, counseled against its actions. Stillhouse's argument that its negligence should be reduced because the Secretary did not demonstrate that mine management knew about the air reversal in the mine is unavailing. The only immediate benefit to come out of Stillhouse's conduct was 700 tons of coal.

Given the nature of the risks involved in Stillhouse's conduct, a reasonably prudent operator would not have purposefully altered the mine ventilation as Stillhouse did in this case. Even if the reasonably prudent operator incorrectly determined that shutting the mine fan was appropriate, it would have at least taken the precautions of moving the miners not associated with the shutdown to the surface and shutting down its underground electrical circuits and equipment. The reasonably prudent mine operator also would not have turned its fan back on with miners and energized equipment underground. Stillhouse's violation created the high risk of death to eight miners. *See* discussion *supra* Part IV.B.3.a. Stillhouse did not take the steps of a reasonably prudent mine operator to eliminate its known violation of 30 C.F.R. § 75.324 and deliberately disregarded an unjustifiable, reasonably likely risk of death or serious bodily injury. Stillhouse committed a reckless failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard, establishing the first two elements of a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.1.

Moreover, in light of my conclusion that Stillhouse's reckless failure to eliminate its violation of 30 C.F.R. § 75.324 was highly likely to bring about death to eight miners, I determine that the third and fourth elements of a flagrant violation are also satisfied. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.2. Because I conclude all the elements of a flagrant violation are established in this case, Order No. 6665037 is AFFIRMED as a flagrant violation.

4. Disposition of Other Issues

a. S&S

As with the violation in Citation No. 6665036, Stillhouse initially disputed whether this violation was S&S prior to the hearing but later stipulated in its post-hearing brief that this violation indeed was S&S. (Resp't Br. 4.) Again, due to the unique nature of the legal issues before me, I briefly note why this violation is S&S.

Order No. 6665037 concerns the violation of 30 C.F.R. § 75.324, a mandatory safety standard. I have concluded above that Stillhouse's commission of this violation directly contributed to the risk of a deadly mine explosion. *See* discussion *supra* Part IV.B.3.a. I have also concluded above that such an explosion was highly likely during the commission of the violation. *Id.* Stillhouse's violation directly compromised its mine ventilation system, and the continuation of its operation in this manner would have furthered the high risk of such an event. Given the nature of a mine explosion, fatal injuries were highly likely to occur to eight miners. Having met all four of the *Mathies* criteria for an S&S violation, Order No. 6665037 is AFFIRMED as S&S.

b. Unwarrantable Failure

Several factors bear on the determination of whether Stillhouse committed an unwarrantable failure to comply with 30 C.F.R. § 75.324. As with Citation No. 6665036, this violation involved the high risk of fatal injury. Indeed, the intentional ventilation changes in this case took place in conjunction with Stillhouse's decision to mine 700 tons of coal during the six-hour fan shutoff. Stillhouse was well aware of its violation of 30 C.F.R. § 75.324. Stillhouse knew of its obligations to properly ventilate Mine No. 1 as well as the implications of its failure to make plans to do so following the cutouts on the 002 section. Together, these aggravating factors weigh in favor of my conclusion that Stillhouse committed an unwarrantable failure to comply with 30 C.F.R. § 75.324. Order No. 6665037 is AFFIRMED as an unwarrantable failure to comply with 30 C.F.R. § 75.324.

5. Penalty

As noted above, the parties have stipulated that the proposed civil penalty is appropriate for the size of Stillhouse's business, that the proposed penalty will not affect Stillhouse's ability to continue its business, and that Stillhouse made a good faith effort to achieve rapid compliance after notification of the violation. *See* discussion *supra* Part IV.A.5. Stillhouse has no prior violations of the standard at issue in this order. (Ex. P-10.) However, as I have noted in detail, the gravity and negligence of Stillhouse's violation of § 75.324 was severe. *See* discussion *supra* Part IV.B.3–4. Based on these considerations, and particularly on the severity of the violation's gravity and negligence, I conclude that the Secretary's proposed civil penalty of \$212,700 is warranted by Stillhouse's conduct. I hereby assess a civil penalty of \$212,700.

C. Order No. 6665039

1. Issues Presented

Citation No. 6665039 alleges a violation of 30 C.F.R. § 75.360, a mandatory safety standard requiring Stillhouse to conduct safety inspections prior to each shift.

Stillhouse stipulated to the fact of the violation in Citation No. 6665039. (Tr1. 5:25–6:3.) The parties present the following issues in regard to Citation No. 6665039:

- a. Whether the violation was flagrant, as defined by 30 U.S.C. § 820(b)(2).
 - b. Whether Stillhouse acted with reckless disregard in committing the violation.
 - c. Whether the violation was caused by Stillhouse’s unwarrantable failure to comply with 30 C.F.R. § 75.360;
 - d. Whether the violation was highly likely to result in permanently disabling injuries to eight miners; and
 - e. Whether the violation was S&S.
2. The Parties’ Arguments
- a. The Secretary

In this violation, Stillhouse failed to conduct a preshift examination at the belt power centers in the Wet Area of the mine for three shifts prior to the events on December 3, 2006. (Pet’r Br. 41–42.) The Secretary asserts that Stillhouse had a deliberate plan to turn off the mine fan and make the cutouts at the 002 sections. (*Id.* at 50.) The Secretary argues that in doing so, Stillhouse failed to make efforts to identify potential fire or methane hazards. (*Id.* at 46–49.) According to the Secretary, the gravity of Stillhouse’s failure was compounded by the fact that miners must travel through this area to exit the mine, increasing the likelihood of exposure to the dangerous conditions created by Stillhouse. (*Id.* at 46.) Because Stillhouse deliberately disregarded the known risks of failing to conduct a preshift examination of the Wet Area, the Secretary argues that the violation was flagrant. (*Id.* at 50–51.)

- b. Stillhouse

Stillhouse argues that Order No. 6665039 is “[t]he most curious violation.” (Resp. Br. 15.) Stillhouse stresses that the Secretary has not even shown the existence of the discrete safety hazard necessary to establish an S&S violation. (*Id.* at 16.) Stillhouse points to the fact that once a preshift examination was conducted in the Wet Area, no hazardous conditions were found. Stillhouse relies on the Administrative Law Judge’s decision in *Manalapan Mining Co. (Manalapan I)*, 16 FMSHRC 1669 (Aug. 1994) (ALJ), in support of its position. (*Id.*) According to Stillhouse, the Judge in *Manalapan Mining* determined that the failure to conduct a preshift violation was not S&S because subsequent investigation of the area revealed no hazards. (*Id.*) Similarly, because no

hazards were discovered in this particular case, Stillhouse argues the violation cannot be S&S, much less flagrant. (*Id.*)

Stillhouse also argues that because the preshift examinations of the Wet Area should have been conducted prior to the fan shutdown, they would not have revealed any of the risks associated with the ventilation change. (Resp't Br. 16.) Stillhouse further asserts that its ventilation changes have no relationship with this violation. (Resp't Reply 9.) Stillhouse concludes that the Secretary cannot show any factual predicate for her determination on the gravity of its violation. (Resp't Br. 16–17.) Finally, Stillhouse contends its negligence as to this violation is obviated by its diligence in conducting preshift examinations in the other parts of the mine. (*Id.* at 17.)

