FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 25 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. EMERALD COAL RESOURCES LP, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2011-262 A.C. No. 36-05466-248226 Mine: Emerald Mine No. 1

ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION and ORDER TO PAY

Before: Judge Harner

On November 15, 2013, the Secretary filed with the undersigned a Motion for Summary Decision and Determination of Penalty in PENN 2011-262. This docket includes one citation (No. 7021263), which was assessed as Significant and Substantial ("S&S"), moderate negligence, and 3 persons affected, with a civil penalty of $1,026.00.[1] On December 2, 2013, the Respondent filed a Response to Secretary's Motion for Summary Decision and Determination of Penalty. In its response, the Respondent asserted that the Secretary's Motion should be denied as there exists a material dispute of fact, or in the alternative, granted to the Respondent. On December 17, 2013, the Secretary filed an Opposition to Cross Motion for Summary Decision. For the following reasons, I grant the Secretary's Motion for Summary Decision.

[1] This case was assigned to me following Judge Gary Melick's retirement from the Commission. Although this docket was originally designated by the Chief Administrative Law Judge as a Simplified Proceeding under 29 C.F.R. Part 2700, Subpart J, Judge Melick issued as order discontinuing Simplified Proceedings on August 25, 2011. On October 12, 2012, I issued an Order granting the Secretary's Motion to amend the single citation in the docket from 30 C.F.R. §70.100(a) to 30 C.F.R. §70.101.

The Regulation

Section 70.101 Respirable dust standard when quartz is present.

When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with§70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10.

Example: The respirable dust associated with a mechanized mining unit or a designated area in a mine contains quartz in the amount of 20%. Therefore, the average concentration of respirable dust in the mine atmosphere associated with that mechanized mining unit or designated area shall be continuously maintained at or below 0.5 milligrams of respirable dust per cubic meter of air (10/20=0.5 mg/m(super)3).

Undisputed Facts

Based on documents created by MSHA, depositions, as well as Respondent's responses to discovery, the following facts are undisputed.

1) Respondent is an "operator" as defined in §3(d) of the Act, 30 U.S.C. § 802(d), at the Mine at which the subject Citation was issued. *Exhibit 2.*

2) The operations of Respondent at the Mine at which the subject Citation was issued are subject to the jurisdiction of the Mine Act. *Id.*

3) This case is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to Sections 105 and 113 of the Act. *Id.*

4) The subject Citation was properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated therein as required by the Mine Act. *Id.*

5) The mine tonnage, controller tonnage, and violations per inspection days set forth in Exhibit A are true and accurate for the time period listed. *Exhibit 1.*

6) On June 24, 2010, MSHA took a respirable dust sample at the Mine on the designated area return side bolter C-4 section. When analyzed the sample contained 38% quartz. *Exhibit 3.*

7) Because the MSHA sample contained more than 5% quartz, in accordance with 30 C.F.R. § 70.101, MSHA was required to start the process of placing the Respondent on a reduced standard. *See* 30 C.F.R. § 70.101.

8) In accordance with 30 C.F.R. § 70.101 and the Handbook, Chapter 1 Respirable Dust, Section IV, M: Establishing a Reduced Respirable Dust Standard ("Section M") on July 29, 2010, MSHA notified Emerald of the June 24, 2010, sample results and its right to submit an optional sample for quartz analysis. *Exhibit 4; Exhibit 3.*

9) MSHA has followed the procedures laid out in Section M to establish a reduced standard as mandated by 30 C.F.R. § 70.101 since November 1985. *Declaration of Robert Thaxton, Exhibit 5.*

10) On August 10, 2010, Emerald took an optional sample for submission to MSHA in accordance with the provisions of Section M. The Optional sample contained 5% quartz. *Exhibit 3.*

11) As specified in Section M, if the percent of quartz found in the MSHA sample differs by 2 percent or less from that found in the operator's first optional sample, the two samples will be averaged to set the new reduced standard. However, if the samples differ by more than 2 percent, the operator is given the opportunity to take a second optional sample. The standard is then set based on the average of all three samples, or if no second optional sample is taken or the sample is voided, then the standard is set based on the sample with the highest concentration of quartz. *Handbook Section M(2)(b).*

