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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 13, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of REUBEN SHEMWELL	:	
v.	:	Docket No. KENT 2013-362-D
ARMSTRONG COAL COMPANY, INC. and ARMSTRONG FABRICATORS, INC.	:	

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

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

This discrimination proceeding, arising under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012),[1] involves a Commission Administrative Law Judge's denial of a motion to approve settlement filed by Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc. (collectively referred to as "Armstrong"), the Secretary of Labor, and Reuben Shemwell. For the reasons that follow, we vacate the Judge's decision and approve the parties' proposed settlement.

[1] 30 U.S.C. § 815(c)(2) provides in pertinent part:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

I.

Factual and Procedural Background

Reuben Shemwell's employment as a welder with Armstrong was terminated on September 14, 2011. 35 FMSHRC 1865, 1865 (June 2013) (ALJ). On January 23, 2012, Mr. Shemwell filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.* Shemwell subsequently was temporarily reinstated based upon the Commission's determination that a non-frivolous issue existed as to whether Shemwell had been terminated for engaging in protected activity. 34 FMSHRC 1580, 1582-83 (July 2012). After MSHA's investigation into the matter, the Secretary declined to pursue a discrimination proceeding on Shemwell's behalf. Shemwell subsequently filed a section 105(c)(3)[2] proceeding in Docket No. KENT 2012-1497-D against Armstrong on his own behalf. On September 4, 2013, the Judge issued a decision approving settlement in KENT 2012-1497-D.

In August 2012, following the Secretary's decision not to pursue Shemwell's discrimination complaint, Armstrong filed a civil suit in a Kentucky state court alleging that Shemwell's discrimination complaint constituted a wrongful use of proceedings (referred to as the "Muhlenberg suit").

The Secretary subsequently filed a discrimination complaint in this proceeding pursuant to section 105(c)(2) of the Mine Act, alleging that the Muhlenberg suit interfered with Shemwell's right to file a discrimination complaint in violation of section 105(c)(1) of the Act. The Secretary proposed a civil penalty of $70,000 against Armstrong.

On June 19, 2013, the Judge issued in this proceeding a Decision on Liability and Cease and Desist Order. In the decision, the Judge concluded that the Muhlenberg suit violated section 105(c)(1) because it interfered with Shemwell's right to file a discrimination complaint. The Judge ordered Armstrong to cease and desist prosecution of the Muhlenberg suit "by filing an

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[2] 30 U.S.C. § 815(c)(3) provides in part:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination. . . .

appropriate motion to dismiss" within 40 days of the decision (by July 29, 2013). 35 FMSHRC at 1886. The Judge noted that "withdrawal of Armstrong's suit can be without prejudice, permitting Armstrong to once again bring its civil proceeding in the unlikely event Armstrong is ultimately successful on appeal." *Id.*

On July 29, 2013, Armstrong took three actions. First, it filed with the Commission a petition for interlocutory review. In the petition, Armstrong stated that on July 25, 2013, the parties verbally agreed to the terms of a settlement agreement that will resolve the case, including a term requiring Armstrong to dismiss the Muhlenberg suit. Second, Armstrong filed with the Commission an application for a temporary stay pending the Commission's review of the petition. Third, Armstrong dismissed, with prejudice, the Muhlenberg suit.

On that same day, the Commission issued an order granting a temporary stay.

On August 8, 2013, the Secretary, Shemwell, and Armstrong filed a joint motion to approve settlement with the Judge.[3] Under the terms of the proposed settlement, Armstrong would: (1) pay MSHA a civil penalty of $35,000; (2) provide a copy of the MSHA publication entitled "A Guide to Miners' Rights and Responsibilities" to all employees; (3) post a copy of the Joint Motion to Approve Settlement at each mine that is operated by Armstrong for 60 days; (4) provide two hours of training on miners' rights at each mine operated by Armstrong and, following the training, employees would watch the MSHA video entitled "A Voice in the Workplace: Miners' Rights and Responsibilities;" and (5) post a miners' rights poster about section 105(c) at each mine that is operated by Armstrong for a period of two years.

The motion further stated that Armstrong had dismissed with prejudice the Muhlenberg suit. In addition, the motion included the following exculpatory language:

> Respondents assert that except for proceedings under the Act, nothing contained herein shall be deemed to constitute an admission of a violation of the Act or its regulations. Further, Respondents assert that except for proceedings under the Act, nothing contained herein is intended to constitute an admission of civil liability under any local, state or federal statute or any principle of common law.

Jt. Mot. at 3.

On August 19, 2013, the Judge issued an Order Denying Joint Motion to Approve Settlement Decision on Civil Penalty and Supplemental Decision on Relief. 35 FMSHRC 2680 (Aug. 2013) (ALJ). The Judge concluded that he lacked jurisdiction to consider the settlement motion after he had issued his decision on liability. *Id.* at 2682-83. He reasoned that his

[3] Shemwell was represented by private counsel. Jt. Mot. at 4.

decision on liability was a final decision on the merits as contemplated by Commission Procedural Rule 69, 29 C.F.R § 2700.69. *Id.* at 2682. The Judge determined, as such, that his decision on liability was the binding law of the case and is not subject to modification through a settlement agreement of the parties. *Id.*

The Judge further concluded that even if the proposed settlement agreement were not procedurally defective, he would dismiss it on a substantive basis as contrary to the public interest. *Id.* at 2683. He stated that the exculpatory language would not dissuade Armstrong or other operators from filing similar civil actions in violation of section 105(c)(1). *Id.* at 2686. The Judge also determined that there were no mitigating circumstances to justify the reduction in penalty. *Id.* He noted that Armstrong was required to dismiss the action under the terms of his prior decision and that the other settlement remedies, such as postings and training, are "routine" actions required of operators as a consequence of discriminatory conduct. *Id.* The Judge noted that the legality of civil suits such as the Muhlenberg suit, which are capable of repetition, must not evade review. *Id.* at 2687-88.

Finally, in determining appropriate remedial measures, the Judge required Armstrong to take the remedial actions specified in the settlement motion. *Id.* at 2689. The Judge further assessed a civil penalty of $70,000 against Armstrong, taking into account the "deterrent role civil penalties play in discouraging mine operators from engaging in future similar violative conduct." *Id.* at 2690-92.

The Secretary and Armstrong each filed petitions for discretionary review challenging the Judge's denial of the motion to approve settlement. The parties request that the Commission vacate the Judge's decision and approve the proposed settlement agreement. The Commission granted both petitions.

II.

Disposition

A. The Judge's Procedural Dismissal

We conclude that the Judge erred in holding that his June 19 decision on liability was a final decision on the merits as contemplated by Commission Procedural Rule 69[4] and that he lacked jurisdiction to consider the settlement motion. In an order dated July 26, 2013, we held that the Judge's June 19 decision on liability was "not a final decision ending the judge's

[4] Commission Procedural Rule 69(b) provides, "Except to the extend otherwise provided herein, the jurisdiction of the Judge terminates when his decision has been issued." 29 C.F.R. § 2700.69(b).

jurisdiction over this matter." 35 FMSHRC 2056, 2057 (July 2013). We explained that "a Judge's decision finding a violation under the Mine Act is not final until the judge issues a penalty against the operator." *Id.* Thus, the Judge clearly had jurisdiction to consider the parties' settlement motion, which was submitted after the June 19 decision on liability but before the Judge's August 19 decision assessing a penalty.

B. The Judge's Substantive Denial of the Proposed Settlement

Section 110(k) of the Mine Act, 30 U.S.C. § 820(k), "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.,* 3 FMSHRC 2478, 2479 (Nov. 1981). As the Commission has previously observed, "'[t]he judges' front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion.'" *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012) (quoting *Knox*, 3 FMSHRC at 2479).

A Judge's approval or rejection of a proposed settlement must be based on principled reasons. *Black Beauty*, 34 FMSHRC at 1864. If a "Judge's approval or rejection of a settlement is 'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper, it will not be disturbed, but . . . abuses of discretion or plain errors are subject to reversal." *Id.* (quoting *Knox*, 3 FMSHRC at 2480). An abuse of discretion may be found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 n.3 (July 1997).

As explained below, we conclude in this case that the key legal rulings of the Judge were erroneous and that certain assertions he made were not supported in the record. Accordingly, his denial of the proposed settlement under such circumstances constituted an abuse of discretion.

1. The exculpatory language

The Judge in part rejected the settlement because he believed that the exculpatory language would not dissuade Armstrong or other operators from filing similar civil actions in violation of section 105(c)(1). We conclude that the Judge's rejection of the exculpatory language set forth in the proposed settlement agreement was "based on an improper understanding of the law." *Id.*

The Commission has recognized that the Mine Act requires the Commission "to oversee penalty settlements as a means of encouraging compliance." *Sewell Coal Co.*, 5 FMSHRC 2026, 2030 (Dec. 1983). Recognizing that "[i]nherent in the concept of settlement is that parties find and agree upon a mutually acceptable position that resolves the dispute and that obviates the need for further proceedings," the Commission has held that parties are free to admit or deny the fact of violation in settlement agreements. *Amax Lead Co.*, 4 FMSHRC 975, 977-78 (June 1982). The Commission has explained, however, that the goal of encouraging compliance is not met when a settlement agreement requires the payment of a penalty although the parties have

stipulated facts that do not show a violation. *Sewell*, 5 FMSHRC at 2030 (citing *Co-op Mining Co*., 2 FMSHRC 3475, 3475-76 (Dec.1980) (other citations omitted)).

Commission case law establishes that the type of exculpatory language contained in the proposed settlement here – language which would *not* apply to Mine Act proceedings – is acceptable in settlement agreements. The Commission has rejected a settlement agreement where it contained extremely broad exculpatory language that factual admissions by the operator would not be deemed an admission for any subsequent proceeding brought in any judicial or administrative forum by any party. *Amax*, 4 FMSHRC at 975. The Commission explained that, because the operator could attempt to use that language to shield future key enforcement provisions of the Mine Act, such language was inconsistent with the enforcement scheme of the Mine Act. *Id.* at 978. The Commission noted, however, that it had "no difficulty with the exculpatory language as it relates to proceedings arising outside the scope of the Mine Act's coverage," and that the "effect of such exculpatory language is properly left to the appropriate forum." *Id.* at n.4. The Commission found acceptable amended exculpatory language offered by the operator that the citations would not be used against the operator in forums other than in actions under the Mine Act. *Id.* at 978-79. The Commission reasoned that for purposes of any proceedings under the Mine Act, the violations were to be treated as if established. *Id.*

The exculpatory language at issue concedes Armstrong's violation of the Act for purposes of Mine Act proceedings. *See* S. PDR at 10 n.2; A. Br. at 21; Jt. Mot. at 3. The exculpatory language denies civil liability under "any local, state or federal statute or any principle of common law" other than Mine Act proceedings. Jt. Mot. at 3. Thus, the subject exculpatory language falls within the type of exculpatory language that the Commission has found to be within the public interest. *See Amax*, 4 FMSHRC at 977-78 & n.4. Moreover, we find no record support for the Judge's conclusion that the exculpatory language will not dissuade other operators from filing actions similar to the Muhlenberg suit.

2. <u>Consideration of the non-monetary portions of the proposed settlement</u>

The Judge's conclusion that "there are no mitigating circumstances" to justify the penalty reduction from $70,000 to $35,000 is not "fully supported by the record." *See Black Beauty*, 34 FMSHRC at 1864. Contrary to the Judge's finding that Armstrong was required to dismiss the Muhlenberg suit under the terms of the Judge's June 19 decision, Armstrong dismissed the Muhlenberg suit with prejudice, rather than without prejudice as permitted by the Judge. In addition, there is no support in the record for the Judge's statement that "[t]he other settlement remedies [besides payment], such as relevant postings and training, are routine actions required of mine operators as a consequence of discriminatory conduct." 35 FMSHRC at 2686. Indeed, the Secretary represents that such actions are not routine. S. PDR at 11.

3. The question of mootness

The Judge also erred in his application of mootness principles. The Commission has recognized that a case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome. *North American Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012) (citations omitted).

The Judge stated that "[b]y submitting their settlement agreement for approval, the parties, in essence, rely on the dismissal of the [Muhlenberg suit] to support the proposition that all matters in issue have been resolved, and that further proceedings have essentially been rendered moot." 35 FMSHRC at 2687. We see no contention by the parties that further proceedings have essentially been rendered moot, or any other basis for applying mootness principles in reviewing the parties' proposed settlement agreement.

4. Consideration of the proposed settlement as a whole

Finally, we conclude that the Judge erred by considering the proposed settlement in a piecemeal fashion, focusing on the monetary aspects of the settlement. "The 'affirmative duty' that section 110(k) places on the Commission and its judges to 'oversee settlements,' . . . necessarily requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects." *Madison Branch Mgmt*, 17 FMSHRC 859, 867-68 (June 1995) (Chairman Jordan and Comm'r Marks) (citations omitted); *see also Aracoma Coal Co.*, 32 FMSHRC 1639, 1644 (Dec. 2010) (separate opinion of Chairman Jordan). The Judge was required to consider the settlement agreement as a whole, giving due consideration to the non-monetary aspects of the decision as well as to the monetary aspects. The payment of a reduced penalty was balanced by other non-monetary aspects of the settlement, such as the dismissal of the Muhlenberg suit with prejudice, and the posting and training requirements. We observe that the Secretary's action in filing the instant section 105(c)(2) proceeding can be expected to have a deterrent effect against the filing of Muhlenberg-type suits.[5]

Although it is possible, as the Judge stated, that payment of a higher penalty could achieve greater deterrence, our role in reviewing a settlement agreement is to ensure that the public interest is adequately protected before a penalty is reduced. In considering the public interest standard applied by the Antitrust Procedures and Penalties Act, courts have stated:

> The court should . . . bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is the one that will *best*

[5] We note that Shemwell was reinstated and Armstrong paid monetary remedial relief in settlement of Docket No. KENT 2012-1497-D. *See* slip op. at 2, *supra*; Unpublished Order at 2 (Sept. 4, 2013).

> serve society," but only to confirm that the resulting "settlement is 'within the *reaches* of public interest.'"

United States v. Western Elec. Co., 900 F.2d 283, 309 (D.C. Cir. 1990) (citations omitted) (emphasis in the original).

Here the Judge did not consider the different elements of the proposed settlement as a whole in determining whether the proposed settlement fell "within the reaches of public interest." Indeed, because of his erroneous rulings with regard to the non-monetary elements of the proposed settlement, an appropriate analysis of the proposed settlement as a whole was not possible.

We conclude that the settlement agreement proposed by the Secretary, Shemwell, and Armstrong contains sufficient consideration and deterrent effect to protect the public interest. Accordingly, we vacate the Judge's denial of the motion to approve settlement and approve the settlement agreement.

III.

Conclusion

For the reasons discussed above, we vacate the Judge's decision denying the Joint Motion to Approve Settlement submitted by the Secretary, Shemwell, and Armstrong, and we approve the settlement.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

Commissioners Young and Cohen, dissenting:

We dissent from the majority and conclude that the Judge did not abuse his discretion when he denied the parties' motion to approve settlement. On the contrary, substantial evidence supports the Judge's determination that the proposed settlement terms are inadequate to address the nature of the violation at issue: the filing of a baseless civil action with the intent to retaliate against Shemwell's exercise of his rights under the Mine Act and to chill other miners' exercise of those rights at Armstrong's mines.

Rueben Shemwell filed a complaint with MSHA alleging that he was unlawfully discharged from his position as a welder with Armstrong Coal. Thereafter, the Secretary of Labor filed an application for temporary reinstatement on his behalf. After a temporary reinstatement hearing, a Commission Judge concluded that Shemwell's complaint was not frivolously brought. 34 FMSHRC 1464, 1475 (June 2012) (ALJ), *aff'd*, 34 FMSHRC 1580, 1582-83 (July 2012). Thus, the Judge ordered Armstrong to temporarily reinstate Shemwell. *Id*. at 75-76. Before a hearing on the merits of the unlawful discharge complaint occurred, the Secretary dropped his representation of Shemwell. Shemwell then filed a complaint with the Commission on his own behalf pursuant to section 105(c)(3) of the Mine Act.

After the Secretary discontinued his representation of Shemwell, Armstrong filed a civil action in Kentucky's Muhlenberg Circuit Court, alleging that Shemwell's original filing of a discrimination complaint with MSHA amounted to "Wrongful Use of Civil Proceedings." Circuit Court Complaint at 7-8, No. 12-CI-00897 (hereinafter "Muhlenberg suit"). Armstrong sought an award of punitive damages as well as alleged compensatory damages from Shemwell. *Id*. at 9.

The matter currently before us concerns a second complaint of discrimination that was filed with the Commission by the Secretary on behalf of Shemwell under section 105(c)(2) of the Mine Act. In bringing this complaint, the Secretary alleged that Armstrong filed the Muhlenberg suit as retaliation for Shemwell's previous exercise of his statutory right to file a discrimination complaint. Complaint of Discrimination at 5 (Jan. 8, 2013). The Secretary further alleged that the lawsuit was an attempt by Armstrong to intimidate its workforce and discourage participation by other miners in enforcement proceedings under the Mine Act. *Id*.

Remarkably, at the time the Secretary filed the second complaint on behalf of Shemwell, there were discrimination cases pending before an Administrative Law Judge that involved ten other miners who were discharged by Armstrong in February 2012. Mot to Exp. at 2 (Jan. 8, 2013); *Sec'y, et al. v. Armstrong Coal Co.*, Docket Nos. Kent 2012-1370/1371/1372/1373-D. Three of the miners had been temporarily reinstated to their former positions with Armstrong. 34 FMSHRC 1658, 1667 (July 2012) (ALJ). These miners were laid off following MSHA's attempted inspection of Armstrong's fabrication shop (which Armstrong resisted), and the filing

of an anonymous complaint to MSHA about a safety issue.[1] *Id*. at 1660-62, 1664, 1667. In fact, Armstrong closed its shop and laid off a total of eleven miners following the anonymous safety complaint. *Id*. at 1664-67. Armstrong, as shown by these actions, obviously has a problem with the requirements of the Mine Act and specifically the requirements of section 105(c).[2]

On June 19, 2013, the Judge issued a decision on the Secretary's second complaint on behalf of Shemwell, ruling consistent with the Secretary's allegations, that by filing the Muhlenberg suit Armstrong violated section 105(c)(1) of the Act "with impunity" and intentionally interfered with Shemwell's statutory rights. 35 FMSHRC 1865, 1883 (June 2013) (ALJ). The Judge concluded that the First Amendment did not protect Armstrong's filing of the retaliatory civil action, as the operator contended.[3] *Id*. He ordered Armstrong to dismiss the civil action and further ordered the parties to attempt to reach an agreement on the specific relief to be awarded. *Id*. at 1886-87.

Shortly thereafter, the parties filed a joint motion for approval of settlement with the Judge. 35 FMSHRC 2680, 2682 (Aug. 2013) (ALJ). The Judge rejected the motion. In a decision issued on August 19, 2013, he concluded that he lacked jurisdiction at this stage in the proceedings. *Id.* at 2682-83. He also stated that regardless of the jurisdiction issue, he would deny the motion because the terms of the settlement were contrary to the public interest and inconsistent with the enforcement scheme of the Mine Act. *Id*. at 2683-88. The Judge was concerned that the parties' agreement contained exculpatory language that limited the finding of a violation exclusively to proceedings under the Mine Act. *Id*. at 2685. Specifically, the Judge stated that he was "unconvinced that [the] broad exculpatory language that seeks to shield Armstrong from responsibility for discriminatory conduct in virtually any statutory or common law matter that may arise outside of a Mine Act proceeding, can reasonably be construed as a means of dissuading Armstrong . . . from filing similar civil actions." *Id*. at 2686. Furthermore, he concluded that the joint motion failed to articulate mitigating circumstances that justified reducing the proposed penalty from $70,000 to $35,000. *Id*. The Judge stated that neither the cited posting and training requirements, nor Armstrong's filing of a motion to dismiss the

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[1] Special MSHA Investigator Kirby Smith testified in the temporary reinstatement proceeding that MSHA's attempt to inspect the facility was prompted by Shemwell's health and safety complaint. *Id.* at 1664. Armstrong's reaction to the attempted inspection was to shut off the power and send the employees home for the day. *Id*.

[2] Indeed, in the Decision and Order of Temporary Reinstatement, the Judge observed, "I can think of nothing more chilling on an employee's inclination to report possible health and safety issues than the threat imposed by [Armstrong's vice president of operations] Allen at that meeting . . . ." 34 FMSHRC at 1664.

[3] We agree with the Judge. It is well established that objectively baseless retaliatory lawsuits fall outside of the protection of the First Amendment. *See BE & K Const. Co. v. NLRB,* 536 U.S. 516, 530-31 (2002).

Muhlenberg suit subsequent to the July 19, 2013 decision, represented mitigating circumstances to justify the proposed reduction in penalty. *Id*.

Analysis

A. The Judge did not abuse his discretion when he denied the joint motion to approve settlement.

The Mine Act and its Procedural Rules require an Administrative Law Judge to approve the settlement of a contested civil penalty.[4] 30 U.S.C. § 820(k); 29 C.F.R. § 2700.31. A Judge is afforded discretion when considering whether to approve a settlement agreement. *See Black Beauty*, 34 FMSHRC 1856, 1864-69 (Aug. 2012) (holding that the Mine Act and its procedural rules provide Judges the discretion to consider whether a proposed settlement of a civil penalty constitutes a sufficient deterrent); *see also Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981) (stating that "[t]he Judges' front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion.").

For the reasons that follow, we dissent from our colleagues and conclude that the Judge did not abuse his discretion when he denied the parties' motion to approve settlement.[5]

1. The Muhlenberg suit is a SLAPP.

The safety of miners is directly dependent on their ability to voice relevant concerns to management as well as to the representatives of MSHA. We agree with the Judge that the filing of the Muhlenberg suit was an assault on the fundamental operation of the Mine Act. Any action that serves to intimidate miners with potential legal or financial consequences because of their exercise of statutory rights is anathema to the cooperative culture of safety and the Mine Act. *See* 30 U.S.C. § 801(e) (declaring that "the operators of [] mines *with the assistance of the miners* have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices") (emphasis added).

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[4] The Secretary's contention that its settlement agreements are essentially unreviewable by the Commission is contradicted by the plain language of the Mine Act. *See* S. PDR at 11. The Mine Act states that "[n]o proposed penalty which has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k).

[5] We agree with the majority that the Judge erred regarding his lack of jurisdiction to consider the motion, as well as in his application of mootness principles. However, since these matters are not essential to the Judge's decision, they are a distraction from the pertinent question before the Commission: Did the Judge abuse his discretion when he denied the motion to approve settlement?

When enacting the Mine Act, the Senate recognized that if miners are to be encouraged to take an active role in voicing safety concerns, they must be *assured* that they will be protected from any form of discrimination that they may face as a consequence for their protected activities. *See* S. Rep. No. 95-181, at 35-36, *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-624 (1978). "[M]ining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity" and as a result the loss of employment is a particularly devastating repercussion for a miner. *See id*. at 623.

The Muhlenberg suit objectively lacked a legal basis. The basic elements of a cause of action for "Wrongful Use of Civil Proceedings"[6] were plainly missing because there had yet to be a final decision issued on the merits of Shemwell's complaint. *See* 35 FMSHRC at 1868; *See* n.6, supra. Armstrong filed the suit regardless.

Armstrong, by virtue of its resources and access to representation, attempted to use state law as a weapon to discourage miners from exercising statutory rights. Similar abuses of the legal process are commonly referred to as SLAPPs ("Strategic Lawsuit Against Public Participation"). SLAPPs like the Muhlenberg suit function by

> . . . forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent.

Gordon v. Marone, 590 N.Y.S.2d 649, 656 (N.Y. 1992).

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[6] The elements of this cause of action are: (1) the institution or continuation of original . . . administrative . . . proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding. *D'Angelo v. Mussler*, 290 S.W.3d 75, 79 (KY App. 2009).

It is thus not surprising that 28 states as well as the District of Columbia and Guam have responded to the SLAPP threat with either legislative or judicial proscription. Bruce E. H. Johnson, Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 Wash. L. Rev. 495 (2012); *see, e.g.*, Cal CCP Code § 425.16(b)(1) (providing for a special motion to strike a complaint that involves a cause of action against a person that arises from any act of that person in furtherance of the person's right to petition the government).

The West Virginia Supreme Court recognized the need for a judicial proscription in the absence of relevant legislation. In *Webb v. Fury*, 167 W.Va 434, 460 (W.Va. 1981), the court granted a petitioner's request for a writ of prohibition to prevent a coal company from proceeding with a defamation action filed in a Circuit Court. The defamation suit was filed in response to a series of communications made by Webb and his non-profit corporation to the Environmental Protection Agency and the Office of Surface Mining regarding the effects of coal mining on water quality. *Id*. at 437. The court stated that communications regarding matters of public concern are protected by the First Amendment to the U.S. Constitution and Article III, § 16 of the West Virginia Constitution. In so ruling, the court stated that "[o]ur democratic system is designed to do the will of the people, and when the people cannot express their will, the system fails."[7] *Id.* at 460.

2. The exculpatory language is not consistent with the Mine Act.

Our colleagues contend that the exculpatory language included in the motion is consistent with the Mine Act, slip op. at 5-6 (citing *Amax Lead Co.,* 4 FMSHRC 975, 977-78 (June 1982)), and that the Judge erred when he rejected the inclusion of the language. *Id*. at 6.

We believe that the majority's reliance on *Amax Lead* is misplaced. *Amax Lead* did not involve a violation of section 105(c)(1). The Commission concluded that in settling an alleged violation of a mandatory safety standard an operator may limit its admission of liability to proceedings under the Mine Act. *Amax Lead*, 4 FMSHRC at 978-79. The Commission stated that limiting liability is consistent with the Act's enforcement scheme when it does not affect the implementation of some of the strongest compliance incentives, namely the sanction of an "unwarrantable failure" or a "pattern of violations." *Id*.

Unlike the situation with mandatory safety standards, the Mine Act does not contemplate progressive enforcement mechanisms for violations of the anti-discrimination provisions. Accordingly, we don't consider the reasoning or rationale used in *Amax Lead* to be applicable to the facts and circumstances before us.

[7] The Commonwealth of Kentucky does not have a similar precedent or procedure and, accordingly, Shemwell was left without recourse under state law.

We are further troubled by the majority's reliance on *Amax Lead* because the subject settlement agreement's terms require it to be posted at each of Armstrong's mines. In *Amax Lead*, the Commission did not consider how language limiting liability may impair effective communications to a mining workforce of the Secretary's position on and the Commission's resolution of violations of section 105(c)(1). As discussed more fully below, the exculpatory language contained in the settlement agreement here eviscerates any educational and deterrent effect of the posting requirement.

We conclude that the Judge correctly recognized that the settlement of a violation of section 105(c)(1) is not directly analogous to the settlement of a citation issued for a violation of a safety standard. *See* 35 FMSHRC at 2685-86. Therefore, the Judge did not abuse his discretion in rejecting the subject exculpatory language.

3. The Judge considered all the terms in the motion for settlement.

Our colleagues have also held that the record does not support the Judge's conclusion that the settlement agreement lacks mitigating circumstances to justify a reduction in penalty from $70,000 to $35,000. Slip op. at 6. We again disagree.

First, the Judge correctly excluded Armstrong's withdrawal of the Muhlenberg suit as a mitigating circumstance. The Judge had already ruled that by filing the civil action Armstrong violated the Act. 35 FMSHRC at 1886-87. A fundamental principle of the Mine Act is that operators are required to abate violations of the Act. *See* section 104(a), 30 U.S.C. § 814(a) ("[i]f, upon inspection or *investigation*, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act *has violated this Act* . . . he shall, with reasonable promptness, issue a citation to the operator. [T]he citation shall fix a reasonable time for the abatement of the violation")[8] (emphasis added). Because Armstrong was *required* by the terms of the Act to dismiss the objectively baseless Muhlenberg suit, its abatement of the violative condition *cannot* be considered a mitigating circumstance.[9] The violative condition should have been abated as soon as the Secretary's investigator concluded that the Act had been violated and issued the complaint. Furthermore, Armstrong did not demonstrate good faith in its compliance. *See* 30 U.S.C. § 820(i) ("good faith" efforts to achieve

[8] Under the terms of the Act, the Secretary should have fixed a reasonable time for abatement and required the suit to be dismissed within that time frame.

[9] Armstrong's ultimate dismissal of the Muhlenberg suit *with prejudice* as opposed to the Judge's minimum requirement of dismissal *without prejudice* lacks any real significance. The Judge explained that in his Decision on Liability and Cease and Desist Order, he permitted the dismissal of the Muhlenberg suit to be without prejudice so as to "permit[] Armstrong to once again bring its civil proceeding in the unlikely event Armstrong is ultimately successful on appeal." 35 FMSHRC at 1886. Our holding should make clear that baseless retaliatory lawsuits violate the Mine Act and therefore, if filed, must be dismissed.

compliance may be a mitigating circumstance justifying a reduction in civil penalty). It didn't dismiss the suit after both the Secretary and a Commission ALJ found it to be in breach of the Act. Rather, Armstrong flouted the law by refusing to dismiss the Muhlenberg suit without a settlement.

Second, the Judge was correct in stating that posting and training requirements are routinely included in motions for settlement in section 105(c) cases. In fact, the Secretary has recently authored several press releases announcing the inclusion of posting and training requirements in agreements to settle discrimination cases. *See* Press Release, Mine Safety and Health Administration, "MSHA settles two discrimination cases with Tennessee mine operator" (Jan. 9, 2014); Press Release, MSHA, "MSHA, New Elk Coal reach settlement" (May 8, 2013); Press Release, MSHA, "MSHA and Pennsylvania coal operator reach settlement in discrimination case" (Jan. 4, 2012). Our colleagues quote the Secretary's representation that the posting and training requirements were not routine. However, the Secretary's bare assertion is not supported by any evidence. The Secretary's lawyers are apparently unaware of the Secretary's actual practices as described by the press releases. Accordingly, the Judge did not abuse his discretion in concluding that the settlement terms before him were routinely included in motions to approve settlement of discrimination cases.

For the foregoing reasons, the Judge's conclusion that the parties failed to present mitigating remedies to offset the proposed $35,000 reduction in penalty is fully supported. His analysis in light of these facts reflects that he thoroughly considered each aspect of the settlement and then concluded that, on balance, the remedies were not proportionate to the insidiousness of the violation or consistent with the enforcement scheme of the Mine Act. *See* 35 FMSHRC at 2686-87. We disagree with the majority's assertion that the Judge's analysis reflects that he somehow failed to consider the effect of the settlement as a whole. *See* slip op. at 7-8 (citing *Madison Branch Management*, 17 FMSHRC 859, 867-68 (June 1995)). The Judge correctly concluded that the reasons advanced by the Secretary to justify reducing the penalty were baseless: "There are no mitigating circumstances to justify the proposed reduction." 35 FMSHRC at 2686. Perhaps the Secretary had some other reason for reducing the $70,000 penalty that his Office of Assessments proposed. We don't know. But there is nothing in the record to justify a reduction.[10]

[10] The fact that Shemwell was represented by private counsel, as noted by the majority, slip op. at 3 n.3, is irrelevant to the *Commission's* consideration of the settlement agreement.

B. The settlement agreement is not in the public interest because the terms are inadequate to address the nature of the violation and contrary to the public policy of the Mine Act.

1. The posting requirement in the settlement agreement is inadequate.

As a SLAPP, the Muhlenberg suit is contrary to the public policy of a majority of U.S. jurisdictions, and the Judge correctly condemned it as contrary to the federal policy goals of the Mine Act. Miners working at Armstrong's mines must be informed *in unambiguous terms* that in filing the civil action against Shemwell, Armstrong violated the Mine Act. We would require the mine operator to post a notice with language that is clear and direct.[11] *See* S. Rep. 95-181, 95th Cong., 1st Sess. 37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978) (the Mine Act's legislative history states that the Commission should require "all relief that is necessary to make the complaining party whole and to *remove the deleterious effects of the discriminatory conduct* including . . . requirements for the posting of notices by the operator.") (emphasis added).

Instead of posting the Judge's decision, under the proposed agreement Armstrong is required merely to post a copy of the settlement motion complete with the clause that states: "except for proceedings under the Act, nothing contained herein shall be deemed to constitute an admission of a violation of the Act or its regulations." Jt. Mot. at 3 (Aug. 8, 2013). The inclusion of this limiting language creates an equivocacy about the unlawfulness of the Muhlenberg suit that undermines the effectiveness of the posting requirement and the Act's anti-discriminatory provisions. *See Pottsville Bleaching Co.*, 301 NLRB 1095, 1095 (Feb. 1991) (rejecting the inclusion of a nonadmissions clause in a Board notice and stating that "the inclusion of a nonadmissions clause in the Board's notice could be confusing to those reading the notice and could undermine its effectiveness"); *see also Independent Shoe Workers of Cincinnati, Ohio*, 203 NLRB 783, 783 (May 1973) (rejecting a recommended official Board notice because it contained a nonadmissions clause that would "undermine the effectiveness intended to be had by the Board notice and, accordingly, would fail to effectuate the policies of the Act"). We cannot comprehend why the Secretary agreed to a posting requirement which does not state, in unambiguous terms, that Armstrong's lawsuit seeking punitive damages for Shemwell's filing of a safety complaint with MSHA was a gross violation of the Mine Act.

We conclude that the posting requirement in its current form is not in the public interest and represents ineffective enforcement of the Mine Act. In view of Armstrong's conduct, its miners need to be informed that they may assert statutory rights without the threat of reprisal by

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[11] The Judge, in his August 19, 2013 Order and Supplemental Decision on Relief, properly ordered Armstrong to post both the June 19th Decision on Liability and the August 19th Supplemental Decision at suitable locations at each of Armstrong's facilities for a period of 90 days. 35 FMSHRC at 2692.

oppressive litigation. This is especially important given the pattern of Mine Act discrimination complaints against Armstrong.

2. The reduction in penalty is not adequately justified.

The Secretary's motion does not adequately justify the proposed 50 percent reduction in the civil penalty. We agree with the Judge that the posting and training requirements that Armstrong agreed to are unremarkable and not proportionate to the violation. The Judge was well within his rights to insist that the filing of the Muhlenberg SLAPP is the type of violation that warrants the imposition of the statutory maximum penalty of $70,000 originally proposed by the Secretary.

In an attempt to justify the proposed terms of the settlement, the Secretary contends that he alone has "the historical expertise to determine whether the proposed relief will best protect miners." S. PDR at 11. However, Congress empowered the *Commission* to determine whether or not to approve a settlement. 30 U.S.C. § 820(k). In this case, the Judge found that a 50 percent reduction of the maximum penalty, for what he properly characterized as an egregious transgression against the Act, was inadequate. The record before us stands in support of his decision.

Conclusion

In summary, we dissent from our colleagues because we believe that the Judge did not abuse his discretion when he denied the motion to approve settlement. In addition, we independently consider the proposed settlement terms to be inadequate to address the violation. We would affirm the Judge's denial of the joint motion to approve settlement.

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

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

Distribution

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Mason L. Miller, Esq.
Daniel Z. Zaluski, Esq.
Adam K. Spease, Esq.
Miller & Wells, PLLC
300 E. Main Street, Suite 360
Lexington, KY 40507

Tony Oppegard, Esq.
P.O. Box 22446
Lexington, KY 40522

Wes Addington, Esq.
Appalachian Citizens Law Center
317 Main Street
Whitesburg, KY 41858

Administrative Law Judge Jerold Feldman
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW
SUITE 520N
WASHINGTON, DC 20004

May 23, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. LAKE 2009-490
v.	:	LAKE 2009-491
	:	LAKE 2009-531
BIG RIDGE, INC.	:	LAKE 2009-532

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), an Administrative Law Judge found a violation of the lifeline requirements contained in 30 C.F.R. § 75.380(d)(7)(i)[1] to be significant and substantial ("S&S").[2] 33 FMSHRC 689, 693-99 (Mar. 2011) (ALJ). Big Ridge, Inc., subsequently petitioned for review of the Judge's S&S finding, which the Commission granted. For the reasons stated herein, we affirm the Judge's decision and conclude that Big Ridge's violation of the lifeline requirements was S&S.[3]

[1] Section 75.380(d)(7)(i) provides as follows: "Each escapeway shall be provided with a continuous, durable directional lifeline or equivalent device that shall be installed and maintained throughout the entire length of each escapeway."

[2] The S&S 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."

[3] We have determined that oral argument is not necessary and, therefore, Big Ridge's motion for oral argument is denied.

I.

Facts and Proceedings Below

During a March 12, 2009 inspection, an inspector with the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") observed that 20 feet of a lifeline was missing on a secondary escapeway at Big Ridge's Willow Lake Mine. 33 FMSHRC at 694-95. The secondary escapeway was next to a belt entry at a heavily traveled crosscut intersection. *Id*. At least 40 miners in the working area would have used this escape route in the event of an emergency. *Id.* at 695. As a result, the inspector issued a citation alleging that the secondary escapeway was not being provided with a lifeline at a crosscut intersection for approximately 20 feet. *Id*. at 694.

There was no dispute that there was a 20-foot gap in the lifeline. *Id*. at 694-97. After a hearing on the merits, the Judge concluded that a violation of section 75.380(d)(7)(i) had occurred and found the violation to be S&S. *Id*. at 693-99.

The Judge applied the Commission's four-part S&S analysis established in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Judge found that a "discrete safety hazard existed as a result of the violations, i.e, the danger of being unable to quickly and safely escape the mine in the event of an emergency where smoke and/or fire are created by various scenarios." 33 FMSHRC at 697.

The Judge did not find it necessary to assume the existence of an emergency, as requested by the Secretary, because she determined that "an emergency [wa]s likely to occur" "in the continued course of mining operations." *Id.* at 698-99. She also concluded that the hazard described would result in an injury and that the injury would be "serious or fatal." *Id.* at 699. Additionally, the Judge found that this violation would affect 40 or more miners who used the travelway on a daily basis. *Id*. at 699.

II.

Disposition

The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal*, the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is,

> a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Because this case involves a violation of an emergency lifeline standard, our application of the *Mathies* test is controlled by *Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011), *aff'd Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). In *Cumberland*, the Commission held that "[t]he hazard contributed to by defectively placed lifelines necessarily involved consideration of an emergency situation." 33 FMSHRC at 2364. This is because "[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs." *Id.* at 2367.

When applying the *Mathies* analysis with respect to escapeway violations, a Judge is to consider the S&S nature of those violations within the context of an emergency. *Cumberland*, 717 F.3d at 1027-28 (providing that "assuming the existence of an emergency" when evaluating the S&S nature of emergency safety measures is consistent with *Mathies*). The D.C. Circuit made clear that the likelihood of an emergency actually occurring is irrelevant to the *Mathies* inquiry, which focuses on the nature of the violation itself. 717 F.3d at 1027 (citing *Sec'y of Labor v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997)). *Cf. Spartan Mining Co.*, 35 FMSHRC 3505, 3509 (Dec. 2013) (Secretary need not prove the likelihood of an emergency when evaluating whether escapeway violations were S&S).

Applying the *Mathies* test to the case at bar, we note that the first *Mathies* element is satisfied by the Judge's finding of violation. 33 FMSHRC at 697.

With regard to the second *Mathies* element, the Judge determined that a discrete safety hazard existed as a result of the violation, i.e., "the danger of being unable to quickly and safely escape in the event of an emergency where smoke and/or fire are created by various scenarios." *Id*. The Judge's statement of hazard is consistent with the *Cumberland* decisons and is an accurate description of the relevant hazard contributed to by the violation. 33 FMSHRC at 2364.

Substantial evidence in the record supports the Judge's finding that the gap in the lifeline would contribute to a hazard of miners being unable to quickly and safely escape in the presence of an emergency.[4] As the Judge found, the area where the lifeline was missing for 20 feet is a heavily-traveled area at a crosscut. 33 FMSHRC at 695; Tr. II at 122-24. In such an intersection, there is no rib line to help miners find their way, and other wires and cables may confuse miners looking for a missing lifeline. 33 FMSHRC at 695; Tr. II at 127-28, 131. In addition, the presence of the conveyor belt would contribute to the thickness of the smoke in the cited area. 33 FMSHRC at 695; Tr. II at 129. The inspector testified that the air in the escapeway was common to the air in the next entry, which contained the conveyor belt. Tr. II at 121. In a fire near a belt, the smoke would be so thick from the rollers on the belt that a miner would be unable to see his hand in front of his face. Tr. II at 129. The Judge also found that at least 40 miners in the working area would use this escape route in the event of an emergency. 33 FMSHRC at 695; Tr. II at 122-23.

We reject Big Ridge's argument that miners would find their way out because they knew which way the air was ventilated and would have the air at their backs. As the Judge noted, even experienced miners panic and become disoriented in an emergency. 33 FMSHRC at 695. In addition, ventilation may be interrupted in an emergency. Tr. II at 123, 141-42, 164, 197. Moreover, this violation involved a secondary escapeway, where the air flows outby or away from the working face. Tr. II at 121. This increases the possibility that a fire inby, close to the face, would contaminate the entry with smoke, making a usable and accessible lifeline critically important.

Big Ridge argues that 20 feet of inaccessible lifeline is not sufficient to support an S&S finding as shown by the longer distances of the deficient lifelines in *Cumberland.* *Cumberland* involved four violations with inaccessible lifelines that spanned the distances of 6,650 feet, 450 feet, 120 feet and 300 feet, respectively. 33 FMSHRC at 2358-60. Although a gap of 20 feet is smaller than the distances involved in *Cumberland*, the Judge could reasonably find on this record that the deficient lifeline posed a hazard when considered in the context of an emergency situation. In particular, the gap occurred at a critical intersection, where miners could get disoriented and lost; there were many cables and wires to further confuse escaping miners; and the intersection was near a belt line with common air, which would make any smoke very thick, greatly diminishing visibility. 33 FMSHRC at 694-95.

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[4] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Substantial evidence also supports the Judge's determination that the third and fourth *Mathies* elements were satisfied. In addressing the third and fourth *Mathies* elements, the Judge determined: "It has been demonstrated that if a large gap remained in the lifeline, it would hinder the evacuation of the mine, thereby causing serious injury." *Id*. at 699. Although Big Ridge calls the 20-foot gap small, we note that Inspector Morris testified that "[i]n smoky conditions, 20 feet is a long way." Tr. II at 129. As in *Cumberland*, the Judge relied on the inspector's testimony that in an emergency, miners become disoriented or panic and cannot see in dense smoke, such that a directional lifeline is essential to help them find their way and avert disaster. *Compare Cumberland*, 33 FMSHRC at 2365, *with* 33 FMSHRC at 695. The hazard of a delayed escape or no escape at all due to a missing lifeline in an emergency is reasonably likely to result in serious or fatal injuries. Accordingly, the Judge's application of the *Mathies* test to conclude that the lifeline violation was S&S is fully supported by substantial evidence on the record.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's determination that the lifeline violation was S&S.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

Distribution

R. Henry Moore, Esq.
Arthur M. Wolfson, Esq.
Jackson Kelly, PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1500
Pittsburgh, PA 15222
hmoore@jacksonkelly.com
awolfson@jacksonkelly.com

Edward Waldman, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209
waldman.edward@dol.gov

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Margaret Miller
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-5268

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW

SUITE 520N

WASHINGTON, DC 20004

May 23, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2009-565
v.	:	A.C. No. 12-02295-188278
BLACK BEAUTY COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), an Administrative Law Judge found a violation of the lifeline requirements contained in 30 C.F.R. § 75.380(d)(7)(iv)[1] to be significant and substantial ("S&S").[2] 33 FMSHRC 1174, 1176 (May 2011) (ALJ). Black Beauty Coal Company subsequently petitioned for review of the Judge's S&S finding, which the Commission granted. For the reasons stated herein, we affirm the Judge's decision and conclude that Black Beauty's violation of the lifeline requirements was S&S.[3]

[1] Section 75.380(d)(7)(iv) provides as follows: "Each escapeway shall be provided with a continuous, durable directional lifeline or equivalent device that shall be located in such a manner for miners to use effectively to escape."

[2] The S&S 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."

[3] We have determined that oral argument is not necessary and, therefore, Black Beauty's motion for oral argument is denied.

I.

Facts and Proceedings Below

During an April 21, 2009 inspection, an inspector with the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") observed that a lifeline at Black Beauty's Francisco Mine was at a height of seven to twelve feet above the mine floor for a distance of 100 to 110 feet. 33 FMSHRC at 1174-75. Both the inspector and the Black Beauty representative who accompanied him were unable to pull the lifeline down to an accessible height. *Id*. at 1175-76. As a result, the inspector issued a citation, alleging that "in the event of a disaster the miners trying to use the lifeline to escape would not have been able to keep hold of the lifeline and safely exit the mine." *Id*. at 1175.

After a hearing on the merits, the Judge concluded that a violation of section 75.380(d)(7)(iv) had occurred. *Id.* at 1176. There was no dispute that the lifeline was at a height of seven to twelve feet above the mine floor and was not located such that a miner could effectively use it. *Id.*

In finding the violation to be S&S, the Judge applied the Commission's four-part S&S analysis established in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Judge found that "a discrete safety hazard existed as a result of the violations, i.e., the danger of not being able to access or use the lifeline in the event of an emergency where visibility is reduced and miners must rely on the tangible nature of the lifeline to quickly escape the mine." 33 FMSHRC at 1177-78. The Judge did not find it necessary to assume the existence of an emergency, as requested by the Secretary, because she determined that "an emergency [wa]s reasonably likely to occur in the course of continued mining operations." *Id.* at 1178. She also concluded that the hazard described would result in an injury and that the injury would be "serious or fatal." *Id*. at 1179. Additionally, the Judge found that this violation would affect 14 miners who were on the section at the time the citation was issued and noted that 28 miners would have been affected if a fire or explosion were to occur during a shift change. *Id*.

II.

Disposition

A. Jurisdictional Issue

At the outset, we turn to the Secretary's argument that the Commission lacks jurisdiction to consider certain arguments in Black Beauty's brief because they were not raised in its initial petition for discretionary review ("PDR").

Mine Act section 113(d)(2)(iii) provides that review by the Commission "shall be limited to the questions raised by the petition." 30 U.S.C. § 823(d)(2)(iii). In its brief, Black Beauty argues that the violation is not S&S because the violation would not have significantly

delayed miners in exiting the mine. However, Black Beauty's PDR identified the issue as whether the judge erred when she found a reasonable likelihood of an emergency requiring the use of a lifeline.

The Commission has held that section 113(d)(2)(iii) does not preclude review if the issue was implicitly raised in the PDR or is sufficiently related. *Fort Scott Fertilizer-Cullor, Inc*., 19 FMSHRC 1511, 1514 (Sept. 1997) (broadly construing PDR to encompass party's argument). Although Black Beauty did argue in its PDR that the Judge erred in finding an emergency reasonably likely, it framed the issue broadly as: "Whether the ALJ erred in finding that the condition was properly designated S&S." PDR at 4. Since this broad issue was raised in the PDR, it encompasses the arguments that Black Beauty later raised in its brief. Thus, we will address Black Beauty's S&S arguments on their merits.

B. S&S Issue

The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal*, the Commission further explained:

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

6 FMSHRC at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Because this case involves a violation of an emergency lifeline standard, our application of the *Mathies* test is controlled by *Cumberland Coal Res., LP*, 33 FMSHRC 2357 (Oct. 2011), *aff'd Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). In *Cumberland*, the Commission held that "[t]he hazard contributed to by defectively placed lifelines necessarily involved consideration of an emergency situation." 33 FMSHRC at 2364. This is because "[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs." *Id.* at 2367.

When applying the *Mathies* analysis with respect to escapeway violations, a Judge is to consider the S&S nature of those violations within the context of an emergency. *Cumberland*, 717 F.3d at 1027-28 (providing that "assuming the existence of an emergency" when evaluating the S&S nature of emergency safety measures is consistent with *Mathies*). The D.C. Circuit made clear that the likelihood of an emergency actually occurring is irrelevant to the *Mathies* inquiry, which focuses on the nature of the violation itself. 717 F.3d at 1027 (citing *Sec'y of Labor v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997)). *Cf. Spartan Mining Co.*, 35 FMSHRC 3505, 3509 (Dec. 2013) (Secretary need not prove the likelihood of an emergency when evaluating whether escapeway violations were S&S.)

Applying the *Mathies* test to the case at bar, we note that the first *Mathies* element is satisfied by the Judge's finding of violation. 33 FMSHRC at 1177.

With regard to the second *Mathies* element, the Judge determined that a discrete safety hazard existed as a result of the violation, i.e, "the danger of not being able to access or use the lifeline in the event of an emergency where visibility is reduced and miners must rely upon the tangible nature of the lifeline to quickly and safely escape the mine." 33 FMSHRC at 1177-78. The Judge's statement of hazard is consistent with the *Cumberland* decisions and is an accurate description of the relevant hazard contributed to by the violation. 33 FMSHRC at 2364. She reasoned that if an escaping miner cannot reach the lifeline for 110 feet, the miner will become disoriented in a matter of seconds and could stumble and fall and not know which way to travel to exit the mine. 33 FMSHRC at 1179.

Substantial evidence in the record supports the Judge's opinion that the gap in the lifeline would contribute to a hazard of miners being unable to quickly and safely escape, in an emergency.[4] As the Judge found, the lifeline was unreachable for 110 feet. 33 FMSHRC at 1179. Because the area was on a grade, a tripping or stumbling hazard was even more likely. Tr. 31. Although Black Beauty argues that the lifeline was only temporarily inaccessible due to construction, the inspector testified that during the five-day period that the lifeline was unreachable, miners traveled in the area. Tr. 28-29. We also reject Black Beauty's argument that miners would find their way out because they knew the way the air was ventilated. As the Judge noted, even experienced miners panic and become disoriented in an emergency. 33 FMSHRC at 1179. Ventilation may also be interrupted in an emergency. Tr. 24, 42.

[4] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Moreover, this violation involved a secondary escapeway where the air flows outby or away from the working face. Tr. 40-42. This increases the possibility that a fire inby, close to the face, would contaminate the entry with smoke, making a usable and accessible lifeline critically important.

Black Beauty argues that 110 feet of inaccessible lifeline is not sufficient to support an S&S finding as shown by the longer distances of the deficient lifelines in *Cumberland. Cumberland* involved four violations with inaccessible lifelines that spanned the distances of 6,650 feet, 450 feet, 120 feet and 300 feet, respectively. 33 FMSHRC at 2358-60. Although a gap of 110 feet is slightly smaller than the distances involved in *Cumberland*, a Judge could certainly find on this record that the deficient lifeline posed a hazard when considered in the context of an emergency situation. As she held, an escaping miner who cannot reach the lifeline "will become disoriented in a matter of seconds." 33 FMSHRC at 1179.

In addressing the third and fourth *Mathies* elements, the Judge determined that "the unreachable, and thus unusable, lifeline created a hazard" and that the "likelihood of injuries or death increases as the distance of the unavailability of the lifeline increases." 33 FMSHRC at 1179. As in *Cumberland*, the Judge relied on inspector testimony that in an emergency, miners become disoriented or panic and cannot see in dense smoke, such that a directional lifeline is essential to help them find their way and avert disaster. *Compare Cumberland*, 33 FMSHRC at 2365, *with* 33 FMSHRC at 1179. Thus, substantial evidence supports the Judge's determination that the third and fourth *Mathies* elements were satisfied. The hazard of delayed or no escape at all due to an inaccessible lifeline in an emergency is reasonably likely to result in serious or fatal injuries. Accordingly, the Judge's application of the *Mathies* test to conclude that the lifeline violation was S&S is fully supported by the record.[5]

[5] In challenging the S&S determination, Black Beauty raises the presence of other safety measures, such as a viable primary escapeway, tethers, and reflective material, as mitigating the S&S determination. The Commission and courts have soundly rejected this line of argument. As stated in *Cumberland*, additional safety measures do not prevent a finding of S&S. 33 FMSHRC at 2369 (citing *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995)).

III.

Conclusion

For the foregoing reasons, we affirm the Judge's determination that the lifeline violation was S&S.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

Distribution

R. Henry Moore, Esq.
Arthur M. Wolfson, Esq.
Jackson Kelly, PLLC
Three Gateway Center
401 Liberty Avenue, Suite 1500
Pittsburgh, PA 15222
hmoore@jacksonkelly.com
awolfson@jacksonkelly.com

Robin Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209
rosenbluth.robin@dol.gov

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Margaret Miller
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-5268

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 28, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. VA 2010-81-R, et al.[1]
v.	:	
KNOX CREEK COAL CORPORATION	:	

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

DECISION

BY: Jordan, Chairman; Nakamura, and Althen, Commissioners

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 Administrative Law Judge concluded that five citations issued by the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA") to Knox Creek Coal Corporation were not significant and substantial ("S&S").[2] Slip op. at 61-64, 79-82, 97-98, No. VA 2010-81-R (Dec. 27, 2010) (ALJ) ("*ALJ Dec.*").[3] The Commission granted the Secretary of Labor's petition for discretionary review challenging the Judge's decision. For the reasons that follow, we vacate in part the Judge's decision, conclude that four of the five violations were S&S, and remand for further consideration consistent with our decision.

[1] The relevant docket numbers involved in this proceeding are listed in an appendix attached to this decision.

[2] Section 104(d)(1) of the Act authorizes the Secretary to make a special finding if a violation "is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).

[3] The Judge's decision was not published in the Commission's Blue Books, its official reporter. However, the Judge's decision can be found on the Commission's website (www.fmshrc.gov). All citations to the Judge's decision are to the slip opinion.

I.

Facts and Proceedings Below

Knox Creek's Tiller No. 1 Mine, an underground bituminous coal mine located in Tazewell County, Virginia, liberates in excess of 900,000 cubic feet per hour of methane in a 24-hour period and is subject to section 103(i)[4] spot inspections every 10 days. *ALJ Dec.* at 4, 51. In January 2009, the mine had a face ignition. Jt. Ex. 1, Stip. 21; G. Ex. 132; Tr. 1332. This resulted in a change in the mine's ventilation plan. *ALJ Dec.* at 60; Tr. 1448. However, as the Judge noted, MSHA was still concerned about elevated methane readings at the face and the potential for ignitions, given the gassy nature of the mine. *ALJ Dec.* at 60.

At issue in this proceeding are five violations which the Judge found were not significant and substantial ("S&S"). *ALJ Dec.* at 61-64, 79-82, 97-98. The citations for these violations were issued between October 30 and November 20, 2009. *Id.* at 50, 80, 95. On December 27, 2010, the Judge issued his written decision, which the Secretary appealed. Below, these consolidated proceedings involved 37 dockets concerning 35 violations and their associated penalties, of which only five citations are currently under consideration by the Commission on appeal.[5]

II.

Disposition

The fundamental issue on appeal is whether the Judge erred in determining that the five violations in question were not S&S. As explained below, three of the violations (Citation Nos. 8170363, 8170375 and 8169155) involve the Secretary's standard requiring that certain equipment be "permissible." Another violation (Citation No. 8169156) involves the standard governing the safety of power cables, and the remaining violation (Citation No. 8170394) involves the accumulation of combustible materials on a conveyor belt. In section A below, we discuss the relevant facts and legal principles pertaining to the three permissibility violations. In section B, we address the facts and legal principles pertaining to the power cable violation, and in section C, we do the same for the accumulations violation.

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[4] Section 103(i) of the Act provides in pertinent part that a coal or other mine liberating in excess of one million cubic feet of methane or other explosive gases during a 24 hour period is subject to a minimum of one spot inspection every five working days, and a mine that liberates in excess of five hundred thousand cubic feet of methane or explosive gases during a 24 hour period is subject to a spot inspection every 10 working days at irregular intervals. 30 U.S.C. § 813(i).

[5] The remaining citations and their penalties generally settled, were not appealed or were denied review. Knox Creek's petition for review of seven of the citations (Nos. 8170360, 8170391, 8170398, 8169126, 8169147, 8170374 and 8169146) was denied by the Commission on February 4, 2011.

Applying Commission case law setting forth the test for determining whether a violation is S&S, we conclude that each of the three permissibility violations and the accumulations violation were properly designated as S&S by the Secretary. Accordingly, we reverse the Judge's decision as to the S&S nature of these violations and remand the case for the reassessment of penalties. As to the power cable violation, we affirm the Judge's determination that this violation is not S&S.

The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). It is the contribution of the violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co*., 6 FMSHRC 1834, 1836 (Aug. 1984). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

A. Permissibility Violations

The first three violations involve 30 C.F.R. § 75.503,[6] the standard requiring all face[7] equipment to be maintained in permissible condition. "Permissible" means "all electrically

[6] Section 75.503 provides that "[t]he operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine." 30 C.F.R. § 75.503.

[7] A "working face" is "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle. . . . " 30 U.S.C. § 878(g)(1); 30 C.F.R. § 75.2. *See also Dictionary of Mining, Mineral, and Related Terms* 407 (1968) (defining "face" as "[t]he solid surface of the unbroken portion of the coalbed at the advancing end of the working place").

operated equipment taken into or used inby the last open crosscut of an entry . . . are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and . . . to prevent, to the greatest extent possible, other accidents in the use of such equipment." 30 C.F.R. § 75.2.

The permissibility requirements are designed to ensure that ignitions occurring within enclosures on mining equipment which contain electrical circuits will not escape into the mine atmosphere. Specifically, the requirements are intended to prevent the ignition of an explosive air-methane mixture surrounding mine equipment. An ignition inside the enclosure will generate hot gases. When the equipment is permissible, these gases will escape through a flame-arresting path built into the enclosure and will cool as they pass through. Consequently, the gas escaping into the surrounding atmosphere will not ignite any external explosive air. G. Ex. 4 at 4.

On October 30, 2009, MSHA Inspector Jason Hess issued Citation No. 8170363, alleging an S&S violation on the continuous mining machine located on the 005 MMU for an opening in excess of .004 inches in the trailing cable junction box.[8] G. Ex. 75; *ALJ Dec.* at 54-55.

On November 4, 2009, Inspector Hess issued Citation No. 8170375, alleging an S&S violation on the 005 MMU continuous miner because it had an opening exceeding .004 inches in the conveyor motor cover. G. Ex. 78; *ALJ Dec.* at 56.

On November 20, 2009, MSHA Inspector Michael Colley issued Citation No. 8169155, alleging an S&S violation on the continuous mining machine located on the 003 MMU due to an opening in excess of .004 inches in the plane flange joint of the lead junction box. G. Ex. 71; *ALJ Dec.* at 53-54.

The Judge concluded that each of the three permissibility violations was not S&S. *ALJ Dec.* at 61-64. He rejected the Secretary's argument that there should be an assumption of the occurrence of an explosion within the enclosure housing the electrical components on the equipment when considering the S&S designation of permissibility violations. *Id.* at 57-59. Applying *Mathies*, he held that for each of the three permissibility violations, the Secretary had proved the first, second, and fourth elements, i.e., Knox Creek committed a violation of a mandatory safety standard, the violation contributed to a safety hazard, and the resulting injury would be of a reasonably serious nature. *Id.* at 59.

As to the third *Mathies* element, the Judge found that, given the gassy nature of the mine, sudden methane buildups in the explosive range could reasonably be expected to occur. However, he concluded that the Secretary had failed to establish the reasonable likelihood of an

[8] In the citations, the MSHA inspectors referenced 30 C.F.R. § 18.31, which sets forth the requirements for explosion-proof enclosures on electric motor-driven mine equipment. G. Exs. 71, 75, 78. Section 18.31 bases the enclosure requirements on the internal volumes of the empty enclosure. 30 C.F.R. § 18.31(a)(6). Enclosures with more than 124 cubic inches of internal volume, with the joint all in one plane, must have a maximum clearance of .004 inches. *Id.*

ignition inside of the enclosures. *Id.* at 61-64. He found that the Secretary had failed to produce any evidence concerning the frequency with which the electrical malfunctions of the equipment causing sparking or arcing described by the inspectors occurred. *Id.* He therefore concluded that the Secretary had failed to prove that there was a reasonable likelihood that the hazard would result in an injury to miners. *Id.*[9]

On appeal, the Secretary maintains that the Judge erred by failing to assume the occurrence of an explosion inside the enclosures housing the electrical components on the cited equipment. We agree with the Secretary that the Judge erred in finding that these three permissibility violations were not S&S. We arrive at our conclusion that the violations were S&S based on the correct application of *Mathies* and relevant Commission precedent.

The Judge erred by limiting his consideration of the violative conditions as they existed at the time of the inspection, taking a "snapshot" approach to the issue of an arc or spark within the subject enclosures. The Commission has clearly held that the Judges must consider the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal mining operations continued. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 677-78 (Apr. 1987); *U.S. Steel*, 7 FMSHRC at 1130; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (rejecting the mine operator's argument that a significant and substantial violation should be determined based solely on the condition as it exists at the precise moment of inspection); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012); *Bellefonte Lime Co., Inc.*, 20 FMSHRC 1250, 1255 (Nov. 1998) (holding that judge failed to consider whether there was reasonable likelihood of injury during the "operative time frame . . . [of when the] violative condition existed prior to the citation"). Here, the impermissible equipment that was cited was expected to be put into service in its violative condition on the next shift. *ALJ Dec.* at 53-56. The Judge should have considered the inspectors' and expert witness' extensive testimony addressing the conditions expected to result from continued mining.

Additionally, the Judge's focus upon the absence of quantitative proof of the frequency of malfunctions within the enclosures is contrary to uncontradicted testimony regarding the likelihood of such malfunction, and thus, to the *Mathies* test. *See Amax Coal Co.*, 19 FMSHRC 846, 848-49 (May 1997) (declining to impose a "more probable than not" standard when considering the third *Mathies* element), citing *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June

[9] The Judge found other facts supportive of a reasonable likelihood of a methane ignition in the mine, including that the .001 inch excess gap would permit ignited methane to enter the mine's atmosphere. He found: "[E]ach violation contributed to a safety hazard in that the testimony overwhelmingly establishes the cited openings could have allowed methane to enter the subject compartment[s,] an electrical malfunction in [the] compartment[s] could [have] ignite[ed] the methane[, t]he flame[s] could [have traveled] out of the compartment[s] into the atmosphere surrounding the cited equipment, and if the methane concentration outside the equipment were in the explosive range of 5 [%] to 15 [%], the result could [have been] an [ignition] and [perhaps] explosion, causing serious burn injuries to [the] equipment operators and to those operating equipment immediately behind[.]" *ALJ Dec.* at 59.

1996). By requiring the Secretary to prove essentially a statistical frequency of a spark occurring inside the compartments housing the electrical connections on the face equipment, the Judge imposed on the Secretary an unwarranted standard beyond reasonable likelihood.

The Commission has expressly rejected a similar argument. *See Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010) (in supporting an S&S designation, Secretary not required to produce evidence that, at other mines, reliance on mine maps that were not final had resulted in breakthroughs and injuries). Similarly, in this case, the Secretary was not required to produce quantitative evidence of the frequency of malfunctions within these types of enclosures in order to establish that arcing or sparking was reasonably likely.

Applying the correct standard under *Mathies* and considering the specific facts and circumstances of this case, we conclude that the Judge erred in finding that the Secretary did not prove an ignition was reasonably likely to occur.[10] *ALJ Dec.* at 64. We instead conclude that the evidence compels the conclusion that the permissibility violations could have contributed significantly and substantially to the cause and effect of a methane ignition or explosion at the Tiller Mine. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

As a threshold matter, when evaluating evidence to determine whether permissibility violations are S&S, the Commission has considered the particular circumstances present in the mine. In cases involving violations which may contribute to the hazard of methane explosions or ignitions, the Commission has held that the likelihood of an injury resulting from the hazard depends on whether a "confluence of factors" exists that could trigger an explosion or ignition. *Texasgulf, Inc*., 10 FMSHRC 498, 501 (Apr. 1988).[11] Some of the factors to be considered include the presence of methane, possible ignition sources, and the types of equipment operating in the area. *See Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990);

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[10] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable 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 reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[11] The factual circumstances in the instant case are readily distinguishable from those in *Texasgulf*. The mine in *Texasgulf* contained only miniscule amounts of methane and had never had a methane ignition or explosion. 10 FMSHRC at 501. By contrast, as discussed above, the record in this case establishes that the Tiller Mine was subject to section 103(i) spot inspections because of its excessive liberation of methane and that a face ignition had recently occurred. Tr. 1239, 1242, 1320.

Texasgulf, 10 FMSHRC at 501-503. Consideration of the particular circumstances in the mine is an acknowledgement of the complex nature of permissibility violations, which may pose a serious risk of a mine ignition or explosion during normal operations in the presence of certain conditions.[12]

MSHA witnesses testified to a "confluence of factors" that could trigger an ignition. In particular, the inspectors and expert witness testified that under normal wear and tear, the subject equipment would tend to break down or malfunction, thereby providing an ignition source. *ALJ Dec.* at 53-56, 61-64; Tr. 1270-72, 1287-88, 1323-24. They also testified that because of the impermissible gaps around the enclosures, methane could enter the enclosures. Should the equipment malfunction, resulting in a spark, the gap could permit the ignition to reach the mine atmosphere. *ALJ Dec.* at 53-56, 61-64; Tr. 1287-88, 1321. Significantly, the inspectors testified that this mine was known to liberate excess methane, i.e., it was subject to section 103(i) spot inspections, and that it had a history of face ignitions. Tr. 1239, 1242, 1271-72, 1288, 1320. Thus, an ignition within the enclosure could escape to the mine atmosphere and contribute to a greater explosion, resulting in serious injury and potential fatalities. Tr. 1288-90, 1326-27.

Kenneth Porter, MSHA's chief electrician and expert witness, submitted an expert report in which he explained that although there is normally no active arcing or sparking in the enclosures for the three pieces of equipment at issue, vibration could loosen electrical connections, leading to arcing or sparking or increased heat. G. Ex. 4 at 4-8. He explained that the insulation on conductors can be damaged by rubbing against other insulation or against the case of the enclosure, creating an increased likelihood of an arc or spark within the enclosure. *Id.* at 5. Also, water can enter the enclosure, causing degradation. *Id.* at 5-6. Porter explained that during continued mining operations, conveyor motors for the continuous miner machines were especially subject to failure because of vibration, shock, water, and loading. *Id.* at 8. He also testified that typical failures create the likelihood of an arc or spark. *Id.* at 5-6.

Turning to Citation No. 8170363 – an opening in excess of .004" in the trailing cable junction box on the continuous miner on the 005 MMU – Inspector Hess testified that the leads

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[12] Congress recognized the inherent dangers of mining and in particular the potentially catastrophic consequences of such violations when, after much debate, it extended the permissibility requirements of electrical equipment to both gassy and non-gassy underground coal mines. S. Rep. No. 91-411, at 25-35 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 151-61 (1975); H. Conf. Rep. No. 91-761, at 83 (1969), *reprinted in Legis. Hist.* at 1527. Congress acknowledged the need for these permissibility requirements for electrical equipment to control face ignitions and explosions by "preventing the emission of a spark or arc which could cause a mine fire or explosion." S. Rep. No. 91-411, at 68-69 (1969), *reprinted in Legis. Hist.* at 194-95; s*ee also Sewell Coal Co.*, 3 FMSHRC 1402, 1405-06 (June 1981) (discussing legislative history of permissibility provisions of the Mine Act). Sections 305 and 318(i), 30 U.S.C. § 865 and 878(i), which address permissibility requirements for electrical equipment, remain unchanged from the 1969 Coal Act to the present time.

were bolted together in such a way that those connections could become loose, resulting in increased current draw heating the wiring, melting insulation, and allowing a short circuit and spark or arc to ignite methane. *Id.* at 55; Tr. 1287-88. In addition to the evidence of face ignitions, the inspector testified that in the past, methane readings in the explosive range had been detected at the face. *ALJ Dec.* at 55; Tr. 1290-91.

