August 2017

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 1, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINSTRATION (MSHA)	Docket No. PENN 2017-109
v.	
LARRY ANDERSON, formerly employed by AK COAL RESOURCES INC.	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). It involves a section 110(c) proceeding[1] in which Larry Anderson served notices of deposition on an attorney in the Secretary of Labor's Office of the Solicitor and on an unnamed official of the Mine Safety and Health Administration. The Secretary in turn filed two motions for protective orders. In an order dated July 20, 2017, the Administrative Law Judge granted in part and denied in part the Secretary's motions. The Judge's order addressed the Secretary's contentions regarding the qualified immunity privilege, deliberative process privilege, investigative process privilege, attorney-client privilege, and attorney work product privilege.

On July 26, 2017, the Secretary filed a motion to certify for interlocutory review the Judge's order and to suspend the depositions and trial proceedings. On that same day the Judge denied the motion.

On July 27, 2017, the Secretary filed a Petition for Interlocutory Review and For Suspension of Two Depositions and Trial Proceedings Below, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76. This petition seeks review of the Judge's July 20,

[1] Section 110(c) of the Mine Act states: "Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d)." 30 U.S.C. § 820(c).

2017, order. The petition seeks review on the grounds that the information sought in the two depositions is not relevant as a matter of law.

Commission Procedural Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

The Commission usually does not grant interlocutory review of discovery orders. *See Nagel v. Newmont USA Ltd.*, 32 FMSHRC 1694, 1696 (Nov. 2010) (denying petition for interlocutory review of a motion to compel production); *Asarco, Inc.*, 14 FMSHRC 1323, 1328 (Aug. 1992) ("[U]nless there is a 'manifest abuse of discretion' on the part of a judge, discovery orders are not ordinarily subject to interlocutory appellate review.") (citations omitted); *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1004 (June 1992) ("[D]iscovery orders are usually not appealable."); *see also* 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2006 (3d ed. 2002) (same).

Moreover, the Secretary stated in his petition that the Judge ordered one of the depositions to go forward on July 27, and that the Secretary "preserved his objections as to relevance" regarding certain questions. Petition at 1, n.1 Given that this deposition has already taken place, and objections have been preserved, Letter from Amelia B. Bryson, Attorney, U.S. Dept. of Labor (July 28, 2017), immediate review would not materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(2).[2] A similar process can be put in place for the second deposition (scheduled for August 7, 2017), whereby the Secretary could preserve his objections.[3] We therefore deny the petition, as well as the Secretary's request to suspend the two depositions and any trial proceedings before the Judge pending appeal.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

[2] Because the deposition of Stepanic has already occurred, the Secretary's interlocutory appeal of the Judge's order and his request to suspend that deposition may also be moot.

[3] We note that the Secretary does not make a showing that this process will cause great harm.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 3, 2017

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

KENTUCKY FUEL CORPORATION

Docket No. KENT 2013-1050
A.C. No. 15-18363-329924

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 14, 2015, the Commission received from Kentucky Fuel Corporation ("Kentucky Fuel") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 23, 2014, the Chief Administrative Law Judge issued an Order to Show Cause in response to Kentucky Fuel's failure to answer the Secretary of Labor's October 22, 2013, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on February 24, 2014, when it appeared that the operator had not filed an answer with the Judge within 30 days.

Kentucky Fuels claims that it never received the initial Petition for Assessment of Civil Penalty. Moreover, it claims that it received the Order to Show Cause on January 27, 2014, and promptly filed a response on February 6, 2014. This Response was received by the Commission on February 11, 2014. However, while the Response listed the correct Assessment Control Number, it showed the docket number as "WEVA 2013-1050" rather than "KENT 2013-1050."

The evidence shows that the operator intended its February 6, 2014, letter to serve as a response to the Order to Show Cause in KENT 2013-1050, but it mistakenly wrote "WEVA" instead of "KENT." The Commission received Kentucky Fuel's letter on February 11, 2014, prior to the February 24, 2014, deadline for responding to the Order to Show Cause. Therefore, we conclude that the operator was not in default under the terms of the Order to Show Cause because it timely complied with the Order. *See Vulcan Constr. Materials*, 33 FMSHRC 2164 (Sept. 2011). This renders the Default Order a nullity. Accordingly, KENT 2013-1050 is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

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August 3, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. KENT 2016-22-M A.C. No. 15-00013-190469
ROGERS GROUP, INC.	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 31, 2015, and September 25, 2015, the Commission received from Rogers Groups, Inc. ("Rogers") motions seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1] The Secretary opposed these motions.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

[1] The present motions represent Rogers' second and third requests that the Commission reopen Assessment No. 000190469. On January 12, 2010, the Commission dismissed the first motion to reopen without prejudice. *Rogers Group, Inc.,* 32 FMSHRC 8 (Jan. 2010).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on July 15, 2009, and became a final order of the Commission on August 14, 2009.

On September 1, 2009, Rogers' safety manager, Karonica Glover, filed the initial motion to reopen this matter. Glover justified Rogers' failure to timely contest the assessment by stating she was unaware that multiple citations issued during a single inspection had been placed in two separate dockets. On January 12, 2010, the Commission issued an Order concluding that proffered explanation was not sufficiently detailed and did not provide an adequate basis to reopen, denying the motion without prejudice, and inviting Rogers to file another request to reopen with supporting documentation establishing good cause for the failure to timely contest the citations.

According to Ed Elliott, Rogers' Director of Safety and Health, Glover took no action in response to the Commission's Order and did not inform the operator about her activities in this matter. Elliott stated that he believed that she was engaged in ongoing "informal contest procedures" with MSHA. On March 26, 2010, Glover left her employment with Rogers and her files, including records regarding the previous request to reopen, were "somehow lost." Elliott asserts that after she left, no one else was aware of any of the actions that Glover had taken, nor was anyone aware that the Commission had issued an order denying the original motion to reopen.

However, by the operator's own admission, at least one Rogers employee was aware that Glover had filed the original motion to reopen and that, as of January 2010, the motion was being considered by the Commission. On December 1, 2009, MSHA answered an inquiry by Rogers' Safety and Health manager, Kellyann Krause, by telling her that the case was "on hold' because it "received [a] motion to re-open [Assessment No. 000190469] and [was] awaiting approval from the FMSHRC to process [sic] for hearing." *Operator's Response to Opposition* at 2. In January 2010, MSHA further explained that the Secretary could not proceed with the case until the Commission had ruled on the motion. *Id.*

Despite knowing that a motion to reopen had been filed with the Commission, Rogers' does not appear to have made any effort in the intervening years to request a status update from the Commission. Instead, the operator attempted to revive the final order through informal discussions with MSHA representatives. On September 9, 2010, Krause asked whether the instant matter could be included in that settlement and was told "it could not be included because it was part of a back log [sic] sent to Atlanta." *Operator's Response to Opposition* at 2. Further, in 2014 and again in early 2015, Elliott spoke informally with the MSHA Southeastern District Manager and the Southeast Assistant District Manager about ways that the operator could proceed with the case.

On August 31, 2015, Rogers received a delinquency notice related to the matter.[2] Elliott believed that this notice had been issued in error because the operator had not concluded its contest "according to normal procedures." After consulting with the MSHA Assistant District Manager and the Civil Penalty Compliance Office, Elliott filed the two letters to the Commission, which we have construed as motions to reopen.

In these letters, Rogers does not address its initial failure to file its contest in a timely manner, nor does it mention the motion to reopen previously filed by Ms. Glover. Instead, Rogers offers several justifications for not having filed the present motion to reopen timely. Rogers claims that it thought that Glover had initiated informal contest proceedings and that the case remained pending. However, Rogers also claims to have had no knowledge of any of the actions Glover had taken because she had not informed her superiors, was no longer with the company, and all of her correspondence had been lost. Additionally, Rogers contends that it had mistakenly believed that the citations "might" have been included in a 2015 global settlement consisting of a substantial number of outstanding penalties.

On October 26, 2015, the Secretary filed an opposition to Rogers' request to reopen. The Secretary asserted that the operator's late filing is without adequate excuse and that the request to reopen must be denied because it was filed more than one year after the proposed assessment became a final order of the Commission. Moreover, the Secretary contends that Glover, who left Rogers' employment roughly two months after the Commission's order was issued, would have had plenty of time to refile her motion to reopen.

On December 9, 2015, Rogers filed a Response alleging that the "the government took inappropriate action without our having the opportunity to exercise our rights to contest." In it, Rogers takes exception to the fact that MSHA's Mine Data Retrieval database consistently stated that the matter was "pending" or "on hold." Rogers asserts that it relied on these representations and that it believed that the case would be reopened and that the operator was simply "waiting for the next step."

When we initially dismissed this matter without prejudice, we concluded that "the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment." 32 FMSHRC 8. We went on to explain that, if Rogers submitted another request to reopen, it would be required to show "good cause" for its failure to contest the citations and penalties within 30 days. We noted that under Rule 60(b) of the Federal Rules of Civil Procedure that "good cause" could be established by a number of different factors, including mistake, inadvertence, surprise, excusable neglect, the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party.

Seven years, two requests to reopen, and a response later, the operator has still not provided any additional explanation or established good cause for its initial delay in contesting

[2] The Secretary explained the delay in the issuance of the delinquency notice, stating, "MSHA originally put a hold on sending the delinquency notice because of the pending motion to reopen and then the possible resubmission after the January 2010 denial order, and the system did not pick up the outstanding delinquency until August 2015." *Secretary of Labor's Opposition to Request to Reopen Penalty Assessment* at 3.

this matter. In its three filings in 2015, Rogers provided justifications for why it took no action following the Commission's initial Order denying its request without prejudice. However, it never provided any explanation for why it failed to contest this matter before August 14, 2009, beyond its statement that it was not aware that citations from a single inspection were placed in two dockets. As we noted in our January 12, 2010 Order, this is not "good cause" for failing to contest a citation. At best, it is evidence that Rogers had not properly trained its employees and thus had an inadequate or unreliable internal processing system, which is not a basis for reopening an assessment. *See, e.g.*, *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). When an operator's second request to reopen following a denial without prejudice again fails to explain its failure to timely contest the proposed penalty, the request should be denied. *See Byholt, Inc.*, 34 FMSHRC 2875 (Nov. 2012); *Pinky's Aggregate, Inc.*, 32 FMSHRC 790 (Jul. 29, 2010).

However, even if Rogers had presented evidence of "good cause" in any of its three 2015 filings, we would still deny the operator's request. The Commission has held that a second request to reopen filed after a denial without prejudice must be made "within a reasonable time." *See WKJ Contractor's Inc.*, 32 FMSHRC 45 (Jan. 2010) ("WKJ"); *see also SOL v. Thomas Hale*, 17 FMSHRC 1815 (Nov. 1995)(Four year delay between final order and request to reopen too long); *SOL v. Ravenna Gravel*, 14 FMSHRC 738 (May 1995) (Commission "constrained" to deny a request to reopen filed more than one year after becoming final). In *WKJ*, the Commission denied a request to reopen when it was made more than a year after the assessment had become final and five months after the initial Order denying without prejudice was issued. *Id*. The instant motion to reopen was filed on September 11, 2015, more than five years after the assessment became final on August 14, 2009 and more than four years after the initial Order denying reopening without prejudice on January 12, 2010. The second request to reopen was not filed within a reasonable time. Further, as in *WKJ*, Rogers offered no adequate reason for this delay.

Rogers provided several explanations for why it failed to resubmit its request to reopen for more than five years. First, Rogers claimed that in December 2009 and January 2010, it was told by MSHA officials that the motion to reopen was pending. Second, it claims that its former safety manager, Karonica Glover, who received the Commission's previous order, left the company on March 26, 2010, and did not leave any records of the Commission's order. Then, in September 2010, Rogers claims that MSHA told it that the matter had been turned over to an Atlanta backlog office. Finally, the operator claims that in the years following its initial request to reopen, the MSHA Mine Data Retrieval website consistently stated that the matter was "pending" or "on hold." However, these explanations are insufficient to excuse the extremely long delay in this case.

There was nothing misleading or inappropriate about MSHA's comments in in December 2009 and January 2010 (particularly if those comments occurred in early January 2010). At that time, Rogers' initial request to reopen was still pending; our Order was not issued until January 12, 2010. After that date, the Commission mailed the Order to Rogers, which should have cleared up any confusion about the status of the case. Further, the Commission did not simply mail the decision to the parties; it published the opinion at 32 FMSHRC 8. Even if MSHA was later unclear about the status of the case, the operator should have possessed the Order and been

aware that it needed to promptly resubmit a request to reopen. The fact that Ms. Glover left the company on March 26, 2010, does not explain what happened during the period of over two months following her receipt of the Commission's January 12, 2010, order. Her failure to take the appropriate action or inform her superiors of the status of the case is not an acceptable excuse for the operator's failure to resubmit the motion in a timely manner. After all, "[i]t is the operator's responsibility to properly train all personnel who handle proposed assessments." *Kentucky Fuel Corp.*, 38 FMSHRC 632, 634 (Apr. 2016).

Even if the operator was misled by MSHA's statements and website, it provides no reasonable explanation for why it failed to actively follow up on this matter between September 2010 and 2014. Regardless of whether Rogers believed the matter was "pending" or "on hold," it should have been diligently pursuing its case. The fact that there is no record of any conversations between the operator and MSHA for approximately four years indicates Rogers was not diligent.

Properly contesting citations and orders, managing and supervising its personnel and providing appropriate justification and support for a request for extraordinary relief are the operator's responsibilities. They have not been fulfilled by the unreasonably delayed and incomplete explanations submitted to us in the instant motion. We therefore deny the motion.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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August 3, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. VA 2016-59 A.C. No. 44-06859-389543
BLACK RIVER COAL, LLC	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On December 14, 2015, the Commission received from Black River Coal, LLC ("Black River") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 17, 2015, and became a final order of the Commission on September 16, 2015. Black River asserts that the Notice of Contest in this matter was mailed to the correct address but was never received by the Secretary

of Labor. A certified mail receipt shows that Black River mailed the contest to the correct address, but failed to include the suite number. USPS tracking records show that the contest was mailed on August 29, 2015 and reached the Merrifield, Virginia post office on September 1, 2015. No further delivery is shown. Black River was mailed a delinquency notice on November 2, 2015.[1] The Secretary does not oppose the request to reopen.

Having reviewed Black River's request and the Secretary's response, we determine that the operator mistakenly failed to include the suite number in an otherwise correct mailing address for the Secretary of Labor. The initial mailing was timely and the operator rapidly corrected the filing upon learning of its mistake. Therefore, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

[1] The Secretary submitted a letter stating that the delinquency notice was mailed on November 2, 2015. However, he did not provide any mailing records to substantiate that claim.

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August 3, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2014-890 A.C. No. 46-09062-348647
DYNAMIC ENERGY, INC.	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 15, 2015, the Commission received from Dynamic Energy, Inc. ("Dynamic") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On October 16, 2014, the Chief Administrative Law Judge issued an Order to Show Cause in response to Dynamic's failure to answer the Secretary of Labor's June 18, 2014, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on November 17, 2014, when it appeared that the operator had not filed an answer with the Judge within 30 days. The Judge's order here became a final order of the Commission on December 29, 2014. *See* 30 U.S.C. § 823(d); 29 C.F.R. § 2700.70(a).

On July 7, 2015, Dynamic received an email from the Commission's docket office asking whether it had submitted an answer to the Secretary's petition. On July 8, 2015, Dynamic filed its Answer to the Petition for Assessment. In that Answer, Dynamic did not refer to the Order to Show Cause but stated that it had never received a copy of the Petition for Assessment of Civil Penalty. On October 5, 2015, the docket office issued a Notice informing the operator that the proceeding was defaulted following its failure to respond to the Order to Show Cause.

In its motion to reopen, Dynamic alleges that it had good cause for its failure to file its Answer and its failure to respond to the Order to Show Cause. With respect to its failure to file an Answer, Dynamic asserts that when it received the Order to Show Cause, it searched its records and could not find a petition. Dynamic also asserts that upon receiving the Order to Show Cause it immediately drafted an Answer and sent it via certified mail. However, Dynamic's representative alleges that personal and computer "issues" prevented it from locating copies of that Answer to include with its Motion to Reopen. In lieu of records or certified mail receipts, Dynamic's representative averred via affidavit that he received the show cause order and personally mailed the operator's response in October 2014. Dynamic stated that it reasonably believed that Answer had been accepted by the Commission because it received no

communication from the Office of the Administrative Law Judge regarding dismissal. Following the October 5, 2015, Notice from the Commission's docket office, Dynamic drafted a second Answer and mailed it immediately.

On January 7, 2016, the Secretary filed an opposition to Dynamic's Motion to Reopen. The Secretary asserts that Dynamic has failed to establish good cause for its failure to file an Answer or timely respond to the Show Cause Order.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

The party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty or answer the Secretary's petition, and any delays in filing for reopening:

> An operator seeking to reopen a proceeding after a final order is effective bears the burden of establishing an entitlement to extraordinary relief. At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure. . . . Affidavits from persons involved in and knowledgeable of the situation and pertinent documents should be included with the request to reopen.

Higgins Stone Co., 32 FMSHRC 33, 34 (Jan. 2010); *see also Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013).

We find that Dynamic has failed to meet this burden here. With respect to its failure to timely respond to the Show Cause Order, Dynamic claims that it filed a Response via certified mail. Dynamics implies that this Response was lost in transit. A copy of Dynamic's response should have been sent to both the Commission and the Secretary per Commission Procedural Rule 7(a). 29 C.F.R. §7200.7(a). Neither the Commission nor the Secretary has a record of any such response. Dynamic submitted no certified mail receipts to confirm that a Response was sent in October 2014. These physical receipts would not have been lost as the result of computer issues.

Dynamic was also unable to locate a copy of the Answer that it claims it filed in response to the Order to Show Cause.[1] In fact, citing an absence of computer records, Dynamic claims that it prepared another Answer dated July 8, 2015. The absence of records compounds the movant's failure to prepare and submit timely and appropriate responses and indicates that Dynamic's failure to timely file its response to the Show Cause order was the result of an inadequate internal processing system, which is not a basis for reopening an assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008).

Moreover, as the Secretary points out, in addition to this case, Dynamic has a record of 16 delinquent penalties totaling over $131,000 dating back to 2012. It is important that a party seeking the extraordinary relief of reopening a final order demonstrate good faith, *See Pioneer Inc. Serves. Co. V. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 295 (1993), *FG Hemisphere Assocs., LLC. V. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Dynamic's record of unpaid final assessments is evidence of an absence of good faith and militates against the grant of such extraordinary relief. *See Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3348-49 (Nov. 2013); *Oak Grove Res., LLC*, 33 FMSHRC 1130, 1132 (June 2011).

[1] Dynamic's assertion that it was misled by the Commission to believe that the Response was received because no dismissal order was issued in this matter is without merit. The Order to Show Cause explicitly states, "[i]f you do not file an answer within [30 days], you will be in default under the terms of this order on the 31st day after the date of this order. *No further orders will be issued.*" (emphasis added).

As a result, we find that Dynamic failed to meet its burden of establishing good cause for failing to meet the deadline contained in the Order to Show Cause.[2] Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Dynamic's motion.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

[2] Having determined that Dynamic failed without good cause to timely file a Response to the Show Cause Order, it is not necessary to determine whether the operator had good cause in missing the initial deadline for filing an Answer. The Chief Judge properly entered a default judgment and there is no reason to grant relief. Nonetheless, the Secretary provided evidence showing that it mailed the Petition for Assessment to the correct address for Dynamic. Dynamic should have been aware that Petition for Assessment would be sent within 45 days but it never questioned why it had not received the petition for months. The files of Dynamic's representative were, admittedly, in disarray and the operator had difficulty locating old documents, including its alleged initial Answer filed in response to the Order to Show Cause. It seems likely that the operator received the Petition for Assessment, but misplaced it before contesting it. The operator's inadequate internal processing system, as we noted above, would not be a sufficient excuse.

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August 7, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. BROOKFIELD SAND & GRAVEL, INC.	Docket No. LAKE 2016-253-M A.C. No. 12-02240-396032

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 8, 2016, the Commission received from Brookfield Sand and Gravel, Inc. ("Brookfield") a motion seeking to reopen a penalty assessment that the Secretary asserted had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On November 16, 2015, Brookfield received a proposed penalty assessment from the Secretary. Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate the operator mailed its contest on December 16, 2015. This was a timely response. *See* 30 U.S.C. § 815(a) (operator has 30 days within which to notify Secretary it intends to contest citation or penalty); (29 C.F.R. § 2700.8 (Computation of 30 days excludes day from which obligation to respond begins to run).[1] We therefore conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested it.

Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

[1] Computation would be the same under the Federal Rules of Civil Procedure. *See* FRCP 6(a)(1)(A) (Computation excludes day of the event that triggers the period).

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August 7, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. VA 2016-40-M A.C. No. 44-00025-388289
LUCK STONE CORPORATION	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 2, 2015, the Commission received from Luck Stone Corporation ("Luck Stone") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

On August 13, 2015, Luck Stone received a proposed penalty assessment from the Secretary. On September 14, 2015, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30

days.[1] Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that a delinquency notice was mailed to the operator on October 29, 2015.

Luck Stone asserts that its employees believed that the proposed penalties had been properly contested, but because the contest was not sent via certified mail, there is no record of when the contest was sent. The Secretary does not oppose the request to reopen, and acknowledges that Luck Stone's contest would have been mailed while MSHA was transitioning to a new office, and may not have been delivered properly.

Having reviewed Luck Stone's request and the Secretary's response, we find that Luck Stone's apparent failure to timely contest is excusable in light of the Secretary's problems receiving contests through the mail. *See Allstate Materials, LLC*, 38 FMSHRC 645, 646 (Apr. 2016) (granting motions to reopen involving a similar mailing issue following the move of MSHA's headquarters). Indeed, the Commission received at least 20 motions to reopen penalty contests that were not delivered, apparently because of MSHA's relocation. We therefore hold that the circumstances here my indicate that the operator may have timely contested the proposed assessment, and we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

[1] Monday, September 14, 2015, was the first business day following the 30th day. *See* 29 C.F.R. § 2700.8.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 7, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2015-1016-M A.C. No. 46-08620-389553
FAIRFAX MATERIALS	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 22, 2015, the Commission received from Fairfax Materials ("Fairfax") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 17, 2015, and became a final order of the Commission on September 16, 2015. Fairfax asserts that the proposed assessment contained two penalties, Citation Nos. 8915870 and 8915871. Fairfax timely

contested Citation No. 8911571 and paid the $100 penalty for Citation No. 8911570.[1] Fairfax contends that it had inadvertently selected the wrong penalty to contest. The Secretary does not oppose the request to reopen, but urges the operator to take steps to adopt procedures to ensure that future penalty contests are timely filed.

Having reviewed Fairfax's request and the Secretary's response, we find that Fairfax inadvertently checked the wrong penalty to contest, but took prompt action to correct the mistake when it became known. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

[1] Citation No 8915171 was docket as WEVA 2015-974. On November 9, 2015, the Chief Administrative Law Judge approved a settlement of this case whereby Fairfax agreed to pay the penalty for Citation No. 8915171 in full.

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August 7, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEVA 2016-103 A.C. No. 46-09172-388781
v.	Docket No. WEVA 2016-104 A.C. No. 46-09172-394014
GREENBRIER MINERALS, LLC	Docket No. WEVA 2016-105 A.C. No. 46-09154-391339

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 19, 2015, the Commission received from Greenbrier Minerals, LLC ("Greenbrier") a motion seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure, under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEVA 2016-103, WEVA 2016-104, and WEVA 2016-105 involving similar procedural issues. 29 C.F.R. § 2700.12.

Greenbrier asserts that it timely contested the three penalty assessments at issue here, but the contest forms were mailed to an older address for the Department of Labor's Mine Safety and Health Administration ("MSHA"). After learning that MSHA apparently had not received the contest form for Assessment No. 000388781, Greenbrier preemptively requested the Commission reopen all three assessments and provided records showing that the operator had timely contested the assessments at issue.

MSHA's records indicate that Assessments Nos. 000388781 (WEVA 2016-103) and 000394014 (WEVA 2016-104) were timely contested. However, MSHA has no record of receiving a contest of Assessment No. 000391339 (WEVA 2016-105).

We note that on July 15, 2015, MSHA moved its headquarters, and that in the subsequent months, mail sent to MSHA's old address was often not forwarded to its new location. *See Allstate Materials, LLC*, *et al.*, 38 FMSHRC 645, 646 (Apr. 2016). When mail was forwarded to MSHA's new headquarters, it often arrived so late that MSHA was already acting under the presumption that the proposed penalties had become final orders of the Commission. *Blue Diamond Coal Co., et al.*, 38 FMSHRC 640 (Apr. 2016).

The record indicates that, in the three months following the move of MSHA's headquarters, Greenbrier filed timely contests in the three above-captioned cases. However, these contests were all mailed to MSHA's former address. The contests for Assessment Nos. 000388781 and 000394014 appear to have eventually been forwarded to MSHA's new location.[2] As these cases were not final orders of the Commission at the time the motion to reopen was filed, the motion to reopen Docket Nos. WEVA 2016-103 and WEVA 2016-104 is moot.

The proposed assessment in WEVA 2016-105 was delivered on September 14, 2015, and became a final order of the Commission on October 14, 2015 when it appeared that the operator had not filed a timely contest. Greenbrier, however, provided the Commission with a copy of a letter dated September 22, 2015, which purports to demonstrate that it timely mailed its contest to MSHA headquarters' old address. The Secretary does not oppose the request to reopen.

[2] Assessment No. 00388781 was docketed as WEVA 2016-92 and was disposed on July 22, 2016, after the parties reached a settlement. Assessment No. 000394014 was docketed as WEVA 2016-109 and WEVA 2016-110. On September 28, 2016, these cases were also disposed after the parties reached a settlement.

Having reviewed Greenbrier's request and the Secretary's response, we find that Greenbrier's failure to timely contest WEVA 2016-105 was the result of it mistakenly mailing its contests to MSHA's old address. While Greenbrier should have mailed its contests to the address provided by MSHA in its contest instructions, we find Greenbrier's mistake excusable in light of the fact that its prior contests had been successfully forwarded to MSHA and deemed timely filed. Accordingly, in the interest of justice, we hereby reopen WEVA 2016-105 and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
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August 16, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. WEST 2015-635 WEST 2015-676-R WEST 2015-677-R
v.	
CANYON FUEL COMPANY, LLC	

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The case involves two citations issued to Canyon Fuel Company by the Department of Labor's Mine Safety and Health Administration ("MSHA").[1] Both citations address the surface conditions at the mine opening where the alternate escapeway for Canyon Fuel's Sufco Mine terminates. Citation No. 8483766 alleges that those surface conditions make the mine opening unsuitable for safe evacuation, in violation of 30 C.F.R. § 75.380(d)(5).[2] Citation No. 8480766 alleges that emergency services could not reliably reach injured persons at the mine opening, and therefore Canyon Fuel had failed to provide 24-hour emergency transportation, as required by 30 C.F.R. § 75.1713-1(b).[3]

After a hearing on the merits, an Administrative Law Judge issued a decision affirming both citations. 38 FMSHRC 2205 (Aug. 2016) (ALJ). Canyon Fuel filed a petition for discretionary review, which the Commission granted.

The Commission unanimously affirms the Judge's finding that Canyon Fuel violated section 75.1713-1(b), which requires 24-hour availability of ambulance service. With regard to

[1] A third citation, No. 8483666, was vacated by the Judge, and the Secretary of Labor did not appeal. 38 FMSHRC 2205, 2227 (Aug. 2016) (ALJ). Accordingly, Docket No. WEST 2015-677-R is no longer at issue.

[2] The standard requires that escapeways "shall be . . . [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5).

[3] The standard requires operators to "make arrangements with an ambulance service, or otherwise provide, for 24-hour emergency transportation for any person injured at the mine." 30 C.F.R. § 75.1713-1(b).

the citation issued for a violation of section 75.380(d)(5), two Commission members vote to affirm the Judge's decision, and two Commission members vote to reverse. As a result of the split votes, the Judge's decision as to that citation will stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

I.

Factual and Procedural Background

A. Factual Background

Canyon Fuel's Sufco Mine is an underground coal mine in Utah, with approximately 20 miners per shift in the working sections. The mine's primary escapeway exits at the West Lease Portal, which has road access, and where Canyon Fuel maintains a 24-hour ambulance.

The alternate escapeway terminates at the 4 East Fan Portal, which exits onto a flat area on a mountain slope approximately 150 feet above the canyon floor. This area is approximately 200 feet long and 50 feet wide. Three buildings housing the fan motor, a diesel generator, and spare parts take up more than half of the surface area. There is no road access. To leave the area on foot, one could hike down to a creek bed at the bottom of a canyon, then follow an unpaved trail for a few miles to a gravel road. This path took Canyon Fuel's operations manager two hours to walk, in good weather, while uninjured. Alternatively, one could hike uphill 400-500 yards up to a plateau, then follow a ridge for a short way to a Forest Service road which was not plowed in winter months. This route was not tested.

During an inspection in June 2014, MSHA Coal District 9 Manager Russell Riley viewed the mine's escapeway maps and noticed that the 4 East Fan Portal did not have road access. He asked mine personnel how miners would be evacuated away from the portal in the event of an emergency. They responded that they did not know, and had never been asked. During the closeout conference, Riley expressed his concerns to mine management. He was told that the alternate escapeway followed the shortest path out of the mine, and that MSHA had never previously taken issue with the route since it was developed in 1991. Riley described MSHA's failure to raise the issue for 21 years as an oversight. He left the mine without issuing a citation, because he was under the impression that the mine planned to take steps to relocate the alternate escapeway.

In March 2015, Riley learned that the mine did not intend to relocate the escapeway, and issued Citation No. 8483766. The citation alleges that the 4 East Fan Portal is not provided with surface road access or any dependable alternative evacuation methods in the event of a mine emergency, and therefore the mine's alternate escapeway does not terminate at a mine opening suitable for safe evacuation as required by section 75.380(d)(5). Riley explained that miners at the portal would be exposed to potential hazards such as exposure to gas and smoke, and would be cut off from medical assistance.

MSHA proposed a new alternate escapeway which would run parallel to the primary escapeway and terminate at the West Lease Portal. This route would require rehabilitation, including widening entries, adding support, and installing signs, lifelines, reflectors, and caches of Self-Contained Self-Rescuers ("SCSRs"). Riley conceded that the existing route is more direct than the proposed route. The 4 East route is 2.34 miles long with 5 overcast crossings,[4] and would require 2 SCSR change-outs. The West Lease route is 5.88 miles long with 12 overcast crossings, and would require 5 SCSR change-outs. However, Riley believed the proposed route to be the safer and more practical option. He noted that two-thirds of the distance could be travelled by vehicle, that the extra overcasts had well-built stairs and would only take a few seconds to traverse (assuming that miners were not injured), that miners would be unlikely to require SCSRs since the route was ventilated with intake air, and that it would exit at a portal with road access.

In May 2015, Canyon Fuel contacted Intermountain Life Flight to arrange for helicopter rescue services at the 4 East Fan Portal. Although helicopters would not be able to land on the area outside the portal, miners could be evacuated two at a time using a hoist. However, helicopters would not be able to perform rescue services in winds above 10 mph, in poor weather or poor visibility, or at night. Because the mine operates in winter and at night, Riley determined that reliable 24-hour emergency transportation was not available at the 4 East Fan Portal as required by section 75.1713-1(b), and issued Citation No. 8480766.

Canyon Fuel contested the first citation, asserting that the alternate escapeway met the requirements of section 75.380(d)(5) by following the most direct, safe and practical path *to* the surface. Contrary to the Secretary's interpretation, Canyon Fuel argues that the purpose of the section is to permit the fastest, safest route to the surface. Alternatively, Canyon Fuel argues the conditions on the bench were safe. Canyon Fuel also contested the second citation, asserting that the mine complied with section 75.1713-1(b) by providing 24-hour ambulance services at the West Lease portal, or alternately, that the second citation should be vacated due to lack of notice.

B. The Judge's Decision

With respect to the citation issued for the failure to provide a safe escapeway, the Judge deferred to the Secretary's interpretation of the standard, finding it reasonable to consider surface conditions outside the mine when determining whether a mine opening is suitable for safe evacuation. 38 FMSHRC at 2214-16. The Judge rejected Canyon Fuel's argument that the Secretary's interpretation was inconsistent with MSHA's prior practice, finding instead that the Secretary simply had not previously considered the issue at this mine. *Id.* at 2217. Having accepted the Secretary's interpretation, the Judge found that the escapeway violated section 75.380(d)(5). He found that the 4 East Fan Portal was not suitable for safe evacuation because miners would be stranded and exposed to hazards once they exited the mine, particularly if dealing with harsh weather or injury. He concluded that the Secretary's proposed alternative,

[4] An overcast is an "enclosed airway that permits an air current to pass over another one without interruption." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 384 (2d ed. 1997). Ramps or stairs are built to allow miners to cross over the overcast. Tr. 53-54, 182-83.

although longer and more difficult to traverse, is the most direct, safe and practical route to a mine opening suitable for safe evacuation, noting that it terminates at a portal with road access, the overcasts had well-built stairs, and it is similar in length to the primary escapeway. *Id.* at 2217-18.

The Judge also affirmed the citation issued for the failure to provide 24 hour ambulance service, holding that "a violation is established if, as in this case, an operator has arranged for emergency transportation, but that transportation is not available 24 hours a day at the alternate escapeway." *Id.* at 2220. He explained that the standard requires emergency transportation for "*any person* injured at the mine," but such transportation was not available for injured miners at the 4 East Fan Portal, because they could not be reliably reached by ambulance or helicopter. *Id.* The Judge rejected Canyon Fuel's argument regarding lack of notice, but found that it did indicate the operator's belief that it was in compliance with the standard. Accordingly, he reduced the degree of negligence from moderate to low. *Id.* at 2220 n.11, 2222.

II.

Disposition

For the escapeway citation, Canyon Fuel argues on appeal that the Judge erred in deferring to the Secretary's interpretation and in concluding that the existing escapeway violated the standard. It claims that section 75.380(d)(5) requires escapeways to follow the most direct, safe and practical evacuation route to permit safe exit from the mine, and that the existing escapeway does so. With regard to the 24-hour ambulance service citation, Canyon Fuel argues on appeal that the Judge erred in rejecting its claim that the standard did not provide adequate notice of what it required.

A. 24-Hour Ambulance Citation No. 8480766 (Docket No. WEST 2015-676-R)

Canyon Fuel challenged the Judge's finding of a violation of section 75.1713-1(b).[5] The plain language of the standard requires 24-hour emergency transportation to be provided "for any person injured at the mine." 30 C.F.R. § 75.1713-1(b). Here, injured miners exiting at the 4 East Fan Portal may not be able to hike to the nearest road, could not be reliably reached by helicopter, and could not be reached at all by ambulance. Injured miners at the 4 East Fan Portal would be stranded without reliable immediate access to medical transportation. Common sense dictates that compliance requires accessibility; transportation cannot be provided on a 24-hour basis if the injured persons cannot be reached. The requirement for ambulance service was not available to "any person injured at the mine." Hence, we conclude that Canyon Fuel was not able to provide the requisite 24-hour ambulance service to the portal from its existing alternate escapeway and was in violation of the standard.

[5] Canyon Fuel devoted little or no attention in its brief to contesting the violation. At oral argument counsel for Canyon Fuel prudently stated that its arguments on appeal were focused upon the notice issue. PDR at 11; Oral Arg. Tr. 14, 66.

Alternatively, Canyon Fuel argued that it could not be found to have violated the standard because it had never received fair notice that the standard required the 24-hour availability of ambulance service to the alternate escapeway portal. For the reasons set forth below, we conclude that Canyon Fuel had adequate notice of the requirements of the cited standard.

To comport with due process, laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [the person] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (Sept. 1991). In determining whether a safety standard provides adequate notice, the Commission generally applies an objective standard, asking "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Adequate notice may also be established when the language of the standard provides unambiguous notice of its coverage and requirements, or when an agency gives actual notice of its interpretation prior to enforcement. *See DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087 (Dec. 2014) (citing *Bluestone Coal Co.*, 19 FMSHRC 1025, 1029 (June 1997)); *Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

As set forth above, the plain language of the standard requires 24-hour emergency transportation for persons injured at the mine. In determining whether emergency transportation arrangements comply with the standard, a reasonably prudent operator would consider accessibility. Had Canyon Fuel considered accessibility as a reasonably prudent mine operator, it should reasonably have realized that its existing arrangements at the termination point for the alternate escapeway — an area where one would reasonably foresee injured miners — did not comport with the requirements of the standard. Helicopter services that cannot operate at night or in bad weather, and that could not safely land on the area outside the portal, did not provide 24-hour access; and ground ambulances simply could not reach the site due to the absence of road access. A reasonably prudent operator would have understood that such a situation does not comply with section 75.1713-1(b).

Indeed, evidence demonstrates that Canyon Fuel was aware of the insufficiency of its plan for extracting injured miners. It began making arrangements for helicopter rescue services, and was informed by Intermountain Life Flight that there may be a fair number of no-fly days, *prior* to the issuance of the citation. Gov. Ex. 5. These facts indicate awareness that the existing ambulance arrangements were insufficient, and that even helicopter services would not be able to guarantee 24-hour availability. Canyon Fuel should have been, and may indeed have been, aware that existing emergency transportation arrangements did not comply with the standard, given the conditions at the 4 East Fan Portal.[6]

A reasonably prudent operator familiar with the industry and the standard's protective purpose should have recognized that the existing arrangements at the mine did not meet the

[6] In addition, the record indicates that Canyon Fuel had never contemplated how injured miners would be rescued from the area prior to Inspector Riley's visit in June of 2014. Tr. 24-25.

requirements of section 75.1713-1(b). The Judge properly rejected Canyon Fuel's claim of inadequate notice. We affirm the Judge's decision with respect to Citation No. 8480766.

B. Separate Opinions of the Commissioners Regarding Safe Escapeway Citation No. 8483766 (Docket No. WEST 2015-635)

Commissioners Jordan and Cohen, in favor of affirming the Judge:

Canyon Fuel raises both legal issues of interpretation and factual issues as to the sufficiency of the cited escapeway. The Commission applies de novo review for legal issues, and the substantial evidence test for factual issues. *See, e.g.*, *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1194 (Nov. 1999). For the reasons below, we conclude that surface conditions are relevant to and may properly be considered when determining compliance with section 75.380(d)(5), and that substantial evidence supports the Judge's conclusion that the cited escapeway was not the "most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners" as required by the standard.