3. Whether the Violation Was Flagrant

a. Risks of Stillhouse's Violation of § 75.360

The gravity of Stillhouse's violation must be assessed in light of its mining operations during third-shift on December 3. As discussed above, Stillhouse was reminded about its safety obligations nearly a year in advance of cutting to the surface of the 002 section. *See* discussion *supra* Part IV.A.3.b. Indeed, during that time Stillhouse had revealed to Johnson and Clark that it would cut to the outside of the 002 section. Stillhouse's mining operation apparently continued to advance ceaselessly until it broke to the outside at the 002 section. When Stillhouse cut outside of the mine, it did not have a proper ventilation plan in place to handle the cutouts' severely compromising effect on the mine's ventilation system. Instead Stillhouse completely shut down the mechanical device ventilating the mine. These actions created a high risk of a mine explosion throughout Mine No. 1, including in the Wet Area. *See* discussion *supra* Part IV.A.3.a. Such an explosion could have been precipitated by transient hazards, such as methane, present in the Wet Area where Stillhouse's belt haulage system was located. Preshift examinations in this area would have detected problems associated with the belt haulage system, which had numerous potential ignition sources associated with its electrical components and belt rollers. (Tr1. 198:21–200:6.)

Amidst this scheme to breach its MSHA-approved ventilation plan and mine coal under extremely dangerous underground conditions, Stillhouse failed to conduct a preshift examination in the Wet Area. Stillhouse did not miss performing just one preshift examination. Stillhouse did not perform preshift examinations prior to any of the shifts on December 2, 2006. The Wet Area also lies under the water table. Water inhibits methane's escape out of the mine to the surface, increasing the probability of methane accumulations in this area. That this area was wet did not reduce the risk of methane ignitions. The belts hung from the ceiling in the Wet Area. (Tr1. 250:18–21; Tr2. 85:2–4.) Being above the water, coal still could have stuck in the belt rollers, thus allowing for the possibility of ignitions precipitated by the friction of the belt. (Tr1. 250:22–251:2.)

It is true that the Wet Area's location relatively close to the mine entrance meant that a mine explosion in this area would have been less likely to impact the miners working on the 002 section during the fan shutdown. However, miners must pass the Wet Area to exit the mine. Moreover, Mine No. 1's carbon monoxide system was compromised during the mine fan shutdown. The carbon monoxide system's reduced ability to alert miners to the dangers of a mine fire in the Wet Area significantly heightened the miners' chances of receiving little or no notice of encountering a

mine fire as they exited the mine. The risks associated with the violation primarily concerned the miners' risk of encountering a mine fire rather than being in the midst of a mine explosion. I determine that the risk of serious bodily injury, and not necessarily death, is appropriately associated with this violation. Serious bodily injuries may include permanently disabling injuries, such as being severely burned or lung damage from smoke inhalation. This violation was highly likely to result in permanently disabling injuries to eight miners.

Stillhouse believes that, in accordance with "well-settled law," the Administrative Law Judge's decision in *Manalapan I* supports its argument that Order No. 6665039 was not even S&S. (Resp't Reply 8.) It argues that because no hazardous conditions were found upon MSHA's inspection of the Wet Area, the violation was not S&S. However, as a threshold matter, the decisions of the Commission's Administrative Law Judges are not binding precedent. 29 C.F.R. § 2700.69(d). More important is the Commission's actual precedent on this issue. In *Manalapan Mining II*, four commissioners joined in vacating the conclusion of the Administrative Law Judge relied upon by Stillhouse. 18 FMSHRC at 1382 (Holen & Riley, Comm'rs, concurring); 18 FMSHRC at 1396 (Jordan & Marks, Comm'rs, concurring). The Commissioners unanimously agreed that it is incorrect as a matter of law for a Commission Administrative Law Judge to determine that a preshift violation is not S&S based on a post-violation preshift inspection that failed to disclose any hazards. *Id.* The Commission recently relied upon the rule in *Manalapan Mining II*, in part, to affirm a Commission Administrative Law Judge's decision that a preshift violation was S&S. *Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006) (citing 18 FMSHRC at 1382, 1396). The Commission explained that "because preshift examinations have a prophylactic purpose and because certain mine conditions are transitory in nature, later examinations are not sufficiently indicative of the conditions that may have existed at the time the area should have been examined." *Id.* Thus, the Administrative Law Judge's decision in *Manalapan I* is not entitled to any persuasive weight on this issue. Stillhouse's assertion that its preshift violation was not S&S because the post-violation inspection of the area revealed no hazards is incorrect as a matter of law.

b. Application of the Elements of a Flagrant Violation and Determination of Reckless Disregard

Here, even assuming that a reasonably prudent mine operator made the mistaken conclusion that turning off its mine fan and producing coal for nearly an entire shift was warranted, Stillhouse's failure to conduct a preshift exam of the Wet Area was not warranted. Stillhouse indicated its intention to cut to the surface of the 002 section nearly a year before December 3, 2006. MSHA provided Stillhouse ample notice of the implications of its decision to make the cutouts. *See* discussion *supra* Part IV.A.3.a. Stillhouse's management was aware that cutting to the surface at the 002 section would not comply with its MSHA-approved ventilation plan. Stillhouse had long-standing plans to cut to the surface of the 002 section, and it had long-standing notice that these actions would be harmful. A reasonably prudent mine operator would have at least conducted a proper preshift examination of the Wet Area. The Wet Area had multiple potential ignition sources. Ensuring a safe environment was vital in light of Stillhouse's conduct on the night of December 3, 2006. As recognized by the Commission, "[t]he preshift examination requirement is unambiguous and is of fundamental importance in assuring a safe working environment underground. . . . It is common knowledge that the preshift examination must be completed and recorded at the surface

before miners are allowed to enter a mine.” *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). Stillhouse’s failure to conduct these examinations was known to it.

Stillhouse believes that its failure to conduct a preshift examination of the Wet Area is mitigated by the fact that the examination would not have revealed the risks associated with the mine fan shutdown. Here, Stillhouse acknowledges that the gravity of this violation was connected to the ventilation changes in Mine No. 1, contrary to its assertion otherwise. Johnson did recognize at the hearing that a preshift examination would not have revealed hazards associated with the mine fan shutdown. (Tr1. 250:2–14.) However, Stillhouse’s argument ignores how the preshift examinations of the Wet Area could have at least revealed the hazards associated with normal mining operations, such as the accumulation of methane gas. The circumstances surrounding Stillhouse’s extraordinary changes to Mine No. 1’s ventilation compounded the risk of a dangerous mine explosion in this area. *See* discussion *supra* Part IV.C.3.a. If anything, the risks associated with Mine No. 1’s normal mining operations were amplified by Stillhouse’s intentional ventilation changes.

Stillhouse also criticizes Johnson for stating in the Secretary’s interrogatory responses that “[t]his refusal to conduct a preshift examination in light of the lack of ventilation and the mining of coal on three shifts without such preshift examination of this area demonstrates a reckless disregard for this standard.” (Ex. R-1, at 11.) The idea that the risks of Stillhouse’s violation were heightened by the mine fan shutdown underlies Johnson’s interrogatory statement, not the mistaken assertion that the gravity of the violation was high because Stillhouse failed to conduct a preshift examination while the fan was off. By not conducting any preshift examinations of the Wet Area prior to destroying the ventilation of its mine, Stillhouse’s third-shift operation on December 3, 2006, resembled a pilot flying without instruments through the mountains while blinded by fog. In light of these considerations, Stillhouse’s ability to comply with its regulatory mandate to conduct preshift examinations in the other areas of its mine does not reduce the severe gravity and negligence of its violation.