With regard to Citation No. 8170375 – an opening in excess of .004" in the conveyor motor cover on the continuous miner on the 005 MMU – Inspector Hess testified that the equipment was used in the prior shift, and was to be used on the next shift. *ALJ Dec.* at 56; Tr. 1318-19. The inspector also testified that the motor cover was within ten feet of the face where methane is liberated during the mining process and also close to the mine floor, which also liberates methane. Tr. 1319-20, 1327. He explained that methane liberated from the mine floor could enter the motor compartment at an explosive level before traveling to the other side of the machine and being detected by the methane monitor. *ALJ Dec.* at 56; Tr. 1327-28. Inspector Hess further testified that although he did not open the conveyor motor cover, a photograph taken by Knox Creek after the MSHA inspection showed wear and an absence of insulation on one of the connection points where a power lead connects to the machine. *ALJ Dec.* at 56; Tr. 1321-24; G. Ex. 80. Hess testified that the wearing could lead to arcing within the motor during normal continuous mining operations. Tr. 1324.

Regarding Citation No. 8169155 – an opening in excess of .004" in the plane flange joint of the lead junction box on the continuous mining machine on the 003 MMU – the evidence indicates that, while the equipment was not in use at the time of the inspection because it was a maintenance shift, it was used on the prior shift, and the operator planned to use it on the next shift, which was a production shift. *ALJ Dec.* at 54; Tr. 1263-64. Inspector Colley testified that rust and corrosion showed that there was moisture inside the box. Tr. 1269-70. He said this is highly dangerous around electrical connections because it could wear away the protective tape covering the cables and lead to a spark or arcing, triggering an explosion. Tr. 1269-72. The inspector also testified that the electrical connections could come loose due to the moisture, causing a similar problem. Tr. 1272.

As is relevant with each of the permissibility violations, the mine was subject to section 103(i) spot inspections due to excessive liberation of methane, and the record establishes that this mine previously experienced face ignitions. *ALJ Dec.* at 60; Tr. 1239, 1242, 1271-72, 1288, 1290-91, 1320. Significantly, for each violation, the Judge concluded that the Secretary had proved that an accumulation of methane in the explosive range was reasonably likely and that the gap would permit an ignition within the equipment to enter the mine atmosphere. *ALJ Dec.* at 61-63.[13]

Knox Creek's witnesses testified that the wires at issue (located inside of the equipment) were covered with tape and/or sleeves and adequately insulated (*id.* at 54-56; Tr. 1457-59, 1473,

[13] As the Judge explained in his decision, the explosive range of methane is 5 – 15%. *ALJ Dec.* at 59.

1476-77, 1494), and as the inspectors admitted at trial, at the time of the inspection, no defects or elevated methane levels were found (Tr. 1274-75, 1278, 1299, 1304). However, Knox Creek did not refute the Secretary's witnesses' testimony regarding the potential dangers posed by the violative conditions. Moreover, the Judge specifically discounted the prophylactic effect of the O rings relied on to secure the enclosures, stating that even if the rings were in perfect condition, he could not find that they would have prevented methane from entering the enclosures or prevented flames from escaping. *ALJ Dec.* at 59. The Judge credited the testimony of MSHA's expert Kenneth Porter that the rings were designed to keep out moisture, not gas and flames, and that the rings would deteriorate over time. *Id.*; Tr. 1340-42, 1361.

In prior cases, the Commission has upheld S&S determinations for permissibility violations in analogous circumstances. For example, in *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866 (Aug. 1984), the Commission upheld an S&S finding for a permissibility violation involving headlights, even though at the time of the violation there appeared to be adequate ventilation in the mine, and mining was not taking place at the precise moment the citation was issued. *Id.* at 1869. The mine at issue was classified as gassy and had a history of methane ignitions. The Commission held that substantial evidence supported the judge's conclusion that sparking occurs within the equipment. This was based on the testimony of the inspector, who stated that although sparking with headlights is not "normal," it is "frequent" and can be caused by a number of factors. *Id.* at 1868.

Similarly, in *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1284 (Sept. 1986), the Commission affirmed the judge's S&S findings regarding a permissibility violation involving electric face equipment. The inspector had observed a bolt missing on the cover plate of the control compartment of a shuttle car. The control plate was designed to keep an ignition confined and the missing bolt could permit methane to enter the control compartment, causing an ignition. *Id.* at 1289-90. This mine liberated more than one million cubic feet of methane in a twenty-four hour period, and there had been a methane ignition there in the year preceding the hearing. The Commission concluded that this was sufficient to uphold the S&S designation.

We must assume, in the absence of contrary evidence, that these three pieces of equipment would be used in coal production during the continuation of normal mining operations beginning on the next shift. We conclude that the operator's evidence does not rebut the Secretary's showing that deteriorating conditions were reasonably likely to create an ignition hazard in a gassy mine. As stated by Kenneth Porter in his report, the whole purpose of the permissibility requirements is to ensure that all electrical circuits which are inby the last open crosscut of an underground coal mine shall be maintained in enclosures which are "explosion-proof." G. Ex. 4 at 2. The record as a whole compels the conclusion that these permissibility violations

significantly and substantially contributed to the hazard of a methane ignition or explosion, which would reasonably likely result in serious injury to miners.[14] Accordingly, we reverse the Judge's S&S findings.

B. Trailing Cable Violation (30 C.F.R. § 75.517)

On November 20, 2009, Inspector Colley issued Citation No. 8169156, alleging an S&S violation of 30 C.F.R. § 75.517,[15] which requires that power wires and cables be adequately insulated and fully protected. The citation alleged that the trailing cable of a continuous mining machine had a one-half inch opening in the cable, exposing the insulated power conductors. *ALJ Dec.* at 79-80; G. Ex. 97. The conductors were covered by shielding and the opening was located ten feet from the machine. The citation also states that the mine floor in this section where the continuous miner was located was wet and that the cable was handled by miners during the course of each shift. *ALJ Dec.* at 79-80; G. Ex. 97.

The Judge found that the Secretary established the first, second, and fourth *Mathies* elements. However, he found that the violation was not S&S because the evidence did not support the conclusion that miners were exposed to the hazard before the inspection or that there was a reasonable likelihood that miners would be exposed to an injury-causing hazardous event when mining resumed. With respect to the third *Mathies* element, the Judge found no miners were exposed to the hazard and miners would not have been reasonably likely to be exposed to a shock hazard because, as a result of ongoing repair work, the opening in the cable would have been found and repaired before the equipment was put back into service. *Id.* at 81.

[14] Substantial evidence supports the Judge's other S&S findings as to these permissibility violations. The parties stipulated to the violations (*ALJ Dec.* at 56; Jt. Ex. 1, Stip. 16), and the Judge specifically found that an ignition or explosion within the housing compartments could result in a serious burn to the equipment operators or to those operating equipment immediately behind. *ALJ Dec.* at 59; *see Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (recognizing that "ignitions and explosions are major causes of death and injury to miners"). The parties did not dispute these facts below or the Judge's findings on appeal.

[15] Section 75.517 states that "power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." 30 C.F.R. § 75.517.

We conclude that substantial evidence supports the Judge's conclusion that there was not a reasonable likelihood that the condition of the cable would have caused a shock hazard to a miner under the specific circumstances of this case.[16] Two witnesses testified with respect to this citation – Inspector Colley and Mark White, Knox Creek's maintenance foreman. Inspector Colley testified that the machine was being repaired. Tr. 1712, 1717. He further testified that the conductors within the cable were shielded and that he did not find any defects in the shielding. Tr. 1708-09, 1722-23. He conceded that the shielding would have insulated the cable during the course of the repairs unless an accident occurred. Tr. 1724. In addition to acknowledging the machine was undergoing repairs, Inspector Colley testified that such repairs would be completed in accord with a Knox Creek action plan (Tr. 1719-20) and acknowledged that the cut was obvious and easy to find. Tr. 1717. He did not present any testimony that the cut existed in the cable while the machine was in use for mining.

Mark White, the Knox Creek maintenance foreman, testified that the machine had been down for repairs for the two prior days and that the interior conductors were properly insulated. White testified that the machine was locked out. Tr. 1453, 1925, 1931. He also provided details regarding the repair action plan acknowledged by Inspector Colley but about which the inspector did not provide detailed information. White testified that the machine would have been inspected with the power off prior to being put back into service. This inspection would include running a hand down the entire length of the cable to look for gashes or cuts. Tr. 1927-28. He testified that the cut was obvious, and that the cut would have been found and fixed during that part of the action plan repair process.

Based upon this evidence, the Judge found that the machine had been unused with its power off for two days before the citation was issued. Therefore, there was no way of knowing whether the opening in the cable occurred before the cable was last moved. *ALJ Dec.* at 81. The Judge further found that both the inspector and operator witness testified that before the machine would have been returned to service, the cable would have been inspected according to the Knox Creek action plan. Thus, the Judge found that because the machine was being repaired at the time of the inspection according to that action plan, the obvious cut would have been noticed and corrected before the machine was returned to service. According to the Judge, the opening would have been found and repaired so that no miner would have been exposed to the cut when mining continued. *Id.*

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[16] The parties dispute whether the equipment was energized, thereby potentially exposing miners to the hazard. The Secretary relies on the inspector's testimony that, when he first observed the continuous mining machine, it was energized while miners were *working on it* ("putting power in, taking power out, and repositioning the machine to make repairs to the part"). S. Reply Br. at 14-15 (citing Tr. 1171). Knox Creek's maintenance foreman Mark White testified that although the machine was energized, it was only energized as a courtesy for the inspector. *ALJ Dec.* at 80; Tr. 1923-24. The Judge's finding that no miners were exposed or would have been exposed to the hazard is consistent with White's testimony.

Our finding that substantial evidence supports the Judge with respect to this violation contrasts with our resolution of the citation for accumulation of combustible materials discussed immediately below. The trailing cable violation involved circumstances where the machine was shut down and was already undergoing active repairs. Unlike the cases cited in the dissent, remedial efforts were already underway when the inspector arrived. We also disagree with our dissenting colleagues that a cut that went halfway around the circumference of the cable, and in a part of the cable that was, in their words "handled frequently by miners," would nevertheless not be repaired during the ongoing repairs and that the cable would be permitted to deteriorate over time.[17] Slip op. at 16. Substantial evidence supports the Judge's implicit finding that the only possibility through which miners could have been exposed to a hazard from the cut in the cable was if a mine repairman were willfully grossly neglectful in completing repairs under an action plan that was underway. The possibility of such willful gross neglect in ongoing repairs does not provide grounds to overturn the Judge's finding that that the Secretary did not carry his burden of proof.

Accordingly, we affirm the Judge's conclusion that Citation No. 8169156 is not S&S.

C. Accumulation Violation (30 C.F.R. § 75.400)

On November 9, 2009, Inspector Hess issued Citation No. 8170394, alleging an S&S violation of 30 C.F.R. § 75.400,[18] due to accumulations of combustible material on the 1A conveyor belt. *ALJ Dec.* at 95-96; G. Ex. 114. The belt was turning in the accumulations, which were dry. *Id.*; Tr. 2000-034, 2007. Although a pre-shift report indicated that the belt needed cleaning, when the inspection took place at the start of the next oncoming production shift, no cleaning had begun. *ALJ Dec.* at 96; G. Ex. 114.

The citation states that accumulations of combustible material consisting of coal fines, float coal dust, and coal were present on and around the 1A conveyor belt. The citation specifically charged that: (1) accumulations were four inches to eight inches deep for the width of the belt at the secondary scraper where the belt was running against the accumulations; (2) accumulations were in two piles, 10 inches and 12 inches deep under the belt's rollers, where the rollers and belt were turning in the accumulations; (3) accumulations were up to 12 inches deep and were stacked on the frame and metal braces of the belt structure; (4) accumulations were four

[17] The dissent candidly concedes away its position by acknowledging that it would not find S&S if the repairmen had made a written notation of the cut before the inspection occurred. Slip op. at 16. We do not find S&S to turn upon whether repairmen note every item needing repair before beginning repairs under a specific and orderly plan.

[18] Section 75.400 provides: "Coal 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.

inches to six inches deep and extended the width of the belt under the take up roller where the belt was turning in the accumulations; and (5) other parts of the metal frame and the belt drive were covered with float coal dust. *ALJ Dec.* at 95-96; G. Ex. 114.

The parties stipulated to the violation. *ALJ Dec.* at 97. The Judge found that the Secretary had established the first, second, and fourth *Mathies* elements. As to the second element, the Judge found that the violation contributed to the hazard of a potential explosion – the belt rollers were turning in accumulations and the friction points were potential ignition sources. *Id.* As to the fourth element, the Judge found that if an ignition occurred, two miners working downwind would have suffered from smoke inhalation and possible asphyxiation. *Id.* However, the Judge found that the violation was not S&S because there had been no coal production, and thus no ignition sources, on November 7 and 8, the two days prior to the inspection. *Id.* at 98. At the time of the inspection, the accumulations had been reported in the pre-shift report and miners were on their way to clean them up. The Judge reasoned that as mining continued, the accumulations would have been cleaned up very shortly. *Id.*

Considering the evidence based on the continuation of normal mining conditions, we conclude that substantial evidence does not support the Judge's conclusion that the Secretary failed to establish the third *Mathies* element. The Judge credited the inspector's testimony as to the conditions of the accumulations. *ALJ Dec.* at 97. At the time of the inspection, the belt was on, and coal was turning in the rollers. The Judge found that these friction points were potential ignition sources. *Id.* at 97-98. The inspector testified that the accumulations were significant and that it took three miners 40 to 45 minutes to clean up the accumulations. *Id.* at 96.

We agree with the Secretary that the Judge erred in assuming that the accumulations would have been abated when determining whether the violation was S&S.[19] The Commission has emphasized that the proper approach is to assume the continuation of normal mining conditions. *U.S. Steel*, 6 FMSHRC at 1574; *U.S. Steel*, 7 FMSHRC at 1130. While the Judge accepted the operator's argument that abatement had begun because miners had been assigned to clean the accumulations, there were no miners actually working to remove the accumulations when the inspector noted the violation. There was no order directing that production not resume until the accumulations were resolved and no evidence that miners had made any efforts to abate the violation during the preceding maintenance shift.

[19] The Judge also erred in failing to account for the entire relevant period in his S&S analysis. While the judge found that there was no coal production on November 7 or 8, the fact is that the accumulations must have occurred during production. If rollers were turning in coal on November 9 despite no production for two days, that simply means that at some point on a production shift prior to November 7, the coal accumulations reached the dangerous condition Inspector Hess found during his inspection. *See Bellefonte Lime Co*., 20 FMSHRC 1250, 1255 (Nov. 1998) (error in failure to consider existence of violation prior to issuance of citation). Because we reverse on other grounds, we do not need to remand for consideration of this time period by the Judge.

Knox Creek's argument that the violation was not S&S because a cleanup was underway therefore has no merit.[20] Knox Creek contends that at the start of the oncoming production shift, when the citation was issued, miners were assigned to clean the accumulations and were in fact on their way when the inspector issued the citation. The Commission has expressly rejected the argument that "accumulations of combustible materials may be tolerated for a 'reasonable time.'" *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957–58 (Dec. 1979); *see also Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990) (section 75.400 "was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated") (citations omitted), *aff'd*, 951 F.2d 292 (10th Cir. 1991); *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558-59 (D.C. Cir. 2012).

The Judge thus erred in concluding that the condition was being actively abated. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1838 n.4 (Aug. 1984) ("relying on [the] skill and attentiveness of miners to prevent injury 'ignores the inherent vagaries of human behavior"'). Similarly, we cannot assume that miners assigned to a task would have completed the clean-up prior to production resuming, without the presence of the inspector to ensure that the abatement was timely and satisfactorily completed.

The Judge found that miners working in the shop area downwind from the accumulations would have been affected if a belt fire resulted, suffering from serious smoke inhalation or even death by asphyxiation. *ALJ Dec.* at 97. Accordingly, substantial evidence supports the conclusion that the hazard of a mine fire would be reasonably likely to result in serious injury in this case. Based on the foregoing, we conclude that the record compels the conclusion that this violation was S&S. *See American Mine Servs.*, 15 FMSHRC at 1834.

[20] This fact would have been relevant if MSHA had alleged an "unwarrantable failure" to comply with mandatory health or safety standards under section 104(d)(1) of the Mine Act, because it relates to the operator's negligence.

III.

Conclusion

For the foregoing reasons, we reverse and vacate the Judge's decision that Citation Nos. 8169155, 8170363, 8170375, and 8170394 did not involve S&S violations, and remand for reassessment of the penalties. As to Citation No. 8169156, we affirm the Judge's decision that the violation is not S&S.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

Commissioners Young and Cohen, concurring in part and dissenting in part:

We join our colleagues in sections A and C of the majority opinion and the decision to reverse the Judge's findings that the permissibility and coal accumulations violations were not S&S. However, we respectfully disagree with their opinion on the trailing cable violation addressed in section B. We believe that the Judge erred by assuming that the violative condition would have been detected and corrected before the equipment was returned to use. We thus conclude that the record compels the conclusion that the trailing cable violation was S&S.

It is undisputed that the trailing cable of the continuous mining machine had a one-half-inch-wide opening running three inches around the six-inch circumference of the cable, exposing the inner insulated leads. *ALJ Dec.* at 80; Tr. 1709. The opening was located ten feet from the machine, and the cable would be handled frequently by miners during use. *ALJ Dec.* at 80; Tr. 1709, 1711-12. Due to wet conditions of the mine floor, the opening in the outer covering of the cable would have permitted water to penetrate and deteriorate the inner shielding tape around the conductors and lead to rust and corrosion, causing the possibility of electrical shock and also creating an ignition hazard. *ALJ Dec.* at 80; Tr. 1710-15.

We agree with the Secretary that the Judge erred in concluding that the violation was not S&S because the Judge assumed that the operator would have detected and corrected the cut in the trailing cable before returning the continuous miner back to service. This is contrary to Commission case law establishing that S&S determinations must be made without any assumptions as to abatement. *See Consolidation Coal Co.*, 35 FMSHRC 2326, 2337 (Aug. 2013) (rejecting operator's argument that violative condition would have been detected in next equipment inspection); *Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006) (holding that it is "improper to rely on later circumstances to find that the violation was not S&S"); *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984) (rejecting the mine operator's argument that a significant and substantial violation should be determined based solely on the condition as it exists at the precise moment of inspection); *Crimson Stone v. FMSHRC*, 198 Fed. Appx. 846, 851 (11th Cir. 2006) ("[a]ny assumptions about how and when [the equipment] would have been repaired do not alter the significant and substantial nature of the violation").

The parties dispute whether the equipment was energized, thereby potentially exposing miners to the hazard. However, even if substantial evidence supported the Judge's finding that the equipment was not energized at the time the citation was issued, the Judge erred in assuming that the condition would have been corrected before being put back into service and in concluding that no miners would have been exposed prospectively to the hazardous condition under continued normal mining conditions. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1838 & n.4 (Aug. 1984) (in concluding that injury was reasonably likely to result from operator's violation, the Commission explained that "relying on [the] skill and attentiveness of miners to prevent injury 'ignores the inherent vagaries of human behavior'") (quoting *Great W. Elec. Co.*, 5 FMSHRC 840, 842 (May 1983)); *see also Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992) (a miner's exercise of caution is not a factor in considering whether violation is S&S). Having already found that the violation contributed to a serious hazard posing a risk of serious injury, the Judge should have concluded that the Secretary had established the third *Mathies* element.

The majority assumes that the cut in the cable would have been detected in the examination to be performed on the equipment before it was returned to service. Slip op. at 10-11. However, such assumption fails to acknowledge that human error could fail to observe the cut or that the operator could fail to correct the condition even if it were detected before being put back into operation. That is precisely why the Commission has rejected such explanations and arguments by operators in past cases. *See supra*.

Critically, there is no evidence in the record that the operator was aware of this violative condition prior to MSHA's inspection. While the continuous mining machine was down for repairs, there is no evidence that the cut in the cable was expressly cited as one of the repairs the operator was to perform on the continuous miner. We concede that circumstances would be different if the violative condition was tagged or otherwise identified as an item needing repair at the time the machine was being worked on.[1] But absent MSHA's inspection and citation, the machine might have been put back in operation without correcting the defect, exposing miners to the hazardous condition of shock or electrocution or allowing the condition to be a potential ignition source during production.

The assumptions made by the majority are therefore in direct contravention of Commission precedent requiring the consideration of continued normal mining conditions and without reliance on human intervention. *See Consolidation Coal Co.*, 35 FMSHRC at 2337 ("all violations could be defended against as to whether they are S&S by maintaining that they would have been recognized in the next pre-shift examination"); *U.S. Steel*, 6 FMSHRC at 1574; *U.S. Steel Mining Co.*, 6 FMSHRC at 1838 & n.4. We must disagree that substantial evidence supports the Judge's conclusion that the Secretary failed to establish the third *Mathies* element because that conclusion rests on a misapprehension of the law.

As the Judge found, the violation posed a discrete safety hazard – insulation on the inner phase conductors could have worn away or deteriorated from moisture so that a miner could have been seriously shocked or electrocuted. *ALJ Dec.* at 80. Inspector Colley testified that during the course of the shift, the cable had to be moved as the continuous mining machine made its cuts; the machine was to be put back into production on the next shift. *Id.* at 80; Tr. 1711-12, 1719. Inspector Colley also testified to the potential danger of electric shock because the insulation on the inner cable could deteriorate through normal use, handling and exposure to water, thereby creating a danger to miners operating the equipment and handling the cable. *ALJ Dec.* at 80; Tr. 1713-14.

[1] In that case, abatement would not be assumed but would actually be underway.

Thus, the record compels the conclusion that the hazard would reasonably likely result in an injury. Accordingly, we would conclude that the violation was S&S and would reverse the Judge's finding. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993).

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

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

APPENDIX

VA 2010-81-R
VA 2010-82-R
VA 2010-83-R
VA 2010-84-R
VA 2010-85-R
VA 2010-86-R
VA 2010-87-R
VA 2010-88-R
VA 2010-89-R
VA 2010-90-R
VA 2010-91-R
VA 2010-92-R
VA 2010-93-R
VA 2010-94-R
VA 2010-95-R
VA 2010-96-R
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VA 2010-102-R*
VA 2010-103-R
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VA 2010-107-R
VA 2010-108-R
VA 2010-109-R
VA 2010-110-R
VA 2010-111-R
VA 2010-112-R
VA 2010-113-R
VA 2010-130-R*
VA 2010-131-R
VA 2010-132-R
VA 2010-133-R
VA 2010-166
VA 2010-214

*The Judge's December 27, 2010 decision inadvertently omitted from the case caption

Docket Nos. VA 2010-102-R and VA 2010-130-R. We hereby amend the case caption to include Docket Nos. VA 2010-102-R and VA 2010-130-R.

Docket No. VA 2010-102-R involves Order No. 8170395, a non-assessable section 104(b) withdrawal order related to Citation No. 8170387, which is the subject of contest proceeding Docket No. VA 2010-103-R and penalty proceeding Docket No. VA 2010-166. Both violations were contested by the operator and the underlying Citation No. 8170387 was ultimately settled by the parties. *ALJ Dec.* at 104-05.

Docket No. VA 2010-130-R involves Citation No. 8169132 and is related to penalty proceeding Docket No. VA 2010-166. The parties likewise settled this citation. *Id.* at 102; Tr. 67-68.

Distribution:

Alexander Macia, Esq.
Spilman, Thomas & Battle, PLLC
300 Kanawha Blvd. East
P.O. Box 273
Charleston, WV 25321
amacia@spilmanlaw.com

W. Christian Schumann, Esq. Office
of the Solicitor
U.S. Department of Labor 1100
Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judges David F. Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 2004

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 2, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-409
v.	:	A.C. No. 41-04085-311359
LUMINANT MINING COMPANY, LLC	:	

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

ORDER

BY: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners

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 18, 2013, the Commission received from Luminant Mining Company, LLC ("Luminant") 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 January 16, 2013, and became a final order of the Commission on February 15, 2013. MSHA mailed a delinquency notice on April 2, 2013. Luminant asserts that its administrative assistant was on vacation and inadvertently overlooked the assessment upon her return. The Secretary does not oppose the request to reopen and urges the operator to adopt procedures to ensure that the absence of administrative personnel will have no effect on filing timely penalty contests.[1]

Having reviewed Luminant's request and the Secretary's response, 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/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

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[1] The dissent has correctly noted that we have held that inadequate or unreliable internal processing systems do not constitute excusable neglect. While Luminant is making its fifth motion to reopen in the past five years, that amounts to one motion per year for a large operator. We cannot determine, on this basis alone, that Luminant's procedures are inadequate. However, its motions have provided the bare minimum by way of explanation. It is not too much to expect that a sophisticated operator will provide safeguards to ensure penalties are timely contested, and subsequent failures to do so, unless more adequately explained, may be viewed as an inexcusable pattern of neglect.

Commissioner Cohen, dissenting:

I dissent from my colleagues because I believe that Luminant Mining has not established good cause to reopen the subject civil penalty case.

As grounds to reopen the proceeding, Luminant states that an administrative assistant inadvertently overlooked the proposed assessment because it arrived at their office on a day when she was on vacation. Mot. at 1. The operator's motion provides no details of the assistant's absence, such as the dates she was out of the office. The operator does not describe any office procedures in place to accommodate staff absences. Moreover, no affidavit accompanied the motion to verify the facts alleged.

Luminant's lack of diligence in handling this proposed assessment is not an isolated incident, but rather it seems to be part of a pattern of behavior. Its April 2013 motion was the fifth motion to reopen a penalty proceeding that it has filed in a five year period. *See Luminant Mining Co., LLC*, 33 FMSHRC 2135 (Sept. 2011); 33 FMSHRC 1041 (May 2011); 31 FMSHRC 1026 (Sept. 2009); 31 FMSHRC 58 (Jan. 2009). In each of the five motions, the operator alleges that due to the inadvertence of its personnel it failed to timely contest a proposed penalty assessment.[2]

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the 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). In examining the operator's asserted justifications for reopening a particular case, the Commission has also explored whether the

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[2] On September 2, 2008, the Commission received a motion to reopen a penalty proceeding from Luminant that stated that "due to the inadvertence and mistake by Company personnel, the proposed assessment form . . . was not processed in a timely manner by its personnel." 31 FMSHRC 58; Mot. at 1. On December 22, 2008, the Commission received a motion from Luminant that stated that "as a result of [an] internal miscommunication, it failed to timely request a hearing on the penalty and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding." 31 FMSHRC 1026; Mot. at 2-3. On December 10, 2010, the Commission received a motion from Luminant that states that "[through the inadvertence or mistake of a new employee] it failed to timely request a hearing on the penalty and that such inadvertence or mistake constitutes good cause to reopen the penalty proceeding." 33 FMSHRC 1041; Mot. at 2. On July 15, 2011, the Commission received a motion that stated that Luminant failed to timely contest a proposed assessment because it did not realize that citations and orders that arose from an investigation were assessed in two different proposed assessment forms. 33 FMSHRC 2135; Mot. at 2.

operator has demonstrated a pattern of behaviors that are attributable to inadequate or unreliable internal processing systems in other cases. *See Oak Grove Res*., *LLC*, 33 FMSHRC 2378, 2379-80 (Oct. 2011).

I find Luminant's conclusory contention of inadvertence or mistake to be insufficient and that the operator has not established good cause to reopen the proceeding. Moreover, I conclude that based on Luminant's own submissions, it has demonstrated a pattern of document mismanagement which results from an inadequate or unreliable internal processing system. Luminant is a large operator which should have the resources to adequately process mail in the absence of a single employee.

Therefore, I would deny its motion to reopen.

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

Distribution:

Karen L. Johnston, Esq.
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 2, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-619-M
v.	:	A.C. No. 42-01665-298804 B108
HR WAGSTAFF COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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 March 28, 2013, the Commission received from HR Wagstaff Company, Inc. ("Wagstaff") a motion seeking to reopen a penalty assessment that had apparently become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

Wagstaff asserts that it never received the proposed assessment or delinquency notice because they were not mailed to Wagstaff's address of record in Utah. Wagstaff submits that its Contractor ID Form was updated in 2001 with the Utah address, and that it had never been associated with the Colorado address.[2] The Secretary notified the Commission that he has discovered an error in the posting of the Contractor ID and wishes to withdraw his opposition to the motion to reopen.

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[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).

[2] In its response, Wagstaff also requested to be awarded attorneys' fees under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1). This matter falls outside the scope of our review of Wagstaff's motion to reopen, and we thus do not reach it. *See Tide Creek Rock, Inc.*, 24 FMSHRC 428, 429 n.1 (May 2002). If the operator wishes to apply for attorneys' fees in conformity with the procedural and substantive requirements of the Equal Access to Justice Act, it may do so before the Administrative Law Judge.

Having reviewed Wagstaff's request and the Secretary's response, we conclude that the above-captioned assessment has not become a final order of the Commission because it was never received by Wagstaff. Accordingly, we deny the request to reopen as moot and remand this matter 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/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

Distribution:

Florence M. Vincent, Esq.
HR Wagstaff Co., Inc.
36 South State St., Suite1900
Salt Lake City, UT 84111-1478
fvincent@vancott.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 02, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-946-M
v.	:	A.C. No. 26-02142-320267
NEVADA READY MIX CORP.	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners[1]

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 2, 2013, the Commission received from Nevada Ready Mix Corp. ("Nevada") 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

[1] Commissioner Althen was recused from this case.

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 May 7, 2013, and became a final order of the Commission on June 6, 2013. Nevada asserts that an unknown person signed for the assessment, and that it discovered the delinquency on June 18, 2013, after receiving a different proposed assessment. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewedNevada's request and the Secretary's response, 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/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distriibution:

Gwendolyn K. Nightingale, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
1909 K Street NW, Suite 1000
Washington, DC 20006
gwendolyn.nightingale@odnss.com

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 5, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2013-298
v.	:	A.C. No. 36-07230-319909 N4A
FARNHAM & PFILE CONSTRUCTION, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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 2, 2013, the Commission received from Farnham & Pfile Construction, Inc. ("Farnham") 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 May 1, 2013, and became a final order of the Commission on May 31, 2013. Farnham's vice president asserts that due to his filing error, he did not respond to the proposed assessment until June 27, 2013. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Farnham's request and the Secretary's response, 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/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

Distribution:

Jackson Shoup, Vice Pres.
Farnham & Pfile Construction, Inc.
1200 Maronda Way, Suite 301
Monessen, PA 15062

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 16, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. CENT 2013-389-M
v.	:	A.C. No. 13-02138-312685
L & W QUARRIES, INC.	: :	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, 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 5, 2013, the Commission received from L & W Quarries, Inc. ("L&W") 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 became a final order of the Commission on March 6, 2013. L&W asserts that it mistakenly believed that it did not need to forward the proposed assessment to its counsel because it had previously contested the underlying citations. L&W's counsel discovered the delinquency on March 27, 2013, after reviewing the MSHA data retrieval system. L&W states that it has modified its office procedures to contact counsel upon receipt of MSHA documents. The Secretary does not oppose the request to reopen.

We hereby reopen Order No. 8737420. However, with respect to Citation Nos. 8737422 and 8737425, L&W's motion does not establish that its failure to contest the civil penalties assessed for these two citations arose from mistake, inadvertence, or excusable neglect.

In its motion, L&W asserts that it asked counsel to file notices of contest for the order and two citations at issue. Mot. at 1. A notice of contest for Order No. 8737420 was timely filed. *See* Attachment 1. L&W states that it mistakenly believed that it was not required to subsequently forward the proposed assessment form to counsel, because it had asked its counsel to file the appropriate notices of contest. Mot. at 2. Conspicuously absent from L&W's request to reopen is any documentation which establishes that notices of contests for Citation No. 8737422 or Citation No. 8737425 were filed.

While there is no precise formula for evaluating an operator's request for reopening, "we consider the entire range of factors relevant to determining mistake, inadvertence, surprise, excusable neglect, or other good faith reason for reopening." *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013).

L&W demonstrated some intent to contest the civil penalty assessed for Order No. 8737420 when it filed a notice of contest. It appears that its failure to forward the proposed assessment to counsel was the result of mistake, inadvertence or excusable neglect. Moreover, L&W promptly sought reopening of the order when it learned of its default. Therefore, it is appropriate to reopen Order No. 8737420 for further proceedings.

Based on the record before the Commission, we cannot conclude that L&W demonstrated a similarly justifiable reason to reopen Citation Nos. 8737422 and 8737425. While L&W asserts that it requested that its counsel file notices of contest for both citations, a request made to counsel does not demonstrate sufficient intent to contest the civil penalty in the absence of evidence that the citations were actually contested by counsel.

Accordingly, we hereby deny L&W's request to reopen Citation Nos. 8737422 and 8737425.

Having reviewed L&W's request and the Secretary's response, in the interest of justice, we hereby reopen Order No. 8737420 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/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura, Commissioner
Patrick K. Nakamura, Commissioner

/s/ William I. Althen, Commissioner
William I. Althen, Commissioner

Distribution:

Diana Schroeher, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

May 16, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2013-882-M
ADMINISTRATION (MSHA)	:	A.C. No. 35-00541-321284
	:	
v.	:	Docket No. WEST 2014-525-M
	:	A.C. No. 35-00541-332405
CRATER SAND & GRAVEL, INC.	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 1, 2014, the Commission received from Crater Sand & Gravel, Inc. ("Crater") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it, and 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]

In Docket No. WEST 2013-882-M, Chief Administrative Law Judge Robert J. Lesnick issued on September 16, 2013, an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Crater's perceived failure to answer the Secretary's July 12, 2013 Petition for Assessment of Civil Penalty. The Commission did not receive Crater's answer within 30 days, so the default order became effective on October 17, 2013.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2013-882-M and WEST 2014-525-M, both captioned *Crater Sand & Gravel, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

In Docket No. WEST 2014-525-M, records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on September 24, 2013, and became a final order of the Commission on October 24, 2013. MSHA mailed a delinquency notice on December 9, 2013.

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. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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).

Crater asserts that it mailed a timely answer to the petition to MSHA, and encloses a copy of a USPS receipt dated July 26, 2013. Crater further states that it contested all four underlying citations issued during this inspection and has been responding to discovery requests from MSHA. Crater also asserts that its bookkeeper was out of the office in October 2013, which contributed to Crater's confusion. The Secretary of Labor does not oppose the requests to reopen and states that MSHA received a timely but misdated answer to the petition in Docket No. WEST 2013-882-M, which was forwarded to the Commission on August 27, 2013. The Secretary further states that MSHA received a letter from the operator dated January 26, 2014, enclosing a copy of a checked proposed penalty contest form in Docket No. WEST 2014-525-M. The Secretary notes that it appears that the operator thought that all proposed assessments and citations had been contested.

Having reviewed Crater's request and the Secretary's response, in the interest of justice, we hereby reopen these matters and vacate the Default Order in Docket No. WEST 2013-882-M. Accordingly, in Docket No. WEST 2014-525-M, 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. Because Administrative Law Judge Richard Manning has the companion case, Docket No. WEST 2013-881-M, we are remanding these matters to him for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

Distribution:

Richard A. Stark
Stark & Hammack, P.C.
100 East Main St., Suite M
Medford, OR 97501
ras@starkhammack.com

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Administrative Law Judge Richard W. Manning
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-5268

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

May 1, 2014

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on behalf	:	
of JOSHUA D. BURKHART,	:	Docket No. LAKE 2014-342-D
Petitioner	:	VINC-CD-20 14-01
	:	
v.	:	
	:	
PEABODY MIDWEST MINING, LLC,	:	
Respondent	:	Mine ID: 12-02295
	:	Mine: Francisco Underground Pit

ORDER ON TEMPORARY REINSTATEMENT

Appearances: Travis W. Gosselin, Esq., U.S. Department of Labor, Office ofthe Solicitor, Chicago, IL for Complainant

Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, PA for Respondent

Before:Judge Rae

This case is before me upon an application for temporary reinstatement filed by the Secretary on behalf of the complainant under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) and 29 C.F.R. §2700.45.

Statement of the Case

On April 16, 2014, Respondent made a timely request for a hearing which was held on April29, 2014 in Evansville, Indiana.

The parties submitted the following stipulations: 1) Peabody is an operator as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977 as amended (hereinafter "the Mine Act"); 2) Operations of Peabody at the Francisco Underground Pit mine in or around Francisco, Indiana are subject to the jurisdiction of the Mine Act; 3) This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act; and 4) Prior to his termination by Peabody, Joshua D. Burkhart was a "miner" as defined in Section 3(g) of the Mine Act. Ex. J-1.

For the reasons set forth below, I find the complaint of discrimination was not frivolously brought and Burkhart is entitled to temporary reinstatement.

Summary of Evidence

Joshua Burkhart, previous to his recent termination, was employed by Peabody Midwest Mining at the Francisco mine as a ram car driver. He had been at the mine for approximately 3 years and was assigned to the third shift which commenced at 11 p.m. at the time of the incident at issue. Ex. R-4. His normal assignment was as a coal hauler, or ram car driver. His immediate supervisor was the face boss, Jamie Mincey. The mine manager was Clint Underhill, however, on the night in question, Chris Falls was filling in for Underhill. !d.

On the January 26-27 night shift, Burkhart was assisting another miner hanging cable overhead. Directly thereafter, he felt a burning pain in his right shoulder. He reported the injury to Mincey who in turn called out to Falls, informing him that Burkhart needed medical attention. Falls accompanied Burkhart to Gibson General Hospital, arriving at approximately 0410 hours. He was discharged that same morning at 0500 hours. The discharge summary indicates that he did not suffer a fracture or dislocation and it was recommended that he apply ice. He was given a sling for support of his right arm and was prescribed Norco and Norflex for pain and inflammation. The return to work portion of the discharge sheet indicates that he was restricted to limited duty for a few days. Ex. G-2. Burkhart testified that he was further told by the physician, in the presence of Falls, that he should not work underground. Tr. 21.

Upon discharge, Burkhart was taken back to the mine where he clocked out and went home. A copy of the discharge paperwork was given to Mike Workman, the safety director. Burkhart took the Norco, which he stated was a generic of Lortab, later that morning as prescribed for pain. The restrictions attendant with the medications was to avoid driving and operating machinery. They made him feel dizzy and tired. Tr. 23, 43. By the time he reported for work on the night of the 27th he had taken three doses of the pain medication, the last one being about 35 minutes before reporting in. Tr. 25.

Burkhart's statement as to what happened upon reporting to work the night of the 27th and what transpired thereafter differs from the Respondent's version. Burkhart testified that upon arrival at the mine that night his foreman, Underhill, asked repeatedly whether he could work underground. The third time he was asked this question he responded that he thought it would be unsafe for him to operate a ram car while on medication. Underhill continued to insist that he operate his ram car despite the light duty chit and the effects of medication. Ex. R-4; Tr. 28-29. After refusing to work underground, Burkhart was told to sweep the locker rooms.

When he finished this task, Underhill told him to go home because there was nothing further he could do. Tr. 30-32. Later that evening, Burkhart received a telephone call from Mike Workman and Ben Greenwell in Human Relations and was told not to report in for a few days and that a follow-up medical appointment had been made for him on Thursday, January 30. He was accompanied to this appointment by Workman, at which time he was again told to remain on light duty and not work underground. Tr. 34; Ex. R-4. Initially, Workman told him to report as usual that evening and his restrictions would be accommodated. Later, however, Workman

called him and told him not to report for work but to report on Friday morning at 10 a.m. for a meeting. He met with Jon Dever and was terminated for insubordination based upon his refusal to work underground the night of the 27th. Ex. R-4; Tr. 36. Burkhart testified that it would have been unsafe to him to perform any other tasks underground besides operating the ram car because of the effects of the medication. Tr. 29.

Respondent presented the testimony of three witnesses, Underhill, Mincey and Greenwell. Their testimony was essentially that on the night of the 27th during the management meeting prior the beginning of the night shift, Underhill and Mincey had determined that there were jobs that Burkhart could do within his light duty restrictions. Tr. 47, 67. Before Underhill could tell Burkhart what jobs he would be doing, Burkhart showed up without his mining clothes, which precluded his performing any duties because they did not have tasks that could be done on the surface. Underhill testified that he found another miner who was willing to give him clothes to use underground. When Burkhart heard he would not be working on the surface, according to Underhill, he just decided to leave. Tr. 53.

Applicable Law and Conclusions

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).

Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. § 2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 45(d) provides:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

29 C.F.R. § 2700.45(d).

In its decision in Jim Walter Resources, Inc. v. FMSHRC, 920 F.2d 738 (11th Cir. I990), the Court noted that the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court stated:

The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' -an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are not insubstantial or frivolous.'

920 F.2d at 747 (citations omitted).

While the Secretary is not required to present a prima facie case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the "not frivolously brought" standard. As a general proposition, to demonstrate a prima facie case of discrimination under section I 05(c) of the Mine Act, the Secretary must establish that the complainant participated in safety related activity protected by the Mine Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. See Sec y of Labor on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (Oct. I980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d I2II (3d Cir. I98I); Sec y of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 8I7-8I8 (Apr. 1981).

It is not the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses at the preliminary stage of the proceedings. Sec y of Labor on behalf of Albu v. Chicopee Coal Co., 21 FMSHRC 717 (July 1999). It is sufficient to find the Complainant engaged in protected activity, the respondent had knowledge of that activity, and there was a coincidence in time between the protected activity and adverse action. Sec y of Labor on behalf of Williamson v. CAM Mining, LLC, 31 FMSHRC I 085 (Oct. 2009).

Respondent takes the position that first, the complainant has fabricated the facts and secondly, that the complainant did not have a good faith or reasonable basis upon which to refuse to work due to his injury. This is based upon the allegation of Underhill that they had intended to assign tasks to Burkhart that met the limited duty restrictions and were not unsafe, however, he elected to walk off the mine property before Underhill or Mincey had the opportunity to tell him what those tasks were. Responded asserts that the "quantitative" evidence proves these points and therefore, no issue of credibility is involved. I disagree.

In order for me to find that the complainant has fabricated the facts, I would necessarily have to make a credibility determination against Burkhart. The only "quantitative" evidence admitted at hearing was a computer generated time sheet which indicates that Burkhart did not clock in for work on the January 27/28 shift. This document was offered to impeach Burkhart's statement that he worked for several hours sweeping the locker room on the shift after his

accident. Respondent urges that the information is irrefutable and therefore, proves Burkhart fabricated the facts. It serves only to create a conflict in testimony between Burkhart's and Underhill's as to whether he worked for several hours that night or not. It also raises the issue of whether the document itself is accurate. These issues are not within the scope of a temporary reinstatement hearing.

Respondent's second argument also calls for a credibility determination beyond the scope of this hearing. Respondent cited Bush v. Union Carbide, 5 FMSHRC 993 (June 1983) in support of its assertion that a work refusal must be made in good faith and be reasonable in order for it to be protected activity. This is an accurate statement of the law. The Bush matter involved a trial on the merits of the discrimination complaint; it was not a temporary reinstatement proceeding. The Commission upheld the ALJ' s determination that the complainant's work refusal was not reasonable. It stated that the ALJ made his credibility determination against the complainant based upon substantial evidence produced at the hearing. At issue here is whether Burkhart's refusal to work underground on the January 27/28 shift was reasonable and in good faith. The resolution of that issue depends upon whether Burkhart's account of the facts is more credible than Underhill's. Burkhart maintained he was repeatedly asked by Underhill whether he could work underground on the coal hauler and that no other work was offered to him. He maintained that he specifically told Underhill that when he broke his collar bone he was allowed to perform light duty on the surface. Underhill told him they no longer allowed for light duty on the surface. Ex. R-4. Underhill testified that he had jobs identified that he intended to assign to Burkhart that did not involve driving the ram car or violate the work restrictions. He implicitly denied Burkhart's testimony.

Clearly, the two arguments Respondent makes in an attempt to establish that the complaint was frivolously brought involve divergent versions of material fact which requires the resolution of conflict in testimony. The law requires only that the miner's complaint appear to have merit in order to meet the not frivolously brought standard. I find this has been established. The evidence is sufficient to establish reasonable cause to believe that Burkhart did engage in protected activity, management was aware of it, and there was a nexus in time between that protected activity and his termination.[1]

[1] Respondent requested that should temporary reinstatement be ordered, he be restored to the same disciplinary level he was in at the time of his termination. This would include the insubordination charge at issue herein. I deny this request.

ORDER

For the reasons set forth above, Peabody Midwest Mining is ORDERED to immediately reinstate Joshua Burkhart to his former position with all rights and benefits to which he is entitled. This includes a forty hour work week at the rate of pay of $27.50 and between 8 and 9 hours of overtime per week at $41.24 per hour as recorded on his 2013 leave and earnings statement at Ex. R-15.

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

Distribution:

Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

Arthur M. Wolfson, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500,401 Liberty Avenue, Pittsburgh, PA 15222

Joshua D. Burkhart, 4642 W. Street Road 64, Princeton, IN 47670

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

May 6, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of FRED MCKINSEY, Complainant	:	DISCRIMINATION PROCEEDING Docket No. SE 2014-223-DM MSHA Case No.: SE MD 14-12 TR
v.	:	
PRETTY GOOD SAND COMPANY, INC., Respondent	:	Mine: Great Pit Mine ID: 31-02014

DECISION AND ORDER REINSTATING FRED MCKINSEY

Appearances: Uche N. Egemonye, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, Representing the Secretary of Labor

Roger Sauerborn, President, Pretty Good Sand Company, Inc., Battleboro, NC, Representing Respondent

Before: Judge Lewis

On March 26, 2014, 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 Fred McKinsey ("McKinsey" or "Complainant") to his former position with Pretty Good Sand Company, Inc., ("Pretty Good Sand" or "Respondent") at the Great Pit Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint filed by McKinsey on February 18, 2014, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate McKinsey to his former position as a maintenance mechanic.

Respondent requested a hearing regarding this application on April 10, 2014 via conference call. A hearing was held in Rocky Mount, NC on April 30, 2014.[1] The Secretary

[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). During the April 10, 2014 conference call, the parties agreed to waive this limitation to allow the hearing to be held on April 30, 2014.

presented the testimony of the complainant. Respondent had the opportunity to cross-examine the Secretary's witnesses and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of McKinsey.

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." 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).

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).

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 the 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*,

[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)).

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 the adverse action complained of 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).

However, in the instant matter, the Secretary and McKinsey 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 the 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).

It should be noted that at pre-trial conference and at the hearing, this court gave repeated instructions to Respondent regarding the narrow scope of a temporary reinstatement proceeding.[3] Respondent could not understand or was unwilling to accept that the Secretary and McKinsey were not required at the within temporary reinstatement proceeding to prove a *prima facie* case of discrimination with all for the elements required at the higher evidentiary standard.

Despite repeated sustained objections, Respondent mistakenly attempted to transmute the reinstatement hearing into full-scale credibility[4] and discovery inquiries that were far beyond the scope of a temporary reinstatement hearing.

[3] *See also* attachment sent to the Respondent with relevant case and statutory law regarding the lesser evidentiary burden imposed on the Secretary at a temporary reinstatement hearing.

[4] *See also* Respondent's queries regarding credibility being "the heart" of a reinstatement proceeding (Transcript at 47) and this Court's specific instruction that it would not attempt to resolve alleged inaccuracies or conflicts in testimony prior to discovery and hearing on the merits.

Stipulations

The parties stipulated to the following legal and factual propositions:

1. Pretty Good Sand Company, Inc. is and was at all relevant times through this proceeding the operator of the Great Pit Mine, Mine ID number 31-02014.

2. Great Pit is a mine. The term mine is defined in Section 3(h) of the Mine Act, 30 U.S.C. Section 802(h).

3. At all times relevant to this proceeding, products of Great Pit Mine entered commerce, are the operations of products thereof affecting commerce, within the means and scope of Section 4 of the Mine Act, 30 U.S.C. Section 803.

4. Pretty Good Sand Company is an operator, as the term operator is defined in Section 3(d) of the Mine Act, 30 U.S.C. Section 802(d).

5. Fred McKinsey was previously employed by Pretty Good Sand Company. Fred McKinsey is a miner within the meaning of Section 3(g). Mine Act, 30 U.S.C. Section 302(g).

6. Fred McKinsey was terminated from Pretty Good Sand Company on January 10, 2014.[5]

7. Pretty Good Sand Company is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. The presiding administrative law judge has authority to hear this case and issue a decision regarding this case, pursuant to Section 105 of the Act, 30 U.S.C. Section 815, as amended.

(Transcript at 6-8).[6]

[5] The parties stipulated that the termination occurred on January 10, 2014. However, all testimony and previously filed documents indicated that the date was January 13, 2014. No explanation was given for this discrepancy.

[6] Hereinafter references to the transcript will be cited "Tr." with the page number.

Contentions of the Parties

On January 20, 2014, McKinsey executed a Summary of Discriminatory Action. It was filed with his Discrimination Complaint on February 18, 2014. In this statement he alleged the following[7]:

> My employment with Pretty Good Sand Company began in July, 2013. During my interview [wi]th Roger Sauerborn, the owner of the company, I disclosed that I have [Asp]ergers Syndrome and explained the ways in which I am different from other people. [A] short time after hire, I was promoted to a supervisory position, where I remained [unt]il late December 2013. Pretty Good Sand Company (PGSC) was reported to MSHA for [vio]lations, resulting in an MSHA inspection of the facility on 11/26/13. Immediately [aft]erwards, I was treated differently by Roger. He intentionally created difficult interactions [bet]ween himself and I, using strategies that would exacerbate my Aspergers tendencies, [res]ulting in escalating confrontations. On 12/8/2013, I received an email from Roger [det]ailing specific tasks he felt I had handled incorrectly and discussing the MSHA [ins]pection. After reading that e-mail, I believed that he felt I was responsible for [rep]orting PGSC to MSHA. The workplace harassment and associated tension continued [to] build for the duration of the remainder of my employment with PGSC. I [rec]eived a mailed letter of reprimand on 12/20/2013, a hand written note attached to [a] time card a few days later, and a second reproach email on 12/30/2013. I [wa]s verbally demoted from my supervisory position without any explanation. My work [h]ours were cut by sending me home early multiple times, as well as reducing [m]y scheduled hours to work. On the morning of 01/13/14, I received a text [m]essage from Roger stating that I had been fired. After I requested to be [in]formed of the reason(s) for dismissal, Roger sent an email to me on the same [d]ay, explaining his reasons for termination. I believe Roger deliberately [fo]stered a trying work environment for me in an attempt to push me to resign, [a]nd when his repeated efforts were unsuccessful, he dismissed me.

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

The Secretary also submitted the March 25, 2014 Declaration of Michael Larue, a Special Investigator employed by the Mine Safety and Health Administration with the Application. Larue wrote that he investigated McKinsey's discrimination claim against Respondent. Larue laid out the facts that he determined based on his investigation. *Id.* at Exhibit A, p. 1-3. He concluded:

[7] The left-hand margin of the photocopied Discrimination Report filed by the Secretary was cut off. As a result, several words are either missing in whole or in part. These words have been recreated to the extent possible. Words and letters that are based on attempts to complete the document are included in brackets.

3. Based upon the information so far available as the result of the special investigation being conducted in these matters, I have concluded that Fred McKinsey's Claim that he was terminated from his employment with Respondent as a result of his lodging a safety hazard complaint with MSHA and participating in MSHA's investigation was not frivolously brought.

Id. at Exhibit A, p. 3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Id.* at 3.

Respondent disputes the Secretary's claim that McKinsey was terminated because he noted safety concerns in check sheets or because he was suspected of making safety complaints to MSHA. Instead it claims that he was terminated for failure to conduct work assignments properly and for unprofessional attitude at work.

Summary of Testimony

Fred McKinsey[8] was hired at the subject mine as an hourly employee by Roger Sauerborn[9] in July 2013 at $15.00 an hour and generally worked 45 to 50 hours per week. (Tr. 15, 65). Respondent's mine was a sand pit that produced sand for sale to the public. (Tr. 14-15). McKinsey's job included maintenance, general labor, operating an excavator, driving a dump truck, and operating a pull behind a scrapper pan. (Tr. 15).

On August 23, 2013, Sauerborn promoted McKinsey to supervisor and gave him a raise to $17.75 an hour. (Tr. 15-16, 65). McKinsey was not sure if the foreman preceding him was fired for unsafe conduct. (Tr. 29-30). As a supervisor, McKinsey continued to do all of his previous duties and work the same hours, but was also responsible for tasking three other employees (Alton "Low" Moses, Matthew Stanley, and, later, Joshua Lane) and ensuring safety. (Tr. 16-17). To do so, he reported safety issues to Sauerborn as they arose. (Tr. 16).

McKinsey took several safety precautions, including completing pre-work checks on equipment. (Tr. 18). Whoever operated equipment for a day would check out the equipment, fill out a pre-shift sheet, carry it to the office, place it in the appropriate folder, and discard the previous day's pre-shift sheet. (Tr. 52). These forms were designed to identify and maintain records of malfunctions and safety issues. (Tr. 19). As foreman, McKinsey looked at these sheets. (Tr. 63). At hearing, McKinsey reviewed several pre-shift examination forms (CX-9); he had completed three of the pages and someone else had completed the fourth. (Tr. 19-20). McKinsey did not recall filling out the form dated November 2, 2013 but he completed them as a part of his daily tasks. (Tr. 19-20). He was not positive that he worked that day. (Tr. 30).

[8] Fred McKinsey was present at the hearing and testified for the Secretary. (Tr. 14). At the time of the hearing, he was unemployed, having last worked for Respondent. (Tr. 14).

[9] Roger E. Sauerborn was the owner of Respondent and represented Respondent at the hearing. (Tr. 64). He was also called as a witness by the Secretary and testified at the hearing. (Tr. 64).

As Supervisor, McKinsey reported several safety issues to Sauerborn. (CX-9)(Tr. 17-18). If McKinsey noticed a problem, he would report the issue to Sauerborn, they would discuss it, and Sauerborn would make a final decision. (Tr. 52, 56, 63). McKinsey would follow Sauerborn's instructions on whether to repair something or not. (Tr. 56). McKinsey would make minor repairs, but anything major had to be discussed with Sauerborn. (Tr. 63). If an issue was not immediately resolved, the machine was not moved to the "do not operate" line. (Tr. 52).

The safety issues raised by McKinsey included the fact that Respondent's Mack Truck needed new brakes and that it had suspension and bed issues. (Tr. 17). McKinsey also noted that the D-250B Caterpillar haul truck had a center pivot issue that needed to be repaired. (Tr. 17). He reported that highwalls with roads above them needed to be supported. (Tr. 17). In one pre-work sheet, McKinsey noted that the articulation joint of the baby loader was worn out. (Tr. 46-47). McKinsey told Sauerborn that this condition had to be repaired elsewhere because Respondent had neither the facilities nor the tools to do so on site. (Tr. 48). When McKinsey reported these conditions, Sauerborn would deflect the concerns and raise other jobs that needed to be completed. (Tr. 18). Sauerborn did not address the safety issues McKinsey raised. (Tr. 18).

On or around November 23, 2013, McKinsey filed a complaint with MSHA. (Tr. 21). He filed this complaint because he learned that as a supervisor at the mine he was responsible if anyone was hurt, even if a safety inspection was performed. (Tr. 21). He was the responsible party and did not want anyone to get hurt while he was working. (Tr. 21).

The next day, November 24, 2013, MSHA inspected the Great Pit mine as a result of this complaint. (Tr. 21, 65). Two citations were issued that day. (Tr. 66). One citation was for a failure to record new miner training. (Tr. 66). However, while preparing for hearing, Sauerborn found the record of the new-miner training; it had been misfiled. (Tr. 66). Sauerborn testified that the issues cited were not the ones complained of and that he hoped that the inspection would allow McKinsey to see that his safety complaints were unfounded so that they could then move forward as a company. (Tr. 70).

Sauerborn conceded that he told the inspector that the complaint could only come from one of the employees. (Tr. 65-66). In fact, he testified "what I said was it had to be someone from my company, and it's not a great big company, okay. So, you know… I'm not that stupid." (Tr. 66). However, at hearing he stated that he did not know who called MSHA. (Tr. 67). On the record, the ALJ accepted that Sauerborn's other witnesses would have testified that he was uncertain as to who actually made the stated complaints. (Tr. 76). Regardless, the number of complaints convinced him that it had to be someone from the company. (Tr. 66-67). On the day of the inspection, McKinsey stopped Sauerborn and said that maybe one of his (McKinsey's) girlfriends called or Lane's parents called. (Tr. 67).

McKinsey was not sure if the citations issued during that inspection were written near the berm area. (Tr. 53). He was not present when the citations were issued; he was working with the other employees elsewhere. (Tr. 53). When Sauerborn was nearby on the inspection, McKinsey was working on other tasks and was not paying attention. (Tr. 53-54).

Before this inspection, McKinsey had never received any verbal reprimands or discipline.[10] (Tr. 21, 29-30). After the MSHA inspection, the environment at work changed. (Tr. 21). Specifically, Sauerborn would belittle McKinsey and give him a hard time. (Tr. 22). Sauerborn would give McKinsey conflicting instructions that were impossible to follow. (Tr. 22). He also sent McKinsey several e-mails stating, incorrectly, that McKinsey had improperly repaired equipment or "messed up" a task. (Tr. 22-23).

On December 12, 2013 McKinsey was demoted, although his pay remained the same. (Tr. 24-25, 40, 49-50, 69-70). Sauerborn said Lane would become supervisor. (Tr. 40). When McKinsey asked why he was demoted, Sauerborn referred to several disciplinary emails he had sent previously. (Tr. 25, 50). McKinsey did not say anything except that he would quit rather than take a pay cut. (Tr. 40-41, 69-70). The harassment began before this demotion and continued afterwards. (Tr. 50).

According to McKinsey, on December 20, Sauerborn approached a vehicle where McKinsey and Lane were sitting. (Tr. 41). McKinsey rolled down the window and Sauerborn started to harass him, though he could not recall what was said. (Tr. 41-42). McKinsey's nerves began to bother him and he began to shake. (Tr. 41). McKinsey stepped out of the car in hopes that Sauerborn would see how badly he was affected and give him space. (Tr. 41). Sauerborn said that he was uncomfortable and McKinsey needed to clock out for an hour. (Tr. 41).

According to Sauerborn, the events of that day proceeded as follows: Sauerborn saw Lane and McKinsey in the Suburban. (Tr. 71). After he said "hello," McKinsey jumped out of the vehicle and yelled that Sauerborn was discriminating against him. (Tr. 71-72). McKinsey approached and Sauerborn raised his hands because his personal space was invaded. (Tr. 72). Sauerborn told McKinsey that he needed to clock out for an hour so that he could calm down before the Christmas party. (Tr. 72). McKinsey went to the office to clock out. (Tr. 72). While there McKinsey, who was within earshot of a truck driver, threatened to kill Sauerborn.[11] (Tr. 72).

Finally, on January 13, 2014 McKinsey was informed via text message from Sauerborn that he was fired. (Tr. 25). When McKinsey asked why, Sauerborn said that the issue was covered in an email. (Tr. 25). McKinsey then contacted MSHA because he believed he was fired for calling and reporting violations. (Tr. 25). McKinsey believed that the email marked

[10] However, McKinsey conceded it was possible that he and Sauerborn had a conversation of September 16, 2013 about promptly ordering parts, but he could not recall specifically. (Tr. 30). He did not receive a written follow up the next day. (Tr. 30).

[11] There is clearly a conflict in the testimony regarding what occurred on December 20, 2013. However, at this time it would be improper to weigh this testimony. Instead, the miner's testimony will be considered in determining whether this claim was frivolously brought.

CX-5 showed that Sauerborn believed that he was the person who called MSHA.[12] (Tr. 26-27). McKinsey was still making $17.75 an hour at that time.[13] (Tr. 67-68).

Findings and conclusions

Protected Activity and Adverse Employment Action

The Mine Act contains security measures for miners engaged in protected activity. Specifically, §105(c)(1) states, in relevant part:

> No person shall discharge or in any manner discriminate against...or otherwise interfere with the exercise of the statutory rights of any miner...in any coal or other mine subject to this chapter because such miner...has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent...of an alleged danger or safety or health violation in a coal or other mine.

30 USC § 815(c)(1). As discussed *supra*, to support a temporary reinstatement there must be protected activity with a connection, or nexus, to an adverse employment action. The initial issue is whether McKinsey engaged in activity that triggered those protections.

Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See 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). In this matter, McKinsey testified that he made safety complaints both to his employer, Sauerborn, and MSHA. (Tr. 17-18, 21). Those complaints dealt with the unsafe condition of mobile equipment and support for high walls. (Tr. 17-18, 46-48). These complaints resulted in an MSHA

[12] The subject paragraph stated, "An unknown person called MSHA with five allegations of wrong doing. While the inspector was on site, MSHA was contacted, a sixth allegation was made, then amplified. Most of the allegations were topics you and I discussed, and had disagreements. MSHA found the six allegations to be false. You volunteered that you did not call MSHA, and it may have been one of your girlfriends, or Josh's parent. I would like you to tell me later what you have learned from this incident." (CX-5)(Tr. 26-27).

[13] Respondent's Representative testified at length (and elicited testimony) regarding the miner's attitude and the quality of his work. Specifically, Respondent presented evidence regarding McKinsey's efforts to fix a mirror and windows on a truck (Tr. 31-34, 45-46); McKinsey's work on a truck that subsequently lost a wheel (Tr. 35); McKinsey's work in cleaning dirt out of a truck (Tr. 43-44); McKinsey's actions in accidentally striking a flashboard riser's supports in a piece of equipment (Tr. 33-34); and the length of time that McKinsey took in repairing a Suburban truck. (Tr. 34, 56-57). Further, Respondent presented evidence regarding the special accommodations Sauerborn made to help McKinsey succeed. (Tr. 68-70). As the purpose of this hearing is to determine whether McKinsey's claims "may have merit," this evidence is not relevant. However, all or some of this evidence may be appropriate for presentation during a hearing on the merits.

inspection of the Mine and the discovery of violations. (Tr. 21, 65-66). There is no question the sending a complaint to MSHA to discuss a safety concern is protected activity. In fact, this is precisely the interaction between miner and MSHA that §105(c) was drafted to protect. Therefore, McKinsey's claim that he was engaged in protected activity is not frivolous.

The next issue is whether McKinsey suffered an adverse action. According to the Act and well-settled Commission precedent, suffering a discharge or a demotion is an adverse employment action. 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), aff'd, 770 F.2d 168 (6th Cir. 1985). It is uncontested that on December 12, 2013, McKinsey was demoted from supervisor to maintenance mechanic. (Tr. 24-25, 40, 49-50, 69-70). Further, there is no question that a month later, on January 13, 2014, McKinsey was terminated from his position as maintenance mechanic. (Tr. 25). Therefore, McKinsey's claim that he suffered an adverse employment action is not frivolous.

Nexus between the protected activity and the alleged discrimination

Having concluded that McKinsey engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action, namely the January 13, 2013 termination. The Commission recognizes that direct proof of actual knowledge 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.

Knowledge of the protected activity

According 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*, *supra*. McKinsey testified that he made safety complaints to Respondent's owner, Sauerborn. (Tr. 17-18). Specifically, he discussed problems with equipment at the mine and inadequate support for a wall. (Tr. 17-18, 46-48). If McKinsey raised safety complaints directly to Sauerborn, clearly the owner would have knowledge. Further, McKinsey testified that when Sauerborn failed to take corrective action, he contacted MSHA. (Tr. 21). Saueborn conceded that during the resultant inspection, he stated that the complaints could have only come from one of his employees. (Tr. 65-67). On December 7, 2013 Sauerborn sent a letter (CX-5) to McKinsey that implied that he suspected that McKinsey was the person who contacted MSHA. (Tr. 26-27). Finally, Sauerborn testified at hearing that he hoped the inspection would show McKinsey that his complaints were unfounded, showing

that he was aware that McKinsey's complaints were the ones that prompted the inspection. (Tr. 70). Therefore, there is some evidence to suggest that Sauerborn was aware or at least suspected the McKinsey had engaged in protected activity. Thus, I find that Complainant and the Secretary have raised a non-frivolous issue as to whether Respondent had knowledge of the protected activity when the decision was made to fire McKinsey.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and 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 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the present matter, the time between the McKinsey's final protected activity (the call to MSHA) and the termination was approximately 51 days. McKinsey testified that he called MSHA on November 23, 2013 and he was terminated on January 13, 2014. (Tr. 21, 25). However, even before the termination, McKinsey alleged other adverse actions. For example, on December 12, 2013, just 19 days after the call to MSHA, McKinsey was demoted. (Tr. 21, 24-25, 40, 49-50, 69-70). Further, McKinsey reported being harassed and belittled from the time of the inspection until his termination, with one instance on December 20, 2013 discussed at length at hearing. (Tr. 21-23, 41, 50, 71-72). These time frames easily meet the Commission's requirements. Thus, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Hostility or animus towards 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).

McKinsey testified that before he contacted MSHA, he had never received a verbal or written warning regarding his conduct at work. (Tr. 21, 29-30). Following the protected activity, McKinsey received several disciplinary notes. (Tr. 21-23). One of those warnings, a letter dated December 7, 2013 (CX-5) specifically addressed the call to MSHA. (Tr. 26-27). The fact that a discipline letter included reference to protected activity clearly implies animus toward that activity. McKinsey also experienced "harassment and belittlement" regularly from

that time until his termination. (Tr. 21-23, 50). He described one instance in particular, on December 20, when he was so distraught from this harassment that he began to shake. (Tr. 41,71-72). After this harassment, he was forced to clock out of work, losing compensation. (Tr. 41, 72). McKinsey was also demoted from his position as supervisor, albeit without a corresponding reduction in pay. (Tr. 24-25, 49-50, 69-70). Finally, less than two months after the inspection and following a campaign in which McKinsey alleged Sauerborn was attempting to force him to resign, McKinsey was terminated. (Tr. 25)*(Application for Temporary Reinstatement* at Exhibit B, p. 2). I find that McKinsey's testimony regarding the negative change in his work environment following his safety complaints raises a non-frivolous issue as to hostility or animus towards protected activity.

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). In this case, McKinsey was allegedly fired for deficiencies in his work and attitude. There is no evidence on record of any other employees receiving less severe punishment for the same or similar misconduct. However, 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.

As has already been shown, there is sufficient evidence to conclude that this discrimination claim was not frivolously brought as it relates to animus, knowledge, and coincidence in time. Therefore, I find that the Secretary has established a nexus between McKinsey's protected activity and the Respondent's subsequent adverse action.