1. Interpretation of Section 75.380(d)(5)

Section 75.380(d)(5) requires that escapeways be "located to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5). Citation No. 8483766 alleges that the alternate escapeway is not routed to a mine opening suitable for safe evacuation because there is no reliable means of evacuation from the surface at the portal where the escapeway terminates. The Secretary claims that "safe evacuation" as required by the standard involves conditions *at* the surface as well as underground, while Canyon Fuel argues that the standard only addresses underground conditions and the route *to* the surface. The Judge found that the standard was ambiguous, and that the Secretary's interpretation was reasonable.[7] 38 FMSHRC at 2214-16. We would affirm in result, finding that the plain meaning of the standard allows for consideration of surface conditions in determining whether a mine opening is suitable for safe evacuation.

The plain text of the regulation requires that escapeways be routed to the "nearest mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5). Basic rules of grammar and interpretation dictate that "suitable for safe evacuation" modifies "mine opening," rather than "most direct, safe and practical route." *Cf. Barnhart v. Thomas*, 540 U.S. 20, 26

[7] Where the language of a regulatory provision is clear, the terms must be enforced as they are written unless the regulator clearly intended the words to have a different meaning, or unless such a meaning would lead to absurd results. *See Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010); *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (Jan. 1998). If the language is ambiguous, the Commission generally defers to the Secretary's interpretation unless it is unreasonable, i.e., it is plainly erroneous or inconsistent with the regulation, or there is reason to suspect that it does not reflect fair and considered judgment. *Drilling and Blasting Syst., Inc.*, 38 FMSHRC 190, 194 (Feb. 2016) (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)); *Island Creek*, 20 FMSHRC at 18-19.

(2003) (under the "rule of the last antecedent," a limiting clause or phrase should be read to modify only the noun or phrase that immediately precedes it). As both parties agree, the ordinary meaning of "evacuation" is removal from an endangered area to a place of safety. In other words, evacuation is a process that ends once the miners being evacuated are no longer exposed to hazards. As a general matter, one might expect the majority of portals to be free of surface hazards, such that evacuation is complete once miners reach the surface, and compliance effectively turns on underground conditions. However, in order to truly provide for safe evacuation, the standard must be read to consider surface hazards, if and where they exist. Our colleagues agree that the standard requires consideration of surface conditions, rejecting Canyon Fuel's argument that only underground conditions are relevant. *See* slip op. at 13.

Indeed, the Secretary offers a convincing hypothetical: If section 75.380(d)(5) were limited to underground conditions, then theoretically, an escapeway would be compliant if it followed a safe, direct and practical route to a mine opening which opened onto thin air. Clearly, such a mine opening is not suitable for safe evacuation. Indeed, at oral argument Canyon Fuel's counsel conceded that such an escapeway would not provide for "safe evacuation." Oral Arg. Tr. 8. While this is obviously extreme, the point stands: To serve the purpose of the standard (safe evacuation), miners must be able to safely exit away from the escapeway's termination point, as well as safely reach it. *Cf. American Coal Co.*, 29 FMSHRC 941, 948 (Dec. 2007) (interpreting an escapeway standard to find that an escapeway had not been "provided" where it was not readily accessible). Section 75.380(d)(5) must logically be read to allow for the consideration of surface conditions.[8]

Our colleagues disparage the Secretary's hypothetical of an escapeway leading to a mine opening into thin air, slip op. at 15, overlooking the fact that Canyon Fuel's position was — and continues to be — that the standard only addresses underground conditions and the route *to* the escapeway. In this context, the hypothetical makes complete sense. Indeed, Commissioner Young addressed this hypothetical to Canyon Fuel's counsel at oral argument. Oral Arg. Tr. 7-8.

Canyon Fuel dismisses the risk of surface hazards, arguing that the expected hazards during an emergency in an underground coal mine are underground, and therefore travelling *to* the surface removes miners from the endangered area. In support, Canyon Fuel notes that the preamble to the final rule for section 75.380(d)(5) focuses on underground conditions. Canyon Fuel correctly characterizes the focus of the preamble. *See* 61 Fed. Reg. 9764, 9812-13 (Mar. 11, 1996). This is a logical focus for the preamble. As Canyon Fuel states, it is reasonable to assume that most hazards in an underground coal mine emergency will indeed be underground, and most mine openings will be safe at the surface. As the Judge stated, "the drafters of the safety standard quite naturally assumed that once miners reach the surface, they would be safe." 38 FMSHRC at 2216.

[8] We fail to understand why our colleagues assert that the Secretary's interpretation of section 75.380(d)(5) "extends beyond the plain language of the standard." Slip op. at 15. The standard requires that the mine opening at which the escapeway terminates be "suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5). The Secretary's concern for "safe evacuation" at the surface clearly is within the standard's plain language. *See infra* p. 6.

However, the preamble's failure to address surface conditions does not mean that such conditions should never be considered. Rather, it simply indicates that such a scenario was so unlikely that the drafters of the preamble did not address it. As the Judge said, "[w]hen MSHA promulgated and revised the safety standard, it is unlikely that the drafters of the standard thought that a situation would arise in which miners escaping from a mine might be required, after arriving at the mine opening, to hike four to five miles along a wildlife/cattle trail over rough terrain or hike up to the top of a canyon. Likewise, it is unlikely that MSHA contemplated that injured miners would require rescue via baskets suspended from a helicopter." *Id.* at 2216.

Preambles need not expressly detail every circumstance in which a standard may apply. A regulation may be applied to a scenario which was not expressly anticipated by its drafters, as long as it serves the regulation's intended purpose. *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1132–33 (9th Cir. 2003); *cf. Simola, empl. by United Taconite LLC*, 34 FMSHRC 539, 549-50 (Mar. 2012), *citing People of Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937) (Congress would have intended section 110(c) of the Mine Act to apply to LLCs, if they had existed when the statute was drafted); *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (a statute can apply in situations not expressly anticipated by Congress).

Section 75.380(d)(5) requires escapeways to provide for safe evacuation, i.e., the removal of miners from an endangered area to a place of safety. That miners will be safe once they reach the surface in most situations does not mean that potential surface hazards at the mine opening can be ignored if and when they are relevant. The plain language and purpose of the standard provide for the consideration of surface conditions when determining if an escapeway follows "the most direct, safe and practical route to the nearest mine opening *suitable for the safe evacuation of miners*."[9] 30 C.F.R. § 75.380(d)(5) (emphasis added).

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[9] Because we rely on the plain meaning of the standard, we need not address Canyon Fuel's claim that the Secretary's interpretation is undeserving of deference because it is inconsistent with prior interpretations. However, even if it were otherwise, the claim would be unconvincing. Canyon Fuel notes that MSHA's Program Policy Manual ("PPM") focuses on underground conditions. V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 42-43 (2015). However, the relevant section almost directly quotes the preamble, so the same analysis applies. *See supra* pp. 7-8. Regardless, "the Commission has never held that the Secretary is bound by the recommendations in a PPM." *Big Ridge, Inc*., 37 FMSHRC 213, 216 (Feb. 2015).

Canyon Fuel also notes that the Secretary has never before taken issue with the surface conditions at the portal. However, prior inconsistent enforcement does not constitute a viable defense. *See U.S. Steel Mining Co., Inc.*, 15 FMSHRC 1541, 1546-47 (Aug. 1993); *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981). An individual inspector's decision not to issue a citation (or failure to notice a violation) does not create a binding interpretation on behalf of the Secretary. As the Judge found, the "Secretary's failure to enforce the safety standard at the Sufco Mine until District Manager Riley's visit is more accurately attributed to a lack of attention by MSHA than to a change in the interpretation of the standard." 38 FMSHRC at 2217. District Manager Riley should be commended for recognizing the potential danger to miners evacuating out of the 4 East Fan Portal.

2. Substantial Evidence

In establishing a violation of section 75.380(d)(5), the Secretary's burden is "to prove that, as compared to the [operator's] designated route, there is at least one other escapeway route that [he] has determined more closely complies with the standard's requirement." *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (Nov. 1992). In other words, the Secretary must show that the operator's route is *not* the most direct, safe and practical route to a mine opening suitable for the safe evacuation of miners. The Judge held that the Secretary's proposed alternative route is the safer, more direct and practical route to a mine opening suitable for safe evacuation. We find that substantial evidence supports the Judge's conclusion.

An escapeway must lead to a "mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5). The record supports the Judge's conclusion that the cited escapeway is deficient in this respect. The mine is in a mountainous region in Utah, and operates at night and in the winter. *See* Tr. 64-67, 266, 280; Gov. Ex. 11. As previously mentioned, the escapeway terminates at the 4 East Fan Portal, which exits onto a flat area approximately 50 feet wide, 200 feet long, and 150 feet above the canyon floor. Tr. 30-31, 150, 163. There is no road access. Tr. 23. To leave on foot, miners have to either walk down the slope to a creek bed and follow a cattle trail for 4-5 miles, or hike up the canyon a few hundred yards to a plateau, then walk to a Forest Service Road which is unplowed in the winter. Canyon Fuel's operations manager, John Byars, testified that the lower route took two hours to travel on foot, while he was uninjured and walking in good weather. The upper route has never been tested. Tr. 232-37, 276, 300-303, 317, 340.

Alternatively, miners might stay on the ledge and await helicopter rescue. However, the ledge at the 4 East Fan Portal does not have room for a helicopter to land. Tr. 155-56; Gov. Ex. 10. To perform a rescue, the helicopter crew would have to hover overhead and drop a basket to hoist miners up to the helicopter. Tr. 62, 65-66, 265-66; Gov. Exs. 5, 6. Only two miners at a time could be transported in the helicopter, and so as many as 10 helicopter trips might be necessary to bring all the miners off the ledge. Tr. 156. The hoist operation could not be performed at night, in winds over 10 miles per hour, in rain, or in most winter weather. Tr. 62, 64-68, 265-67; Gov. Exs. 5, 6. Moreover, the helicopter service requires that the lowest level of cloud cover be at least 1000 feet above the ground, and that visibility be at least three miles. Tr. 67; Gov. Ex. 6. Additionally, District Manager Riley and Assistant District Manager James Preece expressed concern that the fan at the portal discharges several hundred cubic feet of air from the mine up toward any helicopter which is hovering above, trying to drop a basket to hoist miners. This could affect the helicopter's control, and the discharge could contain mine gases or smoke. Tr. 65-66, 155.

Essentially, miners exiting at the portal in the event of a mine emergency would have to choose between hiking down a slope and then walking some distance along a cattle trail, hiking up a slope to a road that may not be passable, or waiting on the ledge until conditions are fair for helicopter rescue, all potentially in the dark, in inclement weather. They might need to do so while injured, or while assisting other injured miners. Depending on the nature of the injury, a miner may not be able to be hoisted up to the helicopter in a basket.

Safe evacuation means removing miners to a place of safety. Miners who may emerge from the escapeway to find themselves hiking through or stranded in harsh weather, while injured and without access to medical assistance, have not yet reached that place of safety. [10] Based on the record, the Judge reasonably concluded that the 4 East Fan Portal is not a mine opening suitable for safe evacuation.

Escapeways must also follow "the most direct, safe and practical route" to that mine opening. 30 C.F.R. § 75.380(d)(5). Canyon Fuel argues that MSHA's proposed route does not meet those criteria, as it forces miners to stay underground in dangerous conditions for a longer period of time. The underground portion of the proposed route is indeed longer than the existing alternate escapeway, with more overcast crossings. However, substantial evidence supports the Judge's conclusion that, *when all relevant factors are considered*, the Secretary's proposed route better complies with the standard. 38 FMSHRC at 2217-18. The proposed route may be longer than the present alternate escapeway, but it is no longer than the primary escapeway which runs parallel to it. Tr. 133. Unlike the existing alternate escapeway, it is drivable for the majority of its length. Tr. 133-34. While there are more overcasts, Supervisory Inspector Sydel Yeager testified that they would not be difficult to negotiate, as they have well-built stairs. Tr. 182. Perhaps most importantly, MSHA's proposed route leads miners to a portal where there is an ambulance continually stationed. Tr. 43.

Furthermore, as discussed above, compliance with section 75.380(d)(5) is not limited to underground considerations. Here, the underground portion of the existing route is more direct (2.34 miles with 5 overcasts), but miners following the most likely route away from the ledge would still have to descend a canyon slope and walk an additional 4-5 miles before evacuation is complete. The underground portion of the proposed route is less direct (5.88 miles with 12 overcasts), but evacuation is complete once miners reach the surface. When considering both

[10] With regard to potential hazards, the Judge also noted that miners stranded on the ledge could be exposed to gas and smoke. 38 FMSHRC at 2218. Canyon Fuel contests this, stating that exhaust from the fan would disperse any gases. Of course, this assumes that the emergency which prompted the evacuation did not affect the operation of the fan. Regardless, even without the added hazard of exposure to toxic fumes, miners still potentially face being stranded in inclement weather without medical assistance.

Canyon Fuel argues that neither harsh weather nor unavailability of medical care is relevant here. It states that concerns regarding exposure are addressed because miners can take shelter in the buildings on the ledge. Oral Arg. Tr. 11. However, shelter and evacuation are fundamentally different; if a miner is trapped in a building surrounded by hazardous conditions, he has not been moved away from the danger — particularly if the miner is injured and in need of medical attention. Canyon Fuel also states that medical assistance is more properly addressed by section 75.1713-1(b). However, the standards are different in scope. Section 75.1713-1(b) focuses on the transportation of injured individuals, whether or not there has been a mine emergency. Section 75.380(d)(5) focuses on ensuring that all miners can be evacuated during a mine emergency without being unduly exposed to hazards, one of which might be the exacerbation of injury due to the unavailability of medical care.

underground and surface conditions, substantial evidence supports the Judge's conclusion that the proposed route better complies with the standard.[11]

For the foregoing reasons, we would affirm the Judge's decision with respect to Citation No. 8483766. Substantial evidence supports a finding that the alternate escapeway here violated the plain meaning of section 75.380(d)(5).

Acting Chairman Althen and Commissioner Young, in favor of reversing the Judge:

We join our colleagues in affirming the violation of 30 C.F.R. § 75.1713-1(b), stated in Citation No. 8480766, for a failure to provide 24-hour emergency transportation at the 4 East Fan Portal, the site of the alternate escapeway at Canyon Fuel's Sufco Mine. We write separately because we would reverse the Judge's finding of a violation of 30 C.F.R. § 75.380(d)(5). We disagree with our colleagues' reading of the language of the regulation. Moreover, we do not agree that the Secretary has met his burden of proving that the operator's designated route was not "the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners." 30 C.F.R. § 75.380(d)(5).

Section 75.380(d)(5) states that "[e]ach escapeway shall be . . . [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners." The focus of this provision is the route itself and more specifically addresses the efficiency of that route for purposes of providing miners, in the event of an emergency, quick and safe egress out of the mine.

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[11] Our colleagues assert that the Secretary failed to consider the "relative risks and benefits" of each route. Slip op. at 13-14, 16. They overlook that District Manager Riley considered various alternative routes for the secondary escapeway, taking into consideration the most direct route, among other factors. Tr. 49-56. More importantly, the Secretary's assessment did not rest on a pure cost-benefit analysis. Rather, the Secretary's finding of a violation is based on the fact that the existing escapeway to the 4 East Fan Portal failed to meet a basic requirement of section 75.380(d)(5). The termination point of this escapeway failed to provide for "safe evacuation of miners," as the standard requires, and thus was not "suitable." 30 C.F.R. § 75.380(d)(5); Tr. 40-41; Sec. Br. at 26-27.

Our colleagues further assert that "the agency has created the tension here between the competing obligations of the standard by questioning the previously-approved escapeway." Slip op. at 14. In so arguing, our colleagues overlook the facts that (1) when asked by Riley, mine personnel said that they had never considered and did not know how to evacuate miners from the ledge at the 4 East Fan Portal (Tr. 24-25); (2) after his discussion with mine personnel in June 2014, Riley did not issue a citation because he understood that Canyon Fuel would consider alternatives to the existing escapeway (Tr. 38); and (3) during the next nine months, Canyon Fuel not only failed to consider relocating the escapeway but did not even contact a helicopter service to inquire about emergency evacuation from the 4 East Fan Portal. Tr. 267. Hence, rather than "creat[ing] the tension," MSHA acted in a measured way, and only issued a citation after it became clear that Canyon Fuel would not act to resolve the problem of unsafe evacuation at the termination of the alternate escapeway.

Subsection (d)(5) explicitly requires the mine operator to provide the most direct, safe and practical route to the nearest mine opening. These terms clearly identify the characteristics the Secretary must use to evaluate whether the operator's designated escapeway is preferable to an alternative route. Hence, the Secretary must evaluate and compare alternatives and determine which is the most (1) direct, (2) safe and (3) practical route to (4) the nearest mine opening (5) suitable for the safe evacuation of miners.

The plain, ordinary meaning of the term "direct, safe and practical route" is not in dispute. This case turns on the meaning of "suitable for the safe evacuation of miners." The circumstances here present an evident tension between the two clauses. In seeking to resolve that tension, the Secretary has not fully considered the implications his solution will have on miner safety. This is contrary to fundamental principles of administrative law:

> Proper administrative interpretation of a statute, rule, or regulation must meet the following three requirements: (1) the factual findings underlying the interpretation must be supported by substantial evidence, *Greater Orlando Aviation Auth. v. FAA*, 939 F.2d 954, 958 (11th Cir. 1991); *HHS v. FLRA*, 885 F.2d 911, 915 (D.C. Cir. 1989) (citations omitted); (2) the agency must offer a satisfactory explanation for its actions, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 . . . (1983); and (3) the interpretation must be consistent with the statute, rule, or regulation being interpreted, *U.S. v. Larionoff*, 431 U.S. 864, 873 . . . (1977).

Rocky Mountain Helicopters, Inc. v. FAA, 971 F.2d 544, 547 (10th Cir. 1992). The Secretary's interpretation fails on all three counts.

First, there is no substantial evidence regarding the comparative safety trade-offs presented by the two escapeways. The Secretary can cite nothing in the record showing that he even considered this aspect, even though his preferred route would have the miners remain underground for hours longer. This also renders the explanation for his policy choice unsatisfactory, as explained further below. Finally, in choosing to elevate one clause of the standard — that requiring a "safe" location upon evacuation — over the prime imperative to choose the most direct, safe and practicable route, the Secretary has made a decision at odds with the express terms of the standard.

The record clearly establishes that the operator's secondary escapeway to the 4 East Fan Portal is safer, more direct, and more practical than the Secretary's alternative route. First, it is much shorter. The Secretary's chosen alternative escapeway is to the West Lease Fan Portal, which at 5.9 miles long is more than twice the distance than the 2.3-mile escapeway via the 4 East Portal. Canyon Fuel Ex. 7; Tr. 49-50.

Additionally, the operator's route has fewer obstacles, such as overcasts, making it easier to traverse — especially with injured miners. Further, this opening is the nearest to the active

working sections where miners would be working. The Secretary's route requires 12 overcast crossings compared to 5 in the 4 East Portal. Canyon Fuel Exs. 2, 7; Tr. 244, 247-48, 254.

While the Secretary downplays these difficulties, Gary Leaming, Canyon Fuel's safety manager, testified that the West Lease Fan Portal is the most difficult escapeway to travel. Tr. 243. Thus, the operator's designated escapeway provides the shortest, most direct route out of the active working sections of the mine in the case of an emergency. Tr. 99, 207, 225-26, 297-98. This must be the primary consideration, absent extreme conditions that would make the shortest, most direct and practical route unsuitable for the safe evacuation of miners.

The Secretary has not explained why it must be preferable to expose miners to the hazards of a longer, more arduous journey through the perils imposed by an underground mine disaster. We concede that the conditions outside the mine at the 4 East Fan Portal are not ideal, but they are *outside the mine*. Should an emergency occur, the most urgent and primary concern is getting miners out of the mine quickly and safely.

Once miners have exited the mine, they should ideally be in safe conditions away from dangers both underground and on the surface. However, the issue before us is not limited to only the route taken from the active workings to the outside, or only the conditions encountered outside. The standard requires both. Here, neither option clearly meets both of the standard's criteria, and there is thus no "ideal" alternative.

The question posed by the standard, then, is "safe compared to *what*?" The Secretary never addresses this, and the failure to do so renders his choice impermissibly arbitrary. It is a policy prerogative ungrounded on any consideration of the real problem, whose resolution may have real-world, life-and-death consequences for miners.

Our colleagues seem untroubled by the Secretary's myopia and are more than willing to fill in the interpretive gap by assuming that the Secretary's alternative is safer, without any evidentiary support for this logical leap. This is clear error:

> The Supreme Court has stated that "a rational connection between the facts found and the choice made" would be a satisfactory explanation, but that where the agency has failed to adequately supply this, "[t]he reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given."

Rocky Mountain Helicopters, 971 F.2d at 548, (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43 (citations omitted)).

Thus, we cannot assume that the Secretary has a good reason for his policy choice: It must be shown. The Secretary is obliged to supply a rationale and a factual basis that takes into account the relative risks and benefits of each route and must articulate a reasoned judgment as to why his route — clearly not the most direct, safe or practical, in terms of the route itself — must be adopted. The record is entirely barren of such proof.

We note that the agency has created the tension here between the competing obligations of the standard by questioning the previously-approved escapeway. The Secretary must thus "acknowledge and account for a changed regulatory posture the agency creates." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011). This duty, too, has been ignored. Indeed, the Secretary appears entirely oblivious to the requirement to exercise a thoughtful, comparative analysis before choosing between two less-than-perfect alternatives.

When the question of regulatory interpretation involves a choice between two options, neither of which clearly meets the requirements of the standard, the question is not really one of interpreting the meaning of each term contained in the regulatory standard. Rather, the inquiry focuses on whether the Secretary has demonstrated that the operator's choice is either not compliant with the plain terms of the standard or, as is the issue in this case, is not a "suitable" choice. *Cf. Peabody Coal Co.*, 18 FMSHRC 686, 690-91 (May 1996) (stating that in plan disputes, the Secretary bears the burden of proving to the Judge that an operator's proposed plan or revision was unsuitable to the mine, which is reviewed by the Commission under the substantial evidence standard); *Prairie State Generating Co. v. Sec'y of Labor*, 792 F.3d 82, 90-91 (D.C. Cir. 2015) (noting that the plan approval process is akin to notice-and-comment rulemaking, in which mine operators receive written notice of reasoning and bases for the Secretary's initial plan-suitability determination).

Here, the issue is whether the Secretary has proven that the operator's 4 East Fan Portal, which clearly is the most direct, safe and practical route to the nearest mine opening, was not "suitable for the safe evacuation of miners." When viewed properly against the gravamen of the Secretary's policy choice, the evidence does not support the Secretary's finding of a violation of section 75.380(d)(5).

As our colleagues acknowledge, the Secretary's burden is "to prove that, as compared to the [operator's] designated route, there is at least one other escapeway route that [he] has determined *more closely* complies with the standard's requirement." *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (Nov. 1992) (emphasis added). Hence, our colleagues explain that the Secretary must show "that the operator's route is *not* the most direct, safe and practical route to a mine opening suitable for the safe evacuation of miners." Slip op. at 9.

Having correctly stated the law, our colleagues fail to apply it. The Secretary's failure to meet the burden stated in *Southern Ohio Coal* is manifest in this case. He has not explained why the most direct, safe and practical route out of the mine is less acceptable — indeed, *un*acceptable — because the relative safety of the operator's route likely puts them in greater danger than the alternative route.

The facts clearly do not support the Judge's finding that the operator's route does not meet the requirements of section 75.380(d)(5) because the Secretary focused entirely on only one part of a binary standard. The Secretary must concede that the operator's route is superior as an evacuation route. But he asserts that the imperfect refuge available at the 4 East Fan Portal renders the escapeway "[un]suitable for the safe evacuation of miners."

In so doing, the Secretary posits the extreme example of a route which terminates at a plummet into space. Yet this amounts to a *reductio ad absurdum*. Obviously, an escapeway that exposes miners to a deadly hazard on their exit from the mine would not constitute a "safe evacuation." But miners exiting from the 4 East Fan Portal would not have faced the certain death postulated by the Secretary's hypothetical. On the contrary, the miners would have been "safely evacuated from the mine."

Whether they would be safe enough, relative to the alternative approach — which would have confined them inside the mine for hours longer, but would have ensured better egress from the mine site to medical treatment facilities — is a valid question. The problem is that the Secretary never seeks to address that question.

The answer is essential. As the Supreme Court has noted, "[n]o regulation is 'appropriate' if it does significantly more harm than good." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). In order to determine whether the Secretary's approach conforms to this standard, he must consider the alternatives and compare their relative costs and benefits. He has failed to do so here.

Instead of making a qualified determination that the record cannot support, our colleagues focus instead on the surface conditions outside the 4 East Fan Portal in isolation, and argue for an interpretation of section 75.380(d)(5) that extends beyond the plain language of the standard. This interpretation disregards Commission precedent governing the interpretation and application of, and compliance with, standards applicable during emergency conditions.

We have previously agreed with the Secretary's contention that violations of standards that become relevant only during a mine emergency must take into account the occurrence of the emergency when determining if the violation is S&S. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2366-67 (Oct. 2011), *aff'd*, 717 F.3d 1020 (D.C. Cir. 2013). Ironically, the Secretary has generally failed to contemplate the type of emergency that would require an evacuation in this case.

We must assume that this would be a severe emergency requiring evacuation of the workforce. The emergency must be of such nature as to render the primary escapeway unsuitable, because our concern in this case lies entirely with the secondary escapeway. Further, we must acknowledge certain conditions the Secretary does take into account, including numerous injured miners, some with serious injuries that would require professional medical attention, and the presence of noxious gases emanating from the mine. Indeed, section 75.380 is in Subpart D of Part 75, which provides the mandatory standards for mine ventilation. The problem with the Secretary's thesis is that it utterly disregards the fact that these conditions, especially smoke and gases, would also exist inside the mine, an environment in which the miners would be confined for several hours longer if egress were required instead from the West Lease Fan Portal alternative preferred by the Secretary.

As noted above, the Secretary offers no proof that he ever has considered the relative risks and benefits of the two alternatives or that he has reached a determination that fairly contemplates the qualitative differences between a route that is more direct, safer and more

practical — increasing the likelihood of a successful escape from the dangers inside the mine — versus a route that may afford better survivability once the miners have exited the mine. Instead of assuming the emergency, the Secretary assumes a safe exit through a more arduous route. This is, tragically, not a valid assumption in a mine-wide emergency.

Clearly, the standard at issue is not concerned solely, or even primarily, with surface conditions outside a mine portal. In skewing the analysis toward that consideration, though, the Secretary, the Judge, and our colleagues fail to take into consideration the overwhelming evidence that the 4 East Portal is the most direct, safe and practical route to the nearest mine opening.

As we noted before, this is not a case of self-evident unsuitability.[12] There is no contention that the portal was obscured, inaccessible, or otherwise unusable. Our colleagues' entire decision rests on the theory that the surrounding area outside the portal was not suitable because it failed to ensure ready and immediate access to professional medical care. However, that is not what the standard requires, and pretending as though it does disregards the fact that miners inside the mine would also be denied such care until they have been successfully evacuated.

Our colleagues contend that to interpret the regulation in any limiting manner that excludes consideration of the surface conditions would undermine the purpose of the standard. However, they fail to address the fact that the regulation makes no mention of surface conditions and does not identify specific requirements that would apply to surface conditions surrounding a mine portal access to an escapeway.[13] Significantly, the remaining provisions of section

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[12] Our colleagues somehow believe otherwise, asserting that the Secretary's representative did make a determination that the East Fan Portal route was *per se* unsuitable because it would not safely evacuate the miners. *See* slip op. at 11 n.11. That is patently false. The miners would in fact be outside the mine, with indoor shelter, provisions, and rudimentary first-aid available, not a plummet into the abyss as suggested by the Secretary. The problem is the Secretary's utter failure to consider the vast, gray expanse between evacuation to perfect safety and ejection into the abyss. This case is thus entirely about relative safety, because neither condition of the standard may be ideally served.

[13] Our colleagues even dismiss that the agency limited its consideration of escapeway factors, in both the rule's preamble and MSHA's Program Policy Manual, to only underground conditions. They state that the agency could not have foreseen every possibility that could arise and would need to be addressed by the rule. Slip op. at 7-8. However, underground coal mining, which is an inherently dangerous occupation, clearly occurs in remote geographic regions, and the requirement for 24-hour access to emergency medical care was clearly contemplated by MSHA and is addressed in a separate rule. *See* 30 C.F.R. § 75.1713-1(b); slip op. at 4-5. Crafting an interpretation that extends the application of the rule to matters beyond the explicit terms of the rule is tantamount to creating a rule without engaging in mandatory rulemaking, which is a violation of the APA. *See RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 82-87 (Feb. 2004) (holding that a change in occupational code amounted to substantive rule change, rather than an interpretation, requiring rulemaking).

75.380(d) in particular address other characteristics of the escapeway, such as suitability for injured miners to traverse, the height and width of the passageway, clear markings along the route, and the provision of certain safety equipment on the route, among other requirements related to the underground conditions of the escapeway. Nowhere in the entire provision does it address or define suitable surface conditions at the mine portal.

The concerns our colleagues raise about emergency vehicle access to injured miners after they have left the mine is addressed in another provision, which the Secretary cited in this case and which the Commission has unanimously sustained. Slip op. at 4-5. We agree that miners need access to emergency services and remote locations present problems with facilitating that. However, section 75.380(d)(5) does not address this requirement, expressed in section 75.1713-1(b). Interpreting section 75.380(d)(5) to require expedited access to medical care is unnecessarily duplicative of section 75.1713-1(b).

Our colleagues also rely on speculative evidence of contaminated air exiting from the mine portal onto the miners at the landing as evidence of the unsuitability of this escapeway. Slip op. at 10 n.10. But the Secretary did not offer reliable evidence about the operation of the fan, and our colleagues' affirmance of the Secretary's opinion disregards that the noxious air that concerns them so would be coming from inside the mine.[14]

In sum, the Secretary proposes a half-considered regulatory solution in contravention of well-settled tenets of administrative law. *See Motor Vehicle Mfrs Ass'n*, 463 U.S. at 43 ("[A]n agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem. . . ."). We understand our colleagues' concerns and agree that an effective escapeway must not only provide a safe passage for miners to get out of the mine, but must also lead them to a safe location once outside of the mine. But substantial evidence does not demonstrate that the Secretary even considered, let alone made a reasoned determination in concluding, that the operator's designated route was inherently unsuitable for the safe evacuation of miners.

Accordingly, we would vacate and reverse the Judge's decision and vacate Citation No. 8483766 as the product of arbitrary and capricious decision making.

[14] The Secretary has argued that the mine's ventilation system "could be blowing toxic gases out of the air." Oral Arg. Tr. 40. There is no factual basis for assuming that the ventilation system in the mine will continue to function in an emergency that requires evacuation of the workforce. Indeed, numerous standards presume that miners will be inundated in smoke and will require supplemental air. *See, e.g.*, 30 C.F.R. § 75.380(d)(7) (lifelines required due to presumed poor visibility); 30 C.F.R. §§ 75.1506(c)(2), 75.1714-3, 75.1714-4 (SCSRs mandated at intervals to ensure miners will have access to emergency air supplies).

III.

Conclusion

For the foregoing reasons, we conclude that Canyon Fuel had adequate notice that it was not in compliance with section 75.1713-1(b) and affirm the Judge's decision with respect to Citation No. 8480766. With respect to Citation No. 8483766, two Commissioners vote to affirm the Judge's decision and two Commissioners vote to reverse. Accordingly, the Judge's decision as to that citation stands as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 17, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SHERWIN ALUMINA COMPANY, LLC.	Docket No. CENT 2017-25-M A.C. No. 41-00906-417961

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
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August 17, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. EMBER ENERGY, LLC	Docket No. KENT 2017-67 A.C. No. 15-19459-412128

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
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August 17, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LHOIST NORTH AMERICA OF VIRGINIA, INC.	Docket No. VA 2017-9-M A.C. No. 44-00082-417992

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
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/s/ Robert F. Cohen, Jr.
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August 17, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CROELL REDI-MIX INC.	Docket No. WEST 2017-45-M A.C. No. 39-01494-414819

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

Having reviewed movant's unopposed motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 2, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2016-0365 A.C. No. 11-03114-412496
v.	
MORRIS SAND & GRAVEL, INC., Respondent	Mine: Morris Sand & Gravel, Inc.

DECISION AND ORDER

Appearances: Daniel Brechbuhl, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner

Daniel P. Foltyniewicz, Risk Management Network, Inc., Wheaton, Illinois for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Docket No. LAKE 2016-0365 involves one 104(d)(1) Order charging Respondent Morris Sand and Gravel, Inc. ("Respondent") with an unwarrantable failure to comply with the Secretary of Labor's mandatory safety standard set forth in 30 C.F.R. § 56.9300(a).

A hearing was held in Chicago, Illinois on March 20, 2017. During the hearing, the parties offered testimony and documentary evidence.[1] Witnesses were sequestered. The issues presented are whether Respondent violated the cited standard, and if so, whether the significant and substantial (S&S), gravity, negligence, and unwarrantable failure designations were appropriate, and what civil penalties should be assessed. For the reasons discussed below, I affirm Order No. 8890960, as written, and assess a civil penalty of $2,000.

[1] In this decision, "Tr. #" refers to the hearing transcript, "Jt. Ex. #" refers to joint exhibits, "P. Ex. #" refers to the Petitioner's exhibits, and "R. Ex. #" refers to the Respondent's exhibits. Jt. Ex. 1, P. Exs. 1-9, and R. Exs. 1-9 were received into evidence.

II. PRINCIPLES OF LAW

A. Gravity and Significant and Substantial (S&S)

The Mine Act describes 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)(1). By contrast, the gravity of a violation "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The gravity component of the penalty assessment is not synonymous with finding that a violation is S&S, but may be based on the same evidence. The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that "the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury . . . but rather on the effect of the hazard if it occurs"). Alternatively, 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." *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S 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 in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984).[2] The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation considers the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).[3]

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[2] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

[3] *See also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

Once the fact of the violation has been established, step two of the *Mathies* analysis focuses on "the extent to which the violation contributes to a particular hazard." The Commission has recently clarified that this step is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016) (*citing Knox Creek Coal Corp.*, 811 F.3d at 163). Step two of the *Mathies* test involves a two-part analysis: 1) identification of the hazard created by the violation of the safety standard; and 2) "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2038.

The third step of the *Mathies* analysis is "primarily concerned with gravity," and whether the hazard identified in step two "would be reasonably likely to result in injury." *Id*. at 2037 (internal citations omitted). The third step's inquiry is whether the hazard, assuming it occurred, would likely result in serious injury. *Knox Creek*, 811 F.3d at 161-65. The question in applying the third step of *Mathies* "is not whether it is likely that the hazard . . . would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest Mining, LLC v. Fed. Mine Safety & Health Rev. Comm'n*, 762 F.3d 611, 616 (7th Cir. 2014). The Secretary "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (*citing Musser Engineering, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc.*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC at 906); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

The fourth *Mathies* factor requires the Secretary to show a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. As a practical matter, the last two *Mathies* factors are often combined in a single showing. *Id*. Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* factors.[4]

B. Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry,

[4] Per training, MSHA inspectors do not designate a violation as S&S unless item 10.A on the citation form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC 669, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)). Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal*, 52 F.3d at 136.

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if aggravating factors exist. The Commission examines seven aggravating factors, which include the duration of the violation, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard, the operator's efforts in abating the violative condition, whether the violation is obvious, whether the violation poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g.*, *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). The Commission and its judges must take into account all of the factors, but may determine, when exercising discretion, that some factors are not relevant, or are much more or less important than other factors under the circumstances. *IO Coal Co.*, 31 FMSHRC at 1351; *Excel Mining, LLC*, 497 F. App'x 78, 79 (D.C. Cir. 2013); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (2001).

D. Penalty Criteria

The Commission has the independent authority to assess all civil penalties. 30 U.S.C. § 820(i). In so doing, Commission Judges must consider six statutory criteria set forth in section 110(i), and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator's history of previous violations, 2) the appropriateness of the penalty to the size of the business, 3) the operator's negligence, 4) the operator's ability to stay in business, 5) the gravity

of the violation, and 6) any good-faith compliance after notice of the violation. *See, e.g.*, *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criterion. *Spartan Mining*, 30 FMSHRC at 723.

Commission Judges are neither bound by the Secretary's proposed assessment nor by his Part 100 regulations governing the penalty proposal process. *American Coal Co.*, 38 FMSHRC 1987, 1993-94 (Aug. 2016) (citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984); *Mach Mining*, 809 F.3d at 1263-64 (MSHA Part 100 regulations are not in any way binding in Commission proceedings)). The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone* Co., 5 FMSHRC 287, 290-94 (Mar. 1983). The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC at 601 (citation omitted).

III. FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Stipulations of Fact and Law

The parties have stipulated to the following:

1. Morris Sand & Gravel, Inc. ("Morris") is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act").

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to §105 of the Act.

3. The citation at issue in this proceeding was properly served upon Morris as required by the Mine Act.

4. The citation at issue in this proceeding may be admitted into evidence by stipulation for the purpose of establishing its issuance.

5. Morris demonstrated good faith in abating the violation.

6. The penalty proposed by the Secretary in this case will not affect the ability of Morris to continue in business.

7. Morris was at all times relevant to this proceeding engaged in mining activities at the Morris Sand & Gravel Mine located in or near Morris, Grundy County, Illinois.

8. Morris' mining operations affect interstate commerce.

9. Morris is an "operator" as that word is defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the Morris Sand & Gravel Mine (Federal Mine I.D. No. 11-03114) where the contested citation in this proceeding was issued.

10. On the date the citation in this docket was issued, the issuing MSHA metal/non-metal mine inspector was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the citation.

Jt. Ex. 1.

B. General Factual Background of Order No. 8890960

Order No. 8890960 was issued on April 20, 2016 by MSHA inspector Peter Ackley, who was conducting a regular E01 inspection at Respondent's Morris Sand & Gravel mine.[5] P. Ex. 3. Respondent's sand and gravel mine contains two dredging lakes, referred to as the "north" or "blue" lake, and the "south" or "white" lake. Tr. 38-39.[6]

Prior to beginning his inspection, Ackley reviewed the mine's records and held a pre-inspection conference with Tom Van Cura, who had been working as a mechanic at Respondent's mine for about 35 years. Tr. 30-31, 36-38, 143-44; *see also* P. Ex. 7 at 16; P. Ex. 5 at 17.[7] During the pre-inspection conference and his review of mine records, Ackley learned that on May 20, 2015, Respondent had opened the south lake for dredging operations. Tr. 30-32. Although the north lake had been previously inspected by MSHA during past E01 inspections, the south lake had not. The most recent inspection prior to Ackley's inspection was conducted by MSHA inspector Don Reed on November 12, 2014, about five months prior to when Respondent opened the south lake. Tr. 29-32; P. Ex. 8 at 1. Therefore, the south lake had never been inspected by MSHA prior to Ackley's arrival at the mine site on April 21, 2016.