In failing to examine the Wet Area, Stillhouse did not take the steps a reasonably prudent mine operator would have taken to eliminate the violation of 30 C.F.R. § 75.360. Stillhouse’s violation created the high risk of permanently disabling injury to eight miners. *See* discussion *supra* Part IV.C.3.a. Stillhouse deliberately disregarded an unjustifiable, reasonably likely risk of serious bodily injuries in failing to eliminate its violation. Stillhouse recklessly failed to make reasonable efforts to eliminate a known violation of a mandatory safety standard, establishing the first two elements of a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.1. The first two elements of a flagrant violation are established as to this violation. In deliberately disregarding an unjustifiable, reasonably likely risk of serious bodily injury, I also conclude that Stillhouse acted with reckless disregard in committing this violation.

Additionally, Stillhouse’s failure to eliminate its violation of 30 C.F.R. § 75.360 was highly likely to result in permanently disabling injuries to eight miners. Accordingly, the third and fourth elements of a flagrant violation are established in this case. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.2. Because I conclude that all of the elements of a flagrant violation have been established, Order No. 6665039 is AFFIRMED as a flagrant violation.

4. Disposition of Other Issues

a. S&S

This violation involves the breach of a mandatory safety standard. In committing the violation, Stillhouse created a discrete safety hazard by heightening the risk of a mine explosion. It did so when it failed to conduct a preshift examination of the Wet Area, an area through which the belt haulage system runs and turns with head drives and power centers, prior to events during the third-shift on December 3, 2006. *See* discussion *supra* Part IV.C.3.a. The hazard of a mine explosion in this part of the mine was highly likely to result in permanently disabling injuries. *Id.* Satisfying all of four of the *Mathies* criteria, Order No. 6665039 is AFFIRMED as S&S.

b. Unwarrantable Failure

Here, Stillhouse's violation involved the high risk of permanently disabling injuries. *See* discussion *supra* Part IV.C.3.a. The failure to conduct a preshift examination occurred during the three shifts immediately prior to Stillhouse's purposeful engagement in highly risky mining conduct where it breached its MSHA-approved ventilation plan and mined with the fan shut off. This conduct heightened the risks associated with its failure to conduct preshift examinations, aggravating its failure to do so. Stillhouse was aware of this violation. All of these factors establish that Stillhouse's failure to conduct the examinations demonstrated an aggravated disregard, constituting more than ordinary negligence in violating 30 C.F.R. § 75.360. Order No. 6665039 is AFFIRMED as an unwarrantable failure to comply with a mandatory safety standard.

5. Penalty

The parties stipulated that the proposed civil penalty is appropriate for the size of Stillhouse's business, that it will not impact Stillhouse's ability to stay in business, and that Stillhouse made a good faith effort to achieve rapid compliance after notification of the violation. *See* discussion *supra* Part IV.A.5. I have considered that Stillhouse has committed several minor prior violations under 30 C.F.R. § 75.360. (Ex. P-10, at 3.) Here, though, the gravity and negligence of Stillhouse's violation was very high. Nevertheless, this violation involved the high likelihood of permanently disabling injuries, not fatal injuries. I conclude that the Secretary's proposed penalty of \$158,000 is warranted by Stillhouse's conduct. I hereby assess a civil penalty of \$158,000 against Stillhouse.

D. Order No. 6665038

1. Issues Presented

Order No. 6665038 alleges a violation of 30 C.F.R. § 75.220(a)(1), a mandatory safety standard.

The parties present the following issues in regard to Citation No. 6665038:

- a. Whether a violation of 30 C.F.R. § 75.220(a)(1) occurred.
- b. Whether the alleged violation was flagrant, as defined by 30 U.S.C. § 820(b)(2).
- c. Whether Stillhouse acted with reckless disregard in committing the alleged violation.
- d. Whether the alleged violation was caused by Stillhouse's unwarrantable failure to comply with 30 C.F.R. § 75.220(a)(1);
- e. Whether the alleged violation was highly likely to result in fatal injuries to two miners; and
- f. Whether the alleged violation of 30 C.F.R. § 75.220(a)(1) was S&S.

2. The Parties' Arguments

a. The Secretary

The Secretary argues that Stillhouse intentionally disregarded its roof control plan by cutting the entries of the 002 section within 150 feet of the surface, called the "outcrop," wider than the 18-foot width prescribed by the plan. (Pet'r Br. 36.) The Secretary relies on evidence that mine roofs are weaker the closer they are to the surface, and, as a result, entries must narrow as mining advances to the outside. (*Id.* at 35.) As for the hazards in this particular case, the Secretary argues that Stillhouse disregarded obvious hazards, including hill seams and cracks. (*Id.* at 34, 36.) The Secretary points out that the roof in one of the entries had collapsed. (*Id.* at 36.) The Secretary also points out that Stillhouse's failure to follow its roof control plan occurred under circumstances where crossbars or steel beams were warranted to support the roof. (*Id.*) The Secretary emphasizes that Stillhouse improperly used thin metal straps to support an area of the roof affected by hill seams, rather than the required crossbars or steel beams. (*Id.*) The Secretary stresses that had Stillhouse used properly sized metal straps, called steel channels, it still would have been required to further reduce the width of the entries to sixteen feet. (*Id.*) According to the Secretary, because Stillhouse intentionally disregarded these hazards, it committed a flagrant violation. (*Id.* at 40.)

b. Stillhouse

Stillhouse's major argument is that a violation did not actually occur. (Resp't Br. 12.) Stillhouse argues that Field Office Supervisor Johnson and Inspector Clark gave vague, overly broad definitions of the term "outcrop." (*Id.*) Relying on *Secretary of Labor v. Reed*, 16 FMSHRC 2108 (Oct. 1994) (ALJ), Stillhouse's position is that MSHA's Johnson and Clark improperly understood "outcrop" to mean a natural exposure of coal to the surface and a

mechanically created exposure to the surface, when the term actually means just the natural exposure of coal to the surface. (*Id.* at 12–13.) Because Johnson and Clark did not testify about the location of the natural outcrop, Stillhouse argues that the Secretary has not proven her case.

Even if the Secretary establishes a violation, Stillhouse argues that the gravity and negligence must be reduced. (Resp’t Br. 13.) Stillhouse states that the actions of Johnson and Clark provide the most telling evidence in support of its position. (*Id.*) Stillhouse notes that Johnson and Clark inspected the entries without installing any supplemental supports, taking a miner with them to the area. (*Id.* at 13–14.) According to Stillhouse, “[i]t defies credibility to contend that these inspectors would expose themselves and a *miner* to conditions they believed to be highly likely to cause a fatality.” (*Id.* at 14.) Stillhouse also asserts that Stillhouse had substantially complied with its roof control plan by using roof bolts of the proper length and spacing and cable bolts as supplemental support. (*Id.* at 13; Resp’t Reply 7.) Stillhouse relies on Johnson’s acknowledgment that the roof bolts were supporting the areas where the roof had cracked. (Resp’t Br. 13.) Stillhouse also specifically discounts the hazards posed by the roof fall in Entry No. 2 and the inadequately supported hill seams in Entry No. 3. (Resp’t Reply 7.)

