# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, D.C. 20004-1710

May 22, 2014

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner,<br><br>v.<br><br>OAK GROVE RESOURCES, LLC,<br>Respondent. | CIVIL PENALTY PROCEEDING<br><br>Docket No. SE 2011-881<br>A.C. No. 01-00851-265581-01<br><br><br><br>Mine: Oak Grove Mine |

## DECISION

Appearances: Monique Wright Hudson, Esq., and Leslie P. Brody, Esq., Office of the Solicitor, Atlanta, Georgia, on behalf of the Secretary of Labor;

Eric Johnson, Esq., Office of the Solicitor, Nashville, Tennessee, on behalf of the Secretary of Labor (on briefs);

R. Henry Moore, Esq., Jackson Kelley PLLC, Pittsburgh, Pennsylvania, on behalf of Oak Grove Resources, LLC.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). This case initially involved one section 104(d)(2) order and one section 104(a) citation. However, the parties reached a settlement regarding the section 104(d)(2) order, which was disposed in a separate Decision Approving Partial Settlement.

In dispute is one section 104(a) citation issued to Oak Grove Resources, LLC ("Oak Grove" or "Respondent"). To prevail, the Secretary must prove his charges "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

## I. STATEMENT OF THE CASE

The single alleged violation remaining in this case was issued at the Oak Grove Mine on March 16, 2011. Citation No. 8519718 charges Oak Grove with a violation of 30 C.F.R. § 75.203(b) for failing to use sightlines or other method of directional control to maintain the direction of certain cuts in the 13 East Section of the mine. The Secretary designated the citation as significant and substantial ("S&S")[1] and characterized Oak Grove's negligence as moderate. The Secretary proposed a specially-assessed penalty of $10,700.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. SE 2011-881 to me, and I held a hearing in Birmingham, Alabama.[2] The Secretary presented testimony from MSHA Inspector Stanley Wilkosz and Conference Litigation Representative (CLR) John Church.[3] Oak Grove presented testimony from Lead Safety Auditor Thomas Fisher, Section Foreman Paul Jamison, and Safety Manager Lawrence Pasquale. The parties each filed closing briefs, and the Secretary filed a reply brief.

## II. ISSUES

The Secretary contends that section 75.203(b) imposes two independent duties. (Sec'y Br. at 6–9.) In addition, he argues that Respondent fulfilled neither duty. (*Id.*) Accordingly, the Secretary claims that the condition was properly cited as a violation and that the allegations underlying the citation are valid. (*Id.* at 14.) Oak Grove denies that a violation existed and rejects the Secretary's allegations regarding the gravity of the violation. (Resp't Br. at 6, 10–11.) In addition, Oak Grove contends that Citation No. 8519718 is duplicative of two citations that are not before me. (*Id.* at 14–18.)

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[1] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), 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."

[2] In this decision, the hearing transcript, the Secretary's exhibits, and Oak Grove's exhibits are abbreviated as "Tr.," "Ex. G–#," and "Ex. R–#," respectively.

[3] In the early stages of this proceeding, Church represented the Secretary as a CLR. Respondent objected to Church's testimony based on the advocate-witness rule, but I permitted his testimony. (*See* Tr. 64:5–72:14.) In its posthearing brief, Oak Grove again claims I should disregard Church's testimony. (Resp't Br. at 18–20.) Although Oak Grove identifies case law suggesting a *current* advocate should not testify as a witness, it is unclear why Church cannot testify as a witness *after* he has ceased to represent the Secretary. Indeed, one of the cases Respondent cites, *United States v. Johnston*, specifically suggests withdrawal as a solution to the advocate-witness problem. 690 F.2d 638, 645 (7th Cir. 1982) ("The most obvious alternative was for the witness-prosecutor to withdraw from any further participation in the trial of defendant."). Despite his early involvement in the case, Church was no longer the Secretary's representative at the time of the hearing. He questioned no witnesses. He made no opening or closing statement. Accordingly, I conclude that Church's testimony is properly part of the record before me.

The parties raised several potentially interesting questions. However, the threshold issues before me are as follows: (1) whether 30 C.F.R. § 75.203(b) implies two independent duties; and (2) whether the Secretary has proven by a preponderance of the evidence facts demonstrating a violation of mandatory health or safety standards regarding directional controls. For the reasons set forth below, Citation No. 8519718 is **VACATED**.