After the pre-inspection conference, Ackley inspected the north lake where miners were actively working. Tr. 36. Van Cura accompanied Ackley as Respondent's representative. Tr. 144-46. After inspecting the north lake, Ackley and Van Cura used a public highway to access the south lake. Tr. 39. As they approached the south lake, Ackley noted that there were no berms separating the road and the edge of the lake on the west and south sides of the lake, and only partial berms on the north side. Tr. 39; P. Ex. 5 at 1-13. Ackley also observed tire and excavator tracks on the south, west, and north sides of the lake. Some of the tire tracks were as close as two feet from the edge of the lake. Tr. 41, P. Ex 5 at 2-6 (south side), 7-12 (west side),

[5] Ackley estimated that he has inspected ten different dredging operations during his seven-and-a-half years as an MSHA inspector. Tr. 27.

[6] The two dredging lakes are divided by a public highway that runs from west to east between the lakes. Tr. 50-51.

[7] Despite working at Respondent's mine site, Van Cura is employed by Respondent's parent company, D Construction, rather than by Respondent. Ackley was not aware of this fact. Tr. 30-31, 143-44. Van Cura testified that he was instructed—presumably by Mike Lenzie, Respondent's supervisor—to accompany Ackley during his E01 inspection. Tr. 144-46; *see also* Tr. 97. In any event, I find that Van Cura acted as Respondent's walk around agent with apparent authority during Ackely's inspection.

13 (north side). The path on the south side of the lake was used by vehicles traveling around the south lake. The path on the west side went to the stripping area, and the path on the north side was similarly used to store mobile equipment. Tr. 74-75. There was no sign of activity on the east side of the south lake, so Ackley determined that there was no need for berms there. Tr. 88.

Based on the proximity of the tire tracks to the three-to-four-foot drop-off at the edge of the lake, Ackley issued Order No. 8890960, alleging a violation of 30 C.F.R. § 56.9300(a),[8] based on the following condition:

> There were no berm [sic] or guardrail [sic] provided for the travel way around the south dredge lake. The unbermed area was on three sides of the lake. The south side drop off to the water was approximately 3 to 4 feet. Mobile equipment tracks were observed approximately 2 feet from the edge. With no berms or guardrails provided to serve as a warning, mobile equipment may travel over the edge of the roadway. Should the mobile equipment using the roadway go over the edge it would result in the operator receiving serious injuries. The supervisor has been at the south lake daily to do work place exams. The supervisor engaged in aggravated conduct constituting more than ordinary negligence in that he did not take any action to correct the condition. This violation is an unwarrantable failure to comply with a mandatory standard.

P. Ex. 3.

Ackley brought the alleged violation to Van Cura's attention and explained that there was a drop-off sufficient to cause a vehicle to overturn or endanger persons in equipment. Tr. 73-74. While Van Cura agreed with Ackley's assessment concerning the depth of the drop-off, Van Cura opined that he was unsure whether the grade of the drop-off would cause a vehicle to overturn. Tr. 73-74; Tr. 14, 147. After this conversation, miners put up cones around the violative condition at the south lake. Tr. 67; P. Ex. 5 at 13. Respondent installed berms around the lake and abated the violation by the time Ackely arrived the next day. Tr. 86; P. Ex. 3 at 1; P. Ex. 5 at 18-22.

C. The Violation in Order No. 8890960 was S&S.

The Secretary requests that I affirm Order No. 8890960, as written, and assess the Secretary's proposed penalty of $2,000. The Respondent argues that Order No. 8890960 should be vacated. In the alternative, Respondent challenges the fact of the violation, the S&S, high negligence, and unwarrantable failure designations, and the proposed penalty. Tr. 13-14.

In applying the Commission's *Mathies* factors, I must first determine whether the conditions cited by Ackley in Order No. 8890960 constitute a violation of section 56.9300(a). Section 56.9300(a) requires that "[b]erms or guardrails shall be provided and maintained on the

[8] Section 56.9300(a) requires that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a).

banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). The Commission's decision in *Lakeview Rock Products*, 33 FMSHRC 2985 (Dec. 2011), identified three relevant inquiries for alleged violations of section 56.9300(a): (1) whether there was an established roadway, (2) whether "a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment," and (3) whether any berms or guardrails exist. *See Lakeview Rock Products, Inc*., 33 FMSHRC at 2988. I address each element in turn.

While the term "roadway" is not defined in Part 56 of the Secretary's regulations, the Commission has looked to the "common usage" and "a common-sense application of the standard to the facts" to determine whether a roadway exists. *Capitol Aggregates, Inc*., 4 FMSHRC 846, 846-47 (May 1982) (upholding the ALJ's determination that an elevated ramp used by a front-end loader to dump petroleum coke into a loading hopper is an "elevated roadway"). The Commission has generally found roadways to exist "where a vehicle commonly travels over a surface during the normal mining routine." *Black Beauty Coal Co.*, 34 FMSHRC at 1735; *see, e.g.*, *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 36 (Jan. 1981) (finding that an elevated bench used for haulage is a roadway); *Peabody Midwest Mining, LLC*, 762 F.3d at 615 (finding that a bench regularly used by service trucks during regular mining operations constitutes a roadway).

Ackley observed what he determined to be bulldozer, excavator, and service vehicle or pick-up truck tracks around the south, west, and north edges of the lake. Tr. 41, 74-76, 117-18; P. Ex. 5 at 5-12. Ackley also observed a black truck (likely the dredge operator's vehicle) parked near the south lake, and a dozer and an excavator parked on the north side of the lake. Tr. 75, 104-105. The numerous tracks from tire-mounted and track-mounted equipment were sufficient indicia for Ackley to determine that the travel route around the lake had been used frequently and recently. Tr. 74-75; P. Ex. 5 at 5-12.[9] Although Respondent argued at hearing that the south lake accounted for only twenty percent of the mine's total production, and the travel ways were not used frequently enough to constitute a roadway within the meaning of section 56.9300(a), I do not find this argument persuasive. Tr. 156-161. Even with the reduced activity level, the dredge operator will likely be using the south lake paths as roadways with regularity. I find that vehicles commonly travel around the edges of the south lake during the normal mining routine, and those travel ways constitute roadways within the meaning of section 56.9300(a).

I turn next to the question of whether "a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). Ackley testified that the three-to-four-foot drop-off at the edge of the lake was sufficient to cause a vehicle to overturn. Tr. 67, 73-74. Van Cura agreed with the depth of the drop-off but opined that a vehicle would not overturn. Tr. 147. I credit Ackley's contrary determination based on his years of experience as an MSHA inspector and the fact that the drop-off was three to four feet, which could cause track-mounted equipment, in particular, and tire-mounted equipment to topple over. Ackley designated the violation as reasonably likely to result in injury or illness resulting

[9] There was no sign of activity on the east side of the south lake and Ackley determined that there was no need for berms on that side. Tr. 88.

in lost work days or restricted duty, because overtraveling the drop-off would result in, at minimum, "sprain[s], broken bone[s], [or] strain[s]." P. Ex. 3; Tr. 75. Ackley also credibly testified that mobile equipment accidents have sometimes resulted in miners being knocked unconscious, which poses a drowning risk for any vehicle that over traveled the drop-off and became submerged in the lake.[10] Tr. 76-77. I therefore find that the three-to-four-foot drop off was "of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." *See* 30 C.F.R. § 56.9300(a).

Neither party disputes that the roadways around the south, west, and north sides of the lake lacked berms or guardrails. Tr. 77-78; P. Ex. 5 at 2-12.[11] I therefore find that the lack of berms or guardrails around the roadways surrounding the south lake constitutes a violation of section 56.9300(a).

I next identify the hazard in the first part of step two of the clarified *Mathies* test as set forth in *Newtown Energy*, 38 FMSHRC at 2038. As the Commission explained, "a clear description of the hazard at issue places the analysis of the violation's potential harm in context, by requiring a determination of the relative likelihood that the violation will have a meaningful, adverse effect on conditions miners will encounter during normal mining operations." *Id.* Under *Mathies*, the hazard contributed to by the violation is defined "in terms of the prospective danger the cited safety standard is intended to prevent," and therefore "the starting point for determining the hazard is the actual cited section [of the Code of Federal Regulations]." *Id*. The clear purpose of section 56.9330(a) is to prevent vehicles from over traveling the roadway and overturning or endangering occupants as a result of traveling too close to drop-offs.

Having determined that the lack of berms presents an over traveling and overturning hazard or an endangerment hazard to vehicle occupants near drop-offs, I now consider whether "there exists a reasonable likelihood of the occurrence of the hazard against which the [standard] is directed." *Newtown Energy*, 38 FMSHRC at 2037. In the context of Citation No. 8890960, I must determine whether the unbermed condition of the roadways around the south lake would lead to a vehicle traveling too close to the edge of the lake and overturning or endangering occupants. I note that, under Commission precedent, "[t]he question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations." *Manalapan Mining Co*., 18 FMSHRC 1375, 1382 (Aug. 1996) (Comm'rs Holden and Riley, plurality) (citing *Eastern Associated Coal Corp*., 13 FMSHRC 178, 183 (Feb. 1991); *U.S. Steel Mining Co*., 7 FMRHC at 1130.

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[10] Van Cura testified that the lake was 25 feet deep at its deepest point, but the majority of the lake was probably between 15 and 17 feet deep. Tr. 161. He also testified that January 2016 flooding of the nearby Illinois River resulted in abnormally high water levels in the lake around the time of Ackley's inspection. Tr. 162.

[11] While there remains a factual question as to whether a berm ever existed on the north shore of the south lake, the point is inconsequential because the photographs and testimony concerning the south shore of the south lake clearly show that if there had been berms, they had deteriorated to the point where they were ineffective. Tr. 39; Tr. 60; P. Ex. 5 at 6.

Workplace examination records initialed by Respondent's supervisor Mike Lenzie indicate that miners were actively preparing the south lake to begin production in the week prior to the issuance of Order No. 8890960. P. Ex. 5 at 15-17; Tr. 134-135. On April 14, 2016, miners installed a new cable on the winch for the south lake dredge. P. Ex. 5 at 15. On April 16, three miners (Kevin Mattox, the dredge operator, Mike Nelson, the excavator operator, and Van Cura) were involved in using the excavator to push the dredge from its winter storage location on the shore out into the main part of the lake. Tr. 164-166; P. Ex. 5 at 16. The three miners accessed the lake by driving trucks via the public road to the lake and then around the lake to where the dredge was parked. *Id*. Production began on the south lake on April 19, 2016. Tr. 103. On April 20, Kevin Maddox, the south dredge operator, performed maintenance on the south lake dredge prior to Ackley's arrival. Tr. 102. On April 21, Nelson used the excavator to move the dredge's anchor blocks. Tr. 140; P. Ex. 7 at 13.

Respondent argues that this elevated level of activity around the south lake was unusual, and that the activity level would be greatly decreased in the course of continued normal mining operations. Van Cura testified that the area had a limited use, accounting for only twenty percent of the mine's production, and that there had only been two days of active dredging in 2016. Tr. 159, 161. Moreover, the dredge operator would be the only person traveling around the south lake for the rest of the production season, which Respondent argues would reduce the number of miners potentially exposed to the hazard. Tr. 152. However, given the high level of activity in the week preceding Ackley's inspection, I find that at least four miners were exposed to the hazardous condition, and at least one miner would be regularly exposed under continued normal mining operations. P. Ex. 5 at 15-16; Tr. 103, 164-166. Significantly, the vehicle tracks that Ackley observed were within two feet of the edge of the drop off, indicating that the vehicles that had recently traveled around the lake had already come in close proximity to the drop-off hazard. Tr. 41, 68, 76, 171; P. Ex. 3.

Furthermore, while there may have been fewer miners exposed to the hazardous condition under continued normal mining operations, there was no indication that the Respondent would have corrected the violation had Ackley not issued Citation No. 8890960. Immediately after issuing the citation, Ackley spoke with Lenzie, Nelson, and Mattox regarding the need to berm the south lake. They indicated to him that "they didn't notice that [berms] were missing," despite having been actively preparing the south lake dredge for production during the preceding week. Tr. 35, 121, 132. Consequently, it is likely that the unbermed condition of the south lake would have continued to exist uncorrected under continued normal mining operations. Given these facts, and considering the totality of circumstance surrounding the violation, including the nature of the vehicle tracks observed in close proximity to the three-to-four-foot drop-off, I find that the Secretary has shown that the hazard of a vehicle over traveling the drop-off and overturning or endangering occupants as it traversed the unbermed south lake roadways was reasonably likely to occur.

I now turn to the third and fourth *Mathies* steps, i.e., whether the hazard identified in step two—an overturning or an endangerment hazard to vehicle occupants traveling near a three-to-four-foot drop off of unbermed roadways—would be reasonably likely to result in an injury of a reasonably serious nature. *Newtown Energy*, 38 FMSHRC at 2038. Common sense suggests that people are likely to be injured when a vehicle overtravels a roadway and overturns into a

drop-off. As noted, Ackley designated the violation as reasonably likely to result in injury or illness resulting in lost work days of restricted duty, because overtraveling the drop-off would result in, at minimum, "sprain[s], broken bone[s], [or] strain[s]." P. Ex. 3; Tr. 75. As also noted, Ackley credibly testified that mobile equipment accidents have resulted in miners being knocked unconscious, which poses a drowning risk for any vehicle that over traveled the drop-off and became submerged in the lake. Tr. 76-77. Although Respondent argues that its vehicles were equipped with seatbelts and life jackets, redundant safety measures are not to be considered in determining whether a violation is S&S. Tr. 129, 174; *Cumberland Coal Res.*, 717 F.3d 1020, 1029 (D.C. Cir. 2013); *Knox Creek Coal Corp.*, 811 F.3d at 162; *Buck Creek Coal*, 52 F.3d at 135; *Brody Mining*, 37 FMSHRC at 1691. Moreover, even seatbelts and life jackets would not prevent an unconscious miner from drowning while trapped inside the submerged vehicle. Given these facts, I determine that the injuries reasonably expected to occur from a vehicle overturning or over traveling the three-to-four-foot unbermed drop-offs are likely to be of a reasonably serious nature resulting in at least lost work days and restricted duty, if not permanently disabling or fatal injuries.

In conclusion, I find that the violation of section 56.9300(a) occurred as alleged by the Secretary, satisfying the first prong of the *Mathies* test. I have found that that the hazards created by the violation were reasonably likely to result in a reasonably serious injury. I therefore find that the violation of section 56.9300(a) was S&S and reasonably likely to result in at least lost work days or restricted duty for one person.

D. The Violation in Order No. 8890960 was the Result of Respondent's High Negligence and Unwarrantable Failure to Comply with 30 C.F.R. § 56.9300(a).

Ackley designated the violation in Order No. 8890960 as the result of Respondent's high negligence and unwarrantable failure to comply with section 56.9300(a). The Secretary requests that I affirm the high negligence and unwarrantable failure designations, as written. Tr. 181-87. Respondent requests that I delete the unwarrantable failure designation and disputes the Secretary's high negligence designation. Tr. 191-95.

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. As noted, the Commission specifically considers seven aggravating factors: the duration of the violation, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance with the standard, the operator's efforts in abating the violative condition, whether the violation is obvious, whether the violation poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See, e.g.*, *Manalapan Mining Co.*, 35 FMSHRC at 293; *IO Coal Co.*, 31 FMSHRC at 1350-51; *Consolidation Coal Co.*, 22 FMSHRC at 353.

i. The Extent of the Violative Condition

Determining the extent of a violative condition requires consideration of the scope or magnitude of the violation. *See Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010), *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988). Extensiveness often concerns the degree of the violation and is a question of fact regarding the material increase in the degree of risk posed to miners as a result of the violation. *Eastern Associated* Coal, 32 FMSHRC at 1189. In some situations, extensiveness depends on the number of people affected by the violation. *See Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002).

I find that the violation in Order No. 8890960 was extensive. The lack of berms extended to three sides of the lake, and Ackley observed vehicle tracks on all three sides. Tr. 74-75; P. Ex. 5 at 2-13.[12] While Ackley designated the violative condition as affecting only one miner, the Secretary has shown that at least four miners (Lenzie, Nelson, Van Cura, and Mattox) were involved in readying the lake for active production in the week preceding the issuance of Order No. 8890960. P. Ex. 5 at 14-17; Tr. 102-103, 134-135, 140, 164-66; P. Ex. 7 at 13. I therefore find that this factor weighs in favor of an unwarrantable failure finding.

ii. The Duration of the Violation

The duration of the violative condition is a necessary consideration in the unwarrantable failure analysis. *See, e.g.*, *Windsor Coal Co.*, 21 FMSHRC 997, 1001-04 (Sept. 1999) (remanding for consideration of duration evidence regarding cited conditions). The duration or length of time that the violation exists is particularly critical, because the longer a violative condition or practice exists, the more likely miners will be injured. *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010); *see also Buck Creek Coal*, 52 F. 3d at 136 (7th Cir. 1995) (violation that lasted more than one shift was properly designated as unwarrantable failure); *Consol Coal Co.*, 23 FMSHRC 588, 594 (June 2001) (violation was unwarrantable failure where the violation existed for several shifts).

Ackley issued the citation on April 20, 2016. The testimony and workplace examinations indicate that preparation work for the 2016 dredging season began on April 14, 2016. Tr.134-35; P. Ex. 5 at 15. As previously noted, the Secretary presented extensive evidence regarding the traffic along the south lake roadways and the activity level on the south lake between April 14 and April 20, 2016. P. Ex. 5 at 14-17; Tr. 102-103, 134-135, 140, 164-66; P. Ex. 7 at 13. Furthermore, mine records indicate that the south lake was actively mined as early as May 20, 2015. Tr. 30; P. Ex. 7 at 13. Thus, the hazardous condition existed for at least a week, and possibly a year. I find that the duration of the violation weighs heavily in favor of an unwarrantable failure finding.

[12] As noted above, there was no sign of activity on the east side of the south lake. Ackley concluded that berms were not necessary on that side. Tr. 88.

iii. Whether Respondent was Placed on Notice that Greater Efforts were Necessary for Compliance with 30 C.F.R. § 56.9300(a)

The Commission has stated that repeated, similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with the cited standard. *IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC at 595. The purpose of evaluating the number of past violations is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a serious . . . problem." *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994)). The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *San Juan Coal*, 29 FMSHRC at 131 (citing *Consolidation Coal*, 23 FMSHRC at 595).

The Secretary failed to establish that the Respondent was placed on notice that greater efforts were necessary to comply with section 56.9300(a). Respondent has no prior violation history regarding section 56.9300(a). P. Ex. 9. Moreover, Ackley's inspection was the first inspection of the south lake since it opened for production in May 2015. P. Ex. 7 at 13; P. Ex. 8; Tr. 29-30. I therefore find that Respondent was not on notice that greater efforts were necessary for compliance with section 56.9300(a). Accordingly, this factor weighs against a finding of unwarrantable failure.

iv. Respondent Should Have Known of the Existence of the Violation

The Commission has held that knowledge is established by showing "the failure of an operator to abate a violation [that] he knew or *should have known* existed." *Emery Mining Corp.*, 9 FMSHRC at 2002-03 (emphasis added); *see also* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 1602 (1975). In the absence of past violations, an operator's knowledge may be established "where an operator reasonably should have known of a violative condition." *IO Coal Company, Inc.*, 31 FMSHRC at 1356-57; *Drummond Co., Inc.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991) (quoting *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991)). The Commission has held that the extent of the involvement of supervisory personnel in a violation should be taken into account in determining whether an unwarrantable failure occurred, because supervisors are held to a higher standard of care. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001); *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Further, the knowledge or negligence of an agent may be imputed to the operator. *See Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015).

As noted above, despite being actively engaged in preparing the south lake dredge for the 2016 production season, none of the miners working in and around the south lake in the week prior to the issuance of Order No. 8890960 noticed that any berms were missing. Tr. 35, 121, 132. As a supervisor, Lenzie was responsible for conducting routine workplace examinations and for safety and training. Tr. 126; P. Ex. 4 at 1. Although Lenzie did not necessarily conduct each daily workplace examination, he signed off on each of them. Tr. 150;

P. Ex. 5 at 14-17. Moreover, berms were installed on the north lake, and Ackley did not issue any citations regarding insufficient berms in that area. Tr. 36. Given the elevated activity level around the south lake just prior to the Order's issuance and the proximity of the tire tracks to the edge of the three-to-four-foot drop-off, I conclude that a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of section 56.9300(a), would have recognized the over traveling and overturning or endangerment hazards created by the lack of berms. Respondent should have known of the violation, and demonstrated indifference or a serious lack of reasonable care by allowing the violation to continue unabated for a week while significant activity took place to prepare the south lake for the 2016 season. I find that this factor strongly weighs in favor of find an unwarrantable failure.

v. Whether the Violation was Obvious

Inspector Ackley credibly testified that the hazardous conditions were obvious and could "be seen as soon as you pull into the south side." Tr. 75, 126; P. Ex. 4 at 1. The conditions existed for at least a week (if not an entire year). Tr. 30; P. Ex. 7 at 13. Ackley credibly testified that a reasonably prudent miner should have known that berms were necessary around the south lake. Tr. 127. I find that the obviousness of the violation weighs in favor of an unwarrantable failure finding.

vi. Whether the Violation Posed a High Degree of Danger

A high degree of danger posed by a violation may also support an unwarrantable failure finding. *See e.g.*, *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals*, 10 FMSHRC at 709. The degree of danger is a relevant factor, but not a threshold requirement for determining whether a violation is an unwarrantable failure. *Manalapan Mining Company, Inc.*, 35 FMSHRC at 294 (citing *Windsor Coal Co.*, 21 FMSHRC at 1001 (Commission recognizes a number of factors relevant to determining whether a violation is the result of an operator's unwarrantable failure)). The factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure, but the converse is not true, i.e., that the absence of danger precludes a finding of unwarrantable failure. *Manalapan*, 35 FMSHRC at 294. Furthermore, a violation may be aggravated and unwarrantable based on "common knowledge that certain equipment, such as power lines, are hazardous and that precautions are required." *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). For purposes of evaluating whether violative conditions pose a high degree of danger, it may be appropriate to consider the same facts already considered as part of the gravity evaluation in an S&S analysis. *See San Juan Coal*, 29 FMSHRC at 125, 132-33 (remanding for failure to apply S&S findings to danger factor in unwarrantable failure analysis).

As noted above, Ackley designated the violation as reasonably likely to result in injury or illness resulting in lost work days or restricted duty, because overtraveling the drop-off would result in, at minimum, "sprain[s], broken bone[s], [or] strain[s]." P. Ex. 3; Tr. 75. He also credibly testified that mobile equipment accidents have sometimes resulted in miners being knocked unconscious, which poses a drowning risk for any vehicle that over traveled the drop-off, overturned, and became submerged in the lake. Tr. 76-77. That result could very well be

life-threatening or fatal. I therefore find that the violation underlying Order No. 8890960 posed a high degree of danger.

vii. Respondent's Efforts to Abate the Violative Condition

An operator's efforts to abate a violation are relevant to an unwarrantable failure determination. Thus, where an operator has been placed on notice of a problem, the level of priority that the operator places on abatement of the problem is relevant. *IO Coal*, 31 FMSHRC at 1356 (citing *Enlow Fork Mining*, 19 FMSHRC 5, 17 (Jan. 1997)). The focus is on abatement efforts made prior to issuance of the citation or order. *Id.* An operator's efforts to abate a violation before a citation or order issues, even during an inspection, may be a mitigating factor in an unwarrantable failure analysis. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1934 (Oct. 1989).

Here, although Respondent was not placed on notice that greater efforts were necessary to comply with the cited standard, Respondent presented no evidence that it attempted to abate the obvious violation in advance of the issuance of Order No. 8890960. Respondent's supervisor and rank-and-file miners admitted that they did not even notice that the required berms were not present. Tr. 35, 121, 132. Although a reasonable, good-faith belief that a condition did not exist may excuse a lack of abatement efforts, I do not find that Respondent's failure to notice that berms were missing was based on a reasonable good-faith belief that a violative condition did not exist. *See IO Coal*, 31 FMSHRC at 1356. In fact, the record suggests the contrary. Respondent had adequately bermed the north lake, but nevertheless neglected to berm the south lake. Tr. 36. I find that Respondent's failure to abate the violative condition prior to issuance of the citation weighs in favor of an unwarrantable failure finding.

Based on the foregoing discussion, I have found that the violative condition in Order No. 8890960 was extensive, obvious, and of sufficient duration to warrant a finding of unwarrantable failure. In addition, I have found that Respondent should have known of the violative condition, failed to abate it prior to issuance of the citation, and that a reasonable person familiar with the mining industry would have recognized that the lack of berms around the south lake posed a high degree of danger to the miners preparing the lake for the 2016 production season. I therefore find that the violation in Order No. 8890960 was the result of Respondent's high negligence and an unwarrantable failure to comply with section 56.9300(a).

E. Penalty Assessment

The Secretary proposed a penalty of $2,000 for Order No. 8890960. P. Ex. 2. Respondent's miners worked 9,021 hours in 2016. Consequently, I find that Respondent is a small-operator. *Id*.; 30 C.F.R. § 100.3, Table III. The parties have stipulated that the proposed penalty will not affect Respondent's ability to continue in business. Jt. Ex. 1. The parties have also stipulated that Respondent demonstrated good faith in abating the violation. *Id*. Respondent's Assessed Violation History report indicated that in the 15-months preceding Order No 8890960, Respondent received only three 104(a) citations, none of which alleged violations of section 56.9300(a). P. Ex. 9. I have affirmed the Secretary's gravity, high negligence, and

unwarrantable failure designations. Based upon my consideration of the section 110(i) penalty criteria, and the deterrent purposes of the Act, I assess a penalty of $2,000.

IV. ORDER

For the reasons set forth above, Order No. 8890960 is **AFFIRMED**, as written. Respondent, Morris Sand & Gravel, is **ORDERED** to pay a total civil penalty of $2,000 within thirty days of the date of this Decision and Order.[13]

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

Distribution:

Daniel P. Foltyniewicz, Morris Sand & Gravel, Inc., P.O. Box 5312, Wheaton, IL 60189

Daniel Brechbuhl, U.S. Department of Labor, Office of the Solicitor, Cesar E. Chavez Memorial Building, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

/adh

[13] 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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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August 4, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2015-100 A.C. No. 36-09860-369007
v.	Docket No. PENN 2015-232 A.C. No. 36-09860-380876
LITTLE BUCK COAL COMPANY #2, Respondent.	Mine: Buck Mountain Vein

DECISION AND ORDER

Appearances: Ryan Kooi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner

Edmund C. Neidlinger, Pine Grove, Pennsylvania, for Respondent

Before: Judge Rae

I. STATEMENT OF THE CASE

These cases are before me upon two petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). In dispute are five violations issued by the Secretary of Labor ("the Secretary") to mine operator Little Buck Coal Company #2 ("Little Buck"): Citation No. 8000756 in Docket No. PENN 2015-100 and Citation No. 8000752 and Order Nos. 8000753, 8000754, and 8000755 in Docket No. PENN 2015-232.

These matters were initially assigned to a different Administrative Law Judge but were reassigned to me in May 2016, after which a hearing was scheduled. The hearing was held in Allentown, Pennsylvania on January 24, 2017, at which time the parties presented testimony, arguments, and documentary evidence. The Secretary also filed a post-hearing brief. Little Buck did not file a brief.

I have reviewed all of the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness. Based on the entire record and my observations of the demeanor of the witnesses, I uphold the violations as written and assess penalties totaling $8,308.00, for the reasons discussed below.

II. STIPULATIONS

The parties have entered into the following stipulations:

1. Little Buck was an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the mine at which the citations and orders at issue in these proceedings were issued.
2. Operations of Little Buck at the mine at which the citations and orders were issued are subject to the jurisdiction of the Mine Act.
3. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815, 823.
4. Buck Mountain Vein is owned by Little Buck.
6. The individual whose name appears in Block 22 of the citations and orders in contest was acting in an official capacity and as an authorized representative of the Secretary when the citations and orders were issued.
7. The citations and orders contained in Dockets PENN 2015-100 and PENN 2015-232 were properly issued and served by a duly authorized representative of the Secretary upon an agent of Little Buck at the date, time, and place stated in the citations and orders, as required by the Mine Act.
8. Exhibit A attached to the Secretary's Petitions in Dockets PENN 2015-100 and PENN 2015-232 contain authentic copies of the citations and orders with all modifications and/or abatements.
9. MSHA's Data Retrieval System, publicly available at http://www.msha.gov/drs/drshome.htm, accurately sets forth:
    a. The size of Little Buck in production tons or hours worked per year;
    b. The size, in production tons or hours worked per year, of the mine;
    c. The total number of assessed violations for the time period listed; and
    d. The total number of inspection days for the time period listed therein.
10. Exhibit A of the Secretary's Petitions for the Assessment of Civil Penalty accurately sets forth:
    a. The size of Little Buck in production tons or hours worked per year;
    b. The size, in production tons or hours worked per year, of the mine;
    c. The total number of assessed violations for the time period listed; and
    d. The total number of inspection days for the time period listed therein.
11. The R-17 Certified Assessed Violation History Report is an authentic copy and may be admitted as a certified business record of MSHA.
12. As of the time the citations and orders in Dockets PENN 2015-100 and PENN 2015-232 were issued, the Buck Mountain Vein mined a total of 5,117 tons of coal.
13. Little Buck was the controller for the Buck Mountain Vein when the citations and orders in Dockets PENN 2015-100 and PENN 2015-232 were issued.

14. On October 8, 2014, Little Buck had developed the Bottom Split Mammoth Vein approximately 80 feet east off the First Level Intake Rock Tunnel.

15. On October 8, 2014, Little Buck had developed the Intake Rock Tunnel approximately 20 feet south off the Bottom Split Mammoth Vein and intersected the Middle Split Mammoth Vein.

16. Little Buck's Roof Control Plan Addendum (submitted February 27, 2014 and approved March 13, 2014) allowed for Little Buck to develop the Intake Rock Tunnel Gangway only as far as the Bottom Split Mammoth Vein.

17. On October 8, 2014, the entry cited in Order Number 8000753 was not provided with a crosscut or ventilation controls.

19. On or before October 8, 2014, two miners worked inby the entry described in Citation Number 8000756.

Joint Ex. 1; Tr. 5-6.[1]

III. FACTUAL BACKGROUND

The Buck Mountain Vein mine is a small underground anthracite mine located in Schuylkill County, Pennsylvania. Tr. 7, 19-20; GX 8. Anthracite, a type of coal that is harder and purer than the more common bituminous coal, is deposited in parallel veins pitched on an angle and separated by layers of rock.[2] Tr. 27-29. It is mined using conventional mining methods and blasting. Tr. 7, 36. The operator first digs a slope that follows the vein underground and serves as the mine's main entry way, haulageway, and air intake. Tr. 7, 28-29, 32, 34. Gangways are driven off the slope horizontally to carry intake air and serve as the primary escapeway for the working section. Tr. 29, 34-36. Thirty-five feet above each gangway and running parallel to it, a "monkey" heading is driven to serve as both the return air course and secondary escapeway. Tr. 29, 34-36. The gangway and monkey are connected at intervals by crosscuts referred to as chutes. Tr. 29. Mining is accomplished by blasting upward from the monkey to create rooms referred to as breasts with pillars of coal between them. Tr. 29, 34-36. Coal blasted from the top of the breasts is allowed to feed down through the chutes by gravity to the gangway, where it lands in carts that are pushed to the slope to be transported out of the mine. Tr. 34-36. After the coal is mined out at one level, the operator sinks the slope another 100 or 150 feet, develops a new gangway, and starts the process over again. Tr. 35-36. Alternately, the operator can tunnel through the overlying layer of rock to reach the next vein.

[1] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary submitted exhibits numbered GX 1-6, 8-15, and 17-18 and Little Buck submitted exhibits numbered LBCC 1 and 2.

[2] Thus, while bituminous coal often lies flat underground like a sheet of paper, an anthracite coal vein more closely resembles a sheet of paper turned on its edge and slid into the ground at an angle. To view a cross-section of the anthracite veins at the Buck Mountain Vein mine, see the third page of GX 12 (numbered "MSHA072"). Tr. 30-33.

The events that led to this proceeding began with Little Buck's decision to tunnel into a new coal vein. The mine's main slope is cut into the Buck Mountain Vein, which runs east to west and pitches south at an angle of roughly 65 degrees. Tr. 19-20, 32. As of 2013, the active working section where two miners worked on a normal basis was the Buck Mountain Vein first level west section. Tr. 23, 72. In December 2013, Little Buck submitted an addendum to its roof control plan proposing to develop a rock tunnel southward through the top rock of the Buck Mountain Vein first level west gangway to the next overlying vein, the Seven Foot Vein. After intersecting the Seven Foot Vein, Little Buck planned to develop a second rock tunnel back to the Buck Mountain Vein to serve as a return airway. The operator would then develop a gangway and begin mining the Seven Foot Vein. If the vein were found to be unsuitable for mining, Little Buck would continue its rock tunnel south to the next vein, the Bottom Split Mammoth Vein (referred to hereinafter as "the Bottom Split"). GX 9; Tr. 31, 49-50. After submitting this proposal to MSHA, Little Buck began developing the rock tunnel without waiting for MSHA to review and approve it. Tr. 81-82. On January 22, 2014, an MSHA inspector issued a citation for this conduct (which is not at issue in this proceeding). GX 15. That same day, MSHA approved the proposed plan addendum so it could be incorporated into Little Buck's roof control plan and development of the rock tunnel could continue. GX 9.

The next month, Little Buck submitted addenda to its roof control and ventilation plans explaining that it had continued to tunnel south and had reached the Seven Foot Vein, which was discovered to be completely faulted to the east. GX 10; GX 11; Tr. 52-53. A "faulted" area is one that cannot safely be mined due to unsuitable geological conditions such as weak rock strata or a twist in the coal seam. Tr. 65. To avoid the faulted area to the east, Little Buck proposed to drive 40 feet west on the Seven Foot Vein and then develop the return rock tunnel back to the Buck Mountain Vein from that location. Mining would then proceed to the west on the Seven Foot Vein. MSHA approved the proposal on March 13, 2014. GX 10; GX 11; Tr. 52-55, 65.

Several months later, Little Buck submitted yet another proposed plan addendum explaining that, after advancing west on the Seven Foot Vein and developing two chutes and a return rock tunnel, it had encountered more faulting and severely unstable roof and bottom rock, meaning that the Seven Foot Vein could not safely be mined any further west. Thus, Little Buck planned to stop developing the Seven Foot Vein and continue the rock tunnel south to the Bottom Split. After intersecting the Bottom Split, Little Buck would develop a return rock tunnel from the Bottom Split to the Seven Foot Vein "using the same procedure" described in the March 2014 addendum. MSHA approved this proposal on August 19, 2014. GX 12; Tr. 41-43, 55-56, 137-39.

On October 8, 2014, MSHA Inspector Michael J. Dudash[3] traveled to the mine to conduct a regular quarterly inspection. Tr. 18, 21. He had already reviewed the mine's roof control and ventilation plans, which were on file with MSHA, and had conducted an imminent

[3] Dudash has worked for MSHA for approximately 19 years. He became a coal mine inspector in 1999 after undergoing a year of training at MSHA's Mine Academy in Beckley, West Virginia, and later underwent additional specialized training to become a roof control and ventilation specialist. Dudash had previously worked for a small family-owned anthracite mining business for more than 15 years, gaining experience in "all of the aspects of underground mining and then later surface mining." Tr. 14-17.

danger run two days earlier. Tr. 18-19, 73, 119-20, 157-58. When he arrived at the mine at 6:00 AM, the working shift had not yet begun and the only person onsite was mine examiner and foreman Edmund Neidlinger, who is also the mine's co-owner, operator, and pro se representative in this proceeding and is the person who prepared and submitted the three roof control addenda described above. Tr. 4, 21-22, 72, 189-91. Inspector Dudash reviewed the preshift exam record on the surface then accompanied Neidlinger underground on his preshift examination of the active working section. Tr. 23-24, 167.

At hearing, Dudash notated a map to show what he had observed underground. *See* GX 19[4]; Tr. 42-44, 54, 56-67, 74. He had expected to encounter mining consistent with the projected development depicted on the map – that is, he expected to find that the rock tunnel had been extended to the Bottom Split, a return rock tunnel had been developed back to the Seven Foot Vein workings, and the Bottom Split was being developed to the west. Tr. 44. Instead, Little Buck had developed a gangway 80 feet east on the Bottom Split with no monkey heading or return rock tunnel. Tr. 56-57, 63-64. Ventilation was being provided by a blowing fan that was pushing air approximately 180 feet through 12-inch ventilation tubing to the face. Tr. 61-62, 125-26.

In addition, Little Buck had continued to develop the rock tunnel south of the Bottom Split. Tr. 57-58. A barricade had been erected at the top rock of the Bottom Split, but Dudash asked Neidlinger to remove it so he could see how far south the rock tunnel had been developed. Tr. 13, 69, 94-95, 121. After it was removed, Inspector Dudash could travel only about ten feet south before reaching an area where the roof had collapsed at the point where the rock tunnel intersected another coal vein, which Neidlinger identified as the Middle Split.[5] Tr. 59-60, 73-74, 95. Although Dudash could not travel beyond the roof fall, he testified he could see into a coal face in the Middle Split which he estimated to be about 30 feet away. Tr. 59, 63, 95. (Later, after the roof had been supported, Dudash returned to the area to measure it and found that the distance from the barricade to the end of the rock tunnel was 20 feet, and the operator had driven east from the end of the rock tunnel into the Middle Split for an additional 20 feet. Tr. 95-96.) There were no ventilation controls in the area beyond the barricade and no detectable air movement. Tr. 71, 75, 94, 96. The alarm on Dudash's Solaris multi-gas detector went off, signaling low oxygen. Tr. 68-71, 96-97, 100. The reading was 19.4% oxygen, whereas the regulations require the air to be maintained at 19.5% oxygen. Tr. 69-70, 96, 99. Dudash took an air sample with a vacuum bottle which he later submitted to an MSHA laboratory for analysis and which confirmed his oxygen reading. Tr. 97-99; GX 18.

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[4] GX 19 is a blown-up copy of the map that appears in the August 2014 addendum (GX 12) on the page numbered "MSHA073." The court reporter labeled the marked-up map "GX 18" after hearing. *See* Tr. 3. I have relabeled it "GX 19" because another exhibit is already designated as GX 18. *See* Tr. 110.