Finally, Stillhouse argues that the Secretary cannot establish it knew about its violation and consciously disregarded it. (Resp’t Br. 15; Resp’t Reply 5–8.) Stillhouse criticizes Johnson’s assessments of Stillhouse’s alleged negligence based on Johnson’s allegedly contradictory statements concerning Stillhouse’s violation of its roof control plan. (Resp’t Br. 5.) Stillhouse further asserts that this violation does not even rise to the level of an unwarrantable failure based on the Commission’s decision in *Virginia Crews Coal Co.*, 15 FMSHRC 2103 (Oct. 1993). (Resp’t Reply 5–6.)

3. Whether a Violation Occurred

The provision at 30 C.F.R. § 75.220(a)(1) requires “[e]ach mine operator [to] develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.” The relevant part of Stillhouse’s roof control plan states:

When mining approaches within 150 feet of an outcrop:
Initial development sketch will apply . . .
Width of places within 150 feet of the outcrop will be maintained no more than 18 feet wide. Roof bolts will be at least 12 inches longer than the minimum specified in the Approved Roof Control Plan

(Ex. P-21, at 8.)

As set forth by the Commission, “[i]t is well established that plan provisions are enforceable as mandatory standards.” *Martin Cnty. Coal Corp.*, 28 FMSHRC 247, 254 (May 2006) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 12995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987)). The law governing the interpretation of a

regulatory standard applies to the interpretation of plan provisions. *Martin Cnty. Coal*, 28 FMSHRC at 255 (citing *Energy West*, 17 FMSHRC at 1317).

As with statutory interpretation, the ““language of the regulation [or in this case, plan provision] . . . is the starting point for its interpretation.”” *Martin Cnty. Coal*, 28 FMSHRC at 255 (quoting *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987)). If the terms of the provision are clear, then they must be enforced as written unless the regulator intended a different meaning or that meaning would lead to absurd results. *Martin Cnty. Coal*, 28 FMSHRC at 255 (citing *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989)).

Here, the operative term “outcrop” is commonly understood in the mining community as “[t]he part of a rock formation that appears at the surface of the ground.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 383 (2d ed. 1997). The term “does not necessary imply the visible presentation of the mineral on the surface of the earth, but includes those depositions that are so near the surface as to be found easily by digging.” *Id.* Johnson’s and Clark’s statements that the outcrop is the portion of the coal exposed to the surface via either natural or mechanical means are fully consistent with this definition. Indeed, the plan’s requirements for outcrops appear directly below its requirements for openings to the surface, called “drift openings.” (Ex P-21, at 8.) The overall context of the roof control plan affirms the conclusion that the outcrop lies at the surface where the coal is exposed, whether or not that surface was naturally or artificially created. Nothing in the roof control plan suggests that MSHA and Stillhouse intended a contrary meaning.

As for Stillhouse’s position on the definition of “outcrop,” a threshold issue is Stillhouse’s reliance on the Administrative Law Judge’s decision in *Reed*. As I note above in my discussion of Stillhouse’s arguments concerning the preshift violation, the decisions of the Commission’s Administrative Law Judges are not binding precedent. 29 C.F.R. § 2700.68(d). My consideration of this issue is not controlled by *Reed*.

During the hearing, Stillhouse suggested how its interpretation of “outcrop” should be applied. On cross-examination, Johnson was asked whether he knew the location of the outcrop prior to the creation of the box cut outside of the 002 section. (Tr1. 258:22–23.) The problem with Stillhouse’s focus on the pre-box cut location of the outcrop is that it ignores that the box cut merely provides an area on the surface for the miners to emerge from underground through the coal seam. (Tr1. 260:10–19.) As discussed above, the purpose of narrowing the widths of the mine’s entries as mining advances within 150 feet of the outcrop is to stabilize the roof in areas where it is expected to be much weaker. Only the span of roof between the underground working area and the cutout to the surface at the box cut is relevant to the application of this component of the roof control plan. The location of the outcrop prior to creation of the box cut has no relationship with this distance. Stillhouse’s restrictive view of the term “outcrop” thwarts the purposes of its roof control plan by creating the possibility of exceptions to the plan’s requirement for narrower entries in underground areas near the surface, which typically need extra support. Based on these considerations, I conclude that the term “outcrop” in Stillhouse’s roof control plan refers to areas of coal both naturally and mechanically exposed to the surface. Here, the outcrop was located at the box cut at the surface outside the 002 section.

When Johnson and Clark inspected the 002 section, they determined that the widths of the entries located within 110 feet of the surface exceeded the 18-foot distance prescribed by the roof control plan. The area where Johnson and Clark measured entry widths exceeding eighteen feet falls within the outcrop, as defined by the roof control plan. Because Stillhouse violated its roof control plan, I determine that Stillhouse committed the violation charged in Order No. 6665038.

4. Whether Order No. 6665038 Constitutes a Flagrant Violation
 - a. Risks of Stillhouse's Violation of § 75.220(a)(1)

As Stillhouse advanced toward the surface in the 002 section and the second-shift drew to a close, one of Stillhouse's miners tipped off MSHA by reporting poor roof conditions to an MSHA field office supervisor at his home late at night on Saturday, December 2, 2006. When Johnson and Clark arrived early the next morning, they indeed discovered dangerous roof conditions. Glue that should have been anchoring the roof bolts was running out of their holes, indicating that the roof was weak, as the roof bolts were not fully anchored. The roof was cracked and sagging, that is, beginning to fall, in several locations. (Tr1. 183:8–11.) Hill seams, areas where the roof is particularly susceptible to falling, were present in Entry No. 3.

It is worth noting that Clark issued a citation under section 104(a) of the Mine Act for Stillhouse's use of thin metal straps in securing the hill seams. (Ex. P-22, at 1.) Clark determined that this violation was highly likely to result in fatal injuries to two miners and concluded that the violation was S&S. (*Id.*) When hill seams are present, Stillhouse's roof control plan permits the use of steel channels instead of crossbars or steel beams. (Ex. P-21, at 11.) Had Stillhouse used steel channels to support the hill seams, its roof control plan obligated it to add cribs, posts, or jacks to limit the roadway to sixteen feet in width. (*Id.*) Stillhouse's roof control plan, however, did not permit the use of thin steel straps in lieu of crossbars, steel beams, or steel channels. (*Id.*) Reflecting the requirements of its roof control plan, Stillhouse paid the violation as written by Clark.

In addition to all of these conditions, a significant roof fall measuring four feet thick and running the width of the entry had occurred in Entry No. 2. After Johnson and Clark concluded their inspection of the area, posts were installed to provide additional support in the outcrop area.

The maximum deviations from the MSHA-approved roof control plan in each entry ranged from just under a foot to over three feet in Entry No. 3, which actually should have had supports reducing its width to sixteen feet given Stillhouse's decision to use metal straps to support hill seams in that area. Johnson and Clark identified numerous roof problems in the area, including the section 104(a) S&S violation discussed above that was determined to be highly likely to result in the death of two miners. Although many times roof falls do not occur when cutting to the outside, one did in this case. Indeed, Johnson explained that even if the entry where the roof fall occurred had been the proper width, in his judgment the fall would have occurred anyway. Narrower roof entries increase the strength of a roof. Cumulatively, these multiple hazards demonstrate how Stillhouse's violation fostered the high risk of a roof fall.