Conclusion

In concluding that McKinsey's complaint herein was not frivolously brought, I give weight to the evidence of record that he called to make complaints to MSHA. I also conclude that there were non-frivolous issues as to whether Respondent was aware of McKinsey's actions, that Respondent showed animus toward McKinsey's alleged protected activities, and that there was a close connection in time between his alleged protected activity and his demotion and discharge.

Respondent asserts that its discharge of Respondent was based on his unprotected activities, specifically failure to properly perform work tasks. I find that Respondent's evidence on this record is not sufficient to demonstrate that McKinsey's complaint of discrimination was frivolously brought. To the contrary, since the allegations of discrimination have not been shown to be lacking in merit, I find they are not frivolous.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Respondent is **ORDERED** to provide immediate reinstatement to McKinsey, as a maintenance mechanic, at the same rate of pay, for the same number of hours worked, and with the same benefits, as at the time of his discharge.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution: (Certified Mail)

Uche N. Egemonye, Esq., Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, SW, Room 7T10, Atlanta, GA 30303

Fred McKinsey, 6888 US Hwy 258 N, Tarboro, NC 27886

Roger Sauerborn, President, Pretty Good Sand Company, Inc., 6563 NC 97 W, Battleboro, NC 27809

Michael Larue, Special Investigator, Southeast District, USDOL/MSHA/MNM, 135 Gemini Circle, Suite 212, Birmingham, AL 35209

/tjb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
(202) 434-9933

May 11, 2012

BLEDSOE COAL CORP., Contestant	:	CONTEST PROCEEDING
	:	DOCKET NO. KENT 2011-972-R
v.	:	WRITTEN NOTICE NO. 8333606; 04/18/2011
HILDA L. SOLIS, Secretary of Labor, United States Department of Labor,	:	DOCKET NO. KENT 2011-973-R ORDER NO. 8353820; 04/18/2011
Respondent	:	DOCKET NO. KENT 2011-974-R ORDER NO. 8353821; 04/18/2011
	:	DOCKET NO. KENT 2011-975-R ORDER NO. 8353825; 04/21/2011
	:	DOCKET NO. KENT 2011-976-R ORDER NO. 8353838; 05/03/2011
	:	DOCKET NO. KENT 2011-977-R ORDER NO. 8353839; 05/03/2011
	:	DOCKET NO. KENT 2011-978-R ORDER NO. 8353855; 05/10/2011
	:	DOCKET NO. KENT 2011-979-R ORDER NO. 8353858; 05/12/2011
	:	DOCKET NO. KENT 2011-980-R ORDER NO. 8406696; 05/10/2011
	:	DOCKET NO. KENT 2011-981-R ORDER NO. 8406699; 05/10/2011
	:	DOCKET NO. KENT 2011-982-R ORDER NO. 8406809; 05/11/2011
	:	MINE I.D. NO. 15-19132 MINE: Abner Branch Rider

ORDER ON THE SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Moran

Introduction.

Pursuant to 30 C.F.R. § 2700.67, on March 6, 2012, the Secretary of Labor filed a motion for partial summary decision, seeking a ruling upholding the issuance of the Notice of Pattern of Violations, No. 8333606, which Notice was issued to the Respondent, Bledsoe Coal Corporation, regarding its Abner Branch Rider Mine, ("mine"), on April 12, 2011. Motion at 1-2. The Secretary notes that it issued Respondent a notice, alleging a potential pattern of violations on November 18, 2010, as well as a withdrawal order under section 104(e)(1), alleging a significant and substantial violation of a mandatory standard, and eight (8) withdrawal orders pursuant to section 104(e)(2). The Secretary contends that, as it followed the requirements for issuance of a Notice of Pattern of Violations, pursuant to 30 C.F.R. Part 104, the Notice should be upheld. For the reasons which follow, the Court GRANTS the Secretary's Motion and DIRECTS that the outstanding, identified, non-final S&S citations/orders associated with this litigation be set for prompt hearing.

Findings of Fact and Conclusions of Law.

The actions described above were the culmination of several preceding events. The Secretary completed its pattern of violations screening for the mine, which screening encompassed the twelve month period beginning on September 1, 2009 and ending August 31, 2010. As noted above, that screening resulted in the Respondent being notified,[1] on November 18, 2010, pursuant to 30 C.F.R. § 104.4(a), that its mine was identified as having a potential pattern of violations. Nine citations or orders were identified, each pertained to violations of 30 C.F.R. § 75.400, and each of those had become final orders during the twelve month review period.[2] Bledsoe opted to implement a corrective action plan, which was dated January 5, 2011. However, about two months later, on March 18, 2011, in compliance with 30 C.F.R. § 104.4(b), MSHA advised Bledsoe that a potential pattern of violations continued to exist, noting that the mine's S&S violations were double the target violation rate. Ex. 6. The same report, again following section 104.4(b), informed the mine that it had 10 days to submit comments about it to the Administrator for Coal Mine Safety and Health, but comments would not forestall submission of the report to the Administrator.

[1] The Notice informed Bledsoe that nine citations or orders, each of which, pursuant to 30 C.F.R. § 104.2(c), were issued after October 1, 1990, were considered in the initial screening.

[2] The November 18, 2010 Notice advised the mine that it had been issued "10.98 S&S violations per 100 inspection hours during the 12-month review period . . . [and that] the mine must maintain an S&S rate of 5.49 or lower during the evaluation period [which would constitute] a 50 percent reduction from the . . . review period." A greater reduction, to 3.68 or lower would be required if the mine did not opt to implement a corrective action program. Bledsoe did opt for a corrective action plan.

The Secretary concludes that, as MSHA fully complied with the Part 104 Pattern of Violations provisions at every step of that process, and as the Mine's "history of nine final S&S violations of 30 C.F.R. § 75.400 during the one-year pattern review period establishes a pattern of violations [pursuant to 30 C.F.R. § 104.3(a)(1)]," the pattern of violations notice, No. 8333606, should be upheld.[3] Sec. Motion at 4-5. In support of that conclusion, the Secretary notes that this Court, in its November 10, 2011 Order on the Contestant's Motion for Summary Decision, observed that Congress left it to the Secretary's expertise to determine when more was needed to be done for enforcement than simply identifying each violation and then acting to have each violation corrected. Instead, when an operator has a pattern of S&S violations of mandatory standards, the provisions of section 104(e) of the Mine Act are to be applied. In enforcing those provisions, the Secretary was directed by Congress to make such rules *as the Secretary deemed necessary* to establish criteria for determining when a pattern of violations of mandatory standards exists and making the determination for the enhanced enforcement provision addressing a pattern of violations. The Secretary took these steps both through the Pattern of Violations provisions at 30 C.F.R. Part 104 and implementing the policy. Accordingly, it is the Secretary's position that, as it fully complied with both the statutory provision and with the Part 104 Pattern of Violations provisions in all respects, and as there is no issue of any material fact, the issuance of the Notice of Pattern of Violations No. 833606 should be upheld. Sec. Motion at 4-5.

In its response to the Secretary's Motion, Bledsoe decided to renew its cross-motion for partial summary decision. However, that latter matter was fully addressed in the Court's prior Order. For the reader's convenience, it appears again as an appendix to this Order.

Bledsoe notes that the Secretary has argued that POV Notice No. 8333606 should be upheld as a matter of law as she has "followed all of the procedural requirements set forth in 30 C.F.R. Part 104." Bledsoe Response at 2. Bledsoe contends that "[a]ll that is said by the Secretary to support a substantive finding of a POV in this case is . . . 'the Abner Branch Rider Mine's history of nine final [significant and substantial or 'S&S'] violations of 30 C.F.R. § 75.400 during the one-year pattern review period establishes a pattern of violations.'" *Id.* at 3, citing the Secretary's Motion at 4.

Mischaracterizing the Secretary's position, Bledsoe asserts that, by the Secretary's argument, "[a]ll the Secretary must show is that she **accused** Bledsoe of subsequent S&S violations." *Id*. (emphasis in original). Underlying that assertion is Bledsoe's claim that the Secretary has not "offer[ed] a legal definition of 'pattern,' [and] ... instead has determined that more than one final S&S violation is sufficient." *Id.*

[3] That provision, 30 C.F.R. § 104.3(a)(1), identifies "[a] history of repeated significant and substantial violations of a particular standard" as one of three listed, independent, criterion for identifying a pattern. To state the obvious, MSHA was identifying repeated violations of 30 C.F.R. § 75.400, which pertains to the grave matter of accumulation of combustible materials.

Bledsoe then transitions to its overriding issue of dissatisfaction, a matter already addressed in the Court's prior Order, asserting that "[i]t is incumbent upon the Secretary to establish criteria to guide Bledsoe – and other operators – on what the law requires."[4] Bledsoe asserts that, per the Court's Order, the Secretary has both unfettered and unreviewable discretion to call "any pattern of more than one S&S accusation a POV." [5] *Id.* at 4-5. Resurrecting its due process claim, it suggests that, as there is no definition of a POV, it would be impossible to determine if a POV is present for Bledsoe. On this basis, Bledsoe renews, with no new grounds, its prior motion for partial summary decision. The Court again directs attention to the Appendix to this Order, which provides its prior decision addressing these contentions.

Short of its wish to have the Secretary's POV provisions cast aside, Bledsoe alternatively maintains that "[a]t the very least, [it] must be allowed to adjudicate whether the violations which placed it on POV status were properly designated S&S." *Id.* at 6. In support of this, departing from the facts here, Bledsoe points to *Rockhouse Energy Co. v. Secretary*, 30 FMSHRC 1125 (December 2008) (ALJ)(*"Rockhouse*"), wherein another ALJ "accelerat[ed] his trial schedule to rule decided similar S&S issues [*sic*] prior to the issuance of a POV notice . . . ." *Id.* But Bledsoe, in characterizing what another judge had to decide as "similar S&S issues,"

[4] Bledsoe, noting that the Court observed that the dictionary definition of a "pattern" involves " a *reliable sample* of traits, acts, or other observable features characterizing an individual [ ] behavior [pattern] . . . ," redescribes the issue as "[w]hether there is a '*reliable pattern*, . . ." asserting that is "a question for which there is no legal answer." Respondent's Response at 3-4 (emphasis added). A *reliable sample* is not synonymous with a *reliable pattern.*

[5] Divorced from the reality of what occurred here, Bledsoe then lifts off into a nightmarish scenario, starting with the idea that the Secretary could call "any pattern of more than one S & S accusation a POV . . .[and] [o]nce a mine has more than one final S&S violation, the Secretary could call this a PPOV." The subsequent issuance of S&S violations "could be factually deficient, contrary to law or even arbitrary, and [yet] the [mine] operator would be subject to a pattern finding." Bledsoe Response at 5. While Bledsoe acknowledges that the Secretary would be required to follow her own internal guidelines, it asserts these could change at any time and without notice. *Id.*

must be using the phrase "similar S&S issues" in the loosest of senses in trying to apply that case to the facts at hand.[6] The reason is plain. Whereas in *Rockhouse* the mine operator was challenging whether some 23 citations issued under Section 104(a) were valid and whether, if valid, they were "S&S," those issues had *not* already been decided. For Bledsoe, though it would like to unring the bell, it cannot. It has settled and paid the matters constituting the violations the Secretary has used for its pattern case.

Having considered the Secretary's Motion and Bledsoe's Response, the Court posed questions to the parties to better understand their positions. These were useful to the Court's resolution of the Motion. Based in part upon those responses, the Court makes the following observations and findings. In Exhibit 1 to the Secretary's Motion, the Secretary did identify, with particularity, to Bledsoe, under the page entitled "Screening Criteria for Pattern of Violations" at the "Final Order Criteria" box, that there were at least five (5) S&S citations /orders of the same standard that became final orders of the Commission during the 12 month period being reviewed of September 1, 2009 through August 31, 2010. In fact, MSHA identified that nine (9) such citations/orders were so involved. There is no dispute that each of these 9

[6] As Bledsoe stretches the applicability of *Rockhouse*, using a case that the Court considers to be very distinguishable, it also took the opportunity to bemoan that in this Court's earlier Order of November 10, 2011, it "was needlessly castigated for not quoting a portion of [the] language contained in 30 U.S.C. Section 814(e), although it repeatedly cited to the statute, the full text of which is readily available." Response at 6-7. Bledsoe claims it was "needlessly castigated" because, after all, it made *reference to the cite for* the full statutory provision. By the full provision being cited, Bledsoe means it gave a full listing to the cited provision and one would not have to guess, for example, the chapter or section involved and therefore anyone could go look up the provision and there they would discover *all* of its words. While that much is true, as Bledsoe has elected to recast its approach as innocent, it is necessary to revisit what occurred in Bledsoe's argument and its renewed protestation over the Court's dim view of it. The provision at issue provides, *in full*, "(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists." 30 U.S.C. § 814 (e)(4). In contrast, Bledsoe, citing to the same provision advised that "Congress mandated the Secretary, under Section 104(e)(4) of the Mine Act, to "make such **rules"** to establish the criteria for determining when a pattern of violations exists." Bledsoe Motion at 3-4. (emphasis in Bledsoe's motion). Apparently to save toner ink, Bledsoe omitted the *four* unhelpful words "as he deems necessary" from the 27 word provision. Four pages later in its argument, Bledsoe reasserted this claim, asserting that "Section 104(e)(4) of the Mine Act directed the Secretary to make rules for determining when a pattern of violations exists," again omitting the "as he deems necessary" language. That omission is no small matter though, as Bledsoe takes the implication of its selective reading further by advising that in directing the Secretary "to make rules", "Congress, in unambiguous language directed the Secretary to use notice and comment rulemaking."

violations involved the same standard, that each became final orders of the Commission and that each of them became final during the review period, as just cited above.[7]

The Court also noted that, within the Secretary's Exhibit 1, attached to the Secretary's Motion, five (5) pages were included, listing some 159 citations. Thirty-one (31) of those listed citations cited section 75.400 and Citation numbers 8356674, 8356676, 8362103, 8362416, 8362419 and 8362424 were among the thirty-one citations citing that section.[8] The Secretary explained the inclusion of these documents stemmed from the fact that they were included in MSHA's November 18, 2010 letter to the Respondent. The five page list of 159 citations represents all of the violations issued to the mine during the review period and, of those, 79 were S&S.[9] The five page list of 159 citations supports the Secretary's determination that the mine met the initial screening criteria, per 30 C.F.R. § 104.2. As shown by the "Screening

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[7] The Court found it unclear why Citation number 8333031, issued 4/15/2008, Citation number 7528749, issued 7/30/2009 and Citation number 7528752, issued 8/3/2009 were included among the 9 citations identified by MSHA when they seemed to be before the commencement of the September 1, 2009 review period. The answer was that the test for inclusion considers citations that *became final* during the September 1, 2009 through August 31, 2010 time frame. The Court had overlooked that the "Pattern Criteria" provision, at 30 C.F.R. § 104.3, in fact provides that in identifying mines with a potential patten of violations, two prerequisites must be present: only citations and orders issued after October 1, 1990 are considered *and they must have become final.* The nine citations identified in the Final Order Criteria meet both those requirements: each was issued after October 1, 1990 and each became *final* during the review period. There is no dispute about these facts.

[8] The Court also inquired about the relevance of the 31 citations which cited the proscription of accumulations of combustible materials, per 30 C.F.R. § 75.400, among the total number of 159 citations. Those 31 citations concerning § 75.400 included six of the nine citations which became final during the review period. As noted above, the other three became final during the review period, being issued *after* October 1, 1990 and becoming *final* during the review period but they were not *issued* during the twelve month review period. One will recall that, as long as a citation/order is issued *after* October 1, 1990, the other determining factor for inclusion is that the citation/order becomes *final* during the review period. Each of those three did become final during the review period and, as previously noted, there is no factual dispute about that. Accordingly, while representing a complete record of the Section 75.400 violations cited during the review period, the 31 citations are not germane to the Secretary's motion, other than reflecting six of the nine S&S violations which became final. Those nine, it will be recalled, met the "Final Order Criteria," requiring that at least 5 such S&S citations/orders became final orders of the Commission during the one year review period. The Court notes that there is no factual dispute about this matter either.

[9] The same 5 pages include a running total of the S&S violations, (described as "S&S Count" within the "Cumulative During Review Period" categories) as reflected in the next to the last column on the right hand side of each page. The S&S Count begins with Citation No. 8356674, which was issued on 11/19/2009; it was the 6th citation issued to the mine during the date span reflected on the 5 pages reflecting all of the citations issued during the review period.

Criteria Results for Pattern of Violations," ("SCR for POV"), which was included in November 18, 2010 letter from MSHA to the Bledsoe Mine, Initial Criteria 1 at item 1 requires that a mine have at least 50 citations/orders that were "S&S" and Bledsoe had 79. In each of the three other categories for Initial Criteria 1, Bledsoe's Abner Branch Mine met those requirements.[10]

The Court also inquired as to the particular pattern criteria MSHA relied upon when it informed Bledsoe on November 18, 2010 that a Potential Pattern of Violations existed at its Abner Branch Mine. A related question, the Court asked whether, when MSHA informed the mine on March 18, 2011 that a PPOV continued to exist, that determination was based upon *all* S&S violations or only S&S violations involving 30 C.F.R. § 75.400. The Secretary advised that the November 18, 2010 letter relied upon Section 104.2 *in toto*, as that Section identifies the factors to be considered in the Initial Screening review period. Once, as happened here, that Initial Screening did not eliminate the mine, MSHA advanced to the Pattern Criteria provision, as set forth at Section 104.3. In turning to Section 104.3, MSHA examined the three criteria identified at that provision, which includes "[a] history of repeated significant and substantial violations of a particular standard." 30 C.F.R. § 104.3(a)(1). That "particular standard" here was 30 C.F.R. § 75.400. That determination was then reflected in MSHA's November 18, 2010 letter to the mine which letter included the Agency's "Screening Criteria Results for Pattern of Violations" (i.e. the "SCR for POV," referred to above). Accordingly, the Court finds that MSHA followed its rules completely; first finding that the mine was captured within the Initial Screening, per 30 C.F.R. Section 104.2, then identifying the applicable Pattern Criteria, per 30 C.F.R. Section 104.3, and then issuing the notice, per 30 C.F.R. Section 104.4, on March 18, 2011, that the mine failed to meet its target rate. Again, completely complying with its 30 C.F.R. Pattern of Violations provisions, the MSHA District Manager, finding that Bledsoe did not meet its target rate,[11] and that no mitigating circumstances existed to explain that failure,[12] submitted

[10] For example, in category 2, it exceeded the rate of eight or more S&S citations/orders issued per 100 inspection hours by having a rate of 10.98.

[11] MSHA's November 18, 2010 letter to the mine advised that it had to meet an S&S target rate of 5.49, *or lower*, per 100 inspection hours. As noted in MSHA's March 18, 2011 letter to the mine, Bledsoe did not come even close to this rate. Instead, its rate was more than *double* the maximum rate allowed, at 11.54 S&S violations per 100 inspection hours. In noting that the mine failed to achieve the target rate, MSHA's review took into account all S&S violations issued per 100 inspection hours.

[12] It should be noted that Bledsoe's Counsel has not argued that there were any such mitigating circumstances that should have been considered to explain its failure to meet the target rate of S&S violations.

his report to the Administrator for Coal Mine Safety and Health and noted that the mine had 10 days to submit comments to the Administrator about MSHA's finding that a Potential Pattern of Violations continued to exist.[13]

MSHA has noted in its Supplement to Motion for Partial Summary Decision (Sec's Supplement) that for the 18 alleged violations, each of which is also alleged to be S&S, none are final. That is, each of the 18 alleged violations, referenced in its March 18, 2011 letter to Bledsoe, are contested and pending litigation. Supplement at 6 and Exhibit 6. The Secretary takes the position that none of those 18 would need to be upheld for the Respondent to continue to be under a pattern. As expressed in the Sec's Supplement, the mine met the pattern criteria per the District Manager's November 18, 2010 letter to Bledsoe. However, the Secretary goes on to state that "[*t*]*o avoid* the consequences that may result from establishing such a pattern, under 30 C.F.R. § 104.4(a)(4) the mine was provided with an opportunity to institute a program to avoid repeated significant and substantial violations. The District Manager allowed a nine-week period, from January 11, 2011 to March 12, 2011, for determining whether the program effectively reduced the occurrence of significant and substantial violations at the mine. . . . that program was aimed at reducing the occurrence of significant and substantial violations at the mine without limitation to specific mandatory standards. The program failed." Sec's Supplement at 7. Thus, by the Secretary's vantage point, because the mine "failed to effectively reduce the occurrence of significant and substantial violations during the period provided under 30 C.F.R. § 104.4(a)(4), the Secretary issued 104(e) Notice No. 8333606." *Id.*

Although the Secretary notes, and the Court agrees, that "[t]here is no regulatory requirement that significant and substantial violations issued during the corrective-action-program period must be final before the Secretary may determine whether the program effectively reduced the occurrence significant and substantial violations at the mine," that can only carry the Secretary's position until the alleged violations with the disputed significant and substantial findings have been adjudicated. Any other position would make no sense at all. For example, if none of the 18 S&S violations were found, upon being litigated, to be, in fact, "S&S," the Secretary could hardly assert that the mine failed to meet its target rate. While the Secretary adds that the pattern provision under the Mine Act does not even require "that the mine be provided with an opportunity to institute a program to avoid repeated significant and substantial violations before the Secretary may issue a 104(e) pattern notice," the fact of the matter is that *MSHA does provide such an opportunity*. Sec's Supplement at 7. That *opportunity* would be meaningless if, under the example just given, a mine, despite showing that it *in fact had met or exceeded its target rate*, would remain under the pattern, regardless.

[13] The 18 S&S violations identified in MSHA's March 18, 2011 letter to Bledsoe have not become final orders. Each of them are being litigated. Accordingly, it is possible that, should a certain number of those S&S violations ultimately be found, either through litigation or otherwise, that they were not, in fact, S&S, the S&S violation rate could be redetermined to be at a lower rate than the presently assumed rate of 11.54 such violations per 100 inspection hours.

Finally, the Court inquired as to the impact on the other ten (10) dockets[14] if it were to rule in favor of the Secretary's Motion for Partial Summary Decision. The Secretary advises that a hearing would be needed for each of dockets.

Bledsoe too responded to questions posed by the Court and it renewed its cross-motion for summary judgment in the same document. ("Bledsoe Response"). In its Response, Bledsoe contends that the Secretary "argues that following the **procedures** set forth in 30 C.F.R. Part 104 is all that is needed for an adjudication of a POV." Bledsoe Response at 2 (emphasis in Response). Of course, the Secretary does not merely claim that **procedural** fealty alone can carry the day. Among other things, there have to be violations, which have become final and which became final during a particular review period. Bledsoe continues its argument, asserting that "the statute and the regulations remain silent as to what constitutes a POV," but that too is an exaggeration, as the regulations do explain the pattern criteria and the steps which follow on the road to the issuance of a notice of a pattern of violations from the Administrator. Continuing its usage of hyperbole, Bledsoe claims that the Secretary "has determined that more than one final S&S violation is sufficient." *Id.* at 3. The Secretary made no such claim. Instead, the Secretary gathered the facts pertaining to violations which became *final* during the review period and applied those final determinations to the regulations, noting along the way the Agency's meticulous adherence to the procedural steps under the Pattern of Violations regulations at Part 104.

So too, Bledsoe takes references to Congress' statements about a pattern, wherein that body expressed that "a pattern would be 'more than an isolated violation' but not necessarily 'a prescribed number of violations," and the Court's statement from that Congressional remark about patterns that "Congress identified one end of the spectrum, that a pattern is more than an isolated violation, but left it to the Secretary's expertise to determine when *more* was needed to be done for enforcement than simply the routine process of identifying each violation, one by one, and then having each violation abated," and transforms them into "the ALJ's ruling" claiming that it is a "more than one" standard. In its subsequently submitted "SUPPLMENTAL [*sic*] MEMORANDUM", Bledsoe repeats this claim: "Bledsoe is fully aware that the ALJ has ruled that more than one S&S violation may be sufficient to establish a pattern" and that this judge-created standard "subjects every mine in the country to a POV finding . . . [by] hold[ing] that any mine which receives more than one S&S violation over a two year period may be subject to a POV finding based on whatever criteria the Secretary chooses to apply at a given time." SUPPL[E]MENTAL MEMORANDUM at 3. The Bledsoe-created "more than one"

[14] These are Docket Numbers KENT 2011-1345, KENT 2011-1220, KENT 2012-284 and KENT 2012-381.

standard blossoms into a claim that it allows the Secretary to "call any pattern of more than one accusation a POV." BLEDSOE RESPONSE TO SECRETARY'S MOTION at 4-5.[15]

In Bledsoe's "SUPPL[E]MENTAL MEMORANDUM IN RESPONSE TO THE SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION," it responded to two questions posed by the Court in reaction to the Motion and Bledsoe's initial response thereto.[16] The Court asked if Bledsoe believed it should be entitled to relitigate all S&S violations, including those which have become final orders. As to final orders, Bledsoe concedes that it cannot relitigate S&S violations which have become final. However, Bledsoe, notes that, of the 79 citations designated as "S&S" in the period from November 2, 2009 through August 25, 2010, it challenged 53 of them, with the 26 others becoming final orders. Bledsoe Suppl[e]mental Memorandum at 2-3. Bledsoe notes that "**[**a]ll 79 were the basis for the PPOV notice issued by the Secretary." *Id*. at 3.

In one aspect the Court does agree with Bledsoe. This relates to any S&S citations/orders which it has contested and have not since become final orders. As noted in a more detailed fashion below, any such non-final citations/orders which were a part of the basis for MSHA's determination to issue its Section 104(e) Notice, No. 8333606, because they were part of the Agency's determination that Bledsoe failed to meet its target rate, must be tried promptly because there is the possibility that some number of those violations could be found by the Court as non-S&S violations. A sufficient number of such non-S&S findings raises the possibility that Bledsoe's S&S rate could be at or below 5.49 per 100 inspection hours. Only a hearing and a decision on those non-final matters can resolve that. In the meantime, just as with a section 104(d)(1) citation or order, that is subsequently found, after a hearing, to lack the special findings of being S&S and unwarrantable, or simply unwarrantable, as the case may be, the section 104(e) Notice, No. 8333606 remains intact. Should the requisite number of violations be found to be

[15] Though it started with the "more than one" seed, then nurtured it into a flower, Bledsoe then cultivates an entire garden, claiming that "[o]nce a mine has more than one final S&S vioilation, the Secretary could call this a PPOV [and following that it] "could issue as many S&S violations as her inspectors could write." Moving to the hysterical, in both senses of the word, Bledsoe asserts "[i]n no time, every underground coal mine in the country will be on a POV." *Id.* at 5. Really.

[16] The Court's second question to Bledsoe requires little time to address. The Court asked Bledsoe whether, given its position that there is no definition of what constitutes a POV, does it maintain that MSHA must embark on rulemaking again. Bledsoe answered in the affirmative, asserting that the Secretary must engage in rulemaking to define a pattern of violations. Bledsoe Suppl[e]mental Memorandum at 4. The Court, based on its prior Order on Contestant's Motion for Partial Summary Decision and this Order, finds that the Secretary's Rulemaking for Part 104, Pattern of Violations passes scrutiny.

"non-S&S," and therefore establish that Bledsoe did achieve at least its target rate, the section 104(e) Notice would be unwound, just as in the case of 104(d)(1) citations and orders found to be lacking.[17]

CONCLUSION

For the reasons set forth above, the Secretary's Motion for Partial Summary Decision is GRANTED. However, as noted at footnote 13, "The 18 S&S violations identified in MSHA's March 18, 2011 letter to Bledsoe have not become final orders. Each of them are being litigated. At the hearing, these will be tried first. Accordingly, as discussed earlier, it is possible that, should a certain number of those S&S violations ultimately be found, either through litigation or otherwise, that they were not, in fact, S&S, the S&S violation rate could be redetermined to be at a lower rate than the presently assumed rate of 11.54 such violations per 100 inspection hours." This is potentially important for Bledsoe, as a finding that some, yet to be calculated, number of violations either were not violations or at least were not "significant and substantial" violations, could reduce its S&S violation rate to at or below 5.49 per 100 inspection hours. Therefore these alleged violations need to be set for hearing immediately. The parties are directed to email the Court immediately to establish a date and time for a conference call so that the prompt hearing for these matters can be finalized.

SO ORDERED.

/s/ William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

Mary Beth Zamer, Esq., Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2440

Marco Rajkovich, Esq., John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

[17] The analogy to the "chain" created under section 104(d) of the Mine Act is well understood and apt here. Placing a mine operator under the "increasingly severe sanctions" through that provision does not have to await a final determination before such sanctions become effective. *See, e.g., Secretary v. Weirich Brothers*, 27 FMSHRC 379, 2005 WL 1198587 (April 2005), and *Secretary v. Lodestar Energy*, 25 FMSHRC 343, 2003 WL 21665294 (July 2003), noting that, where S&S and unwarrantable findings are not sustained, the citations or orders issued under section 104(d) are to appropriately modified.

APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
(202) 434-9933

November 10, 2011

BLEDSOE COAL CORPORATION,	:	CONTEST PROCEEDING
	:	
Contestant	:	DOCKET NO. KENT 2011-972-R
	:	WRITTEN NOTICE NO. 8333606;
	:	04/18/2011
	:	
	:	DOCKET NO. KENT 2011-973-R
v.	:	ORDER NO. 8353820; 04/18/2011
	:	
	:	DOCKET NO. KENT 2011-974-R
	:	ORDER NO. 8353821; 04/18/2011
	:	
HILDA L. SOLIS, Secretary,	:	DOCKET NO. KENT 2011-975-R
of Labor, United States Department	:	ORDER NO. 8353825; 04/21/2011
of Labor	:	
	:	DOCKET NO. KENT 2011-976-R
	:	ORDER NO. 8353838; 05/03/2011
	:	
	:	DOCKET NO. KENT 2011-977-R
	:	ORDER NO. 8353839; 05/03/2011
	:	
	:	DOCKET NO. KENT 2011-978-R
	:	ORDER NO. 8353855; 05/10/2011
	:	
	:	DOCKET NO. KENT 2011-979-R
	:	ORDER NO. 8353858; 05/12/2011
	:	
	:	DOCKET NO. KENT 2011-980-R
	:	ORDER NO. 8406696; 05/10/2011
	:	
	:	DOCKET NO. KENT 2011-981-R
	:	ORDER NO. 8406699; 05/10/2011
	:	

: MINE ID NO. 15-19132
: MINE: Abner Branch Rider

ORDER ON CONTESTANT'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Moran

On August 17, 2011, Contestant Bledsoe Coal Corporation ("Bledsoe": filed its Motion for partial summary decision ("Motion": seeking the vacation of each order issued by the Mine Safety and Health Administration ("MSHA" or "Agency": associated with the Agency's issuance of a notice of a pattern of violations ("POV": on April 12, 2011. Bledsoe assails the Agency's decision on the grounds that it was never subjected to notice and comment rulemaking, that it lacked fair notice and that the criteria it used were an unreasonable interpretation of the Mine Act and regulations. For the reasons which follow, each of Bledsoe's claims is rejected.[18]

In an unfortunate practice of selectively quoting, and by that process, being misleading as to the Mine Act's requirements regarding a pattern of violations of mandatory health or safety standards, Bledsoe asserts "Congress mandated the Secretary, under Section 104(e:(4: of the Mine Act, to "make such **rules**" to establish the criteria for determining when a pattern of violations exists." Motion at 3-4 (emphasis in Motion:. The Mine Act states no such thing. Instead, the provision provides, *in full*, that "The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists."[19]

Although once would be too often, Bledsoe repeats its mischaracterization, which mischaracterization is *not* about some ancillary matter, but involves a fundamental aspect of the issue. Bledsoe's own words put this on full display, as it asserts: "Section 104(e:(4: of the Mine Act directed the Secretary to make rules for determining when a pattern exists, but in so doing, Congress, in unambiguous language, directed the Secretary to use notice and comment rulemaking in accordance with the Administrative Procedure Act." Bledsoe Motion at 8. And yet again, not much later in its Motion: "Congress required the Secretary to use notice-and-

[18] Simultaneously being issued today is the Court's ruling on the Secretary's Motion to Dismiss for Lack of Jurisdiction in which the Court DENIES the Secretary's Motion. For ease of reference and because the two orders need to be considered together, a copy of that Order appears as an Appendix to this Order.

[19] It is a curious thing, the practice of advocates to parse out words and apparently assume that no one will notice that only part of the story has been told. In the Court's view, it is better, and ethically superior, to acknowledge the troublesome language and deal with it forthrightly, either by arguing that it means something other than the words suggest or by demonstrating, if possible, that notwithstanding the nettlesome words, the Secretary must make rules even though the statute suggests that discretion is involved.

comment rulemaking to establish POV criteria." *Id.* at 11. To borrow, and slightly alter, an expression, "a mischaracterization, stated often enough, does not become an accurate characterization." That is, proof by repeated assertion does not make something so. Accordingly, to keep the facts straight, it bears repeating, with emphasis upon the critical phrase omitted by the Contestant, to bring attention to the words of the statutory provision:

> The Secretary shall make such rules *as he deems necessary* to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

Thus, as evident by the italicized language, any rules are only as the *Secretary deems necessary.* With that power and discretion, one obvious option for the Secretary was that it could have been decided that no such rules were necessary.

The parameters which may constitute a Pattern of Violations

As the Secretary has observed, the dictionary defines a "pattern" in a manner which is consistent with the common understanding of the word, by describing it as "a reliable sample of traits, acts, or other observable features characterizing an individual [] behavior [pattern] . . . ." In line with that sense, the Senate Committee spoke to that provision of the Mine Act, expressing that it would be shown where a mine has "'an inspection history of recurrent violations' or 'continuing violations,' and that a pattern would be 'more than an isolated violation' but not necessarily 'a prescribed number of violations.'" Response at n. 2, citing S. Rep. No. 95-151, pp. 32-33. Thus, Congress identified one end of the spectrum, that a pattern is more than an isolated violation, but left it to the Secretary's expertise to determine when *more* was needed to be done for enforcement than simply the routine process of identifying each violation, one by one, and then having each violation abated.

That Congress decided to leave it to the Secretary to develop the parameters for a pattern is not simply surmise. Both the statutory provision itself and the legislative history make this clear. Regarding the latter, the same Senate Report expresses an intent for the Secretary to be afforded "broad discretion in establishing criteria for determining when a pattern of violations exists." Response at 6, citing the same S. Rep. at 33. The Senate, rather than setting a number of conditions and requirements for the pattern tool to be employed, did the opposite. It noted that the criteria for identifying a pattern would "necessarily have to be broad enough to encompass the varied mining activities within the Act's coverage." *Id.* The Senate went further in explaining its design, stating that a pattern can be composed of violations of *different* standards and was certainly not limited to violations of particular standards. Although it acknowledged the obvious, that a pattern, by definition must be more than a single, isolated, violation, that did not mean that "a prescribed number of violations" had to occur, nor that the violations had to come from "predetermined" that is, previously identified, standards. Last, the Senate noted that, while a "pattern" represents something more than an isolated violation, it does not require some intent or state of mind on the part of the mine where a pattern is found to exist. *Id.* Thus, if the pattern is present, that is sufficient, even if no intentional disregard of safety or health concerns is

evident. In short, with intent not a prerequisite, a number, as long as it is a number greater than one, potentially can be enough, dependent upon the circumstances, to establish a pattern.

As the Secretary notes, from the Mine Act's legislative history, the provision was intended to "provide an effective enforcement tool" in situations where the mine operator has demonstrated disregard for miners' safety and health by having a pattern of violations. Its use was contemplated where a mine has permitted continued safety and health standard violations, and it has been concluded that simply abating violations as they occur is not doing the job, and that a next step is necessary to "restore the mine to effective safe and health conditions." Response at 5, citing S. Rep. No. 95-181, pp. 32-33. (1977:.

Apart from whether the Secretary was obligated to promulgate a pattern regulation, the fact is that it did so, utilizing the notice and comment rulemaking procedures under the Administrative Procedure Act. This result of this process, appearing at 30 C.F.R. Part 104, begins by examining the compliance records of mines annually. Other factors, such as whether a mine has demonstrated a lack of good faith in correcting significant and substantial violations, the non 104(e: enforcement measures that have been applied, and whether the mine's accident, injury or illness record reflects a serious problem with managing safety or health matters, are examined, together with any mitigating considerations. Where a mine is not ruled out after the initial screening, then a mine with recurring significant and substantial violations is evaluated by application of the pattern criteria. These are set forth at 30 C.F.R. § 104.3(a:(1:- (3:.[20] Again, the review works by determining, at that second stage, if the mine under review may be eliminated from a pattern designation. If a mine remains a subject of concern, the third phase is applied. In that posture, the mine is notified of MSHA's concern and that it has been identified

[20] § 104.3 Pattern criteria. (a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with § 104.2 of this part reveals that the operator may habitually allow the recurrence of violations of mandatory safety standards or health standards which significantly and substantially contribute to the cause and effect of mine safety or health hazards. These criteria are (1) A history of repeated significant and substantial violations of a particular standard; (2) A history of repeated significant and substantial violations of standards related to the same hazard; or (3) A history of repeated significant and substantial violations caused by unwarrantable failure to comply. (b) Only citations and orders issued after October 1, 1990, and that have become final shall be used to identify mines with a potential pattern of violations under this section. 55 FR 31136, July 31, 1990.

as having a potential pattern of violations issue.[21] Even then, in what can only be described as an overabundance of due process, the mine is not faced with a section 104(e: enforcement action. Instead the mine has the opportunity: to examine the documents MSHA has relied upon to arrive at that stage of review; to provide additional information to the Agency; to request a conference with MSHA; and to launch a program to avoid such repeated significant and substantial violations.[22] As the Secretary appropriately observes, Section 104(e:(1: does not require that these extraordinary lengths be taken before a notice under that provision can be issued. Thus, it is a great understatement on the Secretary's part to describe the rulemaking as providing "ample notice" before issuance of the section 104(e:(1: notice. A mine operator is provided notice "writ large" under the rule and this occurs in the context of requiring the Secretary to provide only a

[21] The Proposed Rule noted that the intention behind section 104(e) is plain; it is intended to address "mines with a record of repeated S & S violations" upon the Secretary's determination that the Act's other enforcement mechanisms have not been effective in achieving compliance with the safety and health standards. The Rule noted that, in accomplishing that next step, "[t]he Secretary has broad discretion in determining [the] criteria [for determining when a pattern exists]." 54 FR 23156-01 at * 23156.

Truly, the Rule's operation allows, effectively, an individualized notice and comment procedure, upon the Agency's notification to a particular mine that the mine is under review for a possible pattern of violation issuance. This process ensures that a given mine will have had the opportunity for full input into the Agency's review of the appropriateness for that specific mine to be issued a notice of a pattern under section 104(e).

Certainly the Agency's final rule reflected full consideration of all comments made to the proposal, together with the Agency's rationale for its responses to those comments. In short, the rule does not operate in any automatic function; input from the mine involved is considered before the Administrator makes the final determination. Further, while the "Initial screening" considers non-final citations and orders, the "pattern criteria" used to identify mines with a potential pattern takes into account only those that have become final citations or orders. 55 FR 31128-01 at * 31136.

[22] Section 104.4, Issuance of notice, provides: (a) When a potential pattern of violations is identified, the District Manager shall notify the mine operator in writing. A copy of the notification shall be provided to the representative of miners at the mine. The notification shall specify the basis for identifying the mine as having a potential pattern of violations and give the mine operator a reasonable opportunity, not to exceed 20 days from the date of notification, to take the following steps: (1) Review all documents upon which the pattern of violations evaluation is based. (2) Provide additional information. (3) Submit a written request for a conference with the District Manager. The District Manager shall hold any such conference within 10 days of a request. The representative of miners at the mine shall be provided an opportunity to participate in the conference. (4) Institute a program to avoid repeated significant and substantial violations at the mine. The District Manager may allow an additional period, not to exceed 90 days, for determining whether the program effectively reduces the occurrence of significant and substantial violations at the mine. The representative of miners shall be provided an opportunity to discuss the program with the District Manager. 30 C.F.R. § 104.4.

notice that a pattern of violations exists.[23] Again, that determination by the Secretary, that a mine has "a pattern of violations of mandatory health or safety standards," requires making rules for establishing the criteria for determining when a pattern exists, only as the Secretary *deems necessary*. Section 104(e:(4:.

Even after the completion of all that process, more is provided, as the District Manager, upon concluding at the end of the day that a potential pattern exists, then sends a report concerning the evaluation to the applicable MSHA Administrator at which point the mine has yet another opportunity for comment. It is not until all that has transpired that the Administrator makes the decision whether the mine is to be issued a notice of a pattern of violations. 30 C.F.R. § 104.4(c:. If there is a problem to be identified with the procedure developed by MSHA, it is that it is far too generous and prolonged. It is hard to imagine, given the Senate Report statements about this enhanced enforcement tool and the design for its use, that Congress intended such a protracted process.[24]

Moving from the established framework for determining whether to proceed with a pattern of violations to applying that procedure in the present case, the Secretary notes that it conducted such a screening for Bledsoe's Abner Branch Rider Mine, examining a 12 month period which ended on August 31, 2010, and then, following the final rule's procedure, informed Bledsoe there was a potential pattern. Bledsoe was advised at that time that 9 citations or orders pertaining to violations of 30 C.F.R. § 75.400, which had all become final orders were part of this matter. Meetings followed and Bledsoe, utilizing the Rule's procedures, submitted a corrective action plan. That plan, again pursuant to the Rule, was evaluated by the District Manager, who advised the Respondent that he would be required to make a report to the Administrator and that occurred on March 18, 2011. Nearly four weeks later, on April 12, 2011, the Administrator for Coal Mine Safety and Health notified Bledsoe that he had determined the existence of a pattern of violations at the mine. The District Manager then issued, that same day, a Section 104(e:(1: notice, Number 8333606, which is the subject of this litigation.

In arguing that Bledsoe's arguments should be rejected, the Secretary first addresses the claims about inadequacy of the screening process, and its objections that the regulation does not "specify the time period of a mine's compliance history that will be examined during the initial

[23] Accordingly, Bledsoe's claim that the Secretary did not give "fair notice" of the criteria to determine a POV is hollow. When challenging those citations/orders which have not been settled, Bledsoe could, in theory, challenge whether it received "fair notice" of the particular standard therein cited, as distinct from the rejected claim that it had no notice of the criteria used to determine a POV. In the same vein, claims that "rulemaking by program policy manual and website" and by "press release" do not deserve further comment.

[24] While one might think that the final rule would be the final word on the subject, MSHA has further addressed the subject in its Program Policy Manual. Suffice it to say that while the PPM provides helpful explanatory guidance about the final rule for Agency personnel, it does not amend, alter, or otherwise change that Rule.

screening" and that it is not limited to considering only final orders in that initial screening process. The Secretary's response is convincing, as it notes that Section 104(e: has no such requirement for a particular time period to be examined. The implicit suggestion, that MSHA should have selected a fixed time period, would have been arbitrary. The Secretary properly notes that the legislative history recognized that a one-size-fits-all approach would be jejune.[25] Further, as this reasoned choice by the Secretary is not unreasonable, nor arbitrary or capricious, the deference principles articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984: apply. Sec. Response at 23.

In the same vein, the Secretary observes that the statutory provision is also silent on the issue of whether non-final citations and orders may be considered.[26] The Secretary makes two key points on this issue:

> Limiting pattern consideration to final orders would undermine Section 104(e:'s effectiveness by eliminating consideration of current or recent mine conditions and practices – precisely the matters that are most relevant in determining whether the mine currently should be considered for enhanced enforcement measures – and focusing consideration instead on mine conditions and practices that are more remote in time.

Sec. Response at 24-25. The Contestant's position would severely hamper the enforcement tool that Section 104(e: surely is, as "citations and orders frequently do not become final until months or years after they are issued."[27] *Id.* at 24.

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[25] As the Secretary states: "In promulgating § 104.2 - the initial screening regulation - the Secretary expressly declined to impose a particular period to be examined in every case, recognizing that 'interruptions in mining operations, changes in mine management or ownership, or other factors could indicate that this period should be longer or shorter.' 55 Fed. Reg. 31,130 (July 31, 1990). And in promulgating the pattern criteria in § 104.3, the Secretary expressly rejected the suggestion that 'only citations and orders issued within certain time periods . . . be considered in applying the pattern criteria' because such a rule 'would unduly restrict the Agency's ability to enforce section 104(e). . . .' *Id*. at 31,132-3." Sec. Response at 23. Further, the Secretary observes that "Congress expressly delegated to the Secretary the authority to make rules to implement Section 104(e) [and that the same Section] is silent with respect to the compliance-history period to be considered when determining whether the mine has a pattern of violations. *Id.*

[26] The Secretary looks to the legislative history, urging that it "suggests that Congress did not intend to require the Secretary to limit her consideration to final orders. Section 104(e) was enacted in response to the Scotia mine disaster and the ensuing investigation which revealed that the mine had an 'inspection history of recurrent violations.' S. Rep. No. 95 181, p. 32. Congress thus focused Section 104(e) on a mine's 'inspection history' rather than on a mine's final order history." Sec. Response at 24. In the Court's view, this is certainly a rational interpretation of the legislative history and therefore it supports the Secretary's approach here, per *Chevron.*

Second, the Secretary aptly compares the pattern of violation application with the unwarrantable failure sequence of Section 104(d:. This is not a stretch by any means, as the Senate Report itself made such a comparison, observing that the POV "sequence parallels the current unwarrantable failure sequence." S. Rep. No. 95-181, p. 33. Borrowing from that Senate Report, the Secretary notes that the comparison was expressly stated. Particularly pertinent here in that comparison is the point that "[i]t is beyond debate that a closure order under Section 104(d:(1: may be based upon a Section 104(d:(1: citation that is not final, and a closure order under Section 104(d:(2: may be based upon a Section 104(d:(1: order that is not final." *Id.* at 25.

Thus, the Court agrees with the Secretary's point that, by Congress making such a comparison, it is reflective that POV determinations also need not be based upon final orders. Further, clearly, under a *Chevron* analysis, the Secretary's decision to include non-final citations and orders, does not run counter to the statute, nor can it be characterized as arbitrary, unreasonable or capricious.

Turning to Contestant's claim[28] that the POV Procedures Summary and Screening Criteria are "rulemaking through website" in violation of Section 104(e: of the Mine Act and the notice-and-comment provisions of the APA, the Secretary makes the same point that the Court noted earlier, namely that, "Section 104(e:(4: of the Mine Act does not 'require[] the Secretary to use notice-and-comment rulemaking to establish POV criteria' . . . . Section 104(e:(4: provides only that the Secretary 'shall make such rules as he deems necessary'; it does not require any particular rulemaking procedure." *Id.* at 26, referencing Contestant's Motion at 11.

The Secretary also makes note that, under the Administrative Procedure Act, rules may be valid even though not promulgated after notice under 5 U.S.C. § 553(b:,[29] and that, as "rules," they are exempt from the APA's notice-and-comment provisions because such provisions "do not apply to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice [ ].'"[30] *Id.* at 26-27.

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[27] One could fairly expect that if mine operators had their way and only final orders could be considered before a pattern could be invoked, the defense would then be raised by some that such information was now stale and useless in assessing the mine's current operational procedures, given the passage of years since the conditions were initially cited. Thus, if it were to prevail that such pre-final orders were "too soon" to be considered, and MSHA were left to consider only final orders, those would then be characterized as "too late." Often, the approach is really about delay. For example, back in 1980, when the task of identifying mines with a pattern of violations was first raised as a proposed rule, the "concerns" raised caused the Agency to withdraw its proposal with the result that it was not until nearly nine (9) years later before it was proposed again.

[28] Contestant's Motion at 12.

[29] 5 U.S.C. § 553(b)(3)(A), (B).

[30] 5 U.S.C. § 553(b)(3)(A)

These two observations also make sense when placed in the context of the use for the "POV Procedures Summary and Screening Criteria." That critical context is that the POV Procedures "describe the *internal* procedures MSHA personnel – and only those who answer to the Administrator – follow in reviewing mine violation histories under Section 104(e: of the Mine Act and Part 104; they pertain to the procedural aspects of the review of mine violation histories. They are not law; they do not bind the public." *Id.* at 27. (emphasis added:.

Further, as the Secretary also notes, although the POV Procedures "may bind MSHA personnel to the extent personnel must follow supervisory direction, they do not bind the Administrator in any case. *They address MSHA's conduct* in reviewing mine violation histories *in preparation for the Administrator's exercise of discretion regarding possible enforcement action*; they do not address operator conduct. [Accordingly,] [t]hey help 'direct the analysis [of whether the mine has a pattern of violations] but not necessarily the answer.'" *Id.* at 27.[31] (emphasis added:. The Secretary observes that this is consistent with "MSHA's Procedure Instruction Letter [which was] held exempt from notice-and-comment rulemaking in *National Mining Ass'n. v. Secretary of Labor*, 589 F.3d 1368, 1372 (11th Cir. 2009:."[32] Similarly, the Secretary points out that "the POV Procedures Summary and Screening Criteria address 'the general procedures District Managers are to consider' in evaluating a mine's violation history under Section 104(e: of the Mine Act and Part 104; but the agency – the District Managers and

[31] Citing *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983). As the 11th Circuit observed in that case, "[a]s long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm." Citing *American Trucking Associations, Inc. v. ICC*, 659 F.2d at 463, among other cases. In *Ryder*, the Court recognized that various criteria had been enumerated but that any presumptions remained rebuttable and that the review will involve scrutinizing the actual operation. That is *exactly* what occurs here. Also as in *Ryder*, the process of issuance of a section 104 (e) notice follows "an intensely factual determination informed by [the] relevant criteria."

[32] As the 11th Circuit emphasized, *National Mining Ass'n. v. Secretary of Labor*, the obligation to publish a proposed rule pertains to the promulgation of new or revised *mandatory* standards. No new "across-the-board rules" have been created by the POV Procedures.

ultimately the Administrator – is 'free to consider individual facts' when evaluating each specific mine." (quoting *Ryder Truck Lines*, 716 F.2d at 1377:." Sec. Response at 27-28.[33]

Thus, the Court agrees with the Secretary that Part 104 informs the mining community of the pattern criteria used to identify a potential pattern of violations at a given mine and the procedures MSHA will follow upon making such identification, culminating in the Administrator's decision as to whether a notice of a pattern of violations will be issued.[34]

Drummond is not instructive.

Bledsoe points to *Secretary v. Drummond Company, Inc.*, 14 FMSHRC 661, 682 (May 1992: for authority in support of its inaccurate claim that "Section 104(e:(4: of the Mine Act directed the Secretary to make rules for determining when a pattern of violations exists . . . ." Motion at 8. *Drummond* challenged the Secretary's interim excessive-history civil penalty program and the Commission found that the program was inconsistent with and therefore modified the existing 30 C.F.R. Part 100 penalty regulations. However, as the Secretary

[33] The Secretary cites a host of cases presenting similar situations: the Occupational Safety and Health Administration's per-instance-penalty policy held exempt from notice-and-comment rulemaking in *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1132-33 (D.C. Cir. 2001), the POV Procedures Summary and Screening Criteria do not "'encode[] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of behavior.'" (quoting *American Hosp. Ass'n. v. Bowen,* 834 F.2d 1037, 1047 (D.C. Cir. 1987)); the Department of Health and Human Services ("HHS") Provider Reimbursement Manual provision held exempt from notice-and-comment rulemaking in *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992), the POV Procedures Summary and Screening Criteria are "not intended to substantively change existing rights and duties." In *Sentara-Hampton Gen. Hosp*., the Court explained that explaining ambiguous language or reminding parties of existing duties, that is not creating new law. *Id.* Thus, the POV procedures only address the exercise of enforcement discretion under 30 C.F.R. Part 104 and not "enforcement of new obligations." Accordingly, they do not bring about substantive change. See also *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326-27 (D.C. Cir. 1994) (holding exempt FCC's "hard look" rules that guided agency's review of license applications and resulted in elimination of some applications); the HHS Manual IM85-3 policy held exempt from notice-and-comment rulemaking in *American Hosp. Ass'n. v. Bowen*, 834 F.2d 1037, 1051-52 (D.C. Cir. 1987), the POV Procedures Summary and Screening Criteria "target" the "focus" of MSHA's "enforcement efforts," do not impose new burdens on operators, and are well within MSHA's "discretionary enforcement authority;" and the Federal Savings and Loan Insurance Corporation's directives held exempt from notice-and-comment rulemaking in *Guardian Fed. Sav. and Loan Ass'n. v. FSLIC*, 589 F.2d 658, 666-67 (D.C. Cir. 1978), the POV Procedures Summary and Screening Criteria preserve the enforcement discretion of the Administrator."

[34] Having concluded that the Secretary was not required to do as much as it did, the Court agrees that more was not needed beyond the issuance of Part 104. As the Secretary notes, the Administrative Procedure Act "does not require that all the specific applications of a rule evolve by further, more precise rules." Sec. Response at 30, citing *Shays v. Federal Election Comm'n*., 528 F.3d 914, 930 (D.C. Cir. 2008) (quoting *Shalala v. Guernsey Mem'l. Hosp.*, 514 U.S. 87, 96 (1995)).

correctly observes, " nothing in the POV Procedures Summary or Screening Criteria is inconsistent with or modifies 30 C.F.R. Part 104 or any other regulation." *Id.* at 30.

The Court would add that the circumstances were very different in that case as *Drummond* focused exclusively on the penalty computation regulations which were in existence and formulated through the notice and comment process.[35] Placed in context, in that litigation, the complaint was that penalties were being computed, not in accordance with Part 100 but rather upon the Secretary of Labor's Program Policy Letter, which was a program established outside the notice and comment process of the Administrative Procedure Act. As the Commission expressed it, the challenge from the mine operators in *Drummond* was that the Secretary was failing to act within the framework of its own Part 100 regulations. *Id.* at *672.

The Secretary's action here would seem to fit within the APA definition of a "Rule,"[36] but the present question is whether there is any deficiency in its application. There was, following the proposed rule, the opportunity for comment from the affected public. It is also true that the notice and comment process is not applicable where interpretive rules, general statements of policy, or rules of agency organization, procedure or practice are involved. 5 U.S.C. § 553 (b:(3:(A:. While notice and comment is intended to accomplish public participation and fairness, here Congress' expressed intent was to leave it to the Secretary's discretion as to whether such rules were needed. In short, it was left to the Secretary, not the public, to ultimately decide the parameters of a pattern. Further, consistent with the conclusion that the pattern rule is a statement of policy, it clearly leaves the Agency, through the Administrator, with discretion in its decision making. In fact, it is the ultimate in that regard, as the Administrator, not the final rule, makes the final decision whether to proceed with a pattern notice.[37]

Regarding Bledsoe's claim that there was retroactive rulemaking, the Secretary responds that the Pattern provision was promulgated decades before the notice of pattern issued here. The Court agrees that, by that rulemaking, Sections 104.2 (a:(1: and 104.3(a: gave Bledsoe notice of the parameters upon which a pattern could be formulated. Therefore, Bledsoe's protestation that

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[35] Based on the Court's other comments in this Order, Bledsoe's claim that MSHA has engaged in "rule-making through website postings" needs no further comment. Bledsoe Motion at 12-13.

[36] 5 U.S.C. § 551(4) defines "Rule" as "the whole or 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."

[37] It must again be noted that once the Administrator makes that determination, it is hardly the end of the story. A mine operator then has the opportunity to challenge the violations constituting the pattern.

it was caught unaware of the effect of not challenging 26 of the citations which make up the 79 citations during the period from September 1, 2009 through August 31, 2010, rings hollow. There are two reasons for this: first, "Bledsoe was not entitled to know and the Secretary was not obligated to supply information about the internal procedures adopted to guide the agency's exercise of Section 104(e: enforcement discretion." Second, and of significance, as a "pattern does not necessarily mean a prescribed number of violations[38], . . . Bledsoe had no reason to expect that it would ever know that a certain number of S&S violations would subject it to review for a potential pattern or pattern of violations."[39] *Id*. at 34-35.

In sum, the Secretary reiterates that the POV Procedures Summary and Screening Criteria were not required to undergo notice and comment rulemaking. Instead, they serve as guidance for MSHA in the exercise of its discretionary enforcement authority and as such they are not binding on the public or the Administrator. Thus, the Secretary emphasizes that it sufficiently "informed the public through § 104.3(a: that a history of repeated S&S violations: (1: of a particular standard; (2: of standards related to the same hazard; or (3: caused by unwarrantable failure to comply, would identify it as a mine with a potential pattern of violations."[40] Sec. Response at 32. The Court agrees.

There is one aspect of Bledsoe's argument with which the Court agrees, at least in theory. That is Bledsoe's assertion that the "practical effect of a POV notice is that a mine is subject to closure every time an S & S citation is issued. [It notes that] [t]hese citations may be challenged by the operator; however there will still be a closure upon issuance. This allows the Secretary, based on nothing more than allegations, to repeatedly close a mine in perpetuity. In fact, even if all such citations are later vacated, the operator has no remedy to prevent such closures." Bledsoe Motion at 8. In the Court's view, this observation is really an argument in support of

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[38] Though referenced earlier in this Order, the Senate spoke to this subject at S. Rep. No. 95-181, p. 33.

[39] In the same vein, the Secretary points out that *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204 (1988), involving as it did, the retro-active application of a substantive, legislative rule that was intended to have the force and effect of law, is inapposite, as the POV Procedures Summary and Screening Criteria are procedural.

[40] The Court further agrees that the cases cited by Bledsoe, cases – *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301 (D.C. Cir. 2000), and *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982) – involved challenges to the Secretary's interpretation of mandatory standards that required or prohibited certain conduct by the mine operator and that *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) – involved the FCC's interpretation of a regulation that required certain conduct by a regulated party. It is a key distinction that the POV Procedures Summary and Screening Criteria "merely instruct agency personnel in screening and reviewing mines for potential patterns of violations" as opposed to requiring or prohibiting certain conduct by operators. Sec. Response at 33.

Bledsoe's Response to the Secretary's Motion to Dismiss for Lack of Jurisdiction. As noted at the outset of this Order, the Court has DENIED the Secretary's Motion. *See* n.1, *supra.*

For the foregoing reasons, Contestant Bledsoe's Motion for Partial Summary Decision is DENIED. The parties are directed to contact the Court via its email address for the purpose of arranging a hearing date so that this matter can proceed forward.

SO ORDERED.

/s/ William B. Moran

William B. Moran
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577/ FAX 303-844-5268

May 13, 2014

NORTH COUNTY SAND & GRAVEL, INC., Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	Docket No. EAJ 2014-1-J
v.	:	Formerly WEST 2010-365-M
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 04-05632 Mine: Roadrunner 32

INTERIM DECISION

Appearances: Timothy J. Turner, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner
C. Gregory Ruffennach, Esq., Washington D.C. for Applicant

Before: Judge Manning

This case is before me upon an application for the award of fees and expenses under the Equal Access to Justice Act ("EAJA") 5 U.S.C. 504 and the Commission's regulations at 29 C.F.R 2704. North County Sand & Gravel, Inc., filed the application against the Department of Labor's Mine Safety and Health Administration based upon my decision in *North County Sand & Gravel, Inc.*, 35 FMSHRC 3217 (Sep. 2013) (ALJ).

North County seeks an award in the amount of $40,180.60 under the EAJA, alternatively under 29 C.F.R 2704.105(a) and 29 C.F.R 2704.105(b). North County attests, and the Secretary does not oppose, that it satisfies the basic requirements to be eligible to receive an EAJA award under 29 C.F.R 2704.104.[1]

I find that North County is entitled to an EAJA award under 29 C.F.R 2704.105(a). I furthermore order the parties to confer upon the amount of reimbursement to be awarded to North County.

[1] Section 2704.104 requires that only small entities that are parties to the adversary adjudication may seek EAJA awards. The standards are different for individuals and entities, but focus on net worth and number of employees. North County has a net worth less than "$7 million and not more than 500 employees." 29 C.F.R 2704.104(b)(3)(iii).

I. BACKGROUND

The underlying case concerned one citation that MSHA issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act" or "Act"). A hearing in that case, concerning Citation No. 7980681 of Docket No. WEST 2010-365-M, was held on May 1, 2013, in San Bernardino, California.[2] The parties presented testimony and documentary evidence and filed post-hearing briefs.

On April, 16, 2009, MSHA Inspector Steven Soderburg issued Citation No. 7980681 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.15005 of the Secretary's safety standards. The inspector designated Citation No. 7980681 as significant and substantial ("S&S") and highly likely to cause an injury that could reasonably be expected to be fatal. He also alleged that the violation was the result of North County's reckless disregard and unwarrantable failure. The Secretary proposed a specially assessed penalty of $35,500 for this citation.

Citation No. 7980681 alleged that Inspector Soderburg saw the owner and president of North County, Michael LaPaglia, standing upon a portable crusher without fall protection. The ground was 11 feet below where LaPaglia stood. The Secretary provided photographs and called Inspector Soderburg to testify to show where LaPaglia was standing when the inspector issued the citation and also provided proof to show that LaPaglia was an experienced miner who had owned North County for over 20 years. Counsel for the Secretary focused her efforts upon impeaching LaPaglia's testimony by asking questions about specific details concerning when North County purchased the cited portable crusher and when it obtained legal title to the crusher. These events occurred years earlier and were irrelevant.

At hearing, North County contested the citation and its designations, but stated that the "number one reason" it brought the citation to hearing was the large penalty that the Secretary proposed. (Tr. 125 in WEST 2010-365-M). North County focused upon providing evidence to show that the Secretary did not consider factors required by the Secretary's penalty regulation at 30 C.F.R. § 100.3(a)[3] and that the penalty was too high based upon the factors set forth in section

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[2] Pamela Mucklow represented the Secretary prior to and at the hearing. On July 22, 2013, Timothy Turner filed a Substitution of Counsel and became the Secretary's counsel.

[3] Section 100.3(a) states, in part:

> The amount of the proposed civil penalty shall be based on the criteria set forth in sections 105(b) and 110(i) of the Mine Act. These criteria are:
>
> (i) The appropriateness of the penalty to the size of the business of the operator charged;
>
> (ii) The operator's history of previous violations;
>
> (iii) Whether the operator was negligent;
>
> (iv) The gravity of the violation;
>
> (v) The demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation; and
>
> (vi) The effect of the penalty on the operator's ability to continue in business.

30 C.F.R. 100.3(a).

30 C.F.R. § 100.3(a)[4] and that the penalty was too high based upon the factors set forth in section 110(i) of the Mine Act.[5] North County called one witness, LaPaglia, to testify.

I issued a decision on the merits on September 26, 2013. In that decision, I modified the citation at issue, reducing the penalty to $3,500, the negligence designation from reckless disregard to high, the likelihood from highly likely to reasonably likely, and reduced the Secretary's designation of fatal for the likely injury.

The day of the hearing, May 1, 2013, North County filed a Motion to Strike the Secretary's Specially Assessed $35,500 Proposed Penalty. In that Motion to Strike, North County argued that the Secretary's special assessment procedure was arbitrary and unlawful because the Secretary's general principles used to determine the amount of special assessments modify the part 100 penalty scheme, but did not undergo notice and comment rule making required by the Administrative Procedure Act. (Ex. R-3). North County argued that the special assessment general procedures removed the requirement that the Secretary base penalties upon the six penalty criteria and make narrative findings of his consideration of those criteria. (R. Mot. to Strike at 9). The special assessment policies produce penalties contrary to the scheme mandated by congress in the Mine Act by inflating penalties against small, compliant operators. Due to what North County asserted to be the unlawful procedures used to determine and apply the specially assessed penalty, it asserted in its Motion to Strike that the $35,500 special assessment at issue should be removed.

On July 22, 2013, the Secretary filed a substitution of counsel and on July 23, 2013, prior to submitting a post hearing brief, the Secretary filed a Motion to Amend the Penalty Proposal and to Deny North County's Motion to Strike as Moot. The Secretary's Motion to Amend reduced the proposed penalty from $35,500 to $5,961, removing the special assessment. North County subsequently opposed the Secretary's Motion to Amend, objecting to the assertion that

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[4] Section 100.3(a) states, in part:

> The amount of the proposed civil penalty shall be based on the criteria set forth in sections 105(b) and 110(i) of the Mine Act. These criteria are:
>
> (i) The appropriateness of the penalty to the size of the business of the operator charged;
>
> (ii) The operator's history of previous violations;
>
> (iii) Whether the operator was negligent;
>
> (iv) The gravity of the violation;
>
> (v) The demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation; and
>
> (vi) The effect of the penalty on the operator's ability to continue in business.

30 C.F.R. 100.3(a).

[5] Section 110(i) of the Mine Act states, in part:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 C.F.R. 110(i).

the amendment of penalty mooted its Motion to Strike. In response, the Secretary filed a motion in support of its Motion to Amend. On July, 30, 2013, I issued an order granting the Secretary's Motion to Amend and finding North County's Motion to Strike moot because the subject special assessment was no longer at issue after I granted the Secretary's Motion to Amend. *North County Sand & Gravel, Inc.*, 35 FMSHRC 2318 (July 2013) (ALJ). In that order, I limited my ruling to the civil penalty proceeding, specifically stating that the ruling did not address or affect an EAJA claim. *Id* at 2320.

II. PARTIES' ARGUMENTS

North county argues that it is entitled to fees and expenses under 29 C.F.R 2704.105(a) because it was a prevailing party and the position of the Secretary was not substantially justified. The judge lowered the penalty. The initial penalty is the Secretary's position "upon which the adversary adjudication [was] based[.]" 29 C.F.R 2704.105(a). The judge's de novo penalty determination of $3,500 must be compared to the original proposed penalty of $35,500. The judge made a decision on the merits and the Secretary can no longer demand a higher penalty for Citation No. 7980681, which makes North County a prevailing party. The judge's penalty was a de novo assessment that provided the necessary judicial imprimatur and was not affected by the Secretary lowering the penalty.

The Secretary, North County argues, provided no evidence to support the extreme nature of the penalty and did not address the history, good faith, or size of North County. North County references the argument in its Motion to Strike that the procedure used in the special assessment of Citation No. 7980681 violated 30 C.F.R. 100.5(b). The assessment was also not proportional to other penalties assessed against North County, inconsistent with penalties assessed to other operators for violations of section 56.15005, and was substantially in excess of the properly assessed penalty under 30 C.F.R 100.3. The Secretary's post trial decision to remove the special assessment also supports the argument that the $35,500 penalty was unreasonable and unjustified.

North County also notes that the judge removed the reckless disregard determination from Citation No. 7980681 because the Secretary presented "no evidence" to show that LaPaglia knew of his violation of the standard but ignored it. *North County Sand & Gravel*, 35 FMSHRC at 3223. Section 56.15005 does not designate a height at which fall protection must be worn, which shows that the Secretary based its argument upon unjustified inferences and not objective factors.

If North County is not a prevailing party under 29 C.F.R 2704.105(a), it argues that it is entitled to attorney fees and expenses under 29 C.F.R 2704.105(b) because the demand of the Secretary was unreasonable and substantially in excess of the judge's decision.