12) As the August 10, 2010, sample was more than 2 percent different then MSHA's June 23, 2010, sample, the Respondent was given the opportunity to either have the reduced standard set based off of the sample with the highest concentration of quartz or take a second optional sample. *Exhibit 3.*

13) On August 30, 2010, Emerald took a second optional sample with a cassette number of 51067982 for submission to MSHA. On September 2, 2010, Emerald's August 30, 2010, second optional sample was analyzed by MSHA's lab and was voided as insufficient weight gain ("IWG"). *Exhibit 6.*

14) Emerald's August 30, 2010, sample was voided as IWG in accordance with MSHA policy contained in Section M because the sample had a total weight gain of less than .450 mg, and did not contain at least .025 mg of quartz. *Id.*

15) Emerald's Second Optional Sample had a weight gain of .345 mg and had a quartz content of .020 mg. *Id.*

16) When determining whether to use a sample in the standard setting process, MSHA uses samples that meet the NIOSH Part B Standard (alternatively referred to as the P7

standard); samples that do not meet this standard are voided because there is "no confidence" in the results of the sample. *Thaxton 39:1 - 41:8, Exhibit 8.*

17) When a sample complies with the NIOSH Part B Standard, there is a 95% level of confidence that the result of the analysis is within 25 percent of the true value of the sample. *Id.*

18) According to Mr. Thaxton and Mr. Fenlock, samples with a weight gain of less than .450 mg and containing less than .025 mg of quartz do not meet the NIOSH Part B standard. The Respondent's Expert, Mr. Hall, also stated that he believed samples containing .040 or .050 or below of quartz would not meet the NIOSH Part B standard. *Exhibit 8; Hall 144:4 - 144-13, Exhibit 9.*

19) Mr. Hall further stated that MSHA has a rational basis for excluding samples, like the Respondent's second optional sample, that had a weight gain of less than .45 mg and had less than .025 mg of quartz. *Hall 142:13 - 144-17, Exhibit 9.*

20) As the second optional sample was voided, in accordance with Section M, the reduced standard was set using the respirable dust sample with the highest concentration of quartz present, which in this case was MSHA's original sample. *Exhibit 10.*

21) On September 10, 2010, Emerald Mine No. 1 was placed on a reduced respirable dust standard of .3 mg/m3. *Exhibit 2.*

22) The .3 mg/m3 reduced standard was derived from the June 24, 2010, MSHA sample that contained 38 % quartz and in accordance with the procedures outlined in Section M. *Exhibit 10.*

23) Emerald's October-November 2010 bimonthly sampling of the designated area 9290 return side bolter resulted in a 0.268 mg/m3 concentration, which was compliant with the applicable 0.3 mg/m3 standard. *Exhibit 2.*

24) Respondent's December/January 2011 bimonthly sampling of the designated area 9290 return side bolter resulted in a 0.472 mg/m3 concentration, which exceeded the applicable 0.3 mg/m3 standard in effect. *RFA 7, Exhibit 2.*

25) All samples in this matter were analyzed using the IR quartz method of analysis. Mr. Hall agrees that this is an appropriate methodology to analyze quartz in respirable coal mine dust. *Hall 128:20 - 128:22, Exhibit 9.*

26) Mr. Hall has stated that "I have no reason to doubt their [the 5 samples making up the December/January bimonthly sampling] validity represented conditions that existed at that point in time." *Id. at 152:17 - 152:21.*

27) Mr. Hall stated, during his deposition, that the June 24, 2010, sample that contained 38% quartz was representative of the conditions in the mine at the time it was taken. *Id. at 110:8-110:13, 149:10 -149:13, 151:12-151:15.*

28) Respondent did not formally request a reevaluation of the designated area 9290's 0.3 mg/m3 standard any time between being placed on the reduced standard on September 10, 2010, and the issuance of the citation on January 18, 2011. *Exhibit 2.*

29) Based on the December/January bimonthly sampling results, the Respondent was issued Citation 7021263. *Exhibit 11.*

30) Citation 702163 was issued as an S&S, reasonably likely citation, with a reasonable likelihood of causing a permanently disabling injury and affecting 3 miners. *Id.*

31) The Respondent has not produced any evidence that the miners were not actually exposed to respirable dust in the environment.