[5] Neidlinger later decided this was actually the Top Split. Tr. 207-08. Because the parties more frequently called it the Middle Split throughout the hearing, it is referred to as such in this decision. The Bottom Split, Middle Split, and Top Split are three coal veins that together comprise one larger formation called the Mammoth Vein. Tr. 27-28.

Inspector Dudash believed that both the mining to the east on the Bottom Split and the further development to the south were outside of what was allowed under Little Buck's roof control and ventilation plans. Tr. 64-68, 81. Accordingly, he issued Citation No. 8000752 and Order No. 8000755 for violations of the roof control plan and ventilation plan, respectively. Tr. 67-68, 115-16; GX 1; GX 4. Little Buck abated the violations by submitting an addendum proposing to convert the existing rock tunnel into a return air course and develop a separate rock tunnel to the east to serve as the intake air course. MSHA approved the proposal on October 14, 2014. GX 13; Tr. 82-88, 141-43, 148-51. The new rock tunnel branched off of the existing rock tunnel just north of the Seven Foot Vein and connected to the Bottom Split gangway. GX 13. Little Buck was also required to develop a monkey heading in the Bottom Split. GX 13. Despite taking these corrective measures and seemingly admitting to violating his plans, Tr. 175, Neidlinger maintains that the plan violations were not as serious as Inspector Dudash indicated, for several reasons, including that the plans did not specify whether development of the Bottom Split would proceed to the east or west and that Little Buck mined past the Bottom Split by accident. Tr. 12-13, 168-70.

In addition to the plan violations, Inspector Dudash also issued Order Nos. 8000753 and 8000754 on the day of the inspection alleging that Little Buck failed to conduct an adequate preshift examination or install ventilation controls in the area south of the Bottom Split. GX 2; GX 3; Tr. 115-16. Later, after the MSHA laboratory analysis of the air sample he had taken in that same area confirmed that low oxygen had been present, Dudash issued a fifth violation, Citation No. 8000755, alleging an air quality violation. GX 5; Tr. 116. The narrative portions of Order Nos. 8000753 and 8000754 state that, to abate the violations, Little Buck extended ventilation controls into the Middle Split entry and traveled the entire area south of the Bottom Split to conduct an adequate examination, both of which would have required the operator to timber up the roof in the area where it had collapsed so that men could walk under it. GX 2; GX 3. However, Neidlinger disputes that the area where the roof collapsed was re-timbered and contends that ventilation tubing was not extended all the way to the end of the Middle Split entry. Tr. 185-87. He further argues that the area south of the Bottom Split did not need to be examined because it was part of a return air course, and he also believed that Little Buck was not required to install ventilation controls or conduct examinations because it had already fulfilled its duty to protect miners by barricading the area off. Tr. 13-14, 116-17.

IV. LEGAL PRINCIPLES

A. Violation

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

B. S&S (Significant and Substantial) and Gravity Findings

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S "if, based upon 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." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated S&S:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987).

The Commission recently stated that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug. 2016). The second step "addresses the extent to which the violation contributes to a particular hazard" and "is primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Id.* Thus, the second step requires the judge to first identify the hazard, which the Commission defines "in terms of the prospective danger the cited safety standard is intended to prevent," then determine whether the violation sufficiently contributed to this hazard by considering "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard." *Id.* at 2038. At the third step, the judge must determine whether the occurrence of the hazard would be reasonably likely to result in injury, assuming the hazard were to occur. *Id.*

The S&S determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co.*, 17 FMSHRC 508, 511-12 (Apr. 1995); *see, e.g.*, *Wolf Run Mining Co.*, 36 FMSHRC 1951, 1957-59 (Aug. 2014). Evaluation of the reasonable likelihood of injury should be made assuming "continued normal mining operations," *U.S. Steel Mining Co.,* 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be made "in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). The inspector's judgment is also an important element of the S&S determination. *Wolf Run*, 36 FMSHRC at 1959; *Mathies*, 6 FMSHRC at 5.

The S&S nature of a violation and the gravity of the violation are not synonymous, although they are frequently based on the same or similar factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). The Secretary assesses gravity in terms of the reasonable likelihood of injury, the severity of the expected injury, the number of persons affected, and whether the violation is S&S. The Commission generally expresses gravity as the degree of seriousness of the violation. *Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The Commission has pointed out that the focus of the gravity inquiry "is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation*, 18 FMSHRC at 1550; *see also Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance on the operator's part, or a violation that could combine with other conditions to set the stage for disaster).

C. Negligence and Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary's regulations, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). The Secretary defines high negligence as having occurred in connection with a violation when "[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances." *Id.* § 100.3, Table X. The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc.*, 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015) (explaining that Commission ALJs "may evaluate negligence from the starting point of a traditional negligence analysis" rather than adhering to the Secretary's Part 100 definitions); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

More serious consequences can be imposed under the Mine Act for violations that result from the operator's unwarrantable failure to comply with mandatory health or safety standards. The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). 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, 193-94 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995).

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 or mitigating circumstances exist. These factors often include (1) the extent of the violative

condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice prior to the issuance of the violation that greater efforts were necessary for compliance. *See CAM Mining, LLC*, 38 FMSHRC 1903, 1909 (Aug. 2016); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Assoc'd Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal*, 31 FMSHRC at 1351. However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

V. ANALYSIS AND CONCLUSIONS

A. Citation Number 8000752 (Roof Control Plan Violation)

1. Violation of 30 C.F.R. § 75.220(a)(1)

Citation No. 8000752 was issued on October 8, 2014 under section 104(d)(1)[6] of the Mine Act and alleges:

> The operator is not following his roof control addendum, approved August 19, 2014. The operator has developed the 1st level Bottom Split Mammoth Vein gangway east approximately 80 feet off the first level intake rock tunnel gangway (MMU-001-0)[.] In addition, the operator has developed the same intake rock tunnel gangway approximately 20 [feet] south of the Bottom Split Mammoth Vein, and intersected the Middle Split Mammoth Vein. The Middle Split Mammoth Vein gangway is developed approximately 30 feet east off the same intake rock tunnel gangway. Pages one and three of the operator's approved roof control addendum clearly states [sic] that he will only develop the rock tunnel gangway to the Bottom Split Mammoth Vein and he will only develop the Bottom Split Vein west off the same rock tunnel gangway. The operator does not have an approved plan to develop the intake rock tunnel gangway beyond the Bottom Split Mammoth Vein or to develop the Bottom Split Mammoth Vein east of the intake rock tunnel gangway. The preshift exam record states that the east Bottom Split Mammoth Vein gangway was started

[6] The issuance of a citation under section 104(d)(1) denotes that the alleged violation was S&S and was caused by the mine operator's "unwarrantable failure" to comply with a mandatory health or safety standard. *See* 30 U.S.C. § 814(d)(1).

> September 15, 2014 and that the Middle Split Mammoth Vein was worked September 16, through September 29, 2014. The preshift examiner, Edmund Neidlinger, is also the mine foreman and co-owner of this mine. He has been conducting the preshift examinations since at least July 30, 2014 to present. The operator, Edmund Neidlinger, was issued Citation 8000809, January 22, 2014 for starting this same intake rock tunnel gangway from the Buck Mountain Vein without an approved roof control plan.

GX 1.

The standard alleged to have been violated is 30 C.F.R. § 75.220(a)(1), which states: "Each mine operator shall 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 purpose of the roof control plan is to set parameters governing how the mine roof and ribs will be supported to prevent them from collapsing and causing harm to miners. Tr. 45. For example, Little Buck's plan (admitted to the record as GX 8) specifies the size, configuration, and spacing of the timbers the operator is required to install to support the roof in each different area of the mine, including the slope, gangway, monkey, chutes, and breasts. GX 8; Tr. 46, 48. An operator can amend or supplement its roof control plan by submitting a proposed addendum, which must be approved by the District Manager before it can be incorporated into the plan and implemented at the mine. Tr. 47, 134, 155-56, 204-06. After a roof control plan or plan addendum has been approved by the District Manager and adopted by the operator, its provisions are enforceable at the mine as mandatory safety standards. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (May 2006).

In this case, as discussed above, Little Buck submitted a series of addenda that were incorporated into its roof control plan to permit it to tunnel south from the Buck Mountain Vein to the Seven Foot Vein and eventually the Bottom Split. The Secretary contends that Little Buck violated its plan in five different ways: by continuing to develop the rock tunnel beyond the Bottom Split; by failing to adequately support the roof in the rock tunnel; by mining for 20 feet on the Middle Split; by mining to the east, rather than the west, on the Bottom Split; and by mining 180 feet without connecting a return airway or alternate escapeway. Sec'y Br. 15-17.

Regarding the first allegation, Little Buck has essentially conceded that it committed a plan violation by developing the rock tunnel south of the Bottom Split. Little Buck stipulated that although its March 2014 addendum allowed for development of the rock tunnel only as far as the Bottom Split, the tunnel had been extended approximately 20 feet south and had intersected the Middle Split by the date of the inspection, and Neidlinger admitted as much at hearing. Joint Ex. 1; Tr. 12-13, 169-70. Although the stipulations specifically reference the March addendum, I note that Little Buck's other two plan addenda did not permit development south of the Bottom Split either. *See* GX 9; GX 12. Continuing to tunnel south without permission from the District Manager was clearly a violation.

I also agree with the Secretary's allegation that Little Buck failed to adequately support the roof in the rock tunnel south of the Bottom Split in the area where the roof fall occurred. Neidlinger asserts that the rock tunnel was timbered in accordance with the roof control plan. Tr. 170. However, the plan and its addenda were specific to the veins where Little Buck was expected to be mining, not the rock tunnel or any of the veins south of the Bottom Split. *See* Tr. 48-49, 147-48. Moreover, the plan requires Little Buck to use whatever measures are necessary to support the top when adverse roof conditions are encountered. Tr. 146; GX 8 at 19. The roof collapsed in the rock tunnel at the point where it intersected with the Middle Split because the coal was so thick in the Middle Split vein that the roof support installed at that location admittedly "wasn't sufficient." Tr. 170. Thus, Little Buck violated the roof control plan and § 75.220(a)(1) by mining into a new area without implementing any measures to adequately address the adverse geological conditions that were present there in the form of an unusually thick coal seam.

Mining coal on the Middle Split was also a violation. Inspector Dudash's sketch of the development below the Bottom Split shows an L-shaped area with an entry or gangway driven eastward on the Middle Split vein at a 90 degree angle to the rock tunnel. GX 19. Dudash initially could not determine exactly how far east the Middle Split had been developed, but estimated approximately 30 feet, which he noted in the citation. Tr. 59, 63, 95; GX 1. He testified that later, after the roof had been supported, he returned to the area to measure the tunnels and found that, in addition to driving the rock tunnel 20 feet south of the barricade at the Bottom Split, the operator had driven 20 feet east from the end of the tunnel into the Middle Split. Tr. 95-96.

Neidlinger denied engaging in any mining on the Middle Split and characterized Dudash's sketch as inaccurate. Tr. 178-81. According to Neidlinger, the rock tunnel veered slightly southeast beyond the Middle Split to avoid a patch of conglomerate rock that could not be mined without special equipment, but there was no gangway leading east nor a coal face in that vein. Tr. 180-86. Neidlinger further contended that his men intersected the Middle Split by accident. He explained that when they began developing the rock tunnel, they did not have an engineering cross-section or any bore holes to tell them exactly where the veins were or how far apart they lay. Tr. 12-13, 169-70. When they first reached the Bottom Split, they tunneled through it and continued driving south because the coal was only 10 inches thick and they believed it to be a small leader vein, a type of formation that is commonly found between larger veins in anthracite mines. Tr. 13, 169-70. It was only when they reached the Middle Split that they realized their error. Neidlinger testified that the coal in the Middle Split was so thick that he knew right away they had tunneled too far and immediately withdrew his men and equipment to the Bottom Split. Tr. 13, 170, 177-78.

Although Little Buck may have initially intersected the Bottom Split unwittingly, the evidence does not bear out Neidlinger's assertions that he withdrew his men from the Middle Split immediately upon intersecting it and did not engage in any mining on that vein. The mine's preshift examination records tell a different story. According to Dudash, the records reveal that

the Middle Split was examined from September 15 or 16 until on or about September 30,[7] indicating that men were working in the vein for almost two weeks. Tr. 60, 63, 73. Neidlinger does not dispute Dudash's description of the exam records. Moreover, Neidlinger testified that he abandoned the area south of the Bottom Split only after the roof collapsed, contradicting his own testimony that he withdrew immediately. Tr. 170. It was not inconsistent with Little Buck's past behavior to commence or continue mining into an area without permission from MSHA, as the operator had previously received a citation for beginning this very rock tunnel without waiting for MSHA's approval. Tr. 81-82; GX 15. In addition, Inspector Dudash testified that he measured the tunnels beyond the Bottom Split after the collapsed roof in the area had been re-timbered and definitively determined that Little Buck had driven 20 feet east on the Middle Split. Tr. 95-96. Twenty feet of development in the coal vein is obviously inconsistent with Neidlinger's account that he withdrew as soon as he intersected it.

Neidlinger disputes that Dudash actually walked into the entry on the Middle Split and measured it, arguing that the area where the roof collapsed was never timbered up and it was too wet for Dudash to travel beyond the roof fall. Tr. 186-87. I reject these contentions. I have no doubt that Dudash, a roof control specialist bearing no apparent ill will toward Little Buck who testified from memory without referring to his notes once and who quite candidly admitted Little Buck likely could have taken the same actions without incurring any violations if it had simply obtained MSHA's approval first, Tr. 154, was a credible witness. Dudash testified there was only a small amount of water on the mine floor beyond the roof fall, and he could and did travel through it to take measurements and terminate the violations. Tr. 203. He also explained that the roof needed to be re-timbered so that mine personnel could travel under it to extend ventilation tubing to within 17 feet of the face of the Middle Split to abate Order No. 8000754 (the ventilation control violation). Tr. 202-04. The abatement narratives in that order and Order No. 8000753 (the preshift exam violation) support this testimony, indicating that after the inspection, Little Buck extended ventilation tubing into the Middle Split and a preshift examiner accessed the area to conduct an adequate examination so the violations could be terminated. GX 2; GX 3. Considering all the foregoing, I credit Dudash's allegation that he measured the entry on the Middle Split and found that Little Buck had mined 20 feet in this vein, which violated the roof control plan.

Mining east rather than west on the Bottom Split also violated the roof control plan. Neidlinger claims that characterizing the eastward development as a violation is "a total misunderstanding" of his plan addenda. Tr. 168. He admits the addenda he submitted were confusing, but asserts that his original plan was to drive east on both the Seven Foot Vein and the Bottom Split and eventually connect the return to the east side of the Buck Mountain Vein workings across the main slope or connect the return in the same manner as set forth in the October 2014 addendum that was submitted to abate the violation. Tr. 153, 178, 194, 200. The map submitted with the January 2014 addendum appears to support this assertion, as it shows projected development to the east of the rock tunnel on both the Seven Foot Vein and the Bottom Split. *See* GX 9 (page numbered "MSHA053"); Tr. 136-37.

[7] There is some discrepancy regarding the timeframe in which the area was worked and when it was or should have been preshifted – specifically as to whether the examinations ended on September 26, 29, or 30. *See* Tr. 60, 63, 73, 114, 206; GX 1; GX 2; GX 3; GX 4; GX 6 at 12, 28. Regardless, men were working in the Middle Split for almost two weeks.

However, the fifth paragraph in the narrative portion of the addendum clearly states that development of the veins will proceed to the west. GX 9; Tr. 159-61. Likewise, both the text and the maps[8] in the March and August 2014 addenda, which supersede the January addendum, indicate that the Seven Foot Vein and Bottom Split will be mined to the west because the Seven Foot Vein was unmineable to the east. GX 10; GX 12; Tr. 53-56, 161-65, 189-91. Neidlinger has been working in the mining industry for forty years. Tr. 171. An operator with his experience should be well aware that the wording of the roof control plan and addenda and the maps submitted in support of them must be precise and accurate in order for MSHA to be able to approve them. Neidlinger prepared the maps and narratives at issue in this case and would have used terms with specific meanings. There are only two directions mining could have proceeded off the rock tunnel, east or west, and Neidlinger made it very clear which directions he was referencing whenever he encountered faulting and proposed ways to work around it. It is not plausible to believe he was simply confused about which direction he was permitted to mine.

Further, the August addendum stated that Little Buck would connect a return airway from the Bottom Split to the Seven Foot Vein "using the same procedure" described in the March addendum, which would be impossible or very difficult to accomplish if the Bottom Split were developed to the east. GX 12. The referenced procedure was to develop a chute upward in the front/overlying/south vein (in this case, the Bottom Split) then develop a rock tunnel to meet it from the back/underlying/north vein (in this case, the Seven Foot Vein) in order to "have [the] return connected in like an apex," which would be infeasible if the workings in the front vein were not aligned at least roughly parallel to the workings in the back vein. GX 10; Tr. 65, 140-41, 192-93. Here, the workings in the two veins were not aligned at all.

Considering all the foregoing evidence, I find that the March and August addenda permitted mining on the Bottom Split only to the west of the rock tunnel. Little Buck violated its approved roof control plan by developing a gangway to the east instead.

Finally, I find that Little Buck also violated its roof control plan by mining approximately 180 feet without developing a return airway or secondary escapeway. The roof control plan mandates that chutes (crosscuts) will be developed at least every 60 feet along each gangway. GX 8 at 18; Tr. 64, 147-48. The chutes are an important feature because they connect the gangway to the monkey heading, which carries return air and serves as a secondary escapeway. Little Buck's plan addenda indicated that chutes would be developed on 40 foot centers. Tr. 66; GX 10; GX 12. The addenda also indicated that, whenever it was feasible to do so, Little Buck would immediately develop a return after intersecting a new vein. GX 9; GX 12; Tr. 133-34. Nonetheless, starting at the Seven Foot Vein, Little Buck drove a rock tunnel south

[8] The map in the August addendum on the page numbered "MSHA073" shows projected westward development that has been sketched in by hand and labeled "Bottom Split Vein." GX 12. At hearing, Neidlinger admitted he prepared the addendum but denied sketching in the projected westward development on the map and suggested that someone in the MSHA District Office must have added it. Tr. 191, 195-98. However, the handwriting on the map is consistent with all the other materials submitted with the addenda and appears to be Neidlinger's. Tr. 196. Further, Inspector Dudash testified that operators are responsible for submitting maps in support of plan proposals and MSHA never prepares them or marks them up. Tr. 205-06. I reject Neidlinger's assertion that he did not add the markings on the map in question.

approximately 100 feet to intersect the Bottom Split and then drove a gangway directly east for 80 more feet on the Bottom Split without developing a return rock tunnel, a monkey heading, or any chutes, in violation of the roof control plan. Tr. 63-64, 148.

I conclude that Little Buck violated the mandatory safety standard at § 75.220(a)(1) by violating its approved roof control plan and addenda in the multiple ways discussed above.

2. S&S and Gravity

Inspector Dudash marked this violation as S&S and reasonably likely to cause a lost workdays or restricted duty type injury to two miners. GX 1. He testified that mining outside of the roof control plan is generally considered highly unsafe, but multiple other more specific factors influenced his opinion that this particular violation was S&S, including that intake air was being pushed 180 feet by a fan, no secondary escapeway was provided for that entire distance, there were no ventilating devices in place to move air south of the barricade at the Bottom Split, and low oxygen was present in that area. Tr. 68-72.

With regard to the S&S determination, the first prong of the *Mathies* test is satisfied by my finding of a violation of a mandatory safety standard.

The second element of the test is also satisfied because mining outside of the roof control plan contributed to several discrete safety hazards that were reasonably likely to occur. First, by tunneling south of the Bottom Split and mining into the Middle Split without developing a plan to support the roof in this very thick coal seam and without obtaining MSHA's input and approval of the plan, Little Buck contributed to the hazard that a roof or rib fall would occur with continued normal mining operations due to the lack of roof control parameters tailored to the geological conditions in the newly developed area. A roof fall did, in fact, occur due to inadequately supported roof.

Second, the violation also created a hazard in that there was no secondary escapeway in the entire area south of the Seven Foot Vein. The operator had driven the rock tunnel a total of approximately 120 feet south (about 100 feet from the Seven Foot Vein to the Bottom Split and 20 feet beyond the Bottom Split) and developed two entries to the east (the 80-foot entry on the Bottom Split and the 20-foot entry on the Middle Split) without driving a second rock tunnel or monkey heading to carry return air separately and to serve as an alternate escapeway. If an emergency had arisen, miners working anywhere south of the Seven Foot Vein along the entirety of the rock tunnel and the Bottom Split and Middle Split workings would have had only one possible escape route – the existing rock tunnel. If passage through the rock tunnel had been impeded, they would have had no escape route at all.

The likelihood an emergency would occur with continued normal mining operations was increased by the ventilation hazards present in the area, which Inspector Dudash cited in the other four violations at issue in these proceedings and which are discussed in greater detail below. To briefly summarize, there was no monkey or return tunnel south of the Seven Foot Vein to separate the return air from the areas where miners worked and traveled. Tr. 63-64. Instead, the operator was using tubing and an air-moving fan to ventilate the Bottom Split. Tr.

125. The fan was pushing clean air through 180 feet of tubing, a much longer distance than the 40 to 60 feet (the distance between crosscuts) contemplated in the ventilation plan, and air that had swept the face was then allowed to flow back outside of the tubing. Tr. 68, 76, 126. For this reason, miners on the active MMU in the Bottom Split were required to work in 180 feet of dirty air that had already swept the face, including air that had passed the barricaded-off area south of the Bottom Split. Tr. 118, 126. The entire 40 feet of development in the barricaded area south of the Bottom Split was found to have no ventilation controls and no air movement, and low oxygen was detected there. Tr. 70-71, 96-99, 112; GX 3; GX 5. The barricade was not airtight and would not have prevented bad air from rolling out onto the working section, and moreover, by blocking access to the area, it prevented the operator from conducting preshift examinations to identify and address the hazardous ventilation conditions described above. Tr. 69-70, 80. In sum, ventilation was inadequate south of the Seven Foot Vein. If an emergency were to arise stemming from inadequate ventilation, Little Buck's violation of its roof control plan contributed to the discrete hazard that the miners on the active working section would be unable to escape the area due to the lack of a secondary escapeway.

The third and fourth *Mathies* elements inquire whether the hazard, assuming it were to occur, would be reasonably likely to result in a reasonably serious injury. A roof fall actually occurred in this case. Fortunately, no one was injured. However, roof or rib collapses are historically a leading cause of injury in underground mines and are reasonably likely to cause serious or fatal crushing injuries to anyone in their vicinity. In this case, two miners were regularly working underground on the active working section at the time of the violation and were therefore exposed to the hazard. Tr. 72-73. With regard to Little Buck's failure to maintain a secondary escapeway, assuming an emergency were to occur underground such as a mine fire or encroachment of bad air on the working section that would necessitate the use of an alternate escapeway, any miners on the section would be trapped underground and would be reasonably likely to incur serious injuries or perish. Accordingly, the third and fourth *Mathies* elements are satisfied.

Because the four *Mathies* elements are met, I find that this violation was S&S. I also find that this was a serious violation because it could have caused death or serious injury to the two miners working south of the Seven Foot Vein due to a roof or rib collapse arising out of Little Buck's failure to comply with an approved roof control plan or due to entrapment in the mine during an emergency arising out of Little Buck's failure to maintain a secondary escapeway.

3. Unwarrantable Failure and Negligence

Dudash marked this violation as involving a high degree of negligence and designated it an unwarrantable failure to comply with a mandatory safety standard. GX 1. He reasoned that Neidlinger is the owner, operator, and foreman of the mine who puts together the plans, signs them, and examines the mine on a daily basis, and who had received a citation less than a year earlier for mining outside of his roof control plan, yet he knowingly violated his plans again by mining to the south and east without seeking MSHA's approval. Tr. 76-77.

Extensiveness of Violation; Duration; Degree of Danger Posed

The extensiveness of a violation is usually analyzed in terms of the physical dimensions of the affected area, the number of miners endangered, the efforts required to abate the violation, or other similar factors. This violation was extensive in that Little Buck mined 80 feet outside of its roof control plan on the Bottom Split and another 40 feet in the areas south of the Bottom Split. *See* Tr. 77. In addition, all of the miners on the working section would have been exposed to the dangers presented by the violation. Neidlinger suggested that he was required to do almost nothing to abate the violation and simply carried on with his plans to drive east, *see* Tr. 141, 153, but I find that the violation required extensive abatement actions. Little Buck was required to develop a monkey heading and crosscuts and drive a second rock tunnel all the way from the Bottom Split gangway to the rock tunnel north of the Seven Foot Vein.

At the time of the October 8, 2014 inspection, the examination records revealed that Little Buck had been mining on the Bottom Split and Middle Split since September 15 or 16, 2014. Tr. 77-78. Accordingly, the duration of this violation was approximately 23 days.

During this entire time period, as discussed above, all the miners on the active working section were subjected to the danger of roof or rib falls because they were working in locations that were not covered by an approved roof control plan. In addition, they were exposed to the hazards posed by working on a section without a secondary escapeway. Accordingly, I find that the degree of danger posed by the violation was high.

Knowledge of Violation; Obviousness

Knowledge of a violation is established where the operator knew or reasonably should have known of the violation. *Coal River Mining, LLC*, 32 FMSHRC 82, 95 (Feb. 2010). The knowledge or negligence of an agent may be imputed to the operator. *Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015); *Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

Inspector Dudash testified that he himself did not notice that Little Buck was mining in the wrong direction until he had looked over the plans in detail, but he believed the violation should have been obvious to Neidlinger because he was the person who had drafted and submitted the plan addenda, was responsible for implementing them and ensuring compliance with them, and was the foreman responsible for directing the everyday work of the miners. Tr. 21-23, 78-80, 165. Neidlinger had been examining the mine since at least July 29, 2014. Tr. 21-22. He admitted he wrote the plans at issue in this case and submitted them to MSHA. Tr. 189-91, 193. In Inspector Dudash's opinion, Neidlinger was well aware of the requirements of the roof control plan and simply ignored them. Tr. 166. I agree. As the mine's co-owner, operator, foreman, and preshift examiner who regularly traveled underground to inspect the active working section, I find that Neidlinger had knowledge of this violation. Because he is an agent of the company, his knowledge is imputable to Little Buck.

Notice of Need for Greater Compliance Efforts

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the unwarrantable failure analysis to the extent the past violations and warnings placed the operator on notice, before the citation was issued, that greater efforts were necessary for compliance with the cited safety standard.

Dudash testified that, at the time this citation was issued, Little Buck had already been warned not to mine outside of its roof control plan because it had received a citation in January 2014 (GX 15, Citation No. 8000809) for beginning development of this very rock tunnel without an approved plan. Tr. 81-82, 144-46. Neidlinger had also received a citation for mining outside his roof control plan at a previous mine when he was leaving pillars that were not wide enough. Tr. 82. However, Inspector Dudash believed that the January citation, alone, placed the operator on notice of the need not to initiate new development without submitting a plan and waiting for approval. Tr. 146. I find that the January citation placed Little Buck and Neidlinger on notice of the need for greater compliance efforts before the subject citation was issued.

Abatement Efforts

Although Little Buck knew of this violation and had prior notice of the need for greater compliance efforts, the operator made no effort to abate the violation and did not submit a plan addendum addressing the many problems created by mining outside its approved plan until after the citation was issued.

Little Buck did erect a barricade to prevent travel south of the Bottom Split, which was an abatement measure of sorts in that it stopped miners from accessing some of the areas that had previously been mined without an approved roof control plan. However, the barricade did not resolve any of the ventilation issues affecting the working section because it was not airtight, and it also prevented anyone from conducting a proper preshift examination of the barricaded area. Tr. 69-70, 80. Moreover, the barricade was erected and the men and equipment were withdrawn from the area beyond it only after the roof had collapsed, at which point miners had already been working in the area for more than two weeks. Tr. 80-81. Thus, I do not consider Little Buck's installment of a barricade to be a significant mitigating factor.

Conclusions

The evidence shows that Neidlinger flatly disregarded the requirements of § 75.220(a)(1) and knowingly forged ahead with development of new areas of the mine without an approved roof control plan. At hearing, Inspector Dudash seemed to lament the senselessness of these actions, noting that "if you [Neidlinger] would have put in for a plan like that originally, you could have done it legally. And you would have not had any problems. The district manager could have looked it over, provided whatever safeguards he deemed necessary to protect you and then allowed you to do it. It all just came for naught that you did it before you got the plan." Tr. 154. Neidlinger should have submitted another plan addendum and waited for MSHA's approval, and his negligence in failing to do so is imputable to Little Buck. Based on all the factors discussed above, particularly the obviousness of this violation, the fact that Little Buck

had recently received a citation for beginning this very same rock tunnel without an approved roof control plan to do so, the extensiveness and degree of danger posed by the violation, and the knowledge and involvement of supervisor and co-owner Neidlinger, I find that Little Buck exhibited aggravated conduct constituted more than ordinary negligence. Accordingly, I find that this violation constituted an unwarrantable failure to comply with the roof control plan and with § 75.220(a)(1), and it was appropriate for Inspector Dudash to issue the citation under 104(d)(1).

For the same reasons, I also find that Little Buck's negligence was high.

B. Order Number 8000755 (Ventilation Plan Violation)

This order was issued on October 8, 2014 under section 104(d)(1)[9] of the Mine Act and alleges, in pertinent part:

> The operator is not following his ventilation control addendum to develop a rock tunnel gangway, approved March 13, 2014. … The operator's approved ventilation addendum clearly shows all development will be on the west side of the intake rock tunnel gangway. The operator's approved roof control addendum indicates the same. In addition, the operator can not develop a return through the 7 Foot Vein to the Buck Mountain Vein, as stated in the approved ventilation addendum. There is no 7 Foot Vein developed east of the intake rock tunnel gangway for a return connection and connecting to the Buck Mountain Vein would put the return on the intake side of the Buck Mountain gangway. The approved ventilation addendum also states that the 7 Foot Vein is totally faulted on the east side and this would make it impossible to develop a complete return rock tunnel. Thus, this addendum is to develop the return to the west. … Two miners work on this MMU-001-0 on a daily basis and are exposed to this violation.

GX 4.

The standard alleged to have been violated is 30 C.F.R. § 75.370(a)(1), which states in pertinent part: "The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." Inspector Dudash explained that the purpose of the ventilation plan is to show how the operator will maintain a complete air circuit to ensure the faces are swept with clean air and any methane and noxious gases are removed from the areas where men are actively working. Tr. 46. As is the case for roof control plan provisions, the provisions of a mine's approved ventilation plan are enforceable as mandatory safety standards at the mine. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (May 2006).

[9] The issuance of an order under section 104(d)(1) denotes that the alleged violation was caused by the mine operator's "unwarrantable failure" to comply with a mandatory health or safety standard and that the operator had already received a 104(d)(1) citation within the past 90 days. *See* 30 U.S.C. § 814(d)(1).

Little Buck's main ventilation plan for this mine was not submitted as evidence. The only portion of the ventilation plan submitted to the record is GX 11, a March 2014 plan addendum that is substantively identical to the March 2014 roof control plan addendum. Tr. 163; *compare* GX 10 *with* GX 11. Dudash testified that Little Buck also submitted an August 2014 ventilation plan addendum containing the same information as the August 2014 roof control addendum. Tr. 44-45. The Secretary contends that Little Buck violated its approved ventilation plan and addenda in the same ways it violated the roof control plan. Sec'y Br. 15-17.

I have already found that Little Buck's roof control plan addenda did not discuss or permit developing the rock tunnel south of the Bottom Split, engaging in mining on the Middle Split, or mining east rather than west on the Bottom Split. Little Buck's ventilation plan addenda were substantively identical to the roof control plan addenda. Therefore, I find that Little Buck also violated its ventilation plan by extending the rock tunnel 20 feet south of the Bottom Split, mining 20 additional feet on the Middle Split, and mining to the east rather than the west on the Bottom Split.

Little Buck also violated the ventilation plan by driving approximately 180 feet without developing a monkey heading or a return rock tunnel. As previously discussed, the Bottom Split workings were being ventilated with the aid of a fan that was pushing intake air through 12-inch tubing from a point 180 feet outby the face. Tr. 125. After sweeping the face, the air was then allowed to flow back along the entirety of the 180-foot intake airway before being swept up into the Seven Foot Vein. Tr. 125-26. Dudash testified that miners normally are not allowed to work in return air, which is generally defined under 30 C.F.R. § 75.301 as air that already ventilated the working place, unless the work is "rehabilitating." Tr. 118, 127-28. Dudash further explained that in an anthracite mine with chutes on 40 to 60 foot centers, the mine operator is permitted to use an air mover to ventilate the area inby the last open crosscut only because miners are working in dirty air for a relatively short distance of 40 to 60 feet (the distance from the face to the last open crosscut). Tr. 68, 76, 117-18. By contrast, under the setup that was in place on the day of the inspection, miners working on the active section would have been exposed to 180 feet of dirty air that had already swept the face, as no separate return structures had been developed to carry this air away. Tr. 118. The District Manager likely would not have approved this arrangement or permitted Little Buck to continue mining east without implementing safeguards such as requiring the operator to develop a monkey heading and return rock tunnel, which were some of the measures taken to abate the violation. *See* Tr. 142-43. I find that driving 180 feet without developing a return violated the mine's ventilation plan.

Because Little Buck violated its approved ventilation plan in multiple ways, I find that a violation of § 75.370(a)(1) occurred.

2. S&S and Gravity

Inspector Dudash marked this violation as S&S and reasonably likely to cause a lost workdays or restricted duty type injury to two miners. GX 4.

The first prong of the *Mathies* test for S&S is satisfied by my finding of a violation of a mandatory safety standard.

The second element of the test is also satisfied because mining outside of the ventilation plan contributed to the discrete safety hazard of inadequate ventilation controls, a hazard which was more than reasonably likely to occur. It is inherently dangerous to engage in mining without an approved ventilation plan because this creates a risk that miners will be working in an area without the appropriate safeguards and parameters in place to ensure that clean air is being delivered to the face and air carrying potentially harmful gases is being safely swept away. In this case, submission and approval of a ventilation plan covering the areas where Little Buck was mining would have likely required the operator to develop a return tunnel and monkey heading in the Bottom Split to prevent miners from working in 180 feet of dirty air. Also, Little Buck likely would have been required to install ventilation controls to move air through the area south of the Bottom Split and would have been required to conduct regular preshift examinations in that area to ensure there were no air quality problems developing such as low oxygen that might affect the working section if air were to pass through the barricade. However, these safeguards were never implemented because Little Buck failed to develop and follow a roof control plan tailored to the areas in question, and by the time of the inspection the barricaded-off area was found to be a dead-air space with low oxygen, high carbon dioxide, and no air detectable movement. Tr. 68, 96, 99. Considering all the foregoing, Little Buck's failure to develop and follow a roof control plan did not just contribute to a potential hazard, but actually exposed all the miners working in the areas south of the Seven Foot Vein to the discrete hazard of inadequate ventilation controls.

This hazard was reasonably likely to result in a reasonably serious injury to the two miners who were regularly present on the active working section. With continued normal mining operations, inadequate ventilation leads to the accumulation of explosive dusts and gases and of noxious gases such as carbon dioxide that can cause suffocation. This was not a gassy mine and there is no evidence an explosion was likely. Tr. 76. However, low levels of oxygen and high levels of carbon dioxide were in fact detected in the unventilated dead-end area south of the Bottom Split, and no preshift examinations were being conducted in the area that would have timely identified the problem. The bad air could have seeped through the barricade erected at the Bottom Split, which was not airtight, and mixed with the atmosphere in the areas where miners were actively working. Tr. 68-72, 107. This condition, if allowed to worsen with continued normal mining operations, would be reasonably likely to result in serious and potentially fatal injuries to miners rendered unconscious and unable to escape the area due to oxygen deprivation, as miners can be overcome by oxygen deficient air and lose consciousness without even realizing what is happening. Tr. 103-04. Accordingly, the third and fourth *Mathies* elements are satisfied.

Because the four *Mathies* elements are met, I find that this violation was S&S. I also find that this was a serious violation because it could have caused death or serious injury to the two miners on the active working section due to inadequate ventilation in all the areas to the south of the Seven Foot Vein.

3. Unwarrantable Failure and Negligence

Dudash marked this violation as involving a high degree of negligence and designated it an unwarrantable failure to comply with a mandatory safety standard, for largely the same reasons he had assessed the roof control plan violation as an unwarrantable failure. Tr. 76-77.

Extensiveness of Violation; Duration; Degree of Danger Posed

This violation was extensive in that Little Buck mined 80 feet outside of its ventilation plan on the Bottom Split, mined 40 feet outside of its plan in the areas south of the Bottom Split, and developed a 120-foot rock tunnel with two east-facing entries without creating any separate return structure. The violation was also extensive in that all of the miners on the active working section would have been exposed to the dangers it posed. As was the case for the other plan violation, Little Buck was required to take the fairly extensive abatement measures of developing a monkey heading and crosscuts and driving a second rock tunnel all the way from the Bottom Split gangway to the rock tunnel north of the Seven Foot Vein.

Based on the preshift examination records showing that Little Buck had started mining on both the Bottom Split and Middle Split on September 15 or 16, I find that the duration of this violation was approximately 23 days. Tr. 77-78.

During this entire time period, all the miners on the active working section were exposed to the dangers of inadequate ventilation, for the reasons mentioned above in my discussion of S&S and gravity. Accordingly, I find that the degree of danger posed by the violation was high.

Knowledge of Violation; Obviousness

As was the case with the roof control plan violation, the ventilation plan violation would have been very obvious to Neidlinger because he was the co-owner, operator, foreman, and examiner of the mine and had prepared and submitted the ventilation plan and addenda, which he was responsible for faithfully implementing at the mine. Tr. 21-23, 79-80, 189-93. Accordingly, I find that Little Buck had knowledge of this violation through its agent, Neidlinger.

Notice of Need for Greater Compliance Efforts

As previously noted, Little Buck received a citation for mining outside of its roof control plan in January 2014 after it began developing the same rock tunnel at issue in this case without waiting for the District Manager's approval. GX 15; Tr. 81-82. Although the January citation does not pertain to ventilation, it pertains to a plan violation and is factually related to the events leading to the issuance of the instant violation. The January citation should have placed Little Buck on notice of its general need not to embark on new development without creating plan addenda, submitting them to the District Manager, and waiting for approval to proceed.

The record also shows that Little Buck received acitation for a violation of the standard cited here, § 75.370(a)(1), within the fifteen months preceding the issuance of the instant violation. GX 14. This should have further placed Little Buck on notice of the need to make greater efforts to comply with this regulation.