The Secretary argues that North County was not a prevailing party because the Secretary, not the judge, voluntarily removed the special assessment and lowered the penalty to $5,961. The judge never ruled upon the $35,500 penalty because the Secretary voluntarily amended the penalty. The judge also affirmed the Secretary's unwarrantable failure and S&S designations and found that North County's high negligence caused Citation No. 7980681.

Even if North County was a prevailing party, the Secretary asserts that his position was substantially justified. A reasonable person could find that the underlying violation was the result of North County's reckless disregard because LaPaglia owned the mine. The highly likely designation was also reasonable because the inspector had a reasonable belief that the cited conduct would recur. The fatal designation of Citation No. 7980681 was justified based upon the inspector's experience and the judge's finding that a fatality was possible. Citation No. 7980681 violated a Rule to Live By, which led to a special assessment of the penalty. MSHA also followed its usual procedures to propose a penalty under special assessment and did not review the application of those procedures to this case until after the hearing.

The Secretary cites *Colorado Lava* to argue that if North County was a prevailing party, then section 2704.105(b) is inapplicable under Commission precedent. *Colorado Lava Inc.*, 27 FMSHRC 186, 195 (Mar. 2005). The Secretary's position is substantially justified and therefore is also reasonable under 29 C.F.R 2704.105(b). The Secretary's proposed penalty of $5,961, furthermore, was not substantially in excess of the judge's decision.

III. DISCUSSION AND ANALYSIS

Commission procedural rules state that "a prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Secretary was substantially justified." 29 C.F.R 2704.105(a).

The "position of the agency" includes the "position taken by the Secretary in the adversary adjudication" and "the action or failure to act by the Secretary upon which the adversary adjudication is based." 29 C.F.R 2704.105(a). A position may "encompass both the agency's prelitigation conduct and…subsequent litigation positions," but "only one threshold determination for the entire civil action is to be made." *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 159 (1990).

Section 5 U.S.C. 504(a)(1), implemented by the Commission in 29 C.F.R 2704.105(a), requires that a party to the action be a prevailing party to be awarded funds in an EAJA claim. The term "prevailing party" is a term of art that means "one who has been awarded some relief by the court[.]" *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603 (2001). A prevailing party must prevail on the merits of some of its claims and receive at least nominal relief. *See Buckhannon*, 532 U.S. at 603-04 (citing *Farrar v. Hobby,* 506 U.S. 103, 113 (1992)). The D.C. Circuit interpreted *Buckhannon* to impose a three part test to determine prevailing party status, "(1) there must be a "court-ordered change in the legal relationship" of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." *District of Columbia v. Straus,* 590 F.3d 898, 901 (D.C. Cir. 2010) (quoting *Thomas v. National Science Foundation*, 330 F.3d 486, 492-93 (D.C. Cir. 2003)).

Once a party is established as the prevailing party, EAJA mandates that the Commission award fees and expenses to the prevailing party unless the Secretary proves that "the position of

the agency was substantially justified or that special circumstances make an award unjust." 29 C.F.R 2704.100.

The government bears the burden to show that its position was substantially justified. *Scarborough v. Principi*, 541 U.S. 401,414 (2004). The Secretary must justify his position "to a degree that could satisfy a reasonable person" to prove that his actions were substantially justified. *Pierce v. Underwood*, 487 U.S. 552, 564-566 (1988). The substantially justified standard demands more than non-frivolousness, but less than a showing that the government's "'decision to litigate was based on a substantial probability of prevailing.'" *Taucher v. Brown–Hruska,* 396 F.3d 1168, 1173 (D.C. Cir. 2005) (quoting *Spencer v. NLRB,* 712 F.2d 539, 557 (D.C. Cir. 1983)). The position must be "substantially justified on the law and facts[.]" *Contractor's Sand and Gravel, Inc. v. Federal Mine Safety and Health Review Com'n*, 199 F.3d 1335, 1340 (D.C. Cir. 2000).

Secretary's Position in the Underlying Case

I find that the position of the Department of Labor pertinent to North County's EAJA claim includes the Secretary's demand for $35,500. Only one determination of the Secretary's position can be used in an EAJA proceeding; each change in position does not warrant a separate finding. *Jean*, 496 U.S. at 159. The Secretary's original position demanded a penalty of $35,500 from North County for its violation of section 56.15005. The Secretary adhered to this position throughout the proceeding including during the hearing. The large monetary amount of the proposed penalty caused North County to contest the penalty, incur substantial legal fees, and proceed to hearing. The Secretary adhered to this position for years and it composed both "the position taken by the Secretary in the adversary adjudication" and "the action or failure to act by the Secretary upon which the adversary adjudication is based." 29 C.F.R 2704.105(a).

The Secretary consistently maintained that the proposed penalty of $35,500 was appropriate from the onset of the litigation until more than two months after the close of the hearing. The Secretary's actions led North County to incur substantial legal fees. The aim of EAJA is to deter the government from forcing small entities to incur legal fees when the government's position is unjustified; here, allowing the government to change its entrenched position to avoid an EAJA claim defeats the purpose of EAJA. The government stood by its position through the adversary adjudication and North County had already incurred attorney fees, regardless of the post-hearing amendment that the Secretary made. The adjudication was based upon the Secretary's prehearing and litigation position that included a proposed penalty of $35,500 and that is the position that is pertinent to this EAJA award.[6]

The Secretary argues that had North County filed its Motion to Strike earlier, the parties could have resolved the case without a Motion for Summary Decision or hearing; I disagree. North County raised this issue in its answer to the Secretary's penalty petition. Moreover, North County filed a Motion for Summary Decision on June 30, 2012 that, among other issues, argued

[6] I reject the Secretary's argument that the decrease in penalty was a voluntary change and not the product of judicial action. I assessed the penalty de novo and my assessment of a $3,500 penalty was not influenced by the fact that the Secretary amended the penalty after the hearing.

that MSHA's special assessment did not consider the six penalty criteria in the Mine Act and the Secretary's penalty regulations and that the Secretary "provided absolutely no information as to how the $35,500 penalty was determined." (R.'s Motion for Summary Decision at 11-14).[7] Thus, North County presented the core argument included in its Motion to Strike to the Secretary well before the hearing, but the Secretary did not change his position and, in all likelihood, did not review the legitimacy of the special assessment at that time. The Secretary only reduced his proposed penalty, changing his position and settlement offer, after participating in the hearing and appointing new counsel as his representative. Ms. Mucklow, the Secretary's counsel until July 2013, apparently showed no interest in reviewing the basis for the special assessment or in otherwise settling the case.

North County's Prevailing Party Status

I find that North County is a prevailing party under 29 C.F.R 2704.105(a) because in the underlying proceedings, (1) I ordered a change in the relationship of the parties (2) in favor of North County which (3) provided judicial relief to North County. In my September 26, 2013, decision, I ordered a final disposition of Citation No. 7980681, which modified the citation and removed the Secretary's ability to further change the penalty or designations of the citation. The modifications all favored North County: I lowered the negligence designation from reckless disregard to high, found that the cited condition was reasonably likely and not highly likely to lead to an injury, and that the likely injury would not be fatal.[8] Most important to this proceeding is the significant reduction of penalty that North County received. North County declared that its main objective at hearing was to achieve a reduction in the proposed penalty and tailored its arguments and presentation of evidence to achieve that goal. North County achieved its primary goal of a penalty reduction and is therefore a prevailing party, even though I found that they owe more than zero dollars.[9] My conclusion that a penalty of $3,500 was appropriate for the violation was not based on the Secretary's motion to amend the penalty.

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[7] By order dated April 12, 2012, I denied the motion because material facts were in dispute as to the merits of the citation.

[8] I reject the Secretary's argument that he was victorious based upon the affirmation of the unwarrantable failure and S&S designations of Citation No. 7980681. Every modification made to the citation was adverse to the Secretary's position. Any success achieved by the Secretary would affect the extent of North County's victory, which subsequently would diminish the fees awarded to North County. *Hensley v. Eckerhart*, 461 U.S. 424, 432 (1983).

[9] North County argues that if it is not a prevailing party it is entitled to relief under section 2704.105(b). The Secretary made a demand that substantially exceeded my decision and was unreasonable, but I find that North County is not eligible for relief under section 2704.105(b). A party that does not prevail may be entitled to attorney's fees under EAJA if "the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision[.]" 29 C.F.R 2704.105(b). Section 2704.105(b) does not apply to prevailing parties because prevailing parties "could argue that they meet the requirements of the 'excessive demand' prong of section 504(a)(4) in nearly every instance, rendering it essentially meaningless (although the Secretary's demand must also be determined to be 'unreasonable')." *Colorado Lava, Inc.*, 27 FMSHRC at 189.

The decision provided judicial relief and changed the legal relationship of the parties by modifying the citation and lowering the penalty owed by North County. The legal relationship between the parties changed, North County prevailed in some of its claims and was awarded relief by the court; North County is therefore a prevailing party for the purposes of this EAJA proceeding.

Substantial Justification

The Secretary did not fulfill his burden to substantially justify his position on the law and facts; he did not adhere to the requirements of 30 C.F.R. 100 and provided no convincing evidence that he was justified to initially propose and then litigate a $35,500 penalty. Once an applicant shows that it was a prevailing party, the Secretary bears the burden to justify his position "to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. at 564-66. Although the Secretary substantially justified his positions concerning his negligence and gravity designations that I modified following the hearing,[10] he did not justify the amount of his proposed penalty. The Secretary's Objection to Application for Award of Attorney's Fees and Expenses ignores the criteria required by 30 C.F.R. 100.3(a) and 30 C.F.R. 100.5(b)[11] and argues that the Secretary's procedures, which were either inapplicable or not followed, justified his position; the Secretary did not satisfy a reasonable person that his position was justified.

The Secretary did not provide evidence to show that he proposed the penalty after considering all the factors that the Mine Act requires, as set forth in 30 C.F.R. 100.3(a) and 30 C.F.R. 100.5(b). The Secretary did not address the penalty factors or explain why a penalty of $35,500 was appropriate under the Mine Act. The Mine Act mandates that Secretary formulate penalties based upon the six criteria in section 100.3(a). To justify the specific penalty amount in an EAJA case, therefore, the Secretary must show how he applied the penalty criteria to the facts of the case or at least address why the amount was reasonable.

In the underlying case, furthermore, the penalty was the focus of the dispute and the Secretary should have supported that penalty by demonstrating its consideration of all the factors required by the Mine Act. The Secretary had numerous opportunities to provide that information and justify his penalty, but he failed to do so. North County challenged the validity of the specially assessed penalty in its answer to the Secretary's penalty petition and in its motion for summary decision. In his opening statement at the hearing, counsel for North County asserted that his primary goal at hearing was the reduction of the penalty. The basic facts of the violation, which were easy to discern from photographs, were the only proof presented by Mucklow at the underlying hearing. These facts allowed me to uphold the violation as well as the Secretary's

[10] Although I did not uphold all the designations proposed by the Secretary, they were not unreasonable for the purposes of this EAJA proceeding. The reasonableness standard of the EAJA is a distinct legal standard. The judicial decision in the proceeding underlying the EAJA claim can be relevant, but is not determinative. *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000) (citing *F.J. Vollmer Co., Inc. v. Magaw,* 102 F.3d 591, 595 (D.C. Cir. 1996)).

[11] Section 100.5(b) mandates that "[w]hen MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form." 30 C.F.R. 100.5(b).

S&S and unwarrantable failure designations, but they do not justify the large proposed penalty, especially considering the mine's small size, the company's sparse history of previous violations, and its demonstrated good faith. I determined that North County was a small operator with only two employees at the Roadrunner 32 Mine at the time the citation was issued. 35 FMSHRC at 3223. The mine had a history of three violations, none of which were S&S. (*Id.*; Ex. G-19 in WEST 2010-365-M). The mine operated on an intermittent basis. North County employed between 20 and 25 people at other facilities but most worked in operations that were not subject to the Mine Act. (Tr. 130-31 in WEST 2010-365-M).

When North County filed its Motion to Strike, the Secretary did not oppose the motion by supporting the validity of its special assessment by addressing the six penalty criteria; the Secretary chose instead to avoid doing so and removed the special assessment. In its motion to amend the penalty, the Secretary stated: "After reviewing the arguments presented in Respondent's motion and revisiting the evidence of the circumstances surrounding the citation at issue, the Secretary has determined that the conditions surrounding the violation at issue do not warrant a special assessment." (Motion at 2). At no point in the underlying proceedings did the Secretary show how the penalty amount was formulated, how it related to the penalty factors in section 100.3(a), or show that he even considered all the factors. The Secretary's Petition for Assessment of Penalty, as filed with the Commission, did not include Narrative Findings for a Special Assessment or any other documents setting forth the basis for the proposed penalty.

I reject the Secretary's argument that his $35,500 proposed penalty was justified because he abided by his "own policies." (Sec'y Br. at 12). The Secretary states that he decided to lower his proposed penalty "based on procedural gaps within the specific assessment process[.]" (Sec'y Br. at 6, 13-14). These "procedural gaps" could have and should have been discovered by the Secretary long before the citation was adjudicated at a hearing. When North County challenged the special assessment in its motion for summary decision, the Secretary should have conducted a review of his special assessment of the citation. His failure to do so is not a defense to North County's EAJA claim.

The Secretary's assertion that his position is justified because MSHA specially assesses all violations of its "Rules to Live By" actually undermines his position. As North County points out, MSHA's "Rules to Live By" policy referenced by the Secretary did not exist when the penalty was proposed, which shows that the Secretary could not possibly have abided by it when assessing this penalty.[12] The Secretary cannot revise the past to make the position he took in the past appear justified.

The timing of the Secretary's amendment of its penalty, moreover, is suspicious. North County disputed the specially assessed penalty throughout the proceedings, including in its answer to the penalty petition filed February 18, 2010 and in its Motion for Summary Decision filed on January 30, 2012. The Secretary maintained that his initial penalty proposal was appropriate and only reconsidered the penalty after North County filed its Motion to Strike and the Secretary substituted counsel.

[12] The Rules to Live By policy was enacted in March 2010, but the Secretary filed his Petition for Penalty on January 15, 2010.

Once an operator shows that it is a prevailing party, the Secretary bears the burden to show that his position was substantially justified. I find that the Secretary failed to fulfill this burden. The Secretary's justification of his position in this case could satisfy no reasonable person.[13] The arguments that there were procedural gaps within the assessment process at issue and that the Secretary did not review the penalty procedures until after North County filed its Motion to Strike actually support that it was unreasonable for the Secretary to pursue such a high penalty against a small operator; he did not follow his own procedures and did not bother to review the procedures that the disputed penalty was based upon, but adhered to the penalty throughout the adjudication. The Mine Act requires the Secretary to base his proposed penalty upon the six penalty criteria and therefore he is required to present his consideration of those factors to the court. This failure, in addition the arguments that the Secretary did present, make it clear that the Secretary did not fulfill his burden to justify his position. North County is entitled to an EAJA fee award under 29 C.F.R 2704.105(a).

IV. ORDER

It is **ORDERED** that North County's EAJA application for attorney's fees and expenses is **GRANTED**. The parties are **FURTHER ORDERED TO CONFER** before **May 21, 2014**, in an attempt to reach agreement upon the specific reimbursement to be awarded. An agreement as to the amount of reimbursement to be awarded will not preclude either party from appealing this decision upon entry of my final order. If an agreement is reached, a Joint Stipulation on Reimbursement shall be submitted to me on or before **June 4, 2014**. The relief may be a lump sum payment.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions upon the disputed issues, with any necessary supporting arguments, case citations, and citations to the record, on or before **June 18, 2014**. Each party shall submit specific proposed dollar amounts with explanations for the amount chosen.

I retain jurisdiction over this case until I issue a specific award to North County. Consequently, this decision will not become a final appealable decision until I issue an order containing a monetary award.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

[13] North County argues that the Secretary's special assessment procedure is inherently unreasonable. In this instance I find that the application and litigation of that procedure was unreasonable, but it is unnecessary for me to rule upon the procedure in general and therefore I decline to do so. I limit my findings to the specific facts and circumstances presented by this case.

Distribution:

Timothy J. Turner, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5708 (Certified Mail)

C. Gregory Ruffennach, Esq., 1629 K Street, N.W. STE 300, Washington DC 20006-1621 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 13, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2008-1059 A.C. No. 15-12428-149534
v.	: :	
SEQUOIA ENERGY, LLC, Respondent	: :	Mine: Prep Plant

REMAND DECISION

Before: Judge Feldman

The Commission, in a decision with a majority and concurring opinion, has vacated the $8,300.00 total civil penalty assessed for the four citations adjudicated in this proceeding, and remanded this matter for reconsideration of the appropriate civil penalties. 36 FMSHRC __ slip op. (April 2014), *remanding* 32 FMSHRC 1361 (Sept. 2010) (ALJ). The four citations were issued at Sequoia Energy's ("Sequoia's") coal preparation plant located in Harlan, Kentucky. At the prep plant, rock material separated from coal is loaded into haul trucks from refuse bins. The refuse trucks then transport the rocks from the refuse bins to a refuse pile that is situated approximately one quarter of a mile from the preparation plant. 32 FMSHRC at 1362.

The Commission majority has directed that I revisit the appropriate civil penalties consistent with its decision. The Commission majority remanded this matter because it concluded that:

(1) I erred in assessing the penalties because I reduced the proposed penalties "based upon [my] consideration of prior penalties that were proposed pursuant to a different penalty regulation [in 30 C.F.R. Part 100];"[1] and

(2) the initial decision failed "to reconcile seemingly unsupported or inconsistent findings with respect to the four penalties."

Slip op. at 1.

[1] Specifically, the majority notes that the initial decision made reference to prior proposed penalties assessed under the Secretary's outdated penalty formula, rather than the revised formula contained in the March 2007 amendment of Part 100 of the Secretary's penalty regulations. 72 Fed. Reg. 13592 (Mar. 22, 2007).

The joint concurring opinion of two Commissioners did not assume that I had considered the amount of the Secretary's prior proposed penalties in my penalty assessment. Rather, the concurring opinion would have remanded for "clarification of the reason [the Judge] referred to prior [proposed penalties] and the use, if any, he made of them." Slip op. at 16 (Commissioners Young and Althen, concurring). In addition, the concurring Commissioners noted that they would have provided an opportunity "to explain whether [the Judge] was aware of and/or took into account the change in penalty regulations in referring to the prior penalties." *Id.* at n.10.

The genesis of this remand is the "principal argument advanced by the Secretary – that the Judge 'abused his discretion by considering a factor outside those listed in Section 110(i), [30 U.S.C. § 820(i),] i.e., the amounts of previous penalties.'" Slip op. at 11 (concurring), *citing* PDR at 11.[2] The Secretary's assertion is predicated on a parenthetical paragraph contained at the end of the initial decision, which states:

> I note parenthetically, that the previous penalties proposed by the Secretary for violations concerning Sequoia's failure to correct defects on mobile equipment ranged from $60.00 to $400.00 compared to the $3,996.00 to $5,503.00 range currently proposed by the Secretary for the four adjudicated citations. I recognize the Secretary's concern that Sequoia needs to display greater efforts to maintain its heavy duty refuse trucks regardless of their operation under adverse conditions. The imposition of civil penalties from $1,200.00 to $3,500.00 in this case, that are significantly greater than previous assessments imposed by the Secretary for similar violations, adequately address the Secretary's concern.

13 FMSHRC at 1372.

[2] Section 110(i) states:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. § 820(i).

I. Relevance of 30 C.F.R. Part 100

The Commission routinely remands matters involving civil penalty amounts for analysis of whether the civil penalty criteria in Section 110(i) were properly applied. However, in this case, the Commission has concluded that I impermissibly considered the Secretary's prior proposed penalty amounts in my civil penalty analysis.

Of course, as directed by the Commission, I will revisit the issue of the appropriate civil penalties by reconciling unsupported or inconsistent findings, and address their impact with respect to application of the traditional Section 110(i) framework.[3] However, it is difficult to discern whether the Commission majority found error because it believed I considered the old, rather than the new, civil penalty regulations promulgated by the Secretary, or, because it concluded that I should not have considered the Secretary's Part 100 criteria at all. In any event, as discussed below, I hope it is clear that I am incapable of correcting a perceived error in my analysis that has not occurred.

The Judge is the most reliable source for identifying the scope of the civil penalty analysis considered in his decision. Slip op. at 11, 16 (concurring). The Commission's well-established framework for assessing civil penalties, upon which I solely relied, is set forth in the initial decision and need not be repeated. 32 FMSHRC at 1364-65. In this regard, the initial decision explicitly and repeatedly considered Section 110(i) criteria in determining the appropriate penalties. 32 FMSHRC at 1364-65, 1367, 1369, 1371, 1372.

My reference to prior penalty amounts in the initial decision was solely intended to illustrate that I was not trivializing the four violations in issue.[4] Significantly, the parenthetical paragraph appears at the end of the initial decision, after the civil penalties had already been assessed pursuant to Section 110(i).

While the penalties proposed by the Secretary in contested cases before an ALJ are always a focus, and the basis for any significant reduction in proposed penalties must be articulated, I have never, in more than two decades with the Commission, considered the history of the Secretary's proposed penalty amounts in my assessment analysis. *See* Slip op. at 9, *citing Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000) (holding that substantial deviations from the Secretary's proposed assessments must be adequately explained). It is significant that the Secretary also asserts that "an ALJ may not rely on such amounts [past penalties] to arrive at penalties for new violations." Slip op. at 13 (concurring), *citing* PDR at 11, *citing Jim Walter*

[3] Although the deterrent purposes of the Mine Act are inherent in the Section 110(i) criterion concerning the appropriateness of the amount of the civil penalty compared to the size of the mine operator, the Commission did not explicitly articulate that deterrence was an appropriate consideration until *Black Beauty Coal Company*, 34 FMSHRC 1856 (Aug. 2012). As the Commission's decision in *Black Beauty* was issued after the penalties were initially assessed in this matter, I will not consider the effect of *Black Beauty*, if any, in my reassessment of the appropriate civil penalties.

[4] In its remand, the Commission majority also used comparisons of penalty amounts for illustrative purposes. Slip op. at 6, n.7.

Resources, Inc., 28 FMSHRC 579 (Aug. 2006) (holding that although past penalties may be noted, they are not a determinative factor as they are outside the scope of Section 110(i)).

Moreover, the importance of insulating the Commission's exercise of its delegated authority to assess civil penalties independent from the Secretary's penalty proposals is consistent with both longstanding legislative history and caselaw. In this regard, the Conference Report for the Act states:

> The conference substitute provides for an independent Federal Mine Safety and Health Review Commission. This Commission is assigned all administrative review responsibilities and is also authorized to assess civil penalties. The objective in establishing this Commission is to separate the administrative review functions from the enforcement functions, which are retained as functions of the Secretary. *This separation is important in providing administrative adjudication which preserves dues process and instills confidence in the program*.

S. Conf. Rep. No. 95-461, at 58 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1360 (1978) (emphasis added).

The Court affirmed the Commission's firm belief in its independent role in assessing civil penalties in *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1152 (7th Cir. 1984) (holding that neither the Mine Act nor the Commission's regulations require Commission Judges to apply the Part 100 point system in assessing penalties). Thus, although relevant as a point of reference, Commission Judges are not beholden to the penalties proposed by the Secretary. In fact, it is not uncommon for Commission Judges to assess penalties greater than those proposed by the Secretary. *See, e.g.*, *Spartan Mining Company, Inc.*, 29 FMSHRC 465 (June 2007) (ALJ), *aff'd* 30 FMSHRC 699 (Aug. 2008); *F.R. Carroll, Inc.*, 26 FMSHRC 97 (Feb. 2004) (ALJ).

Although I did not distinguish between the Secretary's former and current Part 100 penalty regulations, implicit in my assessment of penalties higher than those previously proposed by the Secretary was a recognition of the increased penalties sought by the Secretary under his revised guidelines.[5] I agree with the Secretary that the history of proposed penalty amounts is a "factor outside" the Section 110(i) penalty criteria. Slip op. at 11 (concurring), *citing* PDR at 11. As such, since it is not a proper consideration in determining the appropriate penalty to be assessed, whether I referenced the old or new Part 100 regulations is immaterial.

Rather, my goal was merely to ensure that the penalty reduction in the initial decision was viewed in the proper perspective. Having excluded consideration of the Secretary's previous penalty amounts from my initial penalty calculation, resolution of the question of

[5] I have issued numerous penalty decisions concerning penalties proposed under the Secretary's March 2007 revised enhanced Part 100 penalty criteria. *See*, *e.g.*, *McCoy Elkhorn Coal Corp*., 33 FMSHRC 2403, 2420, 2421-22 (Oct. 2011) (ALJ) (imposing the proposed penalty for one citation, and raising the proposed penalty for another); *Knox Creek Coal Corp.*, 31 FMSHRC 1422, 1434 (Dec. 2009) (ALJ) (assessing the Secretary's proposed penalties for two citations).

whether Administrative Law Judges may now use prior proposed penalty amounts in assessing penalties, despite longstanding caselaw to the contrary, goes beyond the scope of this proceeding.

Finally, in a further effort to place the challenged parenthetical paragraph in perspective, it is helpful to view the May 4, 2010, hearing in context. The hearing was conducted in the midst of an unprecedented backlog of pending Mine Act cases. The approximate pending Commission caseload was 1,300 in September 2004; 1,600 in September 2005; 2,800 in September 2006; and 4,000 in September 2007. In contrast, at the time of the January 2010 hearing, the Commission's caseload had increased nearly fourfold to approximately 15,700.

At the end of the hearing, in an effort to preserve limited government resources by encouraging a settlement, I informed the parties that my initial inclination was to affirm the fact of the violations and their significant and substantial ("S&S") designations, and to impose a total civil penalty of $8,300.00 for the four citations in issue. As noted previously, my reference at the hearing to the Secretary's history of lower proposed penalties provided context, in that the comparatively higher penalties I was suggesting were consistent with the Secretary's revised policy of seeking enhanced penalties.[6] Alternatively, the parties were afforded the opportunity to file briefs if they wished to dissuade me of my tentative decision. Ultimately, the Secretary elected to have the parties file briefs rather than settle this matter. Suffice it to say, my efforts to seek an expeditious and efficient resolution of this case have been manifestly unsuccessful. However, I note, parenthetically, that I have no regrets.

II. Traditional Section 110(i) Penalty Analysis

The initial decision noted statutory penalty criteria that were essentially not in dispute. The initial decision stated:

> It has neither been contended nor shown that imposition of the civil penalties proposed in this case will adversely affect Sequoia's ability to continue in business, or, that the penalties proposed are disproportionate to the size of Sequoia's business. The cited conditions were abated in a good faith and timely manner. The Secretary has not specifically asserted that Sequoia's history of violations is an aggravating factor.

32 FMSHRC at 1365. My initial decision was based on my evaluation of the evidence and the credibility of the witnesses. In its remand, the Commission has directed that I reconcile seemingly unsupported or inconsistent findings with respect to negligence and gravity that impact the appropriate civil penalty to be assessed for each of the four citations.

As a general matter, to the best of my recollection, I did not find the inspector's testimony with respect to Sequoia's awareness of the cited violative conditions entirely

[6] The concurring opinion recognized I was unlikely to have considered the Secretary's previous penalty criteria, as my assessed penalties were as much as five and a half times greater than those that would have been proposed under such criteria. Slip op. at 12, n.2 (concurring).

convincing. The initial decision made several references to the fact that the inspector's testimony was not supported by his contemporaneous notes. In this regard, the initial decision noted:

> Although [the inspector] reviewed the pre-shift examination reports for these three trucks, [he] did not make copies of the pre-shift reports and he did "[not] recall exactly what [they] said." (Tr. 104). [The inspector] did not take photographs of any of the cited conditions and he did not record any information from the pre-shift reports in his contemporaneous notes. (Tr. 107; Gov. Ex. 2). The pre-shift examination reports are not in evidence.

32 FMSHRC at 1363.

It is significant that the only relevant reference to a pre-shift examination in the inspector's notes concerns the inoperable backup alarm. (Gov. Ex. 2 at 32). The inspector's notes also reflect that two uncontested violative conditions that are not at issue in this matter were also noted in pre-shift examinations. (Gov. Ex. 2 at 16A, 29). In stark contrast, there is no contemporaneous documentation in either the inspector's notes, or the body of the citations, to support the inspector's testimony that the conditions cited in the three remaining contested citations were noted on pre-shift examinations. (Gov. Ex. 2 at 14-16, 19-27; Gov. Exs. 4, 5, 7, 8, 10). Consequently, I can give little weight to the inspector's testimony that all of the cited defects were noted in pre-shift examinations, yet went unaddressed. A further reevaluation of the issues of negligence and gravity for each of the citations follows.

A. Citation No. 7496260: Exhaust pipe and headlights[7]

The initial decision affirmed the alleged violation and S&S designation for Citation No. 7496260, which alleged a violation of the mandatory standard in 30 C.F.R. § 77.404(a). This standard requires mobile equipment to be maintained in safe operating condition, and that equipment in unsafe condition must be removed from service immediately.

Citation No. 7496260 was issued after the MSHA inspector observed a defect on the Volvo A40D No. T9 refuse truck's vertical exhaust pipe. The exhaust pipe was located behind the platform used to access the operator's compartment. The pipe was connected to a muffler with a clamp located at the approximate height of the operator's seat in the cab of the truck. The MSHA inspector noted that the muffler clamp was loose, which permitted exhaust fumes to escape. The citation also included an inoperable headlight on the right (passenger) side that was due to a short in the harness in which the headlight was mounted. 32 FMSHRC at 1365-66.

The Secretary proposed a civil penalty of $4,689.00 for Citation No. 7496260. However, although the initial decision affirmed the fact of the violation, the S&S designation, and the

[7] The defective exhaust pipe was initially the sole subject of Citation No. 7496260. This citation was subsequently modified to include defective front lights. The defective lights were initially the subject of Citation No. 7496257, which has been vacated. (Gov. Exs. 4, 5).

Secretary's attribution of moderate negligence, the proposed penalty was reduced to $1,400.00 based on mitigating circumstances.

As noted by the Commission, de novo assessments of civil penalties by Commission Judges are accorded broad discretion. Slip op. at 4, *citing Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In this regard, a Judge is not required to impose the civil penalty proposed by the Secretary, even though the Judge has affirmed all elements of the subject citation. Rather, a Judge's civil penalty assessment must be supported by an articulation of the facts considered, with reference to the applicable penalty criteria in Section 110(i) of the Act. The de novo assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." 32 FMSHRC at 1364, *citing Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). In other words, an ALJ may give greater weight to facts related to a particular penalty criterion than the Secretary has chosen to give in his proposed penalty analysis.

Here, the focus is on whether there are circumstances that mitigate Sequoia's negligence. As noted in the initial decision, the condition of the exhaust pipe was not obvious, in that it could only be heard when the engine was started. 32 FMSHRC at 1366 (citing Tr. 146). Consequently, the defective exhaust was less noticeable from inside the operator's compartment. Additionally, the loose muffler clamp was not visible because it was located between the cab and the truck bed. *Id.* at 1365 (citing Tr. 143).

The inspector relied on a layer of soot on the side of the frame of the truck bed as an indication of a compromised exhaust system. *Id.* (citing Tr. 57). I do not view soot on a truck that is routinely operated in the muddy and dusty conditions in a coal preparation plant as an obvious byproduct of a loose muffler clamp. It is true that Sequoia's mechanic conceded that the exhaust leak caused soot to accumulate on the frame of the truck. *Id.* at 1366 (citing Tr. 145-46). However, the evidence is inadequate to reflect that the mechanic was aware of the soot caused by the loose muffler clamp prior to the issuance of the citation. Nor do I accept the Secretary's contention that the smell of fumes in the vicinity of an exhaust pipe is a clear sign that repair is required. (Tr. 118).

The inspector related that the truck operator complained to him about exposure to carbon monoxide when the truck was idling. 32 FMSHRC at 1365 (citing Tr. 54). However, this conversation was not documented in the inspector's contemporaneous notes. *Id.* I can give l ittle weight to the inspector's undocumented recollection of a conversation that occurred approximately two years prior to the hearing in this matter. Similarly, as discussed above, the inspector's testimony that the defective exhaust pipe had been noted in pre-operation

checklists is not reflected in the inspector's notes or the body of the citation. *See* pg. 6, *supra*. Moreover, it is surprising that the Secretary would only attribute the cited condition to a moderate degree of negligence if the defective exhaust was repeatedly noted, and/or complained about, yet remained unaddressed. While I have concluded that Sequoia's negligence remains in the moderate range, the Secretary has not satisfied his burden of demonstrating that the exhaust defect was obvious due to soot, was noted in pre-shift examinations, and that any alleged complaint was communicated to mine management.

With respect to the negligence attributable to the inoperable headlight, the inspector did not recall whether additional upper lights were installed on the refuse truck. *Id.* at 1365 (citing Tr. 61-62). Thus, the Secretary did not refute Sequoia's assertion that all of its refuse trucks were equipped with supplemental upper lights. Upon viewing a photograph of Sequoia's refuse truck at the hearing, the inspector conceded the upper lights depicted in the photograph were more powerful than headlights, stating that "they just light up the . . . [kind of] the whole area in front of you." *Id.* (citing Tr. 106; Resp. Exs. 4-6).

Moreover, the initial decision noted:

> There are lighting systems at the refuse bins and refuse pile sites. The refuse bins are illuminated with 250 watt while halogen bulbs that are located on each of the four corners of the refuse bins. The halogen bulbs are aimed toward the ground where the truck beds are positioned for loading from the bins located above. (Tr. 139-40). The refuse pile is illuminated by two sources of light each energized by two diesel-powered generators. Each light source consists of four halogen lights. One light source illuminates the refuse pile at the top of the hill. The other light source shines down from the top of the hollow to illuminate the access road to and from the refuse pile. (Tr. 140-41).

32 FMSHRC at 1362.

While I am not suggesting that an inoperable headlight does not constitute a violation, the evidence reflects there were three operable lights – two upper and one lower – and that the refuse bins and piles where the haul trucks operated within the preparation plant were extremely well lit. I view the evidence with respect to the issue of adequate lighting, as well as the absence of any documentation supporting relevant pre-shift examination notations, to be significant mitigating factors. Putting aside the supplemental lights installed on the refuse truck, while it is true that the truck could be used for other purposes, the truck was routinely operated between the refuse bins and the refuse piles, a distance of only several hundred yards to approximately one quarter of a mile. (Tr. 37-38).

In the final analysis, the term "moderate negligence" is not intended to be precise. While I have affirmed the Secretary's attribution of moderate negligence, I believe the mitigating factors discussed herein warrant the conclusion the Sequoia's culpability was not as high as the Secretary has alleged. However, in revisiting this issue, in recognition of the serious gravity created by the potential exposure to carbon monoxide fumes, and the impact of the failure to maintain both headlights in operable condition on the degree of negligence, I shall increase the initial $1,400.00 assessment that was vacated by the Commission to $1,900.00.[8]

B. Citation No. 7496262: Mirrors and headlights[9]

The initial decision affirmed the alleged violation and S&S designation for Citation No. 7496262, which also alleges a violation of the mandatory standard in 30 C.F.R. § 77.404(a). The citation was issued for a cracked upper left (driver's side) side view mirror, a missing left lower front side mounted mirror, and a non-functioning right headlight, on the Volvo A40D No. T7 refuse truck.

A refuse truck is normally equipped with two pairs of side view mirrors. The upper pair of mirrors are traditional side view mirrors that enable a truck operator to view the areas alongside of the truck. These side view mirrors are four inches wide and six inches long, and are capable of lateral adjustment. (Tr. 188). The refuse truck is also normally equipped on each side with bottom mirrors that are adjusted downward to enable the operator to view the rear wheels of the truck. (Tr. 189). These bottom mirrors serve two purposes. As a source of hazard prevention, they are used by the truck operator to avoid breaching a berm when backing into an elevated area. (Tr. 185). Pragmatically, as primarily used in this case, the lower mirrors also enable the truck operator to properly position his truck by viewing the rear tires as they approach berms which act as a reference point. (Tr. 158-59, 191).

With respect to the missing left lower mirror, the inspector easily could have, but did not, credibly identify any areas within the preparation plant where the refuse trucks could be exposed to the hazard of breaching a berm and falling down an embankment while maneuvering in reverse. While the inspector did testify that there were berms on elevated roadways (Tr. 185), such berms are a safety precaution in the event a truck operator loses control while traversing the road. Lower side mirrors, which are used when maneuvering in reverse, are not intended to prevent a breach of such roadway berms. Rather, as discussed, lower mirrors are intended to assist the truck operator in utilizing berms that have been constructed to aid in properly positioning the truck.

[8] It is difficult to assess an appropriate civil penalty, with respect to the cumulative effect of negligence, when the subject citation deals with two unrelated violative conditions. For example, if the negligence attributable to one condition is greater than the other, should the overall negligence attributed be in the higher or lower range?

[9] As with Citation No. 7496260, Citation No. 7496262 initially only involved defective mirrors, but was subsequently modified to include defective lights. The defective lights were initially contained in Citation No. 7496261, which has been vacated. (Gov. Exs. 7, 8).

The testimony reflects that the general area around the refuse pile is relatively flat, having been crushed by the dozers. 32 FMSHRC at 1368 (citing Tr. 165). The inspector did not identify any elevated hazards in the area of the refuse pile, and Government Exhibit 13 clearly depicts a refuse area that is relatively level. In essence, the inspector's testimony reflects that the lower mirror is relied on by the truck operator to view the rear tires, enabling him to use a berm as a reference point to determine how close the bed of the truck is when backing up to dump material at the refuse pile. In this regard, the relevant testimony was:

> Q: [W]hy is this condition [c]ited in Citation [No. 749]6262 hazardous?
>
> A: The fact [of] the visibility backing up. When you - - when you're backing up this truck, if it was backing up to a berm and whatever, it was backing under the refuse bin, whatever, you need to be able to see the back - - the bottom back of his tires where they're located.
>
> Q: And why is that important?
>
> A: Well, you need to know where you're at and where you're located at, how close you are to the - - how close you are to the berm. *A berm is just used for a reference point.* You know, they help you stop your vehicle. You back up to it and then dump. You need to know where you're at.

(Tr. 158-59) (emphasis added). The inspector's testimony further unequivocally reflects that it was not uncommon for refuse trucks to back into previously dumped material, and that the "purpose for a berm at the end dumps" was to act as a "warning device" to prevent the truck from reversing into the material that had been previously dumped. (Tr. 191).

Thus, having concluded that the evidence fails to reflect any relevant elevated hazards at the refuse piles, we turn to a consideration of the refuse bins. The material dumped at the refuse sites is loaded onto the refuse trucks from two bins. The trucks are loaded from the first bin by driving the truck under the bin, and then directly through the bin area, without the need to use any mirrors. (Tr. 159-60, 192). The second bin requires the truck operator to maneuver the truck by backing the truck under the bin between two beams, primarily relying on the side view mirrors to avoid striking the beams. (Tr. 159-60, 192). In either case, the refuse truck is not on an elevated structure. In the final analysis, the evidence does not reflect that the missing lower mirror posed a hazard, at either the refuse pile or the bins, with respect to potentially breaching a berm constructed to prevent descent to the area below.

Turning to the cited upper left side mirror, it is significant that the inspector testified that the mirror was functional despite the cited crack. 32 FMSHRC at 1368 (citing Tr. 188, 207). Thus, the evidence does not reflect that the crack created a distortion that prevented the truck operator from using it for its intended purpose. The Commission has directed me to reconcile my initial reduction of the Secretary's proposed penalty with the initial decision's finding that a cracked side view mirror could contribute to an injury to individuals in the vicinity of the truck,

and that the missing lower mirror could contribute to a truck driving through a berm in an elevated area. Slip op. at 8. These findings were made to support the Secretary's designation of the violation as S&S. As such, the findings were made in the context of continued mining operations and the myriad of circumstances under which a truck may be operated. Such findings were not intended to elevate the level of Sequoia's culpability, as S&S and degree of negligence are independent elements of a civil penalty analysis that must be considered based on the totality of circumstances.

Finally, the remand directed that, in reconsidering the civil penalty assessment, I revisit the inspector's testimony that the cited refuse truck "traveled at night, on steep grades, up and down hills, and around other equipment and miners." Slip op. at 8. Although a defective headlight would ordinarily significantly interfere with operation of a truck on dark roads with steep grades, as previously discussed, the hazard is mitigated by the supplemental floodlights that apparently were installed on the subject refuse truck. *See* pg. 8, *supra.* In addition, while it is true that the refuse trucks could be operated anywhere within the prep plant, their primary purpose was to transport rock material to and from the well-lit areas of the refuse bins and refuse piles, which were located between approximately several hundred yards and one quarter of a mile from each other. (Tr. 37-38, 58, 139-41).

In retrospect, although I have concluded that the degree of negligence, while moderate, is lower than that alleged by the Secretary, in recognition of the fact that refuse trucks are multi-purpose vehicles that can be used in a variety of circumstances, I have concluded that there is a basis for assessing a civil penalty greater than the initial assessment. Consequently, I shall increase the initial $1,200.00 assessment that was vacated by the Commission to $1,800.00.[10]

C. Citation No. 7496263: Accumulation of oil on hood

The initial decision affirmed the fact of the violation and S&S designation for Citation No. 7496263 that concerned a violation of the mandatory safety standard in 30 C.F.R. § 77.1104, based on an accumulation of hydraulic fluid on the Volvo A40D No. T7 refuse truck. This safety standard prohibits the accumulation of combustible materials or flammable liquids that can create a fire hazard. The violation was attributed to a moderate degree of negligence, and a penalty of $5,503.00 was proposed by the Secretary.

The initial decision reduced the proposed penalty to $3,500.00, despite my conclusion that the evidence reflected at least a moderately high degree of negligence, rather than the moderate degree of negligence claimed by the Secretary. 32 FMSHRC at 1371. The condition was readily observable and, given its nature, apparently existed for several shifts. The increase in the degree of negligence was based on the degree of hazard posed by a leak in pressurized hydraulic oil that accentuated the unpredictability of its directional flow with respect to potential contact with extremely hot surfaces. *Id.* The degree of negligence was also raised because

[10] It is difficult to assess a penalty with respect to determining degree of negligence when the citation contains unrelated violative conditions. *See* n.9, *supra*.

I initially credited the inspector's testimony that the condition had been noted in the pre-shift examination records. *Id.* However, I now realize that this testimony is neither supported by the inspector's contemporaneous notes, nor his summary of the violation in the body of the citation. Consequently, despite its obviousness, the claimed prior identification of the condition in pre-shift examinations that would have surely alerted Sequoia maintenance personnel that repair was necessary cannot be considered as an additional aggravating factor.

In the final analysis, the obvious nature of the condition, as well as the fact that it apparently existed for several shifts, support the conclusion that Sequoia's negligence was moderately high. Absent any relevant pre-shift examination notations, the other aggravating factors are inadequate to warrant a penalty in the range the Secretary has proposed. In view of the increase in the degree of negligence over that alleged by the Secretary, the initial $3,500.00 assessed civil penalty that has been vacated by the Commission shall be reassessed at $4,200.00 for Citation No. 7496263.[11]

D. Citation No. 7496266: Inoperative backup alarm

Citation No. 7496266 alleges that a backup alarm on the Volvo A40D No. T10 refuse truck was not maintained in functional condition, in violation of the mandatory safety standard in 30 C.F.R. § 77.410(c). This safety standard requires warning devices to be maintained in functional condition. The cited condition was designated as S&S, and attributed to a high degree of negligence because the pre-shift examination reports reflected that the backup alarm was non-functional for several months. (Gov. Ex. 2 at 32). The Secretary proposed a civil penalty of $3,996.00 for Citation No. 7496266.

Sequoia stipulated to the fact of the violation at the hearing. 32 FMSHRC at 1371. Sequoia's service mechanic testified that the backup alarm was functional, but its sound was muted because it was covered with mud. *Id.* (citing Tr. 317-18). As mud was the underlying cause, Sequoia abated the citation by cleaning the mud that had accumulated around the alarm, and washing the alarm with water. *Id.* (citing Tr. 318-19). The mechanic testified that the periodic washing of the backup alarm to restore its functionality was not noted in the pre-shift notes because it was a recurring problem caused when the rear of the refuse truck came into contact with muddy refuse piles. *Id.* at 1372 (citing Tr. 319-20). The issuing inspector conceded it was not uncommon for refuse trucks to back into previously dumped material that was muddy, thereby preventing the backup horn from working. *Id.* (citing Tr. 307). Significantly, in abating the citation, the inspector did not note that any significant repairs were made, noting only that "the back up horn [was] now working on the on the Volvo A40D refuse truck, Co No. T10." (Sec'y Pet., Ex. A at 27).

[11] I do not view a reduction of the Secretary's proposed penalty of $5,503.00 to an assessed penalty of $4,200.00 as a substantial deviation that requires a more detailed explanation than provided in this decision. *See Cantera Green*, 22 FMSHRC at 620-21.

The truck mechanic testified that minimizing the deleterious effects of mud was ultimately accomplished by repositioning the backup alarm so that the sound was directed in a downward position. (Tr. 319). Specifically, the mechanic testified that:

> [A]fter we just cleaned it and got the backup alarms where they worked, at a later time, me and another mechanic went back as we got time and took each of the trucks . . . and we took - - instead of facing the horn outward, we faced it downward where the mud wouldn't shove into the horn part of the backup alarm.

(Tr. 319-20). To achieve this repositioning, the mechanic "made us a bracket and turned [the horn] upside down where the horn would still be loud, but it'd keep the mud from pushing up inside of it." (Tr. 322). Notably, multiple trucks were modified in this manner, and the repairs were made after the horn on the cited No. T10 truck had already been cleaned for abatement purposes. (Tr. 319, 323). This indicates that Sequoia made an effort beyond that minimally required to satisfy the inspector in order to correct the underlying problem.

The initial decision lowered the degree of negligence from high to moderate. While Sequoia is required to maintain the backup alarm in functional condition, the reduction in negligence was based on testimony that the refuse trucks were operated in adverse muddy conditions, and that periodic cleaning of the backup alarm had occurred. 32 FMSHRC at 1372. I viewed the efforts to achieve compliance, albeit unsuccessful because of periodic contact with the muddy refuse piles, to be a mitigating factor. *See Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (Jan. 1997) (holding that an operator's compliance efforts made prior to the issuance of a citation is a factor when assessing culpability). The Commission has concluded that the reduction in negligence is not a subject for further review, because it was not challenged by the Secretary. Slip op. at 9, n.11.

However, the Commission has directed that I may not consider the muddy conditions as a factor in recalculating the appropriate civil penalty. Slip op. at 9. In view of the Commission's directive, the initial penalty of $2,200.00 that has been vacated by the Commission shall be reassessed at $3,100.00 for Citation No. 7496266. In assessing this penalty, I have imposed a civil penalty less than that proposed by the Secretary, as I consider the construction of a bracket to effectuate the repositioning of the backup alarm as a demonstration of good faith to achieve compliance after notification of the violation, a civil penalty criterion contained in Section 110(i).

ORDER

Consistent with this Decision, **IT IS ORDERED** that Sequoia Energy, LLC, shall pay a total civil penalty of $11,000.00 in satisfaction of Citation Nos. 7496260, 7496262, 7496263 and 7496266.

IT IS FURTHER ORDERED that the parties' motions to approve partial settlement **ARE GRANTED**. Consistent with the parties' settlement terms, **IT IS ORDERED** that Sequoia Energy, LLC, shall pay a total civil penalty of $3,343.00 in satisfaction of the remaining citations that are at issue in this proceeding.

Accordingly, **IT IS ORDERED** that Sequoia Energy, LLC, pay, within 30 days of the date of this decision, a total civil penalty of $14,343.00 in satisfaction of the eleven citations that are the subject of this proceeding.

IT IS FURTHER ORDERED that, upon receipt of timely payment, the civil penalty proceeding in Docket No. KENT 2008-1059 **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution:

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2220, Arlington, VA 22209-2296

Edward Waldman, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2220, Arlington, VA 22209-2296

Melanie Garris, Office of Civil Penalty Compliance, MSHA, U.S. Department of Labor, 1100 Wilson Blvd., 25th Floor, Arlington, VA 22209-3939

Jim F. Bowman, P.O. Box 99, Midway, WV 25878

/tmw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 13, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LUCERO ZAMBONINO, Applicants	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2014-196 DM MSHA Case No. SE-MD-14-05 TR
v.	:	Mine: Williams Farms Sand & Shell, Inc. Mine ID: 08-01331
COLONIAL MINING MATERIALS, LLC, and INFINITY MINING MATERIALS, LLC, Respondents	:	

AMENDED DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Tara E. Stearns, Esq., Office of the Solicitor, Washington, DC and Channah S. Broyde, Esq., Office of the Solicitor, Atlanta, GA for Petitioner

Mark N. Savit, Esq., and Ross J. Watzman, Esq., Jackson Lewis P.C., Denver, Colorado for Respondents

Before:Judge McCarthy

I. Statement of the Case

This case is before me upon the Secretary of Labor's Amended Application for Temporary Reinstatement filed on behalf of Complainant, Lucero Zambonino, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against Colonial Mining Materials, LLC ("CMM"), and its putative successor-in-

interest, Infinity Mining Materials, LLC ("IMM").[1] The Secretary seeks an Order holding Respondents jointly and severally liable to reinstate Zambonino to her ticketing agent (scale clerk) position held immediately prior to her December 20, 2013 alleged termination, or to a similar or substantially position at the same rate of pay, benefits, and hours, with the same or equivalent duties. Amended Appl. at 4; *see also* Tr. 45.

II. Jurisdiction

Respondents stipulated to jurisdiction in this matter. Tr. 9-10. Jurisdiction exists because Respondents, Colonial Mining Materials, LLC and Infinity Mining Materials, LLC are or were the operators of the Williams Farms Sand and Shell, Inc., (the "Mine") a mine within the meaning of section 3(d) of the Mine Act, 30 U.S.C. § 803, and the products of the subject mine entered the stream of commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Act, 30 U.S.C. § 804. Respondents are covered by the Mine Act because the Mine's activities affect interstate pricing and demand. *See D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460, 464 (2d Cir. 2004); *United States v. Lake*, 985 F.2d 265, 269 (6th Cir. 1993). In addition, CMM and IMM are "person[s]" within the meaning of sections 3(f) and 105(c) of the Mine Act, 30 U.S.C. §§ 803(f) and 815(c).

III. The Application's Procedural History

On March 14, 2014, the Secretary filed an Application for Temporary Reinstatement against Respondent CMM and served a copy of the Application on CMM by first class mail. On March 18, 2014, IMM registered with MSHA as the operator of the Williams Mine. (R. Prehearing Report, 12; Sec'y Mot. to Amend, Ex. B). On March 24, 2014, CMM filed a request for a hearing.

On April 1, 2014, the undersigned convened a conference call with the parties. The parties requested that an expedited hearing be postponed to allow them time to work out stipulated facts on the successorship issue and submit cross motions on summary decision. Although expressing skepticism that the parties would arrive at agreement, the undersigned allowed them to try. On April 3, 2014, the parties executed an agreement to waive the hearing and provide the undersigned with stipulated facts by April 11, 2014, and cross motions for summary decision by April 18, 2014.

[1] At the outset of the hearing, after review of the Secretary's Motion to Amend Application for Temporary Reinstatement and Authorities in Support Thereof, Respondent's Opposition and Authorities in Support Thereof, and after hearing oral argument on the issue, I granted the Secretary's Motion to Amend Application for Temporary Reinstatement because the Secretary timely filed the Amended Application before the commencement of the hearing and Respondents have failed to demonstrate prejudice and have had ample opportunity to research the successorship issue, file an Opposition, and make oral argument. Tr. 36.

As deadlines approached, the parties informed the undersigned that they could not agree on stipulated facts and that a hearing would be necessary. Accordingly, during a conference call with the parties on April 24, 2014, the undersigned set an expedited hearing date for April 30, 2014 in Fort Myers, Florida. During that call, the Secretary advised that she would be filing a Motion to Amend Application for Temporary Reinstatement.

On April 25, 2014, the Secretary filed a Motion to Amend Application for Temporary Reinstatement and Authorities in Support Thereof to add IMM as a Respondent successor. On April 29, 2014, Respondents' Opposition was filed.

An expedited hearing was held on April 30, 2014 in Fort Myers, Florida. Witnesses were not sequestered as credibility is not at issue in a temporary reinstatement proceeding. *See, e.g., Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089, 1091 (Oct. 2009). The parties filed simultaneous post-hearing briefs on May 7, 2014.

At the hearing, Respondents stipulated that Ms. Zambonino's January 14, 2014 discrimination complaint was not frivolously brought. Tr. 44, 58-59, 156.

The Secretary called two witnesses, Complainant, Lucero Zambonino, and MSHA Special Investigator, Michael Larue. At the close of the Secretary's case, the undersigned denied Respondents' motion to dismiss, as more fully explained below.

Respondent then called one witness, Randall Bono. Bono, a retired lawyer and judge, is the managing member of Pantheon Management, LLC, which is the managing member and part owner of Gravitas, LLC ("Gravitas"), the parent company of CMM, IMM, and Colonial Concrete Construction Precast, LLC ("C³P"). Bono testified that Gravitas is the majority partner of IMM for tax purposes. Bono is also the managing member and owner representative of both CMM and IMM. Tr. 176, 224-225, 250. Bono also owns Frugalitas, LLC, which wrote an (unsigned) $500,000 check on behalf of IMM on February 25, 2014 to execute the purchase of 500,000 tons of rock, sand, shell, and other material from the Mine. Sec'y Ex. 2; Tr. 230-31.

Respondent called Bono primarily in an effort to show that the Secretary failed to establish a non-frivolous claim that IMM is a successor-in-interest jointly and severally liable for discriminatory actions of CMM and that temporary reinstatement should be tolled because the alleged layoff of Zambonino and the subsequent elimination of her position was motivated solely by economic conditions.

After close of Commission business on Friday, May 9, 2014, Respondents filed a motion to strike section IV(B) of the Secretary's post-hearing brief, which summarizes the facts alleged by MSHA Special Investigator Michael LaRue in a sworn declaration, attached to the Secretary's original and amended Application for Temporary Reinstatement. On Monday, May 12, 2014, the Secretary filed an Opposition to Respondents' Motion to Strike.

On Monday, May 12, 2014, the undersigned convened two conference calls with the parties and *sua sponte* re-opened the record until close of business that day for proffer and receipt of, and objection to, all pleadings in this matter, including, inter alia, the Secretary's Application for Temporary Reinstatement, with attached exhibits; Respondent's Request for Hearing; the Secretary's Motion to Amend Application for Temporary Reinstatement and Authorities in Support Thereof, with attached exhibits; Respondent's Opposition to the Secretary's Motion to Amend Application For Temporary Reinstatement, with attached Exhibits; the Parties' respective Pre-hearing Reports, with attached exhibits; Respondents' Motion to Strike; and the Secretary's Opposition. By close of business May 12, 2014, the Secretary filed a Motion Responsive to the Court's Telephonic Order and Respondent filed a e-mail proffer, which attached, inter alia, "R-7," a document showing CMM employees, job titles and termination dates.

Minutes before close of business that day, and one minute after I issued my original decision in this matter at 4:54 p.m., the Secretary objected to "R-7," arguing that the document, unlike the other documents proffered by the parties, had previously not been submitted to the undersigned prior to the hearing. On May 13, 2014, the undersigned convened a conference call with the parties to discuss the Secretary's objection. During that call, Respondent withdrew its proffer of "R-7."

I receive all of the other documents set forth above and previously submitted to the undersigned before hearing into the record in this matter. Accordingly, Respondent's Motion to Strike is denied.

*The undersigned emphasizes that it is best practice at the outset of all Commission litigation, including discrimination and civil penalty proceedings, to proffer the pleadings or formal papers at issue, and any position statements or alleged admissions against interest at the outset of the hearing. After all, as in other administrative litigation, it is the pleadings that join the issues to be litigated by the parties before the administrative law judge and these should be part of the record. Unfortunately, this practice is rarely followed in Commission proceedings***.**

IV. The Disputed Issues

According to Respondents, the issues that remain to be litigated are:

1. Whether IMM is a successor-in-interest jointly and severally liable for the alleged discriminatory action of CMM under the test adopted by the Commission in *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465 (Dec. 1980), *aff'd in relevant part sub nom.*, *Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied sub nom., Smitty Baker Coal Co. v. FMSHRC*, 464 U.S. 851 (1983)?

2. Whether temporary reinstatement is appropriate because Zambonino's former job at CMM has been eliminated and Respondent IMM claims that it does not intend to hire someone to perform that job in the future?

3. Whether Respondent IMM is required to create a position for temporary reinstatement of Zambonino given the Administrative Law Judge's decision in *Sec'y of Labor on behalf of Haynes v. Decondor Coal Co.,* 10 FMSHRC 1810, 1814 (Dec. 1988) (ALJ),which denied immediate reinstatement to complainant's former position because that job had been eliminated due to a layoff "necessitated by business reasons," but ordered temporary reinstatement once any position became available that complainant was qualified to perform by training or work experience?

4. Whether temporary reinstatement should be granted because the alleged layoff of Zambonino and subsequent elimination of her position was motivated solely by economic conditions?

According the Secretary, the issues that remain to be litigated are:

1. Whether IMM is a successor-in-interest jointly and severally liable for the discriminatory discharge of Zambonino on December 20, 2013 by predecessor CMM?

2. Whether temporary reinstatement should be ordered and not tolled, notwithstanding Respondents' claim that Zambonino would have been included in a subsequent economic layoff, because there is still work available for her, and the evidence, as a whole, supports a non-frivolous finding that her inclusion in any such layoff might have resulted, at least in part, from her protected activity?

V. Stipulated or Disputed Facts at Hearing

At the hearing, the parties stipulated to the facts described in paragraphs 1, 2, 3, 4, 6, 8, 12, 15, 16, 17, 19, 23, 24, 26, 27, and 28, and the second two sentences of paragraph 30 of Respondents' Prehearing Report. Tr. 11-18. Those stipulated or disputed facts are summarized below.

1. CMM is a wholly owned subsidiary of Gravitas. Gravitas is the principal owner of eighteen other companies involved in: commercial real estate holdings, private lending and capital investment, multi-family/condo development, residential custom home building, hotel development and management, hollowcore manufacturing, concrete manufacturing, and aggregate mining.

2. CMM entered into an Excavation Agreement with Williams Farms Partnership on June 28, 2013 for the purpose of excavating, removing, processing, marketing, and selling sand, rock, shell, and other materials from the Mine.

3. The Mine is a sand and shell mine located in Punta Gorda, Florida.

4. Complainant worked as a ticketing agent at the Mine from July 2013 to December 2013.

5. Respondents contend that Zambonino was *laid off* from her position as a ticketing agent on December 20, 2013 by the Mine's manager, Wayne Filyaw, and Gravitas representative, Randall Bono. The Secretary claims that Zambonino was *terminated* on said date by Filyaw for making safety complaints. Tr. 11.

6. On January 8, 2014, Zambonino filed a discrimination complaint with MSHA. After receiving the complaint, MSHA Special Investigator Michael LaRue conducted an investigation of Zambonino's discrimination claim against Respondent. The Secretary subsequently filed an Application for Temporary Reinstatement on March 14, 2014.

7. CMM contends that it laid off two other employees before Zambonino and eight other employees following Zambonino's alleged layoff. The Secretary disputes this and argued at hearing that requested personnel records were not provided. Tr. 13.

8. On February 25, 2014, Williams Farms Partnership and CMM executed a Release Agreement and Covenant Not to Sue whereby the parties agreed to terminate the Excavation Agreement dated June 28, 2013.

9. CMM claims that it operated the Mine until it ceased all excavation activities on February 28, 2014. The Secretary disputes this and argued at hearing that MSHA's data retrieval system shows that IMM did not register as operator of the Mine until March 18, 2014, and that CMM did not assign its machine repurchase agreements to IMM until March 12, 2014, and did not assign its long-term equipment lease agreements to IMM until March 21, 2014. Tr. 11-12; R. Opposition, Ex. 2.

10. CMM contends that it shut down on February 28, 2014 due to: (1) losses of approximately $800,000 in its eight months of operation, and (2) the wash plant located at the Mine was unable to provide useable sand. Respondent contends that it currently has approximately $800,000 in debt and $25,000 in accounts receivable. The Secretary disputes this and argued at hearing that audited financial information was not provided to substantiate CMM's contentions. Tr. 12-13.

11. IMM contends that it commenced operations at the Mine on February 28, 2014. The Secretary disputes this and implicitly argues that IMM could not legally commence operations until it registered with MSHA on March 18, 2014. Tr. 13, 16. IMM contends that 30 C.F.R. § 41.11 permits a 30-day grace period from commencement of operations to submit a legal identity report. Tr. 16.

12. On March 18, 2014, Respondent completed and filed MSHA ID form (2000-7) transferring operations of the Mine to IMM.

13. CMM contends that it had a maximum of fifteen employees at one time during its period of operation, but was down to seven employees at the time it shutdown. Three of the seven employees were re-hired by IMM. The Secretary disputes this. Tr. 13.

14. Two of the re-hired employees were equipment operators and one was a working foreman. One of the equipment operators was re-hired as a part-time employee. The Secretary disputes and notes that personnel records were not provided. Tr. 13.

15. Mr. Filyaw is now employed as the mine manager of IMM.

16. Ms. Zambonino is currently employed by Home Depot in Fort Myers, Florida.

17. Amanda Miller, Ms. Zambonino's former coworker, is no longer employed as a scale clerk (ticketing agent) at the Mine. She is now working in accounts payable at C^3P, a Hollowcore manufacturing company owned by Gravitas.

18. There are no plans or agreements for further excavation at the Mine by a Gravitas subsidiary. Additionally, there are no plans to resume use of scales by anyone other than a manager or foreman at the Mine or any other mine owned by a Gravitas, LLC subsidiary. The Secretary declined to stipulate to this. Tr. 14.

19. CMM is no longer engaged in mining operations in the United States.

20. Infinity Lake, LLC, a wholly owned subsidiary of Gravitas, LLC, was formed on July 16, 2013 and purchased the Infinity Lake Mine, in Punta Gorda, Florida on July 26, 2013. The Secretary declined to stipulate to this. Tr. 14.

21. IMM was formed on August 27, 2013 for the purpose of operating the Infinity Lake Mine. The Secretary declined to stipulate to this. Tr. 14.

22. Infinity Lake Mine is not currently operational as it does not have all of the necessary permits required to excavate. As such, it does not have a registered Mine ID at this time, and has no employees. The Secretary declined to stipulate to this. Tr. 14.

23. IMM is owned 70% by Gravitas LLC, 15% by Wayne Filyaw, and 15% by Phil Morris.

24. On January 1, 2014, IMM entered into a lease with Williams Farms Partnership allowing IMM to store, stockpile, process, load, weigh, and remove from the property the quantity of material acquired by IMM.

25. IMM does not engage in any extraction activities. The Secretary declined to stipulate to this. Tr. 14.

26. On February 25, 2014, IMM and Williams Farm Sand and Shell, Inc. executed a Bill of Sale in which IMM bought approximately 500,000 tons of rock, sand, pre-excavated shell, and other material located at the Mine for $500,000.

27. IMM is processing raw rock material into mostly #89 and some #57 stone. Approximately 100% of the #89 stone and 25% of the #57 stone is delivered to Coast Concrete Company, a Gravitas subsidiary. The remainder of the #57 stone is sold to multiple entities.

28. Neither CMM nor IMM owned any of the extraction, washing, crushing, or screening equipment on the site. CMM leased its equipment from a third party.

29. IMM has four employees, including one manager, one working foreman, and two equipment operators. The Secretary declined to stipulate to this. Tr. 14-15.

30. IMM does not have a ticket agent employed at either the Mine or the Infinity Lake Mine, and does not intend to hire one in the future. While DOT regulations require the trucks to be weighed upon leaving the Mine, the manager and/or foreman are responsible for completing this task before the material is sold. Typically, only ten to fifteen trucks leave the mine per day. The Secretary declined to stipulate to the first sentence since it addressed future intent. Tr. 15.

31. IMM lost approximately $43,000 from January through March 2014. The Secretary declined to stipulate to this. Tr. 15.

VI. Summary of Testimony

A. Randall Bono's Testimony and Respondents Minimal Financial Documentation

Randall Bono testified that CMM was formed about late 2011 or early 2012 to operate the Quality Mine on a royalty basis to supply sand, shell, and other material to Colonial Concrete Company, which ran a redi-mix plant located about two miles from the Quality Mine. Tr. 177-79.

Bono testified that IMM was formed about June 2013. Tr. 194. No documentation was proffered to support this. As noted, IMM is majority owned (70%) by Gravitas. IMM has two minority shareholders, Wayne Filyaw and Phillip Morris, who each own 15%. Tr. 213. Bono is Gravitas' majority owner representative to IMM. Tr. 212.

CMM operated the Quality Mine until September 2013, when the mine ran out of viable material. Tr. 1178-79. CMM began looking for other sources of sand, rock, and shell material. Tr. 179. Although Gravitas had acquired another mine called Infinity Lake Mine, it was not yet operational because permits were not in place. Tr. 179.

Bono testified that Mr. Williams, the owner of the Williams Farms Sand and Shell Mine, had about 500,000 to 600,000 tons of pre-mined sand and rock stockpiled and approached "us" about negotiating a deal. Tr. 179-80. On June 28, 2012, CMM executed two agreements with the owner of the Williams Mine. Tr. 180; Sec'y Ex. 4. The Excavation Agreement granted CMM the right, inter alia, to excavate rock, sand, and shell on 400 acres at the Williams Mine, in exchange for a $2/ton royalty. *Id*. The Excavation Agreement was effective August 1, 2013 through July 31, 2014 and allowed either party to terminate the agreement without cause one year after the effective date. Sec'y Ex. 4. The other agreement granted CMM the right, inter alia, to buy from Williams' stockpile of mined rock and mined and washed sand, all the rock and washed sand that CMM could process, sell and/or use for a $3/ton royalty as weighed at the Williams scale, a fixture on the property. Tr. 180; Sec'y Ex. 4. Bono signed both agreements on behalf of CMM. Sec'y Ex. 4.

Bono testified that CMM expected to produce 100 to 150 tons of crushed rock per hour at the Mine, but only managed to produce 75 tons per hour. Tr. 183. In December 2013, CMM started trying to produce washed sand, but it did not meet specifications due to problems with the wash plant. Tr. 183-84.

Bono testified that he approached Williams in December 2013 about buying the rock and sand stockpile for $1 a ton. Tr. 197. Bono testified that IMM purchased the stockpile because they still needed rock their concrete companies. When asked by the undersigned why he wanted to purchase the stockpile if he was losing money, Bono testified that "we were paying him $3 a ton royalty for the rock and sand, and if we were able to get it down to $1 a ton, we figured we might be able to make this thing work. We would be closer, which we are closer. Okay?" *Id*.