## III. FINDINGS OF FACT

### A. Safety Principles in Underground Coal Mining

Given the danger involved in underground coal mining, MSHA specifies the manner in which an operator—including Oak Grove—may mine its coal seam and the steps it must take to support its mine roof. Among other provisions, Oak Grove's approved roof control plan dated December 28, 2010 ("December 28 Plan") sets the maximum allowable widths for the "cuts" it makes through the coal seam to extract coal. (Ex. R–7.)

In particular, MSHA requires operators to use sightlines or other directional controls when making cuts to help maintain the projected direction of mining. 30 C.F.R. § 75.203(b). Sightlines are painted onto a mine roof up to the working face. (Tr. 34:8–10, 115:5–12.) A sightline provides a continuous mining machine operator a point of reference for the proper location of the center of the cut. (Tr. 79:9–17, 82:6–9.) Thus, sightlines keep an operator's cuts on the projections included in the operator's mine map. (Tr. 23:8–11.) They also help ensure that those cuts do not exceed the width permitted under the operator's roof control plan. (Tr. 23:11–14.) Here, Oak Grove painted sightlines using fluorescent paint that normally remains visible even after rock dust has been applied to the roof. (Tr. 145:14–17, 146:3–6.)

### B. Operations at Oak Grove Mine

Oak Grove Mine is a longwall coal mine located in Jefferson County, Alabama. (Tr. 24:23–25:3; Ex. R–7 at 1.) As Oak Grove developed the 13 East Section, it cut four parallel entries around the outside of the large coal reserve section. (Ex. R–1; Ex. R–3; Ex. R–8.) From left to right, these entries were numbered 1 through 4. (Ex. R–1; Ex. R–3; Ex. R–8.) As mining advanced, Respondent also made perpendicular cuts, known as crosscuts, that connect those entries. (Tr. 83:6–16, 133:10–16.) Rectangular blocks of coal—also known as coal pillars—were left between the entries and crosscuts to support the mine roof overhead. (Ex. R–1; Ex. R–3; Ex. R–8; Tr. 87:15–88:9, 94:11–17, 119:24–120:4.) When viewed from overhead, these entries and crosscuts resemble a grid of city streets. (Ex. R–1; Ex. R–3; Ex. R–8.) Respondent began developing the 13 East Section in September 2010, and had advanced approximately 34 crosscuts by March 2011. (Tr. 128:19–23.)

Respondent also cut "slants" at a forty-five-degree angle from its No. 2 entry through its coal pillars and into every second crosscut. (Tr. 44:3–18, 86:11–87:3, 119:24–120:4, 133:17–21; Ex. R–3.) Slant cuts provide a place for Respondent to store equipment and supplies used on the

section. (Tr. 37:18–23, 86:25–87:3, 109:19–20, 123:23–25, 124:14–23.) These slant cuts split a formerly rectangular block of coal into two coal pillars: one large, five-sided block and one small triangular block. (Ex. R–1; Ex. R–3; Ex. R–8; Tr. 87:15–88:9, 119:24–120:4.) Respondent's December 28 Plan limits slant cuts to 20 feet in width. (Ex. R–7 at 1.)

Oak Grove cut the 13 East Section's entries, crosscuts and slants using continuous mining machines. (Tr. 105:10–14.) When making cuts, a mining machine operator stands behind the thirty-five-foot long machine with a remote control to direct its cuts. (Tr. 105:13–21, 106:8–16, 107:12–21, 125:23–127:1.) Given the machine operator's distance from the cutting face and the coal dust created in the mining process, it is difficult to make precision cuts along a sightline. (Tr. 91:5–24, 92:11–13, 107:12–24, 127:2–21.) Although an operator's ability to make precision cuts improves with experience, even experienced miners inadvertently cut entries, crosscuts, and slants too wide. (Tr. 107:12–24, 127:16–21.) Moreover, Oak Grove's continuous mining machine operators on 13 East Section did not have much experience. (Tr. 127:9–14.)