Abatement Efforts

Although Little Buck knew of this violation, the operator made no effort to abate the violation or address the ventilation problems on the section until after the order was issued. For

the reasons previously mentioned in my discussion of Citation No. 8000752, I do not consider Little Buck's erection of the barricade at the Bottom Split to be an adequate abatement effort or a significant mitigating factor.

Conclusions

As was the case with the roof control plan violation, the evidence shows that Little Buck flatly disregarded the requirements of the operative regulation and intentionally developed new areas of the mine without an approved plan or addendum in place to assure adequate ventilation. Based on all the factors discussed above, particularly the obviousness of this violation, Neidlinger's knowledge of it, and the extensiveness and degree of danger it posed, I find that Little Buck exhibited aggravated conduct constituting more than ordinary negligence. Accordingly, this violation constituted an unwarrantable failure to comply with the ventilation plan and with § 75.370(a)(1), and it was appropriate for Inspector Dudash to issue the order under 104(d)(1).

For the same reasons, I also find that Little Buck's negligence was high.

C. Order Number 8000753 (Preshift Examination Violation)

This 104(d)(1) order was issued on October 8, 2014 and alleges:

> The operator has not been conducting an adequate preshift examination, on the 1st level MMU-001-0, since September 26, 2014. The preshift examiner has not been traveling an entry developed over 20 feet off the intake rock tunnel gangway air course. This entry has been boarded and dangered off. This entry is not provided with a cross cut or ventilation controls. Air passes by this entry to reach the working section working face, MMU-0010, approximately 80 feet inby the entry. The calibrated permissible multi-gas detector (Ser. No. A5-146096 & Approval No. 22-A040001-0) measured 19.4% oxygen ten feet in this entry. The preshift examiner, Edmund Neidlinger, is also the mine foreman and co-owner of this mine. The preshift exam record indicates that this entry has been abandoned since September 26, 2014. Two miners normally work on this section on a daily basis and are exposed to this hazard.

GX 2; Tr. 90-91.

The standard alleged to have been violated is a subsection of 30 C.F.R. § 75.360, which governs preshift examinations. The cited subsection requires mine operators to conduct preshift examinations of any "[e]ntries and rooms developed after November 15, 1992, and driven more than 20 feet off an intake air course without a crosscut and without permanent ventilation controls where intake air passes through or by these entries or rooms to reach a working section where anyone is scheduled to work during the oncoming shift." 30 C.F.R. § 75.360(b)(6)(ii).

The parties stipulated that the entry cited in this order, the entry on the Middle Split, was not provided with a crosscut or ventilation controls. Joint Ex. 1. As discussed above, this entry was driven 20 feet off the southernmost end of the rock tunnel, which had been driven 20 feet off of the intake air course located at the Bottom Split. The entire area south of the Bottom Split was not being examined as of the inspection date because it was barricaded off. Thus, the remaining inquiry under § 75.360(b)(6)(ii) is whether intake air was passing by or through the cited area to reach the working section.

The Secretary defines the working section to include "[a]ll areas of the coal mine from the loading point of the section to and including the working faces" where the coal is extracted. 30 C.F.R. § 75.2. Intake air is "[a]ir that has not yet ventilated the last working place on any split of any working section, or any worked-out area, whether pillared or nonpillared." 30 C.F.R. § 75.301. The working place is "[t]he area of a coal mine inby the last open crosscut," 30 C.F.R. § 75.2, and the last open crosscut is the crosscut closest to the working face that does not have a stopping. *Jim Walter Res., Inc.*, 11 FMSHRC 21, 26 (Jan. 1989); 30 C.F.R. § 75.360(c)(1).

In this case, Dudash testified that the last open crosscut was the Seven Foot Vein, so the entire area south of the Seven Foot Vein constituted the working place where miners would work and travel all day long; further, he considered all the air flowing through the working place to be intake air. Tr. 62, 72, 123-28, 158. Thus, intake air was flowing by the barricade to reach portions of the working section.

Neidlinger agreed that the Seven Foot Vein was the last open crosscut and that the active working section included the Bottom Split workings and the 100-foot segment of the rock tunnel between the Bottom Split and Seven Foot Vein. Tr. 173, 187-88. However, he characterized the air flowing by the barricade into the rock tunnel as return air because it was moving outby after sweeping the face of the Bottom Split gangway. Tr. 117, 167, 171-74. Generally, return air is defined as air that has ventilated the last working place or that mixes with other return air, although the Commission has noted that the term may have different meanings for purposes of different standards. *Zeigler Coal Co.*, 15 FMSHRC 949, 952 n.3 (June 1993); 30 C.F.R. § 75.301. Relying on this definition, Neidlinger insisted that the area south of the Bottom Split did not need to be examined each shift because it was part of the return air course and the only air passing by it was return air. Tr. 13-14, 116-17, 167, 198-99.

Inspector Dudash noted that even if the area south of the barricade were part of a return air course, it would need to be examined on a weekly basis, which Little Buck was not doing. Tr. 117; *see* 30 C.F.R. § 75.364(b)(2) (requiring weekly examinations of return air courses). But he did not consider the area to be part of a return air course. Tr. 117. For one thing, although the ambient air passing by the barricade had already swept the face in the Bottom Split and was flowing outby, the 12-inch tubing carrying fresh air to the face also passed by the barricade and could have been contaminated with and recirculated dirty air seeping from the barricade if there were any flaws or tears in the tubing. Tr. 128-30. More importantly, Inspector Dudash explained that while return air is generally defined as air that has swept the last working face, in this type of mine it is not considered return air until it hits the last open crosscut and travels up into the monkey heading. Tr. 118-19. Thus, all the air inby the Seven Foot Vein would still be considered intake air. This makes sense because everything inby the last open crosscut is part of

an active working place where men work and travel daily. For purposes of ventilation standards such as § 75.360(b)(6)(ii), any air ventilating areas inby the last open crosscut should be considered intake air regardless of which direction it is flowing and whether it has already swept the face. Accordingly, I accept Dudash's testimony that the air passing the barricade was intake air because it had not yet reached the last open crosscut.

The area south of the barricade was not being regularly examined from the time Little Buck withdrew from the Middle Split and erected the barrier until the date of the inspection. Because this was an entry developed after November 15, 1992 and driven more than 20 feet off an intake air course without a crosscut or permanent ventilation controls, and because intake air passed by it to reach portions of the working section, I find that Little Buck violated § 75.360(b)(6)(ii) by failing to regularly examine it as part of the required preshift examination of the working section.

2. S&S and Gravity

Inspector Dudash marked this violation as S&S and reasonably likely to cause a lost workdays or restricted duty type injury to two miners. GX 2. He was concerned that dangerous gases and low oxygen could accumulate in the area south of the barrier because this was a dead-end space driven more than 20 feet with no ventilation controls, and therefore it should have been examined to ensure nothing harmful was seeping out onto the active working section through the barricade. Tr. 108-10.

The first element of the *Mathies* test for S&S is satisfied by my finding of a violation of a mandatory safety standard.

The second *Mathies* element is also satisfied because the violation contributed to the discrete safety hazard that the operator would not recognize and address hazardous conditions arising in the barricaded area that could have affected miners on the working section. This hazard was reasonably likely to occur, and did in fact occur. Inspector Dudash identified several hazardous conditions that were present in the barricaded area and had not been addressed, including low oxygen and lack of ventilation controls. GX 3; GX 5. If normal mining operations had continued and the operator had continuously failed to examine the unventilated area, noxious gases or oxygen-deficient air could have accumulated there and seeped onto the active working section through the barricade undetected. Tr. 68-72, 107. Any air seeping past the barricade would mix with the ambient air in the rock tunnel where miners worked and traveled on a daily basis, exposing the miners to a discrete safety hazard. For example, carbon dioxide is invisible and odorless, and a miner exposed to high levels of this gas would not be aware of it unless he happens to be wearing a detector that alarms. Tr. 104. Because high levels of carbon dioxide cause a reduction in oxygen levels, the miner could be "overcome with the carbon dioxide without even really knowing it." Tr. 103-04. For these reasons, I find that Little Buck's failure to conduct preshift examinations in the cited area contributed to the discrete safety hazard that the operator would fail to detect hazardous ventilation conditions that would affect the area north of the barricade where miners worked and traveled.

This hazard, assuming it were to occur, would be reasonably likely to result in serious injuries or death under the circumstances of this case, satisfying the remaining two *Mathies* elements. Only two miners were present on the active working section on a regular basis, and they were required to work and travel in 180 feet of air that had already swept the face, including 100 feet of air that had passed by the barricaded area. If bad air were to accumulate behind the barricade and roll past it, both miners could be overcome and lose consciousness, preventing them from escaping the section. This would likely result in death or serious injuries due to suffocation.

Because the four *Mathies* elements are met, I find that this violation is S&S. I also find that this was a serious violation because it could have caused death or serious injury to the two miners working south of the Seven Foot Vein, for the reasons discussed above.

3. Unwarrantable Failure and Negligence

Dudash marked this violation as involving high negligence and unwarrantable failure. GX 2. He testified that he assessed it as an unwarrantable failure because Little Buck knew the cited area was not ventilated, yet barricaded it off, preventing anyone from conducting regular preshift examinations of it. Tr. 106-07.

Extensiveness of Violation; Duration; Degree of Danger Posed

Although only a 40-foot-long area was not being examined, this violation was extensive because it affected the entire working section south of the Seven Foot Vein and all of the miners working there.

At the time of the October 8, 2014 inspection, the examination records revealed that Little Buck had stopped examining the area at some time between September 26 and 30. Therefore, the area had not been preshifted for more than a week.

As discussed above, the violation posed a risk that hazardous conditions, particularly air quality issues, arising in the unexamined area would go undetected and would affect areas where miners were actively working, potentially causing death or serious injuries to those working and traveling in the rock tunnel north of the barricade. Thus, I find that this violation presented a high degree of danger.

Knowledge of Violation; Obviousness

Once again, this violation would have been obvious to Neidlinger in his capacity as the mine's co-owner and operator, the foreman in charge of daily operations underground, and the preshift examiner who had been examining the active working section since July 2014. Neidlinger knew the area south of the Bottom Split was a dead-end space with no ventilation controls, but after the roof collapsed, he decided to simply abandon the area without installing ventilation controls or constructing an airtight seal. Under the circumstances, he should have known that the area needed to be examined regularly to ensure that air quality problems were not developing that could affect the active areas of the mine. Yet he barricaded it off instead,

affirmatively preventing anyone from traveling the area to check for bad air or other hazards. Tr. 110. I find that he knew of this violation, and his knowledge is imputable to Little Buck.

Notice of Need for Greater Compliance Efforts

There is no evidence that Little Buck received past similar violations or other specific warnings from MSHA that would have placed it on notice that greater efforts were necessary for compliance with the cited safety standard.

Abatement Efforts

Although Little Buck knew of this violation and could have easily abated it by conducted an examination of the cited area, no abatement efforts were undertaken until after Inspector Dudash issued the order.

Conclusions

Based on the factors discussed above, particularly Little Buck's knowledge of this violation, the danger it posed, and the fact that the operator knowingly erected a non-airtight barricade which had the effect of preventing anyone from looking into or examining the cited area, I find that Little Buck exhibited aggravated conduct constituting more than ordinary negligence in violating § 75.360(b)(6)(ii). Accordingly, this violation was an unwarrantable failure to comply with the regulation, and Inspector Dudash properly issued the order under section 104(d)(1).

For the same reasons, I also find that Little Buck's negligence was high.

D. Order Number 8000754 (Ventilation Control Violation)

This 104(d)(1) order was issued on October 8, 2014 and alleges:

> The Middle Split Mammoth Vein east is developed over 20 feet off the intake rock tunnel gangway without a crosscut or line brattice installed to provide adequate ventilation. The calibrated permissible multi-gas detector (Ser. No. A5-146096 & Approval No. 22-040001-0) measured 19.4% oxygen ten feet in this entry. Air passes by this entry to reach the working section working face, MMU-001-0, approximately 80 feet inby the entry. The preshift examiner, Edmund Neidlinger, is also the mine foreman and co-owner of this mine. The preshift exam record indicates that this entry has been abandoned since September 26, 2014. Two miners normally work on this section on a daily basis and are exposed to this hazard.

GX 3.

The standard alleged to have been violated is 30 C.F.R. § 75.333(g), which states in pertinent part: "Before mining is discontinued in an entry or room that is advanced more than 20

feet from the inby rib, a crosscut shall be made or line brattice shall be installed and maintained to provide adequate ventilation." The purpose of this provision is to "prevent the creation of 'dead-air' spaces" where harmful gases could accumulate. 57 Fed. Reg. 20868, 20885 (May 15, 1992).

The location cited in the order was the entry driven east on the Middle Split, where mining had been discontinued. The parties stipulated that this entry was not provided with a crosscut or other ventilation controls. Joint Ex. 1; Tr. 71, 75, 93-94. As discussed above, the entry was driven approximately 20 feet off the rock tunnel, which had been driven 20 feet beyond the barricade at the Bottom Split where air coursed by. This created a 40-foot dead-air space. Inspector Dudash testified there was no air movement in the area beyond the barricade. Tr. 96.

Considering the foregoing, I find that Little Buck violated § 75.333(g) by failing to develop a crosscut or install any temporary or permanent ventilation controls to ensure that the face of the Middle Split workings was being ventilated properly and to prevent the accumulation of oxygen-deficient air, methane, or carbon dioxide.

2. S&S and Gravity

Inspector Dudash initially marked this violation as S&S and reasonably likely to cause a lost workdays or restricted duty type injury to two miners, citing the potential for carbon dioxide to escape to the active working section and cause harm to miners and the likelihood it would accumulate to deadly levels if normal mining operations were to continue. GX 3; Tr. 112. In hindsight, he said he would consider marking the severity of the expected injury as "fatal" because analysis of the air sample he had taken in the cited area had revealed high carbon dioxide and low oxygen. Tr. 113.

The first element of the *Mathies* test for S&S is satisfied because a violation of a mandatory safety standard occurred.

The second *Mathies* element is also satisfied because the violation contributed to the discrete safety hazard that, if normal mining operations had continued, oxygen-deficient air or high levels of carbon dioxide could have accumulated in the dead-air space and seeped through the barricade into the areas where miners were actively working and traveling. As discussed above in connection with the previous violations, the likelihood of this hazard occurring was especially high considering that the barricaded area was not being regularly examined to ensure that no bad air was accumulating; that the miners on the active section were working in 100 feet of air (in the rock tunnel between the Bottom Split and Seven Foot Vein) that had passed by the barricaded area; and that there was no alternate travelway or escapeway in which they could have sought refuge from bad air.

As was also discussed above, the two miners regularly working on the active section could be overcome by the low levels of oxygen or high levels of carbon dioxide and could lose consciousness without even recognizing the hazard. Tr. 103-04. Thus, the injuries expected to

result from this hazard, if it were to occur, would likely be serious or even fatal injuries resulting from suffocation. This satisfies the third and fourth elements of the *Mathies* test.

Because the four *Mathies* elements are met, this violation is S&S. I also find that this was a serious violation because it could have caused death or serious injury to the two miners on the active working section.

3. Unwarrantable Failure and Negligence

Inspector Dudash assessed Little Buck's negligence as high and designated this violation an unwarrantable failure because Neidlinger had been onsite directing the workforce and conducting preshift examinations when the area south of the barricade was developed, but when he withdrew his men and equipment from the area, he made no efforts to ventilate it. Tr. 114.

Extensiveness of Violation; Duration; Degree of Danger Posed

Although only a 40-foot-long area was unventilated, this violation was extensive because it affected the entire working section south of the Seven Foot Vein and all of the miners working there. In addition, the efforts required to abate the violation were somewhat extensive in that Little Buck was required to re-timber the area where the roof had collapsed so that ventilation tubing could be extended toward the face of the Middle Split. GX 3; Tr. 202-04.

At the time of the October 8, 2014 inspection, the examination records indicated that Little Buck had discontinued mining in the cited area between September 26 and 30. Thus, this violation had existed for more than a week.

As discussed above in the S&S analysis, this violation posed a danger that bad air would develop in the unventilated dead-air space, would accumulate to harmful levels, and would seep out across the barricade into areas where miners were actively working, potentially causing death or serious injuries. Accordingly, I find that this violation presented a high degree of danger.

Knowledge of Violation; Obviousness

Inspector Dudash testified that this violation should have been obvious to Neidlinger because he was the preshift examiner and had years of mining experience. Tr. 114-15. "He knows that MSHA requires you to ventilate dead end faces, whether it be a[n] intake or a return air course," Dudash stated. Tr. 115. I find that Neidlinger undoubtedly knew of this violation, as he was the mine foreman and preshift examiner during the time the cited area was developed and directed his men to withdraw without installing a crosscut or any other ventilation controls. Tr. 170. Neidlinger's knowledge of the violation is imputable to Little Buck.

Notice of Need for Greater Compliance Efforts

There is no evidence that Little Buck received past similar violations or other specific warnings from MSHA that would have placed it on notice that greater efforts were necessary for compliance with the cited safety standard.

Abatement Efforts

Despite Little Buck's knowledge of this violation, no abatement efforts were undertaken until after Inspector Dudash issued the order. Again, I do not find the erection of the barricade to constitute a mitigating factor because although the barricade prevented miners from traveling into the dead-air space, it was not airtight and therefore did not eliminate the hazard that bad air would escape and affect miners elsewhere on the active working section.

Conclusions

Based on the factors discussed above, particularly Little Buck's knowledge of the violation and the fact that it posed a high degree of danger, especially when considered in conjunction with the other violations present on the date of the inspection (such as failure to regularly examine the cited area and failure to maintain a secondary escapeway and a separate return airway on the active working section where miners would be affected by bad air seeping from the dead-air space), I find that Little Buck exhibited aggravated conduct constituting more than ordinary negligence. Accordingly, this violation was an unwarrantable failure to comply with the regulation, and Inspector Dudash properly issued the order under section 104(d)(1).

For the same reasons, I also find that Little Buck's negligence was high.

E. Citation Number 8000756 (Air Quality Violation)

This 104(a) citation was issued on October 22, 2014 and alleges:

> The air, 10 feet inby an entry along the primary intake air course to the working section (MMU-001-0), contained 19.4% oxygen and 0.52% carbon dioxide according to MSHA laboratories analysis of air samples 5 gas report (MSIS Batch Date: 10-19-2014). This analysis is the result of a bottle sample taken October 08, 2014, after a calibrated permissible multi-gas detector (Ser. No. A5-146096 & Approval No. 22-A040001-0) measured 19.4% oxygen. This entry was approximately 80 feet outby the working section's working face where 2 miners normally worked on a daily basis.

GX 5.

The standard alleged to have been violated is 30 C.F.R. § 75.321(a)(1), which states in pertinent part: "The air in areas where persons work or travel … shall contain at least 19.5 percent oxygen and not more than 0.5 percent carbon dioxide, and the volume and velocity of the air current in these areas shall be sufficient to dilute, render harmless, and carry away flammable, explosive, noxious, and harmful gases, dusts, smoke, and fumes." MSHA has noted that normal air contains about 20.9% oxygen and 0.03% carbon dioxide, while percentages outside the range specified in the regulation indicate an air quality problem that needs attention. 57 Fed. Reg. 20868, 20877 (May 15, 1992).

In this case, Inspector Dudash first detected low oxygen when his Solaris multi-gas detector alarm went off at 19.4% percent oxygen while he was in the rock tunnel about 10 feet south of the barricade at the point where the roof had collapsed, which was as far in as he could safely travel at the time. Tr. 69-70, 96, 99-100. Although the gas detector alerts whenever it detects 19.5% oxygen or lower, 19.4% was the lowest percentage Dudash observed on the day of the inspection. Tr. 96. As previously noted, there were no ventilation controls and no air movement in the area south of the barricade where the low oxygen was detected. Tr. 96. Consistent with the lack of air movement, Dudash explained that low oxygen usually develops when carbon dioxide accumulates in stagnant air, which reduces the proportion of oxygen from the normal level of approximately 20.8%. Tr. 70.

Neidlinger was carrying the same type of multi-gas detector, but his alarm did not go off. Tr. 97, 121-22, 175. However, when he asked Inspector Dudash on cross-examination whether a calibration issue could have caused the one detector to go off when the other did not, Dudash testified that he checks the calibration on his detector every morning and further noted that he took an air sample that later confirmed the low oxygen reading. Tr. 122. As previously mentioned, he had taken the sample using a vacuum bottle after his detector alarmed. Tr. 97-98. He had also taken bottle samples in the Bottom Split gangway and in the rock tunnel 20 feet outby the barricade. Tr. 97, 100. After leaving the mine, Dudash submitted all three bottle samples to an MSHA laboratory to be evaluated, and the results confirmed that the air sample taken 10 feet south of the barricade contained 19.4% oxygen and 0.52% carbon dioxide. Tr. 99, 122-23; GX 18. The two samples taken elsewhere revealed normal levels of oxygen (20.48% and 20.68%). Tr. 130; GX 18.

At hearing, Neidlinger pointed out that the oxygen level was only one tenth of a percentage point out of compliance with the 19.5% threshold and that the area where the low oxygen was detected "was only 6′ by 8′ high" and "[a]pproximately just say 35′ to the longest point." Tr. 175. Neidlinger suggested that in such a small area, two people breathing for twenty minutes could have lowered the oxygen level by a tenth of a percent. Tr. 175. This argument disregards the results of the bottle samples taken elsewhere in the mine, which yielded 20.48% and 20.68% oxygen. The oxygen level south of the barricade was more than a full percentage point lower than this normal level, a discrepancy that is likely too large to attribute to Neidlinger and Inspector Dudash being present in the area and breathing. Moreover, two miners regularly worked together on the active working section at this mine, meaning that when Little Buck was still developing the cited area before it withdrew from the Middle Split and erected the barricade, two men would have been working and breathing in this small enclosed space at any given time. If the presence of two men were sufficient to reduce the ambient oxygen below the level of compliance, this would have indicated an air quality problem which Little Buck should have addressed.

The evidence shows that the oxygen level was 19.4% and the carbon dioxide level was 0.52% in the area south of the barricade. Although these numbers were only slightly out of compliance, I reject Neidlinger's suggestion that the violation was negligible. MSHA purposely imposed the 19.5% and 0.5% thresholds set forth in § 75.321(a)(1). The 19.5% standard for oxygen is above that identified as resulting in impaired judgment, but MSHA, mindful of the "insidious nature of oxygen deficient air," intentionally set the standard high in order to protect

miners from losing consciousness before they can escape an area of low oxygen. *Jim Walter Res., Inc.*, 29 FMSHRC 212, 223 (Mar. 2007) (ALJ); *see also McElroy Coal Co.*, 30 FMSHRC 45, 64-65 (Jan. 2008) (ALJ) (discussing MSHA Program Information Bulletin which states that oxygen concentrations below 19.5% can have adverse physiological effects); 61 Fed. Reg. 9764, 9775-77 (Mar. 11, 1996). In addition, contrary to the stated requirements of § 75.321(a)(1), the volume and velocity of the air current in the cited area clearly was not sufficient to dilute and render harmless any dangerous gases, as there was no air movement in the area. Tr. 96. Accordingly, I uphold the violation of § 75.321(a)(1).

2. S&S and Gravity

Inspector Dudash marked this violation as S&S and reasonably likely to cause fatal injuries to two miners, again citing the potential for carbon dioxide or oxygen deficient air to accumulate behind the barrier and escape to the active working section and cause harm to miners. GX 5; Tr. 102-03.

The first element of the *Mathies* test for S&S is satisfied because a violation of a mandatory safety standard occurred.

The second *Mathies* element is also satisfied because the violation contributed to the discrete safety hazard that, if normal mining operations had continued, the condition could have worsened, with oxygen deficient air and high levels of carbon dioxide accumulating in the dead-air space south of the barrier and leaking out into areas where miners were actively working and traveling. This hazard was likely to occur because the barricaded area was not being regularly examined, meaning that Little Buck likely would not have noticed the bad air until the condition worsened.

The miners in the rock tunnel north of the barricade were working in 100 feet of air that had passed by the dead-end space where the oxygen deficient air was discovered, and there was no alternate travelway or escapeway in which they could have sought refuge from bad air, so they were likely to be exposed to the hazard. If so, they could be overcome by oxygen deficient air, causing loss of consciousness and inability to escape from the area. For the reasons previously discussed, the resulting injuries would likely be serious or even fatal. Thus, the third and fourth *Mathies* elements are satisfied.

Because the four *Mathies* elements are met, this violation is S&S.[10] This was a serious violation because it could have caused death or serious injury to the two miners on the active working section.

3. Negligence

Inspector Dudash charged Little Buck with moderate negligence in connection with this violation. GX 5. He testified he saw no reason to mark the negligence as high because he had

[10] Because I have found all five of the violations to be S&S under the Commission's interpretation of the *Mathies* test, I decline to address the Secretary's argument in favor of a slightly different interpretation. *See* Sec'y Br. 24-25.

already issued high negligence violations for the root causes of the problem: failure to conduct a proper preshift examination and failure to ventilate the dead-end area beyond the barricade. Tr. 105-06.

I have found that this was a serious violation that exposed miners to the risk of serious injury. The violation resulted from Little Buck's failure to adequately ventilate the cited area. However, the gas levels were only slightly out of compliance, and this was not immediately obvious, as evidenced by Dudash postponing the issuance of the citation until he received the results of the laboratory analysis of the bottle sample confirming that a violation had occurred. There is no evidence as to how long the violative gas levels existed and no indication that Neidlinger or any other member of mine management was aware of them before the citation was issued. I find that Little Buck's negligence was moderate.

VI. PENALTY

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, 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.

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 266 (May 2006).

The Secretary asks me to assess penalties of $2,000.00 for each of the section 104(d)(1) violations at issue in this docket, which include Citation No. 8000752 and Order Nos. 8000753, 8000754, and 8000755. This penalty amount is the statutory minimum for 104(d)(1) violations. *See* 30 U.S.C. § 820(a)(3)(A). The Secretary further asks me to assess a penalty of $308.00 for the violation alleged in Citation No. 8000756.

The Secretary has submitted a violation history form showing that Little Buck received just twelve violations from MSHA that became final during the fifteen months preceding the issuance of these violations. GX 14. As discussed in the body of my decision above, this included a citation issued on January 22, 2014 for beginning development of the same rock tunnel at issue in this case without obtaining the approval of the District Manager. GX 15.

The size of Little Buck's business is small. Just two miners regularly work at the mine in question, and the parties stipulated that the mine had produced just 5,117 tons of coal as of the inspection date. Joint Ex. 1. However, Little Buck has not argued before me that the proposed penalties will affect its ability to remain in business nor presented any evidence to that effect.

My findings regarding the gravity and negligence associated with the violations are discussed at length above in the body of my decision. The evidence indicates that Little Buck made good faith efforts to achieve rapid compliance after the inspection by extending ventilation tubing into the dead-end area south of the Bottom Split, examining the area, promptly submitting new plan addenda, and developing a monkey heading and a second rock tunnel to adequately ventilate the Bottom Split workings and provide a secondary escapeway.

After considering the six statutory penalty criteria, I find that the statutory minimum penalty of $2,000.00 is appropriate for each of the four 104(d)(1) violations. I also find that a penalty of $308.00 is appropriate for Citation No. 8000756.

ORDER

Little Buck is hereby **ORDERED** to pay a total penalty of $8,308.00 for the five violations at issue in this docket within thirty (30) days of the date of this Decision and Order.[11]

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution:

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Edmund C. Neidlinger, Little Buck Coal Company #2, 33 Pine Lane, Pine Grove, PA 17963

[11] 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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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PITTSBURGH, PA 15220
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August 15, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of BENJAMIN LEADMON, and FRANKLIN JEREMIAH GIBSON, Complainants, v. BLUE CREEK MINING, LLC, Respondents.	TEMPORARY REINSTATEMENT PROCEEDINGS Docket No. WEVA 2017-498-D MSHA Case No.: HOPE-CD-2017-04 Docket No. WEVA 2017-499-D MSHA Case No.: HOPE-CD-2017-05 Mine: Blue Creek No. 1 Underground Mine Mine ID: 46-09297

DECISION AND ORDER REINSTATING BENJAMIN LEADMON REINSTATING FRANKLIN JEREMIAH GIBSON

Appearances: Kathleen F. Borschow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, Representing the Secretary of Labor

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, KY, Representing Respondent

Todd C. Meyers, Esq., Blackhawk Mining, LLC, Lexington, KY, Representing Respondent

Before: Judge Steele

On July 19, 2017, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.,* and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Benjamin Leadmon ("Leadmon") to his former position with Blue Creek Mining, LLC, ("Blue Creek" or "Respondent") at Blue Creek No. 1 Underground Mine ("Blue Creek Number 1") pending final hearing and disposition of the case. On July 19, 2017, the Secretary of Labor also filed an Application for Temporary reinstatement of miner Franklin Jeremiah Gibson ("Gibson") to his former position with Blue Creek at Blue Creek No. 1 pending final hearing and disposition of the case.

The applications followed two separate Discrimination Complaints filed by Leadmon and Gibson on June 20, 2017, that alleged, in effect, their terminations were motivated by their protected activities. The Secretary represents that these Complaints were not frivolously brought

and requests an Order directing Respondent to reinstate Leadmon and Gibson to their former positions with the same rate of pay and benefits they received prior to their discharge.

Respondent requested hearings regarding these applications on July 31, 2017. On July 31, 2017, an Uncontested Motion To Consolidate Docket Nos. WEVA 2017-499-D and WEVA 2017-498-D was filed by the Secretary. The Motion to Consolidate was granted by the undersigned on August 3, 2017.

A hearing was held in South Charleston, WV on August 8, 2017, where the Secretary and Respondent each had the opportunity to present witnesses and documentary evidence in support of their positions.[1]

For the reasons set forth below, I grant the applications and order Blue Creek to temporarily reinstate Benjamin Leadmon and Franklin Jeremiah Gibson.

I. DISCUSSION OF RELEVANT LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 623 (1978).

Congress created the temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id.* at 624-25.

Temporary Reinstatement is a preliminary proceeding and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.[2] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources,* 920 F.2d 738, 744 (11th Cir. 1990).

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[1] Under Commission Rule 45, a Temporary Reinstatement hearing must be held within 10 calendar days of an operator's request. 29 C.F.R. §2700.45(c).

[2] "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and federal circuit courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that there was an adverse action, which was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

In the instant matter, the Secretary need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept.1999). The Commission has further considered disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

II. THE PETITIONS FOR TEMPORARY REINSTATEMENT

Benjamin Leadmon

On June 6, 2017, Leadmon executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

> Wrongfully terminated after making safety complaints. I would like to have my regular job back with back pay and benefits.

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted with the Application the July 19, 2017, Affidavit of Perry Brown, a Special Investigator employed by the Mine Safety and Health Administration ("MSHA"). Brown made the following findings and conclusions:

> 2. As part of my official responsibilities, I investigate claims of discrimination filed by miners pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). In this capacity I have investigated the discrimination claim filed by Benjamin Leadmon on June 20, 2017. My investigation to date has revealed the following facts:
>
> > A. At all relevant times, Blue Creek Mining, LLC, (the "Operator" or "Blue Creek") is a "person" as defined in § 3(f) of the Mine Act.
> >
> > B. The applicant, Benjamin Leadmon, was employed by the Operator to work as a roof bolting machine operator at the Blue Creek No. 1 Underground Mine and was therefore a "miner" within the meaning of § 3(g) of the Mine Act.
> >
> > C. Leadmon was employed at the mine for approximately 6 years until May 25, 2017.
> >
> > D. Richard "Red" Hensley was Leadmon's partner on the bolting machine for a couple of months. Jeremy Gibson worked on the same crew as a continuous mining machine operator. Bill Vanover was their section boss.
> >
> > E. Leadmon told me of several unsafe incidents he experienced at the mine, including that his crew once cut into the intake airway in violation of the mine's approved ventilation plan, allowing dust to come back over the miner operator; that Vanover told Gibson to cut into unsupported top in violation of 30 C.F.R. § 75.203(d); and that the crew was expected to bolt down wind of the mining machine in the dust more times than the ventilation plan allowed.

F. Leadmon also told me that on one occasion, after telling Vanover his Continuous Personal Dust Monitor was at 98% of the allowable limit, Vanover instructed him to take it to the intake airway and sent someone else to man the bolter in his place. Leadmon believed he would have been fired had he not done as he was told.

G. Leadmon told me that he, Gibson, and Hensley complained to mine management about the above events and their safety concerns on May 23, 2017. Leadmon gave Superintendent Mike Dotson a written list of the above events and safety concerns that Gibson had begun recording approximately one month prior. Dotson said he was concerned and informed Assistant General Manager Jamie Wiant of their complaints. That same day, the three miners each met individually with Dotson, Wiant, Safety Manager Josh Bell, Mine Foreman Nike Nichols, and Maintenance Manager Jason Dooley. Leadmon told them each about his concerns.

H. Leadmon told me that believes he did the right thing by informing mine management of his safety concerns, and felt that mine management would no longer force him to work in the dust so much. He believes, however, that he was discharged for making these safety complaints.

3. There is reasonable cause to find that the Complainant was discharged because he engaged in protected activity. Leadmon engaged in protected activity when he complained to mine management about various safety concerns at the mine. Leadmon suffered an adverse action when he was suspended on May 23, 2017 and ultimately discharged two days later on May 25.

4. Based on my investigation to this date and based upon the proximity in time between the protected activity and the adverse action and the operator's knowledge of the protected activity, I have concluded that there is reasonable cause to believe that Leadmon was discharged because he engaged in protected activities by complaining about unsafe practices at the mine. I have concluded that the complaint filed by Leadmon was not frivolous.

Application for Temporary Reinstatement at Exhibit A, p. 1-3. The Secretary cited this affidavit as a basis for the formal request for temporary reinstatement. *Application for Temporary Reinstatement* at 2.

Franklin Jeremiah Gibson

On June 6, 2017, Gibson executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

> I was wrongfully terminated after making safety complaints. I would like to have my regular job back with back pay and benefits.

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted with the Application the July 19, 2017, Affidavit of Perry Brown, a Special Investigator employed by MSHA. Brown made the following findings and conclusions:

> 2. As part of my official responsibilities, I investigate claims of discrimination filed by miners pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). In this capacity I have investigated the discrimination claim filed by Franklin Jeremiah Gibson on June 20, 2017. My investigation to date has revealed the following facts:
>
> > A. At all relevant times, Blue Creek Mining, LLC, (the "Operator" or "Blue Creek") is a "person" as defined in § 3(f) of the Mine Act.
> >
> > B. The applicant, Franklin Jeremiah Gibson, was employed by the Operator to work as a continuous miner operator at the Blue Creek No. 1 Underground Mine and was therefore a "miner" within the meaning of § 3(g) of the Mine Act.
> >
> > C. Gibson was employed at the mine for approximately ten months until May 25, 2017.
> >
> > D. Richard "Red" Hensley and Benjamin Leadmon worked on the same crew as Gibson for a couple of months. Bill Vanover was their section boss.
> >
> > E. Gibson told me of several unsafe incidents he experienced at the mine, including that his crew once cut into the intake airway in violation of the mine's approved ventilation plan, allowing dust to come back over the miner operator; that Vanover told him to cut into unsupported top in violation of the 30 C.F.R. § 75.203(d); and that the crew was expected to bolt down wind of the mining machine in the dust more times than the ventilation plan allowed.
> >
> > F. Gibson also told me that on one occasion, he questioned Vanover's instruction to take deep cuts into the intake air, and Vanover cursed at him

and told him to do as he was instructed. Gibson believed he would have been fired had he not done as he was told.

G. Gibson told me that he, Leadmon, and Hensley complained to Superintendent Mike Dotson about the above events and their safety concerns on May 23, 2017. Leadmon gave Superintendent Mike Dotson a written list of the above events and safety concerns that Gibson had begun recording approximately one month prior. Dotson said he was concerned and informed Assistant General Manager Jamie Wiant of their complaints. That same day, the three miners each met individually with Dotson, Wiant, Safety Manager Josh Bell, Mine Foreman Nike Nichols, and Maintenance Manager Jason Dooley. Gibson told them each about his concerns.

H. Gibson told me that believes he did the right thing by informing mine management of his safety concerns. He believes, however, that he was discharged for making these safety complaints.

3. There is reasonable cause to find that the Complainant was discharged because he engaged in protected activity. Gibson engaged in protected activity when he complained to mine management about various safety concerns at the mine. Gibson suffered an adverse action when he was suspended on May 23, 2917 and ultimately discharged two days later on May 25.

4. Based on my investigation to this date and based upon the proximity in time between the protected activity and the adverse action and the operator's knowledge of the protected activity, I have concluded that there is reasonable cause to find that Gibson was discharged because he engaged in protected activities by complaining about unsafe practices at the mine. I have concluded that the complaint filed by Gibson was not frivolous.

Application for Temporary Reinstatement at Exhibit A, p. 1-3. The Secretary cited this affidavit as a basis for the formal request for temporary reinstatement. *Application for Temporary Reinstatement* at 2.

III JOINT STIPULATIONS[3]

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Federal Mine Safety and Health Act of 1977 ("the Act").

[3] The Joint Stipulations were entered at hearing and admitted into the record as Joint Exhibit 1. (Tr. 11-12). Each Joint Stipulation will hereinafter be cited to as J.S. followed by its number.

2. Blue Creek Mining, LLC ("Blue Creek") is a wholly owned subsidiary of Blackhawk Mining, LLC.

3. Blue Creek Mining, LLC operates the Blue Creek #1 Mine in Kanawha County, West Virginia.

4. The products or operations of the Blue Creek #1 Mine enter or affect commerce, within the meaning and scope of Section 4 of the Act.

5. The Blue Creek #1 is a mine as that term is defined in 30 U.S.C. 802(h).

6. Blue Creek is an "operator" as defined in Section 3(d) of the Act at the Blue Creek #1 Mine.

7. Operations of Blue Creek at the Blue Creek #1 Mine are subject to the jurisdiction of the Act.

8. Blue Creek is a "person" within the meaning of § 105(c) and within the definition of § (f) of the Act. 30 U.S.C. 802(f).

9. Prior to May 25, 2017, Complainant Benjamin Leadmon was employed as a Roof Bolting Machine Operator at the Blue Creek #1 Mine, and, therefore, was a "miner" within the meaning of § 3(g) of the Act. 30 U.S.C. § 802(g).

10. Prior to May 25, 2017, Complainant Franklin Jeremiah Gibson was employed as a Continuous Mining Machine Operator at the Blue Creek #1 Mine, and, therefore, was a "miner" within the meaning of § 3(g) of the Act. 30 U.S.C. § 802(g).