Stillhouse attempts to counter the Secretary's assessment of the risks involved in its conduct by emphasizing how Johnson and Clark inspected the entries at the cutouts without installing supplemental roof supports. Stillhouse, in effect, criticizes Johnson and Clark for doing their jobs, which is to inspect mines, even ones involving dangerous conditions. In recognition of the risks on the 002 section, Johnson and Clark continually monitored the roof while they conducted their investigation to ensure that neither they nor the miners accompanying them would be hurt by a roof fall. The conduct of Johnson and Clark during their inspection fails to suggest that the area was not as dangerous as they allege.

Stillhouse further argues that it had provided some supplemental support in the entries to the outcrop area. It is true that Stillhouse was installing elongated roof bolts and cable bolts to counteract the unstable roof conditions in accordance with its roof control plan. The roof bolts were of the proper length and spacing. It is also true that the roof bolts anchored the roof where it had cracked. Miners in the area are also required to remain under supported roof. (Ex. P-21, at 9.) However, glue was found to be running out of the holes containing some of the roof bolts, meaning that they were not fully anchored in the roof. The support in the 002 section was not as robust as Stillhouse claims.

The major problem with Stillhouse's attempts to discount the severity of its violation is that the numerous hazards in the entries of the 002 section demonstrate the roof was severely compromised. The roof fall in Entry No. 2 and the hill seams in Entry No. 3 strongly indicated the roof was prone to collapsing. As to these hazards, Stillhouse notes that the roof fall did not crush any miners, asserting that it occurred in an area away from where they were working. (Resp't Reply 7.) Stillhouse also notes that it had provided supports, albeit insufficient thin metal straps, for the hill seams. (*Id.*) Nevertheless, these hazards remained unmitigated while Stillhouse mined coal for nearly an entire shift during the fan shutoff. Stillhouse's observations do not undermine how the presence of these hazards pointed to dangerous roof conditions in the 002 section.

The other hazards discovered in the 002 section corroborated the roof's weakened state. The roof was soft and beginning to fall in the numerous places it had sagged. Cracks were present in the section. Moreover, amidst all of these hazards, Stillhouse's continuing mining activity in the 002 section created vibrations affecting the roof (Tr1. 244:1-4), and deadly loose "draw rock" could have fallen from the areas between the roof bolts, even though they were properly spaced. (Tr2. 73:1-74:10, 75:15-16.) The dangerous roof conditions in this area had not been adequately addressed. (Tr2. 76:16.)

Consequently, that Stillhouse had complied with parts of its roof control plan is unavailing with regard to the violation at issue in this order. The roof control plan merely sets the floor of what is required to ensure miners' safety. The roof control plan regulation explicitly states that "[a]dditional measures shall be taken to protect persons if unusual hazards are encountered." 30 C.F.R. §75.220(a)(1).

Narrower entries create more stable roof conditions. Stillhouse's failure to reduce the width of the entries in the 002 section to at least eighteen feet as it cut coal within 150 feet of the outcrop, as required by its roof control plan, aggravated the chances of a deadly roof fall. These risks were

real, not mere “hyperbole” as Stillhouse contends. (Resp’t Reply 5.) Stillhouse operated one double-headed roof bolter on the 002 section, which worked to secure the roof in the entries dug out by the continuous miner in that section. A double-headed roof bolter is operated by two miners. These miners were exposed to the severe roof conditions that had been further compromised by Stillhouse’s violation. Stillhouse’s violation exposed two miners to a high risk of fatal injury.

b. Application of the Elements of a Flagrant Violation and Determination of Reckless Disregard

Johnson and Clark’s inspection of Mine No. 1 was initiated by a concerned miner’s report to MSHA of bad roof conditions in the 002 section. Hours later, Johnson and Clark discovered extensive evidence of poor roof conditions during their inspection of the section. *See* discussion *supra* Part IV.D.4.a. All five entries were discovered to be out of compliance with the roof control plan. The risk of fatal injuries to two miners pervaded throughout the 002 section.

Stillhouse’s violation was abundantly obvious. The roof control plan plainly stated that eighteen-foot wide entries are required when mining within 150 feet of the outcrop, which in this case was at the box cut prepared for the miners to emerge to the surface from underground. *See* discussion *supra* Part IV.D.3. The fact that not one of the entries in the outcrop area of the 002 section conformed to the roof control plan’s eighteen-foot width requirement was clear to the naked eye. The foreman’s mount showing the distance between the underground area of the 002 section and the surface revealed that Stillhouse was within 110 feet of the outcrop, well inside the 150-foot distance designated by the roof control plan for narrower entries. Actual knowledge is “implied” when an individual has knowledge of certain information that would lead him or her to make further inquiries. Here, the requirements of the roof control plan and the location of Stillhouse’s miners relative to the outcrop were abundantly clear to Stillhouse. Though Stillhouse denies that it had express actual knowledge of its violation, this evidence demonstrates that Stillhouse had implied actual knowledge of its violation. Stillhouse knew it committed a violation of its roof control plan.

The hazards involved with this violation were obvious, as well. Johnson and Clark observed cracks, hill seams, glue running from the roof bolts, and a four-foot thick roof fall spanning the entire width of Entry No. 2. These plainly visible conditions underscored the gravity of the poor roof conditions in the 002 section and confirmed the alarms raised by the concerned miner’s phone call to MSHA the previous night. In cutting these entries too wide, Stillhouse risked the high likelihood that two of its miners would suffer fatal injuries from a roof fall. A reasonably prudent mine operator would have installed supplemental roof support to alleviate the risks involved in cutting its entries too wide. Such supplemental roof support could have included the posts that Johnson and Clark ordered to be installed to abate this violation. Taking these simple precautions would not have placed a significant burden on Stillhouse.

The deliberate nature of Stillhouse’s obvious violation was manifest. Prior to the start of third-shift, none of the entries in the 002 section had been cut to the surface. By the time Johnson and Clark ordered Stillhouse to cease its mining activities at the end of third-shift, Stillhouse had cut Entry Nos. 1 and 2 to the surface and, judging on the continuous miner’s location in Entry No. 3, was well on its way to finishing the three remaining cutouts in the section. Moreover, not one of the

entries in the 002 section complied with the eighteen-foot width requirement of its MSHA-approved roof control plan.

As for Stillhouse's assertion that Johnson's contradictory statements undermine MSHA's negligence findings associated with this violation, Johnson did state in the Secretary's interrogatory responses that "Stillhouse completely disregarded its RCP [roof control plan]" (Ex. R-1, at 8), and he testified at the hearing that Stillhouse had installed roof bolts in the 002 section that were of the proper length and properly spaced. However, on cross-examination, counsel for Stillhouse asked Johnson about this specific contradiction. (Tr1. 255:16–256:10.) Johnson asserted that Stillhouse completely disregarded the portion of its roof control plan concerning development in the outcrop by failing to narrow the width of its entries. (*Id.*) Johnson's explanation of his interrogatory answer is consistent with both the interrogatory answer's and his testimony's focus on Stillhouse's failure to cut entries of the proper width. The distinction Stillhouse attempts to draw between Johnson's interrogatory statement and his testimony does nothing to undermine his statements regarding Stillhouse's negligence.