32) Emerald's payment of the total proposed penalty of $1,026.00 in this matter will not affect Respondent's ability to continue in business. *Exhibit 2.*

<u>Summary Decision Standard</u>

The Court may grant summary decision where the "entire record...shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is "a fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary* (9th ed. 2009, *fact*). "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted). The court must evaluate the evidence "in the light most favorable to ... the party opposing the motion." *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn "from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party's claims. *Celotex*, 477 U.S. at 323. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

The Respondent argues that Summary decision should not be granted because there are material facts in dispute.[2] As examples, it takes issue with the Secretary's labeling of certain sample results that do not meet its standard as it having "no confidence" in the results, and with MSHA's assertion about why it has no confidence in certain results. *Resp. Brief*, note 2. However, these facts are immaterial to the present dispute. Furthermore, the Respondent argues that the Secretary's characterization of its rule as a "non-binding interpretative rule," could be characterized as a dispute of material fact that would preclude summary decision. *Id.* at 12. This issue is at the heart of the Respondent's arguments, and it is certainly material. However, it is not a question of fact, but rather one of law. Having found no material facts in dispute, I find that this case is appropriate for summary decision.

Analysis

1. The procedures contained in Section M of the Handbook constituted an interpretive rule

The Respondent makes two primary arguments for why summary decision should be granted in favor of Emerald. First, it argues that the procedures contained in Section M of the Handbook constitute an improperly promulgated legislative rule because there were no advance notice and public comment procedures. In the alternative, the Respondent argues that the procedures were unreasonable, and MSHA acted arbitrarily and capriciously in adopting a reduced dust standard. Each argument will be considered in turn.

The Administrative Procedures Act ("APA") requires that agencies must provide advance notice and solicit public comments for legislative rules, but not for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. §553(b)(3)(A). The distinction between legislative and interpretive rules is often unclear, having been described by various courts as "enshrouded in considerable smog," *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), "fuzzy," *American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); and appearing "rather metaphysical." *American Mining Congress v. MSHA*, 995 F.2d 1106, 1110 (D.C. Cir. 1993). Administrative law scholar, Robert A. Anthony, has noted that "the subject of nonlegislative rules breeds bewilderment and frustration." Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin. L.J. Am. U. 1, 6 (1994). However, these nonlegislative rules are necessary for an agency to function. "An agency has, of course, the power, indeed the inescapable duty, to interpret its own legislative rules...just as it has the power and duty to interpret a statute that it enforces. *Hoctor v. U.S. Dept. of Agriculture*, 82 F.3d 165, 168 (7th Cir. 1996).

Legislative rules are those that "impose new duties upon the regulated party", while interpretative rules "seek only to interpret language already in properly issued regulations." *Chao v. Rothermel*, 327 F.3d 223, 227 (3rd Cir. 2003). "If the agency is not adding or amending language to the regulation, the rules are interpretive. Interpretive, or 'procedural,' rules do not themselves shift the rights or interests of the parties, although they may change the way in which the parties present themselves to the agency." *Id.* However, "a rule does not become a

[2] Presumably, this is in the alternative to its argument that summary decision should be granted in favor of Emerald.

legislative rule because it effects some unanticipated change; otherwise only superfluous rules could qualify as interpretive rules. We do not think that interpretive rules must be so useless." *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008) (citations omitted); see also *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) ("While we have said that interpretive rules "cannot go beyond the text of a statute, *Fertilizer Inst. v. EPA,* 935 F.2d 1303, 1308 (D.C.Cir.1991), we do not, of course, mean to imply that an interpretive statement may only paraphrase statutory or regulatory language. Indeed, a mere paraphrase would hardly be interpretive at all. Accordingly, an interpretive statement may 'suppl[y] crisper and more detailed lines than the authority being interpreted" without losing its exemption from notice and comment requirements under § 553.' ")