11. Complainant Gibson was employed by Blue Creek for approximately ten months until May 25, 2017.

12. On May 25, 2017, Blue Creek terminated the employment of Complainants Leadmon and Gibson.

13. Between May 23 and 25, 2017, Richard Hensley was employed by Blue Creek as a Roof Bolt Machine Operator in the Blue Creek #1 Mine.

14. Between May 23 and 25, 2017, Jamie Wiant was employed by Blue Creek as the Operations Manager.

15. Between May 23 and 25, 2017, Josh Bell was employed by Blue Creek as the Safety Manager.

16. Between May 23 and 25, 2017, Charles Childers was employed by Blue Creek as the General Manager.

17. Between May 23 and 25, 2017, Jason Dooley was employed by Blue Creek as the Maintenance Manager.

18. Between May 23 and 25, 2017, Bill Simon was employed by Blue Creek as the Evening Shift Mine Foreman.

19. Between May 23 and 25, 2017, Mike Dotson was employed by Blue Creek as the Superintendent of the Blue Creek #1 Mine.

20. Between May 23 and 25, 2017, Mike Nichols was employed by Blue Creek as the Mine Foreman at the Blue Creek #1 Mine.

21. Prior to his discharge on May 23, 2017, Bill Vanover was employed by Blue Creek as the Section Boss on the #4 Mains Section of the Blue Creek #1 Mine.

22. On May 23, 2017, Blue Creek terminated the employment of Mr. Vanover.

IV. SUMMARY OF TESTIMONY

Franklin Jeremiah Gibson was a continuous miner operator at Blue Creek Number 1 Underground Mine. (Tr. 28-29). Blue Creek Mining, LLC, a subsidiary of Blackhawk Mining, LLC, operates Blue Creek Number 1. (J.S. 2,3). Gibson worked at Blue Creek for approximately 10 months.[4] (Tr. 28-29).

At Blue Creek, Gibson worked as a continuous miner first at the eight section, then the four main section. (Tr. 34). At the four main section, he worked dayshift at the time of his discharge. (Tr. 34).

Gibson never had any disciplinary action taken against him at previous mining jobs until he worked at Blue Creek Number 1. (Tr. 32). At Blue Creek Number 1, Gibson was suspended for leaving a dust pump hanging underground. (Tr. 32-33). He was suspended for five days. (Tr. 33-34).

Benjamin Leadmon was a roof bolt operator at Blue Creek Number 1 Mine. (Tr. 97). He worked at Blue Creek Number 1 for 17 months while Black Hawk owned it and five years before that when Patriot owned the mine.[5] (Tr. 97). Leadmon and Richard ("Red") Hensley were roof bolters for the four main section. (Tr. 37, 102).

Leadmon has had only one previous disciplinary action at Blue Creek of a written warning for five excused absences approximately 18 months ago. (Tr. 99).

[4] Gibson has worked as a miner for nine and a half years for several mining companies including Murray Energy, Speed, Yellow Bush, and Campbell's Creek Number 7. (Tr. 30-32).

[5] Leadmon worked at Mammoth Coal for Massey for two years as a roof bolter and supply loader before working at Patriot. (Tr. 98).

Gibson and Leadmon's direct supervisor at the four main section was Bill Vanover, the section foreman. (Tr. 34, 85, 100). Gibson testified that Vanover was his supervisor for only three or four weeks. (Tr. 35). Gibson testified that Vanover was the worst boss he ever had because Vanover would order Gibson to work in unsafe, illegal conditions. (Tr. 35). Leadmon also testified that Vanover made miners take illegal actions because Vanover only cared about "the numbers." (Tr. 101).

On May 4, 2017, Gibson testified that his crew was cutting the four right section, where "the scrubber" was down. (Tr. 35). Gibson told Vanover that the airflow needed to be switched around because it was moving in the wrong direction. (Tr. 35). Vanover ultimately said that nothing could be done about the unsafe air intake situation as the crew was too far behind in production. (Tr. 36). When the evening shift foreman Bill Simon arrived, Gibson testified that he told Simon that they needed to "flop the air." (Tr. 36). Simon just looked at Gibson and walked away "through the flop air" to speak with Vanover. (Tr. 36). Vanover and Simon spoke, and Vanover said again that the crew was too far behind to "shut it down and flop the air." (Tr. 36).

On May 11, 2017, Gibson testified that he was supposed to cut the number four heading at the start time. (Tr. 36). The roof bolter was in three right, so Gibson was sitting, after completing his "dust printers and everything." (Tr. 36). Vanover came to Gibson and told him to begin "loading" because the bolting was almost finished in the three right section.[6] (Tr. 36). Gibson replied that he would not start "loading" until the bolting was finished. (Tr. 36). Vanover told Gibson to "go ahead," and Gibson again said no. (Tr. 36). Vanover then went to check how much bolting was left, and after he returned, said that the bolters were backing out, so Gibson should start loading. (Tr. 37). Gibson then went about 15 feet on one side cut before the bolter Richard Hensley came over and said the area in front of Gibson was not bolted. (Tr. 37). Gibson then backed up and told Vanover that he was not going to cut into the unsupported area. (Tr. 37). Vanover then replied "You F-ing cut into it now." (Tr. 37). Benjamin Leadmon was standing with Hensley at that time, so Gibson looked over at them and cut into the area Vanover requested. (Tr. 37).

Leadmon also testified, in reference to the May 11, 2017, incident, that Vanover had Leadmon and Hensley stop bolting the four right section and back out so that Gibson could cut into the unsupported top. (Tr. 102). Leadmon testified that he objected to this request but Vanover said "you will do it" and "made [Leadmon and Hensley] back out." (Tr. 102).

On another occasion in May, Gibson testified that the continuous miner had "nine inserts crack that would not hold bits… [f]our bits stuck and one lug tore off." (Tr. 37-38). Gibson testified that more than one insert or lug cannot be missing for more than 24 hours. (Tr. 37). Gibson testified that he repeatedly asked Vanover to fix the cracks, and Vanover told Gibson "no, you'll run it" and that "[h]oot owl will fix it."[7] (Tr. 38). Gibson also asked the evening shift

[6] It appears that "loading" refers to cutting into the coal with the continuous miner machine. *See* (Tr. 37).

[7] It is not clear to this Court from the testimony who or what "hoot owl" was, although the term has colloquially been known to refer to the night shift.

electrician to fix the cracks, and was told again that "hoot owl" will fix it. (Tr. 38). Then Gibson asked Hensley to request that Vanover fix the issue because Gibson was tired of asking Vanover to shut down the continuous miner machine. (Tr. 38). Again, Gibson was told to keep running the machine and that "hoot owl" would fix it. (Tr. 38).

These three occasions of cutting into an unsupported top, cutting into the intake air, and running the miner with an improper amount of lugs and bits are the unsafe incidents Gibson remembered at hearing. (Tr. 38). Gibson testified that he first said no to Vanover when ordered to complete these unsafe actions, but completed them anyway because he was afraid he would have been fired if he had not followed orders.[8] (Tr. 39).

Leadmon testified that Jamie Wiant, the operations manager, Tony Sparks, the safety director, and Mike Dotson, the superintendent, said on multiple occasions to follow supervisors' orders, implying that disciplinary action would be taken if you did not follow work orders. (Tr. 102-03).

Gibson testified that he began taking notes of these unsafe incidents because he heard from many miners, including Ernie Butcher, the fill-in boss and Darryl Messer, a continuous miner operator, after returning from his first suspension that Wiant was trying to fire Gibson. (Tr. 39-40). Gibson copied his notes summarizing the unsafe work orders he was given, which were admitted as Government Exhibit 1.[9] (Tr. 41). Gibson said the notes summarize that on May 11, 2017, Vanover ordered Gibson to cut into an unsupported top. (Tr. 41). Also, the notes documented that Gibson was ordered to cut into the intake air on May 4, 2017, which Gibson believes resulted in his lungs hurting and his bronchitis diagnosis.[10] (Tr. 41). On May 5-6, 2017, Gibson was not at work but recorded in his notes that Vanover again asked another miner, Josh, a "buggy man," who filled in for Gibson, to cut into the air intake. (Tr. 41).

Leadmon testified that Vanover would also have the roof bolters bolt more than one cut each shift in the dust, which is illegal. (Tr. 101).

Leadmon further testified that Vanover told Leadmon to take a personal dust monitor, ("PDM"), to the air intake. (Tr. 84, 101). Leadmon testified that he told Vanover his PDM

[8] Vanover never specifically told Gibson he would be fired for not cutting into the unsupported top or intake air. (Tr. 52-53). However, it was Vanover's insistence that Gibson complete unsafe work orders, which led Gibson to believe his job was at risk. (Tr. 37-39).

[9] Government Exhibits will hereinafter be cited to as GX followed by its number, Joint Exhibits will be cited to as JX followed by its number and Respondents Exhibits will be cited to as RX followed by its number.

[10] Gibson testified that he was out of work on May 5-6, 2017, because he had to go to the doctor for lung pain that resulted from cutting into the air intake, "half through the sand rock." (Tr. 41). He had bronchitis and "something else" that he was certain resulted from breathing in dust during the aforementioned incident. (Tr. 41).

monitor was at 98%. (Tr. 104). Vanover then told Leadmon to take his PDM over to the air intake. (Tr. 104). Leadmon testified that he did not know it was illegal, but he knew that Vanover instructed him to take the PDM to the air intake for a fresh air sample. (Tr. 104).

Wiant testified at hearing that he first became aware of safety infractions from Levi Stevens ("Cody"), a scoop operator, who gave his two weeks' notice on May 22, 2017. (Tr. 68-69). Gibson also testified that he heard from Levi Stevens that Stevens was going to inform management of the unsafe working conditions in the four main section. (Tr. 55). Stevens told Dotson about miners making deep cuts and cutting into unsupported top. (Tr. 69). Wiant testified that taking a deep cut in a crosscut that is not bolted puts miners at risk for a cave-in from the roof or ribs. (Tr. 74). Wiant testified that Dotson went underground on May 22, 2017, but did not observe any safety infractions. (Tr. 71). That evening Dotson called Wiant to inform him of the situation, and Wiant told Dotson he would be in the office the next day. (Tr. 71).

On May 23, 2017, Gibson made a copy of his notes with safety complaints and gave it to Leadmon, because they were going to bring the notes to Mike Dotson, the superintendent. (Tr. 42). Gibson testified that Leadmon brought the notes to Dotson, who took the notes and went back into his office.[11] (Tr. 42). It did not appear to Gibson that anything was "going on," so he went with Leadmon and Hensley to speak with Dotson about the unsafe working conditions. (Tr. 43). Leadmon testified that he, Hensley, and Gibson went to give Gibson's note to Dotson on May 23, 2017, because they listed the most serious infractions that they believed could hurt or kill someone. (Tr. 108-09). Dotson told them that he was sorry any of these things happened and

[11] Wiant testified at hearing for Respondent. Wiant is currently employed at Blue Creek as the operations manager and was operations manager on May 22-25, 2017. (Tr. 63). As operations manager, he oversees the safety, compliance, health, and production in three underground deep mines, including Blue Creek Number 1. (Tr. 63). His duties include disciplining and terminating miners. (Tr. 64). He has worked at Blue Creek for approximately one year. (Tr. 64). He was an Equipment Operator from 2000 to 2003, which included working with a continuous miner machine. (Tr. 64). Since 2003 Wiant has worked in management. (Tr. 65). Wiant received his foreman's papers in 2003 and his mine foreman's card in 2005. (Tr. 65). He became a mine foreman at that time. (Tr. 65). In 2007, Wiant became a mine superintendent until 2012. (Tr. 65). In 2012, Wiant worked for Patriot. (Tr. 65). Prior to working for Patriot, he worked for Massey and Alton. (Tr. 65). He has a miner's red card, foreman card, EMT card, shop foreman's card, and underground instructor card." (Tr. 65).

Wiant testified as to the events on May 23, 2017. (Tr. 71-72). As this testimony conflicts with that of Leadmon and Gibson, it is noted only for the record, as credibility determinations will not be made concerning these Temporary Reinstatement proceedings. Wiant testified that on May 23, 2017, Dotson was in his office and saw Leadmon, who Dotson asked to come into the office and speak with him. (Tr. 71). Dotson first questioned Leadmon and no safety accusations arose. (Tr. 72). However, during a second questioning, where Dotson again approached Leadmon, Leadmon stated the same infractions as Levi Stevens for deep cuts, cutting into the unsupported top, intake air, and also falsifying a PDM dust sample by taking it down the air intake. (Tr. 72).

that they should not have been asked to do the unsafe work. (Tr. 43). Dotson told them that he would "take care of it." (Tr. 43).

After, there was a safety meeting that morning on May 23, 2017. (Tr. 43). Following the meeting, the four main section was asked to remain. (Tr. 43). Each person was taken into the office and questioned about any safety concerns in the four main section. (Tr. 43). Wiant testified that nine individuals were questioned from the four main section. (Tr. 81). When Gibson was called into the office, he told management that his boss had him cut into unsupported top and into intake air that wasn't "flopped." (Tr. 44). Gibson testified that management said they appreciated him telling the truth and that "the truth will set you free." (Tr. 44). Gibson left the meeting with a feeling that management really listened and was going to do the right thing. (Tr. 44). Gibson believed the right thing was to give section four a different supervisor because he believed Vanover, the current supervisor, was going to "get someone killed."[12] (Tr. 44-45).

Leadmon also testified that he told mine management about the unsafe work orders on May 23, 2017, during his individual meeting. (Tr. 107-08). Leadmon testified that he did not say anything earlier because he was afraid he would be terminated. (Tr. 108). When Leadmon met with management individually, he told Dotson about the deep cut, and cutting into the unsupported top, as well as taking a PDM to the air intake for a sample while roof bolting. (Tr. 110). Leadmon told Dotson about the PDM sample because he thought someone was bolting when that occurred, not because he thought it was illegal. (Tr. 110).

Wiant testified that Ron Bennett, in the four main section made a safety related work refusal to haul any of the cuts because a shuttle car was supposed to do that work. (Tr. 87-88). Wiant testified that Bennett was not disciplined by Vanover or anyone else in management (Tr. 87). Wiant also testified that all of the other miners from the four main section raised the same safety infractions as Leadmon and Gibson during these individual meetings. (Tr. 87-88). Wiant testified that these other miners were not disciplined. (Tr. 88).

After the individual meetings for the four main section on May 23, 2017, Gibson was told to wait with the other miners and not to talk to anybody. (Tr. 45). He stood outside until approximately 12:30 p.m. when he was called into the office. (Tr. 45). Wiant, the operations manager, Dotson, the superintendent, Mike Nichols, the dayshift mine foreman, Bell, the safety director, and Dooley, the chief electrician were in the meeting. (Tr. 114-15). At this meeting, management told Gibson he was suspended. (Tr. 46). Gibson testified he was told he could sign a document stating that he cut into the air intake and unsupported top, then leave work. (Tr. 46). Gibson said at this second individual meeting that Vanover made him do this unsafe work. (Tr. 46). Management asked if Vanover held a gun to Gibson's head, to which Gibson replied no. (Tr. 46). Management said Gibson had the keys to the continuous miner machine and did not have to do that work, and it was Gibson's fault. (Tr. 46). However, Wiant testified that Gibson said he questioned Vanover's work orders when told to cut into the unsupported top and air intake. (Tr.

[12] Two months prior to this meeting Vanover was removed from his position as a boss and Gibson testified that Wiant said Vanover "would never boss again at this mine as long as I'm here." (Tr. 45).

91). Gibson then signed this document and left. (Tr. 46). Gibson believed that management would fire Vanover and bring Gibson back to work in two or three days. (Tr. 46-47).

At approximately 1 p.m. on May 23, 2017, Leadmon was called into the office, where management told Leadmon that he would be suspended for five days for falsifying a PDM sample. (Tr. 115). Leadmon felt he was not in the wrong because he was following a direct order, and he did not know it was illegal at the time. (Tr. 115-16). Leadmon signed a written warning for falsifying a PDM sample and then Leadmon left. (Tr. 116). On Friday, May 25, 2017, two days after the suspension, Wiant, Samantha Owens, from human resources, and Chuck Childers, the mine operator called Leadmon on the phone. (Tr. 47, 116). Owens told Leadmon he was fired for falsifying a PDM sample. (Tr. 47, 116)

On May 25, 2017, Gibson testified that he also received a phone call from Samantha Owens, who said Chuck Childers, and Jamie Wiant, were on the phone call too. (Tr. 47). During this phone call, Owens told Gibson that he was terminated. (Tr. 47-48).

Owens called Gibson back approximately one hour later and asked if Gibson had anything to turn in. (Tr. 48). At that time, Gibson asked why he was being terminated. (Tr. 48). Owens said it was because Gibson willingly, knowingly cut into the air intake and unsupported top. (Tr. 48).

Wiant testified that Gibson was discharged on May 25, 2017, for putting the safety of other miners at risk by cutting into an unsupported top, taking deep cuts, and prior incidents. (Tr. 66). Gibson's Termination Form indicates involuntary termination, which Wiant testified was for safety infractions May 4-22, 2017. (Tr. 67; RX-1). Wiant further testified that Leadmon was terminated that same day for falsify a PDM sample and not notifying management. (Tr. 130).

Wiant testified that Vanover was also terminated for not making sure the miners under his supervision were following safety requirements and for not bringing "accusations" to upper management. (Tr. 85-86).

V. CONTENTIONS OF THE PARTIES

Gibson and Leadmon argue that they have met their burden of establishing that their complaints are non-frivolous, and as a result they should be temporarily reinstated. Gibson highlighted his protected activities of making safety complaints and providing a copy of his notes with safety complaints on May 23, 2017, to management as well as making safety complaints to Vanover when he was given unsafe work orders. Gibson argues that his suspension on May 23, 2017, and termination on May 25, 2017, are adverse actions under the Act for which Respondent is liable. Further, Gibson argues that there was knowledge and a coincidence in time between the protected activities and the adverse actions.

Leadmon also argued that he made safety complaints by bringing Gibson's notes with safety complaints to management and that Leadmon verbally made safety complaints to management in multiple meetings on May 23, 2017. Leadmon argues that his suspension and

termination were adverse actions under the act. Further, Leadmon argues that there was knowledge and a coincidence in time between the protected activities and adverse actions.

Respondent argues that both Gibson and Leadmon did not make protected work refusals, and that the safety complaints made were in response to disciplinary proceedings. Respondent argues that Gibson and Leadmon were terminated for violating safety regulations.

VI. FINDINGS AND CONCLUSIONS

The scope of this proceeding is narrow. Credibility determinations are not made; conflicts in testimony are not resolved. It is well recognized by the Courts that the Secretary's burden is "relatively insubstantial." For example, beyond the scope of the hearing is testimony and/or documentary evidence that the adverse action was justified by unprotected activity alone or was also motivated by unprotected activity or other non-discriminatory grounds. For the reasons set forth below, I find that the record presents a reasonable cause to believe the instant Discrimination Complaints were not frivolously brought.

Gibson and Leadmon's discrimination complaints and the adverse actions taken against them coincide factually. Thus, this Court will address Gibson's and Leadmon's claims together.

A. Gibson and Leadmon Engaged in Protected Activity

The record contains several actions that constituted protected activity. First, Gibson testified that on May 4, 2017, he told his supervisor, Vanover, when they were cutting with the continuous miner machine, that the airflow needed to be "flopped" for safety. (Tr. 35-36). Vanover refused to "flop" the airflow because production was running behind. (Tr. 35-36). Next, on May 11, 2017, Gibson told Vanover that Gibson did not want to use the continuous miner machine in the number four heading because it was unsafe due to the area not being properly bolted. (Tr. 36-37). Then, on May 23, 2017, Gibson engaged in protected activity when he copied his notes listing unsafe work orders given by Vanover and gave them to Leadmon, who brought the notes to Dotson, the superintendent. (Tr. 42). Gibson further engaged in protected activity by making safety complaints to Dotson and the other members of management, Wiant, the operations manager, Nichols, the dayshift mine foreman, and Bell, the safety director, in the two meetings that occurred on May 23, 2017 concerning the four main section, such as cutting into the air intake and cutting into an unsupported roof with the continuous miner machine. (Tr. 43-46).

Leadmon engaged in the same protected activity on May 23, 2017. (Tr. 107-10) Leadmon took the note with safety complaints that was copied by Gibson and brought them to Dotson. (Tr. 107-08) This alone is protected activity. Then, in the following meeting Leadmon had with Gibson, Hensley, and Dotson, the three miners made safety complaints involving Vanover. (Tr. 108-09). These safety complaints included cutting into the air intake and cutting into an unsupported top that was not roof bolted. (Tr. 109-10). Leadmon also complained in his individual meeting with management, Wiant, Nichols, Dotson, and Bell that Leadmon was given a work order to take his PDM, which was supposed to remain with him while roof bolting, to the air intake for a sample. (Tr. 110).

There was some dispute by Respondent as to the motivation for the safety complaints made by Gibson and Leadmon. (Tr. 76-77). Respondent argues that the safety complaints were made in response to disciplinary proceedings. (Tr. 76-77). However, this Court cannot resolve conflicts in testimony in the context of a Temporary Reinstatement. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co*., 21 FMSHRC 717, 719 (July 1999). Therefore, this Court finds Gibson and Leadmon presented substantial evidence that they engaged in protected activity.

B. Gibson and Leadmon Suffered Adverse Employment Actions

There is clear adverse employment action for both Gibson and Leadmon who were suspended on May 23, 2017, after their individual meetings with management. (Tr. 45-46, 115). Gibson and Leadmon were also discharged over the phone on May 25, 2017, by Owens, Wiant, and Childers. (Tr. 47-48, 116). These adverse actions are not in dispute by either party. (Tr. 47-48, 83, 116, 134; RX-1, 3).

C. A Nexus Existed Between the Protected Activity and the Adverse Employment Action

The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See*, *e.g.*, *CAM Mining, LLC,* 31 FMSHRC at 1089; *see also*, *Phelps Dodge Corp.*, 3 FMSHRC at 2510.

1. Knowledge of the protected activity

According to the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC,* 31 FMSHRC at 1090, *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley*, 4 FMSHRC at 1478.

Gibson testified that he repeatedly told Vanover, the section foreman, that Gibson did not want to engage in unsafe work orders—cutting into the air intake and an unsupported top—which he ultimately admitted to completing for fear of termination. *See* (Tr. 39). Leadmon also testified that he told Vanover that he did not want to back out of the four right section when it was not sufficiently roof bolted for the continuous miner machine to run. (Tr. 102).

Gibson and Leadmon further testified that Gibson wrote up safety complaints, which he copied on May 23, 2017, and Leadmon brought the notes to Superintendent Dotson. (Tr. 42, 108-09). Additionally, Gibson and Leadmon testified that they went with Hensley on May 23, 2017, into Dotson's office to make safety complaints concerning work orders from Vanover to cut into

the air intake and an unsupported top. (Tr. 43, 108-09). As Leadmon and Gibson were both part of the conversation on May 23, 2017, where they made safety complaints to Dotson, this shows sufficient evidence that Dotson, the superintendent, knew of their safety complaints. (Tr. 43, 108-09).

Wiant admitted that Dotson told him prior to Leadmon and Gibson being suspended that "an issue" was brought forward. (Tr. 81). Dotson told Wiant this right after Wiant saw Leadmon, Gibson, and Hensley meet with Dotson. (Tr. 81).

Nonetheless, a credibility determination cannot be made at this time, and the allegations by Gibson and Leadmon that they spoke with Vanover, the section foreman, and Dotson, the superintendent, about their safety complaints is sufficient to demonstrate knowledge by Respondent.

2. Coincidence in time between the protected activity and adverse action

The Commission has accepted substantial gaps between the last protected activity and the adverse employment action. See e.g. *CAM Mining, LLC,* 31 FMSHRC at 1090 (three weeks) and *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC 34 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the instant cases, there was an extremely close proximity in time between the protected activities and adverse actions. Gibson and Leadmon both brought safety complaints to management on May 23, 2017, engaging in protected activity. (Tr. 42-43, 108-09). The same day, on May 23, 2017, Gibson and Leadmon were suspended. (Tr. 45-46, 115). Two days later, on May 25, 2017, Gibson and Leadmon were discharged. (Tr. 46-47, 116). As a result, I find that the time span between the protected activities and adverse actions is sufficient to establish a nexus.

3. Hostility or animus toward the protected activity

The Commission has held, "[h]ostility towards protected activity—sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

Gibson experienced multiple occasions of hostility to the safety complaints he made to Vanover, the section foreman, and Dotson, the superintendent. (Tr. 36-37). When Gibson asked

Vanover to switch the airflow while the continuous miner machine was cutting in to the air intake on May 4, 2017, Vanover and Smith, an evening shift foreman, just ignored Gibson's complaints and told Gibson to keep working in the dangerous condition. (Tr. 36). Moreover, on May 11, 2017, Gibson testified that Vanover cursed at him, yelling that Gibson needed to "F-ing cut into it now" when Gibson objected to cutting into an unsupported roof. (Tr. 37). Gibson also was suspended on May 23, 2017, after written and verbal safety complaints were presented to management. (Tr. 42-43).

Leadmon also experienced hostility when he told Vanover that he did not want to back out of the number four right section without completing bolting for the continuous miner. (Tr. 101). Vanover told Leadmon "you will do it" and "made [the roof bolters] back out." (Tr. 102). Additionally, Leadmon was suspended on May 23, 2017, after he brought Gibson's list of safety complaints to Dotson and made verbal safety complaints to management. (Tr. 108-09, 115).

As a result, Gibson and Leadmon both received hostility, which was directed towards their safety complaints when Vanover ignored their safety complaints and continued to demand they complete unsafe work orders. (Tr. 36-37). Moreover, the fact that they were suspended the same day that they made safety complaints to management demonstrates animus. (Tr. 45-46, 115).

4. Disparate treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). The Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id*. at 2510-2513.

There was some testimony brought forward by Respondent indicating that Ron Bennett and the other miners working in the four main section made safety complaints without being terminated. (Tr. 87-88). Evidence was not brought forth by the Secretary to indicate whether there was disparate treatment in the instant matter. However, this factor is not necessary for a *prima facie* claim of discrimination and does not outweigh the other factors indicating a nexus between protected activity and adverse action.

D. Defenses

Respondent argued at hearing that Leadmon and Gibson's safety complaints were only made in response to disciplinary action taken by Respondent. (Tr. 76). This defense requires a credibility determination, and is therefore outside of the scope of these temporary reinstatement cases. Further, Respondent argues that Complainants were terminated for taking unsafe actions in the mine. (Tr. 66, 130). Specifically, Respondent contends that Gibson was terminated for cutting into the air intake and an unsupported roof, while Leadmon was terminated for falsifying a PDM sample. (Tr. 66-67, 130; RX-1, 3). These defenses are not appropriate for a temporary reinstatement proceeding as they do not challenge the Secretary's burden of bringing a claim that

is not frivolous. These defenses do not challenge that there is reasonable cause to believe by substantial evidence that a violation of section 105(c) has occurred.

VII. CONCLUSION

In concluding that Gibson's and Leadmon's complaints were not frivolously brought, I find that there is reason to believe Gibson and Leadmon engaged in protected activities and that there was a nexus between the protected activities and their terminations.

ORDER

For the reasons set forth above, it is **ORDERED** that Complainant Benjamin Leadmon be immediately reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision.

Further, it is **ORDERED** that Complainant Franklin Jeremiah Gibson be immediately reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision.

The court retains jurisdiction over these temporary reinstatement proceedings. 29 C.F.R. § 2700.45(e)(4). The Secretary shall complete the investigation of the underlying discrimination complaints *as soon as possible*. Immediately upon completion of the investigations, the Secretary shall notify counsel for Respondent and this court, in writing, whether violations of Section 105(c) of the Mine Act have occurred. *Id*.

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of PEDRO IGLESIAS, Petitioner	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2015-0105 A.C. No. 08-00051
v.	DISCRIMINATION PROCEEDING
TITAN FLORIDA, LLC, Respondent	Docket No. SE 2015-0234-DM A.C. No. 08-00051 MSHA Case No. SE-MD-15-04 Mine: Pennsuco Cement Plant

ORDER OF DISMISSAL
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge McCarthy

This proceeding is before me on an Amended Complaint of Discrimination filed by the Secretary of Labor (Secretary) on April 2, 2015, on behalf of Complainant, Pedro Iglesias (Iglesias), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Act), as amended. *See* 30 U.S.C. § 815(c)(2). The Amended Complaint alleges that on November 11, 2014, the Respondent, Titan Florida, LLC (Titan), terminated the employment of Iglesias in violation of section 105(c) because he exercised his statutory rights to make safety complaints to the Mine Safety and Health Administration (MSHA) and to Titan. Currently pending before the Court are the Respondent's Motion to Modify Order of Temporary Economic Reinstatement, filed on July 3, 2017 in Docket No. SE 2015-0105,[1] and the parties' Joint Motion to Approve Settlement and Dismiss filed on August 25, 2017 in Docket No. SE 2015-0234.

[1] On December 23, 2014, the Secretary filed an Application for Temporary Reinstatement on behalf of Iglesias, which was docketed before the Commission as Docket No. SE 2015-0105. Respondent did not request a hearing on the Application. Instead, the parties negotiated a settlement of the issues raised by the Application. On February 19, 2015, the Secretary, Respondent, and Complainant filed a Joint Motion to Approve Agreement for Economic Reinstatement. On February 27, 2015, the undersigned issued an Order of Temporary Economic Reinstatement, retroactive to the date of the Secretary's December 23, 2014 Application. Respondent was ordered to economically reinstate Iglesias, as specified in the Joint Motion to Approve Agreement for Economic Reinstatement, under the same terms as if Iglesias's employment had not been terminated on November 11, 2014.

The Secretary's Amended Complaint alleges that on June 25, 2013, Iglesias filed a hazard complaint with MSHA under section 103(g) of the Act; that on October 17, 2014, Iglesias informed his supervisors of safety concerns about damaged energized cables; and that on November 1, 2014, Iglesias informed supervisor Cesar Soriano of safety concerns regarding lockout/tagout. Complaint at ¶ 8. The Amended Complaint further alleges that on or about November 11, 2014, with the agreement of Titan's upper management, Human Resources (HR) manager, Yvette Rodriguez [Hernandez, Tr. 12], and Titan's former production manager, Jeff Harris, fired Iglesias. The Amended Complaint alleges that Hernandez and Soriano knew that Iglesias participated in MSHA's investigation of the hazard complaint, which resulted in an MSHA inspection and five citations for Titan, and that Hernandez and Soriano also knew or suspected that Iglesias filed the hazard complaint. *Id*. at ¶ 10 and 11. Based on the foregoing, the Amended Complaint alleges that Respondent discharged Iglesias because he made a Complaint under the Act and/or caused to be instituted a proceeding under the Act and/or exercised his rights under the Act. *Id*. at ¶ 12.

The parties have filed a Joint Motion to Approve Settlement and Dismiss to resolve both the Motion to Modify Order of Temporary Economic Reinstatement pending in Docket No. SE 2015-0105 and the underlying discrimination claims in Docket No. SE 2015-0234. The parties represented in their Joint Motion that Complainant Iglesias and Respondent have entered into a Confidential Settlement Agreement resolving all issues. The Secretary is not a signatory to the Confidential Settlement Agreement. Jt. Mot. at ¶ 6. The Joint Motion also proposes a reduction in the penalties from $13,100 to $3,000. I have reviewed the Joint Motion to Approve Settlement and Dismiss. I have reviewed the Confidential Settlement Agreement *in camera.* Following such review, I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act, is in the public interest, and will further the intent and purpose of the Federal Mine Safety and Health Act, as amended.

Accordingly, the parties' Joint Motion is **GRANTED**, and the parties are **ORDERED** to comply with the terms and conditions of both the Joint Motion and the Confidential Settlement Agreement within 30 days of the date of this Order, except as otherwise provided in the Joint Motion and/or the Confidential Settlement Agreement. My Order of Temporary Economic Reinstatement is dissolved as of the date of Iglesias's full reinstatement, per the terms of the Joint Motion approved herein. Upon completion of the terms and conditions of the Joint Motion and the Confidential Settlement Agreement, the above-captioned proceedings are **DISMISSED**.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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/ccc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 31, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2015-996 A.C. No. 46–06265–383951
v.	
RAW COAL MINING COMPANY, INC., Respondent	Mine: Sewell Mine B

DECISION

Appearances: Paige I. Bernick, Esq. (Eric Johnson, Esq., on brief), U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;

James F. Bowman, Safety Consultant, Midway, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon a 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).[1] In dispute are three section 104(d)(2) orders issued by the Mine Safety and Health Administration ("MSHA") to Raw Coal Mining Company, Inc. ("Respondent" or "Raw Coal"), as owner and operator of the Sewell Mine B ("Sewell mine") in Asco, West Virginia. To prevail, the Secretary must prove any cited violation "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).

I. STATEMENT OF THE CASE

These three section 104(d)(2) orders were issued at Raw Coal's Sewell mine. Although none of them were designated as significant and substantial ("S&S"), the Secretary characterizes Raw Coal's negligence as "high" for all three orders and alleges that the violations were a result

[1] In this decision, the hearing transcript, the joint exhibit, the Secretary's exhibits, and Raw Coal's exhibits are abbreviated as "Tr.," "Joint Ex. #," "Ex. S–#,"and "Ex. R–#," respectively.

of the company's unwarrantable failure to comply with mandatory safety standards.[2] The Secretary proposes a penalty of $4,000.00 for each violation for a total penalty of $12,000.00.

This matter was initially the subject of a default judgement. The Commission, in an order encompassing several consolidated dockets and operators, granted Respondent's request to reopen this case. *Allstate Materials, LLC*, 38 FMSHRC 645 (Apr. 2016) (reopening unrelated matters involving eight different operators in a single order). Thereafter, Chief Administrative Law Judge Robert J. Lesnick assigned me Docket No. WEVA 2015-996, and I held a hearing on March 9, 2017, in Beckley, West Virginia. The Secretary presented testimony from MSHA Inspector Nicholas Christian and Inspector Trainee Donald LeMarr. Raw Coal presented testimony from general mine foreman Fred Ciampanella, mine superintendent Randy Campbell, and third shift section foreman Burb Blankenship. The parties each filed post-hearing briefs and reply briefs, whereby the record closed on June 7, 2017.

II. ISSUES

Raw Coal, through its lay representative, challenges the fact of the violation, the negligence and unwarrantable designations, and the proposed penalty for each order.

Order No. 9020987 charges Raw Coal with a violation of 30 C.F.R. § 75.364(b)(2) for failing to perform the required weekly examination of the Left Return Aircourse and Seals. Raw Coal, however, contends it conducted the exam but simply failed to record it.

Order No. 9064481 charges Respondent with a violation of 30 C.F.R. § 75.333(b)(1), which requires Raw Coal to construct a line of stoppings (solid physical barriers) in the crosscuts between the working section's intake and return entries, so as to separate the fresh air in the intake entry from the contaminated air in the return entry. Although the standard permits the two connecting crosscuts closest to the working face (where coal is actively being mined) to remain open for travel between the two entries, the Secretary alleges Raw Coal impermissibly allowed

[2] The S&S and unwarrantable failure terminology is taken from section 104(d)(1) of the 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" and establishes more severe sanctions for any violation caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." A violation that is both S&S and an unwarrantable failure shall result in a 104(d)(1) citation. *Id*. The occurrence of another unwarrantable failure violation within the next 90 days, even if not S&S, shall result in the issuance of a 104(d)(1) order withdrawing miners from the affected area. *Id*. Any subsequent unwarrantable failure withdrawal orders are issued under section 104(d)(2) until such time that an inspection of the mine discloses no further unwarrantable failure violations. *Id*.; *Greenwich Collieries*, 12 FMSHRC 940, 945 (May 1990). The 104(d)(1) predicate for the three orders in this case was Order No. 9061670, which was issued on January 21, 2015, and became a final order on November 23, 2015. (Tr. 43:9–21; Ex. S–18.)

an additional two crosscuts between those entries to remain open.[3] Raw Coal, in turn, argues that the third connecting crosscut was permitted to remain open when the order was issued, and that the ventilation control for the fourth connecting crosscut was adequately maintained.

Lastly, Order No. 9064486 charges Respondent with violating its approved ventilation plan in a number of ways, including moving an entire line of stoppings to a series of crosscuts where they were not permitted to be, altering the direction of air flow in a return entry, and creating a dead air space. Raw Coal denies it moved a line of stoppings or altered the direction of air flow, and argues that the arrangement of its ventilation controls constituted a permissible variation of the MSHA-approved ventilation plan.

Alternatively, if any violations were to be found, Raw Coal disputes the unwarrantable failure designations due to the alleged limited duration and extent of the violation in Order No. 9020987, inadequate notice that greater efforts were needed for compliance in Order No. 9064481, and complexity of the ventilation map at issue in Order No. 9064486.

Accordingly, the following issues are before me: (1) whether Respondent violated 30 C.F.R. § 75.364(b)(2) as alleged in Order No. 9020987; (2) whether Respondent violated 30 C.F.R. § 75.333(b)(1) as alleged in Order No. 9064481; (3) whether Respondent violated 30 C.F.R. § 75.370(a)(1) as alleged in Order No. 9064486; (4) whether the Secretary's gravity determinations are properly designated for these three section 104(d)(2) orders; (5) whether Respondent's negligence is properly designated as "high" and constitutes an unwarrantable failure; and (6) whether the proposed penalties are appropriate.

For the reasons set forth below, Order Nos. 9020987, 9064481, and 9064486, are **AFFIRMED**.

III. FINDINGS OF FACT

The parties stipulated to the following:

1. Raw Coal Mining Company, LLC ("Respondent") is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has the authority to hear this case and issue a decision.
3. Respondent has an effect upon commerce within the meaning of Section 4 of the Federal Mine Safety and Health Act of 1977.

[3] If one were to proceed away from the face where coal was actively being mined at the time of the inspection, the two crosscuts that do not require permanent ventilation controls would be the first and second crosscuts encountered. Hence, they are referred to in this decision as the first and second crosscuts outby the working face. The crosscuts with allegedly missing or incomplete stoppings would be the third and fourth crosscuts encountered and are accordingly referred to as the third and fourth crosscuts outby the working face.

4. Respondent operates Sewell Mine B, Mine Identification Number 46-06265.

5. Sewell Mine B mined 97,208 tons of coal in 2016.

6. Respondent abated the citations involved herein in a timely manner and in good faith.

7. Secretary's Exhibits 1 through 22 are admissible.

8. Respondent's Exhibits 1 through 7 are admissible.

(Joint Ex. 1.)