Bono started negotiating the purchase of the material when CMM was still the operator of the Williams Mine. Tr. 197-98, 236. The lease was initially drafted as an agreement between CMM and the Williams Farm Partnership. Tr. 237. CMM's name was subsequently crossed out by hand and IMM's name was inserted on the tenant signature line. Sec'y Ex. 3; Tr. 237. While describing the negotiations with Williams, Bono did not refer to CMM or IMM as separate entities, rather he used the term "we." Tr. 198.

Bono testified that in early to mid-January 2014, CMM attempted excavating shell at the mine. Tr. 182-83. Bono testified, however, that the MSHA inspection on December 16, 2013, further discussed below, caused a two-week delay because the area that CMM intended to excavate remained flooded after MSHA allegedly shut the mine down. Tr. 187-88. He further testified that eventually CMM was able to begin excavating and it spent "most of January just putting product on the ground." Tr. 188. Bono testified, without explanation, that there was "no market" for the product CMM excavated. Tr. 188.

Respondents submitted unaudited profit and loss statements from CMM from January through December 2013 and from January through cessation of operations in late February 2014,

purporting to show approximately $750,000 in losses from January 2013 to April 2014. Tr. 193; R. Ex. 5. That financial information, however, partially encompassed CMM's operation, revenue and fees from the Quality Mine. Tr. 191; R. Ex. 5. Respondent also submitted unaudited balanced sheets for CMM as of December 31, 2013 and February 28, 2014, the date CMM ceased operations. R. Ex. 5. That financial information, however, includes long-term loans payable to Frugalitas of $600,000 and $735,000, respectively.

On February 25, 2014, Frugalitas, LLC, a financing company that Bono personally owns, purchased 500,000 tons of rock, sand, shell, and other material from Williams Farms Sand and Shell, LLC on behalf of IMM. Sec'y Ex. 2; Tr. 230-31. No balance sheet, audited or otherwise, was proffered for IMM. Respondents did admit into evidence an IMM profit and loss statement from January through March, 2014, even though Bono testified that IMM did not commence operations until March 3, 2014. R. Ex. 6; Tr. 213. Although not proffered in evidence, Bono testified that he had reviewed IMM's profit and loss statement through the end of April 2014, which shows losses are down to $24,000 and IMM may have actually made a little bit of money. Tr. 218.

Bono testified that CMM ceased operations on February 28, 2014 because it could not sustain the losses it was suffering and could not afford its leases on equipment. Tr. 194. Bono testified that Williams let CMM out of the Excavation Agreement, but Gravitas did not walk away from the Williams Farms Sand and Shell Mine because "we still needed the rock." Tr. 196.

As noted, on February 25, 2014, Bono executed an agreement to have IMM purchase the entire pre-mined stockpile at the Williams Mine. Tr. 223; Sec'y Ex 2. Also on February 25, 2014, Bono executed a 20-acre lease with typewritten date of January 1, 2014, under which Williams Farms Partnership granted IMM the right to crush and process the stockpile at the mine for the earlier of 60 months or the date on which the material had been completely processed. Tr. 133; Sec'y Exs. 2-3.

Bono testified that IMM began operating the Mine in place of CMM on March 3, 2014, although CMM as a corporate entity still exists. Tr. 193, 215. Wayne Filyaw, Mine Manager for both CMM and IMM did not change the mine operator ID with MSHA until March 18, 2014, four days after the Secretary served a copy of the Application for Temporary Reinstatement on Respondents by first-class mail. Sec'y Application for Temporary Reinstatement; Sec'y Mot. to Amend, Ex. B; R. Opposition at para. 4. CMM assigned its machine repurchase agreements to IMM on March 12, 2014. CMM assigned its long-term equipment lease agreements to IMM on March 21, 2014. R. Opposition, Ex. 2. Bono testified that other equipment, such as the Sandvik crusher, has yet to be assigned, although "we're trying to get Sandvik assigned." Tr. 185, 254.

Bono testified that CMM had seven or eight employees at the end of February 2014, and IMM employs four of these former CMM employees, one on a part-time basis. Tr. 201-02. These miners are Wayne Filyaw, Mine manager; John David Hardee, foreman; Jason Mosley,

full-time operator; and Floyd Layport, part-time operator. Tr. 200; Sec'y Mot. to Amend, Exs. A, B; R. Opposition, Ex. 3. Filyaw is the manager, salesman, ticket agent, and office sweeper at the Williams Mine for IMM. Tr. 200. Bono further testified that one or two of the other employees were employed by other subsidiaries of Gravitas including Amanda Miller, former ticket agent, who was employed by C³P without training as a receptionist when her predecessor resigned right before CMM ceased operations. Tr. 202. Bono testified that Gravitas rehired "[a]s many as we could, and I think it was one or two." *Id.* Accordingly, based on Bono's own testimony, five or six of the seven or eight CMM employees in late February 2014 retained employment with Gravitas subsidiaries.

IMM crushes and screens from the same pre-excavated stockpile that CMM crushed and sold. IMM produces and sells 89 stone used for pump mixes that are poured from trucks, and a larger 57 stone used in pouring concrete. Tr. 199, 217. Colonial Concrete Company uses 100% of the 89 stone and about 25-30% of the 57 stone. Tr. 216. Bono testified that IMM has been unable to sell the remaining 57 stone because they do not have certification from the Florida Department of Transportation (FDOT), but IMM is expecting to receive FDOT certification any day. Tr. 216-17. IMM's crushing operation is currently producing about 75 tons an hour, the same rate of production as when CMM operated the Mine, but a rate that Bono testified was insufficient to make crushing rock "solely a possibility." Tr. 183, 216.

Bono testified that IMM weighs an average of about ten trucks a day at the Williams Mine, which takes 15-20 minutes for Filyaw or foreman Hardee to perform. Tr. 204-05. Respondents' Pre-hearing Report states that the average number of trucks weighed per day is 10-15. R. Prehearing Report at 30. Bono testified that he anticipates a 20-40% increase in truck volume once IMM obtains FDOT certification. Tr. 218. He further testified that IMM will be a very profitable business once it obtains FDOT certification for the 57 stone and is able to wash the sand and make a usable product, but as things currently stand, IMM would not be profitable if it hired more people. Tr. 219.

Bono testified that IMM is still trying to open the Infinity Lake mine: "We're working on that as we speak trying to get the permits." Tr. 201. He explained that IMM does not currently excavate or sell sand or shell at the Williams Mine, although it wants to sell sand. Tr. 205. IMM hopes to open the wash plant at the Infinity Mine and take its sand there to wash it and get the fines out. Tr. 216.

B. Complainant Zambonino's Testimony and MSHA's Special Investigation of Her Safety Complaints

Zambonino testified that on July 1, 2013, she completed an application for employment at C³P's main office in Placida, Florida after Wayne Filyaw told her about a job in e-mail correspondence during June 2013. Tr. 60-61, 70, 105; Sec'y Ex. 1 (page one of a multi-page application); *see also* Tr. 68-69. Zambonino testified that she was absolutely sure that the

handwritten notation "CMM" was not present of the top of the application when she completed it. Tr. 105.

Filyaw told Zambonino that "he was going to be working from a mine that they were leasing, and they were going to open the Infinity Lakes mine that he used to work from before, and he was going to need several people. He was going to have to staff both mines, and he needed bilingual ticketing agents to work at both mines . . . ." Tr. 79-81; *see also* Tr. 127 (Zambonino testified on questioning from the undersigned that "[t]hey were planning to open [the Infinity Lakes mine] again because Mr. Bono had bought it . . . he needed to staff both mines; the Williams Farm mine and the Infinity Lakes mine. So he needed to staff both mines, and he needed bilingual ticketing agents for that.").

When mine manager Filyaw hired Zambonino, he told her that he worked for C³P and gave her a business card that said project manager for C³P. Tr. 69. Zambonino testified that she assumed that she was being hired by C³P. Tr. 70. Zambonino was paid by a payroll company. Tr. 106. Filyaw, who reported to Bono, supervised Zambonino, and hired her about July 1, 2013, as a bilingual ticket agent to work at the Williams Farms Sand and Shell Mine. Tr. 70, 78.

Zambonino testified that there were about four or five employees working at the Mine at that time, and others coming and going. Tr. 96, 115. Filyaw was present at the Mine on a daily basis. Tr. 102. He did not testify in this matter, although he was present in the courtroom.

Zambonino testified that people were constantly applying for jobs at the CMM trailer during September, October, and November 2013, and most of them were hired. Tr. 103. Zambonino testified that CMM equipment operator, Louis Blackwelder, was hired in October, but then went out on workers' compensation disability because of an accident he had at the Mine. Tr. 84, 116. Zambonino testified that she learned from speaking to Filyaw that operator John Murawski was also not laid off. Rather, he was let go after his equipment broke down and he refused to load trucks as directed by Filyaw. Tr. 84, 122.

In October 2013, about four months after hiring Zambonino, Filyaw hired Amanda Miller, another ticket agent so that Zambonino could train her to work at the Infinity Lakes mine when it opened. Tr. 79-80, 120. Miller did not speak Spanish. Tr. 83, 121. Miller also received some quality control training from CMM to ensure that samples from stockpiled material were up to standards. Tr. 95. According to Zambonino, Miller worked at the Infinity mine on December 12 or 13, 2013 generating tickets for trucks loaded with dirt fill to be sold to a landfill company. Tr. 80-81, 120-21.

Zambonino described her ticket agent job duties as printing out computerized tickets from the scale house, which showed the weight of the trucks as they crossed the scale before leaving the Mine. Tr. 71. Zambonino spoke to the truck drivers in Spanish, and sometimes was asked to take or make calls in Spanish. Tr. 78. She testified that her other duties included compiling daily and weekly reports regarding the number of loads that were broken down by material or truck number, answering and making phone calls in Spanish, researching on the

Internet to find prospective customers, and cleaning the office trailer. Tr. 71, 78. She testified that an average of about fifteen loaded trucks left the mine each day, although Zambonino recalls a five to eight day busy period during October 2013 when about thirty to forty trucks left the mine. Tr. 75-76. It took Zambonino about a minute or two per truck to generate a ticket. Tr. 130.

Zambonino would send her tickets and reports through interoffice envelopes to a lady named Mandy Pittman at Colonial Coast Concrete Company (CCC), the main customer and accounting entity for CMM. Tr. 72-75. CCC purchased CMM's raw stockpile material such as sand and rock, which was crushed and washed into crushed concrete and sold to CCC for about $5 a ton. Tr. 77-78.

According to the sworn declaration of MSHA Special Investigator, Michael Larue, which is attached to the Secretary's initial Application, the Secretary alleges the following:

On November 12, 2013, Filyaw directed Zambonino and Miller to clean out the officer trailer located on the Infinity Mine, an abandoned mine in Punta Gorda, Florida, which Respondent CMM planned to reopen. Upon arriving at the Infinity Mine, Zambonino observed rat feces, urine and nests inside the trailer and she complained to Filyaw that the trailer was unsafe. Filyaw told Zambonino to either go home or clean the trailer.

On December 6, 2013, Zambonino submitted a written complaint to OSHA describing the conditions inside the Infinity Mine trailer and requesting an inspection. In her complaint, Zambonino also alleged that the heavy equipment operators at the Williams Mine did not have access to restroom facilities. Zambonino had previously complained to Filyaw about the lack of restroom facilities at the Williams Mine.

On December 9, 2013, OSHA forwarded Zambonino's complaint regarding the lack of facilities at the Williams Mine to MSHA. On December 10, 2013, an OSHA compliance officer arrived at the Williams Mine, privately interviewed Zambonino, Miller, and Filyaw, and then went to the Infinity Mine and inspected the trailer.

On December 16, 2013, MSHA inspected the Williams Mine and issued two citations and ordered CMM to withdraw two miners who had not been trained.

On December 17, 2013, Zambonino reported for work at the Williams Mine and Filyaw told her that the mine had been shut down. Zambonino and all the other employees left the Mine. Later that day, Filyaw discussed the situation with Bono, who told Filyaw to "cut back the staff now."

On December 18, 2013, Filyaw called all employees back to the Williams Mine for training, except Zambonino. On December 19, 2013, after the training was completed, MSHA terminated the citations and order and the Mine resumed operations. That same day, Filyaw

informed Zambonino that her services as a bilingual ticket agent were no longer needed. On December 20, 2013, Zambonino was officially terminated. At C³P, Filyaw continues to employ Miller, who has less seniority, experience, and education than Zambonino.[2]

Based on the foregoing, Special Investigator Larue concluded that Zambonino's claim that she was *terminated* by Respondent CMM because she filed a safety complaint with MSHA was not frivolously brought. *See* Application For Temporary Reinstatement, Ex. A.

As noted, at hearing, Respondents stipulated that Zambonino's January 14, 2014 discrimination complaint was not frivolously brought. Tr. 44, 58-59, 156.

Zambonino testified that on Tuesday, December 17, 2013, when she reported for work and was entering the open door to the trailer, foreman John David Hardee was talking to foreman Rodney Flint and mine manager Filyaw. Tr. 85-87, 96, 100, 111. Zambonino heard Hardee tell Flint and Filyaw that it would be really nice to find out who the rat was that told on us so we can crush it. Zambonino testified that Hardee looked into her eyes when he uttered these words. Tr. 86.[3] At that point, Filyaw approached Zambonino from his desk and told her that he had "bad news, that MSHA had come the day before, and they had cited them for violations and that they (MSHA) had shut down the mine." Tr. 85, 89. Filyaw further told Zambonino that "[w]e can no longer operate, have any trucks carrying material. So I need to send all the employees home." Tr. 89. On cross, Zambonino testified that Filyaw told her that MSHA had shut them down. Tr. 106, 113; R. Ex., 13, line 3.

At that point, Zambonino asked to see the papers that Filyaw was holding and he showed such papers to her. Tr. 89-90. Zambonino then told Filyaw that since the mine had been shut down by MSHA, she understood that she no longer had a job, and she asked Filyaw for copies of the papers for unemployment purposes. Filyaw told her that she did not need to have a copy of the documents, and if anybody needed any information, they could call him. Tr. 90.

Zambonino testified that she assumed that day was the last day of operations so she finished up pending reports and went home. Tr. 90. Before Zambonino left, she overheard Filyaw tell Hardee and Flint that CMM was losing money and that Bono was sick of all the problems they were having (including problems with MSHA)**,** and that Bono wanted to pull the plug and close down the Mine for good. Tr. 112, 128, 130.

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[2] Zambonino did not know whether Miller made complaint to OSHA or MSHA. Tr. 121.

[3] On cross, counsel established Zambonino did not mention Hardee's alleged statement in her complaint to MSHA. Tr. 110-111.

Zambonino testified on aggressive cross that Filyaw did *not* say ". . . no, we're not closing. We're going to open. You still have a job here." Zambonino explained that Filyaw led her to belief that she did not have a job anymore. Tr. 113.

Later that day, Zambonino called Filyaw from home because she was not completely sure that CMM was going to close for business. So, Zambonino asked Filyaw when she could return to work. Tr. 91. Filyaw told Zabonino that he was going to turn in his resignation in the morning and he would not be able to tell Zambonino "if they were going to ever open again," but she could call Mandy Pittman to find out when she can go back to work if they ever open again. Tr. 91, 107.

The next day, Wednesday, December 18, 2013, Zambonino called the Mine because she still was not sure that they were out of business. Tr. 91. Ticketing agent Miller answered the phone. Zambonino hung up. Tr. 92.

Later that same day, Zambonino called Pittman to ask if Zambonino could work. Tr. 92. Zambonino told Pittman that she was calling because Filyaw had told Zambonino that he was going to turn in his resignation, and that if Zambonino wanted to go back to work, that she should call Pittman. Tr. 93. Pittman told Zambonino that she was not aware that Filyaw was resigning, that the mine was going to open after the miners were trained, and that Miller was not there either. Tr. 93.

Filyaw never called Zambonino back for training. Tr. 94.

On Thursday, December 19, 2013, Zambonino called Filyaw about coming back to work. Filyaw told Zambonino that "they were doing fine without a bilingual ticket agent and not to [come] back." Tr. 94; *see also* R. Ex. 13 (Zambonino's January 14, 2014 MSHA discrimination complaint stating, inter alia, "[o]n December 19, . . . Filyaw . . . told me 'things are working out well without a bilingual ticketing agent' and that I was not to go back to work." Zambonino understood Filyaw's comments to mean that there was no longer a job for her. Tr. 94. It was obvious to Zambonino that Filyaw had not resigned. Tr. 121.

Zambonino testified that she was willing to do any training if it would help her get her job back. Tr. 95. Zambonino testified that about ten people worked at the mine at the time she was let go, and Zambonino was not aware of more than ten people working at the mine at any time that she was employed. Tr. 117, 118.

C. Special Investigator Larue's Testimony and Bono's Rejoinder

MSHA inspector and special investigator Michael Larue testified that he was assigned Zambonino's discrimination complaint. On January 23, 2014, he interviewed Filyaw, at Gravitas offices in Sarasota, Florida in the presence of Bono and the intermittent presence of Gravatis CEO Flynn. Tr. 134-35; Sec'y Prehearing Report at 3, para 17. Based on his investigation,

Larue understood that the rank and file miners at CMM reported to a foreman, who reported to mine manager Filyaw, who reported to CMM representative for Gravitas, Randall Bono. Tr. 136.

After Filyaw's interview of Filyaw, while the group was waiting for portable toilets to arrive at the Mine site, Larue explained to Filyaw and Bono that MSHA did not shut the Mine down, but only withdrew two miners under a 104(g)(1) Order until proper training had been provided, at which point the Mine could continue operating. Larue testified that Bono then made a comment that insinuated that he was a direct decision maker in Zambonino's termination. Tr. 137, 144. Larue testified that Bono exhibited frustration because he had received information from Filyaw that MSHA had shut him down, and Bono pointed at Filyaw and told Larue that upon receiving that news he had told Filyaw to cut the staff now (immediately). Tr. 138.

Bono testified, "I don't recall saying that. I'm not denying it, but it's certainly true that we decided to start cutting staff in November, and then, after the episode in December with the MSHA inspection and shutdown of the mine, I said we can't keep doing this. We're getting killed. We got to start cutting back." Tr. 220. Respondents' counsel then asked Bono:

> Q. And was there a time when maybe you even thought about dare I say pulling the plug on the entire operation?
>
> A. That was under consideration as early as November.
>
> Q. Did Mr. Filyaw ever offer to resign?
>
> A. Yes, sir.
>
> Q. Did he offer you his resignation?
>
> A. Yes, sir.
>
> Q. And what happened?
>
> A. The MSHA inspection occurred, as I understand it, at 3:50 in the afternoon on Monday, [December] January 16. I didn't know anything about it until Tuesday morning when I got a call from the crusher salesman out there. He had brought people in from the Northeast to repair the crusher that was shut down or wasn't working appropriately, and he told us that the MSHA inspector had shut the mine down and they got kicked off the property and he couldn't do the repairs.
>
> I didn't know anything about the MSHA inspection or the repairs or anything going on at that point in time. I was distraught that

Wayne hadn't called me and told me the mine had been shut down by MSHA. I called Wayne up and not politely asked what was going on, and Wayne then informed me at that time, and I asked Wayne what happened. He said MSHA shut us down. I wasn't here. He was out making a sales call. There was no management staff there at the time of the MSHA inspection according to Wayne, and he didn't know what happened, and he was trying to reach the MSHA inspector, was unable to reach him, and didn't reach him -- another MSHA representative sometime that afternoon, as I recall, to find out what was going on and what had happened.

Q. Did anyone at the mine tell you or did you ever hear that they were given a piece of paper that evidenced that the inspection was made as a result of an employee complaint?

A. Never. The first time we ever saw that document -- and we still haven't seen it to this day -- it was flashed by this investigator in front of Mr. Filyaw, and he said did you ever see this before, and Wayne said no, and I still haven't seen it to this day.

THE COURT: Who? By Mr. LaRue?

THE WITNESS: Yes, sir. That was during the interview. We had no notice that anyone had ever filed a complaint. The MSHA inspector never told us. We never got any notice, and whoever he told, if he told anybody, it wasn't an officer, manager, or anything to do with the management of that company because none of them were there that day.

BY MR. SAVIT:
Q. Fair to say, Mr. Bono, that all of the decisions to lay people off or not replace them were economic at Colonial and –

THE COURT: Well, you're leading.

MS. STEARNS: Objection.

MR. SAVIT: Okay.

THE COURT: In a critical area I might add.

MR. SAVIT: I will withdraw that question. I'm very sorry.

> BY MR. SAVIT:
> Q. Can you tell me what your reasons were for not replacing people after October of 2013 at Colonial Mining?
>
> A. It was all economic. We were losing our backsides, and we couldn't continue those kind of losses. We had to figure out a way to cut it down to try to save as many jobs as we could.
>
> Q. Same reason for layoffs during that period?
>
> A. Yes, sir.
>
> MR. SAVIT: I don't have anything further.

Tr. 220-223.

Larue testified that he understood Bono's December 17, 2013 directive to Filyaw, i.e., cut the staff now, to mean that Bono was upset that MSHA had shut him down, and given the time line of events, Bono was "eliminating" Zambonino because he believed that she may have made the complaint that brought MSHA out to the Mine site. Tr. 138, 142.

On cross, Larue conceded that Bono did not explicitly say anything in connection with cutting the staff now that had anything to do with a complaint being made to MSHA. Tr. 139. Rather, Larue testified that he drew an inference based on Bono's comment that after learning from Filyaw that MSHA shut the mine down, Bono had ordered Filyaw to cut the staff immediately because MSHA was on the scene. Larue conceded that he did not formally interview Bono or ask him to explain his comment. Tr. 139, 142. On further cross, Larue testified that he had reason to doubt that the reason for the shutdown was financial, but had no reason to doubt Zambonino's testimony that Filyaw stated on December 17 that the reason Bono said that he was pulling the plug was in part because of financial reasons and in part because Bono believed that MSHA had shut them down. Tr. 140-42. Larue further conceded, however, that Bono may have been under the mistaken impression that MSHA had indeed shut him down. Tr. 144. Larue did not recall whether he asked CMM for overall financial statements and did not recall receiving any. Tr. 145.

On questioning from the undersigned, Larue testified that he reviewed e-mail correspondence between Filyaw and Zambonino in which Filyaw indicated that he had a need for a bilingual ticket agent, but that Filyaw did not indicate that both mines needed to be staffed with bilingual agents. Tr. 146. The Secretary did not offer the e-mail colloquy.

On February 13, 2014, MSHA apparently issued citations to CMM for defective brake lights on a loader, improper containment of fuel storage tanks, and failure to regularly inspect fire extinguishers. Sec'y Prehearing Report at 13, para. 18.

VII. Respondent's Motion to Dismiss

At the close of the Secretary's case, the Respondents moved to dismiss the Amended Application for Temporary Reinstatement because the Secretary allegedly produced no evidence to show that the elimination of Zambonino's ticket agent job was in any part motivated by discriminatory as opposed to financial reasons, that the evidence established that CMM's largest miner complement was in October 2013 after which there were work force reductions supporting Respondents' argument that there was no need for two ticket agents, and that ticketing agent Miller was hired to work at another mine, which did not ever open. Tr. 152-53.

The Secretary responded that the burden of proof to establish a tolling defense is on the operator and the Secretary's obligation to establish a non-frivolous claim that the so-called economic layoff tolls the reinstatement obligation does not even come into play until the operator has made a showing concerning tolling. Furthermore, the Secretary noted that in the Commission's *Cobra* decision (cited below), the Secretary offered no evidence whatsoever, and the Commission looked at the evidence provided by the operator to determine that there was a non-frivolous reason to think that the layoff that supposedly would have included the miner might have been motivated, at least in part, by the miner's protected activity. Therefore, the Secretary reserved the right make her case at the end of the hearing after cross examination of Respondent's witnesses. Tr. 153-54.

The undersigned denied Respondents' Motion to Dismiss, noting the parties' stipulation that Zambonino's discrimination complaint was non-frivolous. The undersigned found that the Secretary established a non-frivolous case that IMM is a successor to CMM based on facts concerning substantial continuity in the business entity going forward. The undersigned further found that the Secretary established a non-frivolous claim that IMM may be a *Golden State* successor with notice of the MSHA complaints that Zambonino filed and therefore jointly and severally liable for Zambonino's termination. Even assuming that the undersigned needed to reach the tolling issue based on a layoff for economic reasons, the undersigned found that the Secretary has put on a non-frivolous case establishing facts that could support the inference that Zambonino was fired and not laid off. Finally, the undersigned found that should it be necessary to reach the tolling issue, the Secretary has provided sufficient evidence in this temporary reinstatement record to support a non-frivolous claim that Zambonino's selection for or inclusion in any layoff or the elimination of her ticketing agent position was motivated (at least in part) by her protected activity. Accordingly, the undersigned denied the motion to dismiss. Tr. 156-57.

VIII. Legal Analysis

A. Applicable Temporary Reinstatement Precedent

As noted, Respondents have stipulated that Zambonino's discrimination complaint was not frivolously brought. The Commission has recognized, however, that "the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation." *Sec'y on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012) (citations omitted). Consistent with the narrow scope of temporary reinstatement proceedings, the Commission permits a limited inquiry into whether the obligation to reinstate a miner may be tolled even when it has been established that the miner's discrimination complaint is not frivolous. *See Sec'y on behalf of Gatlin v. KenAmerican Res., Inc*., 31 FMSHRC 1050, 1054 (Oct. 2009) (temporary reinstatement order does not require that a miner is owed reinstatement under every circumstance, regardless of changes that occur at the mine after issuance of the order). In *Gatlin*, the Commission held that the duration of a miner's temporary reinstatement may be modified if the operator can prove that the miner's inclusion in a subsequent layoff was entirely unrelated to his protected activity. *Id*. at 1055.

The Commission addressed this issue again in *Sec'y on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394 (Feb. 2013), *dismissed for lack of jurisdiction*, *Cobra Natural Res., LLC v. FMSHRC*, 742 F.3d 82, 83 (4th Cir. 2014). The Commission reiterated that when an operator attempts to demonstrate that a layoff properly included a reinstated miner (or would have included the miner if he or she had not been discharged previously, in the case of a complaining miner whose case is being heard), the Secretary may "assert that the miner's inclusion in the layoff was, or might have been, related to protected activity engaged in by the miner." *Id*. at 397. Given that the layoff itself, as a termination of employment, must at that point be evaluated as a potentially wrongful adverse action, the Commission held that "if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, judges must apply the 'not frivolously brought' standard contained in section 105(c)(2) of the Mine Act to the miner's claim [regarding the layoff]. . . In other words, temporary reinstatement should be granted and not tolled unless the operator shows that the claim that the layoff arose at least in part from protected activity is frivolous." *Id*.

The Commission most recently affirmed this precedent in *Sec'y on behalf of Dustin Rodriguez v. C.R. Meyer & Sons Co.,* 35 FMSHRC 1183 (May 2013). The Commission reiterated that the inquiry into tolling must be limited, consistent with the scope and spirit of a temporary reinstatement proceeding. The Commission stated:

> . . . the Secretary shall be allowed to present the rebuttal evidence he indicated he was prepared to introduce on the issue of tolling at the original hearing. (Tr. citations omitted). The Secretary can also introduce evidence and cross-examine witnesses to question the objectivity of the layoff as it would have applied to Rodriguez. If the Secretary pursues that issue, the judge shall determine whether

> the evidence, as a whole, supports a "non-frivolous" claim that such a layoff might have been motivated in any way by the miner's protected activity. If it does, the operator's request that reinstatement be tolled must be denied. *See Cobra*, [35 FMSHRC at 397]. Because it is inappropriate to resolve conflicting testimony at this stage, the Secretary's burden of proof is limited to establishing facts which could support the claim that any inclusion of the complaining miner in the layoff might have been based in part on the miner's protected activity.
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> Should the Secretary fail to sufficiently establish the possibility that any inclusion of Rodriguez in the layoff might have been motivated by the miner's protected activity, the judge must then consider the entire record and determine whether the operator has proven by a
> preponderance of the evidence that the layoff of local miners, which the operator alleges took place no later than February 22, justifies tolling its obligation to temporarily reinstate Rodriguez. If the operator succeeds in proving that tolling is justified, the judge shall determine the period of time for which the layoff would have properly included Rodriguez and shall limit any tolling to that period.

Id. at 1187-88.

In the instant case, the tolling issue is presented by Respondents CMM and IMM and its obverse is presented by the Secretary, i.e, that alleged successor IMM is jointly and severally liable for CMM's alleged discrimination. Accordingly, I apply the non-frivolous standard to both the successorship issue and the tolling issue.

B. The Secretary Has Established a Non-Frivolous Claim that IMM is CMM's Successor, Jointly and Severally Liable for Zambonino's Termination

In *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973), the Supreme Court, after noting that the successor company acquired the predecessor with notice of unfair labor practice litigation, and continued the business without substantial interruption or change in operations, employee or supervisory personnel, upheld the Board's order requiring the successor to reinstate with back-pay an employee discharged by the predecessor company. Both companies were held jointly and severally liable for the back-pay award.

Quoting with approval from *Perma Vinyl Corp*., 164 NLRB 968, 969 (1967), *enforced sub nom. United States Pipe & Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968), the Court stated:

> 'To further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.
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> 'In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.'

414 U.S. at 171-172, n. 2.

Thereafter, in addressing the remedies available under the National Labor Relations Act (NLRA), the Court determined that the Act's remedies may not be thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated

against. *Id.* at 188. Rather, the purpose of reinstatement is to restore the economic status quo that would have obtained but for the (alleged) wrongful discharge. *Id*.

In *EEOC v. MacMillan Bloedel Containers, Inc*., 503 F.2d. 1086 (6th Cir. 1974), the Sixth Circuit expressed the view that the considerations set forth by the Supreme Court in *Golden State* as justifying a successor doctrine to remedy unfair labor practices were *mandated* in the Title VII context, which was designed to eliminate discrimination in employment by giving courts broad equitable powers to eradicate the present and future effects of past discrimination. *Id*. at 1092 (citations omitted). The court held that successor liability must be determined on the facts of each case by balancing the purposes of the statute with the legitimate and often conflicting interests of the employer and the discriminatee, and that a successor may be liable for some purposes and not for others. *Id*. at 1091-92 (citations omitted).

The court reasoned that the failure to hold a successor employer liable for the discriminatory employment practices of its predecessor could emasculate the relief provisions of Title VII by leaving the discriminatee without remedy or with incomplete remedy. For example, where the predecessor no longer had any assets, monetary relief would be precluded, thus encouraging evasion in the guise of corporate transfers of ownership. Similarly, where relief involves seniority, reinstatement or hiring, only the successor could provide it. The court emphasized that the equities favor successor liability because the successor benefitted from the discriminatory employment practices of its predecessor. The court observed that although the nature and extent of liability is not subject to any formula, the primary concern is to provide the discriminatee with full relief, and such relief may be awarded against the successor, albeit the ability of the predecessor to provide relief will be a necessary inquiry. *Id.*

The Sixth Circuit further determined that courts considering the successorship issue in a labor context have found a multiplicity of factors to be relevant, including: 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production, and 9) whether he produces the same product. *Id*. at 1094 (citations omitted).

The Commission with D.C. Circuit approval has found these nine factors to provide a useful framework for resolving successorship and successor liability under the Mine Act. *Munsey v. Smitty Baker Coal Co.,* 2 FMSHRC 3463, 3465-66 (Dec. 1980) ("*Munsey*"), *aff'd in relevant part sub nom., Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied sub nom., Smitty Baker Coal Co. v. FMSHRC*, 464 U.S. 851 (1983); *see also Sec'y of Labor on Behalf of Keene v. Mullins,* 888 F.2d 1448, 1453 n. 15 (D.C. Cir. 1989).

Applying the above precedent and nine-factor test to the facts of this case, the Secretary has established a non-frivolous claim that IMM is CMM's successor and thus jointly and severally liable for Zambonino's termination.

First, IMM had notice of MSHA proceedings which could lead to successor liability because Filyaw, who controlled day-to-day operations at IMM and CMM, was mailed a copy of Zambonino's January 14, 2014 discrimination complaint. In addition, Bono was present during MSHA special investigator Larue's interview of Filyaw on January 23, 2014, as was Susan Flynn, CEO of Gravitas, LLC, the parent of both entities. *See Munsey*, 2 FMSHRC at 3466 (notice of proceedings which could lead to liability is the critical factor).

Second, CMM has no ability to provide temporary reinstatement relief since it no longer operates the Mine**.**

Third, there has been substantial continuity of business operations between CMM and IMM. The same surface Mine is now operated without any significant hiatus by IMM, which is engaged in some of the same operations (crushing and screening) as CMM, and uses some of the same leased equipment. Respondents admit that IMM uses the same screening and crushing equipment that CMM had used. CMM assigned its machine repurchase agreements to IMM on March 12, 2014. CMM assigned its long-term equipment lease agreements to IMM on March 21, 2014. R. Opposition, Ex. 2. Respondent IMM also admits that it leases the same scale and scale house leased by CMM, which are integral to the Mine's weighing operations. R. Opposition at para. 7. Although IMM does not engage in extraction or washing activities at the Mine, IMM purchased 500,000 tons of rock, sand, shell and other material at $1 per ton from Williams Farms, who previously had mined and sold substantial quantities of washed sand and rock from its stockpile to CMM at $3 per ton. Sec'y Ex. 2; Sec'y Mot. to Amend, Ex. F. Furthermore, Respondent's own documentation indicates that both IMM equipment operators (John Mosley and Floyd Layport) perform duties that involve escavator operation. R. Opposition, Ex. 3 (IMM Employees - Job Assignments).

Fourth, as noted, IMM uses the same Mine (plant) that CMM used without any significant hiatus in the substantial continuity of business operations.

Fifth, IMM's four employees are all former CMM employees, including IMM equipment operators (Jason Mosley, full-time and Floyd Layport, part-time), foreman (Jason David Hardee), and mine manager (Wayne Filyaw). In addition, Randall Bono is the Gravatis representative for both CMM and IMM. Although Respondents assert that CMM had as many as fifteen employees at the height of its operations, the extent of workforce reduction or carryover cannot be reliably established, absent personnel and payrolls records from CMM and IMM, which Respondents did not provide. In fact, Bono testified that CMM had only seven or eight employees when it ceased operations at the end of February 2014, and IMM employs four of these former CMM employees. Tr. 201-02. Concededly, CMM had two scale house operators or ticket agents (Zambonino and Miller), whereas IMM has none. But Miller, who apparently

did not file a complaint with MSHA, was offered a receptionist job at C³P after Zambonino filed her discrimination complaint with MSHA and after the Secretary began its special investigation with the knowledge of Filyaw, Bono and Flynn. Furthermore, after Zambonino's MSHA discrimination complaint, the duties of scale house operator were allegedly subsumed into IMM Mine manager Filyaw's and foreman John David Hardee's jobs, so the scale operator or ticketing agent job function still exists. *See* R. Opposition, Ex. 3 (IMM job assignments). Zambonino testified, however, that Filyaw stated at the outset of her employment that he needed ticket agents to staff both mines. In these circumstances, I conclude that IMM employs substantially the same miner complement that CMM employed when it ceased operations.

Sixth, IMM uses the same or substantially the same supervisory personnel since Filyaw was/is the day-to-day Mine manager at CMM and IMM, Hardee was/is the foreman for CMM and IMM, and Bono is the Gravatis representative for both CMM and IMM.

Seventh, as noted with respect to the fifth factor above, although the same jobs do not exist, the same essential job functions exist under substantially the same working conditions, and, as further explained below, the Secretary has established a non-frivolous claim that the workforce reduction may have been motivated, in part, by Zambonino's MSHA complaint, MSHA's subsequent investigation, and Zambonino's discrimination complaint filed on the heels of her termination.

Eighth, as more fully explained with respect to the third factor above, IMM uses some of the same machinery, assigned equipment leases, scale and scale house, stockpile and partial methods of production (crushing and screening).

Ninth, IMM mines, processes and sells or intends to sell the same product and materials (rock, sand, shell and other material) that were mined, processed and sold by CMM.

Given all these circumstances, Respondents' reliance on the D.C. Circuit's decision in *Sec'y of Labor on Behalf of Keene v. Mullins,* 888 F.2d 1448 (D.C. Cir. 1989) is inapposite and unpersuasive. In that case, the court found substantial evidence to affirm the Commission holding that two operations were so dissimilar as to negate successor liability for an act of alleged discriminatory discharge by the predecessor. The alleged successor operated a surface mining operation, whereas the predecessor operated an underground mining operation. The successor's mine was located a mile and one-half from the predecessor's mine. The different mines operated under different coal leases. Only two of the alleged successor's eight employees were employed by the predecessor. The two companies employed different supervisors. The machinery, equipment and mining methods were not the same. *Id*. at 1454.

In this case, by contrast, there is substantial evidence in this record, even prior to discovery and a full-blown hearing on the merits, that IMM is CMM's successor, who is jointly and severally liable for Zambonino's non-frivolous complaint of discriminatory discharge.

Certainly, it cannot be gainsaid that the Secretary has established a non-frivolous claim that IMM is CMM's successor and thus jointly and severally liable for Zambonino's termination.

C. Respondents Have Failed to Prove by a Preponderance of the Evidence that Zambonino Would Have Been Laid Off for Economic Reasons When CMM Ceased Operations Thereby Tolling Temporary Reinstatement

At the outset, I find that the Secretary has established a non-frivolous claim that Zambonino was fired on December 20, 2013, and not laid off, as Respondent contends. Tr. 94; R. Ex. 13; *see also Pride Ambulance Co.*, 356 NLRB No. 128, slip. op. at 3-4 (2011) (when employer's words or actions lead an employee to reasonably believe that she has been discharged, a termination has occurred regardless of actual employment status). Nevertheless, Respondents argue that temporary reinstatement should be tolled to February 28, 2014, the date that CMM ceased operations purportedly for economic reasons because Zambonino would have been laid off on that date even if she had not been terminated on December 20, 2013.

I reject this argument. The evidence supports the Secretary's non-frivolous claim that Respondents' decision to eliminate Zambonino 's job might have been motivated, at least in part, by Zambonino's protected activity of complaining to MSHA in December 2013 and filing a discrimination complaint with MSHA on January 14, 2014.

As the Secretary points out in her post-hearing brief at 21-22, Respondents do not contend that the mine where Zambonino was employed has been idled or that her job duties are no longer being performed. *Cf. Gatlin*, 31 FMSHRC at 1055. Nor do they contend, like the operator in *Cobra*, that Zambonino would have been included in an across-the-board reduction in force based on layoff criteria that was applied to all employees. *Cf. Cobra,* 35 FMSHRC at 395. Rather, Respondents allege that the same mine management who were involved in Zambonino's non-frivolous retaliatory termination decided to eliminate her position when IMM began operating the Mine, in an effort to reduce costs. For the reasons set forth below, the undersigned concludes that temporary reinstatement should be ordered and not tolled because the evidence supports a non-frivolous claim that these managers might have made any such decision, at least in part, because of Zambonino's protected activity of complaining to MSHA in December 2013 and filing a discrimination complaint with MSHA on January 14, 2014, and to avoid having to reinstate Zambonino, the alleged "rat."

Given Respondents' contention that Zambonino would have been included in a subsequent layoff or reduction in force (RIF), the subsequent layoff or RIF "must at that point be evaluated as a potentially wrongful adverse action." *Cobra*, 35 FMSHRC at 397. In such circumstances, the traditional circumstantial evidence of discriminatory motivation is relevant in evaluating whether the subsequent adverse action may have resulted, at least in part, from the miner's protected activity. Accordingly, the Commission looks to knowledge by the operator of the protected activity; hostility or animus toward the protected activity; temporal proximity between the protected activity and the adverse action(s); and disparate treatment of the

complainant as compared to other miners. *Sec'y on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds sub nom Donovan v. Phelps Dodge Corp*., 709 F2d 86 (D.C. Cir. 1983). Furthermore, an operator's apparent disinclination to subject itself to MSHA jurisdiction and the involvement of the same managers who were aware of the miner's protected activity in the layoff or subsequent adverse action may be relevant factors with respect to motivation. *See Sec'y on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 1464, 1471 (June 2012) (ALJ), *aff'd*, 34 FMSHRC 1580, 1582-83 (July 2012). These indicia of discriminatory motivation are present here.

Bono admitted that he and Filyaw were involved in the decision to terminate Zambonino.

> Q. Okay. So it's true that you were involved in the decision to terminate Miss Zambonino; correct?
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> A. Ultimately the decision was mine to start cutting down on staff. I had been wanting to get rid of at least one of the ticket agents long before the 16th, and Wayne and Phil said no. This thing's going to work. It's going to work. We need to keep them here in case this works.
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> Then, after we got shut down by MSHA, I said it's time to cut back. We got to do it now. And I didn't take lightly falling two further weeks behind in being able to excavate.
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> So yes. I did not say Lucy had to go or Amanda had to go. Wayne got to choose which one, but we said we had to cut back, and we just didn't have the trucks coming through to justify one, much less two.

Tr. 247.

These same mine managers, Bono and Filyaw, who had knowledge of and were involved in Zambonino's December 20, 2013 termination, were aware of her subsequent discrimination complaint and MSHA's concomitant investigation and any subsequent layoff or restructuring decision. Tr. 137-38; 204. Bono testified that '. . . in cost-saving measures we got rid of all ticket agents in February . . .' Tr. 204. Respondents' decision to eliminate the ticket agent position still being performed by Miller, who did not speak Spanish and had less seniority, experience, and education than Zambonino, occurred six weeks after Zambonino filed her discrimination complaint, and only about a month after LaRue's special investigatory interview. The Mine operator ID was not changed until March 18, 2014, four days after the Secretary served a copy of the original Application for Temporary Reinstatement by first class mail. Certainly, the close temporal proximity of events could reflect a discriminatory motive. *See Sec'y v. All American Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999) (citing *Chacon, supra*, 3 FMSHRC at 2511) ("[a]dverse action under circumstances of suspicious timing taken against the

employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive . . .").

The Secretary also presented evidence that agents of Respondents harbored animus toward Zambonino's protected activity and MSHA's inspection(s) and special investigation. Zambinino heard Respondents' agent Hardee, foreman for both CMM and IMM, tell Mine manager Filyaw and CMM foreman Flint that it would be really nice to find out who the rat was who told on us so we can crush it. Zambonino testified that Hardee looked into her eyes when he uttered these words. Tr. 86. Immediately thereafter, Filyaw told Zambonino that he had "bad news, that MSHA had come the day before, and they had cited them for violations and that they (MSHA) had shut down the mine." Tr. 85, 89. Before Zambonino left, she overheard Filyaw tell Hardee and Flint that Bono was losing money and sick of all the problems they were having and that Bono wanted to pull the plug and close down the mine for good. Tr. 112, 128, 130. Thereafter, Filyaw led Zambonino to believe that he had resigned and she had been terminated. He never called her back for training with other employees. When she persisted in an effort to get her job back, he told her that "things are working out well without a bilingual ticketing agent" and that she would not go back to work. Tr. 90-91, 94, 107.

At the hearing, Bono expressed several instances of apparent disdain toward the MSHA inspection resulting from Zambonino's safety complaint and MSHA's conduct during the subsequent discrimination investigation. When asked on cross why he did not require proof of compliance with MSHA regulations from Filyaw, Bono testified, "I think that would be an impossibility because there are so many MSHA rules and regulations that he would have to bring me volumes of books and show me compliance, compliance, compliance." Tr. 246. Bono insisted that MSHA, not CMM or its alleged non-compliance with mandatory MSHA safety and health standards, "shut us down." Tr. 187. He blamed the MSHA inspection for a two-week delay in CMM's attempt to engage in shell production and excavation activities because the lake filled up with water when the pumps were shut down and it took CMM two weeks to pump down the lake to get to the area of excavation. Tr. 187-88. Bono "didn't take lightly falling two further weeks behind in being able to excavate." Tr. 247. As noted, Bono testified that "after the episode in December with the MSHA inspection and shutdown of the mine, I said we can't keep doing this. We're getting killed. We got to start cutting back." Tr. 220. When asked whether he had seen Zambonino's hazard complaint, he testified not until it was "flashed by this investigator in front of Mr. Filyaw" during the discrimination interview. Tr. 222. Bono's testimony suggests animus towards MSHA's regulatory activity and Zambonino's safety complaints and discrimination complaint, which initiated MSHA's regulatory activity and special investigation.

Regarding disparate treatment, Bono testified that nearly all the other employees who were "laid off" when CMM ceased operations were rehired by IMM or by another subsidiary controlled by Bono and Gravitas, majority owner of IMM. Tr. 201-02. Perhaps most importantly, Bono testified that "we offered" Miller a position as receptionist at C^3P, without any training. Tr. 202. Accordingly, there is evidence that other employees purportedly laid off when

CMM ceased operations were treated more favorably than Respondents claim that Zambonino would have been treated.

In sum, there is sufficient evidence to support a non-frivolous claim that Respondents' decision to eliminate the ticketing agent position might have been motivated, at least in part, by Zambonino's safety complaints and discrimination complaint, which initiated MSHA's regulatory activity and special investigation. Although Respondents submitted evidence of economic difficulties, Respondents failed to demonstrate by a preponderance of the evidence that economic reasons were the sole motivation for eliminating the ticketing agent position or that Respondents adverse actions were in no part motivated by Zambonino's protected activities.

Respondents provided incomplete and cursory evidence of the economic reasons purportedly causing them to eliminated the ticketing agent position at the end of February 2014. Bono failed to explain why the rock crushing operation did not meet economic projections, nor establish by documentation or otherwise, the decision making process that led to the alleged financial curtailment. As noted, unaudited profit and loss statements from CMM from January through December 2013 and from January through cessation of operation in late February 2014, purport to show approximately $750,000 in losses from January 2013 to April 2014. Tr. 193; R. Ex. 5. That financial information, however, partially encompassed CMM's operation, and its revenue and fees from the Quality Mine. Tr. 191; R. Ex. 5. Respondent also submitted unaudited balanced sheets for CMM as of December 31, 2013 and February 28, 2014, the date CMM ceased operations. R. Ex. 5. That financial information, however, includes long-term loans payable to Frugalitas of $600,000 and $735,000, respectively. As noted, on February 25, 2014, Frugalitas, the lending company Bono personally owns, purchased 500,000 tons of rock, sand, shell, and other material from Williams Farms on behalf of IMM. Sec'y Ex. 2; Tr. 230-31. No balance sheet, audited or otherwise, was proffered for IMM. Respondents did admit into evidence an IMM profit and loss statement from January through March, 2014, even though Bono testified that IMM did not commence operations until March 3, 2014. R. Ex. 6; Tr. 213. Although not proffered in evidence, Bono testified that he had reviewed IMM's profit and loss statement through the end of April 2014, which shows losses are down to $24,000 and IMM may have actually made a little bit of money. Tr. 218.

Although Bono testified that CMM ceased operations on February 28, 2014 because it could not sustain the losses it was suffering and could not afford its leases on equipment (Tr. 194), Bono did not walk away from the Williams Mine at the time of alleged economic layoff or retrenchment. Rather, through Frugalitis, he provided $500,000 for IMM to purchase 500,000 tons of stockpile around the same time Respondents would have terminated Zambonino for financial reasons. Tr. 223, 231; Sec'y Ex 2. Bono testified that IMM began operating the Mine in place of CMM on March 3, 2014, although CMM as a corporate entity still exists. Tr. 193, 215. CMM's long-term debt apparently is owed to Frugalitas. Tr. 31; R. Ex. 5. As the Sixth Circuit alluded to in *EEOC v. MacMillan Bloedel*, IMM's purchase "could encourage evasion in the guise of corporate transfers of ownership," and it casts doubt on the veracity of Respondents' economic tolling arguments. 503 F.2d at 1092. Furthermore, Respondents did not submit

personnel records showing which employees were allegedly laid off due to CMM's economic losses. Bono could not identify any of them. Tr. 242. In these circumstances, Respondents have failed to prove its economic tolling defense by a preponderance of the evidence. *Cf. Sec'y on behalf of Pilon v. ISP Minerals, Inc*., 2013 WL 1385626 at *2 (Feb. 28, 2013) (ALJ) (bona fide economic retrenchment in workforce not established given absence of evidence concerning sales volumes, personnel files, or other financial information).

Respondents' reliance on *Sec'y on behalf of Haynes v. Deconder Coal Co.* 10 FMSHRC 1810 (Dec. 1988) (ALJ) is non-precedential and superseded by recent Commission precedent in *Cobra,* 35 FMSHRC at 397*, and C.R. Meyer,* 35 FMSHRC at 1187*,* holding that when an operator asserts that a miner would have been included in a post-termination layoff, temporary reinstatement must be granted if there is a non-frivolous claim that such layoff might have been motivated in any part by the miner's protected activity. As explained above, that non-frivolous claim has been established here. Moreover, the judge's decision in *Deconder* was based on credibility determinations, which are not appropriate in a temporary reinstatement hearing. *Sec'y on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1091 (Oct. 2009).

This case is also sharply distinguishable from *Sec'y v. Argus Energy*, 2014 WL 586885 (Jan. 16, 2014) (ALJ). In that case, the judge tolled temporary reinstatement based on changed circumstances not applicable here. The mine completely ceased operations due to "the collapse of the Central Appalachian coal market" and 56 of the 62 miners were laid off without any transfer to other facilities. *Id*. at *1. Six employees were retained for removal and transportation of equipment, and for clean up of remaining coal. These miners were selected based on seniority, experience and skill, respondent documented the selection process, and the laid-off complainant had fewer certifications and less seniority than those retained. *Id*. at *2. The judge emphasized an "exceptional case" where the discrimination complaint had already been denied, there was complete closure of the mine, and the Secretary submitted no evidence opposing Respondent's claims. *Id*. at *4 n.6.

Here, Zambonino's discrimination complaint is viable, the mine where she worked has not been shut down, and the Secretary has established a non-frivolous claim that there is substantial continuity in the business enterprise with profitability looming on the horizon. Tr. 218-19. Most importantly, the evidence as a whole suggests that Respondents may have eliminated the ticketing agent position, at least in part, to avoid reinstating Zambonino after the MSHA problems she engendered.

It is noteworthy that Zambonino did more than weigh trucks at the extant scale house, a task now performed by managers, who exhibited animus towards her. Zambonino also printed reports, researched potential customers, cleaned, and spoke Spanish with truck drivers or on phone calls. Tr. 71, 78. Respondents have not shown Zambonino's former duties no longer exist, or are no longer needed. Respondents have denied Zambonino the opportunity to perform her duties, which contrasts starkly with treatment of Miller, the other ticketing agent, with less seniority. CMM trained Miller to perform quality control work and continued to employ her as a

ticketing agent until CMM ceased operations about February 28, 2014. Tr. 95, 201-02. At that time, Miller was offered a job as a receptionist with C³P, one of Bono's other Gravitas companies, where other CMM miners also worked. Tr. 202, 60, 64, 96-97, 225.

Respondents argue that Zambonino's temporary reinstatement should not be ordered because Miller was transferred to a position not covered by the Mine Act and Zambonino's ticket agent position no longer exists. This argument must fail. The evidence as a whole suggests that Respondents may have eliminated the ticketing agent position, at least in part, to avoid reinstating Zambonino because of Zambonino's protected activity of complaining to MSHA in December 2013 and filing a discrimination complaint with MSHA on January 14, 2014. MSHA's investigation is ongoing and its theories of liability and discrimination may expand to the layoff or elimination of the ticket agent position, or to other employees affected by such action.

Finally and most importantly, the purpose of temporary reinstatement under the Mine Act is to restore a miner like Zambonino to the economic status quo prior to the alleged discrimination against her, once it has been established, as stipulated here, that her discrimination complaint is not frivolously brought. *Jim Walter Res., Inc., v. FMSHRC*, 920 F.2d 738, 744 (11th Cir. 1990); *cf.*, *Golden State*, 414 U.S. at 188 (the purpose of reinstatement under the NLRA is to restore the economic status quo that would have obtained but for the wrongful discharge). It is undisputed that Zambonino was a miner covered by the Mine Act at the time of her non-frivolous discriminatory discharge. Accordingly, the remedial principles articulated above in *Jim Walter Resources* and *Golden State* apply. The Mine Act's temporary reinstatement remedy may not be thwarted by the fact that Zambonino, who was within the Act's protections when the non-frivolous claim of discrimination occurred, would (or may) have been promoted or transferred to a position not covered by the Act if she had not been allegedly discriminated against. *Id*.; *see Munsey, 2 FMSHRC 3463* (citing *Golden State* with approval in a case involving a successor's joint and several reinstatement liability). Therefore, to restore Zambonino to the status quo ante her non-frivolous discriminatory discharge, Respondents should be required to reinstate Zambonino to her former ticketing agent position or provide her with a job similar to the one provided to Miller.

The undersigned intimates no view on the ultimate merits of Zambonino's discrimination complaint.

IX. Temporary Reinstatement Order

Colonial Mining Materials, LLC and its putative successor-in-interest Infinity Mining Materials, LLC are jointly and severally **ORDERED** to immediately reinstate Lucero Zambonino to her former position that she held immediately prior to her December 20, 2013 termination, or to a substantially equivalent or similar position, at the same rate of pay, hours, benefits, and job responsibilities or equivalent duties.

Ms. Zambonino's reinstatement is not open-ended. It will end upon final order on the underlying discrimination complaint as set forth in section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent and this tribunal.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4).

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

Distribution:

Mark N. Savit, Esq., and Ross J. Watzman, Esq., Jackson Lewis P.C., 950 17th Street, Suite 2600, Denver, Colorado 80202

Tara E. Stearns, Esq., Office of the Solicitor, U.S. Department of Labor, 200 Constitution Ave., N.W., Room N-2700, Washington, D.C. 20210

Channah S. Broyde, Esq., Civil Rights Counsel, Office of the Solicitor, U.S. Department of Labor, 61 Forsyth Street, SW, Suite 7T10, Atlanta, GA 30303

Lucero Zambonino, 2602 70th St. W., Lehigh Acres, FL 33971

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

May 14, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2014-9-M
Petitioner,	:	A.C. No. 11-00012-332726
	:	
v.	:	
	:	
CONMAT, INC.,	:	
Respondent.	:	Mine: Spread 4

ORDER DENYING CONMAT'S MOTION FOR SUMMARY DECISION & ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"). The case involves one 104(a) citation issued to Conmat, Inc. on February 23, 2011.

On March 13, 2014 the parties participated in a conference call with the undersigned.[1] The parties represented to the court that a dispute of fact did not exist, and that the case rested on an interpretation of law. To that end, the parties agreed that the issue could be decided on cross motions for summary decision. On March 28, 2014 Conmat filed its Motion for Summary Decision ("Conmat Mot.") and Memorandum in Support ("Conmat Memo") pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67. The Secretary filed his Motion for Summary Decision ("Sec'y Mot.") on April 11, 2014. For reasons set forth below, Conmat's Motion for Summary Decision is **DENIED**, and the Secretary's Motion for Summary Decision is **GRANTED**.

I. BACKGROUND AND STATEMENT OF UNDISPUTED MATERIAL FACTS

On June 3, 2013 Gordie Pearce task trained a miner on two pieces of equipment at Respondent's mine. Pearce noted the trainings on a task training form, then signed and dated the form on the line reserved for the "[s]ignature of person responsible for health and safety training[,]" which was located immediately below a statement which read: "I certify that the

[1] During the call the court informed the parties that it would obtain a transcript of the call. The transcript was received by the court on March 18, 2014. For purposes of this order the transcript is cited as "Call Tr."

above training has been completed[.]" Jt. Ex. 1.[2] While Gordie Pearce was competent to perform the task training, he was not designated in the mine's Part 46 MSHA-approved training plan as an individual responsible for health and safety training.

On June 25, 2013, Inspector Eric W. Crum with the Department of Labor's Mine Safety and Health Administration issued Citation No. 8741693 under section 104(a) of the Act for an alleged violation of 30 C.F.R. § 46.9(b)(5). The citation alleges the following:

> The task training form for one new miner was not signed by a person designated as responsible for the health and safety of the miners in the mine[']s part 46 training plan. The task training was signed by Gordie Pearce but the three people designated in the plan [as responsible for health and safety training] did not include Gordie Pearce.

Inspector Crum determined that this violation had no likelihood of contributing to injury or illness of a miner, and that, should an injury occur, it could reasonably be expected to result in no lost workdays. He determined that the violation was not significant and substantial ("S&S"), that no persons were affected, and that the violation was a result of low negligence on the part of the operator. The Secretary proposed a penalty of $100.00 for this citation.

II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

a. Conmat's Argument

Conmat argues that it is entitled to summary decision as a matter of law, and that Citation No. 8741693 should be vacated. The regulations require that task training need only be certified by a designated person once every twelve months. Twelve months had not elapsed since the task training occurred and, therefore, the citation was prematurely issued. Call Tr. 2.

According to Conmat, the task training for the new miner was "in progress." *Id.* at 3. Conmat therefore argues that it should have twelve months to certify that the training had been completed. *Id.* Task training is "not a one-shot deal;" Conmat envisions training a miner "one day on three or four things and then a week later you can be task trained on some more." *Id.* at 5. The twelve-month certification timeline is consistent with this reality. "[T]hat's why there's 20 spots on [the task training worksheet] to fill in all the task training." *Id.*

Conmat contends that its interpretation of the standard is justified by MSHA's Program Policy Manual. The manual states that "[a] 'record' of task training must be made at the completion of new task training. New task training records must be 'certified' at least once

[2] Conmat included pictures of the task training form in its motion, however, the form was unreadable due to the poor quality of the printed pictures. On May 5, 2015, the Secretary, after conferring with Respondent, emailed digital pictures of the training form to the court. This document has been marked Jt. Ex. 1. A printed version of the exhibit has been included in the file.

every 12 months, or upon request by the miner." Conmat Memo Ex. RX-11. The Compliance Guideline for MSHA's Part 46 Training Regulations includes identical language, written in response to the question "Does task training have to be recorded and certified each time you train an employee in a specific task?" *Id*. at Ex. RX-6.

According to this interpretation, "recording" and "certifying" each miner's training is intended to be a two part process involving separate and distinct responsibilities. Conmat Memo 6. Part one requires operators to *record* the training, by written record, on a form of the operator's choosing. *Id.* Part two requires operators to *certify* the training, at least once every twelve months. *Id.* Conmat argues that it did not violate section 46.9(b)(5) by failing to certify the training because the certification need only be made within one year of the training. 30 C.F.R. § 46.9(d)(3). The citation was issued twenty-two days after the safety training was recorded, and long before the expiration of the twelve month period during which the operator had to certify the record.

b. Secretary's Argument

The Secretary argues that there are no genuine issues as to any material fact and that the citation should be affirmed because the individual who certified the record was not listed in the mine's training plan. The plain language of section 46.9(b)(5) requires an individual who certifies a miner's training form to be "designated in the MSHA-approved training plan for the mine as responsible for health and safety training." Sec'y Mot. 6-7. Gordie Pearce, who is not listed in the mine's approved training plan as someone who is "responsible for health and safety training," signed the miner's training form in the space clearly reserved for the signature of the individual who certifies the training. *Id*. at 4. Pearce's signature constituted an improper certification of the miner's task training form and, accordingly, a violation of section 46.9(b)(5). *Id*. at 4-5.

Even if the plain language of the standard is ambiguous, deference should be afforded the Secretary's reasonable interpretation that Pearce's signature constituted a violation of section 46.9(b)(5). *Id*. at 7-8. If Conmat's argument were accepted, i.e., that a violation is premature until the expiration of the twelve month window, then the signing of the form would have no effect until the twelve month period expired. *Id*. While mine operators do have twelve months to certify task training, certification can occur prior to the expiration of the twelve month period. *Id*. at 5-6. The twelve month period set forth in section 46.9(d)(3) is the maximum time allowed before certification of task training is required. *Id*. at 6. Here, Pearce certified the miner's training form, albeit improperly, the same day the training occurred. MSHA inspectors cannot be expected to decipher whether the individual who signed the signature line to certify a record intended to certify the record. *Id*. at 5. Given Congress' "deep concern over the problem of poorly trained miners," mine operators' responsibility to conduct training and maintain proper records, and MSHA's reasonable expectation that the records and certificates presented to its inspectors will be correct, deference should be afforded the Secretary's interpretation. *Id*. at 7-9.

III. DISCUSSION

Commission Procedural Rule 67 sets forth the grounds for granting summary decision as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answer to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67.

The parties agree that there are no genuine issues as to any material fact and that this matter should be decided based on the information presently before the court. This case presents questions of regulatory interpretation regarding section 46.9 of the Secretary's regulations, which is titled "Records of training." While Conmat argues that the training form was only a "record" of training, and that the citation was issued prematurely, the Secretary asserts that the form was "certified," albeit improperly, and that a violation existed. For reasons that follow, I agree with the Secretary and find that Pearce's signature constituted an improper certification of the miner's task training in violation of section 46.9(b)(5).

The Commission has explained that, with regard to regulatory interpretation, "'the language of a regulation … is the starting point for its interpretation.'" *Mach Mining*, LLC, 34 FMSHRC 1769, 1773 (Aug. 2012) (quoting *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987)). Further, "[w]here the language of a regulatory provision is clear, the terms of that provision 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." *Id*. (citing *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) and *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993)).

The citation in this case was issued for an alleged violation of section 46.9(b)(5) of the Secretary's regulations, which requires that safety training forms include "[a] statement signed by the person designated in the MSHA-approved training plan for the mine as responsible for health and safety training, that states 'I certify that the above training has been completed.'" 30 C.F.R. § 46.9(b)(5).

The plain language of section 46.9(b)(5) clearly states that only individuals designated in the mine's approved training plan may certify a miner's completion of training by signing a statement that reads "I certify that the above training has been completed." This much does not seem to be in dispute. However, the parties are at odds over whether the particular training form presented to the inspector had been certified.

I agree with Conmat that the regulations and MSHA guidance materials differentiate the creation of a "record" of training from the "certification" of the record of training. Section

46.9(c) requires that a "record" of training be created "[u]pon completion of new task training[.]" 30 C.F.R. § 46.9(c). The record must include the name of the miner being trained, the type of training, the duration of training, the date of training, the name of the trainer, the name of the mine or independent contractor, the MSHA mine identification number, the location of the training, and a statement regarding false certification of the record. 30 C.F.R. §§ 46.9(b)(1)-(4). Proper "certification" of the training occurs when a statement reading, "I certify that the above training has been completed" is signed by an individual designated to do so in the mine's MSHA-approved training plan. 30 C.F.R. § 46.9(b)(5).

The Secretary's regulations do not specify a particular form that must be used to record and certify training and, rather, only require that, in creating the record and certification, certain specific information is provided on the document. 30 C.F.R. §§ 46.9(a) and (b). Given the flexibility afforded mine operators as to how to record and certify training, it is certainly reasonable to expect operators to familiarize themselves with the form they choose to use. Respondent chose to use the form depicted in Jt. Ex. 1.[3] There is no evidence in the record that MSHA required the use of this form, or that Respondent was unfamiliar or confused by the form.

The form, in its blank state, provides input space for all of the information required by 30 C.F.R. §§ 46.9(b)(1)-(3). Further, it includes the required statement regarding false certification required by 30 C.F.R. § 46.9(b)(4). Finally, and as particularly relevant to this analysis, the form includes a statement which reads "I certify that the above training has been completed," followed by a signature line for the "[s]ignature of the person responsible for health and safety[.]" The statement and signature line are clearly intended to satisfy the requirements of 30 C.F.R. § 46.9(b)(5), which outlines what is necessary to properly certify a miner's training record.

It appears that Pearce correctly provided the information required by sections 46.9(b)(1) through (b)(3). *See* Jt. Ex. 1. I agree with Conmat that this information, along with the statement regarding false certification, created a "record" of training. However, I disagree with Conmat that the record of training was not "certified."

Pearce's signature constituted an improper certification of the miner's training record. While Respondent argues that Pearce's signature and date below the statement that "I certify that the above training has been completed," on a signature line for the "[s]ignature of the person responsible for health and safety[,]" is without effect and does not amount to a "certification" of the record, I find to the contrary. I agree with the Secretary that, absent the signature, a violation would not have existed. The statement and signature line for the designated individual have little meaning when a signature *is not present*. Contrarily, the statement and signature line, which is explicitly reserved for a designated individual, must have meaning when a signature *is present*. Pearce's signature was a representation, or in this case a misrepresentation, that he "certified that

[3] Respondent makes passing reference to the training form being in the private possession of the miner at the time the inspector observed it, and not in the possession of an agent of the mine. While Respondent asserts that the form was "not purported to be certified by CONMAT" it acknowledges that the form "was in fact a record[.]" Conmat Memo 6. While Conmat does not explicitly argue that a difference exists between records in the possession of an agent of the mine and those in the private possession of its employees, given its acknowledgement that the form was, at a minimum, a "record," I need not address the issue.

the . . . training had been completed" and was "the person [designated in the mine's approved training plan as] responsible for health and safety."

I agree with the Secretary that MSHA inspectors cannot be expected to deduce the intent of an individual who signs a training form in an area which is clearly intended to be signed by the individual certifying the training. Moreover, given the strict liability imposed by the Mine Act, neither the inspector nor the court need reach the issue of whether Pearce intended, or meant, to certify the form. However, based upon the record evidence before me, and my conversations with the parties, I do not believe that the signature was an overt attempt by Pearce or the Respondent to avoid compliance.[4] Rather, I am inclined to believe that Respondent had a good faith belief that it was complying with the regulations. After all, the parties agree that this was simply a paperwork violation, from which no apparent benefit could be derived by the operator for violation of the standard. While the violation can seemingly be chalked up to simple mistake on the part of Respondent, the fact remains that the purpose of the statement and signature line is to certify the training. To find otherwise would fly in the face of the plain language of both the cited standard and the form chosen by the operator. Accordingly, I find that Pearce's signature amounted to an improper certification of the training form in violation of section 49.6(b)(5).

The Respondent argues that the citation was prematurely issued given that the Secretary's regulations afford twelve months for the designated person to certify the training. The Respondent relies upon section 46.9(d)(3), which states that the operator "must ensure that all records of training . . . are certified under paragraph (b)(5) of this section and a copy provided to the miner . . . [a]t least once every 12 months for new task training, or upon request by the miner, if applicable[.]" 30 C.F.R. § 46.9(d)(3). Respondent avers that, given twelve months had not elapsed since the time of training, time remained for one of the three individuals designated in the approved training plan to correctly certify the training. I find no merit to this argument.

The regulation is clear and requires that a record of training be certified "*at least* once every 12 months for new task training." (emphasis added). I have already found that the task training form was certified, albeit by a person not qualified to do so. The standard requirement for certification "at least once every 12 months" is a baseline/minimum for certification of task training. While operators need only certify the training once every twelve months, they are free to, and for that matter probably encouraged to, do so more often. Here, Gordie Pearce improperly certified the training form the same day the task training occurred. Pearce's improper certification, which was presented to the inspector by the miner who had been trained by Pearce, amounted to a violation at the time the inspector issued the citation. Given this finding, I need not speculate on the issue of whether a subsequent signature and certification by one of the individuals designated in the approved plan would have avoided a violation had the appropriate person signed the form at a time prior to the inspector viewing the form.