At issue here is whether Section M of the Handbook is a legislative or interpretive rule. The Respondent argues that the rule is legislative because MSHA used the procedures as a basis for determining that a violation existed. Further, the Respondent argues that the procedures in Section M established an enforceable standard that placed operators at risk for citations and civil penalties.

In *American Mining Congress v. MSHA*, 995 F.2d 1106 (D.C. Cir. 1993) (hereinafter referred to as "*AMC*") , the D.C. Circuit reconciled previous judicial analyses by laying out a four-part test to determine whether a rule was legislative or interpretive as follows:[3]

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[3] Courts have used several other tests to determine whether a rule is legislative or interpretive. For example, the original "legal effects" test asks whether the agency has used the nonlegislative rule to create a binding norm such that it limited its discretion in future adjudications when it promulgated the rule. *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974). The "substantial impact" test asked whether the rule had a substantial impact on the regulated parties. *See e.g. Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2nd Cir. 1972). Administrative law scholar Jacob E. Gersen has described the doctrine distinguishing between legislative and interpretive rule as an evolution with three distinct strains.

> First, until approximately the late 1970s many courts distinguished legislative from nonlegislative rules by asking whether the rule would have a substantial impact on affected parties. The basic intuition was that procedural formality should be a prerequisite for rules with big impacts. Over time, a general, if not altogether clear, trend has emerged towards various versions of a legally binding test, in which a rule is deemed legislative if and only if it is legally binding. Some courts emphasize the intent of the agency to make the rule legally binding while others focus on the legally binding effect of the rule on regulated parties. Other courts have experimented with variants, for example, the "practically binding" test. Because an agency might pursue only enforcement actions alleging a violation of the given policy, private parties might rationally treat legally nonbinding documents as though they were binding. A third alternative defines the difference procedurally, simply defining legislative rules as those that result from notice and comment, rather than those that require notice and comment.

Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. Chi. L. Rev. 1705, 1712-13 (2007).

The *AMC* test will be applied herein because it addressed many of the previous tests in creating its four-part analysis.

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

Id. at 1112. The court has since modified this test by finding that the second prong was unnecessary as it was little more than "a snippet of evidence of agency intent." *Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994). Applying the *AMC* test, it is clear that Section M was an interpretative rule that is excepted from the APA's notice and comment requirements.

The first prong of the test requires the court to inquire whether in the absence of the rule at issue there would not be an adequate legislative basis for enforcement action to confer benefits or ensure performance of duties. Section 70.101 was promulgated in 1980, following notice and comment. Part 70 of the regulations requires the mine to have certified persons use certified devices in sampling respirable dust in the mine. 30 C.F.R. §70.1 *et seq.* The regulations require an operator to take respirable dust samples at various times and places throughout the mine, and to transmit those samples to MSHA. 30 C.F.R. §§ 70.201, 70.207, 70.208, 70.209, 70.210, and 70.220. When the respirable dust in the mine atmosphere of active workings contains more than 5% quartz, the operator is required to continuously maintain the average concentration of respirable dust in each shift at or below a reduced standard determined by MSHA. 30 C.F.R. § 70.101. The formula for determining the reduced standard is contained in the regulation. It requires MSHA to divide the percent of quartz into the number 10, and that figure, expressed in milligrams per cubic meter, is the reduced standard. *Id.* As an example, the regulation provides that if a mine contained quartz in the amount of 20%, then the reduced standard would be 0.5 mg/m^3. *Id.*