Raw Coal's Sewell Mine B is an underground coal mine in McDowell County, West Virginia. (Ex. R–6.) The Sewell mine consists of a series of entries and perpendicular crosscuts that together form a grid if viewed from above. (*See* Exs. S–14, S–15.) Its low ceilings measure approximately 42 to 44 inches in height and generally require miners to crawl through travelways or ride in a vehicle to get around. (Tr. 25:17–26:4.) The company mines coal on three daily eight-hour shifts at the Sewell mine. (Tr. 33:1–14.) As the operator advances through a section in the course of normal mining operations, it leaves pillars of coal between entries and crosscuts that help support the roof. After a section is completely mined, the operator then engages in a process commonly referred to as "retreat mining." In other words, to collect additional coal from the remaining pillars, Raw Coal removes those pillars and allows the roof to collapse. (Tr. 67:14–68:6.)

Raw Coal also utilizes a system of ventilation controls at the mine (including stoppings and curtains positioned in various crosscuts between entries) to direct fresh air to the active production sections through "intake" entries, and to direct harmful gases and dust from the working faces out of the mine through "return" entries. (Tr. 27:11–30:23.) MSHA views the liberation of methane gas, in particular, as a problem at any underground coal mine due to its explosive potential. However, the Sewell mine produced significantly less than the 200,000 cubic feet of methane necessary to warrant a spot inspection (close and frequent monitoring for issues related to methane buildup), a fact that is reflected in MSHA's gravity determinations for the subject orders. (Tr. 34:16–20, 35:10–23, 36:16–37:4; Ex. S–5.)

A. Order No. 9020987 – The Weekly Exam Violation

Inspector Christian arrived at the Sewell mine at 7:25 a.m. on April 7, 2015, to conduct a regular inspection with MSHA Inspector Trainee Trent LeMarr.[4] (Tr. 15:3–11, 16:12–22.) They were accompanied by Raw Coal agents Fred Ciampanella and Randy Campbell. (*Id*.) Christian

[4] While Christian had only been an MSHA inspector since 2014, he had an additional 13 years of experience in the mining industry, which included jobs as a section foreman, general mine foreman, and mine superintendent. (Tr. 9:22–13:6.) As a mine superintendent, Christian was responsible for developing, reviewing, and ensuring compliance with mine ventilation plans. (Tr. 12:15–24.) Likewise, LeMarr joined MSHA in 2014 and had approximately 20 years of prior experience in the mining industry. (Tr. 274:2–12.)

proceeded to the mine office and began checking Raw Coal's record books. He immediately noticed the company had not recorded in its logbook a weekly exam of the left return aircourse and seals since March 30. (Tr. 15:13–17:5; Ex. S–2.) Raw Coal was required to conduct and record another weekly exam of the area by April 6 (the prior day). (Tr. 17:13–14.) Christian knew Ciampanella had accompanied him for most of the April 6 inspection (which lasted until the early afternoon) and could not have conducted the weekly exam during that time. (Tr. 24: 15–18, 110:18–24.) But, to be certain, Christian asked Ciampanella, "Did you make the exam yesterday?" and, according to the inspector, Ciampanella responded, "No, I did not make the exam yesterday." (Tr. 17:17–24; Ex. S–4 at 5.) Inspector Trainee LeMarr fully corroborated Christian's account of the conversation. (Tr. 276:3–7.) At hearing, however, Ciampanella denied making that statement or even being asked the question, and insisted he had in fact conducted the exam over the course of multiple days, including April 6, but simply failed to record that he had examined the entire left return. (Tr. 245:12–19, 247:20–249:13, 259:3–7.)

Christian next checked the tracking logbook in the dispatcher's office for any evidence that Raw Coal had conducted the weekly exam.[5] (Tr. 18:8–17.) When entering a return, miners are required to phone the dispatcher above ground to record their presence in the return and how long they expect to remain there, so the company knows to look for them if they remain longer than intended. (Tr. 18:8–14.) The company is also required to keep written logs of these calls. (Tr. 21:23–22:2.) The logbook did not display any record of miners entering either the left or right return since April 2. (Tr. 22:1–8; Ex. S–3.) Christian also asked individuals in the dispatcher's office if they had any other notes or records indicating that Ciampanella had been in the return recently. The answer he received was once again, "No." (Tr. 19:5–8.) At this point Christian informed Ciampanella and Campbell "that they were to withdraw the men from the mine until the aircourse [examination] could be made," and the company immediately complied with the withdrawal order. (Tr. 19:8–10, 24:19–22.)

Christian told Ciampanella that he was already planning to travel through the left return airway in the course of his regular inspection that day, so he intended to accompany Ciampanella when he conducted the exam to abate the order. (Tr. 24:23–25:3.) However, while the inspector was checking a coal truck on the surface, Ciampanella hopped onto a vehicle and hurried underground without slowing down to allow Christian an opportunity to accompany him. (Tr. 25:4–9.) Because Ciampanella had left him without a permissible ride, Christian could not travel to the return and observe the examination himself. (Tr. 25:17–26:24.) Instead, Christian waited at the surface.[6] The order was terminated when Ciampanella returned to the surface and presented a record of the exam he had just conducted. (Tr. 25:14–16.)

[5] Although Christian had already confirmed that Ciampanella had not conducted the exam, there were at least four other certified foremen who could have done so. (*See* Tr. 44:21–45:19.)

[6] Being 6'5", Christian would have needed to crawl through the travelways (which averaged 42 to 44 inches in height) to adequately inspect the return, a process he speculated would take him eight or nine hours. (Tr. 25:17–26:24.)

B. Order No. 9064481 – The Missing and Incomplete Stoppings Violation

At the start of a subsequent inspection on the morning of April 21, a section foreman at the mine asked Inspector Christian if the company was permitted to continue cutting, loading, and cleaning a working section while constructing a stopping. (Tr. 46:4–47:7.) Christian recalled that just three weeks prior he had cited the company for a violation of section 75.333(b)(1), which requires stoppings to be installed up to and including the third crosscut outby the working face, so he believed the company was concerned that it was again in violation of the same standard. (Tr. 47:5–22; Exs. S–9, S–10, S–11.) Christian told the section foreman he would assess the situation when he arrived at the section, and then proceeded with his inspection, accompanied by LeMarr and Raw Coal agents. (Tr. 47:19–48:3.)

When Christian arrived at the working section, he observed no stoppings in the three open crosscuts outby the working section (i.e., the three crosscuts closest to the working face). (Tr. 52:12–53:16; *see* Ex. S–7 at 15.) These crosscuts provided access to the left return entry, where air that has ventilated the face directs dust and gas out to the surface. (*Id*.) While the first two crosscuts closest to the face are permitted to remain open in order to allow miners to access the return entry if necessary, the third crosscut (and each one after that) requires a permanent stopping once the first two crosscuts are fully cut through, bolted, and safe for travel.[7] (Tr. 228:13–21.) The ventilation controls are designed to separate fresh air blowing through the intake entry toward the working face from the contaminated or dirty outgoing air in the return entry that has already passed through the working sections, ensuring that a sufficient flow of fresh oxygen reaches the working face without being diverted (or short circuited) into the return entry. *See* 61 Fed. Reg. 9764, 9782 (Mar. 11, 1996) (explaining the rationale for the ventilation control requirements in 30 C.F.R. § 75.333).

The first crosscut outby the working face did not contain any ventilation controls, temporary or permanent, while the second and third crosscuts had temporary curtains installed to control ventilation. (Tr. 53:1–11.) Temporary ventilation controls do not satisfy the standard's requirements. *See* 30 C.F.R. § 75.333(b)(1). Christian observed that the stopping for the fourth crosscut outby the working section was only partially completed, as it contained exposed un-plastered wood and a hole (or opening) at the top spanning 8 to 10 feet — half the width of the crosscut — without even a curtain to fill the gap. (Tr. 48:8–12, 53:11–17, 54:10–15, 61:6–62:17.) Therefore, Christian found Raw Coal to be in violation of the standard at both the third and fourth crosscuts outby the working section. (Tr. 78:19–79:2.) He proceeded to take an air reading at the open crosscut closest to the section face and recorded an airflow rate of only 7,000 cubic feet per minute ("CFM"), well below the mine's ventilation plan requirement of an airflow of 12,000 CFM. (Tr. 53:17–54:1, 57:1–13; Ex. S–8.) Christian explained that by not having stoppings installed, the company was short-circuiting intake air through the crosscuts into the return entry instead of forcing it toward the section face. (Tr. 54:1–12.)

According to Christian, when he told Ciampanella that he would be issuing a section 104(d)(2) order for failing to install the required stoppings and asked for any mitigating

[7] Crosscuts must have adequate roof support to remain safe for travel, so miners can pass through them without subjecting themselves to the risk of a roof fall. Roof bolting is an essential part of the mining process and integral to a mine's roof control plan.

circumstances, Ciampanella responded, "Why should I install those stoppings, when I'm going to tear them back out tonight when I begin pillaring?" (Tr. 67:7–13.) Since Raw Coal would eventually be "retreat mining" in the section, the company would possibly begin "pillaring later that night" after mining out the area. (Tr. 67:14–68:6.) In other words, the operator would begin to remove the pillars of coal to let the roof collapse and bury the section, thereby eliminating the need for any stoppings in the soon-to-be non-existent crosscuts. (*Id*.) Ciampanella's statement convinced Christian that Raw Coal was aware of the violative condition but allowed it to persist for the sake of expediency. (Tr. 73:12–20.)

At hearing, Raw Coal's witnesses, Blankenship and Ciampanella, disputed Christian's testimony regarding the hole in the stopping for the fourth crosscut. (Tr. 200:15–24, 254:6–20.) Ciampanella also claimed that the stopping was fully plastered on one side. (Tr. 254:6–16.) However, the biggest point of contention at hearing was the timing for when the first crosscut had been fully cut through and bolted such that it was safe for travel, thereby triggering the requirement for a completed stopping at the third crosscut.

Christian testified that he was initially informed the company had finished cutting through the first crosscut earlier that morning, during the previous shift, but was later told Raw Coal had completed this process the prior evening. (Tr. 58:23–59:22, 60:1–6, 60:19–61:4.) Nevertheless, Christian observed that the crosscut was fully cut through, bolted, and safe for travel when he arrived at the section at 8:30 a.m. on April 21. (Tr. 59:20–24, 60:8–10, 79:8–19.)

The record for the preshift examination of the section conducted between 5:00 a.m. and 7:42 a.m. on April 21 indicates that the first crosscut outby the working face had not yet been bolted at the time of the preshift examination. (Ex. R–1 at 5; Tr. 75:15–76:8.) In addition, Raw Coal introduced a record of an onshift examination—conducted *after* the issuance of Inspector Christian's citation—that indicates this same crosscut had not yet been bolted. (Ex. R–1 at 6.) All of Raw Coal's witnesses testified at the hearing that the first crosscut had not been fully cut and bolted when Christian observed it, and that it was not until later that day that the company completed this process. (Tr. 204:7–205:18, 227:13–228:4, 250:10–254:5.) However, Inspector LeMarr, who accompanied Christian, corroborated Christian's observation that the first crosscut was fully cut through and bolted when they initially observed it at 8:30 a.m. (Tr. 277:16–24.) Also, LeMarr witnessed the hole Christian had observed in the stopping for the fourth connecting crosscut. (Tr. 278:9–19.)

C. Order No. 9064486 – The Ventilation Plan Violation

The following day, April 22, Inspector Christian returned to the mine to continue his regular inspection, again accompanied by LeMarr. (Tr. 80:21–23, 81:4–5.) At the working section, Christian noticed a number of problems with the ventilation controls in the area which convinced him that Raw Coal was not following its MSHA-approved ventilation plan. (Tr. 81:16–83:16.) Most significantly, he testified that an entire line of stoppings was missing from a series of crosscuts where the ventilation plan indicated they were supposed to be; instead, it appeared that all of those stoppings had been moved exactly one series of crosscuts over, where, according to Christian, they were not permitted. (Tr. 82:2–9, 87:17–88:16.) Christian testified that he saw leftover materials where the stoppings had once been, including blocks and plaster

still stuck to the mine roof and ribs, suggesting that these stoppings had indeed been moved. (Tr. 95:10–24.) LeMarr's testimony at hearing corroborated Christian's observations of missing stoppings and leftover materials in the crosscuts where the approved ventilation plan indicated they were supposed to be. (Tr. 279:15–280:6.) However, at the hearing, Mine Superintendent Randy Campbell not only testified that no stoppings had been moved but denied that stoppings had ever been in the area where Christian believed they should have been. (Tr. 230:15–231:24.) Campbell testified the stoppings were not required to be in the area where Christian believed the ventilation plan required them and denied there were any leftover materials stuck to the roof and ribs in those crosscuts. (*Id*.)

Inspector Christian testified that he initially believed Raw Coal had removed the permanent ventilation controls in order to develop an area beyond those stoppings, and that MSHA had permitted the company to do this. (Tr. 94:4–96:20.) But, once that area had been worked out and Raw Coal retreated from there, MSHA expected the company to reinstall the removed stoppings in the same location where they had originally been, as required by the mine's MSHA-approved ventilation plan. (*Id*.) According to Christian, Raw Coal failed to do this and had not obtained any revision to its approved site-specific plan that would allow a deviation from that strategy. (Tr. 97:2–98:4.) The most recently approved revisions to the mine's ventilation plan had been submitted by Raw Coal on March 25 and approved by MSHA on April 17, five days before Order No. 9064486 was issued. (Tr. 185:1–24.) Campbell testified that he did not think Raw Coal had received the revised ventilation plan by the time of the April 22 inspection. (Tr. 234:6–16.) Yet, Ciampanella testified that he presumed the mine received the approved revisions on April 17 (Tr. 257:15–23), and Christian stated the revised ventilation plan was posted on the mine bulletin board at the time of the inspection. (Tr. 186:3–5.)

More importantly, Christian believed Raw Coal had rearranged its permanent and temporary ventilation controls (i.e., both the stoppings and curtains) to shift from a "split air" plan to a "sweep air" plan. In a split air arrangement, the intake air that reaches the section splits in two different directions down both the left and right return entries. But in the sweep air arrangement Raw Coal had created on April 22, the intake air was sweeping across the face in a single direction, down the left return entry only. (Tr. 82:10–23, 85:12–87:12, 90:19–91:21.) Mine Superintendent Campbell testified that Raw Coal had permissibly maintained a split air arrangement by allowing room for air to travel down the right side through the section they were developing at the time. (Tr. 236:18–237:11.) However, Christian maintained that on April 22 the entries had not yet been cut through in those locations to allow passage for that air. (Tr. 192:15–193:13.)

As a result of the above conditions, Inspector Christian observed that Raw Coal had altered the direction of the air in one of the entries from a return entry to an intake entry, thereby ensuring there was no available entry on that side of the section for return air to travel. (Tr. 82:23–83:3, 90:8–92:14, 182:12–19.) A regulator (i.e., a hole in a stopping) in that entry had previously redirected return (dirty) air to the bleeder entry (thus carrying harmful air-methane mixtures away from working sections to worked-out areas and finally to the surface). However,

the company was now directing intake (clean) air through the regulator.[8] (Tr. 83:5–12.) There was now the potential that this regulator could direct harmful air from the worked out sections to the working section through what was now, impermissibly, an intake entry. (Tr. 103:1–105:7.) Additionally, this new arrangement of stoppings blocked all access by foot to a bleeder entry where a mine examiner would be expected to travel, according to Raw Coal's approved ventilation plan. (Tr. 92:16–24.)

Finally, this arrangement created a "dead air space" off to the side of the section where "there was no air movement whatsoever." (Tr. 88:18–24, 102:15–16.) Christian and LeMarr confirmed this by testing the flow of the air with chemical smoke. (Tr. 88:21–22, 280:7–11.) Although a dead air space might be especially dangerous for miners in the area, Christian saw no reason for anyone to enter the area where this lack of air movement was observed. (Tr. 102:15–19.)

Christian informed Raw Coal that he was issuing a section 104(d)(2) withdrawal order for a failure to follow the mine's approved ventilation plan, and that Raw Coal would have to shut down operations until it reinstalled its stoppings in accordance with the approved plan. (Tr. 107:10–13.) Correcting the cited condition required 33 miners working approximately 27 hours over the course of three shifts, after which point Christian terminated the order. (Tr. 107:14–20.)

IV. PRINCIPLES OF LAW

The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by "indifference," a "serious lack of reasonable care," "reckless disregard," or "intentional misconduct." *Id.* at 2003–04; *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (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 a case to see if aggravating or mitigating factors exist. *See IO Coal Co.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a 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 was obvious, whether the violation posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See id.* "Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation." *Lopke Quarries, Inc*., 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be

[8] Christian noted that whenever a regulator is used for this purpose, a mine operator must then conduct regular preshift examinations in the areas where intake air is being directed from worked-out areas; but Raw Coal was not conducting these exams. (Tr. 83:5–12.) Its failure to do so would be the subject of a separate citation. (Ex. S–16 at 13.)

examined to determine whether an actor's conduct is aggravated or if mitigating circumstances exist. *Id.*

The Commission has noted that "[s]ome of the same evidence that the Judge will examine with respect to the unwarrantable failure factors will be relevant to the question of the degree of the operator's negligence," especially since both unwarrantable failure and high negligence suggest an aggravated lack of care that is more than ordinary negligence. *Brody Mining, LLC*, 37 FMSHRC 1687, 1691, 1703–04 (Aug. 2015) (citations omitted).

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

As a preliminary matter, I note that I found Inspector Christian and Inspector Trainee LeMarr to be credible witnesses. Respondent attacked Christian and LeMarr for their relative inexperience as MSHA agents, pointing out that the inspectors' accounts often diverged from those of Raw Coal's agents. Nevertheless, I find that Christian's 13 years of experience in the mining industry, including as a section foreman, general mine foreman, and mine superintendent, and LeMarr's 20 years of experience in the mining industry more than compensate for their short time as MSHA officials. (Tr. 12:15–24, 274:2–12.)

Additionally, I do not find any reason to doubt the veracity of the inspectors' accounts. In a prehearing statement, the Respondent's lay representative initially alluded to a "heated argument" following the issuance of Order No. 9020987 wherein Christian refused Ciampanella's invitation to travel to the return entry and check the DTI's[9] on site to confirm that Ciampanella had performed a weekly examination of the air course. According to Respondent, Christian instead insinuated that Ciampanella was a liar and the argument "got so bad that the inspector . . . called his supervisor . . . [and] ask[ed] his supervisor to send a federal marshall to the mine and arrest" Ciampanella. (Resp't Prehearing Statement at 1–2.) By presenting the narrative this way, Respondent implied that Christian's subsequent enforcement actions were colored by personal animosity toward Ciampanella. Yet, at hearing, it was revealed this incident occurred on May 6, well after all of the orders in this matter were issued, and no witness testified about Christian threatening to call a federal marshal. (Tr. 131:14–24, 133:17–134:24, 226:6–227:3.) I find these arguments do not undermine Christian's credibility, especially as his observations were recorded contemporaneously in his notes during the April inspection.

Respondent also asks me to discount Christian's testimony due to what it alleges are "numerous discrepancies" between his testimony and the facts in the record. (Resp't Br. at 3.) For example, Christian noted that he did not observe Ciampanella examine the left return aircourse on April 6 while the two were together "for the most part of the day," even though the inspector was only at the mine between 6:20 a.m. and 12:48 p.m. (Tr. 24:15–17; Ex. R–5.) According to Respondent's lay representative, Christian's testimony is inconsistent with the facts because this timeline establishes that Christian technically "wasn't with Mr. Ciampanella all day

[9] "DTI's" is short for "Date, Time, and Initials." The term refers to markings at the site of an examination documenting the date and time of a weekly examination, and the initials of the individual examining the area. (Tr. 129:12–17.)

long" (a phrase that Christian himself never used). (Resp't Br. at 3; Tr. 112:2–113:1.) I do not find that this alleged discrepancy (if it can even be called that) undermines Christian's credibility. If I have chosen not to address any of the other numerous alleged discrepancies raised by Respondent's lay representative in his post-hearing brief, it is because I have found them to be equally insubstantial (for reasons ably demonstrated by the Secretary in his reply brief). (*See* Sec'y Reply Br. at 1–6.)

A. Order No. 9020987 – The Weekly Exam Violation

1. Additional Findings of Facts

I find that Raw Coal failed to conduct a complete exam of the left return aircourse and seals within a week of its prior examination of the area on March 30. I credit Christian's and LeMarr's testimony that during the inspection on April 7 Ciampanella admitted he had not conducted the exam on April 6, the prior day, which is bolstered by Christian's undisputed testimony that Ciampanella did not conduct the exam during the time he accompanied Christian on the prior day's inspection. (Tr. 17:17–24, 24:15–18, 276:3–7.) I further credit Christian's testimony that Ciampanella immediately, and without objection, complied with the withdrawal order and did not argue that he had in fact completed the exam. (Tr. 17:17–18:7, 24:19–22.) I also give significant weight to the fact that Raw Coal could not produce records demonstrating it had completed the exam.[10] (Tr. 19:5–8.) Yet, Respondent now offers an explanation for this omission: Ciampanella purportedly conducted the exam in segments over the course of multiple days, including on April 6, but simply forgot to record his completion of the entire exam. (Tr. 247:20–249:13, 259: 3–8.) When it was pointed out that the mine's tracking logbook also did not contain any record of Ciampanella's entry into the left return aircourse during that entire week, Respondent's lay representative provided an unconvincing explanation: "Tracking of Mr. Ciampanella is done manually by the outside person. . . . [H]uman error was possible when manually logging tracking." (Tr. 22:1–11; Resp't Br. at 16.) Perhaps this was a case of the operator repeatedly failing to do what was expected of it, except of course for the one thing that it was actually cited for. Regardless, I do not find this explanation credible.

Raw Coal also claims that had Christian accompanied Ciampanella for the order's abatement, he would have found Ciampanella's DTI's in the return aircourse confirming that

[10] At hearing, the company did submit evidence documenting Ciampanella's examination between April 1–4 of what he claimed were segments of the left return. (Tr. 247:2–249:5; Ex. R–4.) However, the referenced areas were not displayed in the exhibits relied on at hearing, because none of the maps introduced into evidence showed the entire mine. Without reference to a full mine map, Christian understandably could not point out the precise location of those areas at hearing, nearly two years after the inspection. (Tr. 122:19–124:12.) But, Christian credibly testified that he consulted a mine map at the time of the inspection to confirm the referenced areas were not located in the left return; instead, they were located in the right return. (Tr. 122:4–128:8.) Notably, of the referenced segments purportedly located in the right return, only one is clearly visible on the truncated maps actually introduced into evidence (the segment labelled "EP-5"), and that segment is located in the right return aircourse, not the left, on those maps. (Tr. 124:8–23; Exs. R–4, S–15.) Therefore, I fully credit Christian's testimony on this point.

Raw Coal had in fact examined the area. (Tr. 24:23–25:3, 25:4–9; Resp't Br. at 14–15.) If that were true, one might expect Ciampanella to have seized on the opportunity to show Christian those DTI's himself. Instead, Ciampanella did not allow Christian an opportunity to accompany him on his examination to abate the order, even though Christian asked to do so. (Tr. 24:23–25:3, 25:4–9.) This behavior further supports my finding that Raw Coal had not examined the left return.

Moreover, I find it irrelevant that a month later, in May, Raw Coal conducted but failed to record a different weekly examination of the left return aircourse, or that Christian was able to confirm this by accompanying Ciampanella and checking the DTI's in the area. (*See* Resp't Br. at 14.) As the Secretary notes, "the May inspection shows Inspector Christian's willingness to evaluate all facts provided by the mine." (Sec'y Reply Br. at 1–2.) But on April 7, even without consulting the DTI's, Christian had ample reason to conclude that Raw Coal had not conducted a weekly exam of the left return air course. Thus, I reject Respondent's contention that Christian "did not conduct even a slightest examination to sustain the burden of proving" a violation and that "[i]n the absence of DTI evidence there is no evidence to support a charge that the examination was not conducted." (Resp't Reply Br. at 3.) Rather, the evidence as a whole, including the exam records, the tracking logs, Ciampanella's admission, and Raw Coal's behavior upon being cited, leads me to find that Raw Coal failed to conduct the weekly exam.

2. Analysis and Conclusions of Law

a. Violation

The Secretary alleges that Raw Coal violated section 75.364(b)(2), which requires a certified person to examine at least one entry of each return air course, in its entirety, for hazardous conditions at least every seven days. (Ex. S–1.) I have found that Raw Coal failed to examine at least one entry of the left return air course in its entirety within seven days of its last examination of the area on March 30, 2015. Therefore, the Secretary has established a violation of the cited standard.

b. Gravity

Inspector Christian determined the violation was unlikely to result in injury or illness, but that if an injury or illness occurred, it could reasonably be expected to result in lost workdays or restricted duty. (Ex. S–1.) Christian also determined that ten persons would be affected by the violation, those being the miners working on the section and along the belts. (*Id*.; Tr. 33:17–22, 40:7–20.) Respondent did not challenge these designations. I agree with Christian's findings. At hearing, Christian explained that not examining the left return could lead the operator to fail to identify missing or incomplete stoppings or flooding in the return aircourse, which could in turn lead to contaminated air being redirected to the working section rather than out of the mine. (Tr. 34:1–40:20.) This scenario, however unlikely, could lead the ten miners working on the section to inhale harmful dust, smoke, or methane. (*Id*.) I agree with and adopt Christian's gravity determinations.

c. Unwarrantable Failure and Negligence

The Secretary asserts that Raw Coal's conduct amounted to high negligence and was an unwarrantable failure. (Ex. S–1.) In support, the Secretary argues that Ciampanella admitted to not conducting the examination and therefore knew of the violative condition, and that the violation was extensive, long-lasting, obvious, and highly dangerous. (Sec'y Br. at 14–15.) In contrast, Raw Coal asserts that the negligence and unwarrantable designations are inappropriate because of the violation's limited duration, extent, and prior history. (Resp't Br. at 17.)

In analyzing an unwarrantable failure, I must consider the Commission's factors for determining aggravated conduct. *See IO Coal Co*., 31 FMSHRC at 1350–51. Although the danger posed by a violation "may be so severe that, by itself, it warrants a finding of unwarrantable failure[,] . . . the converse of this proposition – that the absence of significant danger precludes a finding of unwarrantable failure – is not true." *Manalapan Mining Co*., 35 FMSHRC 289, 294 (Feb. 2013). Instead, this factor must be "weighed . . . against the other relevant factors to determine whether the operator's conduct under the circumstances amounted to an unwarrantable failure." *Id*. In this case, the danger was neither a mitigating nor aggravating factor. The failure to conduct an exam of a return aircourse may expose miners to unknown hazards, but the eventual exam to abate this order did not uncover serious hazards and the violation was deemed unlikely to lead to serious injuries. Consistent with Commission case law, I must weigh this factor against the other relevant unwarrantable failure factors. The facts and circumstances surrounding this violation unveil multiple other aggravating factors.

Most significantly, with regard to Raw Coal's knowledge of the violation, Ciampanella admitted to Inspector Christian on April 7 that he had not conducted an exam the prior day, he lacked any record showing he or anyone else had been in the left return aircourse that week, and he did not protest to Christian that he had conducted (but failed to record) any part of the exam during the prior week (as he later did at hearing). (Tr. 17:17–18:7, 19:5–8, 22:1–8, 24:15–18, 110:18–24, 276:3–7.) Strangely, when asked to accompany Christian down to the return aircourse, Ciampanella left Christian behind and hurried into the mine by himself. (Tr. 24:23–25: 9.) Together, these facts indicate to me that Ciampanella not only knew he had not conducted a weekly exam of the left return aircourse, but also knew no one else in the mine had either. Ciampanella was a supervisor with the authority and responsibility to make the required examination. His knowledge of the violation and culpability, therefore, establish an aggravated lack of care on the part of the company. *See Lopke Quarries, Inc*., 23 FMSHRC at 711.

Two other factors strongly point toward an unwarrantable failure determination: extensiveness and obviousness. Any official at the mine who checked either the examination book or tracking log entries that week would have immediately concluded, as Christian did, that no one had been in the left return. The fact that this failure constitutes a violation of MSHA's weekly examination requirements would have also been obvious. This is a basic mandatory standard. Additionally, the violation was extensive in two respects. First, the left return aircourse, by itself, is undeniably extensive – so extensive, in fact, that according to Ciampanella's own description, it could not typically be examined in a single day. (Tr. 249:3–10.) Second, the failure to examine a return aircourse also affects the entire mine, since return entry hazards can spill over into intake entries absent vigilant care and attention. (Tr. 39:6–24.)

The other unwarrantable failure factors (duration, notice, and abatement) appear to be neither mitigating nor aggravating. The violation existed for slightly more than one shift, a duration which I do not find short enough to be mitigating, nor long enough to be particularly aggravating in the context of a weekly examination requirement. (Tr. 32:17–33:8.) Additionally, I do not find the evidence of a lack of notice from MSHA to be mitigating, when dealing with an obvious and known violation such as this one. (Tr. 118:1–12.) In considering the abatement factor, the Commission focuses on compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co*., 19 FMSHRC 5, 17 (Jan. 1997). The record does not support a finding of any abatement efforts made prior to the order's issuance. Accordingly, I afford these factors no weight in my unwarrantable failure analysis.

After considering and weighing all the factors, particularly the violation's obviousness and extensiveness, and the operator's knowledge, I conclude that the violation was the result of the operator's unwarrantable failure. For these same reasons, I also conclude that Raw Coal was highly negligent for failing to conduct the weekly exam.

B. Order No. 9064481 – The Missing and Incomplete Stoppings Violation

1. Additional Findings of Facts

The parties do not dispute that the second and third connecting crosscuts were safe for travel and did not contain permanent stoppings on the morning of April 21, 2015. The only factual disputes concern the first and fourth connecting crosscuts. Specifically, Respondent claims that the fourth crosscut was adequately plastered on one side and contained the type of holes common to stoppings, but not eight to ten feet wide as the Secretary has alleged. (Resp't Br. at 18.) Respondent also claims that, contrary to the inspectors' observations, the first crosscut was unsupported and not safe for travel at the time Raw Coal was cited. (Resp't Br. at 20.) After weighing all the evidence, I find that all four connecting crosscuts outby the working face were in the conditions that Christian and LeMarr observed.

Christian's observations of an 8-to-10-foot hole, exposed wood, and missing plaster in the stopping for the fourth crosscut are supported not only by LeMarr's testimony but also by Christian's contemporaneous notes and drawings. (Tr. 48:8–12, 53:11, 54:10–15, 61:6–62:17, 278:9–19; Exs. S–6, S–7.) Respondent's lay representative labels the Secretary's description of this stopping as "disgusting" and an "[e]mbellishment . . . contradicted by" all available evidence. (Resp't Reply Br. at 5–6.) Respondent argues that Christian initially relied only on the missing stopping in the third connecting crosscut to establish a violation, allegedly not realizing that the crosscut was legally permitted to remain open at the time, but then, "[i]n an attempt to save the order [from being vacated after realizing his mistake], . . . included the 4th connecting crosscut" in his charge and made "an additional charge that the crosscut had a 8 to 10 foot opening." (Resp't Br. at 7; Resp't Reply Br. at 6.) In support of this allegation, Respondent claims that the inspection notes did not contain any reference to the incomplete stopping's holes, no document specified the size of these holes, and in a deposition Inspector Christian disclaimed reliance on the holes to sustain the order. (Resp't Br. at 7, 18.)

Respondent's attempt to paint a conspiratorial picture falls flat, as this alleged conspiracy rests on several factual inaccuracies. First, Respondent's argument that Order No. 9064481 relies only on the missing stopping in the third connecting crosscut to establish a violation appears premised on the phrase "three open crosscuts" in the order. (Resp't Br. at 7.) In context, however, Order No. 9064481 is intended to convey that three crosscuts were fully open, while the fourth was only partially open. (*See* Ex. S–6 ("When observed there were three open crosscuts on the left return stopping line. Also, the fourth crosscut outby had not been completed.").)

Respondent's lay representative is also mistaken in arguing that Christian's deposition testimony did not mention relying on the problems with the fourth crosscut's stopping in citing the operator. (Resp't Br. at 18.) The specific portion of Christian's deposition testimony cited by Respondent was ambiguous on this point, because Christian was cut off before he could fully answer the question posed. But, Christian later provided clarifying testimony fully consistent with the description in the order, noting the problems with both the third and fourth crosscut.[11] (*See* Ex. R–8 at 33, 37; Tr. 154:21–155:3.) Thus, I conclude that Christian's deposition testimony does not alter the order's meaning. By including the issues with the fourth connecting crosscut in the body of Order No. 9064481, the Secretary provided clear notice to Raw Coal that those issues formed part of the basis for the order. And, contrary to Respondent's claims, the body of Order No. 9064481 is not the only contemporaneous document that mentions these issues. The inspector's contemporaneous notes and diagram also make reference to holes in the fourth stopping. (Ex. S–7 at 15.) In contrast, no such contemporaneous corroborating evidence exists for Raw Coal's competing claims. (*See, e.g.*, Ex. R–2 (documenting Ciampanella's objections to Order No. 9064481 on the back of the order but not addressing the issues alleged in the order with the fourth connecting crosscut's incomplete stopping.) While Christian's notes and the order itself do not specify the exact size of the holes, Christian's and LeMarr's testimony were clear and consistent on this point: the hole (or opening) was 8-10 feet long, about half the width of the crosscut. Therefore, I credit Christian's testimony regarding the fourth connecting crosscut and reject Respondent's unsubstantiated conspiratorial allegations.[12]

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[11] During the deposition, Respondent's lay representative asked Christian "Does the stopping that doesn't have plaster on it . . . contribute to this order in any way?" Christian responded, "No. I mean, the stopping wasn't finished. There [were] still holes in it, wasn't --" but he was interrupted by the lay representative with an entirely different question before he could finish his answer. (Ex. R–8 at 33.) Later, Christian clarified that the violative condition was "excessive because of . . . the excessive amount of open crosscuts," i.e., one stopping was missing "[a]nd the other one [was] not completed." (*Id*. at 37.)

[12] In his post-hearing brief, Respondent's lay representative attempts to put new information before me regarding the construction of stoppings in order to argue that the fourth connecting crosscut did not contain any holes. (*See* Resp't Br. at 6.) As Respondent's brief does not cite to any evidence in the record or to any other authority to support its highly technical description of the construction process, I agree with the Secretary's characterization of this "testimony" as improper and give no weight to this description. (Sec'y Reply Br. at 2.)

Regarding the first connecting crosscut, both parties introduced into evidence contemporaneous documents supporting their respective positions. To support its argument that the first crosscut was not fully cleaned, bolted, or safe for travel when the order was issued, Raw Coal first cites to a note that Ciampanella wrote on the evening after the exam denying the fact of the violation. (Ex. R–2.) Next, Raw Coal cites to contemporaneous preshift and onshift examination reports indicating the crosscut closest to the working face had not been bolted until well after the order was issued. (Ex. R–1.) The Secretary, in turn, cites to Christian's contemporaneous notes and diagrams in support of his testimony that the first crosscut was available for travel when he arrived. (Ex. S–7 at 6–15.)

I ultimately credit the testimony of Christian and LeMarr, which is supported by Christian's contemporaneous notes and diagram. I recognize their testimony conflicts with at least the onshift exam report for the area from later that day and possibly the preshift report from the time of the inspection.[13] However, based on Christian's substantial expertise and experience with ventilation plans, and based on LeMarr's clear and consistent corroborating testimony, I find Christian's description of the first connecting crosscut more reliable and less susceptible to the risk of confusion, especially since irregularities in multiple preshift exam reports undercut Raw Coal's argument about timing.[14] (Tr. 9:22–13:6, 277:9–278:8.) Thus, I find that the first connecting crosscut was cut, bolted, and safe for travel when Christian issued Order No. 9064481. I also credit Christian's testimony that when asked for mitigating circumstances, Ciampanella responded, "Why should I install those stoppings, when I'm going to tear them back out tonight," which I find indicative of Ciampanella's knowledge of the violation. (Tr. 67:7–13.)

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[13] Respondent's lay representative calls attention to this conflict and suggests the possibility of criminal penalties against his client if I resolve this credibility dispute in the Secretary's favor: "If the preshift and on-shift reports are not true then two certified foremen have committed a felony," which "may result in [] criminal charges against the offender[s]." (Resp't Br. at 18–20.) MSHA now has all of the information it needs to pursue a criminal investigation. However, as the Secretary points out, Respondent's lay representative has presented a "false dichotomy," because judges routinely make credibility determinations "without resorting to accusations of criminal activity." (Sec'y Reply Br. at 3.)

[14] The Secretary called into question the reliability of Raw Coal's examination reports by pointing out irregularities with the preshift reports submitted into evidence by Respondent for Order No. 9020987. One preshift exam report for the Main area, signed and reported by Burb Blankenship on the morning of April 6, 2015, indicates that a preshift exam was conducted between 5:00 and 7:56 a.m. (Ex. R–3 at 1.) However, Raw Coal also introduced into evidence another preshift exam report for the same Main area conducted the very same morning, also signed and reported by Burb Blankenship, but indicating the exam was conducted between 4:30 and 5:30 a.m. (Ex. R–3 at 2.) Ciampanella conceded that there was a "problem" with these reports, because conducting "two preshift examinations for the same morning" is "not the way business is done." (Tr. 264:19–265:9.) While Raw Coal later presented a possible theory to explain this irregularity and the Secretary did not draw further attention to these discrepancies in his post-hearing briefs, Blankenship's and Ciampanella's clear discomfort with the information contained in these reports gives me pause in relying on Raw Coal's examination reports to establish an accurate timeline of events. (*Id.*; Tr. 214:15–217:11.)

2. Analysis and Conclusions of Law

a. Violation

The Secretary alleges a violation of section 75.333(b)(1), which requires that ventilation control devices be built between intake and return air courses and maintained up to and including the third connecting crosscut outby the working face. (Ex. S–6.) Although this requirement does not apply to rooms that are 600 feet or less in length or to sections specifically exempted by an approved ventilation plan, Christian explained the latter exception did not apply to the cited area, and Raw Coal has not argued that either exception applies. (Tr. 63:3–66:24.) The standard does not specify the exact timing for when the stopping for the third connecting crosscut must be completed, but MSHA has issued guidance in a Procedure Instruction Letter ("PIL") clarifying that "permanent stoppings installed to separate intake and return aircourses must be completed in the third crosscut outby the face by the time the face crosscut [i.e., the first crosscut] is cleaned, bolted, and ready for travel," and both parties agree that this interpretation governs in this proceeding. (Exs. S–19, S–20; Sec'y Br. at 22; Resp't Br. at 18.)