Consistent with my above analysis, I find that the text of the regulation is clear and that the terms of the relevant provisions, when applied to the facts of this case, require that the fact of

[4] The Secretary has made no allegation that Pearce's action rose to the level of a "false certification" contemplated by 30 C.F.R. § 46.9(b)(4).

violation be upheld.[5] In addition, I affirm the Secretary's findings regarding gravity, all of which are already at the minimum, as well as his negligence finding. While Conmat asserts that it was not negligent, Conmat Memo 2, its argument is based entirely on its assertion that there was no violation. Given that I have already found a violation, and based upon my review of the information before me, I affirm the Secretary's "low" negligence designation.

IV. ORDER

Conmat's Motion for Summary Decision is **DENIED**. The Secretary's Motion for Summary Decision is **GRANTED**. Citation No. 8741693 is **AFFIRMED** as issued. Conmat is **ORDERED TO PAY** the Secretary of Labor $100.00 within 30 days of the date of this order.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution:

Dan Venier, CLR, U.S. Department of Labor, MSHA, 515 West 1st Street, Suite 228, Duluth, MN 55802

Shawn Meier, Conmat Inc., 2283 US 20 BR E, Freeport, IL 61032

[5] In the unlikely event that some ambiguity could be read into the pertinent language of section 46.9, I would find that the Secretary's interpretation is entirely reasonable and logically consistent with both the language of the text and intent of the standard. *Alcoa Alumina & Chemicals*, 23 FMSHRC 911, 913-914 (Sep. 2001).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-3577 / FAX: 303-844-5268

May 14, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST-2011-749-M X A.C. No. 35-03702-245915
v.	:	
ROCK N ROAD QUARRY, Respondent	: :	Rock N Road Quarry

DECISION

Appearances: Daniel Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Lee Bissell, Rock N Road Quarry, Culver, Oregon, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Rock N Road Quarry, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Portland, Oregon.

One section 104(a) citation was adjudicated at the hearing. The Secretary proposed a total penalty of $108.00 for this matter.

I. Citation No. 8599814

On January 1, 2011, MSHA Inspector Benjamin Burns issued Citation No. 8599814 under section 104(a) of the Mine Act, alleging a violation of section 56.11001. The citation stated:

> A safe means of access was not provided to the Thunderbird screen deck. The screen was being accessed by a 24 ft. extension ladder for fluid level checks, v-belt maintenance, and screen changes. Miners were tying off with a Miller retractable lanyard 9 ft. X 1 in. X .06 In. Polyester with a 3 1/2 ft. arresting distance to frame work of the over screen conveyor and shimmying along I-beams to change screens and access bolts. From ground level to the top of the deck was approx. 14 ft. This condition creates a fall hazard and could result in a permanently disabling injury. This practice

> has existed for some time and the operator did not recognize this as a hazard.

(Ex. G-3). Inspector Burns determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was Significant and Substantial ("S&S"), the operator's negligence was moderate, and that one person would be affected. Section 56.11001 of the Secretary's safety standards requires that "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001.

For the reasons set forth below, I modify Citation No. 8599814.

Discussion and Analysis

I find that Respondent did not maintain safe access to the Thunderbird screen deck of the cited crusher because it did not correctly instruct miners upon proper use of safety equipment. Section 56.11001 requires that operators both provide and maintain safe access. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707 (July 2001). To comply with section 56.11001, "the standard requires an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place." *Id* at 708. Respondent did not uphold safe access to the cited area because although it provided proper equipment, it did not train miners to properly use that equipment. Inspector Burns testified that he issued Citation No. 8599814 because to maintain the crusher, miners climbed a 24 foot retractable ladder, tied off with a safety line and lanyard, and then side-stepped along an I-beam that was 6 or 7 feet above the ground. (Tr. 14-15, 37). Respondent did not dispute the inspector's testimony regarding its procedure. Although there was more than one point to tie-off, only one point was used when miners accessed and moved across the beam. (Tr. 48). Respondent does not dispute that the inspector correctly stated the substance of its procedure. Respondent argues, and the Secretary does not dispute, that the ladder, the harness, and the lanyard in use at the cited area all worked properly and were not defective. (Tr. 43). If used properly, Respondent's safety equipment could provide safe access to satisfy section 56.11001. Respondent's procedure for using the equipment, however, allowed miners to move horizontally across an I-beam and work a significant distance away from their static tie off point. Working several feet away from a static tie-off point could allow a falling miner to swing into the structure of the crusher, which is unsafe. Respondent did not provide safe access to the cited area.

To maintain safe access, Respondent can utilize the same ladder, harness, and lanyard at issue here, but must train its miners to use that equipment safely.[1] Although Respondent

[1] Section 56.11001 does not specify a means of abatement. Any efforts that create safe access to the cited area can therefore abate Citation No. 8599814. Respondent asserts that the inspector advised it that Citation No. 8599814 could only be abated by buying a bucket truck or lifter or installing a catwalk. (Tr. 46). The inspector did not testify regarding this assertion and Respondent did not address the issue when it questioned the inspector. Regardless of whether the inspector insisted upon an abatement procedure, I find that Respondent's existing equipment, if used properly, could abate Citation No. 8599814.

provided adequate equipment to facilitate safe access to the cited area, it did not maintain safe access in accordance with section 56.11001 because it did not properly instruct its employees to use the equipment that it provided. Respondent must maintain safe access with proper training and enforcement of the implementation of that training.

I find that the Secretary did not fulfill his burden to show that Citation No. 8599814 was S&S[2] because the condition cited in Citation No. 8599814 was not reasonably likely to lead to an injury and such an injury was not reasonably likely to be serious. I credit Bissell's testimony concerning the measurements and procedures in place at the mine.[3] The Secretary relied heavily upon the inspector's estimated measurements to support his reasonably likely designation. Even if I credited the testimony of Inspector Burns, however, these measurements alone do not explain how the hazard was reasonably likely to injure a miner. The inspector did not explain how far a miner could travel from a tie off point before facing a hazard, or how that distance would affect the likelihood of an injury. *Id*. A miner is unlikely to swing like a "pendulum" the entire distance back to the tie-off point; the fall protection would arrest a miner close to the beam and stop the miner from falling. (Tr. 17). At worst, a miner would slide along the side of the crusher to the tie off point, but the miner would not swing into that point with 6 feet of momentum. The fall protection would stop a miner quickly if he lost his footing and the inspector provided no explanation of how injury was likely to occur. I also note that miners only accessed this area two to three times per year, making an injury less likely. (Tr. 49-50, 54). The Secretary did not fulfill his burden to show that the hazard contributed to by the violation was reasonably likely to result in an injury.

The Secretary also did not fulfill his burden to show that the injury contributed to by the cited condition was reasonably likely to be serious. A miner tripping, or at worst bumping into the crusher and sliding back to the tie-off point would most likely receive scrapes and bruises.

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[2] 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) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation…will cause injury." *Musser Eng'g, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

[3] Inspector Burns did not see miners performing work upon the screen; he based his testimony upon "what was gathered" from Lee Bissell, the owner of Rock N Road. Bissell, however, undermined many of the statements made by Inspector Burns at the hearing. Bissell testified that the I-beam upon which miners walked was 10 inches wide and not 6 inches as the inspector believed. (Tr. 14-15, 38-40). Miners did not use the I-beam to access and maintain the v-belt, the upper bolts, or the oil as the inspector suggested. (Tr. 39). Miners only followed the cited procedures to use air guns to tighten the lower bolts, which were underneath the "Thunderbird" logo. (Tr. 38-39; Ex. G-4 at 3). Bissell testified that the distance from the tie-off point that a miner could travel was only 5 to 6 feet, while the inspector believed that distance reached 9 feet. (Tr. 65). The scale of the photograph of the crusher that the Secretary himself submitted as evidence also supports Bissell's testimony. (Ex. G-4 at 3).

The fall protection would stop the miner from falling or gaining momentum to swing into the crusher, preventing a serious injury, especially a permanently disabling injury. Citation No. 8599814 is not S&S.

I find that Respondent's low negligence caused Citation No. 8599814. Respondent supplied all the necessary equipment to provide safe access and believed that its procedure complied with section 56.11001. Previous inspectors, furthermore, asked Respondent to explain its procedure and did not issue any citations as a result. (Tr. 56). I hereby **MODIFY** Citation No. 8599814 to low negligence and non S&S; I also reduce the gravity. A penalty of $80.00 is appropriate for Citation No. 8599814.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Reports, which were submitted by the Secretary. (Ex. G-5). Respondent had no history of previous violations in the two years preceding the issuance of the subject citation. At all pertinent times, Respondent was a small mine operator. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon the ability of Rock N Road Quarry to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

For the reasons set forth above, I **MODIFY** Citation No. 8599814. Rock N Road Quarry is **ORDERED TO PAY** the Secretary of Labor the sum of $80.00 within 30 days of the date of this decision.[4]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

Distribution:

Daniel Brechbuhl, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708 (Certified Mail)

Lee Bissell, Rock N Road Quarry, 7238 South Adams Drive, Culver, OR 97734-9678 (Certified Mail)

[4] Payment should be sent to the 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
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9971 / FAX: 202-434-9949

May 15, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2011-1354 A.C. No. 15-16734-259098
v.	Docket No. KENT 2011-1385 A.C. No. 15-16734-260061-01
CLINTWOOD ELKHORN MINING COMPANY, INC., Respondent	Docket No. KENT 2011-1386 A.C. No. 15-16734-260061-02
	Mine: Clintwood Elkhorn II

AMENDED DECISION

Appearances: Willow Fort, Esq., U.S. Department of Labor, Nashville, Tennessee, for Petitioner

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent

Before: Judge Rae

These cases are before me upon petitions 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). The Secretary's petitions allege that Clintwood Elkhorn Mining Company, Inc. ("Clintwood") is liable for a total of five violations; three violations of the Secretary's mandatory safety standards for surface coal mines and surface work areas of underground coal mines, two violations of "notification ...of accidents, injuries ...in mines." 30 C.F.R. §§50, 77. They propose the imposition of penalties totaling $168,600.00. The parties presented testimony and documentary evidence at a hearing in Pikeville, Kentucky. Post-hearing briefs were submitted by both parties.

After consideration of evidence on the record and post-hearing briefs submitted by the parties, I find that the Secretary has proven a violation of MSHA standards as alleged in two of the citations. I impose civil penalties in the total amount of $29,600.00 for the violations.

The parties submitted the following stipulations: 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 Mine Act; 2) Todd Belcher and Nathan Mounts, whose signatures appear in Citation Nos. 8247826 and 8247827, were citing in the official capacity as MSHA employees and authorized representatives of the Secretary of Labor when the citations were issued; 3) True copies of the citations were served on Respondent as required by the Mine Act; 4) The total proposed penalties in this case will not affect Respondent's ability to remain in business; 5) The alleged violations were abated in good faith. Ex. J-1.

Findings of Fact and Conclusions of Law

The Clintwood Elkhorn II mine is a surface coal preparation plant located in Pike County, Kentucky. Tr. 22. The plant contains a series of belts used to transport coal from the deep mine and to stockpiles outside of the plant. Tr. 34, 235. The coal inside the plant is washed and cleaned to remove rock and clay. Tr. 36, 235. The coal is then transferred to one of six clean coal stocker areas depending on its blend. Tr. 34-35, 235, 270. A stocker is a large concrete cone that holds coal. Tr. 269-70. Flop gates, located inside the plant, are used to direct the coal intothe stockpiles. Tr.II 18.[1]

On January 18,2011, MSHA Headquarters in Arlington received a call from a member of the news media who had heard the ambulance dispatch, asking for information on an accident at the Clintwood Elkhorn II Mine. Tr. 125. MSHA Headquarters, not having heard about an accident, called the district office, which also did not have a report of an accident at the mine. Tr.125. MSHA Inspector Nathan Mounts[2] was instructed to visit the mine the same day and arrived Around 1:00 p.m. Tr. 125. MSHA Inspector Todd Belcher[3] arrived at the mine on January 19, 2011 to conduct an accident investigation. Tr. 78.

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[1] The use of "Tr." refers to the hearing transcript for December 10, 2013. The use of "Tr.II" refers to the hearing transcript for December 11, 2013

[2] Nathan Mounts is a health inspector for MSHA. Tr. 13-14. His duties include observing and evaluating respirable dust parameters as well as evaluating noise and health related issues to dust and noise. Tr. 14. At the time that he issued the two citations below, Mounts had been a general inspector for about 3 years. Tr. 15-16. Prior to joining MSHA, he was an underground coal miner, foreman, and equipment operator for Massey Energy for 12 years. Tr. 16.

[3] Todd Belcher has been a ground control surface specialist for MSHA since 2007. Tr. 73-74,75. His duties include reviewing and sending ground control plans for acknowledgement, inspections as needed, and accident investigations. Tr. 74. Belcher received accident investigation trainingin 2009 and assisted in investigations prior to that. Tr. 75. Since the training, he has participated in 12 to 15 accident investigations, leading all but one or two. Tr. 77-78. Prior to joining MSHA, Belcher worked at Cam Mining for over a year and was an inspector for the Kentucky Department of Surface Mining for 14 of his 21 years there. Tr. 94-95.

The details of how the accident happened are largely undisputed. Between 4:30a.m. and 5:00a.m. on January 18, 2011, Christopher Bowling, a miner, was standing on an elevated metal platform, located between the second and third floors of the plant, trying to manually switch the flop gate to the old syn-fuel stacker 6 when he fell from it. Tr. 25, 30-33, 86-87, 251, 353; Ex. S-4 at 3, S-6 at 2, 5. The platform was accessed by going down steps from the third floor and climbing through handrails and was elevated almost 22 feet above the mine floor. Tr. 85, 353. Bowling stated that he had no memory of the fall but believed his hands slipped on the lever operating the flop gate and he fell backwards. Ex. S-5 at 9. No one witnessed the fall but several employees responded shortly thereafter. He had been taken away by ambulance by the time MSHA investigators arrived at the scene.

As a result of Mounts' inspection and Belcher's investigation, the five citations discussed below were issued.

KENT 2011-1354

Citation No. 8247826

Citation No. 8247826 was issued by Mounts on January 18, 2011 at 1:14 p.m., pursuant to section 104(d)(1) of the Act.[4] It alleges a violation of30 C.P.R. § 77.204[5] which states, "[o]penings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices." The violation was described in the citation as follows:[6]

> On Tuesday, January 18, 2011, a serious fall type accident occurred at the Clintwood Elkhorn Mining Company preparation plant.
>
> A plant employee, who was located at the flop gate for the belt conveyor leading to the syn-fuel storage area, fell to the concrete floor located approximately 20 feet below, receiving multiple injuries as a result.
>
> As a result of the accident investigation and based on additional information obtained from witness interviews and an on-site inspection of the area, this

[4] This citation was originally issued as a 104(a) citation but was modified to a 104(d)(1) citation by Belcher after further evaluation and gathering of evidence. Ex. S-2 at 2. Mounts was not consulted about this change. Tr. 60-61.

[5] The alleged violated section was amended from 77.205(e) to 77.204 in an Order Granting Secretary's Motion to Amend issued on February 12, 2013. Mounts was not consulted about the modification to the cited section. Tr. 60-61.

[6] Grammatical errors in the descriptions from the "Condition or Practice" sections of the citations and orders have been corrected, and subsequent modifications to the citations and orders have been included.

> violation is being modified to reflect changes that describe the condition or practice being cited.
>
> The accident investigation revealed that handrails were not provided on the landing between the second and third floors at the flop gate for the belt going to the old syn-fuel storage area. This area is approximately 20 feet above the concrete floor and metal conveyor belt cover below. As a result, at 0430 hours, a serious accident occurred resulting in an employee seeking medical attention due to the fall.
>
> This is an unwarrantable failure to comply with a mandatory standard. Ex. S-2 at 2.
>
> Mounts determined that an injury occurred as a result of the violation and was reasonably expected to result in lost workdays or restricted duty, that the violation was significant and substantial ("S&S"), that one person was affected, that the level of negligence was high, and that the violation was the result of an unwarrantable failure to comply with a mandatory standard. Ex. S-2 at 1, 2. The Secretary proposed a penalty of $70,000.00.

The Violation

Secretary's Evidence

When Mounts arrived at the mine, he was met by foremen Robert Hinkle and Jim East and taken to the accident scene. Tr. 28. Before arriving at the area where the accident occurred, Hinkle and East informed Mounts that handrails had been installed on the platform. Tr. 28; Ex. S-4 at 3, S-6 at 4, 5. The handrails were installed around the platform from which Bowling fell. Tr. 32; Ex. S-4 at 3, S-6 at 4, 5. Based on this information, Mounts issued Respondent a citation for not having handrails prior to the accident. Tr. 28, 32-33.

The Secretary's initial theory of the case was that this elevated platform required handrails around it under section 77.205(e), which states "[c]rossovers, elevated walkways ... shall be ...provided with handrails ...." Just prior to hearing, the Secretary sought and was granted leave to amend the standard to section 77.204, which states that "[o]penings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices." The later theory being that the space between the edge of a platform and an adjacent wall could be considered an "opening" under the standard.

Mounts believed the work platform was hazardous because there was no barrier to protect miners from falling off of it. Tr. 33, 40. He stated that Hinkle and East informed him that Bowling was on the platform, attempting to manually flop the gate, because the mechanical switch was broken. Tr. 33-34, 36. When questioned about the "opening" between the edge of the platform and the wall, Mounts confirmed that he interpreted it to mean that openings do not need to have handrails if it can be covered by other protective devices that are deemed safe. Tr. 61-62.

Belcher believed the area between the edge of the platform and the wall was a hazard because there were no handrails or cover present and it was big enough for a

person to fall through. He posited that pushing or pulling a lever to switch the flop gate could cause a miner to slip and lose his balance, which likely happened to Bowling. Tr. 105, 106-07.

Respondent's Evidence

Superintendent Sullivan[7] confirmed during his testimony that prior to this accident, handrails were not present on the platform. Tr. 254. He believed that handrails were not required if a safety device was worn and considered fall protection a protective device that satisfied the requirements of section 77.204. Tr. 254, 295. Sullivan stated that a miner wearing fall protection would tie off on round metal eyes attached to the chute in the plant. Tr. 254.

Analysis

Respondent argues that the Secretary is trying to avoid the issue that handrails are not required by part 77 by changing the cited standard and claiming that the edge of the platform is an opening. Resp. Br. at 7. Mounts clearly believed that the regulations called for handrails around the elevated platform and the Secretary amended the citation in an attempt to salvage it. What the Secretary refers to as an opening is really the edge of a platform that happens to have a wall nearby. There were other platforms in the plant that were similarly situated for which citations were never issued. Tr. 258-59. Belcher also focused on the fact that there were no handrails present on the platform. Ex. S-5 at 13. While Respondent believed that it was a hazard to not have handrails on the platform and it installed them, there is unfortunately no requirement in part 77 for elevated work platforms to have handrails.[8] In addition, the presence of handrails, even though used to abate the citation, would not have prevented small objects from falling off the platform because there was large gap between the platform and the first railing Ex. S-6 at 5; Resp. Br. at 9 n.10. This further evidences the fact that neither Belcher nor Mounts were concerned about or considered the area between the edge of the platform and the nearby wall to be an "opening" as set for in section 77.204 at the time that the citation was originally issued. It is further noted that the Secretary failed to prove that the miner fell through this

[7] Homer Sullivan has been the plant superintendent for the past 6 years. Tr. 234. He has a duty to oversee the production of coal and the safety of all employees. Tr. 235. Prior to becoming superintendent, Sullivan was a plant foreman for 7 years. Tr. 236. He is also a certified mine emergency technician (MET). Tr. 236.

[8] As being familiar with the mining industry and from previous ALJ decisions, MSHA has been put on sufficient notice that it should clarify what an opening is and promulgate regulations to require handrails on elevated working platforms. Sunbeam Coal Corp., 2 FMSHRC 192, 221 (Jan. 1980) (ALJ) ("[I]f MSHA desires to provide barriers and other protective devices to prevent personnel from falling off an elevated platform [also used as a work station], it should promulgate a precise standard to cover that situation."). As it stands now, travelways and work platforms are distinguished from elevated walkways in section 205(b) in that they must only be kept clear of extraneous materials and slipping hazards. 30 U.S.C. § 205(b).

alleged opening. Bowling stated that he believed he fell backwards, which would mean he fell off the long edge of the platform behind the flop gate. Ex. S-5 at 9. No one witnessed his fall.

Therefore, I find that the area between the edge of a platform and a nearby wall is not an opening as a matter of law and that Respondent did not violate the cited standard. Citation No. 8247826 is hereby VACATED.

Fair Notice Argument

Assuming, arguendo, that the space between the edge of the platform and the wall could be considered an opening, I find that Respondent did not have fair notice.

"[D]ue process considerations preclude the adoption of an agency's interpretation which 'fails to give fair warning of the conduct it prohibits or requires.'" *LaFarge North America,* 35 FMSHRC 3497,3500 (Dec. 2013); *Gates & Fox Co.* v. *OSHRC,* 790 F.2d 154, 156 (D.C. Cir. 1986). "The Commission's test for notice under the Mine Act is '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.'" *Wolf Run Mining Co.,* 32 FMSHRC 1669, 1682 (Dec. 2010). A number of factors are relevant to this determination, including "the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question." *Id.*

Sullivan testified that the platform was installed in 2006 and MSHA was made aware of this because it gave a courtesy inspection. Tr. 255. MSHA did not tell Respondent that handrails or any other protective devices were needed. Tr. 255. Since 2006, two inspections per year have been done by MSHA, none of which resulted in the issuance of a citation, despite the fact that the platform is easily visible from the steps that lead to a new addition. Tr. 256-57, 258. In addition, there were several other platforms without handrails in the plant and citations were never issued for those areas either. Tr. 258-59. Sullivan stated that when he asked Silas Adkins, now the manager of the Elkhorn Office, why the plant had never been cited for the condition before, Adkins replied that it was not an issue until the accident happened. Tr. 260. I find this testimony by Sullivan to be credible.

Belcher confirmed that the plant is inspected in its entirety every 6 months. Tr. 172. He did not ask past inspectors whether they ever inspected the platform and just assumed that no one from MSHA ever saw the platform. Tr. 172-73. I find this statement to be improbable at best, particularly in light of Sullivan's testimony that the lack of handrails was not an issue until someone was injured.

What constitutes an opening and the devices that can be used to protect an opening are open to broad interpretation. MSHA has not published any notices informing the regulated community of its interpretation of the standard, it performed a courtesy inspection of the platform when it was installed, and it has performed about 12 full inspections of the plant over the course of 6 years and has never issued a citation under section 77.204. Just because an

accident occurs does not mean that a condition never considered by MSHA to be a violation in the past, automatically becomes one for MSHA's convenience of imposing a penalty. Under these circumstances, I find that a reasonably prudent person familiar with the mining industry and protective purposes of the standard would not have recognized the requirements of section 77.204 as being applicable to the area between the edge of a platform and a nearby wall. Therefore, I find that Respondent lacked fair notice.

Citation No. 8247827

Citation No. 8247827 was issued by Mounts on January 18, 2011 at 2:16p.m., pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 77.171O(g) which states, "each employee ...shall be required to wear protective clothing and devices as indicated below ... [s]afety belts and lines where there is a danger of falling ...." The violation was described in the citation as follows:

> An accident occurred on 1118/2011 due to an employee (Christopher Bowling) not wearing fall protection while working from an elevated platform. The employee fell approximately 20 feet onto the concrete floor and metal conveyor belt cover below. No handrails were in place to prevent a person from falling and Citation No. 8247826 was issued for this condition. The employee had to seek medical attention from injuries sustained from the fall.
>
> Standard 77.1710(g) was cited two times in the two years at mine 1516734 (0 to the operator, 2 to a contractor).

Ex. S-3 at 1.

Mounts determined that an injury occurred as a result of the violation and was reasonably expected to result in lost workdays or restricted duty, that the violation was S&S, that one person was affected, and that the level of negligence was high. Ex. S-3 at 1. The Secretary proposed a penalty of $31,000.00.

The Violation

Secretary's Evidence

Mounts stated that he issued this citation because East and Hinkle made statements that Bowling was not wearing fall protection when he was switching the flop gate on the platform and fell through an opening. Tr. 52. Mounts was of the opinion that even with handrails installed, fall protection needed to be worn. Tr. 53-54. In addition, Belcher testified that there were no warning signs to use fall protection posted in the area where Bowling fell. Tr. 224.

In *Southwestern Illinois,* the Commission approved the ALJ's interpretation of the language, "shall be required to wear" in section 77.171O(g) to mean that the operator must require each employee to wear safety belts when needed. *Southwestern Illinois Coal Corp.,* 5 FMSHRC 1672, 1674-75 (Oct. 1983). Specifically, the Commission stated,

> "[t]he regulation does not state that the operator must guarantee that belts and safety lines are actually worn, but rather says only that each employee shall be required to wear them. The plain meaning of "require" is to ask for, call for, or demand that something be done. . . . Accordingly, when an operator requires its employees to wear belts when needed, and enforces that requirement, it has discharged its obligation under the regulation."

Southwestern Illinois Coal Corp., 5 FMSHRC at 1675; see also *Southwestern Illinois Coal Corp.,* 7 FMSHRC 610 (1985) (hereinafter *SOCO /[).*

The Secretary maintains that based on *Southwestern Illinois,* Respondent violated the standard, stating that the Commission found a violation even though its safety rules required miners to wear belts and miners were disciplined for not wearing belts, the operator failed to show that the guidelines were "sufficiently specific." Sec'y Br. at 26.

In *Southwestern Illinois,* the general director of safety and training testified that the decision to wear fall protection was largely up to the miner. This viewpoint was reiterated at oral argument where counsel stated that the use of a safety belt was optional. *Southwestern Illinois Coal Corp.,* 5 FMSHRC at 1676. There were no signs in the mine reminding employees to wear belts and no safety analysis or directives were issued to identify situations where belts should be worn. */d.* The Commission found that the evidence fell short of "demonstrating due diligence in enforcement" and contrasted the case with that of *North American* where the operator had a specific program for avoiding hazards through prominent signs, verbal warnings and reinforcement of safety considerations. *Id; North American Coal Corp.,* 3 IBMA 93 (1974).

Respondent's Evidence

Sullivan stated that the mine has annual refresher training once a year, which in 2011, was January 15, 3 days before the accident. Tr. 283; Ex. R-15. Bowling signed in for the training and Sullivan contended that, even though he did not attend the annual training, fall protection would have been covered under the accident prevention heading on the agenda. Tr. 284-85, 322, 355; Ex. R-15. Sullivan did however confirm that when he arrived at the scene after Bowling fell, it did not appear that Bowling was wearing fall protection. Tr. 313. Sullivan and Brian Hurley[9]

[9] Brian Hurley has been employed at the Clintwood Elkhorn II Mine for about 13.5 years. Tr. 333. He held the position as third shift foreman in January 2011. Tr. 333. Hurley had been a foreman for about 7 years at that time and a certified MET since 2001. Tr. 333, 334. Prior to joining Clintwood, he worked for two other coal mine companies as an equipment operator and mechanic. Tr. 336

also testified that safety meetings were held once a week with miners on all shifts, Bowling being one of them. Tr. 283, 358. Hurley stated that he covered fall protection at least once a month. Tr. 283, 357. Respondent presented a safety meeting agenda from September 2010 that included a fatality at another mine from failure to use fall protection. Tr. 287-88; Ex. R-2.

In addition, all employees received handbooks that address fall protection. Tr. 293. The handbook specifically states that if there is a 'potential' to fall from an unprotected work station, safety belts are required. Ex. R-14 at 8. Miners were also aware that they had to wear protection in any area without handrails and toe boards, and if using a ladder over 6 feet in height, according to Sullivan. Tr. 284.

Further, Bowling was issued his own personal safety belt less than 6 months prior to the accident because of his size and there was fall protection gear readily available. Tr. 358. There were signs to wear fall protection located at various places in the plant. Tr. 284, 358. Pete Maynard, electrician, testified that safety belts were provided on every floor, including the third floor which you had to ascend to in order to access the platform. Tr.II 5, 13. There was also a sign at the entrance to the third floor to wear fall protection which was about 15 to 20 feet from where Bowling was working. Tr. 291, Tr.II 31.

Finally, the mine had a disciplinary program in place that consisted first of a verbal warning and then referral of the issue to human resources. Tr. 292, 294. Sullivan had never seen employees working without fall protection on elevated platforms and Maynard had seen Bowling wearing fall protection in the past. Tr. 294, Tr.II 14-15. The Secretary presented no evidence that Respondent was previously issued citations for failing to wear fall protection and Mounts testified that there was no evidence that anyone was aware, management or otherwise, that Bowling was working on the platform without it. Tr. 63.

Analysis

In this case, evidence was presented of annual refresher training that occurred only three days prior to the accident, which addressed fall protection. There were weekly meetings with miners that addressed safety issues and it appears that Bowling attended these. Fall protection was covered in at least one of these meetings per month. Handbooks were distributed to all miners with clear language of the fall protection requirement. In addition, I credit the testimony of Maynard, Sullivan, and Hurley that there was wide availability of fall protection gear, warning signs close to the platform area that had to be passed by miners to reach the platform, a disciplinary program for violations of mandatory standards, and no previous citations issued under this standard. There was also no mention by any witness that the requirement was lax or left up to the employee's discretion to wear it, making the facts of this case distinguishable from those of *Southwestern Illinois.*

I find that Respondent has demonstrated due diligence in requiring fall protection to be worn and hereby VACATE Citation No. 8247827.

Order No. 8258182

Order No. 8258182 was issued by Belcher on January 21,2011 at 9:00a.m., pursuant to section 104(d)(1) of the Act. It alleges a violation of 30 C.F.R. § 77.1713 which requires that an examination in each active working area be conducted for hazardous conditions and that any hazardous conditions be noted, reported and corrected. The violation was described in the order as follows:

> On Tuesday, January 18, 2011, a serious fall type accident occurred at the Clintwood Elkhorn Mining Company preparation plant.
>
> A plant employee, who was located at the flop gate for the belt conveyor leading to the syn-fuel storage area, fell to the concrete floor located approximately 20 feet below, receiving multiple injuries as a result.
>
> The accident investigation revealed that the preparation plant foreman assigned to perform the daily examination of the facility on this date had failed to conduct an adequate on-shift examination during the night shift of 1/17/2011 to 1/18/2011. A safety hazard existed on a landing between the second and third floors at the flop gate for the belt going to the old syn-fuel storage area and was not recorded in the daily on-shift book. A handrail was not provided for the landing at this work area, resulting in a mine employee falling, striking the belt chute cover, and then landing onto the first floor of the plan. The employee was transported to the hospital by ambulance for medical treatment for the injuries he sustained.
>
> The foreman has engaged in aggravated conduct constituting more than ordinary negligence by not making adequate examinations of active work areas.

This violation is an unwarrantable failure to comply with a mandatory standard. Ex. S-7 at 1, 2.

Belcher determined that an injury occurred as a result of the violation and was reasonably expected to result in lost workdays or restricted duty, that the violation was S&S, that one person was affected, that the level of negligence was high, and that the violation was an unwarrantable failure to comply with a mandatory standard. Ex. S-7 at 1. The Secretary proposed a penalty of $38,000.00.

The Violation

Secretary's Evidence

During Belcher's investigation, he reviewed the on-shift examination books for the night shift of January 17-18, 2011, and found that the "hole" in the floor had not been marked as a hazard and had not been adequately protected to prevent a fall. Tr. 110, 111-12; Ex. S-11. This indicated to Belcher that an examination of the platform had not been performed prior to miners

accessing it to conduct work, and if it had been examined, the exam was inadequate. Tr. 114, 115. In addition, Belcher spoke to the foreman on the January 17, 2011 night shift and stated that the foreman did not say that he failed to inspect the platform area. Tr. 166. As a result, he issued the above order for an inadequate on-shift examination.

Belcher explained that the cited standard requires that all workplaces be inspected at least once a shift in order to identify and correct hazards. Tr. 113. If work was not going to be conducted in a particular area during the shift, an exam would not need to be performed. Tr. 113. While Belcher acknowledged that a miner could guard themselves with fall protection, he contended that it would not change the fact that there was an "opening" in the floor. Tr. 115, 116.

Respondent's Evidence

As discussed above, Sullivan stated that the platform was installed in 2006, MSHA was aware of the installation, conducted a courtesy inspection, and has never issued a citation for an inadequate exam for failure to list the area between the edge of the platform and the wall as a hazard, or notified Respondent that handrails were needed. Tr. 255, 256-57, 260-61. He maintained that the lack of handrails did not need to be listed as long as fall protection was worn in the area. Tr. 261.

Hurley was the foreman on duty when Bowling fell. He testified that he examined the platform from which Bowling fell on January 17 during a pre-shift examination as required by state law. Tr. 380. In the 7 years that Hurley had been performing on-shift examinations, he had never recorded missing handrails as a hazard. Tr. 359. He further contended that the only reason to flop the gate that Bowling was attempting to flop on January 18 was if the belts were torn or stopped working, but neither of those things happened that day. Tr. 373-74.

On January 18, 2011, Hinkle, a foreman, reported the lack of handrails on the platform as a hazard because Bowling fell from it. Tr.II 37. He stated that he never recorded it in prior exam records because he thought fall protection was sufficient. Tr.II 38; Ex. S-11.

Analysis

Because neither section 204 nor 205 under Part 77 requires handrails on elevated platforms, and I found that the area between the edge of a platform and a nearby wall did not constitute an opening, I find that Respondent did not violate section 77.1713, Order No. 8258182 is hereby VACATED.

KENT 2011-1385

Order No. 8258183

Order No. 8258183 was issued by Belcher on January 21, 2011 at 9:00a.m., pursuant to section 104(d)(1) of the Act. It alleges a violation of 30 C.F.R. § 50.10(b) which states, "[t]he operator shall immediately contact MSHA at once without delay and within 15 minutes ... once the

operator knows or should know that an accident has occurred involving ...[a]n injury of an individual at the mine which has a reasonable potential to cause death." The violation was described in the order as follows:

> On Tuesday, January 18, 2011, a serious fall type accident occurred at the Clintwood Elkhorn Mining Company preparation plant.The accident investigation revealed that a plant employee, who was located at the flop gate for the belt conveyor leading to the syn-fuel storage area, fell to the concrete floor located approximately 20 feet below, receiving multiple injuries as a result.
>
> The mine operator has failed to immediately report an accident that occurred on 1118/2011 to MSHA without delay and within 15 minutes. A mine employee fell approximately 20 feet from the landing between the second and third floors at the flop gate for the belt going to the old syn-fuel storage area, striking the belt chute cover, and then landing onto the first floor of the plant, sustaining serious injuries. The employee received multiple injuries to the head, leg, and wrist. Based on information gathered during the accident investigation, the mine employee was found temporarily unconscious and unresponsive after the fall.
>
> The employee was transported from the mine site to an area hospital for medical treatment. Injuries sustained from this type of fall have reasonable potential to cause death.
>
> The mine foreman has engaged in aggravated conduct constituting more than ordinary negligence by not immediately reporting this accident to MSHA without delay within 15 minutes.
>
> This violation is an unwarrantable failure to comply with a mandatory standard. Ex. S-8 at 1, 2.

Belcher determined that an injury occurred as a result of the violation which was reasonably expected to result in lost workdays or restricted duty, that the violation was S&S, that one person was affected, that the level of negligence was high, and that the violation was an unwarrantable failure to comply with a mandatory standard. Ex. S-8 at 1. The Secretary proposed a penalty of $21,900.00.

The Violation

Secretary's Evidence

Belcher arrived at the mine to lead the accident investigation on January 19, 2011. Tr. 78. Prior to arriving, he was only aware that someone had fallen from a platform area and sustained injuries on January 18. Tr. 126. No report of an accident had been made by Respondent. Tr. 125.

During the investigation Belcher took measurements from the platform to the areas below, where Bowling landed. He determined that Bowling fell 17 feet 1 inch from the platform to the belt chute cover, and another 4 feet 9 inches from the top of the conveyor belt chute cover to the concrete floor, a total of 21 feet 10 inches. Tr. 85; Ex. S-5 at 2. Belcher determined that the accident was reportable because of the distance fallen and types of injuries Bowling received. Tr. 126.

In regards to the distance, Belcher testified that there have been numerous falls from lesser distances, some as little as 8 feet, that resulted in fatalities. Tr. 97. He stated that Bowling could have fallen straight to the floor, but because the area was between a wall and the edge of the platform, Belcher opined that Bowling slid down the wall which helped to break his fall. Tr. 97.[10]

Belcher received information on Bowling's injuries through interviews with miners who responded to Bowling after he fell and from reviewing the ambulance records. According to Belcher's notes, Bowling received stitches to his head and right ear as a result of lacerations, a splint on his wrist for a fracture, and a cut on his chin. Tr. 131-32; S-5 at 10. Upon contacting the witnesses on January 19, Belcher was told by Shawn Newsome, tipple operator and MET, that Bowling was knocked unconscious for approximately 3 minutes. Ex. S-5 at 5. He thought Bowling was dying. *Id* Bowling's neck was swollen and he helped to bandage the wounds and administer oxygen. Tr. 127, 135; Ex. S-5 at 5. A second witness, Quentin Harr, equipment operator and MET, said that he gave treatment for shock. Tr. 136; Ex. S-5 at 5. A third witness, Will McCoy, clean coal dozer operator, stated that he arrived a minute after the accident and found Bowling was not responding, talking, or moving. He believed Bowling was hurt badly. Tr. 136; Ex. S-5 at 5.

Hurley, told Belcher that he was the first or second person to reach Bowling after the fall and he called 911 and applied bandages. Bowling knew his name, was responding, and his blood pressure and pulse were okay. Tr. 137; Ex. S-5 at 7-8. Belcher also spoke with Bowling who said he could not remember what happened but did not recall being unconscious. He stated that he was disoriented. Tr. 196.

Belcher testified that he read the ambulance report in an attempt to verify the witness' statements. Tr. 220. He noted that the report stated, "LOC, [d]oesn't remember falling" and based on his MET experience, assumed that LOC meant loss of consciousness. Tr. 138, 140; Ex. S-9 at 2. However, on cross-examination, Belcher did concede, based on the definition of LOC in

[10] Neither Belcher nor Mounts made a definitive determination that Bowling fell off the right hand edge of the platform where the Secretary, through his amendment, claimed the opening was. No one witnessed the fall, there was no evidence that Bowling was found lying next to the wall below the "opening" and he had no recollection of it himself. This assumption was made by Belcher at the hearing after the Secretary amended his order. I do not find any facts to substantiate this claim.

a medical dictionary, that the acronym could mean loss of consciousness or level of consciousness. Tr. 185.

Based on all of this information, Belcher believed that the operator should have known that the accident had a reasonable potential to cause death. Tr. 141. As he testified, the extent of head injuries is not immediately known until further tests are conducted at the hospital. In his opinion, it is not easy to determine whether someone has injuries that would not lead to death within the IS-minute time-frame. Tr. 127. Belcher's understanding was that as soon as a person who is responsible for reporting the accident becomes aware of one, and there is a likelihood that a reasonable potential for death exists, the person must call to notify MSHA within 15 minutes. Tr. 200-01. He agreed that when an accident does not have a reasonable potential to be life threatening, there is a 10-day reporting requirement. Tr. 178-79.

Belcher explained that the purpose of the 15-minute reporting requirement is to prevent injuries to other miners from the same or similar conditions that may be present in the mine. Tr. 128. Another reason is to ensure that evidence is preserved, the accident is investigated properly, and the area is analyzed to determine what hazards need to be corrected to prevent that type of accident from reoccurring. Tr. 129.

Respondent's Evidence

Sullivan, who usually arrived at work around 5:00a.m., testified that his brother, a mine employee, called him on his way to work and notified him of the fall. Tr. 239. Both he and Hurley, the foreman, had the authority to report the accident to MSHA. Tr. 241, 347. Because Sullivan was not present at the mine at the time of the accident, Hurley would have been responsible for making the call. Tr. 239, 241.

According to Sullivan, Bowling was moved onto a backboard so that he did not have to sit up, he checked Bowling for rib and pelvic fractures, and put Bowling on oxygen for shallow breathing and to prevent shock. Tr. 243. Sullivan maintained that Bowling never went into shock and he never saw or heard from another miner that Bowling lost consciousness.[11] Tr. 243, 244, 247-48. He also stated that he performed a pupil check which was normal, and there was not a lot of bleeding. Tr. 244-45.

Sullivan followed the ambulance from the mine to the hospital and contended that he did not learn anything at the hospital that was different than his first assessment. Tr. 246. He overheard the physician tell Bowling's family that Bowling would be okay. Tr. 246-47.

After speaking with the safety director, a decision was made not to report the accident to MSHA because Bowling knew his name, phone number, and was "pretty conscious." Tr.

[11] Sullivan did concede that he heard other employees talking about Bowling losing consciousness the night of January 18 but trusted Hurley and Maynard's account because he believed they got to Bowling first. Tr. 247-48.

244. Sullivan contended that if an injury requires stitches or broken bones are involved, the 10-day reporting period applied. Tr. 241. However, Sullivan testified that he was an MET and admitted that a person can suffer a brain injury that may not be apparent within 15 minutes. Tr. 301. He did not remove bandages around Bowling's head to evaluate the laceration and determined that the injury was not life-threatening before Bowling received brain scans at the hospital. Tr. 304.

Hurley testified that he was the first person to reach Bowling after the fall. Tr. 338. As an MET, he first assessed Bowling's level of consciousness as alert by talking to him and then drove to the foreman's office to get the MET bag. Tr. 340, 341, 360-61. After retrieving the bag, Hurley checked Bowling's pupils, blood pressure and respirations, which he found to be normal.[12] Tr. 340, 341. He did not notice swelling. Tr. 362. Hurley detailed Bowling's injuries in his patient care report as several cuts on the right hand and head, and a 1.5 inch cut on the right leg. Tr. 341; Ex. R-3. He maintained that if there was a brain injury, there would be a lot of blood loss, dilated pupils, and confusion. Tr. 343. Oxygen was administered as a precaution and there was no indication that Bowling was in or going into shock. Tr. 344. As a result of his evaluation, Hurley did not believe Bowling's injuries were life-threatening and did not report the accident. Tr. 346. He stated that the paramedic told him he thought Bowling would be okay and that he heard the physician at the hospital say that the test results looked good. Tr. 348, 349.

During cross-examination, the Secretary confronted Hurley with the ambulance report. He specifically pointed out the findings that Bowling received nausea medication, and that under the injuries section for "head," the columns for "blunt," "laceration," "pain," and "swelling" were checked off. Tr. 363, 365; Ex. S-9 at 2. Hurley questioned how the EMT could have noticed swelling if Bowling was already bandaged and disagreed that there was swelling. Tr. 364. Hurley was also unaware that Bowling had nausea but agreed that nausea could be a sign of a brain injury which could have a reasonable potential to cause death. Tr. 365, 366-67. He also admitted that head injuries could take time to increase in severity. Tr. 367.

Maynard, an electrician without MET certification, testified that after Bowling fell, he reached Bowling at about the same time as Hurley did. Tr.II 8, 15. Belcher's notes indicate that Maynard arrived first. Ex. S-5 at 9. Maynard stayed with Bowling when Hurley went to retrieve the MET bag and maintained that while Bowling had injuries to his head and ear, Bowling never lost consciousness and that there was not a lot of blood. Tr.II 9. As a result, he did not think that there was a reasonable potential for death. Tr.II 9. However, when I asked Maynard what Bowling's complaints were, he stated, "[a]nd we was just trying to, you, know, get him calm to see what actually was wrong.... He was a little disoriented ...[for] [m]aybe ten minutes, maybe. I don't know. I'm not sure." Tr.II 18-19.

[12] Hurley testified that he never saw Bowling lose consciousness and did not hear anyone say otherwise until days or weeks after Belcher conducted his investigation. Tr. 344-45. He believes that the other miners Belcher spoke to essentially exaggerated because they were young, not trained, and scared of what had happened. Tr. 345

Analysis

Respondent cited several cases where judges have vacated section 50.10 citations because the Secretary failed to prove that injuries to the miner did not have a reasonable potential to cause death and cited a Commission case where a violation of section 50.10 was found where a miner had stopped breathing and required CPR. Resp. Br. at 28-32; *Cougar Coal Co.,* 25 FMSHRC 513 (Sept. 2003). In addition, Respondent highlighted that the analysis should focus on whether mine management representatives acted reasonably in concluding that there was no reasonable potential for death. Resp. Br. at 30; *Oneida Coal Co.,* 11 FMSHRC 810, 832-33 (May 1989) (ALJ). Respondent also posed questions during the hearing in an attempt to argue that an MET is more qualified to make a determination as to whether an injury has a reasonable potential to result in death than someone without this certification. Tr. 181-84.

In this situation, Respondent's arguments fail for several reasons. First, in *Cougar Coal,* the Commission rejected the judge's construction that "a medical or clinical opinion of the potential of death would be needed before an accident is even determined to be reportable," stating that to do so would frustrate the immediate reporting of near fatal accidents." *Cougar Coal Co.,* 25 FMSHRC at 521. The Commission goes on to say that "[i]n the field, the decision to call MSHA cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival. The decision to call MSHA must be made in a matter of minutes after a serious accident." *Id* The focus is on the nature of the accident and the type of injuries, i.e. head trauma, not the measurement of the probability of resulting death. Here, a fall of over 20 feet with resulting head injuries per se had the potential to cause death.

Second, in 2006, MSHA issued a final rule in the Federal Register amending the definition of two types of reportable accidents. 71 Fed. Reg. 71430-1 (Dec. 2006). The announcement stated that "[b]ased on MSHA experience and common medical knowledge, some types of 'injuries which have a reasonable potential to cause death' include concussions ... major upper body blunt force trauma, and cases of intermittent or extended unconsciousness." 71 Fed. Reg. at 71433-34.

Third, in a recent decision, the Commission clarified a prior decision, stating that *"Consol,* stands for the proposition that although an operator should be afforded a reasonable opportunity to investigate, once it is determined that a reportable accident has occurred, an operator must act immediately to report the incident." *Wolf Run Mining Co.,* 35 FMSHRC 3512, 3518 (Dec. 2013).

The cases cited where ALJ's vacated the section 50.10 citations did not involve miners with head injuries,[13] and the *Oneida* case, which involved a miner with possible internal injuries from being pinned against a rib by a continuous miner, was decided in 1989, prior to the *Cougar Coal* decision and Federal Register announcement. While the injuries that the miner in *Cougar Coal* sustained were clearly more serious than Bowling's, the Commission in no way restricted 50.10(b) violations to situations where a miner requires CPR.

Here, Bowling fell over 20 feet onto a metal-framed piece of machinery and then to a concrete floor. He had lacerations on his head, was disoriented for a period of time, and three witnesses who Belcher spoke with, two being METs -one who responded first to Bowling contrary to Hurley's testimony, stated that Bowling was unconscious, not responding, had swelling in his neck, and was treated for shock. I find Maynard's statements that Bowling was a little disoriented for "[m]aybe ten minutes, maybe. I don't know. I'm not sure" to be evasive and non-responsive compared to his statements at the scene as recorded in Belcher's notes.

Belcher's notes make it clear the majority opinion was that Bowling was unconscious and hurt very badly. I credit the statements recorded in Belcher's notes as a more accurate description of Bowling's medical symptoms following the fall. Hurley tried to explain the discrepancy, stating that the miners were young and frightened. Tr. 345. This makes no sense in light of the fact that some of them were trained METs. It also begs the question of how accurate an MET's decision is on the probability of death on the scene of a traumatic head-injury type of accident. While Sullivan and Hurley's testimony indicated that Bowling was fine, I find them to be less credible on this issue because they had a motive for not reporting the accident.

Belcher testified that under normal circumstances, when an accident is reported under section 50.10, the entire plant is closed down until it is inspected and considered safe. Tr. 128-29. Sullivan testified that in October 2010, about 3 months prior to the accident, a truck accident occurred and was immediately reported to MSHA. Tr. 299. The entire plant was shut down until an expedited hearing was held and it was ruled by the judge that the event did not constitute an immediately reportable accident under section 50.10. Tr. 326-27. Sullivan was clearly agitated when discussing this at hearing. He also stated that at that time of the year, the only reason to send coal to stacker 6 was because production was high and all of the other ones were full. In fact, directly after the accident, that the plant was up and running again after someone else climbed onto the platform and manually flopped the gate. Tr. 271, 302. Clearly Respondent's foreman had a very strong motive not to report this accident immediately and have production shut down for an

[13] The cited cases included a past Order I issued, Granting a Motion for Summary Decision and Order of Dismissal. PCS Phosphate-White Springs, Unpublished Order dated Jan. 10, 2011. The facts of PCS are distinguishable from those in this case because there, the miner fell 10 feet and was examined by an employee of the mine who was a Licensed Practical Nurse (LPN) with training in emergency and intensive care treatment. The employee had also been a U.S. Army medic for 2 years. Id at 2. An LPN is more qualified than an MET to make a determination as to whether an injury has the potential to be life threatening and the miner fell about half the distance of Bowling. In addition, the Order was issued prior to the Cougar Coal decision.

indeterminate amount of time as they knew would happen once MSHA investigators arrived on the scene and a 103(k) order was issued. Ex. S-1 at 6.

A medical opinion of potential death was not needed before the accident was reported, both Sullivan and Hurley conceded that brain injuries are not necessarily immediately apparent, the symptoms reported by witnesses were serious, and Belcher stated that numerous falls from lesser distances have resulted in fatalities. In addition, the actions taken by mine management to determine whether or not to report the accident once they were aware of it, i.e. checking vital signs, retrieving the medical bag, calling 911, and then discussing the situation with the safety director, took an unreasonable amount of time. Based on these facts and mine management's motive for not reporting the accident, I find that Respondent knew that the accident had a reasonable potential to cause death and therefore, that Respondent violated section 50.1O(b).

S&S

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'/ Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard- that is, a measure of danger to safety -contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.,* 6 FMSHRC 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor,* 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel,* 7 FMSHRC at 1130. The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.,* 6 FMSHRC 1824, 1836 (Aug. 1984).

I have found that the violation has been established. The Secretary charges that failure to report the accident contributed to the discrete safety hazard, exposing other miners at the plant to an increased likelihood of future, similar accidents. Sec'y Br. at 35. The validity of the S&S finding turns on whether the failure to report the accident contributed to a discrete safety hazard, and whether the hazard was reasonably likely to cause an injury or injuries of a reasonably serious nature.

The purpose of the 15-minute reporting requirement is to prevent injuries to other miners from the same or similar conditions that may be present in the mine and to preserve evidence so that the accident can be properly investigated and corrective measures determined. By failing to immediately report the accident, mine management exposed other miners to the possibility of having similar accidents.

Belcher's concern for the likelihood of a similar accident occurring and causing serious injuries was well-founded. Because Respondent did not report this accident immediately, there was no immediate issuance of a 103(k) order that restricted access to the platform. As a result, another person climbed up to flop the gate and production continued throughout Bowling's shift. Itwas not until the following shift that the handrails were installed. The mine also had a number of similar situated platforms, thus, under continued normal mining operations, other miners were put at risk of comparable injuries by not reporting the accident.

Therefore, I find that the violation was S&S. The gravity of the violation was also serious. A miner fell from over 20 feet and suffered head and wrist injuries that had the reasonable potential to result in death and the accident went unreported. This also put other miners in the plant at risk of similar injuries.

Unwarrantable Failure

In *Lopke Quarries, Inc.,* 23 FMSHRC 705 (July 2001), the Commission stated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.,* 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. */d.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." */d.* at 2003-04; *Rochester & Pittsburgh Coal Co.,* 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); *see also Buck Creek Coal, Inc. v. FMSHRC,* 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000) *("Consof"); Cyprus Emerald Res. Corp.,* 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds,* 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.,* 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.,* 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.,* 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.,* 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.,* 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and

> circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol,* 22 FMSHRC at 353. 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. *REB Enters., Inc.,* 20 FMSHRC 203, 225 (Mar. 1998).

Lopke Quarries at 711.

Obviousness, Degree of Danger, Length of Time and Extent of the Violation

The nature of the accident and the type of injuries sustained – a fall from over 20 feet with head injuries – made this a per se obviously reportable accident. Failure to report the accident put other miners in the plant at a high risk of falling off the same platform as Bowling or falling off another similarly situated platform. In addition, Respondent never reported the accident to MSHA. MSHA only arrived at the mine after an inquiry was made by the media to MSHA Headquarters asking about the accident. The violation existed for an extended period of time.

The extensiveness factor involves consideration of the scope or magnitude of a violation. *Eastern Associated Coal Corp.,* 32 FMSHRC 1189, 1195 (Oct. 2010). Respondent had no intention to report this accident until the 10-day report was due. Management took an extensive amount of time to retrieve the MET bag, examine Bowling, bandage him, report their findings, and consult the safety director before deciding whether to report the accident. The violation was moderately extensive.

Operator's Knowledge of the Existence of the Violation

Management was clearly aware of the accident and the nature of it shortly after Bowling fell. The foreman was the one who sent Bowling up to the platform to flop the gate, as they had been doing this manually for 5 years. It was also a foreman who had the gate flopped to resume production immediately after Bowling was taken to the hospital and it was management, Hurley, Sullivan, and the safety director, who made the decision not to report the accident.

The plant was running at full capacity when the accident occurred and the events of October 2010 gave Sullivan and Hurley motive to not report it in order to prevent the entire plant from being shut down. Based on the fact that the accident was obvious in that in needed to be immediately reported and mine management had motive for not reporting it, I find that the operator had knowledge of the existence of the violation.

Operator Placed on Notice that Greater Efforts at Compliance were Necessary and Operator's Efforts in Abating the Violation

There was no evidence presented by either party that Respondent was placed on notice that greater efforts at compliance were necessary.

The focus of the abatement effort factor is on compliance efforts made prior to the issuance of a violation. In general, the factor measures an operator's response to violative conditions that were known to it or that should have been known to it. *Enlow Fork Mining Co.,* 19 FMSHRC 5,

17 (Jan. 1997). It must then be determined whether the efforts "were taken with sufficient care under the circumstances, even if ultimately unsuccessful in completely preventing a violative condition." *Windsor Coal Co.,* 21 FMSHRC 997, 1005 n.9 (Sept. 1999). There was no evidence presented that Respondent made any effort to notify MSHA and abate the violation. The evidence established that management had no intention of reporting the accident until the 10-day section 50.20 report was due.

I find that Respondent's failure to report this fall from almost 22 feet, resulting in a loss of consciousness and open head injuries to be a complete disregard for the miners' safety. It per se posed a reasonable potential of death. It appears that the decision not to report it was to avoid another 103(k) order at a time when production was high. Failure to report the accident was not because Respondent was unaware of the requirement to do so. I find that Respondent's knowledge of the violation and the high degree of danger posed by failing to report it are most significant. I do not find that the Respondent had a good faith belief that there was not a reportable accident under section 50.10, particularly in light of its previous experience with reporting one in October of the prior year. I find that that violation was caused by Respondent's unwarrantable failure to comply with section 50.10.

Negligence

Belcher determined the level of negligence to be high because of the seriousness of the accident and the severity of injuries incurred by Bowling, including loss of consciousness. Tr. 146. In addition, mine management was aware of the accident and never reported it. Tr. 147.

In addition to the facts above, Sullivan and Hurley had motive for not reporting the accident, making their analysis of the situation skewed and unreliable, as exemplified by several other witnesses reporting to Belcher a number of details that they failed to mention. I find the level of negligence was properly marked as high.

KENT 2011-1386

Citation No. 8258184

Citation No. 8258184 was issued by Belcher on January 20, 2011 at 4:00p.m., pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 50.12 which states, "[u]nless granted permission by a MSHA District Manager ...no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment." The violation was described in the citation as follows:

> On Tuesday, January 18, 2011, a serious fall type accident occurred at the Clintwood Elkhorn Mining Company preparation plant.

> A plant employee, who was located at the flop gate for the belt conveyor leading to the syn-fuel storage area, fell to the concrete floor located approximately 20 feet below, receiving multiple injuries as a result.
>
> The accident investigation revealed that the operator had altered the accident site without receiving permission from an MSHA District Manager. Handrails were installed at the landing between the second and third floors at the flop gate for the belt where an accident occurred on 1/18/2011 prior to the completion of the accident investigation. A handrail was not provided for the landing at this work area, resulting in a mine employee falling, striking the belt chute cover, and then landing onto the first floor of the plant. The employee was transported to the hospital by ambulance for medical treatment for the injuries he sustained.

Ex. S-10 at 1, 2.

Belcher determined that an injury occurred as a result of the violation which was reasonably expected to result in no lost workdays, that one person was affected, and that the level of negligence was high. Ex. S-10 at 1. The Secretary proposed a penalty of $7,700.00.

Secretary's Evidence

When Belcher conducted the accident investigation on January 19,2011, he observed that handrails had been installed on the platform at the location where Bowling fell. Tr. 149. He stated that preserving the scene is necessary to prevent evidence from being destroyed. Tr. 204. Installing the handrails, even though it made the platform safer, altered the original accident scene. Tr. 208.

Belcher explained that the purpose of not altering an accident scene is so that the investigators are able to visualize exactly what the scene looked like when the accident happened in order to put measures in place to prevent it from happening again, either at the same location or another similarly situated location in the plant. Tr. 122. When the scene is altered, the investigators must rely on company officials to describe the scene prior to the accident and they therefore cannot say with certainty what the scene looked like. Tr. 122, 149, 150.

In addition, based on the facts that Belcher gathered about the accident, he did not think that the accident scene needed to be altered in order to prevent or eliminate an imminent danger. Tr. 152, 154. Because no imminent danger existed, Belcher maintained that the MSHA District Manager needed to be notified and give permission for any alterations to be done. Tr. 151.

Belcher marked the likelihood of injury as occurred with no lost workdays reasonably expected and one person affected. Tr. 155. He also determined that the level of negligence was high because Respondent knew that an accident had occurred, it installed the handrails intentionally, and Respondent did not receive permission from MSHA to alter the scene. Tr. 157.

Respondent's Evidence

Sullivan testified that after Bowling fell and was picked up by an ambulance, all of the coal was cleaned up off the floor, including the coal that Bowling knocked over when he fell, handrails were installed, a ratchet was replaced where Bowling was attempting to flop the gate, and production started again. Tr. 302-303, 309. At the time that production started, the results from the brain scans at the hospital were not available. Tr. 302-03. Sullivan maintained that installing the handrails was not an attempt to alter the scene or hinder an accident investigation. Tr. 278.

Analysis

In *Cougar Coal,* the Commission found that where a power line, which was involved in an accident, was removed from the scene before MSHA was notified of the accident or began its investigation, a violation of 50.12 existed. *Cougar Coal Co.,* 25 FMSHRC at 521. In addition, several ALJs have made similar determinations where MSHA had not yet been notified of an immediately reportable accident. In *Signal Peak Energy,* Judge Moran stated that Respondent would be excused from liability for failure to preserve the accident scene only if it did not have an obligation to report the accident. *Signal Peak Energy, LLC,* 34 FMSHRC 1346, 1375 (June 2012). In *Chino Mines,* Judge Hodgdon found a violation of 50.12 where a reportable accident occurred, a circuit breaker that exploded was replaced, and MSHA was not notified of the accident until the day after. *Chino Mines Company,* 24 FMSHRC 189, 196-97 (Feb. 2002).

Even though the operators in the above cases had not reported the accident to MSHA at the time that the alterations were made, the Commission has found that an operator still had notice of section 50.10's requirements and impliedly, section 50.12's requirements. In *Cyprus Emerald Resources Corp.,* the Commission concluded that adequate notice is provided when a regulation is unambiguous. *Cyprus Emerald Resources Corp.,* 20 FMSHRC 790,797-98 (Aug. 1998). It stated that "[f]rom our conclusion that the definition of accident in section 50.2 is plain, it follows that section 50.10 provided the operator with adequate notice of its requirements. *Id* If Respondent had adequate notice of the requirements under section 50.10, it follows that Respondent also had adequate notice of its obligation to preserve the accident scene under section 50.12.

Based on the above case law, the fact that handrails were installed on the platform from where Bowling fell, coal was cleaned up off the ground where he landed, and a ratchet was replaced, the scene of the accident was altered without the permission of an MSHA District Manager. Whether the alterations hindered the investigation was immaterial as the only acceptable reasons to alter an accident scene are "to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment." 30 U.S.C. § 50.12. There was no testimony presented by either party that these exceptions applied inthis particular instance. Additionally, it is not within the Respondent's authority, absent these narrowly

delineated circumstances, to determine whether alterations may hinder or impede an investigation by MSHA.

Therefore, I find that Respondent violated section 50.12 and knew of the standard's requirements.

Negligence

The alterations made to the scene of the accident were intentional and the decision to alter the scene was made by management. Respondent has not presented any mitigating evidence. As a result, I find that Belcher properly determined the level of negligence to be high.

Civil Penalties

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 1n 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.[14] *See 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 (May 2006).

[14] Respondent has raised an objection to the special assessments levied by the Secretary, stating that there was no explanation for the extreme divergence between the standard penalty calculated according to the section 100.3 formula and the assessed penalties, and that because the penalties assessed are arbitrary, they should not be considered a benchmark or guideline for de novo penalty assessments. Resp. Br. at 33. My assessment of penalties is based upon all of the statutory criteria above as they relate to the facts of each violation as established by the record evidence. The special assessments levied by the Secretary are immaterial.

Ability to Continue in Business, Good Faith, and Size of the Operator

The parties have stipulated that the proposed penalties will not affect the Respondent's ability to continue in business and that Respondent abated the violations in good faith. Ex. J-1. The parties did not stipulate to the size of the operator, however, on the forms reflecting calculations of the proposed penalties (Secretary's Exhibit A), the mine tonnage is 0 and the controller tonnage is over 5 million. Based on Tables I and II in section 100.3, I find the size of the mine to be small but the overall size of the operator to be large. Therefore, I find that the penalties assessed herein are appropriate to the size of the business.

History of Previous Violations and Negligence

The history of violations provided is over a 2 year period, not the required IS-month period, and reflects that 47 violations became final. Ex. S-13. I accept the figures reflected in the report as accurate. However, the overall violation history set forth in the exhibit is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green,* 22 FMSHRC at 623-24. In addition, because the violations were specially assessed, no points were assigned by the Secretary for the number of violations per inspection day in Secretary's Exhibit A. Therefore, without the number of inspection days, it is not possible to determine whether the history of violations is an aggravating, neutral, or mitigating factor. The negligence and gravity of each violation is discussed at length above.

I assess the following penalties:

1. Citation No. 8247826 is VACATED.

2. Citation No. 8247827 is VACATED.

3. Order No. 8258182 is VACATED.

4. Order No. 8258183 is affirmed. I assess a penalty of $21,900.00. I find the failure to report a fall under the circumstances here to be extremely serious with no mitigating factors. I find that the penalty is appropriate.

5. Citation No. 8258184 is affirmed. I assess a penalty of $7,700.00. While the Respondent alleges the alteration of the scene was for the protection of miners, as stated herein, there were ulterior motives involved. I find that the penalty is appropriate.

ORDER

It is **ORDERED** that the operator pay a total penalty of $29,600.00 within 30 days of the date of this order.[15]

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

Distribution (Certified Mail):

Willow Fort, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

[15] 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
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 15, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEVA 2014-485 A.C. No. 46-08553-341181
v.	:	
ELK RUN COAL COMPANY, INC., Respondent	:	Mine: Black King I North Portal

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Lesnick

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).

The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The CLR has filed a motion to approve settlement. A reduction in the penalties from $11,807.00 to $7,205.00 is proposed. The CLR also requests that Citation No. 8155239 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation. The CLR justifies the modification by stating:

> Respondent would have argued at hearing for modification of Citation No. 8155239's gravity designations because, Respondent claims, the condition cited was for the escapeway map at the section power center not showing the correct location of the mine faces, refuge alternative or the scsr storage locations, yet he further states that this escapeway map is located in close proximity to the current mine faces and all miners affected by the escapeway map

> actually work and travel on the active section and know the current location. He also states that this map is always stored at the section power center and miners can actually see the refuge alternative and scsr storage cache while reviewing the map, which lowers the likelihood of this condition causing injury.

While the Secretary does not admit the relevancy or significance of the Respondent's arguments, the Secretary agrees to modify the citation. The remaining citations and penalties are unchanged.

Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission.[1] The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

Citation No.	**Proposed**	**Settlement**
8155239	$6,458.00	$1,856.00
9005633	$3,405.00	$3,405.00
9005634	$1,944.00	$1,944.00
	$11,807.00	$7,205.00

[1] The Secretary's Motion for Decision and Order Approving Settlement reads in pertinent part:

> 3. In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citation as indicated above.
>
> 4. Consistent with the position the Secretary has taken before the Commission in The American Coal Company, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 8155239 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

It is further **ORDERED** that the operator pay a total penalty of $7,205.00 within thirty days of this order.[2] Upon receipt of payment, this case is **DISMISSED**.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Donald K. Phillips, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 100 Bluestone Road, Mt. Hope, WV 25880-1000

Eric Silkwood, Esq., Hardy Pence, PLLC, P.O. Box 2548, Charleston, WV 25329

/tjr

[2] Payment should be sent to: Mine Safety & 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
WASHINGTON, DC 20004-1710

May 19, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2008-666 A.C. No. 11-02752-161958
v.	: : :	Docket No. LAKE 2008-667 A.C. No. 11-02752-160563
THE AMERICAN COAL COMPANY, Respondent	: : :	Docket No. LAKE 2009-6-A A.C. No. 11-02752-162890-05 Mine: New Era Mine

DECISION AND ORDER

Appearances: Barbara Villalobos, Esq., Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Jason W. Hardin, Esq., Mark E. Kittrell, Esq., Fabian & Clendenin, Salt Lake City, Utah, for Respondent

Before:Judge Zielinski

These cases are before me on Petitions for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petitions allege that The American Coal Company ("AmCoal") is liable for eight violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines.[1] Seven of the violations were deemed to be "flagrant," and subject to substantially higher penalties.[2] A total of $1,182,500 in civil penalties was assessed for the violations. Prior to the hearing, the parties settled three of the violations; the flagrant designations were withdrawn, and the assessed penalties were reduced from $452,000 to $30,000. A Decision Approving Partial Settlement was entered on February 25, 2014.

[1] 30 C.F.R. Part 75.

[2] As discussed *infra*, the Mine Act was amended in 2006 to add a new category of "flagrant" violations, for which penalties up to $220,000 could be imposed. The statutory limit on most other violations is $70,000.

A hearing on the remaining violations was held in Evansville, Indiana and Henderson, Kentucky, before Administrative Law Judge Gary M. Melick, and the parties filed briefs after receipt of the transcript. Judge Melick subsequently retired, and the case was reassigned for purposes of writing and issuing a decision. The parties did not object to the reassignment, or request a supplemental evidentiary hearing.[3] Because of the time that had elapsed since the parties had filed their original post-hearing briefs, they were afforded an opportunity to submit supplemental briefs on the issue of whether the violations were properly assessed as flagrant. Both parties elected to submit briefs, which were filed on March 28, 2014.