Section M of the Handbook provides procedures for determining if, and by how much, the respirable dust levels in a mine exceed 5% quartz. However, just because there are technical procedures articulated in the Handbook, this does not necessitate that it be considered a legislative rule. *Hoctor v. U.S. Dept. of Agriculture*, 82 F.3d at 171 ("Especially in scientific and other technical areas, where quantitative criteria are common, a rule that translates a general norm into a number may be justifiable as interpretation.") The regulations do not specify the precise procedures by which MSHA should determine when the respirable dust samples are to be considered in excess of 5% quartz. Therefore, Section M provides an optional procedure that is, in most respects, beneficial to the operator. According to the procedures in Section M, if a dust sample appears to exceed the 5% allowable limit, the mine operator may submit up to two additional option samples, within certain parameters, and have the reduced standard based on an average of these samples. If the operator chooses, it may simply ignore Section M and have its reduced standard based upon its initial sample that was in excess of 5% quartz. However, if an operator wishes to avail itself of Section M's optional procedures, it can lead to a reduced standard that is higher, and therefore easier to meet, than what it would have been had it been based solely on the first sample.

The regulation provides the maximum allowable dust limits in the mine atmosphere (5%); it provides that a reduced maximum allowable dust limit will be imposed on a mine if it exceeds the 5% maximum; and it provides the formula for determining the reduced standard (10/x%). If Section M did not exist, the regulations would simply seem to require MSHA to base the reduced standard on the original samples transmitted by the operator, without allowing any subsequent optional sampling. Therefore, § 70.101 provides an adequate legislative basis for enforcement action to ensure the performance of duties. As in *AMC*, the regulations themselves contain all the necessary requirements, and "there is no legislative gap" that required the Handbook "as a predicate to enforcement action." 995 F.2d at 1112.

In the seminal *AMC* case, the DC Circuit found that MSHA Public Policy Letters (PPLs) which stated that certain x-ray results need to be reported under Part 50 were interpretive rules. Part 50 required that whenever certain occupational injuries were "diagnosed", the operator was required to report the diagnosis within 10 days. 995 F.2d at 1107. The PPLs stated that certain chest x-ray results constituted a diagnosis that the miner had silicosis or pneumoconiosis for the purposes of the Part 50 reporting requirements. *Id.* at 1108. Applying the first prong of the test articulated by the court, it found that the Part 50 regulations contained the requirements and the PPL merely interpreted one of these requirements. *Id.* at 1112.

Similarly in *Chao v. Rothermel*, the D.C. Circuit held that MSHA's procedures for bi-monthly dust sampling contained in its handbook were not legislative. 327 F.3d 223 (D.C. Cir. 2003). The court stated:

> The Handbook Guidelines do not alter the existing health standards, and they do not place additional burdens on mine operators to comply with those standards. Mine operators must comply with the Mine Act standards regardless of how the MSHA enforces them, or whether it performs respirable dust inspections. These Guidelines do not determine substantive rights, but merely outline a uniform plan for the MSHA inspectors around the country to effectively inspect mines.

Id. at 227.

Though the second prong in the *AMC* test is no longer necessary, it is worth noting that MSHA has not published Section M in the Code of Federal Regulations. The third and fourth prongs similarly point to the rule being interpretive. MSHA has not explicitly invoked its general legislative authority, and Section M does not amend any prior legislative rule. Therefore, I find that the procedures articulated in Section M are interpretive and do not constitute a legislative rule requiring notice and comment.

2. <u>MSHA did not act unreasonably when it adopted the reduced standard</u>

The Respondent argues that MSHA acted unreasonably when it adopted the reduced standard based on one dust sample. The Secretary's interpretation of when to accept additional samples is owed deference and should be upheld if it is reasonable. *Energy W. Min. Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). This analysis requires the court to defer to the Secretary unless his analysis "is clearly erroneous." *Id.* Consistent with the purposes of the Mine Act, interpretations that further the Act's "safety promoting purposes" are preferred. *Secretary v. Walker Stone*, 156 F.3d 1076, 1082 (10th Cir. 1998).