Stillhouse relies on *Virginia Crews Coal* in arguing that this violation does not even rise to the level of an unwarrantable failure. In that case, the Commission explained that "a breach of a duty to know is not necessarily an unwarrantable failure." 15 FMSHRC at 2107 (citing the Administrative Law Judge's decision). The Commission reasoned that resting a determination of unwarrantable failure solely on the breach of the duty to know would make an unwarrantable failure indistinguishable from ordinary negligence. *Id.*

As discussed extensively, this violation does not involve Stillhouse's mere breach of its duty to know about the violation. Instead, Stillhouse systematically cut five entries in the 002 section that failed to comply with its roof control plan. Its failure to comply with the clear requirements of its roof control plan was visible to the naked eye. Most importantly, Stillhouse disregarded numerous, obvious hazards, such as locations where the roof was sagging and glue was running away from the rods, which indicated that its violation created the high risk of fatal injuries to miners working in the section.

Based on the foregoing, Stillhouse did not take the steps a reasonably prudent mine operator would have taken to eliminate its known violation of 30 C.F.R. § 75.220(a)(1). Stillhouse's violation involved the high risk of fatal injuries to two miners. *See* discussion *supra* Part IV.D.4.a. In disregarding this known violation and obvious hazards foretelling a deadly roof fall, Stillhouse deliberately disregarded an unjustifiable, reasonably likely risk of "death or serious bodily injury." § 820(b)(2). As a result, Stillhouse committed a reckless failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard, establishing the first two elements of a flagrant violation. *See* discussion *supra* Part III.D.1. The first two elements of a flagrant violation are present in this violation. As Stillhouse deliberately disregarded an unjustifiable, reasonably likely risk of death or seriously bodily injury, I also determine that Stillhouse acted with reckless disregard in committing this violation.

As noted above, Stillhouse's reckless failure to eliminate its violation created the highly likely possibility that two miners would suffer fatal injuries. *See* discussion *supra* Part IV.D.4.a. Stillhouse's reckless failure to eliminate its violation of 30 C.F.R. § 75.220(a)(1) reasonably could have been expected to cause death or serious bodily injury, thus establishing the third and fourth elements fo a flagrant violation. 30 U.S.C. § 820(b)(2). *See* discussion *supra* Part III.D.2. I therefore conclude that all of the elements of a flagrant violation are satisfied in this case, and Order No. 6665038 is AFFIRMED as a flagrant violation.

5. Disposition of Other Issues

a. S&S

The Secretary proved a violation of the mandatory safety standard at § 75.220(a)(1). Stillhouse's failure to rectify its violation created the high likelihood of roof falls, a discrete mining hazard. Though one roof fall did not crush any miners, had Stillhouse's mining operations continued, such an event was highly likely to have occurred, resulting in fatal injuries to two miners working as roofbolters in the 002 section. *See* discussion *supra* Part IV.D.4.a. As this violation satisfies all four *Mathies* criteria, Order No. 6665038 is AFFIRMED as S&S.

b. Unwarrantable Failure

As for the aggravating factors underlying a determination of unwarrantable failure, Stillhouse's violation involved the high risk of fatal injuries to two miners. The extent of Stillhouse's violation was great, as the operator failed to comply with its roof control plan in every single one of the five entries in the outcrop area. Stillhouse committed this violation in spite of the obvious conditions, such as hill seams, that warned of the dangers associated with its violation. *See* discussion *supra* Part IV.D.4.a. All of these aggravating factors lead to the inevitable determination that Stillhouse's conduct rose to the level of an unwarrantable failure to comply with 30 C.F.R. § 75.220(a)(1). Accordingly, Order No. 6665038 is AFFIRMED as an unwarrantable failure to comply with this safety violation.

6. Penalty

As with the other violations in this case, the parties have stipulated that the proposed civil penalty is appropriate for the size of Stillhouse's business, that it will not impact Stillhouse's ability to stay in business, and that Stillhouse made a good faith effort to achieve rapid compliance after notification of the violation. *See* discussion *supra* Part IV.A.5. In contrast to the other violations in this case, Stillhouse has three prior significant violations of the roof control standard arising from a roof collapse that killed two miners. (Ex. P-10, at 2; Ex. P-23; Ex. P-24.) The collapse occurred a little over a year before this violation. (Ex. P-23.) It is true that the circumstances surrounding the collapse were different than those presented in this violation, e.g., it did not occur in the 002 section. (*Id.*) Nevertheless, these miners' deaths provided to Stillhouse a grave reminder of the importance of complying with its roof control plan. *See San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (recognizing that prior violations of the accumulation standard at 30 C.F.R. § 75.400 for different conditions occurring in different areas of the mine as opposed to the violation at issue may

nevertheless put the operator on notice of an accumulation problem in its mine). As I have noted in detail, the gravity and negligence of Stillhouse's violation was severe. *See* discussion *supra* Part IV.D.4. Based on these considerations, particularly on those concerning the severity of Stillhouse's history of violations and on this specific violation's gravity and negligence, I conclude that the Secretary's proposed penalty of \$177,600 is warranted by Stillhouse's conduct. I hereby assess a civil penalty of \$177,600 against Stillhouse.

E. Stillhouse's Constitutional Argument Against the Penalties Proposed by the Secretary

Stillhouse argues that the Secretary's proposed civil penalty assessments for flagrant violations under section 110(b)(2) of the Mine Act violate the Excessive Fines Clause of the Eighth Amendment, based on the United States Supreme Court's decision in *United States v. Bajkajian*, 524 U.S. 321 (1998). (Resp. Prehr'g Report 2; Resp't Br. 19–20.) Stillhouse argues that any civil penalty associated with a flagrant violation lacks proportionality and is thus punitive, and it invites me to find the penalty grossly disproportional and unconstitutional. (*Id.*) *See Sec'y of Labor v. Kenny Richardson*, 3 FMSHRC 8, 21 (Jan. 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983) (Commission may resolve constitutional challenges raised against enforcement of the Act).

However, Stillhouse's constitutional arguments are misplaced. The Supreme Court has traditionally viewed the Excessive Fines Clause in the context of criminal prosecutions and punishments, such as in personam criminal forfeitures, and this point is reflected in *Bajkajian*, which narrowly applied the Court's test for excessive fines in the context of an in personam criminal forfeiture. *See, e.g.,* Matthew C. Solomon, Note, *The Perils of Minimalism: United States v. Bajkajian in the Wake of the Supreme Court's Civil Double Jeopardy Excursion*, 87 Geo. L.J. 849, 870–82 (Feb. 1999) (discussing *Bajkajian* in the context of the Supreme Court's jurisprudence on the Excessive Fines Clause). I do not accept Stillhouse's invitation to extend Eighth Amendment protections into the administrative civil penalty context. *Cf. S.A. Healy Co. v. Occupational Safety and Health Review Comm'n*, 138 F.3d 686, 687 (7th Cir. 1998) (holding administrative fine does not constitute punishment for Eighth Amendment's double jeopardy purposes). Accordingly, I conclude that the Secretary is not constitutionally barred from seeking to impose a civil penalty on Stillhouse for a flagrant violation.