Remaining at issue are five violations: Order No. 7490572 alleged a flagrant violation of a standard requiring that electrical equipment be de-energized when work is performed, for which a penalty of $161,800 was assessed. Order No. 6668524 alleged a flagrant violation of the roof control standard, for which a penalty of $158,900 was assessed. Order No. 6668526 alleged a flagrant violation of the preshift examination standard, for which a penalty of $161,800 was assessed. Order No. 6673874 alleged a flagrant violation of the accumulations standard, for which a penalty of $188,000 was assessed. Order No. 6673876 alleged a violation of the onshift examination standard, for which a penalty of $60,000 was assessed.

For the reasons that follow, I find that AmCoal committed the violations. However, the flagrant designations are vacated, and several of the special findings on the issues of gravity and negligence are modified, and civil penalties in the total amount of $36,500 are imposed.

Findings of Fact - Conclusions of Law

At all times relevant to these proceedings, AmCoal operated the Galatia Mine, an extremely large underground longwall coal mine, located in Saline County, Illinois. It is a "gassy" mine, liberating over one million cubic feet of methane in a 24-hour period, and is subject to 5-day spot inspections under section 103(i) of the Act. Underground coal mines must be inspected by the Secretary's Mine Safety and Health Administration ("MSHA") four times each year.[4] In order to timely complete the inspections, MSHA assigned several inspectors, most of whom were at the mine virtually every day. Steven Miller, one of the inspectors, issued the five violations remaining at issue. Miller has extensive experience, both as a miner, and an MSHA inspector, and has inspected the Galatia mine since 1991. The orders litigated by the parties were issued during inspections of the mine in September and November 2007, and January 2008.

[3] *See* Commission Procedural Rule 68, Substitution of the Judge. 29 C.F.R. § 2700.68.

[4] 30 U.S.C. § 113(a).

Order No. 7490572 (LAKE 2008-667)

Order No. 7490572 was issued by Miller at 11:30 a.m., on September 6, 2007, pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.509, which requires that "[a]ll power circuits and electric equipment shall be de-energized before work is done on such circuits and equipment, except when necessary for trouble shooting or testing." The violation was described in the "Condition and Practice" section of the citation as follows:

> A maintenance supervisor was observed reaching into a, 480 Volt AC, energized electrical panel. The supervisor had been making repairs to the Stamler Feeder, company number FB-11, located on the Flannigan New Portal Bottom active section. (MMU-003) There was an hourly employee standing next to the supervisor who was also exposed to this hazard. The supervisor stated that he was just reaching in the panel to move some wires as he was closing the access panel. His hand was within ten inches of the un-insulated lugs on the bottom of the energized circuit breaker. This is the second citation of this regulation in the last ten days. The supervisor offered no mitigating circumstances other than to state he was taking a shortcut.

Ex. S-2.

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence rose to the level of "Reckless Disregard." The violation was assessed as flagrant, and a civil penalty in the amount of $161,800 was proposed.

The Violation

On September 7, 2007, Miller conducted an inspection of the Galatia North Mine. He was accompanied by Robert Hatcher,[5] AmCoal's safety director for the mine. They rode in a golf cart approximately 7 miles to the active section of the mine, referred to as the Flannigan New Portal Bottom. When they arrived at the section, near the working face, Miller conducted an imminent danger run, while Hatcher took the cart to a charging station so that the batteries would have enough energy for the return trip.

The mine was not then producing coal, because the working section was bolting screen wire to the ribs. Tr. 47. AmCoal took advantage of the idle period to address a problem with the feeder, which had been malfunctioning. It would not stay on for extended periods due to a problem with sequencing of the electronic controls. Tr. 471. Christopher Cowsert, a

[5] Hatcher left AmCoal's employment in November of 2009, and began working for MSHA as a coal mine inspector. He was so employed when he testified at the hearing. Tr. 28.

maintenance mechanic, called his supervisor, John Jones, the maintenance foreman, to assist in diagnosing and remedying the problem.

Jones and Cowsert reported that they had de-energized the feeder at the power center, and locked and tagged out the 480-volt circuit prior to opening the feeder's electrical panel. One of them then returned to the power center, removed the lock/tag, energized the panel, and Jones began the task of troubleshooting. Jones did not have his equipment with him, so he borrowed Cowsert's gloves and meter while he worked on the panel.[6] Tr. 473.

The feeder's electrical panel was housed in a metal box approximately 4 feet wide, 18 to 20 inches high and 14 inches deep. Tr. 411. It was mounted at roughly waist height, and had a door that was hinged along the bottom of the 4-foot width, with a chain on the right-hand side to limit the swing of the door to an approximately horizontal position. Tr. 475. Several photographs of the panel were introduced into evidence. Ex. S-4, R-27. On the left side there was a breaker that could be re-set externally, i.e., without opening the panel. Next to that were three vacuum lugs which would transmit 480-volt AC power to the main motor. From the center to the right, there were other connections, including numerous connections to a bus bar that ran along the bottom of the panel. The other connections were primarily control circuits, operating at 110 volts or less. Tr. 61, 150, 408-10.

Believing that the problem had been fixed, Jones handed the meter and gloves back to Cowsert, and began to lift the panel door to close it. Tr. 477. No attempt was made to de-energize the panel. Tr. 31. Jones had his left hand on a handle that was located at the top, middle of the panel door, and was lifting it when he noticed that some control wires running along the bottom of the panel might be pinched as the door pivoted up. Tr. 477. He reached into the box with his bare hand, and lifted the wires to allow the door to close. Tr. 477. The wires were insulated, and there were no defects in the insulation. Tr. 93, 477.

At that time, Miller was returning from his imminent danger run and, as he approached the feeder, he observed Jones with his hand in the panel. When Miller asked what he was doing, Jones removed his hand and let the lid back down. Miller reminded the men that electrical panels could not be opened or closed while energized, i.e., that power to the panel had to be shut off and the circuit locked and tagged out, before those actions could be taken. Jones walked back to the power center, 100-200 feet away, to kill the power and lock and tag the circuit. He encountered Hatcher, who was returning from the battery charging station, and told him what happened when Hatcher inquired. Hatcher went to the feeder, where Miller was located. When

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[6] Miller clarified that under MSHA's regulations voltages less than 995 volts are considered "low voltage" and there is no requirement that specially insulated gloves be worn. Tr. 88. Under the general protective equipment regulation, gloves are required when performing work which might cause injury to the hands. 30 C.F.R. § 75.1720(c). MSHA regards the wearing of leather gloves by miners working on low voltage electrical panels as complying with the requirement. Tr. 83.

Jones returned, after de-energizing the feeder panel, Miller asked him whether he was in a hurry or just taking a short cut, and Jones responded, "I guess I was taking a short cut."[7] Tr. 31.

AmCoal does not directly argue that there was no violation. However, it does point out that neither the Act, the Secretary's regulations, nor MSHA's publications provide a clear definition of the terms "work" or "trouble shooting and testing" as used in the standard. Prior to the issuance of the order, however, MSHA's electrical department personnel had determined that the actions of opening or closing an electrical panel constituted work, for which the standard required that the circuits and equipment be de-energized. Tr. 96. That was true even if the purpose of opening the panel was to trouble shoot or test the electrical components. Todd Horton, AmCoal's electrical foreman, confirmed that MSHA had informed AmCoal of its determination, and AmCoal had adopted it as its policy, and incorporated it into its training. Tr. 413, 446-48. Cowsert was well aware of the policy, and Jones surely must have been. Tr. 472, 480.

Any ambiguity in the terms "work" and "trouble shooting or testing" was removed well before the incident at issue, and AmCoal and its employees had received actual notice of the Secretary's interpretation of the standard. An extended discussion of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) is unnecessary. For present purposes, in light of AmCoal's position on this issue, I find that the standard is ambiguous and that the Secretary's interpretation, though not the only permissible view, is reasonable and entitled to deference. In attempting to close the panel, Jones performed work without de-energizing the equipment, in violation of the standard.[8]

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[7] The Secretary argued that adverse inferences should be drawn because AmCoal did not call Jones as a witness. A similar argument was made with respect to AmCoal's failure to call examiners to explain their reports with respect to the accumulations violation. The Secretary failed in both instances to establish a predicate for his missing witness argument, notably that the witness was peculiarly available to AmCoal. In any event, the facts of the respective incidents were largely found to be consistent with the adverse inferences that the Secretary urged.

[8] In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co*., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

Significant & Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*[9] framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011), *aff'd sub nom., Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:
>
> > In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> *Id*. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984).
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> . . . .
> . . . .
>
> The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause

[9] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The fact of the violation has been established. Jones was performing "work" on an electrical panel that had not been de-energized. The violation contributed to a discrete safety hazard, that Jones' hand might contact an uninsulated energized electrical component, resulting in an electrocution type of injury. Any such injury would be serious. Consequently, whether the violation was S&S turns on whether it was reasonably likely that the hazard would result in an injury.

Miller determined that the violation was highly likely to result in a fatal injury. As he explained his rationale, Jones' hand was within approximately 10 inches of lugs energized with 480 volts of AC power, and there were other energized connections, including a breaker, a fuse box, and a bus bar that ran along the bottom-right side of the panel. Tr. 67, 76, 104. He did not believe that Jones could see exactly where his hand was when the panel door was most of the way closed. Tr. 66-67. He also felt that there was a possibility of inadvertent contact between Cowsert and Jones that could have caused Jones' hand to contact energized components inside the panel. Tr. 104.

Miller had to have been mistaken about Jones' hand being within 10 inches of the 480-volt lugs. They were located on the left side of the panel, and Jones' hand was on the right side. Tr. 477. Miller had noted in the order that Jones' hand was within 10 inches of uninsulated lugs "on the bottom" of the panel. Ex. S-2. The lugs on the bottom of the panel were on the bus bar, and were connections for control circuits of no more than 110 volts. Cowsert described the wires as all being insulated along that strip, i.e., the bus bar on the lower right side of the panel with connections for the control circuits. Tr. 477.

The possibility of external movement, e.g., tripping or slipping, causing Jones' hand to move inside the panel was remote. Cowsert had worked as a maintenance mechanic and had received his electrical card. Tr. 484, 469. From past experience, he appreciated the dangers of other persons being too close to him as he worked on electrical equipment, and had stationed himself a safe distance away from Jones. Tr. 478-79. Neither he nor Jones were moving, and there were no other persons or moving equipment in the area. Tr. 106-07.

While Jones may not have been able to see his hand if the panel door was raised close to vertical, he was able to see the location of wires that might get pinched as the panel door closed, and had had a view of the wires as he lifted them. He was not feeling around inside the panel to locate loose wires. Cowsert testified that Jones had lifted the wires and was removing his hand when Miller approached. Tr. 478. With 20 years of experience, Jones was very familiar with the layout of the panel and the locations of the various energized components. The 480-volt lugs for the main feeder power were located on the left side of the panel, and Jones' left hand was on the outside of the panel door, near the handle. He was using his right hand to lift the wires. While Miller estimated that Jones' hand may have been 10 inches away from those lugs, it was considerably farther away from the 480-volt lugs. Tr. 67, 101-02. The bus bar, which was closer to Jones' hand, was configured with the electrical connections recessed between non-conductive fins designed to prevent inadvertent contact with other conductors. Tr. 103; Ex. R-27. His hand would have been in the panel for a few seconds, as he lifted the wires prior to raising the lid toward closure. While the possibility of inadvertent contact with energized components existed, it was not highly likely.

Jones' violation of the standard contributed to a discrete safety hazard of a potential electrocution injury. A hazard that could have been substantially, if not completely, eliminated by his wearing of gloves, or the installation of clips to hold the wires away from the pinch point. Of course, adherence to MSHA's interpretation of the standard, and AmCoal's policy, by deenergizing the panel while it was being closed would have completely avoided the hazard, as well as the violation.

I find that the hazard contributed to was reasonably likely to result in a reasonably serious injury, and that the violation was S&S.

Negligence - Unwarrantable Failure

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

> 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, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. 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. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Miller determined that AmCoal's negligence rose to the level of reckless disregard, and that the violation was attributable to its unwarrantable failure to comply with the standard. Analysis of the unwarrantable failure factors is skewed somewhat by the unusual nature of the violation. The Secretary's position is predicated almost exclusively on Jones' negligence in closing the panel door while reaching in to hold wires away from a pinch point. Since the actions of Jones, an AmCoal supervisor, are normally imputable to the operator, the unwarrantable failure analysis will initially focus on Jones' conduct.

Extensiveness - Length of Time - Abatement Efforts

The violation was not extensive, and existed only for a few seconds. There was no opportunity for AmCoal to have abated the specific violation prior to its occurrence. However, AmCoal had taken steps to eliminate such violations, by adopting MSHA's interpretation of the standard as its policy, and incorporating it into its training. It also disciplined personnel that violated the policy.

Whether Operator was Placed on Notice that Greater Efforts were Necessary for Compliance

The Secretary does not argue directly that AmCoal was placed on notice that greater compliance efforts were necessary. Sec'y. Br. at 21-23. However, he notes that prior incidents occurred ("[t]his was not the first time that an employee was working on energized equipment"), before concluding that "[r]egardless of prior violations or incidents, however, Inspector Miller would have issued the subject citation as reckless disregard because a supervisor put his bare

hand into an energized electrical box." *Id*. at 23. Miller had a somewhat different focus. He testified that he would have issued the violation as an unwarrantable failure order under section 104(d)(2) of the Act, even if Jones had not placed his hand into the open panel, i.e., solely for closing the panel without de-energizing it. Tr. 149-50.

The "prior incidents" included a violation cited by Miller two weeks earlier, on August 26, 2007, where a miner conducting a permissibility check on a roof bolter ran a feeler gauge through openings in an electrical panel and lights while the equipment was energized. Tr. 78-79, 122-24; Ex. S-5, R-33. Miller determined that the actions of the repairman, who he later testified was acting as AmCoal's agent, violated section 75.509, and rated the violation as highly likely to result in a fatal injury. Tr. 147-49. While he determined that AmCoal's negligence was high, he determined that it did not rise to the level of unwarrantable failure, and issued the violation as a citation pursuant to section 104(a) of the Act. Tr. 79, 122-23; Ex. S-5. The repairman's employment was terminated for his actions, and crews were re-instructed on the prohibition of working on energized electrical equipment. Tr. 442; Ex. R-34.

Miller also testified that he was aware that "other inspectors" had issued "similar types of violations." Tr. 73. However, he was unable to relate any details of such incidents. Tr. 111-14. There were no other violations of section 75.509 noted on the exhibit introduced by the Secretary listing AmCoal's past violations although such violations occurring on AmCoal's surface facilities would have been cited under a different regulation. Tr. 112; Ex. S-1. One such incident that occurred on the surface 14 months prior to the instant violation involved repairmen installing relays on an energized panel, which Miller had evaluated as high negligence, rather than reckless disregard. Tr. 116-18. Those personnel were independent contractors, not employees of AmCoal, and the contractor was removed from the mine site as a result of the violation. Tr. 121. Interestingly, the repairman and his supervisor both stated that "they always did it that way." Tr. 120-21.

The incidents of record, two in 14 months, do not support an inference that AmCoal was put on notice that greater efforts to comply with section 75.509 were necessary. In both of the described incidents those involved had their relationship with AmCoal terminated, and it appears that MSHA's interpretation of the standard as prohibiting the opening and closing of energized electrical panels was consistently emphasized in AmCoal's training, a fact that the Secretary relies on in arguing the degree of Jones' negligence. Tr. 412-13, 423-33; Ex. R-20, R-21, R-22.

Obviousness - Knowledge of the Violation

AmCoal's knowledge of the violation, and the fact that it was obvious, are predicated exclusively on Jones' knowing failure to comply with MSHA's interpretation of the standard, which had been adopted by AmCoal and conveyed to its employees. Miller was undoubtedly correct when he surmised that Jones tired of walking back to the power center to de-energize the panel and lock/tag the circuit. Tr. 107. He decided, in effect, to take a shortcut, to close the panel while it remained energized, apparently perceiving little danger in doing so, even when he

reached in to hold a wire or wires away from a pinch point. Consequently, Jones knew that he was violating the standard as interpreted by MSHA, and he knew that the violation was obvious.

Danger to Miners

As noted in the S&S discussion, Jones' actions placed him in danger of an electrocution type of injury that could easily have been fatal. To a lesser extent, Cowsert might also have suffered an injury, if Jones contacted a bare energized conductor and Cowsert tried to free him from it. However, Cowsert had experience as a mechanic, had his electrical card, and had a good understanding of the dangers presented by working on energized equipment and in close proximity to persons who did so. The relatively low voltages involved virtually eliminated the possibility of the electric current arcing, such that Jones' and Cowsert's clothing would have provided effective insulation from the current.[10] It was reasonably likely that Jones would suffer a serious injury as a result of the violation, and a slight possibility that Cowsert would have suffered an injury. No other miners were put in danger by Jones' actions.

Conclusion

As noted above, unwarrantable failure is aggravated conduct constituting more than ordinary negligence, and is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. Jones' actions could certainly be characterized as intentional misconduct. However, it is not clear that they amounted to a serious lack of reasonable care. While MSHA's interpretation of the standard was reasonable, the conclusion that the opening and closing of an electrical panel constitutes work, as opposed to trouble shooting and testing, is certainly not compelled, and apparently was at odds with the common practice of two electrical contractors. It is also unclear that such actions would be inherently hazardous. Miller proffered an explanation of a danger that could be encountered by opening an energized electrical panel, i.e., that a loose wire inside might then contact the metal box, energizing it. Tr. 151. As unlikely as that scenario might be,[11] he did not describe any dangers that might typically be encountered in the closing of a panel, although pinching of an insulated wire could be one. Cowsert explained that the initial examination of the panel when it was first opened revealed no obvious problems, e.g., loose relays. Tr. 472. Jones could see that there were no loose electrical connections when he started to close the panel. The wires that he took hold of were insulated, and the insulation was in good condition, which provided an effective barrier to the transmission of electrical energy to him. Tr. 93-94, 477. In order to

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[10] See note 12, *infra*.

[11] Although not explained in detail, it appears that the energized conductors from the power center were connected to the fixed terminals, e.g., the bus bar, in the panel, and that the wires connected to those terminals conducted power to the various components of the feeder. If a wire came completely loose from the terminal, it would no longer be energized. In addition, it is highly likely that the metal boxes enclosing such components were grounded.

suffer an injury, his bare hand would have had to come into direct contact with an energized component in the panel.[12] He knew where those components were located, and his hand was kept a reasonably safe distance away from them, especially the 480-volt lugs on the left side of the panel.

As noted above, Miller would have cited the violation as an unwarrantable failure, even if Jones' had not reached into the panel. It would be extremely difficult to characterize the mere closing of an energized panel as S&S or an unwarrantable failure. However, Jones' action of using his bare hand to lift some wires while he closed the panel door enhanced the "danger to miners" factor of the unwarrantable failure analysis. The violation was not extensive and existed for only a few seconds. AmCoal had not been put on notice of a need for greater compliance efforts. Jones knew of the violation, which was obvious, but only for its short duration. It was reasonably likely that one miner would suffer a serious injury, and there was a slight chance that one other miner would suffer an injury because of the violation.

Upon consideration of the factors applicable to the unwarrantable failure analysis, I find that Jones' negligence was high, but did not rise to the level of reckless disregard, and that the violation was not the result of an unwarrantable failure to comply with the standard.

AmCoal's Negligence

As a maintenance foreman, a supervisor, Jones was AmCoal's agent and his negligence is imputable to it. *Rochester & Pittsburgh Coal Co.* 13 FMSHRC 189, 194 (Feb. 1991). In *Nacco Mining Co.*, 3 FMSHRC 848, 850 (Apr. 1982), the Commission held that the negligent misconduct of a supervisor will not be imputed to an operator if the operator has taken reasonable steps to avoid the particular class of accident involved in the violation and the supervisor's erring conduct was unforeseeable and exposed only himself to risk. The Commission later held that the *Nacco* defense was not available where the supervisor's conduct

[12] AmCoal referred to a web site in its brief http://www.cirris.com/testing/voltage/arc.html) that it claimed established that the distance that 480 volt electric power could arc in air was approximately 0.001 inches, and requested that judicial notice be taken that the potential arc for 480 volts was "on the order of a few thousandth's of an inch." Resp. Br. at 7 n.2. The Secretary did not oppose that request in his reply brief. The web site generally supports the assertion, but not quite as AmCoal claims. The arc calculator on the site specifies that the distance that 480-volt AC power can arc in air is limited to approximately 0.003 inches. The fact that the low voltage in the panel would have such a limited arcing distance is consistent with MSHA's acceptance of leather gloves as adequate protection for miners performing trouble shooting and testing on energized low voltage electrical panels. I decline AmCoal's invitation to take judicial notice of the specific limitations urged. However, it does appear that the arcing distance of 480 volt AC power in air is extremely limited, and that Jones would have had to physically contact a bare energized conductor to have suffered an injury.

results in an unwarrantable failure violation. *Capitol Cement Corp.*, 21 FMSHRC 883, 894-95 (Aug. 1999), *aff'd.* 229 F.3d 1141 (4th Cir. 2000) (unpublished opinion).

The Secretary argues that Jones' negligence is imputable to AmCoal because his conduct resulted in an unwarrantable failure violation, and that *Nacco* would not be applicable, in any event, because Jones endangered another miner, i.e., Cowsert.

Jones' conduct did not constitute an unwarrantable failure violation. Consequently, under *Nacco*, his negligence cannot be imputed to AmCoal, unless his action endangered other miners.[13] Miller testified that Jones' actions put Cowsert in danger, because he was in close proximity to Jones, and instinctively might have tried to pull Jones out of the panel if he had contacted an energized conductor. Tr. 75-76. As noted above, there was a slight possibility that Cowsert would have suffered an injury if Jones had contacted an energized conductor. Therefore, Jones' actions placed another miner in danger. While Miller's order reflects that one person, Jones, was affected by the violation, his notes and testimony consistently reflect his concern that Cowsert was also exposed to danger.

I find that Jones' violative conduct endangered Cowsert. Therefore, the *Nacco* defense is not available to AmCoal. Jones' negligence is imputable to AmCoal and I find that its negligence was also high, although it was mitigated somewhat by its efforts to eliminate such violations, as noted above.

The propriety of designations of this and the other three orders as flagrant violations is discussed *infra*.

Order Nos. 6668524 and 6668526 (LAKE 2008-666)

Order No. 6668524 was verbally issued by Miller at approximately 8:00 p.m. on November 7, 2007, pursuant to section 104(d)(2) of the Act.[14] It alleges a violation of 30 C.F.R.

[13] The Secretary does not argue that AmCoal had not taken reasonable steps to avoid the particular class of accident involved in the violation, or that Jones' erring conduct was foreseeable. It appears that AmCoal had taken reasonable steps to avoid the particular class of accident involved in the violation by adopting MSHA's interpretation of the standard as its policy and incorporating it into its training. As to foreseeability, Miller had formed an opinion that work on energized equipment seemed to be common practice at AmCoal. However, aside from two incidents, he was unable to provide any details of other such conduct. The incidents that were described had resulted in the termination of the involved workers. Moreover, it was Jones' reaching into the panel that presented the greatest danger, and there is no indication that that action should have been foreseeable.

[14] The order bears a date of November 8, 2007, because it was past midnight before Miller was able to compose it on his computer, and that date was automatically entered when the order was printed.

§ 75.202(a), which requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." The violation was described in the "Condition and Practice" section of the order as follows:

> The roof and ribs along the 1st West Flannigan Longwall Primary Intake Escapeway were not supported or otherwise controlled to protect persons from hazards related to falls of the roof and ribs. There is loose, broken-up, or unsupported mine roof at the following locations: along this escapeway from Number 7 crosscut to Number 25 crosscut. Number 7, 8, 9, 14, 16, 20 and 25. Ribs need to be scaled and supported at the following locations: Number 10-11, 16-17, 19-20, and other intermittent locations.

Ex. S-6.

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that two persons were affected, that the operator's negligence was high, and that the violation was the result of AmCoal's unwarrantable failure to comply with the standard.[15] The violation was assessed as flagrant, and a civil penalty in the amount of $158,900 was assessed.

The Violation

Miller participated in an ongoing inspection of the mine during the second shift on November 7, 2007. He met Mark Odum, an MSHA supervisory roof control specialist, at the mine and they went underground, accompanied by Johnna Durham, an AmCoal safety specialist.[16] They traveled several miles, through the main travelway and primary escapeway, to the headgate of a longwall panel that was being set up at the time. There had been a roof fall in that area, and an order had been issued pursuant to section 103(k) of the Act. Rehabilitation measures had been taken, and AmCoal was seeking to have the order terminated.

The inspection party traveled in a 4-seat personal vehicle ("PV"), equipped with a canopy, and driven by Durham. Tr. 539. They encountered a loose rib between crosscuts 3 and

[15] While the order was issued by Miller, it was Odum who identified the various conditions in the first instance. After the PV was parked, Miller and Durham walked approximately 30 feet behind Odum and either abated or flagged conditions that he pointed out, and were later written into the order.

[16] Durham had over 10 years of mining experience at the time, including operating equipment on a working section, serving as mine manager, and approximately 2-3 years as an examiner. She had been a safety specialist for approximately 6 months, and was continuing to participate in on-the-job training. Tr. 536, 550-52.

4, for which a citation was issued charging a violation of the mine's roof control plan. At crosscut No. 6, they noticed a piece of draw rock hanging down from the roof. They stopped and scaled it down, leaving a loose roof bolt, which was flagged. A citation was issued for that condition. Tr. 539; Ex. S-8.

As they continued on, Odum asked Durham to back up so that he could examine something that "didn't look right" near crosscut No. 7. Miller's notes reflect that there was broken roof and a loose roof bolt at that location. Ex. S-8. After traveling approximately another two crosscuts, Odum had Durham stop so that he could examine another suspect condition. He decided to walk the rest of the way, and asked Durham to park the PV, which she did. Tr. 541. While they walked the 35-40 crosscuts to the headgate, Odum identified numerous places where he felt that the roof and ribs were not properly supported, and Miller made notes of their locations.[17] Tr. 543. At one point, Miller and Durham attempted to pry down a section of rib that appeared to be loose. However, they were unable to do so. They flagged the area and moved on. Tr. 540-41. Durham scaled many of the rib conditions that Odum identified. She described those conditions as not "real big stuff, but it was just a little bit of loose stuff that we could pull down, normal rib rash." Tr. 542. Areas that needed extra attention were flagged by Miller and Durham. Tr. 542. From her experience as an examiner, Durham did not believe that the conditions Odum was identifying were hazardous. Tr. 543.

When they reached the longwall headgate, they encountered Jeff Dyson, the longwall coordinator, and Mike Grant, the longwall boss. Durham related her experience and alerted them to the likelihood that an order would be issued by Odum or Miller, closing the travelway. Tr. 546. Stephen Willis, AmCoal's manger of health and safety for the AmCoal complex, was advised of events, and drove to the mine. He met Durham and Miller at the mouth of the Flannigan unit, and Durham told him what had occurred. Tr. 500. Willis traveled to the area to observe the conditions. Willis, who had 33 years of mining experience, including several years as an examiner, observed areas where there was some loose rock and cracks in ribs. Tr. 504, 516. However, he believed that they were typical of conditions that could be found virtually any time in a large coal mine, and whether they "were unwarrantable or not" was a "subjective"

[17] The description of how the inspection proceeded is based largely on Durham's testimony, and Miller's notes. Durham appeared to have had a fair recollection of the events, and described pertinent details, although she was uncertain of the specific location of some conditions. Any notes she may have taken were lost, and she had not prepared an "order report," which was AmCoal's practice at the time. Tr. 553-54. As a safety specialist in training, who had been assigned to that portal for only a few days, the inspection would have been a significant event for her. Tr. 550-52. Miller, on the other hand, had virtually no recollection of the details of the inspection, or of his visit to the mine the previous day. Tr. 160-61, 214, 262. His testimony was based on his field notes, and his interpretation of what they "evidently" or "probably" meant. Tr. 256-58, 262, 288, 290. He observed that the events occurred "five years ago," and could confirm that Odum was present at the mine, as his notes reflected, but could not recall whether Odum accompanied him. Tr. 217-18, 262.

determination - "a judgment call." Tr. 504-05, 517. Assuming they could be classified as violations, he did not feel that they "in any way" could be attributable to an unwarrantable failure, and AmCoal's negligence should have been rated at "no more than moderate." Tr. 500.

As with the previous order, AmCoal does not argue that the cited conditions did not establish a violation of the standard. The conditions noted in Miller's order were, in his opinion, violations of the standard, i.e., a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the inadequacy of the particular roof and rib support in the areas cited. *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987) (cited in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998)).

As noted above, Willis confirmed, upon inquiry by the judge, that there were areas of the roof where there was "some loose rock" and there were "some cracked ribs." Tr. 504, 516-17. Durham, too, opined that there were some conditions that needed attention. Initially, a rib appeared to be loose and was flagged for further attention. Similarly, other areas that could not be scaled successfully and needed "extra attention," were flagged. As to the roof conditions, she identified an area one row of bolts into a crosscut, and an area where there was a crack in the roof that needed additional support. Tr. 545-46.

I find that the standard was violated.

S&S

The fact of the violation has been established. The violation contributed to a discrete safety hazard, that inadequately supported areas of the roof and/or ribs would fall, possibly injuring any miners who happened to be in the area. While some falls might not result in serious injury, e.g., minor sloughing of a rib, the more serious conditions, large pieces of loose rib and any significantly sized loose rock in the roof, would inflict a serious injury. Consequently, whether the violation was S&S turns on whether it was reasonably likely that the hazard would result in an injury.

Miller opined that a serious injury was "very highly likely" because of the number of hazardous conditions in the travelway, and the fact that virtually all of the miners, working on three shifts, traveled through the area on their way into and out of the mine. Tr. 162-68, 276. While miners generally traveled on mobile equipment for the lengthy ride, not all of the transports had canopies, e.g., some rode in open golf carts. Tr. 169.

The Secretary also notes that the travelway served as the primary escapeway. Miners were required to participate in escape drills every 90 days, and may have been required to use the escapeway in the event of an emergency. Tr. 163, 166. However, there was no evidence establishing that evacuation drills occurred, or would have occurred, while the conditions existed. The Secretary does not contend, and offered no evidence to establish, that an emergency evacuation of the mine was likely to occur while the violative conditions existed. The subject roof control standard under which the order was entered does not apply only, or even primarily,

in emergency situations. Consequently, while the possibility of increased exposure of miners in the event of an emergency could be a legitimate consideration in the S&S analysis, there is no basis for doing so here, and the existence of an emergency will not be assumed. *See Consolidation Coal Co.*, 35 FMSHRC 2326, 2333 (Aug. 2013) (discussing *Cumberland Coal, supra*).

AmCoal makes much of the fact that, in his notes, Miller placed substantial emphasis for his conclusion that a fatal injury to two miners was highly likely on the presence of two miners working "directly under" a "Big Rock" at the "#6 x-cut." Tr. 162, 165, 279-84; Ex. S-8 at 13-14. AmCoal's point is well taken. That condition was not one of the violative conditions cited in Order No. 6668524. Rather it was the subject of a separate violation, Citation No. 6668522, that was issued by Miller shortly before he issued the subject order. Ex. S-8 at 4-5. It is not clear whether, or to what extent, miners would have worked in the area of the cited conditions, i.e., crosscuts 7-25, as opposed to simply passing through it. Also unclear is how often miners traveled on foot or in equipment that did not have a canopy. There is also much uncertainty on the precise nature of the hazards presented by the various conditions, because Miller was unable to recall details of the cited roof and rib conditions.[18] He made no sketch depicting the locations of the various conditions, and could not recall whether roof conditions were located near the center of the entry where miners normally traveled, or near the rib where miners seldom traveled and injury would be unlikely. Tr. 255, 259-60. There is even some question as to whether some of the conditions were located in the travelway or in adjacent crosscuts.

Nevertheless, Miller believed that the conditions were located in the travelway and presented hazards to persons using the travelway. He had cited the travelway, not the crosscuts, and believed that the references to crosscuts in his notes were to locate the conditions along the travelway. Tr. 264. I accept his reasonable interpretation of his notes, and find that the conditions referenced in the order and his notes were located in the travelway and that at least

[18] Durham testified that, as Odum was pointing out conditions, Miller made gestures and comments indicating that he was not in agreement with Odum's determinations. Tr. 543-44. Miller stated that he did not recall disagreeing with Odum or apologizing for the fact that the conditions were being cited. Tr. 217-18. Durham could not recall Miller's exact words, and any notes she made of the event were lost in an office move related to the closing of a portal. At the time, she was still in training and did not prepare an "order report," as Smith had done for citations issued by Miller on November 6. Tr. 553-54. Miller's lack of recollection suggests a ring of truth to Durham's testimony. While the events had occurred years earlier, and Miller's recollection of them was extremely limited, disagreeing with or being critical of a supervisor during an inspection would be a particularly noteworthy occurrence, and it would seem that he would have had a relatively certain recollection that it either did, or did not, take place. Durham's rendition of events would also be consistent with the fact that Odum was identifying a number of conditions in an area that Miller had traveled less than 24 hours earlier without citing any hazardous conditions.

some posed a hazard to persons using the travelway.[19] The travelway was typically 18-20 feet wide. Miners traveling in mobile equipment would tend to travel near the center of the entry, but would have occasion to move closer to the ribs, e.g., when passing another piece of equipment, or maneuvering around debris or other obstructions. Sloughing of smaller pieces of coal from the ribs would not pose a reasonable likelihood of injury. However, falls of large sections of rib, some of which were described in Miller's notes, could inflict serious injuries on miners. Pieces of draw rock, of any appreciable size, falling from the roof, could also inflict serious injuries to miners riding in open vehicles, or on foot.

The "operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1255 (Nov. 1998) (quoting *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989)). As noted in the discussion of unwarrantable failure, *infra*, there is considerable uncertainty as to how long the cited conditions had existed. However, it is likely that they would have continued to exist for a significant period of time, had the order not been entered. Mine examiners had not identified the conditions as hazardous, despite having undergone special training only two weeks prior. Miller noted that rib separations can be difficult to detect, depending upon one's direction of travel. AmCoal's managers who personally observed the conditions did not regard them as particularly problematic. Willis, for example, viewed them as "nothing really out of the ordinary" – at "any given time there are going to be cracked ribs, loose rock up and down travel ways" and whether or not they're unwarrantable is a judgment call. Tr. 504-05. Durham did not feel that the conditions being pointed out by Odum were hazardous. Tr. 543.

Despite the uncertainties argued by AmCoal, there were a significant number of inadequately supported roof and rib conditions along the travelway, some of which, e.g., the large pieces of rib that had separated from coal pillars, could have caused serious injuries to miners. The main travelway/escapeway was heavily traveled, and under continued normal mining operations, the cited conditions would have continued to exist for a significant period of time, i.e., several shifts or longer. With the exception of the large piece of draw rock hanging from the roof at crosscut #6, a condition that was not included in this order, the evidence of the nature of the violative conditions established that, while a fatal injury might have been possible, a far more likely result would be that the violation was reasonably likely to result in a permanent injury to one miner.[20]

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[19] Willis, who viewed the conditions shortly after the order was entered, conceded that some of them posed hazards. His disagreement was addressed to whether they justified the designation of unwarrantable failure. Tr. 504-05, 517.

[20] As noted, *infra*, Citation No. 6668522, which addressed the condition at crosscut #6 where two miners were working under the hanging rock, was subsequently modified to allege that one miner, rather than two, was likely to be injured.

I find that it was reasonably likely that a reasonably serious injury would have resulted from the hazard contributed to by the violation and that the condition was S&S.

Unwarrantable Failure - Negligence

Miller testified that he believed that AmCoal's negligence was high, and rose to the level of unwarrantable failure because of the number of roof/rib control deficiencies, they had existed for "quite some time," and that they were "extensive and obvious." Tr. 166, 169. Moreover, the conditions were allowed to exist, despite the fact that there had been prior discussions with management about the number of roof/rib control violations in quarterly close-out meetings and in informal close-out meetings after such violations had been issued. Tr. 167-69.

The extent of the violation

The cited conditions existed over a relatively large area, from crosscut #7 to crosscut #25, a distance of approximately 2,700 feet. Violative roof conditions were identified at seven locations and violative rib conditions were identified at at least five locations, although there is no information as to the conditions at two of those locations. Ex. S-8. However, some of the conditions may not have been in violation of the standard, and the extent of the conditions at each of the referenced areas was not great. Miller was unable to describe the conditions referenced in the order, beyond the information recorded in his notes. For example, the condition at the #7 crosscut was described in Miller's notes as "not adequately supported along the south side of travelway. Broken up roof and loose roof bolts are present in x-cut and in the intersection." Ex. S-8 at 7. Miller was unable to state how many bolts were involved, the condition of the bolts, how many were in the crosscut as opposed to in the travelway, or where they were located, e.g., along the rib or more toward the center where persons were more likely to travel. Tr. 255-60. He was also unable to recall details of other conditions noted in the order and his notes. Durham shed limited light on the conditions, noting that one of the areas where bolts were referenced involved one bolt in a row of bolts in a crosscut. Tr. 545. In another area, screen had been put up to catch pieces of draw rock, but, additional support was requested because there was a crack in the roof. Tr. 545-46.

The fact that the conditions were in an area that extended 18 crosscuts justifies a finding that they were extensive. However, the evidence does not support a finding that the individual conditions referenced in the order affected significant areas, such that the extensiveness factor does not weigh heavily in favor of a finding of unwarrantability.

Length of time conditions existed

Miller provided several estimates of the length of time that the conditions existed. He recorded in his notes that the length of time that the conditions existed was "unknown." Tr. 235; Ex. S-8 at 8. Several times he expressed his opinion that the conditions existed for "more than one shift" or "several shifts." Tr. 166-67, 211, 239; Ex. R-50. After noting that the order was

not abated until November 13, he opined that since it took 5 days to abate the conditions, "I'm going to say it took five days or better for the conditions to arise."[21] Tr. 240. He also opined that the conditions existed from 5 to 35 shifts, i.e., up to 12 days. Tr. 167. While he stated that there is "usually some evidence" indicating how long a condition existed, he did not identify any such evidence. Tr. 240. The asserted basis for Miller's various estimates of the length of time that the conditions had existed was "just my experience," a reference to his 31 years of mining experience, including serving as a roof control specialist and 15 years of inspecting the Galatia mine. Tr. 211, 240-41.

The Secretary argues that the opinion of an experienced inspector is entitled to substantial weight, citing *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998) and *Buck Creek Coal, Inc.*, 52 F.3d 133, 135-36 (7th Cir. 1995). It is well-settled that, under the Act, a seasoned inspector's judgment is an "important element" in an S&S determination. The same may be true for other opinions offered by experienced inspectors. However, estimating how long a particular condition has existed, based solely on the present appearance of the condition, strikes me as a complex and somewhat speculative undertaking, that calls for a close examination of factors affecting the reliability of such testimony.

Certainly, Miller's 31 years of mining experience and familiarity with the Galatia mine lends some degree of reliability to such an estimate. However, the bare assertion of years of experience, without identification of the particular aspects of that experience that aided the formulation of the opinion, or an explanation of how they informed the specific judgment, can significantly undercut the reliability and probative value of such testimony. Here, however, Miller's various estimates of the length of time that the conditions existed, with one notable exception, were not based upon his observations and evaluations of the conditions.

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[21] I do not credit Miller's "five-day" estimate. Miller did not explain the basis of his assumed relationship between the length of time taken for abatement efforts and the length of time that the conditions would have existed. Willis and Durham estimated that abatement of the conditions should have taken no more than two shifts. Tr. 518, 549. Miller testified that he was in the mine daily and was told that AmCoal was working on it "around the clock." Tr. 231-32. However, as previously noted, Miller's recollection of the inspection was virtually non-existent. I find it highly unlikely that Miller, who could not remember whether Odum accompanied him on the inspection even with the assistance of his field notes, could recall being at the mine and comments about the progress of abatement efforts on 5 consecutive days, without the benefit of any notes. The 5-day period included a weekend and a federal holiday, and it is doubtful that abatement efforts actually consumed 5 days. Durham had scaled some of the conditions and, in anticipation of the order, AmCoal had moved a roof bolter and a scoop to the cited area to facilitate the abatement. Tr. 548. I find that Willis' and Durham's "two shift" abatement time estimate was a substantially more credible measure of the actual time it took to abate the conditions, especially considering that some of the initial effort had to be devoted to rehabilitation of an alternate travelway/escapeway around the area closed by the order.

As previously noted, Miller had virtually no recollection of the inspection. For example, he observed at one point that he had no recollection of a particular condition; "That's five years ago. I don't recall that. Just what I read from my notes." Tr. 262. As reflected in his notes, his opinion, recorded shortly after observing the conditions, was that the length of time that they had existed was "unknown." Ex. S-8. Three days later, when he filled out a form recommending that the violation be specially assessed, he wrote that the conditions existed "for several shifts." Ex. R-50.[22]

As candidly reflected in his notes, Miller was unable to ascertain how long the conditions had existed. There is no indication that he obtained any other information that would have given him a basis for estimating that length of time. He conceded that roof and rib strata can separate at any time. Tr. 240. The more probable basis for his estimate that the conditions had existed for more than one shift, or several shifts, was that "it would be kind of unique or unusual to have a separation of strata in that many locations along that travel way in a half mile." Tr. 240.

That would appear to be a reasonable conclusion. However, it does little to fix a time when the conditions came into existence, or when, or even if, they became hazardous conditions so as to be in violation of the standard. Some conditions, e.g., separation of large slabs of rib, or a crack in the roof, could have come about immediately before Odum and Miller saw them. They may also have occurred sometime prior to that, or have been the result of a slow movement of strata that gradually became more noticeable. Conditions like loose roof bolts, could have occurred over a considerable period of time. Miller concluded they were "probably" hanging from the roof because the immediate mine roof had sloughed away. Tr. 258-59. Such conditions are not unusual in entries that were mined years earlier, and do not necessarily present hazardous conditions.[23] It is the condition of the remaining immediate roof that generally may present a hazard, i.e., if it is broken and pieces of draw rock are likely to fall from it. Miller described some of the conditions as "broken roof." Ex. S-8. However, there is no indication of when the roof had become broken, such that it presented a hazard.

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[22] The Secretary's objections to discovery and introduction into evidence of Special Assessment Review (SAR) forms were overruled. Those objections, on grounds of relevance and deliberative process privilege, were renewed in the Secretary's post-hearing briefs. Sec'y. Reply Br. at 2-4. The discoverability of SAR forms has been the subject of considerable, and in the opinion of the undersigned unproductive, litigation effort, with varying outcomes. *See, e.g., Big Ridge, Inc.*, 34 FMSHRC 2999 (Nov. 2012) (Order Denying Respondent's Motion to Compel). I decline the Secretary's invitation to revisit the issue. In any event, the Secretary's arguments are inapplicable to the subject phrase.

[23] If the bolts were fully grouted, support for the main mine roof may not have been compromised by the fact that the plates were no longer in contact with the immediate mine roof. *See Oak Grove Resources, LLC*, 35 FMSHRC 3039, 3046-49 (Sept. 2013) (ALJ).

Some of the conditions most likely existed for more than one shift, or several shifts, and I so find. However, there is no reliable evidence that the more serious conditions, such as the large pieces that had separated from the ribs, had existed for any appreciable length of time prior to issuance of the order, i.e., longer than one shift. This factor does not weigh heavily in favor of a finding of unwarrantability.

Operator placed on notice that greater efforts were necessary for compliance

The Secretary argues that AmCoal was put on notice that greater efforts were necessary for compliance with the standard by a high number of violations of the standard in the preceding months and by specific discussions of past violations with MSHA inspectors. An Assessed Violation History Report for the mine listing violations of section 75.202(a) issued within the 24-month period preceding issuance of the subject order established that 134 citations or orders for violations of the standard had been issued. Ex. S-1. Miller testified that violations of the standard were discussed with AmCoal officials at quarterly close-out conferences and, frequently, when such violations were issued. Tr. 167-69. MSHA had an "ongoing dialog" with AmCoal about such violations. Tr. 168. AmCoal counters that the Secretary did not establish that there was a history of roof control violations in the Flannagan Headgate travelway, and that there was no attempt to prove that the numbers of violations were excessive compared to comparable mines.

AmCoal's arguments are unavailing. It is well established that repeated similar violations may serve to put an operator on notice that greater efforts are necessary for compliance, and that such violations need not be in the same area of the mine. *IO Coal Co.*, 31 FMSHRC 1346, 1353-54 (Dec. 2009). Past discussions about a problem also can put an operator on heightened scrutiny that it must increase its efforts to comply with a standard. *Id*. at 1353. AmCoal did not introduce evidence challenging Miller's description of an ongoing dialog about compliance with the standard.

I find that AmCoal had been put on notice that greater efforts were necessary to comply with the standard.[24]

[24] This is not to say that AmCoal's arguments are totally without merit. The Galatia Mine was an extremely large mine, comprised of three portals. In order to complete required quarterly inspections MSHA inspectors were in the mine virtually every day. It is not surprising that, from a raw numbers standpoint, a large number of violations were issued. The Secretary's history of violations report appears to indicate that AmCoal was not regarded as having an "excess history" as of the time that the violations were issued. If the Secretary's case on notice rested solely upon past violations, the absence of qualitative violation history information may have affected the finding on this factor. However, the unrebutted evidence of past discussions of roof/rib control violations justifies the notice finding.

Efforts to abate the conditions

The focus of the abatement effort factor is on compliance efforts made prior to the issuance of a violation, generally a measure of an operator's response to violative conditions that were known or should have been known to it. Here there is no evidence that AmCoal made any effort to address the cited conditions prior to the issuance of the order. However, it had undertaken an unusually ambitious training program in an effort to identify and eliminate hazardous conditions, such as the roof and rib conditions that were the subject of the order.

In response to increased emphasis by MSHA on assuring effective preshift, on-shift and other examinations, AmCoal requested MSHA's assistance in providing additional training to its examiners. Tr. 210, 488-89. The result was a collaborative training program, involving instructors from MSHA's training academy at Beckley,West Virginia. Training was conducted at AmCoal's facilities on October 23 and 24, 2007, for examiners, safety and management personnel, and was designed to enhance the ability of responsible personnel to identify hazardous and potentially hazardous conditions. Tr. 210; Ex. R-24, R-25. Miller believed that that had been the first time that MSHA had been involved in a joint training effort with an operator, and conceded that, prior to issuance of the order, AmCoal had made an effort to inform its miners and do a better job of identifying and eliminating hazards. Tr. 205-06, 210.

While not directed at the specific conditions cited in the order, AmCoal's efforts to address such conditions is a factor that should be taken into account in the unwarrantable failure analysis, and weighs slightly against such a finding.

Obviousness of conditions

As noted above, Miller testified that the conditions were obvious. AmCoal attempted to impeach Miller's testimony by establishing that he had traveled through the cited areas only the day before, on November 6, 2007, and had not noted any of the conditions he described as "extensive and obvious." Miller was shown copies of his field notes from that day, which confirmed that he had been in the mine and had traveled to the longwall panel headgate to assess the roof fall. Tr. 213-14; Ex. R-70. However, he did not recall, and could not confirm from his notes, the route that he had traveled, noting that the area could also have been approached from the tailgate travelway. Tr. 288-90, 295-96. He also did not recall what type of vehicle he had ridden in that day, but assumed that it probably had a canopy that precluded viewing the mine roof and allowed only passing observation of ribs. Tr. 214-16. He also offered that he may have been talking to his escort, or writing notes, such that he did not observe the conditions.[25] Tr. 291.

[25] Miller explained that gaps in ribs might be very difficult to see when traveling in one direction. Tr. 292. However, he would most likely have traveled both directions in entering and leaving the mine.

Michael Smith, an AmCoal safety inspector, had traveled with Miller on November 6. In the course of that visit, Miller issued two citations to AmCoal and served them on Smith. Tr. 564-66; Ex. R-68, R-69. It was AmCoal's practice at the time to have its safety personnel write an "order report," memorializing the issuance of orders and S&S violations. Tr. 577-78. The reports were entered into AmCoal's computer system. Tr. 578. Smith reviewed the citations and the order report that he had prepared, which refreshed his recollection of the November 6 events. Tr. 566. He testified that he and Miller traveled the main intake travelway/escapeway to the headgate area, i.e., the same route that the inspection party traveled on November 7.[26] Tr. 567-73; Ex. R-6.

Smith also testified that he and Miller traveled in PV-79, a four-seat personal vehicle, which was the only one that the safety department had available in that area. Tr. 568. It had a canopy, but, also had a large windshield, that allowed examination of the mine roof, which safety personnel were trained to do. Tr. 580. He had ridden in PV-79 numerous times and testified that his view of the roof and ribs was not significantly impeded - "the rides are all open, you've got a big windshield in front of you, it's almost like driving in a car. You do have something overhead, but you can see out in front of you." Tr. 582. While traveling to the headgate, they stopped to abate a couple of citations, but did not observe any adverse roof or rib conditions, and Miller did not issue any citations for such conditions, either while traveling into or out of the mine. Tr. 214-15, 573, 581; Ex. R-70.

Miller's attempts to downplay the significance of his November 6 travel in the mine were unconvincing. His destination was the headgate area of the longwall panel, and the most direct and logical route of travel would have been to proceed through the main travelway/escapeway. Smith testified, credibly, that that was the route that he and Miller traveled on November 6, and I so find. It is also apparent that the canopy on the PV did not preclude viewing of the roof and ribs, and provided adequate opportunity to observe the condition of the ribs. The November 7 inspection party also traveled in a 4-seat PV that had a canopy, and Odum was able to identify several adverse rib and roof conditions prior to the parking of the PV and the party proceeding

[26] Smith confirmed that the area could have been approached from the tailgate travelway, but explained that it would not have "made a lot of sense" to do so. Tr. 573. The tailgate entries had to be "cribbed up" so that the adjacent longwall panel could be mined. That process had begun, and cribs would have precluded vehicular travel closer than 7-8 crosscuts away from the set-up entries. Tr. 572. Persons approaching the headgate from that direction would have had to walk to the set-up entries, then walk all the way across the width of the panel to reach the headgate, and walk back to return to the PV. Tr. 572-73.

on foot.[27] Tr. 539. As Durham stated with respect to the large piece of draw rock that the party observed while traveling in the PV, "we all saw it - no missing it." Tr. 539. I accept Smith's testimony that the PV afforded a reasonable view of the travelway roof and ribs, and that obvious defects should have been observed if they existed.

Miller had no recollection of the November 6 events, but he offered that he may have been talking to Smith or writing notes. He did not explain how talking to Smith may have impaired his ability to observe roof and rib conditions. There was also no explanation of why he might not have paid attention to conditions that may have posed a hazard to him, personally. He acknowledged that mine roof and rib strata can separate at any time, and it would seem that an experienced miner would always be vigilant for such hazards. Tr. 240.

As the Secretary argues, the purpose of Miller's visit on November 6 was to examine the area of a roof fall near the headgate. His ride to the area took about 10-15 minutes. He was not conducting an inspection of the travel/escapeway, which would have been "much more thorough." Tr. 292. Nevertheless, his failure to note any of the conditions that formed the bases of the November 7 order strongly suggests that they were not obvious. AmCoal points out that the examiners who conducted the three preshift inspections immediately preceding issuance of the order, did not note the conditions. They had received the specialized training on the recognition of hazards that was provided by MSHA instructors 2 weeks earlier, and should have been able to recognize obvious conditions. Other examiners had noted other hazardous conditions in their examination reports. Ex. R-16. The fact that, like Miller, the travelway examiners did not identify hazardous conditions, weighs against a finding that the cited conditions were obvious.

I find that the cited conditions were not obvious, and that this factor does not weigh in favor of an unwarrantable finding.[28]

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[27] Durham testified that she "probably" parked the PV around crosscut #9, after which the inspection party walked. Tr. 542-43. According to Miller's notes, a citation was issued for fractures and slips in a coal rib between crosscuts 3 and 4, the large piece of draw rock was identified at crosscut #6, and broken roof was identified at crosscut #7. Ex. S-8. Those deficiencies , as well as the apparently questionable condition that prompted Odum to request that the PV be backed-up and parked, would have been observed while riding in the PV.

[28] AmCoal points out that the examiners conducting the preshift examinations rode in mobile equipment to inspect the several miles of the travelway, and that there is no requirement that examiners walk. Whether examiners ride or walk, however, they are required to conduct the examination effectively, i.e., so as to be able to identify any hazardous conditions. The fact that the examiners rode, no doubt because of the significant distances involved, would not excuse the failure to identify and correct hazardous roof or rib conditions. It does, however, have some bearing on the degree of negligence. A conscientious examiner could well fail to observe a subtle, or minor problem, e.g., rib sloughage that Durham described scaling down, which would not have presented an appreciable hazard to users of the travelway.

Degree of danger to miners

As reflected in his notes, Miller's initial evaluation was that the cited conditions were "likely" to result in fatal injuries to two persons, because "miners are working in the entry every shift and these hazards are up and down the entry and crosscuts." Tr. 276; Ex. S-8 at 8. When the order was reduced to writing that night, the likelihood of injury was listed as "highly likely," the same determination that was made on the companion preshift order, Order No. 6668526. Ex. S-6, S-7. The highly likely determination for Order No. 6668526 was based, to a significant degree, on the fact that two miners were working under the large piece of draw rock that was hanging down from the mine roof at crosscut #6. Ex. S-8 at 14. That condition was the subject of Citation No. 6668522, a separate violation, for which a penalty was assessed and paid. Ex. S-8 at 4; Ex. S-1.[29] Whether or not it could properly be considered in evaluating the gravity of the preshift order, it would not be appropriate to consider the condition cited in Citation No. 6668522 in evaluating the gravity of Order No. 6668524 because it was not among the conditions underlying that order.

Miners on the working crews used the travelway to enter and leave the mine, and there were three shifts per day. Examiners, maintenance, supply, and other persons also used the travelway. Generally, persons using the travelway, including examiners, rode in mobile equipment. Tr. 164. Some pieces of mobile equipment did not have canopies, but there is no evidence as to the numbers of canopied versus open rides. Tr. 164. There were two miners working near crosscut #6, and Miller noted that "miners are working in the entry every shift." Ex. S-8 at 5, 8. The basis for the latter statement was not explained, nor was it explained what such miners might be doing in the entry.

As noted in the S&S discussion, there is considerable uncertainty as to the precise nature of the hazards presented by the cited conditions. Miller was unable to recall the details of the roof conditions, including whether they were located near the center of the entry, where persons were likely to travel, or along the sides. The indications of locations, where available, indicate that they were more to the side, where they would present less of a hazard. The rib conditions included two significantly large pieces that posed a hazard to miners who might be working or traveling near the rib, most likely a rare occurrence.

In light of the uncertainties as to the nature and locations of the conditions, I find that the violative conditions did not pose a high degree of danger to miners.

[29] On June 9, 2009, an order was entered approving a proposed settlement of Citation No. 6668522, which included a modification to reduce the number of persons affected to one, and a reduction in the assessed penalty from $$1,944 to $1,796. *The American Coal Co.*, Docket No. LAKE 2008-120 (unpublished Order Approving Partial Settlement) (ALJ).

Operator's knowledge of conditions

Miller had recorded in his notes that it was "unknown who knew" about the violative conditions. Ex. S-8 at 8. He could not identify a person at the mine who had knowledge of the conditions, other than persons who would have traveled through the area. Tr. 234. The Secretary attributes knowledge to AmCoal through management officials, e.g., foremen, who used the travelway, and preshift examiners, who act as agents of the operator in performing those duties. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,194-96 (Feb. 1991). However, it was not established that the more serious violative conditions existed when preshift examiners conducted their examinations, and it is unclear when other management officials would have traveled the area other than that foremen would likely have done so at the beginning and end of each shift.[30] Other conditions, e.g., sloughage of immediate mine roof from around roof bolt plates, were undoubtedly known to AmCoal, but, depending upon their location and whether the roof was broken to any significant degree, may not have been hazardous when observed by preshift examiners.

The order was issued at 7:00 p.m., approximately 5 hours after the most recent preshift examination had been conducted. While there is considerable uncertainty as to how long the conditions existed, I find that the majority of them existed prior to the commencement of the preshift examination, but that some of them had not developed to the point of being hazardous at that time. Consequently, AmCoal had constructive knowledge of at least some of the hazardous conditions, but that knowledge was significantly mitigated by Miller's failure to identify any of the conditions when he traveled through the area the day before.

Conclusion

AmCoal had been put on notice that greater efforts were required to comply with the roof and rib control standard. The conditions were somewhat extensive and most of them had existed for at least one shift. AmCoal should have had knowledge of the conditions, but, that factor is partially off-set by the fact that the conditions were not obvious. The conditions did not present a high degree of danger to miners, and AmCoal had taken some steps to address potentially hazardous conditions that could be discovered during examinations.

Considering all of these factors, I find that the violation was not the result of AmCoal's unwarrantable failure. Rather, its negligence was moderate.

[30] The most recent preshift examination of the travelway had been conducted between 1:00 and 4:00 p.m. If the report form is indicative of how the examination was conducted, the travelway would have been examined early in the 1-4 p.m. window, approximately 5 hours before the order was entered.

Order No. 6668526

Order No. 6668526 was issued at 11:59 p.m. on November 7, 2007, 5 hours after Order No. 6668524 was issued, and alleges a violation of 30 C.F.R. § 75.360(b)(1), or, in the alternative, section 75.360(g).[31] Section 75.360(b)(1) requires that persons conducting required preshift examinations "examine for hazardous conditions" in "[r]oadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift." Section 75.360(g) requires that examination records be retained. The violation was described in the "Condition and Practice" section of the order as follows:

> An inadequate pre-shift examination for hazardous conditions was conducted along the 1st West Flannigan Longwall Primary Intake Escapeway on the 12:00 PM to 4:00 PM shift on November 7, 2007, in that the hazardous conditions listed in Mine Citation Number 6668524, were neither posted with a conspicuous danger sign nor recorded in a book maintained for that purpose. The hazardous conditions are extensive and readily visible to a mine examiner traveling this entry.

Ex. S-7.

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that two persons were affected, that the operator's negligence was high, and that the violation was the result of AmCoal's unwarrantable failure to comply with the standard. The violation was assessed as flagrant, and a civil penalty, in the amount of $161,800 was assessed.

The Violation

The Secretary's motion to amend the order to allege, alternatively, a violation of section 75.360(g) was prompted by AmCoal's reaction to Miller's confirmation that he had no evidence that the preshift examinations were not conducted and that the violation was based on the examiners' failure to identify and record the hazardous conditions cited in Order No. 6668524. AmCoal contended that those facts, if proven, did not state a violation of section 75.360(b). Tr. 225-27. However, the Commission has consistently held that "section 75.360(b) essentially requires a preshift examiner to find and record a hazardous condition in a preshift examination book." *Cumberland Coal Res., LP*, 32 FMSHRC 442, 446 (May 2010); *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1118 (Oct. 2001); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14-16 (Jan. 1997). Consequently, the failure of a preshift examiner to identify and record a hazardous

[31] During cross-examination of Inspector Miller, the Secretary's motion to amend the order to charge a violation of section 75.360(b)(1), or in the alternative, section 75.360(g), was granted. Tr. 230.

condition that has been proven to have existed when the examination was made, constitutes a violation of section 75.360(b), and the order properly charged a violation of that section.

Order No. 6668524 was issued at 7:00 p.m. When Miller exited the mine, he again reviewed the preshift examination books. Miller confirmed that notations at appropriate locations along the travelway evidenced that preshift examinations had been conducted, and that the results had been recorded in the examination book. Tr. 221-22. However, no hazardous conditions were reported for the examination that had been conducted prior to the start of the second shift or for the previous two examinations. Tr. 223-24; Ex. R-16. He then issued Order No. 6668526 before leaving the mine site.

As noted in the discussion of Order No. 6668524, there were numerous areas in the travelway where the mine roof and ribs were not adequately supported or otherwise controlled that presented hazards to miners. Some of those conditions were found to have existed for more than one shift, although there was no reliable evidence that the more serious conditions had existed for longer than one shift. That order was issued at 7:00 p.m., approximately 5 hours after the most recent preshift examination had been conducted. While there is considerable uncertainty as to how long the conditions existed, the majority of them existed when the preshift examination for the second shift was conducted, and that some of them existed when earlier preshift examinations were conducted. Accordingly, they should have been identified and reported on the preshift examination book, and the failure to do so was a violation of the standard.

S&S

The violation charged in Order No. 6668524 was found to be S&S, in that the hazard contributed to by the violation was reasonably likely to result in a permanent injury to one miner. The failure to identify and record the hazards in the preshift examination book, perpetuated those hazards and resulted in exposure of the miners to the hazards. The violation charged in Order No. 6668526 contributed to most of the safety hazards that existed as a result of the violation charged in Order No. 6668524.[32] Similarly, under continued normal mining conditions, those hazards were reasonably likely to result in a permanent injury to one miner. The violation charged in Order No. 6668526 was also S&S.

[32] As noted in the discussion of that order, Miller's evaluation of the gravity of the violation was premised upon consideration of the large piece of draw rock at crosscut #6 that two miners were working under. While that condition was not included in the conditions cited in Order No. 6668524, it and others cited in the travelway prior to the issuance of the order could properly have been considered predicates for the issuance of the preshift order, because the examinations would have encompassed the entire travelway. However, the order did not reference conditions other than those cited in Order No. 6668524, and there was virtually no attention devoted to those conditions during the hearing. Consequently, they will not be considered in deciding the issues relevant to Order No. 6668526.

Unwarrantable Failure - Negligence

The unwarrantable failure analysis parallels that of Order No. 6668524, with some variations because of the nature of the violation. The essence of the preshift violation occurred over the course of a few minutes when the examiner failed to identify the hazardous conditions cited in Order No. 6668524, the majority of which existed at that time. Those that conducted earlier examinations, and failed to identify hazardous conditions that existed at the time, also contributed to the violation. The extensiveness and time factors, as discussed with respect to Order No. 6668524 are not directly applicable to the preshift violation, and I find that they do not weigh heavily in favor of a finding of unwarrantability.

The more significant factors in the analysis are those directly related to the degree of negligence, or fault, of the preshift examiners, and the gravity of the violation. AmCoal had been put on notice of a need for greater efforts to comply with examination and reporting standards. Miller testified that there were "countless meetings" on those topics, which at least in part prompted the special collaborative training effort two weeks before the order was issued. Tr. 205. AmCoal also should have had knowledge of the violation, which is the essence of the preshift violation itself. As with Order No. 6668524, the notice and knowledge factors weigh in favor of a finding of unwarrantability, and the fact that AmCoal had requested and implemented the training program, weighs somewhat against such a finding. The conditions that existed when the examinations were conducted were not obvious and, again, there is insufficient reliable evidence to establish that they presented a high degree of danger to miners.

Considering all of these factors, I find that the violation was not the result of AmCoal's unwarrantable failure to comply with the standard, and that its negligence was moderate to high.

Order Nos. 6673874 and 6673876 (Docket Nos. LAKE 2008-666 and LAKE 2009-6A)

Order No. 6673874 was issued by Miller at 9:25 a.m. on January 24, 2008, pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.400, which requires 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." The violation was described in the "Condition and Practice" section of the order as follows:

> Float coal dust, a distinct black in color, loose coal, paper, cardboard, wood, and plastic were allowed to accumulate under and along the energized Flannigan Number 2 Conveyor Belt and adjoining crosscuts. This condition existed from the head roller to crosscut number fifty. This area includes the head roller, belt drive, and belt take-up. The accumulations measured approximately 6 inches to 24 inches in depth. The bottom belt and bottom belt rollers were observed turning in these accumulations in the drive area as well as the head roller area. There was also a broken bottom belt roller throwing metal shavings into these accumulations

in this area. This condition has existed for several shifts and [is] continuing to grow as there is fresh spillage on top of some of the areas. These conditions were not reported on the examination books.

Ex. S-18

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that 10 persons were affected, that the operator's negligence was high, and that the violation was the result of AmCoal's unwarrantable failure to comply with the standard. The violation was assessed as flagrant, and a civil penalty, in the amount of $188,000 was assessed.

The Violation

Miller, accompanied by Smith, inspected the belts at the Galatia mine on January 24, 2008. Coal mined at the longwall was transported out of the mine by several miles of belts. It traveled on the longwall belt to the Flannigan #3 belt, to the Flannigan #2 belt, and to the Flannigan #1 belt, on its way out of the mine. Crosscuts along the belt entry were spaced 150 feet apart. Miller started his inspection at the Flannigan #3 belt at crosscut #100. Ex. S-21. After checking on abatement of other citations, he found a carbon monoxide ("CO") monitor that was improperly positioned between crosscuts #75 and #76, and issued Citation No. 6673872 for that condition. Proceeding outby along the #2 belt, he found a broken bottom roller between crosscuts #43 and #44 that was making clanking noises and throwing off metal shavings that were falling onto coal accumulations approximately 3 feet below. Tr. 310, 583-85; Ex. S-21. He issued Order No. 6673873, pursuant to section 104(d)(2) of the Act, and Smith shut the belt down so that the roller could be changed.[33] Tr. 583; Ex. S-20.

The head drive of the #2 belt, which dumped coal onto the tail of the #1 belt, was located around crosscut #42. The head roller of the #2 belt was elevated above the #1 tail, and overlapped it by approximately 10-15 feet. Tr. 322-25, 382-89, 585-86; Ex. R-76. There were water sprays trained on the dumping point to control dust, which wet the belt and caused material to stick to it as it wrapped around the head roller and began its journey back to the tail piece. Scrapers were mounted around the head roller to dislodge the material. If a scraper was damaged or moved out of position, material could "carry back" along the bottom of the returning belt, eventually falling off, e.g., as it contacted a bottom roller. Tr. 304-07, 325-29. Miller observed accumulations of spilled coal, ranging from 6-24 inches deep at various locations from the head drive of the #2 belt, back inby to crosscut #50, a distance of approximately 1,200 feet. Tr. 299-302. Some of the coal was in contact with the belt's bottom rollers in the head drive area, and appeared to be packed. The area around the head drive was covered with a layer of black float coal dust. There was also wood and plastic in the area, along the rib and entrances to crosscuts. Tr. 589. Wooden crib ties, 6" x 6" and 2.5 feet long, were used when belt splices

[33] Citation No. 6673872 and Order No. 6673873 are not at issue in this proceeding.

were made. Three or four of them had been placed along the rib. Cardboard boxes for belt-splicing kits were also present, as were some plastic buckets containing sealant for use on stoppings.

Smith confirmed the observations made by Miller as to the conditions, the presence of combustible accumulations consisting of coal, float coal dust, wood, cardboard and plastic. AmCoal does not challenge the fact of violation, directing its arguments to the S&S and unwarrantable aspects of the order. Resp. Br. at 44-63. I find that the standard was violated.

S&S – Gravity

The fact of the violation has been established. The violation contributed to a discrete safety hazard, the possibility of an ignition or fire in the belt entry. Fires in underground coal mines pose a significant risk of serious injuries. Consequently, whether the violation was S&S turns on whether it was reasonably likely that the hazard would result in an injury.