I conclude that Raw Coal violated the standard by failing to build a stopping in the third connecting crosscut upon cutting, cleaning, and bolting the first connecting crosscut prior to the inspection, and by failing to maintain the fourth connecting crosscut in a condition that complied with the standard's requirements. The Secretary proved that this stopping was improperly maintained in that it lacked necessary plaster, contained an opening of 8–10 feet, and short circuited enough intake air into the return entry to result in legally insufficient airflow (7,000 CFM vs. 12,000 CFM) to the working face. The missing stopping in the third connecting crosscut and the improperly maintained stopping in the fourth connecting crosscut lead me to conclude that Raw Coal only maintained its stopping line up to the fifth crosscut outby the working face.

Therefore, I find that the Secretary has satisfied his burden for proving a violation.

b. Gravity

Christian determined that the violation was unlikely to result in injury or illness, but that in the event of an injury, lost workdays or restricted duty injuries could reasonably be expected. (Ex. S–6.) He determined that missing or incomplete stoppings could redirect harmful return air to a working section, leading the nine miners working in the section to inhale harmful dust, smoke, or methane. (Tr. 71:17–72:7.) I agree with this analysis and affirm Christian's gravity determinations, which were undisputed by Raw Coal.

c. Unwarrantable Failure and Negligence

The Secretary designated this violation as an unwarrantable failure and characterized Raw Coal's negligence as high. (Ex. S–6.) In support, the Secretary alleges that Raw Coal knew of and permitted the violation, was on notice that greater efforts were necessary for compliance, and that the violation was highly dangerous, obvious, extensive, and existed for an extended period of time. (Sec'y Br. at 30–33.) Respondent's lay representative largely passes on his opportunity to contest the negligence or unwarrantable nature of the violation, stating, "Since the

Responde[nt] believed there was no violation[,] any question regarding mitigating circumstances would be [a] mockery of the Respondent's good faith belief." (Resp't Reply Br. at 6.) His reply brief does, however, address the Secretary's notice argument briefly, labeling the use of a recent prior citation to establish notice as "preposterous." (*Id*.)

While the *IO Coal* and *Consolidation Coal* factors are useful for determining whether an operator's culpability rises to the level of "indifference," "serious lack of reasonable care," or "reckless disregard" that generally characterize an unwarrantable failure, it is important to note, before addressing any of those factors, that this violation involves intentional misconduct. "Intentional misconduct, whether by commission or omission, is similar in terms of culpability to . . . indifferent, willful, or knowing behavior . . . [and therefore] is a form of unwarrantable failure for purposes of the Mine Act." *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991). I have reached the conclusion that this misconduct was intentional based on Ciampanella's statement to Christian, "Why should I install those stoppings, when I'm going to tear them back out tonight when I begin pillaring?" (Tr. 67:7–13.) Like Christian, I interpret this statement to mean that Raw Coal knowingly and deliberately failed to construct and finish necessary stoppings near the working face because it knew it would be retreat mining imminently and therefore did not view these safety measures as being worth the effort. This, however, was not the company's call to make. An operator cannot pick and choose which standards to comply with based upon its own determination that the hazards addressed by those standards may be tolerated for a limited amount of time.

Placing these facts in the context of the Commission's unwarrantable factors, I conclude that not only does Ciampanella's statement establish the operator's knowledge of an obvious violation, but it also suggests that the company had taken no steps to abate the violation prior to being cited. In addition, as a supervisor, Ciampanella's involvement in the creation of the violative condition is an independent factor which establishes an aggravated lack of care. *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 (Aug. 2016).

In assessing several of the other unwarrantable factors, I find it useful to distinguish between the two violative conditions cited in the order. As noted previously, it is unclear whether the first connecting crosscut was made available for travel during the previous night's shift, or only immediately prior to the inspection. (Tr. 59:3–61:4.) Thus, the third connecting crosscut may have impermissibly lacked a permanent stopping for only a brief period of time and the omission may not have been obvious during that period. However, I conclude that the incomplete stopping in the fourth connecting crosscut would have been obvious to examiners for a much longer period of time. The hole (or opening) was half the width of the stopping, and Christian credibly explained that the stopping for this crosscut remained incomplete for at least 10, and possibly up to 24, hours. (Tr. 48:8–12, 61:6–62:17, 180:13–181:1.) Therefore, taken together, the violative conditions were obvious and existed for an extended period of time. I also conclude that the violation was extensive, given that Raw Coal violated the standard in two separate crosscuts and that the lack of permanent ventilation controls led to insufficient airflow to the section face. (Tr. 53:17–54:12.) Although this lack of airflow was not reasonably likely to lead to serious injury, and thus the degree of danger is not an aggravating factor, the duration, obviousness, and extensiveness of the violation are.

Raw Coal was also on notice that greater efforts were necessary for compliance. Christian had issued citations for missing stoppings and inadequate ventilation roughly two weeks prior and had discussed the same issues with some, but not all, of the foremen involved in the subject order. (Tr. 54:16–56:23, 73:20–23; Ex. R–8 at 14–15.) Raw Coal now disputes whether one of those prior citations was in fact justified. (Resp't Rep. Br. at 6.) However, it does not dispute that the citations were issued, that Raw Coal paid penalties for them, or that the resulting conversations with MSHA occurred. (*See id*.) Those are the more relevant considerations when analyzing the extent to which the operator was placed on notice that greater efforts were necessary for compliance. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080 n.5 ("[I]t is well settled that we examine the operator's history of violations, warnings from inspectors, and other forms of specific warnings to determine if the operator has been placed on notice of a persistent unsafe condition or practice at its mine."). Notice which the operator finds unwarranted is notice nonetheless.

Raw Coal's lay representative also argues, "An admonishment from MSHA to the Respondent that greater effort is needed from a one time issuance of a non-significant and substantial violation is preposterous." (Resp't Reply Br. at 6.) However, in rejecting a related argument, the Commission recently clarified that "it is not pertinent to the analysis of the notice factor in unwarrantable failure determinations that the prior violations were not designated as S&S." *Manalapan Mining Co*., 35 FMSHRC at 295–96. Similarly, in this matter, the non-S&S nature of the prior citation does not invalidate the notice it provided.

After examining the facts of this violation and the relevant factors, I conclude that the Secretary met his burden of proving that the violation was properly designated as an unwarrantable failure and that Raw Coal's negligence was properly characterized as high.

C. Order No. 9064486 – The Ventilation Plan Violation

1. Additional Findings of Facts

Christian detailed a number of discrepancies between the ventilation controls at the mine as he observed them on April 22, and the ventilation controls displayed on the mine's most recently revised ventilation plan map. (*See generally* Tr. 81:16–96:6.) Raw Coal, for the most part, does not deny these discrepancies existed, but instead disputes their cause and effect. (Resp't Br. at 20–21.) Raw Coal does not deny that an entire line of stoppings was found exactly one entry over from where the ventilation plan indicated they should be. But, whereas Christian testified that the stoppings had been physically moved from their approved location and remnants of those stoppings were still stuck to the ribs and walls of the crosscuts, indicating where they had once been (Tr. 95:10–24), Mine Superintendent Campbell denied the stoppings had ever been moved or that there were any visible remnants to support Christian's belief. (Tr. 230:15–231:24.) In addition, Raw Coal denies that the ventilation controls created a sweep air arrangement or blocked the passage of return air down the right side. (*See* Resp't Br. at 20.) This denial reflects significant disagreement about whether the working section at the time of the inspection had been sufficiently developed to provide a path for return air to flow down the right side. (*Compare* Tr. 192:15–193:13 (Christian's testimony that a right return entry had not been

developed yet), *with* Tr. 236:18–237:11 (Campbell's testimony that air was split down the left return and right bleeder entry); *see also* Tr. 290:1–17 (LeMarr's testimony that he was not sure).)

On each of these points, I credit Christian's observations. Once again, the MSHA inspector had significant experience developing and complying with mine ventilation plans going back to his time as a mine superintendent, which lends credibility to his testimony. (Tr. 9:22–13:6.) In addition, LeMarr fully and credibly corroborated Christian's observations of leftover materials where the stoppings had once been, including blocks and plaster still stuck to the mine roof and ribs. (Tr. 279:15–280:6.) Having examined the map of the section, I determine that this change eliminated the entire right return entry by altering the direction of air in that entry to intake air. (*See* Exs. S–14, S–15.)

Further, I credit Christian's testimony that the working section had not been developed sufficiently to allow for return air to proceed down a different entry on the right side, and that the ventilation controls created a sweep air arrangement while Raw Coal developed that entry.[15] (Tr. 192:15–194:13.) Lastly, neither party disputes that the altered arrangement created a dead air space near the section, and I thus find that to be the case as well. (*See* Resp't Br. at 12.)

2. Analysis and Conclusions of Law

a. Violation

Order No. 9064486 alleges a violation of section 75.370(a)(1), which requires operators to (1) develop and follow an approved ventilation plan; (2) that is designed to control methane and respirable dust and shall be suitable to the mine's conditions and mining system; and (3) consists of the plan content prescribed in section 75.371 and a map as prescribed in section 75.372. 30 C.F.R. § 75.370(a)(1). Portions of the map containing information required under section 75.371 are subject to the district manager's approval. *Id.* Section 75.371's plan content provisions include "section and face ventilation systems used . . . [and] drawings illustrating how each system is used." *Id.* § 75.371(f). In addition, "any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners" must be approved by a district manager in a proposed ventilation plan before implementation. *Id*. § 75.370(d). In a Program Information Bulletin, MSHA lists examples of intentional changes that would materially affect the safety or health of miners, including "changing the direction of air in an air course." (Ex. S–21.)

[15] Respondent's lay representative argues in his post-hearing brief that air readings taken a day before the inspection confirm that air was split in the section and cites to one of Raw Coal's own exhibits for this proposition. (Resp't Br. at 11, 20; Ex. R–7.) However, the record lacks any testimony to support this claim, and fails to provide the necessary context for the information contained in the cited exhibit. I agree with the Secretary that "Respondent had ample opportunity to ask questions regarding this claim on direct and cross examination but failed to do so." (Sec'y Reply Br. at 3–4.) Such testimony might have helped clarify exactly where these readings were taken in relation to the missing and moved ventilation controls and how relevant or significant the measurements listed are.

The mine's ventilation plan was approved in 2012 but was regularly amended in subsequent years following requests for revision from the operator. (Ex. S–12.) Prior to the order, MSHA had approved a revision to the mine's ventilation map and incorporated it into the approved ventilation plan on April 17, 2015, where it was then enforceable as part of the requirements of section 75.370(a)(1). (Ex. S–22.) At the time of the inspection, the ventilation map for the most recently approved revisions displayed a line of stoppings between two entries separating intake air from return air. (Ex. S–14.) I conclude that Raw Coal failed to follow its ventilation plan by both removing this line of stoppings and reversing the direction of air in what had been a return entry. The company also violated the ventilation plan by adding unapproved temporary and permanent ventilation controls that blocked access to the right return air course, created a dead air space, and ensured that intake air was now sweeping across the face in one direction rather than splitting in multiple directions.[16] Because these changes materially affected the safety or health of miners by increasing the risk of methane and contaminated air reaching the working section, Raw Coal was required to stick to the ventilation system diagrammed in its approved ventilation map until it sought and received approval for any desired changes. (Tr. 102:1–105:11.)

Respondent offers two arguments for why it believes it complied with its ventilation plan. It first argues that "[t]he ventilation base plan explicitly allows the operator to vary stopping lines and number of entries." (Resp't Br. at 21 (citing Ex. S–12 at 18).) In other words, Raw Coal argues it is not required to strictly follow the layout of the ventilation controls in its approved ventilation map; rather, it may vary the placement of its stopping lines and the location of return and intake entries as it sees fit. In support of this contention, Respondent cites to an illustrative diagram contained in the ventilation base plan. (*Id*.) The diagram is titled "Typical Face Ventilation" and displays a generic layout of entries, crosscuts, and ventilation controls that might be found in any mine, with notes and symbols indicating how ventilation controls should normally operate in such conditions. In order to alert the reader that this diagram is merely illustrative, the page notes that "Stopping lines and number of entries shown are typical and may vary." (Ex. S–12 at 18.) But, Raw Coal zeroes in on this language under the mistaken belief that it exempts the operator from the site-specific map's requirements. (Resp't Br. at 21.)

I conclude that the diagram and accompanying notes for the "typical" ventilation map included in the base plan do not modify the actual requirements in the mine's revised site-specific ventilation plan, from which language about varying stoppings or entries is entirely absent. (Ex. S–22.) The ventilation base plan's cited language does not affect Raw Coal's obligations to comply with the requirements of the most recently approved ventilation map. Simply put, Raw Coal requested changes to its ventilation plan and documented those changes on a revised map; it must now abide by those approved changes. No variations are allowed.

[16] Although the body of Order No. 9064481 detailed many of these problems, Respondent notes that the order did not explicitly mention that the operator had switched to a sweep air plan. (Resp't Br. at 11.) Yet, by noting that the operator had removed a line of stoppings (that had previously regulated the flow of air in the right return aircourse) and added an unapproved stopping in an "area that the section was using for a split of the return," the order documented the conditions that created the sweep air arrangement. (Ex. S–13.) Considering how many problems there were with the ventilation system at the time, I find that this description adequately alleged the overall violative condition that formed the basis of the order.

Even if some variation were permitted, I conclude that moving a line of stoppings such that it completely eliminates a return air course, changes the direction of air in the return entry, switches to a sweep air plan, and creates a dead air space (thereby materially affecting the safety and health of miners) does not constitute an acceptable "variation" of the ventilation map's requirements. This is especially true, as even the base plan map that the company references applies only to "split ventilation" by its own explicit terms. (*See* Ex. S–12 at 18-20.)

Raw Coal also argues that the most recent revised plan "was not specifically related to ventilation controls" but instead was merely intended "to change the bleeder block travel ways to monitoring points." (Resp't Br. at 20–21.) According to the operator's stated understanding of the plan, the ventilation controls did not have to be installed in the areas designated on the map until after Raw Coal had finished cutting through the section and connecting it to the bleeder entry, and since the operator was cited only five days after the revised plan was approved, it was not given enough time to accomplish this set of tasks. (*Id*.)

I agree that the revised plan relates to Raw Coal's attempt to change the bleeders to monitoring points; but, consistent with Christian's understanding of the plan, I do not accept Raw Coal's argument that the revised *ventilation* plan's specific *ventilation control* requirements were effectively irrelevant until it had finished completing that other task. (Tr. 183:3–185:6.) The revised plan did not set forth any such conditions as to the order in which those tasks should be completed, and the operator has not cited to any other evidence or authority supporting its understanding of the plan. (*See* Ex. S–22.) Indeed, Raw Coal's positon—that it may mine first and worry about ventilation later—undermines the entire purpose of having a ventilation system in place and amounts to a complete reversal of the appropriate process. Raw Coal's failure to comply with the plan created hazards independent of whether or not the bleeder travel ways had been developed yet. (Tr. 103:1–105:7.) Thus, I determine that Raw Coal should have brought its ventilation controls into compliance with the plan as soon as the revisions were approved by MSHA and received, i.e., five days earlier. (Tr. 257:15–23.) Its failure to do so establishes a violation of the standard.

b. Gravity

Raw Coal did not dispute the gravity of the violation. Christian designated the violation as unlikely to lead to an injury, but found that lost workdays or restricted duty injuries to nine miners could be reasonably expected were an injury to occur. (Ex. S–13.) This was mainly due to the remote possibility that dust, smoke, or methane could travel from worked-out areas through a regulator and into the entry that had once been a return entry but now carried common intake air to the working section, thereby leading the nine miners working in that section to breathe in the harmful air. (Tr. 103:1–105:7.) Once again, I affirm these undisputed gravity designations.

c. Unwarrantable Failure and Negligence

In addressing the unwarrantable failure factors for Order No. 9064481, the Respondent's lay representative explains that Raw Coal offered no mitigating circumstances to Christian because they would have fallen on deaf ears and may have only helped to support an unwarrantable designation. (Resp't Br. at 22.) The purpose of asking for mitigating

circumstances of course is not entrapment. It is meant to provide the inspector, and any reviewing body, with all the factual background necessary to make an informed decision about the negligence and unwarrantability of an alleged violation. Accordingly, I will consider such factors below, based on the record I have before me.

The Secretary designated this violation as an unwarrantable failure, characterizing Raw Coal's negligence as high. (Ex. S–13.) In support, the Secretary points to "the knowledge of the operator that the plan had been violated, as well as the violation's extensiveness, obviousness, duration, and high degree of danger." (Sec'y Br. at 40.) In response, Raw Coal asserts that it had a good faith belief it was following its approved ventilation plan, and that the plan was confusing at the stage of the mining process in which the company was engaged. (Resp't Br. at 22.) As these arguments go to the operator's knowledge and the obviousness of the violation, it seems appropriate to begin the unwarrantable failure analysis there.

I conclude that Respondent had knowledge of the violation. In arguing to the contrary, and echoing the beliefs of Mine Superintendent Campbell, the operator's lay representative states, "The revised plan used by the inspector was approved by the district manager on April 17, 2015 [and] may not have been received by the respondent prior to the order being issued." (Resp't Br. at 23; *see also* Tr. 234:6–15.) Yet, Christian testified that the revised plan was posted on the mine's bulletin board at the time of the inspection. (Tr. 186:3–5.) This testimony also corroborates foreman Ciampanella's belief that the mine received the approved revisions on the very same day they were approved, and thus I credit Ciampanella's understanding. (Tr. 257:15–23.)

Curiously, Raw Coal now claims, "The approved map[s] provided by the Secretary and the [inspector] are confusing even for reasonable persons with knowledge of ventilation plans." (Resp't Br. at 22.) This argument obscures the fact that the revised map was drafted and submitted for approval by Raw Coal itself. (Tr. 97:2–22, 106:5–9; Ex. S–22.) It is difficult to believe Raw Coal had trouble comprehending its own plan, as it now claims, or to understand how this fact would mitigate against an unwarrantable failure finding. The Secretary correctly notes that an operator's good faith belief that it was in compliance with a cited standard must be objectively reasonable, *see IO Coal*, 31 FMSHRC at 1356–60, and the obviousness of this violation renders Raw Coal's beliefs anything but that. (Sec'y Reply Br. at 4.) The company's purported misreading of its base ventilation plan and assumption that the revised map's ventilation control requirements did not go into effect until after the company had finished developing a bleeder travelway do not make its beliefs any more reasonable. Further, my findings—that Raw Coal physically removed the required stoppings from locations where they had been approved and relocated them to different locations (a process that would have taken at least the same 27 hours required for the violation's abatement)—lead me to conclude that Raw Coal had plenty of time to consider the safety ramifications and legal consequences of its new arrangement.

Most of the remaining unwarrantable failure factors support the conclusion that Raw Coal's conduct exhibited an aggravated lack of care. Notably, the extent of the violation was significant, with missing or improperly placed ventilation controls in approximately two dozen different crosscuts, impacting the entire working section. (*Compare* Ex. S–14, *with* Ex. S–15.)

Consequently, correcting the cited condition required 33 miners working approximately 27 hours over the course of three shifts. (Tr. 107:14–20.) As noted, a violation that extensive would be hard to miss, and thus its extensiveness and obviousness are both aggravating factors. Because Ciampanella believed the mine received the approved revisions the day they were approved, five days before the issued order, and because the operator works three shifts per day, the violation likely existed for approximately fifteen shifts, a duration that also supports an unwarrantable failure designation. (Tr. 32:1, 185:7–24, 257:15–23.) All of these facts lead me to the additional conclusion that the operator made no effort to abate the condition prior to being cited.

While I do not find the danger of the violation or prior notice that greater efforts were necessary for compliance to be mitigating or aggravating factors, every other factor points to the conclusion that Raw Coal's violation was the result of its high negligence and its unwarrantable failure to comply with the standard. I therefore conclude that Raw Coal exhibited high negligence and that the violation was an unwarrantable failure.

D. Civil Penalties

Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The parties have stipulated that the operator abated the cited conditions in good faith. (Joint Ex. 1.) Raw Coal has not alleged that the proposed penalties would adversely affect its ability to continue in business. The Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247–48 (Sept. 1973)); *accord Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994). I further note that Sewell Mine B was a moderately sized mine, producing 97,208 tons of coal in 2016. (Joint Ex. 1.) In the 15 months preceding the issuance of each violation, Raw Coal was issued 78 violations, and, during that period, it had zero previous violations of the cited standard in Order No. 9020987, one other violation of the cited standard in Order No. 9064481, and eight other violations of the cited standard in Order No. 9064486. (Exs. S–9, S–17, R–6.) I have determined that the gravity of the violations was non-S&S, but that the violations were unwarrantable failures and the result of the operator's high negligence. After considering these factors and the evidence as a whole, I determine that the

minimum statutory penalty of $4,000.00 is appropriate for each of the three section 104(d)(2) orders. *See* 30 U.S.C. § 845(d).

VI. ORDER

Respondent Raw Coal Company, Inc. is hereby **ORDERED** to **PAY** a penalty of $12,000.00 within 40 days of the date of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 2, 2017

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of, STACEY WAYNE PUCKETT, Complainant	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2017-426
v.	
PANTHER CREEK MINING, LLC Respondent	Mine: American Eagle Mine Mine ID: 46-05437

AMENDMENT OF ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Feldman

A summary decision was issued on July 12, 2017, granting the application for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act or Act), 30 U.S.C. § 815(c)(2), on behalf of Stacey Wayne Puckett against Panther Creek Mining, LLC (Panther Creek). 38 FMSHRC __ (July 12, 2017) (ALJ). The reinstatement order required Panther Creek to immediately reinstate Puckett to his former position as a fireboss, or to an equivalent position, at the same rate of pay and benefits he received immediately prior to his discharge, and with the same or equivalent assigned duties.

On July 27, 2017, the parties advised the Commission that, effective July 12, 2017, they have agreed to economically reinstate Puckett in lieu of his temporary reemployment. Letter from Melanie J. Kilpatrick to Judge Feldman (July 27, 2017). Pursuant to their agreement, during the economic reinstatement period, "Puckett will be paid his full rate of pay . . . [including] entitle[ment] to all benefits he would otherwise normally receive." The parties reserve the right to request actual reinstatement at any time after a reasonable notice period.

ORDER

In view of the above, consistent with the terms of the parties' agreement, **IT IS ORDERED THAT** Panther Creek shall economically reinstate Stacey Wayne Puckett, with payment of backpay and benefits as of July 12, 2017.

Puckett's economic reinstatement shall not prejudice Panther Creek's right to contest Puckett's discrimination complaint that currently is being investigated by the Secretary. The Secretary should endeavor to complete, as soon as practicable, his investigation so that this matter may proceed to an evidentiary hearing on the merits. If the Secretary, upon investigation, finds that the provisions of section 105(c) have not been violated, he shall file a motion to vacate

the underlying Order of Temporary Reinstatement. Commission Rule 45(g), 29 C.F.R. § 2700.45(g). Alternatively, Panther Creek may move to vacate this temporary reinstatement order if the Secretary declines to prosecute Puckett's complaint pursuant to section 105(c)(2) of the Mine Act. *Id*. An order dissolving the underlying order of reinstatement shall not bar the filing by Puckett of a discrimination complaint on his own behalf pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3).

If the Secretary elects to file a discrimination complaint on behalf of Puckett pursuant to section 105(c)(2) of the Mine Act, economic reinstatement/temporary reinstatement shall remain in effect until the merits of the Secretary's 105(c)(2) complaint become final. 30 U.S.C. § 815(c)(2)

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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August 28, 2017

R. ALEXANDER ACOSTA, SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	CIVIL PENALTY PROCEEDING
Petitioner	Docket No. KENT 2017-0183
v.	A.C. No. 15-17741-433281
KENAMERICAN RESOURCES, INC.,	Mine: Paradise #9
Respondent	

ORDER DENYING MOTION TO REMAND FOR REASSESSMENT

Before: Judge McCarthy

This case is before me on a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (1994). Currently pending are Respondent's Motion to Remand for Reassessment, the Secretary's Response (Opposition), and Respondent's Reply. For the reasons set forth below, Respondent's Motion to Remand for Reassessment is denied.

I. Background

This matter arises from three violations issued under section 104(d)(1) of the Mine Act. Citation No. 9044780 alleges a significant and substantial ("S&S") violation of 30 C.F.R. § 75.400.[1] Ex. A, *Petition for the Assessment of Civil Penalties*, Docket No. KENT 2017-0183. Order No. 9044781 alleges that the mine examiner performed an inadequate on-shift examination of a head drive and tailpiece in violation of 30 C.F.R. § 75.362(b).[2] The Secretary designated the alleged violation as S&S, reasonably likely to result in injuries resulting in lost

[1] Section 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." 30 C.F.R. § 75.400.

[2] Section 75.362(b) requires, in relevant part, that, "[a] person designated by the operator shall conduct an examination and record the results and the corrective actions taken to assure compliance with the respirable dust control parameters specified in the approved mine ventilation plan." 30 C.F.R. § 75.362(b).

workdays or restricted duty for one person, and the result of Respondent's high negligence. The Secretary also designated the violation in Order No. 9044781 as an unwarrantable failure to comply with section 75.362(b). *Id*.; *see also* Narrative Findings for a Special Assessment, Order No. 9044781, *Petition for the Assessment of Civil Penalties*, Docket No. KENT 2017-0183. Order No. 9049726 alleges that the pre-shift examinations of the No. 9 entry were not accurately recorded for two days in violation of 30 C.F.R. § 75.360(g).[3] The Secretary designated the alleged violation as S&S, reasonably likely to result in injuries resulting in lost workdays or restricted duty for two miners, and the result of Respondent's high negligence. The Secretary designated the violation in Order No. 9049726 as an unwarrantable failure to comply with section 75.360(g). Ex. A; *see also* Narrative Findings for a Special Assessment, Order No. 9049726, *Petition for the Assessment of Civil Penalties*, Docket No. KENT 2017-0183.

The Secretary proposed the following civil penalties: $4,623 for Citation No. 9044780; $12,300 for Order No. 9044781; and $55,200 for Order No. 9049726. The proposed civil penalty for Citation No. 9444780 was calculated according to the Secretary's Criteria and Procedures for Proposed Assessment of Civil Penalties. *See* 30 C.F.R. Part 100. Pursuant to section 100.5, however, the Secretary elected to waive the regular penalty assessments in favor of special assessments for Order Nos. 9044781 and 9049726.[4] *Id.* Both orders were specially assessed using the Secretary's General Procedures for Special Assessments ("General Procedures"), which have not been published in the Code of Federal Regulations. Secy's Response at 2*; see* U.S. Dep't of Labor, Mine Safety and Health Administration, General Procedures, https://arlweb.msha.gov/PROGRAMS/assess/SpecialAssess/assessment%20procedures.PDF (last accessed Aug. 29, 2017).

KenAmerican filed its Motion to Remand for Reassessment contesting the special assessment process and seeking an Order remanding the two proposed special assessments for reassessment without reference to or reliance upon the Secretary's General Procedures. Motion to Remand for Reassessment at 1. Respondent argues that the General Procedures remove all meaningful discretion, and as a result, the General Procedures are substantive or legislative rules under the Administrative Procedure Act's ("APA") formal notice and comment rulemaking requirements. *See* 5 U.S.C. §§ 551-584; Mot. at 2. KenAmerican is not, however, challenging the Secretary's discretion under section 100.5 to decide whether to regularly assess or specially assess a particular violation. Mot. at 2.

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[3] Section 75.360(g) provides, in relevant part:

> A record of the results of each preshift examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards and their locations found by the examiner during each examination, and of the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine.

30 C.F.R. § 75.360(g).

[4] Section 100.5 deals with determinations of penalty amounts and special assessments. 30 C.F.R. § 100.5

In his Response, the Secretary asserts that the General Procedures are a general statement of policy exempt from notice and comment. *See* 5 U.S.C. § 553(b)(3)(A); Resp. at 4-7. In particular, the Secretary contends that he maintains significant discretion in determining penalty assessments because the General Procedures account for varying facts and circumstances. Resp. at 5-7.

II. Jurisdiction

The Commission possesses jurisdiction to rule on the validity of the General Procedures. The Commission has previously concluded that it had jurisdiction to "require the Secretary to re-propose his penalties" in limited circumstances. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 679 (April 1987). When the "Secretary's proceeding under Part 100 is a legitimate concern to a mine operator, and the Secretary's departure from his regulations can be proven by the operator, then intercession by the Commission at an early stage of the litigation could seek to secure Secretarial fidelity to his regulations and possible avoidance of full adversarial proceedings." *Id.* at 680.

The Commission held in *Drummond* that while section 101(d) of the Mine Act vests exclusive jurisdiction over challenges to the validity of promulgated "mandatory safety and health standards" to the Courts of Appeal, section 101(d) does not state or imply that this exclusive jurisdiction extends to non-binding agency pronouncements. 30 U.S.C. § 811(d); *Drummond Company, Inc.*, 14 FMSHRC 661, 673-74 Fn.14 (May 1992) (the Commission examined both the language of the statute and Congressional intent). In addition, the Commission emphasized that section 101(d) confers exclusive jurisdiction only when a mandatory standard is promulgated under section 101 of the Act. *See Brody Mining*, 36 FMSHRC 2027, 2035 (Aug. 2014).

In cases where the operator contests the Secretary's proposed civil penalty under section 105(d), the Commission has held that "where the statute creates Commission jurisdiction, it endows the Commission with a plenary range of adjudicatory powers to consider issues . . . to dispose fully of cases committed to Commission jurisdiction." *Drummond*, 14 FMSHRC at 674. Section 105(d) of the Mine Act also authorizes the Commission to direct "other appropriate relief," which includes declaratory relief in contest proceedings. *Id.*

As the General Procedures are not mandatory safety and health standards promulgated under section 101 of the Mine Act, they are outside the exclusive jurisdiction of the Courts of Appeal. Further, it is appropriate for the Commission to determine whether the General Procedures conform to section 100.5 in order to fully dispose of this matter. As a result, the Commission has jurisdiction over the Respondent's Motion to Remand for Reassessment.

III. Procedure

While the Commission and its judges have jurisdiction over challenges to informal procedures, the Commissions has limited the timeframe in which such challenges may appropriately be considered. In *Youghiogheny & Ohio Coal Co.*, the Commission deemed it appropriate for an operator, prior to a hearing, to have an opportunity to "establish that in

proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations." 9 FMSHRC 673, 679-80 (1987). The Commission in *Drummond* further clarified that it would be inappropriate to require the Secretary to re-propose a penalty "where a hearing on the merits of the penalty had already been held before a Commission judge." 14 FMSHRC at 677. Thus, the most suitable time to seek an order remanding for reassessment is before a hearing on the merits of any alleged violation and the appropriateness of the proposed penalty.

The Respondent filed its Motion to Remand for Reassessment on June 20, 2017, the same day it filed its Answer to the Secretary's Petition for the Assessment of Civil Penalty. Since the Motion to Remand for Reassessment was included within its initial filings and this matter has not yet been set for hearing, I conclude that the Commission may appropriately address Respondent's Motion.

IV. Legal Principles and Analysis

Legislative rules or substantive rules are subject to a notice and comment process before promulgation, modification, amendment, or repeal. 5 U.S.C. § 553. As defined in the Administrative Procedure Act (APA),

> "[r]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4). While the definition of "rule" appears expansive, there are several exceptions to the notice and comment requirements:

> Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C § 553(b)(3).

Courts commonly consider the distinction between a legislative rule and a general statement of policy to be "enshrouded in considerable smog." *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); *see also Friedrich v. Sec'y of Health & Human Servs.*, 894 F.2d 829 (6th Cir. 1990); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984). An agency's expressed intentions may help distinguish between a legislative rule and a general statement of policy. This analysis entails the "consideration of three factors: (1) the agency's own characterization of the action; (2) whether the action was published in the Federal Register or the

Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806-07 (D.C. Cir. 2006). While agency labels are indicative, it is the substance of what the agency has "purported to do and has done which is decisive." *Drummond*, 14 FMSHRC 661, 683 (May 1992).

Another consideration that helps clarify the difference between a legislative rule and a general statement of policy is whether agency action creates a binding norm. Courts consider the effects of agency actions, and determine whether the agency pronouncement (1) imposes any rights and obligations or (2) genuinely leaves the agency and its decision makers free to exercise discretion. *Center for Auto Safety*, 452 F.3d at 806; *Drummond*, 14 FMSHRC at 684 (legislative rules "foreclose alternative courses of action or conclusively affect rights of private parties"). A statement will likely "be considered binding if it narrowly circumscribes administrative discretion in all future cases, and if it finally and conclusively determines the issues to which it relates." *Dyer v. Sec'y of Health & Human Servs.*, 889 F.2d 682, 685 (6th Cir. 1989). Thus, the distinction between legislative rules and general statements of policy "turns on an agency's intention to bind itself to a particular legal policy position." *U.S. Tel. Ass'n v. F.C.C.*, 28 F.3d 1232, 1234 (D.C. Cir. 1994).

An agency creates no binding norm when it is free to consider individual facts. *National Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009). Similarly, when the whole context of a general statement of policy "is in a subject area controlled by individual case-by-case discretion, the [statement] is by its very nature not a binding rule." *Id.* at 1372-73. A court should pay particular attention to the language used in the agency's pronouncement in determining whether the agency action is mere discretionary policy or a binding legislative rule. *See Brody Mining, LLC*, 36 FMSHRC 2027, 2049 (Aug. 2014); *Center for Auto Safety,* 452 F.3d at 806.

In the instant matter, the Secretary characterizes the General Procedures as a general statement of policy that is discretionary in nature and exempt from notice and comment under the APA. *See* 5 U.S.C. § 553(b)(3)(A); Resp. at 4-7. Further, the General Procedures are not published in either the Federal Register or the Code of Federal Regulations.

The General Procedures also fashion no binding norms. No additional obligations or rights are created, and target penalties, which can fluctuate significantly (±25% or more), preserve prosecutorial discretion. Gen. Proc. at 2. Because they are the exception to the norm, special assessments are inherently discretionary. *See* 30 C.F.R. § 100.5. As a result, the decision to apply a special assessment, rather than a regular assessment, is based upon individual case-by-case discretion that extends into the determination of the penalty amount. While the General Procedures provide guiding charts and tables, the General Procedures also state that MSHA is free to adjust the special assessment based on "unique facts and circumstances." Gen. Proc. at 2. The Secretary is not bound to a specific norm or rule. There are many courses of action available.

KenAmerica argues that *U.S. Telephone Association* provides guiding precedent. I disagree. While the penalty schedule at issue in *U.S. Telephone Association* has some similarities

to the General Procedures, the FCC abandoned its traditional case-by-case approach for assessing forfeitures and adopted a base forfeiture schedule as a percentage of maximum fines for each category of licensee that violated the Communications Act. 28 F.3d 1232, 1233 (D.C. Cir. 1994). The instant case, by contrast, involves special assessments, which are inherently discretionary and assessed on a case-by-case basis. Further, the court in *U.S. Tel. Ass'n* went to great lengths to show that the FCC had rigidly applied their allegedly discretionary penalty schedule in 299 out of 300 instances. *Id.* at 1235. There is no such evidence here.[5]

Similarly, the Respondent's reliance on *Drummond* is misplaced. In that case, Drummond asserted that the Secretary unlawfully enforced a substantive program policy letter ("PPL"), which outlined an interim excessive history program, without following the necessary APA notice and comment process. The Secretary claimed that the penalty proposals under the PPL fell within section 100.5 special assessments. The Commission rejected the Secretary's argument, but emphasized that "[s]pecial assessments are based on the condition surrounding the violation and 'neither the nature nor the seriousness of a particular violation will automatically result in a special assessment.'" 14 FMSHRC at 690, citing 47 Fed. Reg. 22292 (1982). The Commission went on to state that "[a]lthough Secretarial discretion is a cornerstone of the section 100.5 special assessment program, the PPl creates a rigid formula for the proposed assessment of all excessive history cases." 14 FMSHRC at 690. The *Drummond* PPL outlined a mathematical formula that "allowed no room for maneuver either with respect to the existence or consequences of an excessive history." 14 FMSHRC at 687, 690. Conversely, the General Procedures not only maintain the discretion to apply a regular or special assessment, but they also provide substantial flexibility in the proposed penalty. Unlike the *Drummond* PPL, the General Procedures are not determinative in nature.

On the surface, the General Procedures may appear mechanical, but in reality, they are non-binding pronouncements that do not create obligations or bestow benefits. Because the Secretary retains significant discretion in proposing special assessment penalties, I conclude that the General Procedures are not legislative or substantive rules subject to notice and comment under the APA.

V. Order

WHEREFORE, Respondent's Motion to Remand for Reassessment is **DENIED**.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

[5] It is unreasonable to infer any broad conclusions based only on the two special assessments at issue.

Distribution:

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/dtm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. VA 2014-243 A.C. No. 44-04534-346270 Docket No. VA 2014-244 A.C. No. 44-04534-346286
v.	Docket No. VA 2014-364 A.C. No. 44-04534-352768 Docket No. VA 2014-365 A.C. No. 44-04534-353549 Docket No VA 2014-383 A.C. No. 44-04534-353996
A&G COAL CORPORATION, Respondent.	Mine: Prep Plant #2

ORDER LIFTING STAY
ORDER OF DEFAULT
ORDER TO PAY

These dockets are before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. At issue are five dockets with a total assessed penalty of $321,753.00. These dockets were consolidated and stayed pursuant to an April 6, 2015 Order of the Court.

On August 7, 2017, the court scheduled a conference call with the parties for Monday, August 14, 2017 at 2:00pm MT to discuss lifting the stay and scheduling a hearing date. August 7, 2017 Court Email. The email allowed Respondent's representative one week to contact the court if he was unavailable and needed to reschedule the call. Respondent's representative made no such request. On August 14, 2017, Respondent's representative failed to appear for the 2:00pm conference call. The parties held the call open until 2:24pm MT, during which the court and the Secretary attempted to contact Respondent's representative via email and phone, respectively. Neither party received a response.

On August 16, 2017, the court issued a formal written Order to Show Cause ordering the Respondent to file a response by August 28, 2017 explaining why it failed to maintain contact with the court and why a default order in favor of the Secretary should not be entered pursuant to Commission Rule 2700.66. The court received confirmation that the show cause order was

processed and signed for on August 21, 2017. However, Respondent failed to file a response as of August 30, 2017.

Under Commission Rules, a Judge may issue an order of default or dismissal after issuing an order to show cause for a party's failure to comply with a Judge's orders. 29 C.F.R. § 2700.66.

Accordingly, I find Respondent to be **IN DEFAULT**. The stay is hereby **LIFTED** and Respondent's notice of contest and request for hearing are **DISMISSED**. Respondent is hereby **ORDERED** to pay a total penalty of $321,753.00 as originally assessed within thirty (30) days of the date of this Order.[1]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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[1] Checks or money orders should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, P.O. Box 790390, St. Louis, MO 63179-0390.