The coal seam in the 13 East Section is soft, and rib sloughage occurs when the rib (or walls) of an entry, crosscut, or slant deteriorates and "rolls off" (or collapses), thereby making the entry, crosscut, or slant wider than initially cut. (Tr. 93:6–13, 99:15–19, 120:5–8.) Sloughage is common in the slants on the 13 East Section. (Tr. 120:5–8.) In addition, the weakest part of the small, triangular pillar is the portion where it comes to a point. (Tr. 93:22–94:3.) Accordingly, the point of the triangular pillar is the most likely to slough off. (Tr. 94:4–7, 120:22–121:8.) Finally, the amount of sloughage increases over time. (Tr. 99:12–21.)

### C. Mine Inspection — March 16, 2011

On March 16, 2011, MSHA Inspector Stanley Wilkosz visited the Oak Grove Mine. (Tr. 24:22.) After reviewing section, pre-shift, and on-shift reports, he traveled to the 13 East Section with a union representative. (Tr. 25:13–17, 26:10–13; Ex. G–1 at 1–2.) Wilkosz noticed "notches" in the section's slant cuts suggesting to him that Oak Grove had mined the slant in the wrong direction, then stopped and redirected its cut. (Tr. 29:2–13, 40:13–20.) However, Wilkosz did not record measurements for any of the notches. (Tr. 56:18–24.) Nevertheless, he and Inspector John Turpo measured portions of slants that exceeded the 20-foot maximum width permitted under the December 28 Plan. (Tr. 29:12–30:3; Ex. G–1 at 5, 12–15.) Wilkosz measured areas as wide as 27 feet near the point of the small, triangular coal block adjacent to crosscuts 21 and 25. (Tr. 30:12–13, 31:1, 120:19–121:1; Ex. G–1 at 12–13.)

According to Wilkosz, cutting without the required sightlines can result in cuts that exceed the permitted width. (Tr. 34:11–14.) He testified that he looked at the mine roof in crosscuts 13, 15, 17, 19, 21, 23, 25, and 29 and saw no sightlines on the roof.[4] (Tr. 31:21–32:10,

[4] In the months preceding Wilkosz's March 16 inspection, he and other MSHA inspectors walked past the very same slant cuts in question. (Tr. 56:25–59:15, 149:19–152:6; Ex. R–4.) No citations for wide entries or missing sightlines had been issued prior to Citation No. 8519718. (Ex. R–4; Tr. 149:19–152:6.)

33:21–25, 40:18–20, 60:6–8.) In addition, Wilkosz testified that no one from Oak Grove pointed out sightlines in the area.[5] (Tr. 32:9–19.)

Based on his observations, Inspector Wilkosz issued Citation No. 8519718 alleging a violation of section 75.203(b):

> A sightline or other method of directional control shall be used to maintain the projected direction of mining in entries, rooms, crosscuts and pillar splits. In the 13 East [S]ection MMU (033-0) where they are cutting slants there are no sight spads to maintain the projected direction of mining at crosscuts 13, 15, 17, 19, 21, 23, 25, and 29.

(Ex. G–2 at 1.) Wilkosz designated the citation as an S&S violation affecting two persons and characterized Oak Grove's negligence as "moderate."[6] (*Id.*)

## IV. REGULATORY ANALYSIS, ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. 30 C.F.R. § 75.203(b)

The Secretary claims that section 75.203(b) includes two independent duties: (1) use of a sightline or other directional control; and (2) maintenance of the projected direction of mining. (Sec'y Br. at 7–8.) According to the Secretary, "[w]ithout the requirement to maintain the projected direction of mining, sightlines serve no purpose." (Sec'y Br. at 7.) Moreover, the Secretary claims that such a requirement is "unique to 30 C.F.R. § 75.203(b)" and is "imposed by the plain language of the standard." (*Id.* at 7–8.)

Regulatory interpretation is a two-step process. First, unambiguous regulatory provisions "must be enforced as they are written unless the regulator clearly intended the words to have a

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[5] Lead Safety Auditor Thomas Fisher and Section Foreman Paul Jamison both disputed Inspector Wilkosz's testimony that no sightlines were present. (Tr. 110:23–111:2, 114:20–115:12, 116:13–14, 142:7–23, 145:1–17.) Fisher and Jamison also testified that they pointed out those sightlines to Wilkosz. (Tr. 117:12–23, 122:11–123:15, 143:5–16, 145:1–17.)