As explained *supra*, Section 70.101 is silent on the issue of what samples the Secretary can review when determining whether the active workings contain more than 5% quartz.[4] The regulation on its own appears to allow a single sample to be used in determining a reduced standard. Section M merely provides optional procedures for arriving at the reduced standard. As such, it is a reasonable interpretation of the regulation entitled to deference.

3. <u>The Violation was Significant and Substantial</u>

Significant & Substantial ("S&S") is described in Section 104(d)(1) of the Act as a violation "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)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission has held that when the Secretary proves overexposure to respirable dust has occurred, it can be presumed that the violation is S&S. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986); *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986).[5] This presumption is based upon the fact that the exposure levels set in the standards are "the maximum level allowed to achieve [Congress's] stated goal of preventing disabling respiratory disease." *Jim Walter Resources, Inc.*, 17 FMSHRC 1423, 1447 (August 1995) (quoting *U.S. Steel*). This presumption may be rebutted by the operator by establishing that miners were not exposed to the hazard posed by the excessive concentration of respirable dust through the use of personal protective equipment. *Consolidation Coal*, 8 FMSHRC at 899. Respondent has presented no such evidence here.

4. <u>The violation was properly assessed as moderate negligence, with 3 persons affected</u>

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[4] The Respondent's reliance on *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (Jan. 1994), is misplaced, as that case only addressed the issue of whether an MSHA spot inspection, where citations were based on a single sample, was valid. In this case, the issue is over the predicate sampling that led to the reduced sample, rather than the follow-up sampling that can lead to a citation.

[5] The Respondent has conceded that Commission precedent establishes that a presumption of S&S exists where the Secretary has proven that an overexposure to respirable dust has occurred. See Resp. Brief, at note 8.

Moderate negligence is defined as "where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). In this instance, the Respondent was made aware of the dust issues through the imposition of the reduced standard. The Respondent subsequently submitted dust samples in excess of the reduced standard, which the Secretary alleges, and I find, to be moderate negligence because Respondent was obligated to be under a heightened state of awareness. Respondent has not presented any evidence to dispute this finding.

The Citation states that 3 persons were affected by the condition, and the Respondent has not presented any evidence to the contrary. During the course of a shift, virtually all shift members in a mechanized mining unit would likely be exposed to the face. Therefore, I find that at least 3 miners were exposed to this hazard.

5. The Secretary's proposed penalty is appropriate

The Secretary's proposed penalty in this matter is consistent with Section 110(i) of the Act.[6] 30 U.S.C. § 820(i). This Court is guided in its final determinations by the polestar of the Section 110(i) penalty considerations:

> In assessing civil monetary penalties, the Commission shall consider 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.

I have been further guided by Commission case law instructing how § 110(i) criteria should be evaluated. *Inter alia*, I note: the Commission's holding in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) that all of the statutory criteria must be considered, but not necessarily assigned equal weight; and the Commission's holding *Musser Engineering*, 32 FMSHRC at 1289 that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. The Commission has affirmed that its Judges are not bound the Secretary's proposals. *Sec. v. Performance Coal Co.*, Docket No. WEVA 2008-1825 (8/2/2013); *see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b). The Commission has also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. *Id.* 2; *see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000). Having considered all of the above, I find the Secretary's proposed penalty of $1,026.00 to be appropriate.

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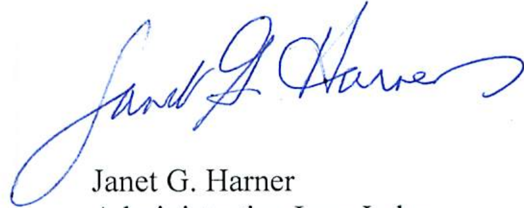
[6] The Secretary notes that his proposed penalty was determined by using the points table calculation contained in 30 C.F.R. § 100.3.

ORDER

The Secretary's Motion for Summary Decision is **GRANTED**, and Emerald Coal Resources, LP, is hereby **ORDERED** to pay the Secretary of Labor the sum of $1,026.00 within 30 days of the date of this Order.[7]



Janet G. Harner
Administrative Law Judge

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[7] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390