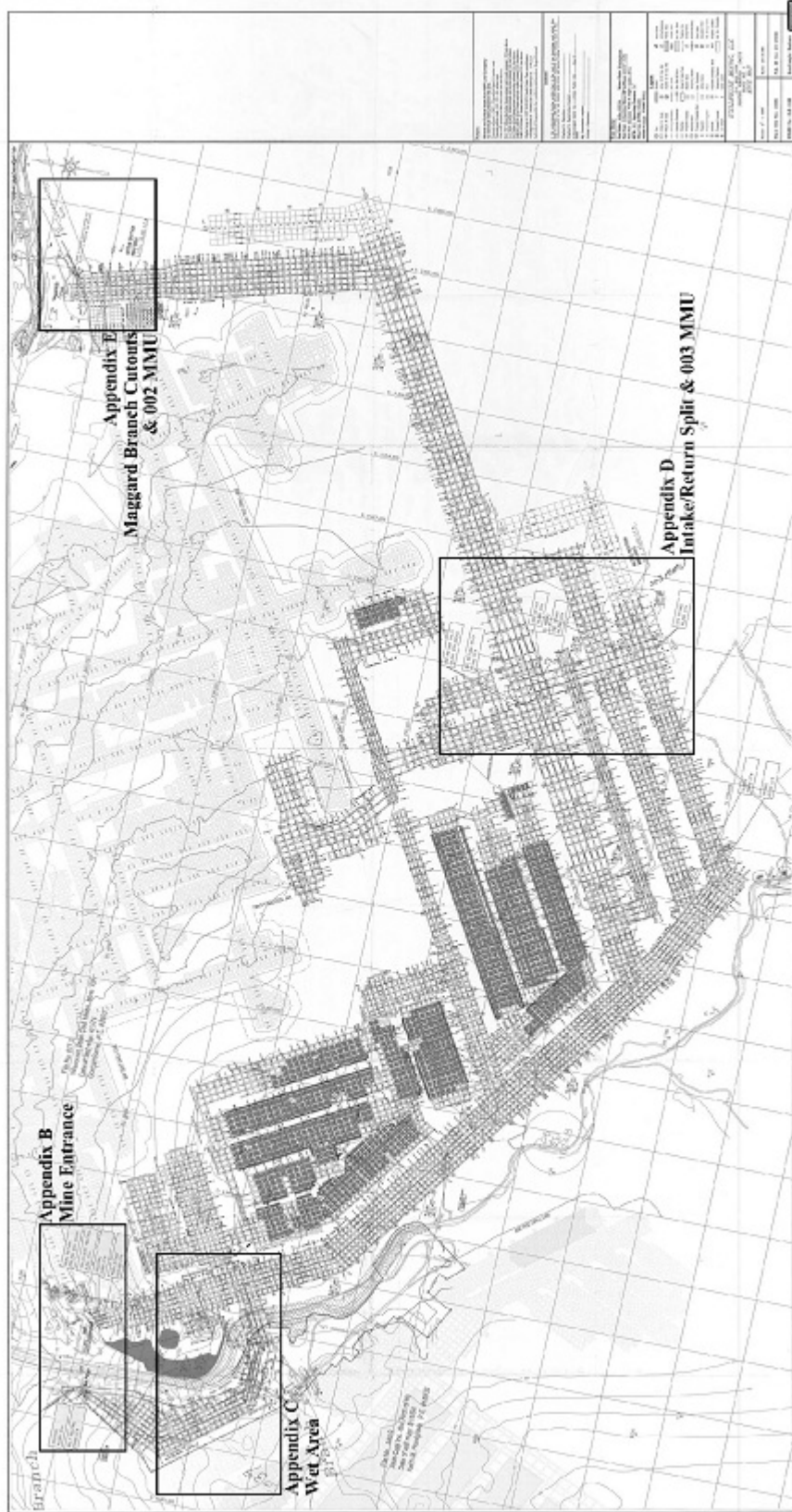
V. Conclusion

I conclude that the evidence in this case establishes that Stillhouse committed the four flagrant violations charged in Citation No. 6665036 and Order Nos. 6665037, 6665038, and 6665039. The citation and orders are hereby **AFFIRMED**, as written.

VI. Order

Stillhouse is **ORDERED** to pay a civil penalty of \$761,000.00 within 40 days of this decision.

Appendix A – Stillhouse Mine No. 1 – December 3, 2006 (Exhibit R-3)



Alan
G. Paez

Administrative Law
Judge

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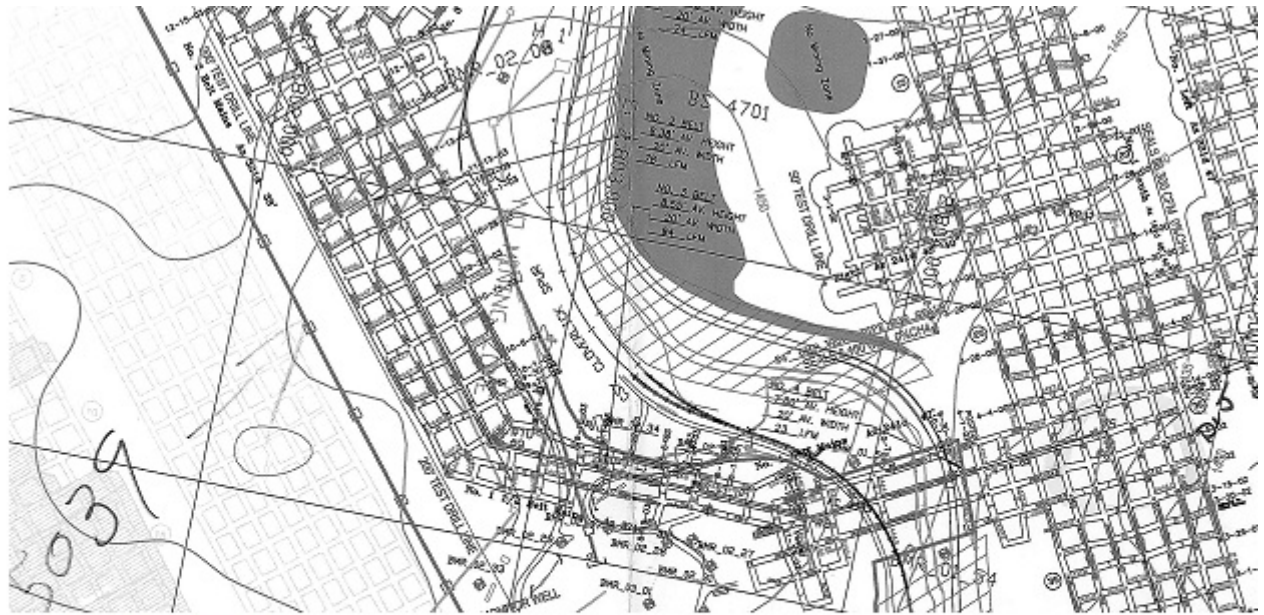
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Appendix B₁ – Mine Entrance