[6] That same day, Wilkosz also issued Citation No. 8519719, which alleged the conditions in crosscuts 13, 15, 17, 19, 21, 23, 25, and 29 constituted a violation of 30 C.F.R. § 75.203(a) for exposing miners to hazards caused by excessive widths. (Ex. G–4; Tr. 61:17–62:22.) In addition, he issued Citation No. 8519720 alleging that the conditions in crosscuts 21 and 25 violated 30 C.F.R. § 75.220(a) because they exceeded the permissible width allowed under the December 28 Plan. (Ex. R–5; Tr. 49:12–50:3, 60:9–61:6.) Wilkosz designated both citations as S&S and characterized Oak Grove's negligence as moderate. Looking at MSHA's public, online retrieval database, I note that Oak Grove paid the proposed penalty in both cases.

different meaning or unless such meaning would lead to absurd results." *Jim Walter Res., Inc.*, 28 FMSHRC 579, 587 (Aug. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987), and *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989)). The meaning of regulations are "ascertain[ed] . . . not in isolation, but rather in the context in which those regulations occur." *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004)). Second, if the meaning of the regulation is ambiguous, the Secretary's reasonable interpretation of the regulation is entitled to deference. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012).

Section 75.203(b) provides that a "sightline or other method of directional control shall be used to maintain the projected direction of mining . . . ." 30 C.F.R § 75.203(b). The text of the regulation can be broken into two parts. The first part lists required items, and the second part establishes a goal or purpose to be achieved. The Secretary's interpretation reads both parts as independent duties. However, the regulation may also be read to simply specify the *manner* in which an operator must achieve a stated purpose. *Cf. Cumberland Coal Res., LP*, 28 FMSHRC 545, 552 (Aug. 2006) (indicating that the duty under section 75.334(b)(1) is to provide an effective bleeder system that protects the active workings from dangerous accumulations of methane); *see also* 30 C.F.R. § 75.334(b)(1) ("During pillar recovery, a bleeder system *shall be used* to control the air passing through the areas and continuously dilute and move methane-air mixtures and other gasses, dusts, and fumes from the worked out areas away from active workings, and into a return air course or to the surface of the mine.") (emphasis added). From that perspective, section 75.203(b) only imposes a duty to use sightlines or other methods of directional control. *Cf. Faith Coal Co.*, 19 FMSHRC 1357, 1372 (Aug. 1997) (affirming Administrative Law Judge's decision finding no violation based solely on whether sightlines were used and deviations were necessitated by poor roof). Given these two plausible readings, section 75.203(b) appears to be ambiguous. *See Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998) (finding that where a meaning of a term in a regulation is "open to alternative interpretations . . . we conclude that it is in some respects ambiguous."). Moreover, nothing in the regulatory history—*see* Safety Standards for Roof, Face, and Rib Support, 53 Fed. Reg. 2,354, 2,355 (Jan. 4, 1988)—or section 75.203(b)'s placement in the Secretary's regulatory scheme suggests that its terms are unambiguous. Accordingly, I conclude that the regulation does not unambiguously—or, in the Secretary's words, plainly—require that the projected direction of mining be maintained.

Next, I must determine whether the Secretary's interpretation is reasonable and entitled to deference. Here, the Secretary interprets maintenance of the direction of mining as an independent duty that is violated when an operator mines an "excessive width." (Sec'y Br. at 7.) Notably, the Secretary's brief neither argues that his interpretation is entitled to deference nor points to any previous interpretive guidance in his Program Policy Manual, Program Information Bulletins, Program Policy Letters, or Procedure Instruction Letters. In fact, the Secretary's proposed interpretation conflicts with Inspector Wilkosz's testimony that he could not cite Oak Grove under section 75.203(b) if sightlines were present. (Tr. 31:17–20.) CLR Church concurred with Wilkosz's interpretation: "If there is a sightline in place and it's being

maintained, [a wide place] would not be a violation of section [75.]203(b)." (Tr. 84:15–20.) Although deference may be accorded to a reasonable interpretation advanced in a legal brief, such deference is inappropriate "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment of the matter in question'" such as "when the agency's interpretation conflicts with a prior interpretation." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citations omitted). I therefore conclude that the Secretary's suggested interpretation is not due any deference.[7] Instead, I determine that section 75.203(b) requires only that a sightline or other directional control be used *to achieve* the intended purpose.

## B. Additional Findings of Fact

The Secretary contends that Inspector Wilkosz's measurements and testimony support a conclusion that no sightlines were present. (Sec'y Br. at 3–4, 6–7.) Oak Grove points to the testimony of Lead Safety Auditor Fisher and Section Foreman Jamison to contend sightlines were present in the 13 East Section and were pointed out to Wilkosz. (Resp't Br. at 6–7.) I therefore must determine whether the Secretary has met his burden of proving that Oak Grove did not use sightlines or other directional controls in its slant cuts on the 13 East Section. For the three reasons outlined below, I determine that the Secretary has not satisfied this burden.

First, the text of Citation No. 8518718, Wilkosz's contemporaneous inspection notes, and the conflicting testimony from Fisher and Jamison each significantly undermine the credibility of Wilkosz's testimony regarding his March 16 inspection. It is uncontroverted that spads are different than sightlines and were not required in Oak Grove's slant cuts. (Tr. 33:2, 89:14–90:19.) However, Inspector Wilkosz alleged in the text of Citation No. 8519718 that Oak Grove did not have "sight spads" in the slant cuts at issue. (Ex. G–2.) His inspection notes likewise refer to "surveyor spads" and "surveyor sights." (Ex. G–1 at 5, 16.) The Secretary argues that in light of his experience Wilkosz's use of "spad" and "surveyor sights" should be read to mean "sightlines." (Sec'y Br. at 6 n.2.) Wilkosz has many years of experience working in and inspecting coal mines, as well specific experience as a topographical surveyor in the U.S. Army Reserve. (Tr. 18:18–24:18.) I also understand that the terms "spad" and "surveyor sights" are sometimes used interchangeably with "sightlines." (Tr. 33:6–7, 89:23–90:1, 90:20–24.) Yet, it is unclear why an inspector aware of the difference between spads and sightlines—as well as the terms of section 75.203(b)—would write "spad" in both his notes and citation unless he was citing Oak Grove for a lack of spads, rather than sightlines. On the contrary, an inspector with Wilkosz's particular experience would seem more likely to be precise in his language. Thus, I do

[7] Even if I found the Secretary's interpretation to be reasonable and worthy of deference, it is unclear whether his *application* of that interpretation would be appropriate. Under the Secretary's theory in this case, "excessive" widths and "notches" constitute a deviation from the proposed direction of mining. (Sec'y Br. at 7–8.) I am not convinced such *widths* demonstrate a change in the direction of *mining*. *See* discussion *infra* Part IV.B (addressing alternate explanations for slant widths). However, I need not decide the issue because I have concluded that the Secretary's interpretation is not due any deference.

not find convicing the Secretary's explanation that Wilkosz meant sightlines when he wrote spads.

In addition, Fisher and Jamison claimed that Wilkosz told them while underground that Oak Grove needed to use spads—in the specific sense—in the slant cuts. (Tr. 116:17–118:16, 143:10–12, 145:1–13.) When they returned above ground, Fisher testified that he specifically reviewed the text of section 75.203(b) with Wilkosz to stress that spads were not necessary. (Tr. 118:6–16.) In contrast, Wilkosz claims he only mentioned spads while underground as a suggestion that might help Oak Grove make straight cuts in the future. (Tr. 38:25–39:6.) Curiously, the Secretary chose not to elicit testimony from Inspector Turpo, who helped Wilkosz take his measurements. Instead, the Secretary chose to rely solely on Wilkosz's observations. Weighing his testimony against the testimony of two credible witnesses who worked in the 13 East Section every day, along with the text of Citation No. 8519718 and Wilkosz's contemporaneous notes, I have significant doubts about the accuracy of Wilkosz's testimony. I therefore accord little weight to his testimony regarding his observations during his March 16 inspection.

Second, Wilkosz's wide measurements on the 13 East Section are insufficient to demonstrate a lack of sightlines. The Secretary hopes I will view Wilkosz's measurements as evidence that sightlines were absent in the slant cuts on the 13 East Section. (Sec'y Br. at 6–8.) From this perspective, missing sightlines led to wide places because the continuous miner operator had no point of reference while making the cut. Yet, as CLR Church testified, wide places merely *suggest* a lack of sightlines but do not *necessarily* indicate that none were used. (Tr. 83:20–84:4.) Thus, wide places are simply indirect evidence from which I might infer a lack of sightlines.