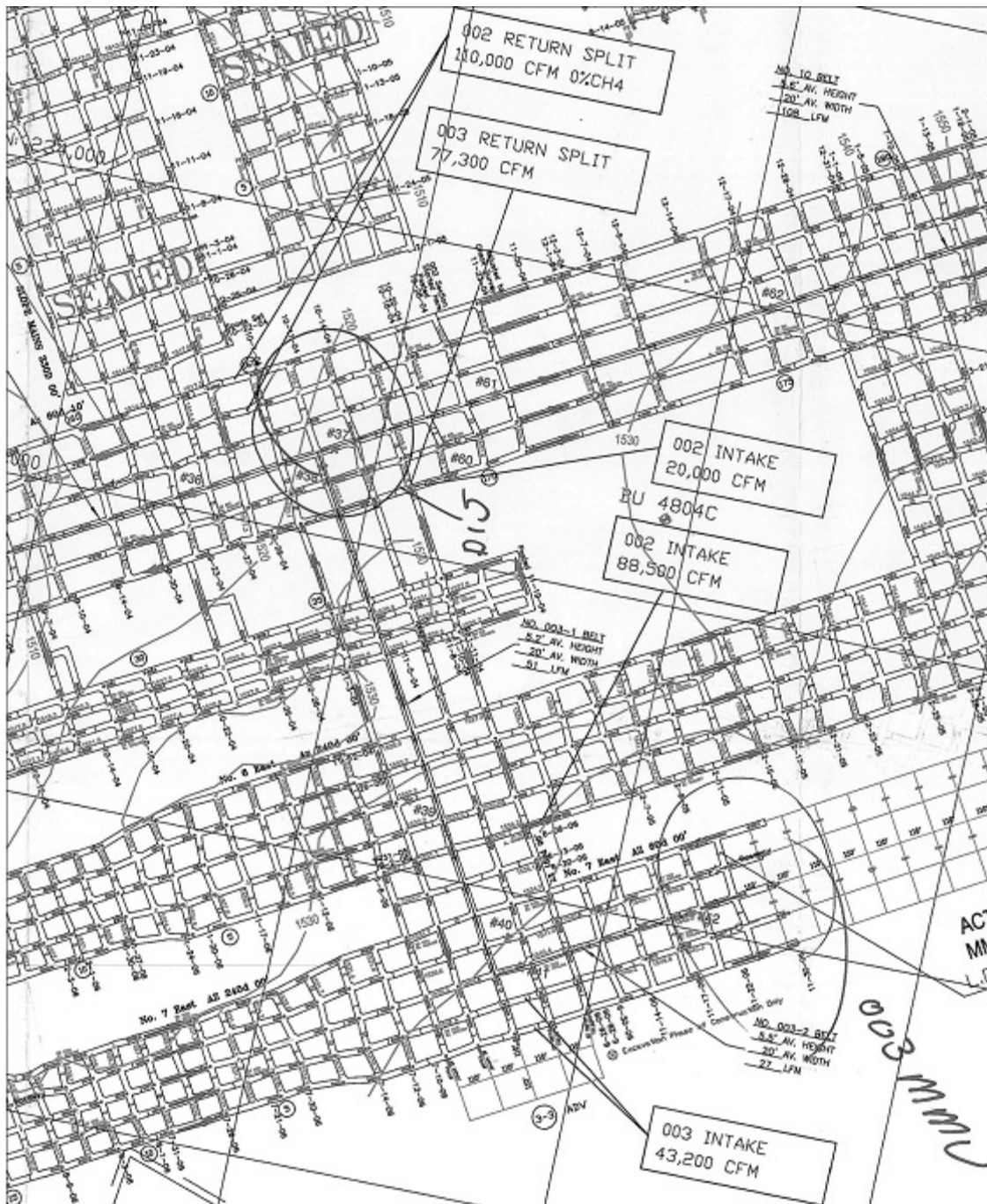
Appendix B₂ – Relative Location of Mine Entrance



Appendix C₁ – Wet Area



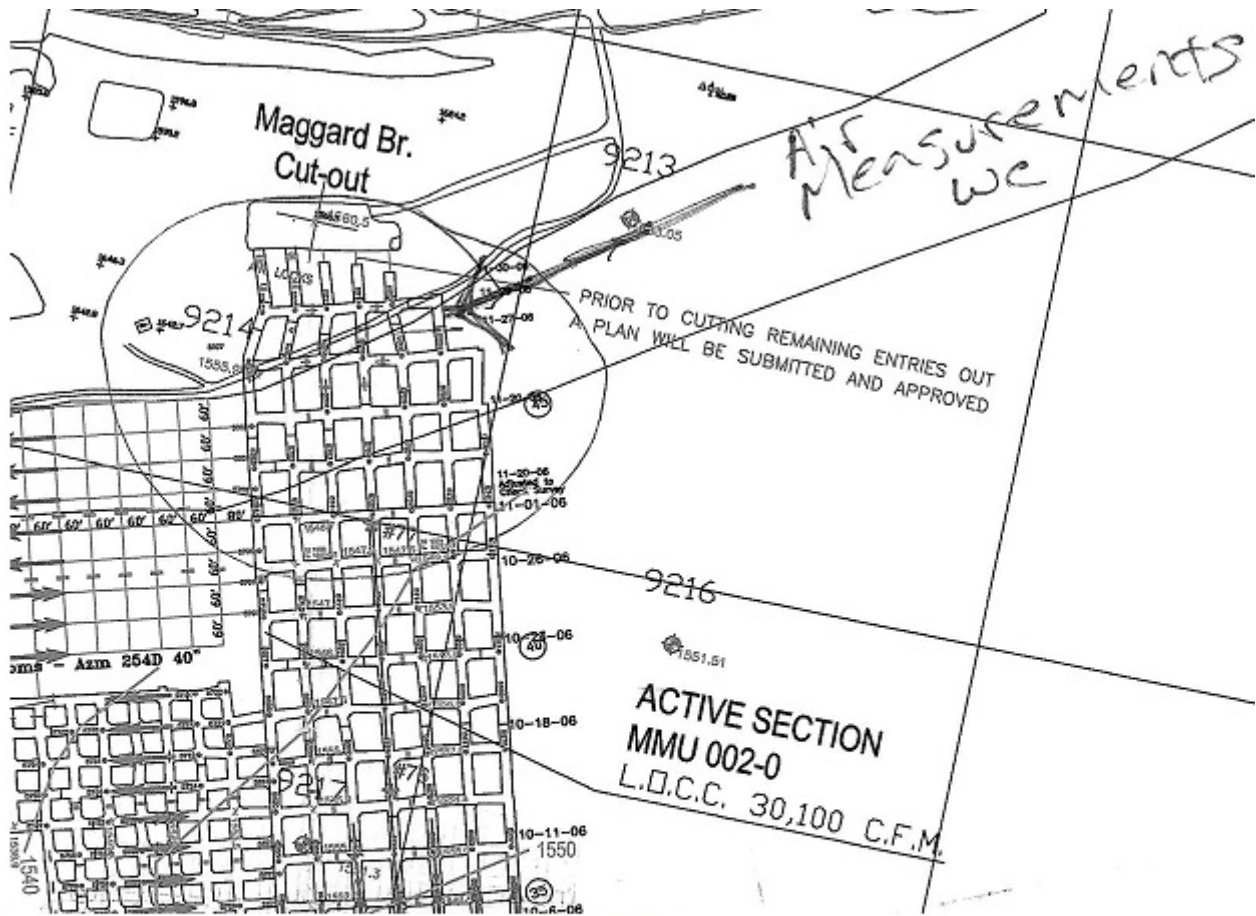
Appendix C₂ – Relative Location of Wet Area



Appendix D₁ – Intake/Return Split & 003 MMU



Appendix D₂ – Relative Location of Intake/Return Split & 003 MMU



Appendix E₁ – Maggard Branch Cutouts & 002 MMU



Appendix E₂ – Relative Location of Maggard Branch Cutouts & 002 MMU