In this case, Respondent presented a countervailing explanation for its wide places: the combination of inexperienced continuous miner operators and rib sloughage. (Resp't Br. at 9–10.) The Secretary does not dispute that even *experienced* miners sometimes cut a slant a few feet wider than permitted even when a sightline is present. (Tr. 84:10–14; Sec'y Br. at 7.) He also does not dispute that sloughage may result in entries that are a few feet wider than initially mined. (Tr. 50:8–11, 93:6–13, 99:12–100:10; Sec'y Br. at 7.) Rather, the Secretary claims that his theory of the case is a "simpler and more plausible" explanation for deviations in width of "up to seven feet." (Sec'y Br. at 7.)

Unfortunately for the Secretary, his burden of proof has not changed. An explanation may often be "simpler" or "more plausible" than others without being "more likely than not." Here, Wilkosz's notes only reflect measurements in the slants for crosscuts 21, 25, 29, and 33. (Ex. G–1 at 12–15.) Notwithstanding Wikosz's measurements showing that two wide places exceeded the permissible slant width by seven feet, it is unclear that those widths are representative of the wide places he found in crosscuts 13, 15, 17, 19, and 27.

Further, I accord little weight to Wilkosz and Church's opinions that sloughage or inadvertent mining were unlikely to explain seven-foot deviations from the permitted slant width. Neither factor need wholly explain the deviation: the wide areas could be explained by some combination of inadvertence *and* sloughage. Here, the wide places that Wilkosz *did* measure appear to have occurred at the point of the small, triangular coal pillar—precisely at the location where rib sloughage would be the most severe. In addition, Oak Grove's miner operators had little experience, which could lead to larger than normal deviations from the permitted cut width. Taken together, these two factors would explain these deviations at least as well as the Secretary's theory that sightlines must have been absent. Critically, Wilkosz and Church failed to address whether the combination of these two factors could result in slants that exceed the permissible width by seven feet.[8] Accordingly, I do not find that an inference of missing sightlines is appropriate based on the few places for which Wilkosz recorded measurements.

Third, it is uncontroverted that Wilkosz and other inspectors traveled the 13 East Section several times since Oak Grove developed the slants in question. The Mine Act is a strict liability statute, and these inspectors' failure to cite violative conditions previously would not excuse Respondent from its duties. However, the inspector's failure to issue such citations in their frequent visits to the area suggests that sightlines were not absent and that seven-foot deviations were not prevalent.

Considering all of the evidence before me, the Secretary has not shown that a lack of sighlines is the necessary—or most likely—inference to be drawn from the wide places in Oak Grove's slant cuts. Given my doubts regarding the accuracy of Wilkosz's testimony, I determine that the Secretary has not met his burden of proving that sightlines were absent in the slant cuts on the 13 East Section.

## C. Conclusions of Law

In view of the above, I conclude that the Secretary has failed to demonstrate by a preponderance of the evidence that Oak Grove violated section 75.203(b). Because I have not found a violation, I do not need to address the Secretary's S&S and negligence allegations. Moreover, I need not address Oak Grove's assertion that Citation No. 8519718 is duplicative of Citation Nos. 8519719 and 8519720.

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[8] I recognize it is counterintuitive to consider the mistakes of inexperienced miners as a reason to question the Secretary's suggested inference. Coal mine operators have a duty to ensure miner safety and should not be "rewarded" for employing miners who do not adequately perform their duties. Yet here, Respondent's explanation simply makes the Secretary's suggested inference less likely as a matter of fact. Moreover, Oak Grove's wide slant cuts did not go unpunished; indeed, Citation Nos. 8519719 and 8519720 involved these same wide places and Respondent has paid the Secretary's proposed penalties for both of these violations. *See supra* note 6.

## VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8519718 be **VACATED**.

Alan G. Paez
Administrative Law Judge

Distribution:

Leslie P. Brody, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, S.W., Suite 7T10, Atlanta, GA 30303

Eric A. Johnson, Esq., U.S. Department of Labor, Office of the Solicitor, 211 Seventh Avenue North, Suite 420, Nashville, TN 37219

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

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