In evaluating the reasonable likelihood of an ignition or fire, the Commission considers whether a confluence of factors render such an event likely.

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.* 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990).

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

Miller believed that the violation was S&S because the accumulations and surrounding coal provided fuel for a mine fire, there was plenty of oxygen because of the air flow in the belt entry, and the broken roller and belt rollers turning in packed coal presented ignition sources. He rated potential injuries as fatal because of the hazards of CO and smoke exposure and that the vision of persons trying to evacuate the mine would be obstructed. As to the number of persons affected, Miller explained that there had been discussions at MSHA around that time and it had been determined that, for violations of the nature of accumulations, that all persons inby would be considered affected because they would have to travel back through the area. Tr. 308-09, 352. There were multiple units working inby at the time, and Miller listed 10 people as being affected because that was the maximum number of persons that the assessment process contemplated at the time. Tr. 309, 360.

AmCoal challenges the S&S designation, arguing that, because of the water sprays, the accumulations were "likely wet to some degree," that the broken roller was not a viable ignition source, and the Secretary did not introduce studies or other evidence that friction produced by the

belt and rollers turning in the accumulations was sufficient to ignite them.[34] Resp. Br. at 45-49. In its reply brief, AmCoal argues that there is no case that holds that accumulations in contact with belts will "*necessarily* and *always* amount to an S&S violation." Resp. Reply Br. at 30. Despite AmCoal's observations, however, belts and/or rollers turning in coal accumulations have frequently been recognized as viable ignition sources, and have been acknowledged by operators as presenting hazardous conditions. *See, e.g., Big Ridge, Inc.*, 35 FMSHRC 1525, 1528 (June 2013) (S&S finding affirmed, noting MSHA inspector's testimony that ignition sources were presented by belt sliding in accumulations and rubbing on belt structure; belt examiner acknowledged that a belt running in accumulations would constitute a hazard, i.e., an immediate danger that can cause a fire); *Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997) (S&S finding affirmed - 15-foot section of belt running on packed dry coal and in loose coal was a potential ignition source; shift manager admitted that a belt running in coal is a dangerous condition and poses a threat of a fire). Smith agreed that a belt turning in coal accumulations created a potential for a fire. Tr. 613.

As noted in the discussion of unwarrantability, there are questions as to how long the broken roller and the accumulations had existed. However, the belts and rollers turning in packed coal presented a viable ignition source and, combined with the other factors identified by Miller, posed a reasonable likelihood of a fire and resultant injuries. Consequently, the violation was S&S.

AmCoal challenges Miller's gravity assessment, i.e., that the violation was highly likely to result in fatal injuries to 10 persons, arguing that any injuries reasonably likely to result should be no more serious than lost work days, and that the number of persons affected should be no more than two or three. Miller had made the same gravity determinations when he issued the CO monitor citation (#6673872) and the broken roller order (#6673873). His reasoning on the subject order, and, presumably, those violations, was that smoke or fire would contaminate both escapeways, and that all persons inby were considered affected because, in trying to get out, they would have to travel back through the area. Tr. 308-09, 352-53. The air flow in the belt entry was inby, such that smoke and other products of combustion would flow into the mine. However, as Miller acknowledged, and the Secretary stipulated, that ventilation flow was coursed into a return, and did not reach the working sections. Tr. 357-59, 522-23; Ex. R-7. While the return served as the secondary escapeway, miners evacuating the mine would almost certainly use the primary escapeway, which was ventilated with fresh intake air and, as a consequence, would be unlikely to become contaminated. Miller was not aware of any deficiencies in the escapeways, e.g., problems with lifelines or the availability of SCRS.

[34] I accept Smith's description of the location of the broken roller as being approximately 3 feet above the accumulations. Unlike a situation where a damaged roller is in contact with accumulations, the subject roller did not present a realistic ignition source. Aside from the stand being "warm" to the touch, there were no sparks, red-hot bearings or other indications that it was generating significant heat.

The mine's air courses were separated by stoppings which were designed to contain the airflow in the designated entries. Miller had postulated that leakage could occur if stoppings were not properly sealed, and the Secretary argues that "there could develop a problem with the stoppings in which case smoke would travel from one entry into the escapeways." Tr. 353; Sec'y. Br. at 70. However, Miller acknowledged that he had made no notes of any such conditions, and had not issued citations for any of those types of conditions. Tr. 342, 353.

The Secretary also argues that the likelihood of an injury producing event was exacerbated by the possible presence of methane. Miller testified that the mine liberated over three million cubic feet of methane in a 24-hour period and that methane could accumulate anywhere at any time. Tr. 341. However, he found no methane near the cited conditions, and did not identify any instance where he had ever detected methane in the belt entries at or near the cited location. Tr. 341. That is not surprising in that the belt entries were ventilated with intake air that had not passed through any areas of active mining. While I accept Miller's opinion that a methane accumulation *could* occur anywhere in the mine, the possibility of its presence in the cited area in sufficient quantity to exacerbate a fire or result in an explosion was highly unlikely and too speculative to be considered in the assessment of gravity. Consequently, even if there were an ignition, there was no realistic possibility of an explosion that could have suspended the float coal dust, possibly resulting in a second explosion that could compromise ventilation controls and threaten other areas of the mine.

AmCoal also relies on its safety systems in arguing that injuries would not be as severe or as numerous as Miller asserted. Conveyor belt systems in coal mines are required to have numerous safety features designed to minimize the substantial threat posed by fires. Transfer points, such as the subject transfer point from the #2 to the #1 belt, where powerful equipment operates, must be equipped with fire suppression systems. CO sensors are placed at intervals along the belt lines, to detect the initial stages of combustion and transmit a warning to the surface. AmCoal also maintains "fire brigades," teams of miners specially trained to fight fires, available on each shift, to promptly respond to any ignitions. Tr. 602-05. Miller acknowledged the presence of these safety features and confirmed that he was not aware of any problems with their functionality at the time. The Secretary stipulated that there was no claim that the CO monitoring or fire suppression systems were not working properly. Tr. 461-66.

While redundant safety systems, such as CO monitors and fire suppression systems, cannot defeat a finding that a violation is S&S,[35] their presence can be taken into consideration in evaluating the number and severity of injuries that may reasonably be expected as a result of a violation. Here, AmCoal's safety systems, all of which were in good working order, could be expected to provide effective control of any fire resulting from the accumulations. While there is no evidence that anyone other than an examiner was inby in the belt entry or in the return, it is not unreasonable to assume that miners could be in those areas, and, in any event, those who responded to the ignition would have been exposed to the hazards of a fire.

[35] See, e.g., *Big Ridge*, 35 FMSHRC at 1529.

The Secretary's position that the violation was highly likely to result in fatal injuries to 10 persons is highly speculative, and is not supported by the evidence. I find that the violation was reasonably likely to result in lost work days injuries to two miners.[36]

Unwarrantable Failure - Negligence

The Secretary argues that the violation was the result of AmCoal's unwarrantable failure because the condition was extensive, had existed for a significant period of time, AmCoal knew or should have known of the violation, it posed a high degree of danger to miners, and AmCoal had been put on notice of a need for greater efforts to comply with the standard. AmCoal disputes most of the Secretary's arguments, asserting that the conditions had not existed for long, it did not, and should not, have had knowledge of them, it had not been placed on notice of a need for greater compliance efforts, the conditions did not pose a high degree of danger to miners, and it had taken reasonable steps to prevent the conditions from arising and going undetected.

Extensiveness

The violative conditions were extensive. The accumulations consisted of loose coal, float coal dust, paper, cardboard, wood and plastic. While the wooden crib ties and, possibly, the belt splice kit boxes and stopping sealant buckets, were most likely not unlawful accumulations in themselves, they added to the combustible load and, in combination with the loose coal and float

[36] As noted above, the other two violations issued by Miller shortly before the instant order had also been evaluated as being highly likely to result in fatal injuries to 10 persons. Those violations were subsequently modified. The broken roller order, #6673873, was modified to a section 104(a) citation and the gravity determinations were changed; from fatal to lost work days and the number of persons affected from 10 to 3, which were "more likely" results "if a fire were to occur in the affected area cited." Ex. R-66, R-67. The negligence was reduced from high to moderate because "it could not be determined how long the cited condition had existed." Ex. R-66. The CO monitor citation was also modified to change the type of injury to lost work days and the number of persons affected to two. Ex. R-74, R-75. Miller did not participate in the modifications. Tr. 396. The Secretary contends that those modifications are not relevant, and that statements made during settlement discussions are privileged. Sec'y. Reply Br. at 1-2. The modifications are not confidential settlement negotiations. They are changes to the subject charges that were agreed to by the Secretary and AmCoal, were included in a document filed in the public record of Commission proceedings, and became final orders of the Commission when approved by the presiding judges. Similar modifications were made to citations for accumulations violations that were introduced as exhibits by the Secretary. Ex. S-92, S-93. I find that the modifications, particularly the modifications to the broken roller order, are relevant to the assessment of the gravity of the subject order, and support the determination that the violation was reasonably likely to result in lost work days injuries to two persons.

coal dust were impermissible accumulations in violation of the standard. The loose coal was 6 to 24 inches deep, at various locations along the belt from the head roller to crosscut #50, some 1,200 feet. Abatement of the conditions, i.e., cleaning and rock dusting, consumed over 100 man-hours. Ex. S-18. AmCoal does not argue that the violative conditions were not extrensive.

AmCoal had been put on notice of a need for greater compliance efforts.

AmCoal's arguments on notice parallel those made with respect to the roof control violation. It points out the broad applicability of the standard and focuses on the very limited evidence of similar accumulations violations in the cited area. As with the roof control violation, AmCoal's points about numbers of past violations have merit. However, as noted there, prior violations need not be in the same area of the mine, and Miller's unrebutted testimony that he had had repeated discussions with AmCoal managers about accumulations violations is sufficient to establish that AmCoal had been put on notice of a need for greater efforts to comply with the standard.

Degree of danger to miners

The accumulations did not present a high degree of danger to miners. As noted in the discussion of gravity, the Secretary's position that the violation was highly likely to result in fatal injuries to 10 persons was speculative and not supported by the evidence. Rather, the violation was reasonably likely to result in lost work days injuries to two miners, most likely those who would have been involved in responding to an ignition or fire. Even that potential outcome was not compelled. The material in contact with the belt and bottom rollers had been carried back on the belt that was wet from sprays at the head roller. While wet coal can dry out when in contact with rollers or the belt, if it ignited, it most likely would have smoldered, would have been detected by the CO monitoring system, and promptly addressed by the fire brigades. AmCoal's fire brigade personnel were well-trained, and, with one notable exception, there has been a remarkable absence of injuries resulting from belt fires in the nation's coal mines. AmCoal refered to an MSHA study on belt fires, referred to as the "Bentley Report," which found that there were no fatalities and no reportable lost time injuries from belt fires in all of the nation's coal mines from 1980 to 2005. Resp. Br. at 64. The belt fire at Aracoma's Alma #1 Mine on January 19, 2006, in which two miners perished, occurred outside the study period. It confirmed the serious threat that can be posed by belt fires. However, the conditions that existed at the Aracoma mine were unique and bear no resemblance to those at the Galatia mine. *See Cumberland Coal Res., LP*, 31 FMSHRC 137, 149 (Jan. 2009) (ALJ).

Length of time conditions existed

As discussed below, there were three distinct types of coal accumulations in the cited area; 1) float coal dust, which had been accumulating for 2-3 days; 2) loose coal at various locations in deposits ranging from 6-24 inches in depth, primarily alongside the belt, most of which was of relatively recent origin; and 3) dust and fines underneath the belt in contact with

the belt and rollers, that had accumulated over time for two or three shifts. In addition, the broken roller existed only for a short time, i.e., an hour or two prior to its being cited.

Float coal dust

Float coal dust was generated at the transfer point where the coal dumped from the #2 belt head roller onto the #1 belt tail. Sprays helped to control the dust, but did not eliminate it. Tr. 328-29. Miller testified that, in his opinion, the accumulations, presumably including the dust, had existed for several days or as long as a week. Tr. 303-05. His notes reflect that his assessment at the time of the inspection was that they had existed longer than a couple of shifts. Ex. S-21. Miller's opinion was based on his observations of the conditions and his review of AmCoal's reports of examinations.

Miller stated in the examination order, Order No. 6673876, and had recorded in his notes, that "accumulations" had been listed in the "remarks" section of the preshift reports for the day and evening shifts on January 22, but were dropped from the report for the third shift, with no corrective action having been noted, leading him to conclude that they had not been addressed.[37] Tr. 314, 371-75; Ex. S-19, S-21 at 13. However, the reports of the preshift examinations conducted during the day and evening shifts on January 22 did not note the presence of "accumulations." Tr. 633-34; Ex. R-17. Rather, they reflected notations in the "remarks" sections of the reports that the area of the #2 belt from the take-up to the #46 crosscut was "getting black," i.e., that float coal dust was being deposited, which indicated, according to Jimmy Wilson, the mine manager at the time, that the area should be checked, and that rock dusting was needed or soon would be. Tr. 633-34. Wilson concluded that the fact that there was no notation that the area was "black" in the subsequent preshift report indicated that the area had probably been rock dusted. Tr. 638-39. Miller testified that the notation that the float coal dust was black indicated that there was no rock dust mixed in with it. Tr. 301-02. The Secretary argues that there is no direct evidence that rock dusting had occurred, and the fact that the area was black is indicative that the area had not been recently rock dusted.

The Secretary's position is reasonable. Miller's notes reflect that when the order was issued, AmCoal officials asked if he would lift the order when the accumulations were cleaned, before rock dusting was done. The reason for the request was that "both rock dusters were down and they didn't know when they would come back up." Ex. S-21. There was no other evidence

[37] Conditions noted during preshift examinations are recorded in one of two sections on the "Preshift Mine Examiner's Report," either "violations and other hazardous conditions" or "remarks." Ex. R-17. Conditions that constitute hazards must be addressed, and the corrective action taken must be recorded in the examination reports. 30 C.F.R. § 75.360(f). Conditions that do not constitute hazards, but should be monitored and/or addressed to prevent them from becoming hazards, are noted in the "remarks" section. Tr. 315, 617, 633-34. There is no requirement that non-hazardous conditions be reported or addressed, and AmCoal does not record actions taken to address non-hazardous conditions. Tr. 612-13, 639.

introduced regarding the rock dusters, which may have been down for some time. While hand dusting may have occurred, is doubtful that rock dusting had been done in the recent past, i.e., few days. Consequently, I find that float coal dust had begun to accumulate on January 22, and had continued to accumulate until the order was issued on January 24.

Accumulations of loose coal in piles at various locations along the belt

Accumulations of loose coal were located at various places from the head roller to crosscut #50, and ranged from 6" to 24" deep alongside the belt. Tr. 299-303. Miller had recorded in his notes, and in the order, that the condition was "continuing to grow as there is fresh spillage on top of some of the areas," which appears to be a reference to those deposits, rather than the float coal dust or the material under the belt. Tr. 344; Ex. S-18, S-21. He was not able to ascertain what caused the accumulations. Tr. 326. He agreed that one indication of the age of accumulations would be whether they had turned brown or reddish in color, which he had not noted with respect to the subject accumulations. Tr. 370.

While these accumulations were noteworthy, the real focus of Miller's concern had to have been the material packed under the belt in the area of the take-up, close to the head drive of the #2 belt. He had approached the area from inby and had issued a citation for the mis-positioned CO monitor between crosscut #75 and #76. According to his notes, the next condition of interest was the broken roller between crosscuts # 43 and 44. Ex. S-21. While he later included accumulations extending back to crosscut #50 in the order, he apparently did not regard them as particularly problematic when he first traveled past them while walking the 900-1,000 feet from crosscut #50 to the broken roller.

Miller was unable to recall any material coming off the belt, but, he had recorded that accumulations were continuing to grow and that there was fresh spillage on top of some of the areas. The loose coal accumulations resulting from spillage would have been relatively obvious, and, with the exception of spillage in close proximity to the transfer point, had not been recorded on preshift or on-shift examination reports. I find that the loose coal accumulations alongside the belt were of fairly recent origin, and that a significant portion of those deposits had occurred within one shift.

Carry back dust and fines under the belt

Miller's primary concern was fine coal that had become packed under the belt, and was in contact with the belt rollers in the take-up area of the #2 belt head drive. The broken roller was just inby the take-up. Consequently the #2 belt take-up was within approximately 150 - 200 feet of the #2 belt head roller and the #1 belt tail. Smith had recorded in his report on issuance of the order, that "rollers were in contact with the material at the inby end of the drive and the #1 Flannigan tail roller." Ex. R-37. Miller believed that the material under the belt and around the rollers was "carry back" from the head roller that had not been removed by the scraper, and that it would normally take "some time," i.e., several shifts, to get packed like it was. Tr. 303, 325-28. Miller did not believe that the accumulations packed under the belt had been cleaned

recently, e.g., within a day or two, because he did not see any shovel marks or fresh rock dust. Tr. 317.

As noted in the discussion of float coal dust, Miller's reference to "accumulations" having been reflected in the preshift reports for January 22, was not accurate. However, there had been references to conditions at or near the transfer point, i.e., at the #1 belt tail, and that actions had been taken to address them. Most significantly, the report of the preshift examination conducted on the previous day, between 5:00 a.m. and 8:00 a.m., reflected that the "tail scraper" of the #1 belt was "dirty," and that Wilson had been informed Tr. 634-37; Ex. R-17 at 1856.[38] He assigned men to clean the area, and the on-shift report for that shift shows that the area was "cleaned." Tr. 637-38; Ex. R-17 at 1857. Wilson also stated that the report of the preshift examination conducted between 1:00 p.m. and 4:00 p.m. on January 23 showed, in the remarks section, that the tail of the #1 belt and the head of the #2 belt were getting dirty, and that the absence of any such notation on the report for the following preshift examination indicated that "it's been cleaned." Tr. 639-40; Ex. R-17 at 1858.

In addition, the hazardous conditions section of the report for the preshift examination conducted between 5:00 a.m. and 8:00 a.m. on January 24, shortly before the order was issued at 9:20 a.m., reflected that the "tail" of the #1 belt was "dirty," and that the mine manager had been informed. Tr. 623-25; Ex. R-17 at 1862. Wilson testified that he had read and signed the report and had assigned men to clean the area. Tr. 623-26. However, the cleaning personnel had to wait for transportation until the "hot-seating" working section miners, who had just been relieved by the new day shift crew, brought transport vehicles back to the bottom area. Tr. 627-31. As a result, they had not arrived at the cited area by the time the order was issued. Wilson got a call about the issuance of the order "before the men even made it there." Tr. 631.

Wilson did not think it was unusual that the #1 tail area had been cleaned the day before, and was dirty again on January 24. He pointed out that the longwall was producing over 6,000 tons of coal each shift, all of which traveled on the subject belt, at 600 feet per minute, across the transfer point from the #2 head drive to the #1 tail. Tr. 641-44. Miller had essentially agreed, stating "[I]t's mining 101. Any time you transfer coal you're going to have a little bit of spillage." Tr. 329.

AmCoal argues that the examination reports show that the belt transfer point was being closely monitored and that accumulations, including coal spillage were being promptly cleaned. The Secretary argues that the reports' references to the #1 tail are not relevant to the conditions cited in the order, because the "area at the #1 tail and the #2 head roller are different areas." Sec'y. Br. at 74. Miller also testified that the references to problems at the #1 tail had nothing to do with the cited area. Tr. 377-78. The Secretary's argument is clearly in error, but, Miller's

[38] Page numbers for exhibit R-17 refer to the last 4 digits of the numbering system used on all of AmCoal's exhibits.

point has some merit. AmCoal was attending to some of the cited conditions at the transfer point, but the fines and dust packed under the belt in the take-up area were not being addressed.

There is no question that the #2 belt head and the #1 belt tail are in the same area. Miller's own sketch of the transfer point shows that the #2 head roller sat directly above the #1 tail piece, and the belts overlapped by 10-15 feet. Ex. R-76. The notations in the reports to the #2 belt head and the #1 belt tail being dirty were most likely references to ongoing spillage that all appear to agree was an inevitable occurrence at a transfer point where large volumes of coal are being dumped from one belt onto another. The reports evidence that AmCoal's examiners were identifying and reporting that condition, and that spills in the area of the #2 belt head and #1 belt tail were being promptly addressed.

However, the packed fines and dust that Miller was most concerned about were in the area of the #2 belt take-up, under the belt and rollers that were, at that point, very close to the floor of the mine, i.e., from 8 to 18 inches. Tr. 301. That area was just inby the transfer point, and may have extended inby approximately one crosscut, close to where the broken roller was located. That material would have been difficult to observe, and I accept Miller's estimate that it had been accumulating for more than a couple of shifts.

The broken roller

Miller testified that, in his opinion, the broken roller had existed for several shifts. Tr. 310; Ex. S-21. While the broken roller, itself, was not included in the conditions cited in the order, it did figure into Miller's assessment of gravity, and was one of the conditions upon which the inadequate examinations order was based. Consequently, the length of time that the roller was broken must be addressed. Miller had spoken to an AmCoal examiner, who informed him that he had not seen the broken roller the day before. Tr. 362; Ex. S-21. Miller wondered if the belt may have been down when that area was examined, in which case a broken roller may not have been found. Tr. 362. The broken roller had not been recorded on any of the on-shift or preshift examination reports, including the examination that had been done only hours before the order was entered. Ex. R-17.

Miller did not explain the rationale for his conclusion that the roller had been broken for several shifts, and was no doubt relying on his extensive mining experience. As noted previously, the persuasiveness of such opinion evidence is significantly undercut when there is no explanation relating particular aspects of such experience to what can be a complex task of estimating the length of time that a condition existed. Smith testified that, while some modes of roller failure, e.g., bearings going bad, might give some advance notice, there is little or no indication that a roller is about to break. Tr. 592-93. Miller confirmed that there was no apparent problem with the roller's bearings. Tr. 364. The broken roller was "clanging around on its axle" and was obvious. Tr. 584. While it is possible that the belt was not running when the preshift examinations of the area were conducted, that appears unlikely in light of the fact that the three previous shifts had each produced 5,000 - 6,000 tons of coal. The fact that the examiner had not seen the roller the day before, and that it had not been noted in any of the

examinations strongly suggests that it broke shortly before Miller found it, i.e., after the preshift examination had been conducted between 5:00 a.m. and 8:00 a.m. that morning, and I so find.

In sum, there were three distinct types of coal accumulations in the cited area; float coal dust that had been accumulating for 2-3 days; loose coal in deposits ranging from 6-24 inches in depth, most of which was of relatively recent origin; and, dust and fines in contact with the belt and rollers that had accumulated over time for several shifts.

Obviousness - Knowledge of the Conditions

The float coal dust was obvious and had been noted on reports of preshift examinations. The loose coal was also obvious, but was of relatively recent origin. AmCoal had identified loose coal deposits at the transfer point and cleaned them on January 23. It had also identified deposits in the same area on January 24, and had taken steps to have them cleaned. Other deposits, further inby, had not been identified, but may have been less obvious or not existed when examinations had been made. Even on the 24th, Miller had not noted deposits between crosscuts #50 and #43 when he first walked the area. The packed fines and dust under the belt and bottom rollers in the take-up area were not obvious because the belt was very close to the mine floor in that area. Nevertheless, a competent examiner should have discovered them, at least by the morning of January 24.

This factor weighs in favor of a finding of unwarrantability.

Efforts to abate the conditions

AmCoal had cleaned the area of the #1 belt tail, where the #2 belt head drive was located on January 23. That area was reported as "dirty" again on the morning of January 24, and Wilson had dispatched a crew to clean it. These efforts were directed at the loose coal spillage in the area of the #2 belt drive, but did not include the float coal dust, the loose coal further inby, or the material packed under the belt take-up. Whether the January 24 crew would have noticed the accumulations packed under the belt and rollers is unknown. However, the broken roller may have called attention to that area, and appropriate actions may have been taken. In addition, AmCoal had implemented the special, MSHA-assisted, training program for managers, safety personnel and others. However, that program had been conducted several months earlier, and is of limited significance to this order.

Conclusion

The combination of the accumulations of float coal dust, loose coal, and the carry back fines and dust under the belt take-up was extensive. AmCoal had been put on notice that greater efforts were required to comply with the standard. The float coal dust had existed for two days, the loose coal for one shift, and the carry back material for several shifts. The conditions did not present a high degree of danger to miners. AmCoal had taken steps to abate at least a portion of

the conditions prior to issuance of the order, and had undertaken efforts to better comply with the standard by providing training on the conduct of examinations.

The obvious - knowledge factors are of more significance on the facts of this case. The float coal dust was obvious, and AmCoal had knowledge that it existed for 2 days. However, it was not, in itself, a hazardous condition. Miller had not cited any inadequacies in rock dust. Tr. 336. The loose coal deposits were of more recent origin, and AmCoal had cleaned and taken steps to clean loose coal deposits in the area of the transfer point. Such deposits further inby had not been noted by Miller has he traveled to the broken roller. The carry back material packed under the belt was not obvious, but AmCoal should have had knowledge of it.

AmCoal's examination reports demonstrate that preshift and on-shift examinations of the belts were being conducted, as required. There is no evidence of deficiencies in documentation of the examinations. Examiners were noting the presence of hazardous accumulations, as well as other conditions, and at least the hazardous conditions were being promptly addressed by the mine manager. While the more serious condition, the carry back material packed under the belt and rollers in the take-up area, should have been discovered and addressed, it was not obvious. That failing, in conjunction with the other factors discussed above, does not rise to the level of aggravated conduct sufficient for a finding of unwarrantability. I find that AmCoal's negligence with respect to the violation was moderate to high.

Order No. 6673876

Order No. 6673876 was issued by Miller at 1:00 p.m. on January 24, 2008, pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.363(b) which requires that a record be made of any hazardous condition found during an on-shift examination and the action taken to correct it. The violation was described in the "Condition and Practice" section of the order as follows:

> The hazardous conditions as reflected by Mine Citation Number 6673873 and Mine Citation Number 6673874 were not recorded in the examiners on-shift book as required. The broken bottom belt roller and the accumulations have existed longer than a couple of shifts. The accumulations were reported on January 22, 2008 on the day shift and the second shift in the remarks column, but dropped on the third shift January 23, 2008. There was no reference to any action taken on the conditions listed in the remarks column.

Ex. S-19

Miller determined that it was highly likely that the violation would result in a fatal injury, that the violation was S&S, that 10 persons were affected, that the operator's negligence was high, and that the violation was the result of AmCoal's unwarrantable failure to comply with the standard. A civil penalty, in the amount of $60,000 was assessed.

The Violation

AmCoal's belts and transfer points were the subject of pre-shift examinations conducted during the 3 hours immediately preceding the start of each of three shifts, and on-shift examinations conducted during the shifts. Tr. 533; Ex. R-17. The standard, parallels the pre-shift standard, and requires that hazardous conditions found during an on-shift examination, and corrective action taken, be recorded in a book maintained for that purpose. None of the reports of on-shift examinations conducted from January 22 through the issuance of the order on January 24, recorded the broken roller or accumulations as hazardous conditions. Tr. 314-16; Ex. R-17. The Secretary argues that the broken roller and accumulations should have been reported, "at a minimum, on the third (midnight) shift on January 23, 2008." Sec'y. Br. at 83.

In that the order includes a charge that the broken roller was a hazardous condition that was not reported before the January 24 inspection, it was not a violation of the standard. As noted above, it was found that the roller did not break until after the preshift examination had been conducted for the day shift on January 24. Consequently, it did not exist and could not have been reported during any on-shift examination prior to its having been cited. In addition, there was no hazardous condition reflected in the "remarks" section of the January 22 pre-shift reports. Those references were to comments about "the area of the #2 belt from the take-up to crosscut #46 "getting black," i.e., the accumulation of float coal dust which was not regarded as a hazardous condition.

However, as also noted above, the accumulation of carry back material that was packed under the #2 belt take-up and bottom rollers, was a hazardous condition that, while not obvious, should have been identified by a competent examiner. Those accumulations grew over time as additional material was deposited, but should have been identified and reported at least on the third shift on January 23 and the shift, which began at midnight on January 24. Consequently, the standard was violated.

S&S - Gravity

The failure to identify and correct the violative condition perpetuated it, and subjected additional crews of miners to the hazard contributed to by the unlawful accumulations. Just as that violation was S&S, the violation of the on-shift examination standard was S&S. It was reasonably likely to result in lost work days or restricted duty injuries to two miners.

Unwarrantable Failure - Negligence

While not all of the unwarrantability factors of the accumulations violation apply directly to the examination violation, the outcome is the same. Required examinations were being conducted and hazardous conditions were being identified and addressed. The failure to identify and correct the condition of the carry back material during the immediately preceding on-shift examinations did not rise to the level of aggravated conduct sufficient for a finding of

unwarrantability. I find that AmCoal's negligence with respect to the violation was moderate to high.

The Allegedly Flagrant Violations

Four of the litigated violations were alleged to have been flagrant, and substantially enhanced penalties were imposed. As noted above, on March 28, 2014, the parties filed supplemental briefs on the propriety of the flagrant designations.

On August 17, 2006, following the Aracoma and Sago Mine disasters, Congress enacted the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"). Among the provisions that were generally intended to enhance worker safety, was an amendment to section 110(b) of the Act that dramatically increased potential civil penalties that could be assessed for a new category of violations designated as "flagrant." Section 110(b)(2) reads:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000 [$242,000]. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

By most accounts, the statute is a model of ambiguity. *See Stillhouse Mining, LLC*, 33 FMSHRC 778, 799-800 (Mar. 2011); *Bowie Resources, LLC*, 33 FMSHRC 1685, 1696 (July 2011) (agreeing with *Stillhouse* finding that statute is ambiguous). More striking, however, is that nearly eight years after passage of the statute, much of the ambiguity remains, especially with regard to what constitutes a repeated flagrant violation.

Under section 8(b) of the Miner Act, the Secretary was required to promulgate rules implementing the flagrant provision. Pub. L. No. 109-236, § 8, 120 Stat. 493 (2006). However, MSHA's final rule, simply repeated the language of the statute, providing no further guidance on how the rule would be applied. 30 C.F.R. § 100.5(e). MSHA issued a Procedure Instruction Letter ("PIL"), No. 106-III-04, effective October 26, 2006, which set forth procedures to evaluate flagrant violations. With respect to "repeated failure" flagrant violations, the PIL provided the following criteria:

1. Citation or order is evaluated as significant and substantial
2. Injury or illness is evaluated as at least permanently disabling
3. Type of action is evaluated as unwarrantable failure, and
4. At least two prior "unwarrantable failure" violations of the same safety or health standard have been cited within the past 15 months.

The PIL expired on May 31, 2008, and was later re-issued as PIL No. 108-III-02, which expired on March 31, 2010. On April 19, 2011, MSHA issued a press release entitled, "MSHA inspectors armed with new online tool to detect flagrant violations." Release No. 11-568-NAT. The press release set forth the same criteria that had been included in the PILs.

The sole case to have reached the Commission resulted in resolution of only one narrow question, that "the Secretary may permissibly consider an operator's past violation history in determining that a violation should be assessed as a 'repeated failure' flagrant violation within the meaning of section 110(b)(2) of the Act." *Wolf Run Mining Co.*, 35 FMSHRC 536, 543 (Mar. 2013). Six years after the MINER Act became law, the Secretary's interpretation was still evolving. As the Commission noted: [t]he Secretary's interpretation has changed several times during the course of this litigation." *Id*. n. 5 at 538-39. The Secretary's position continues to evolve. The flagrant designations in *Wolf Run* were eventually withdrawn. *Wolf Run Mining Co.*, 36 FMSHRC (April 14, 2014) (Decision on Remand Approving Settlement) (ALJ).[39]

In *Wolf Run* the Secretary initially based his interpretation of "repeated failure" flagrant violations on the factors specified in the PIL. However, that position was broadened considerably, including the proposal and later disavowal of a requirement that past violations be "substantially similar" to the allegedly flagrant violation. In these cases, the Secretary has conceded that "the Agency has not issued a definitive interpretation of the statutory provision" and that "MSHA does not argue that the PIL [a general screening device] is entitled to deference." Sec'y. Br. at 30, n 2. As to the PIL, the Secretary claims that all violations that meet the criteria listed in the PIL could constitute flagrant violations, but, that the statutory definition "is broader in scope than the class of violations that would be derived from a strict application of the PIL." *Id*.

In *Wolf Run*, while the Commission held that past violative conduct could be considered in determining whether a cited condition represented a "repeated failure" flagrant violation, it recognized that "[o]ne might reasonably argue about the number of prior violations that should be necessary, or how similar those prior violations should be before conduct is appropriately considered a 'repeated failure' under 110(b)(2)," and did "not resolve which prior violations are relevant to the assessment of a 'repeated failure' violation." 35 FMSHRC at 541, 543.

As in these cases, the Secretary has typically attempted to prove the past violations element of "repeated failure" flagrant violations by introducing a computer printout listing of past violations, and copies of citations or orders charging the operator with violations of the same, or similar, standards. Those attempts have been uniformly criticized. In *Bowie Resources,* Judge Manning stated: "I believe that the Secretary cannot establish the 'repeated failure'

[39] As noted in *Wolf Run*, the Secretary also abandoned efforts to sustain flagrant allegations in *Conshor Mining, LLC*. 33 FMSHCR 2917 (Nov. 2011) (ALJ), after a petition for interlocutory review was granted by the Commission. 33 FMSHRC at 539-40 n 6.

element in section 110(b)(2) by simply introducing a computer printout showing that there have been multiple violations of the cited safety standard at the mine. Such statistics do not establish that the mine operator has repeatedly failed to make reasonable efforts to eliminate a known violation."[40] 33 FMSHRC at 1699. Similarly, Judge McCarthy, in *The American Coal Co.*, 35 FMSHRC 2208, 2255 (July 2013), opined that reliance on violation history to prove the "repeated failure" element "raises a host of proof problems," and observed that the "Secretary has failed to proffer sufficient evidence concerning the nature of the past violations of section 75.400 to support the repeated flagrant designation for either" of the two violations at issue. *Id*. at 2247-48 n.19, 2255. That failing was not fatal to Secretary's case, however, because the violations were sustained as flagrant on a narrow interpretation of the statute that did not rely on past violations. In *Blue Diamond Coal Co.*, 36 FMSHRC 541, 581-82 (Feb. 2014), Judge Paez held that the Secretary's introduction of two section 104(d)(2) S&S orders, 13 section 104(a) S&S citations, and the inspector's vague testimony about the operator's violation history, did not satisfy the Secretary's burden of proof to establish the predicate previous failure to make reasonable efforts to eliminate a previous violation.

Flagrant means Flagrant

As noted in *Wolf Run*, section 110(b)(2) should be interpreted consistent with the Mine Act's graduated enforcement scheme. 35 FMSHRC at 541. The Commission held in *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Mine Act's enforcement scheme, provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." 9 FMSHRC at 2000 (quoting *Cement Div. Nat'l. Gypsum Co.,* 3 FMSHRC 822, 828 (Apr. 1981). In *Stillhouse*, Judge Paez noted that "[i]n *Emory Mining*, the Commission interpreted the unwarrantable failure language of section 104(d) citations and orders in light of th[e graduated enforcement] scheme of escalating sanctions. Here, if a violation is determined to be flagrant, then the Commission is authorized to impose the highest amount of civil penalties available under the Mine Act, up to $220,000 per violation." 33 FMSHRC at 802.

The substantial civil penalties that can be imposed for flagrant violations are several rungs up the graduated enforcement ladder from even more serious violations charged under section 104(d). Accordingly, flagrant violations should denote conspicuously bad, offensive, or outrageous conduct. As Judge Paez noted in *Stillhouse*, "[t]he only thing that is apparent from the [limited] legislative history is that Congress and the President intended flagrant violations to target particularly severe violations of the mine safety and health regulations in order to promote regulatory compliance and miner safety." 33 FMSHRC at 799. In that regard, I agree, in principle, with Judge Feldman's analysis in *Conshor Mining, LLC*, 33 FMSHRC 2917, (Nov.

[40] In that case, the Secretary also relied on specific orders issued shortly before the subject violation. Ultimately, Judge Manning declined to rule on whether an increasing history of S&S and unwarrantable failure violations of a single standard would be sufficient to establish the "repeated failure" element, because he determined that the Secretary had not established another element of the alleged flagrant violation. 33 FMSHRC at 1700.

2011), that a flagrant violation must be conspicuous and egregious, and the fact that Congress did not simply amend section 110(a) of the Act to raise the general statutory penalty ceiling evidences something considerably more than an intent to deter repeated unwarrantable failure violations.

The cases brought by the Secretary and that have been decided by ALJs thus far, at least under the "reckless" prong of the statute, have involved truly outrageous conduct. *Stillhouse* involved egregious conduct by several mine management personnel who ignored prior warnings from MSHA and deliberately violated the mine's approved ventilation plan on more than one occasion. Their actions created a serious risk of a mine disaster and threatened the lives of the entire mining crew, which was left underground to produce coal while the main mine fan was turned off, and then restarted. Three mine managers plead guilty to criminal felony charges for their conduct. In *Roxcoal, Inc.*, 35 FMSHRC 625 (Mar. 2013), a flagrant violation was affirmed under the "reckless" prong of the statute where an operator's chief electrician deliberately circumvented safety measures by taping down a switch that could de-energize power, and then assigned miners to work on the equipment in close proximity to 7,200 volts of electric power. He also failed to take any steps to eliminate the violation and the extremely hazardous condition. As a result, a miner suffered an injury resulting in permanent disability.

The Secretary's ventures into the "repeated failure" prong of the flagrant statute have often strayed from the egregious conduct principle and have met with less success. As noted above, the Secretary voluntarily withdrew the "repeated failure" flagrant allegations in *Wolf Run* and *Conshore Mining*. Alleged repeated failure flagrant violations were rejected in *Bowie Resources* and *Blue Diamond*. The "screening factors," now broadened considerably by the Secretary's evolving interpretation of the statute, appear to sweep within their ambit a substantial portion, if not a vast majority, of violations cited under section 104(d) of the Act. The result is that substantial penalties have been assessed under section 110(b)(2) for violations that are very similar, if not identical, to violations for which penalties have been assessed under section 110(a)(1) that have not even reached the maximum amount allowed under that section.

The Secretary's lone success was the *American Coal* case, in which two repeated failure violations were held to be flagrant under a narrow reading of the statute. Order No. 7490584, charged an S&S and unwarrantable failure violation of the accumulations standard, 30 C.F.R. 75.400, that was found to have been the result of the operator's high negligence, and was reasonably likely to have resulted in lost work days or restricted duty injuries to more than 10 persons. The conditions were found to have existed for at least three shifts, and were known to the operator because they had been noted on reports of required examinations during those shifts, but had not been corrected. The operator's failure to eliminate the known violation during each of the three shifts was held to satisfy the repeated failure element, and the violation was found to be flagrant.

Order No. 7490599, also charged an S&S and unwarrantable violation of the accumulations standard. It was found to have been the result of the operator's moderate negligence, and was reasonably likely to have resulted in serious or fatal injuries to 6 persons. It

was found that the accumulations likely "began building up about two shifts before the violation was cited" and the violation was found to have existed "for two shifts." 35 FMSHRC at 2236. The conditions had not been noted on reports of examinations. However, it was found that the operator knew or should have known of the violation because the conditions were obvious and should have been discovered during required examinations. Its failure to eliminate the violation during either of the two shifts was held to satisfy the repeated failure element.

While I agree with much of Judge McCarthy's analysis in *American Coal*, I am concerned that it could be read to include a large number of violations that were never intended to be addressed by the statute. Can constructive knowledge of a violation that existed for the better part of two shifts, resulting in a finding that the operator was moderately negligent, be squared with the concept that the statute was intended to address egregious conduct, or particularly severe violations? Are those valid conclusions regarding the intent of Congress? Similarly, can a violation that was reasonably expected to result in lost work days or restricted duty injuries, and that would not have passed the Secretary's screening device requirement for at least a permanently disabling injury, be said to be expected to result in death or serious bodily injury within the meaning of the statute? Hopefully, these and other questions will soon be answered by the Commission.

Even in the absence of a review of all reported decisions involving accumulations violations cited under section 104(d), I am confident that it would be difficult to identify more than a handful that did not involve an opinion by the issuing inspector that the conditions had existed for two shifts or longer, and that injuries at least as severe as lost work days were reasonably expected.[41] Could all such violations be classified as repeated failure flagrant violations, and assessed penalties nearly four times higher than the most serious non-flagrant violations? For the reasons discussed above, I do not believe that such a result would be consistent with the Mine Act's graduated enforcement scheme, or a reasonable interpretation of the subject statute.

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[41] See, e.g., *Eastern Associated Coal, LLC*, 35 FMSHRC 1438, 1442-47 (May 2013) (ALJ) (section 104(d)(1) citation issued on April 5, 2008, for S&S and unwarrantable failure violation of section 75.400, extensive accumulations, several ignition sources, inspector estimates accumulations existed at least a couple of weeks, preshift examinations conducted on each of three shifts, MSHA assessed penalty of $6,458); *Rebco Coal, Inc.*, 36 FMSHRC 181, 196-202 (Jan. 2014) (ALJ) (section 104(d)(2) order issued on July 15, 2011, for S&S and unwarrantable failure violation of section 75.400, highly likely to result in permanent injuries to eight persons, accumulations extensive, ignition sources electrical equipment, inspector estimates would have taken several days to build up, no notations in examination records, MSHA assessed penalty of $6,624).

For the reasons that follow, I find that the litigated violations were not flagrant, within the meaning of section 110(b)(2). I decline to accord deference to the Secretary's interpretations of the statute, or to reach AmCoal's more sweeping arguments, e.g., that the statute is void for vagueness, and, like Judge Manning, anticipate substantive rulemaking by the Secretary and/or decisions by the Commission or the Courts, will provide considerably more guidance by the time it is necessary to revisit these questions.

The violation charged in Order No. 7490572 was not flagrant.

The Secretary's supplemental brief did not address the "reckless" prong of the statute, and, consequently, did not address Order No. 7490572. The Secretary's original post-hearing brief short-circuits a detailed analysis of the reckless prong of the statute, arguing that Jones' conduct was so "plainly reckless" that no statutory interpretation is necessary. Sec'y. Br. at 27-29. However, the violation charged in the subject order does not fit easily within the parameters of the statutory definition of a reckless flagrant violation. As AmCoal argues in its brief, "this action was an isolated incident, existed for only moments, occurred during what indisputably had been otherwise proper action, was not clearly and obviously a violation of the regulations, and was not condoned by management (as illustrated by the firing of Mr. Jones)." Resp. Br. at 86.

Jones' negligence was found to be high, but did not rise to the level of reckless disregard. The act of closing the panel without de-energizing it was, under MSHA's interpretation, a known violation. However, MSHA's interpretation of the standard as classifying the opening and closing of a panel while troubleshooting as "work" on circuits and equipment, is certainly not compelled. In fact there is evidence that it may have been a common practice of experienced electricians. It is difficult to understand how AmCoal, or Jones, could have eliminated the known violation, other than by Jones simply not committing it, or, under Judge Paez's formulation of a "reckless" flagrant violation, how "the operator [failed to] take the steps a reasonably prudent operator would have taken to eliminate the known violation . . . and consciously or deliberately disregard[ed] an unjustifiable, reasonably likely risk of death or serious bodily injury." *Stillhouse*, 33 FMSHRC at 805.

Obviously, AmCoal had taken reasonable steps to avoid the violation, by incorporating MSHA's interpretation of the standard into its policies and training. It had terminated the employment of a previous individual who had violated the policy. Aside from Jones, it had no independent knowledge of the violation and no opportunity to eliminate it. While Jones placed himself at risk of a serious, possibly fatal, injury, the risk to the other miner was only slight. Jones' negligence is imputable to AmCoal for purposes of an unwarrantable failure determination. However, in light of the considerations involved in determining whether a violation can properly be characterized as flagrant, it is not at all clear that AmCoal can be charged with a flagrant violation and subjected to substantially enhanced penalties, based solely on the improvident impulsive behavior of its maintenance foreman, who unforeseeably acted in direct contravention of its training and policies, and was terminated as a result. Jones' actions were determined not to have risen to the level of reckless disregard, and there is no evidence that

MSHA initiated an investigation or pursued action against Jones pursuant to section 110(c) of the Act. Tr. 145-46. *See Blue Diamond*, 36 FMSHRC at 579.

Based upon the foregoing, I find that the violation charged in Order No. 7490572 was not flagrant within the meaning of section 110(b)(2) of the Act.

The violation charged in Order No. 6668524 was not flagrant.

Arguing in support of the flagrant designation for Order No. 6668524, the Secretary, in his supplemental brief, reiterates the argument in his original brief, relying on the "R-17" printout of AmCoal's history of violations, which shows that it was issued 86 violations of section 75.202(a) in the 12 months preceding November 7, 2007, including 52 that were S&S, and "at least one violation issued as an unwarrantable failure." Sec'y. Supp. Br. at 3. The report also shows that AmCoal had been issued 135 violations of the standard in the 24 months preceding November 7, 2007, 74 of which were S&S. The Secretary also relies on copies of citations that had been issued pursuant to section 104(a), for violations of section 75.202(a).[42] Ex. S-30 thru S-56. The Secretary maintains that: "[c]onsidering the number of repeat instances of violative conduct, the subject orders constitute 'repeated failures' to make reasonable efforts to eliminate known unsupported roof and rib violations and Order No. 6668524 should be affirmed as flagrant." *Id*.

In his original brief, the Secretary argued that the fact of the prior violations brought the instant violation so clearly within the plain meaning of the repeated failure prong of the flagrant violation definition, that interpretation of the statute was unnecessary. Alternatively, it was argued that the Secretary's interpretation of the provision, at least as reflected in his argument, is entitled to deference. The Secretary also maintained that, past violations aside, the violation was flagrant because AmCoal repeatedly failed to eliminate the violation cited in the order, which was known for at least three shifts. Sec'y. Br. at 45-52.

The Secretary's argument that an operator's history of violations can satisfy the repeated failure element of a flagrant violation has been uniformly rejected, and I reject it here. As to the argument that AmCoal repeatedly failed to eliminate the cited violation, I find that the Secretary's attempt to prove that the violation was known was effectively blunted by the fact that Miller had traveled through the cited area on two occasions the previous day and did not identify any of the conditions that he and the Secretary characterized as obvious. In *Blue Diamond*, the fact that the issuing inspector had participated in an inspection of the cited area the day before

[42] Those exhibits, and similar exhibits charging violations of the accumulations standard (Ex. S-91 thru S-119), had been ruled inadmissible at the hearing. In his supplemental brief, the Secretary argues that in light of *Wolf Run* those exhibits should now be considered in reaching a flagrant determination. Sec'y. Supp. Br. at 5. AmCoal did not address that question in its supplemental brief. I agree with the Secretary that under *Wolf Run* the copies of citations should be admitted as evidence, and they will be considered as part of the record in these cases.

and had not identified any of the supposedly obvious conditions was found to negate the contention that the conditions were obvious, and substantially mitigated the operator's constructive knowledge of the conditions. Here, Miller was not engaged in an inspection on his travels through the area. However, his attempts to downplay the significance of his presence in the area and failure to identify the conditions were found to be unconvincing. He rode through the area in a vehicle that provided a reasonable view of the roof and ribs, such that hazardous conditions, especially those that were obvious, should have been observed. AmCoal examiners, who had recently received special training on examinations also had not noted the conditions.

In *Blue Diamond*, it was found that the conditions were not obvious, that the operator's negligence was moderate, and that the Secretary had not established the "actual or implied knowledge necessary to characterize the cited conditions as a known violation," thereby failing to establish that it was flagrant. 36 FMSHRC at 572. Here, too, the conditions were not obvious and AmCoal's negligence was moderate. I find that the Secretary has failed to establish the actual or implied knowledge necessary to characterize the cited conditions as a known violation within the meaning of section 110(b)(2). I also find that the violation was not particularly severe, or the result of egregious conduct, so as to warrant a flagrant designation.

The violation charged in Order No. 6668526 was not flagrant.

The Secretary made similar arguments as to the examination violation, Order No. 6668526, asserting that AmCoal's history of violations of the same or "similar" standards satisfied the repeated failure element of the statute. He noted that the Act does not "say the *same* standard" and that, in *American Coal*, it was held that "*any* substantive regulatory standard" would satisfy the statutory requirement.[43] Sec'y. Br. at 62-65; Sec'y. Supp. Br. at 3-4. Alternatively, under the "current repeated conduct" theory, he contended that AmCoal had repeatedly failed to eliminate the violation cited in the order. Sec'y. Br. at 65.

The Secretary's history of violations argument has been rejected. As to the alleged repeated failure to eliminate the known violation alleged to have been flagrant, the Secretary makes the same argument that he made for the previous order, i.e., that AmCoal's failure to identify and record the violative roof/rib conditions in the course of at least three preceding preshift examinations amounted to a repeated failure to eliminate the known violation alleged to be flagrant. Sec'y. Br. at 50. Conceptual difficulties can be encountered in attempting to apply the same analysis, e.g., the unwarrantable failure factors, to an alleged violation of a standard like the roof control standard, and an alleged examination violation for failing to identify the roof control violation. The Secretary argued that the failure, during several preshift examinations, to identify and eliminate the roof control violation rendered that violation flagrant, and that the examination violation "is flagrant for the same reasons that the violative conduct in Order No.

[43] The history of violations printout introduced by the Secretary listed 2,611 violations, issued in the 26.5 months preceding the latest violation at issue, raising the possibility that any, or all, of those violations could conceivably be urged as predicate repeated violations. Ex. S-1.

6668524 is 'repeat' flagrant." Sec'y. Br. at 65. I reject the Secretary's argument for the reasons that I rejected it with respect to Order No. 6668524. I am also troubled by the concept that the exact same conduct that was urged to justify a flagrant designation for the roof control violation could also justify a flagrant designation for the examination violation.

The violation charged in Order No. 6673874 was not flagrant.

The Secretary also makes a two-pronged argument urging that the violation charged in Order No. 6673874 was flagrant. He relies on AmCoal's history of violations, which shows that, in the 12 months preceding issuance of the order, AmCoal was issued 201 citations/orders for violations of the accumulations standard, 29 of which were substantially similar, and of the 29, 19 were cited as S&S. Ex. S-1, S-91 thru S-119. The violations history report also shows that in the 24 months preceding issuance of the order, AmCoal was issued 365 violations of the accumulations standard, 55 of which were S&S, and 5 of which were issued as unwarrantable failures. Two of the unwarrantable failure violations became final, one in December 2010, and one in May 2011. The Secretary contends that "under any formulation of the term 'repeated,' the subject orders constitute 'repeated failures' to make reasonable efforts to eliminate known accumulations violations." Sec'y. Br. at 78. The Secretary's violations history argument, which fails to address many of the other terms in the statute, has been rejected, and is rejected for this order. In addition, the violation was found to be reasonably likely to result in lost work days or restricted duty injuries to 2 persons. It was not reasonably expected to result in death or serious bodily injury within the meaning of the statute.

The Secretary also argues that the violation was flagrant under a "current repeated conduct" theory, in that the cited condition was "recorded in the examination records on January 22 but dropped after the midnight shift," and the examiners' failures to identify and record the conditions "over the course of five or more shifts" constitutes a repeated failure to eliminate the known violation. Sec'y. Br. at 80. However, the notations in the examination records from January 22, did not refer to the critical component of "the cited conditions." The notations, in the remarks section of the reports, referred only to the fact that float coal dust was being deposited in the area, a condition that was not, in itself, hazardous. The loose coal in piles alongside the belt was of recent origin, i.e., within one shift. The most significant component of the accumulations, the "carry back" fines that were being deposited under the bottom rollers, was not reflected in the examination reports. As Miller stated in the order: "These conditions were not reported on the examination books." Ex. S-18. Those deposits were not obvious, although they should have been discovered by a competent examiner, one or two shifts before they were cited.

The Secretary did not establish that AmCoal had actual knowledge of the critical component of the cited accumulations. It is, however, charged with constructive knowledge of them one or two shifts prior to their being cited. While that constructive knowledge could be held to satisfy the "known" violation element, it is not sufficient to bring the violation within the statutory framework. As noted in the discussion of this violation, AmCoal's examinations were being conducted as required, and there were no deficiencies in documentation. Hazardous and

other conditions were being noted, and were being addressed. The failure of examiners, over the course of 2-3 shifts to identify the conditions, which were under the belt close to the mine floor and were not obvious, did not rise to the level of aggravated conduct sufficient for a finding of unwarrantability. AmCoal's negligence was found to be moderate to high.

I find those facts insufficient to establish the actual or implied knowledge necessary to characterize the cited conditions as a known violation within the meaning of section 110(b)(2). The violation was not particularly severe, or the result of egregious conduct, so as to warrant a flagrant designation. In addition, as noted above, the violation was found to be reasonably likely to result in lost work days or restricted duty injuries, which I find does not meet the statute's requirement that the violation be reasonably expected to result in death or serious bodily injury.

Based upon the foregoing, I find that the violation charged in Order No. 6673874 was not flagrant.

The Appropriate Civil Penalties

As the Commission 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).
>
> Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."). While there is no presumption of validity given to the Secretary's proposed assessments, we have repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of

how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Findings on Penalty Criteria

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that AmCoal demonstrated good faith in abating the violations in a timely manner, and that the proposed penalties would not affect its ability to remain in business. Jt. Stip. #8, #10. The parties did not stipulate to the size of AmCoal as an operator. However, forms reflecting calculations of penalty assessments were filed with the petitions and indicate that AmCoal is a very large operator, as is its controlling entity, and I so find. AmCoal's good faith abatement efforts should be considered a minor mitigating factor in the penalty assessment process. The fact that it is a very large operator and that the proposed penalties would not affect its ability to remain in business, while not aggravating factors, indicate that a penalty should be higher than that which would be imposed on a smaller operator.

History of Violations

AmCoal's history of violations is reflected in several exhibits. A report generated from MSHA's database, typically referred to as an "R-17" shows violations issued between November 7, 2005 and January 24, 2008, that had become final as of the time of the hearing. Ex. S-1. The report reflects that 2,611 violations issued in that period had become final, 539 of which were S&S, and 17 of which were specially assessed. Copies of some of the citations issued for roof and rib control and accumulations violations were also introduced into evidence. Ex. S-30 thru S-56, S-91 thru S-119. I accept the figures reflected in the reports as accurate. However, the overall violation history is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green,* 22 FMSHRC at 623-24.

Qualitative violations' history information can be found on the forms reflecting calculations of the proposed assessments, and have been represented in Respondent's brief. The

Secretary's Part 100 regulations for regular penalty assessments take into account two aspects of an operator's violation history, the "total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period." 30 C.F.R. § 100.3(c). Only violations that have become final are used in the calculations. For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. Forms stating penalty assessments for the litigated violations generally show that AmCoal had a ratio of violations per inspection day between 0.9 and 1.1, for which 10 penalty points are assigned in the applicable table - a moderate overall violation history.

I find that AmCoal's overall history of violations, as relevant to these violations, was moderate, and should be considered a neutral factor in the penalty assessment process.

Gravity - Negligence

Findings on gravity and negligence are set forth in the discussion of each violation.

Method for Determining the Amount of Penalties for the Litigated Violations

The purpose of explaining significant deviations from proposed penalties is to avoid the appearance of arbitrariness.[44] Similarly situated operators, determined to be liable for violations of similar gravity, negligence and other penalty criteria, ideally should not be assessed significantly different penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of $1.00 to $70,000.00. The Secretary's regulations for determination of a penalty amount by a regular assessment, 30 C.F.R. §100.3, take into consideration all of the statutory factors that the

[44] As explained in *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984):

> When . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Commission is obligated to consider under section 110(i) of the Act.[45] The product of that regular assessment formula provides a useful reference point use, of which would promote consistency in the imposition of penalties by Commission judges.[46]

Accordingly, in determining penalties for the litigated violations, the penalty produced by application of the Secretary's regular assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria. The tables and charts in the regulations provide a limited number of categories for some factors. For example, the table for operator's negligence consists of five gradations, ranging from "No negligence" to "Reckless disregard." 30 C.F.R. §100.3(d). In reality, however, the degree of an operator's negligence will fall on a continuum, dictating that adjustments will generally be required. Other unique circumstances may dictate lower or higher penalties. Violations involving extreme gravity and/or gross negligence, or other unique aggravating circumstances may dictate substantially higher penalty assessments. A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any requested adjustment. Where the Secretary urges a penalty higher than that derived by reference to the regular assessment process, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria.

Order No. 7490572 (Docket No. LAKE 2008-667)

Order No. 7490572 charged a violation of the standard that requires that electrical circuits and equipment be de-energized before work is done on them. It was alleged that the violation was highly likely to result in a fatal injury to one person and that it was the result of AmCoal's reckless disregard of the standard. The violation was determined to be flagrant, and a specially assessed civil penalty in the amount of $161,800 was proposed by the Secretary. Application of

[45] Under the regulations, penalty points are assigned based on the size of the operator and the operator's controlling entity; the operator's history of previous violations; the operator's history of repeat violations of the same standard; the degree of the operator's negligence; and, the gravity of the violation, including the likelihood of an occurrence of an event against which a standard is directed, the severity of injury or illness if the event were to occur, and the number of persons potentially affected if the event were to occur. A penalty amount is determined by applying the total of the points assigned to a "Penalty Conversion Table," which specifies penalties ranging from $112.00 for 60 or fewer points, up to the statutory/regulatory maximum of $70,000.00 for 144 or more points. That figure may then be adjusted by reducing it by 10% if the operator demonstrated good faith in abating the violation. 30 C.F.R. §100.3(f). A further reduction may occur if the operator can demonstrate to MSHA's District Manager that the penalty will adversely affect its ability to continue in business. 30 C.F.R. §100.3(h).

[46] See *Magruder Limestone Co., Inc.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

the Secretary's regular assessment process would have produced an assessed penalty of $63,000. Resp. Br. at 22.

The violation was found not to be flagrant. Therefore, the higher penalties provided by section 110(b)(2) are not available. It was sustained as an S&S violation. However, the gravity was lowered, as it was found to have been reasonably likely to result in a fatal injury to one person, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been high. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $13,500.

This violation involves serious gravity and high negligence, factors that are taken into account in the Secretary's penalty regulations. Neither the gravity, nor the negligence, were of such a level to justify imposition of substantially higher penalties. In addition, AmCoal's high negligence was predicated upon the negligence of its agent, who acted contrary to its established policies and training.

Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $15,000 for this violation.

Order No. 6668524 (Docket No. LAKE 2008-666)

Order No. 6668524 alleged a violation of the roof and rib control standard that was highly likely to result in fatal injuries to two persons and was the result of AmCoal's high negligence and unwarrantable failure. The violation was determined to be flagrant, and a specially assessed civil penalty in the amount of $158,900 was proposed by the Secretary. Application of the Secretary's regular assessment process would have produced an assessed penalty of $45,708. Resp. Br. at 39-40.

The violation was found not to be flagrant. Therefore, the higher penalties provided by section 110(b)(2) are not available. It was sustained as an S&S violation. However, the gravity was lowered, as it was found to have been reasonably likely to result in a permanent injury to one person, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been moderate. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $3,000.

This violation involves neither extreme gravity, nor gross negligence, factors that have justified imposition of substantial penalties in other cases. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $5,000 for this violation.

Order No. 6668526 (Docket No. LAKE 2008-666)

Order No. 6668526 alleged a violation of the preshift examination standard with respect to the conditions cited in Order No. 6668524, that was highly likely to result in fatal injuries to two persons and was the result of AmCoal's high negligence and unwarrantable failure. The violation was determined to be flagrant, and a specially assessed civil penalty in the amount of $161,800 was proposed by the Secretary. Application of the Secretary's regular assessment process would have produced an assessed penalty of $31,989. Resp. Br. at 43-44.

The violation was found not to be flagrant. Therefore, the higher penalties provided by section 110(b)(2) are not available. It was sustained as an S&S violation. However, the gravity was lowered, as it was found to have been reasonably likely to result in a permanent injury to one person, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been moderate to high. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $4,000.

This violation involves neither extreme gravity, nor gross negligence, factors that have justified imposition of substantial penalties in other cases. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $5,000 for this violation.

Order No. 6673874 (Docket No. LAKE 2008-666)

Order No. 6673874 alleged a violation of the accumulations standard that was highly likely to result in fatal injuries to 10 miners, and was attributable to AmCoal's high negligence and unwarrantable failure. The violation was determined to be flagrant, and a specially assessed civil penalty in the amount of $188,000 was proposed by the Secretary. Application of the Secretary's regular assessment process would have produced an assessed penalty of $63,000. Resp. Br. at 64.

The violation was found not to be flagrant. Therefore, the higher penalties provided by section 110(b)(2) are not available. It was sustained as an S&S violation. However, the gravity was lowered considerably, as it was found to have been reasonably likely to result in lost work days injuries to two persons, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been moderate to high. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $5,500.

This violation involves neither extreme gravity, nor gross negligence, factors that have justified imposition of substantial penalties in other cases. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $7,500 for this violation.

Order No. 6673876 (Docket No. LAKE 2009-6A)

Order No. 6673876 alleged a violation of the on-shift examination standard with respect to the conditions cited in Order No. 6673874 that was highly likely to result in fatal injuries to 10 miners, and was attributable to AmCoal's high negligence and unwarrantable failure. The violation was specially assessed and a penalty of $60,000 was proposed. A regular assessment would have produced approximately the same assessed penalty.

It was sustained as an S&S violation. However, the gravity was lowered considerably, as it was found to have been reasonably likely to result in lost work days injuries to two persons, and was not the result of AmCoal's unwarrantable failure. AmCoal's negligence was found to have been moderate to high. Application of the Secretary's regular assessment process to the violation, as modified, would yield a proposed penalty in the range of $2,500.

This violation involves neither extreme gravity, nor gross negligence, factors that have justified imposition of substantial penalties in other cases. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of $4,000 for this violation.

ORDER

Docket No. LAKE 2008-666.

Order No. 6668524 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in a permanent injury, that one person was affected, and that AmCoal's negligence was moderate. A civil penalty in the amount of $5,000 is imposed for this violation.

Order No. 6668526 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in a permanent injury, that one person was affected, and that AmCoal's negligence was moderate to high. A civil penalty in the amount of $5,000 is imposed for this violation.

Order No. 6673874 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in lost work days injuries, that 2 persons were affected, and that AmCoal's negligence was moderate to high. A civil penalty in the amount of $7,500 is imposed for this violation.

Docket No. LAKE 2008-667

Order No. 7490572 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in a fatal injury, that one person was affected, and that AmCoal's negligence was high. A civil penalty in the amount of $15,000 is imposed for this violation

Docket No. LAKE 2009-6A

Order No. 6673876 is modified to a section 104(a) citation and the special findings are changed to reflect that the violation was S&S and was reasonably likely to result in lost work days injuries, that two persons were affected, and that AmCoal's negligence was moderate to high. A civil penalty in the amount of $4,000 is imposed for this violation

Civil penalties in the total amount of $36,500 shall be paid within 30 days.

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

Barbara Villalobos, Esq., Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, Room 844, Chicago, IL 60604

Jason W. Hardin, Esq., Mark E. Kittrell, Esq., Fabian & Clendenin, 215 South State Street, Ste. 1200, Salt Lake City, UT 84111-2323

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH ST., SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

May 20, 2014

POCAHONTAS COAL COMPANY, LLC Contestant,	:	CONTEST PROCEEDING
	:	Docket No. WEVA 2014-202-R
v.	:	Written Notice No. 7219153; 10/24/2013
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	:	Mine ID: 46-08878 Mine: Affinity Mine

ORDER OF DISMISSAL

This case is before me on a Notice of Contest filed by Pocahontas Coal Company, LLC pursuant to Section 105(d) of the Federal Mine Safety and Health. This contest is directed not at a particular citation or order but, rather, at a written notice of pattern of violations issued by MSHA pursuant to Section 104(e) of the Mine Act. On February 27, 2014 the Secretary filed a Motion to Dismiss for lack of jurisdiction. Sec'y Mot. 1. Pocahontas raises a number of arguments in its notice of contest, however, for reasons that follow, I find that the Commission is without jurisdiction to consider these arguments in the context of this proceeding and, accordingly, I **DISMISS** this case.

On October 24, 2013 MSHA issued Written Notice No. 7219153 in which it notified Pocahontas that an alleged pattern of violations existed at Pocahontas' Affinity Mine. The "Condition or Practice" section of the Written Notice included two groups of citations and orders which the Secretary had deemed "illustrative of this pattern of violations." On November 26, 2013, Pocahontas Coal filed this notice of contest pursuant to Section 105(d) of the Act to contest "the issuance of Section 104(e)(1) Written Notice Number 7219153." Pocahontas Notice of Contest 1.

The question of whether the Commission has jurisdiction to hear a contest of a 104(e) written notice of pattern of violations has not been addressed by the Commission. However, two Commission judges have reached conflicting results on the question of jurisdiction regarding a written notice of pattern of violations. In *Bledsoe Coal*, Unpublished Order dated Nov. 11, 2011, Judge William Moran found that the Commission did have jurisdiction to hear a contest of a written notice of pattern of violations. Recently, in *Brody Mining LLC*, 36 FMSHRC ___, slip op. at 4, Docket No. WEVA 2014-81-R (Jan. 30, 2014), Chief Administrative Law Judge Robert Lesnick found that the Commission was without jurisdiction to adjudicate the mine operator's contest of the written notice of pattern of violations by itself.

In order to address this issue, it is helpful begin with a brief overview of the pattern of violations provision in the Mine Act.

The passage of the Federal Mine Safety and Health Act of 1977 introduced the pattern of violations provision. The provision was designed "to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations." S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 620 (1978). The provision grants the Secretary enforcement authority against mine operators that have a "pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health and safety hazards[.]" 30 U.S.C. § 814(e)(1). The Secretary is charged with providing the mine operator with "*written notice* that such a pattern exists." *Id*. (emphasis added). The provision then grants the Secretary authority to issue withdrawal orders, in a sequence which "parallels the . . . unwarrantable failure sequence." for significant and substantial violations issued in the 90 days subsequent to the issuance of the written notice. *See Id*. at (e)(1)-(3); S. Rep. No. 95-181, at 33 (1977), reprinted in Legis. Hist. at 621. The mine operator remains subject to the Secretary's 104(e) withdrawal order power until such time that an inspection of the "entire mine" reveals no S&S violations. 30 U.S.C. § 814(e)(3).

The Mine Act does not define the term "pattern of violations" and, instead, instructs the Secretary to "make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health of safety standards exists." 30 U.S.C. § 814(e)(4). Accordingly, the Secretary has promulgated rules establishing those criteria. *See* 30.C.F.R. § 104.2. Most recently, the Secretary, after determining that the previous version of the rules implementing the pattern of violations provision "[did] not adequately achieve the intent" of the Mine Act, promulgated new rules under part 104 of her regulations designed to "simplify the existing POV criteria, improve consistency in applying the POV criteria, and increase the efficiency and effectiveness in issuance of a POV notice." Pattern of Violations; Final Rule, 78 Fed. Reg. 5056 (Jan. 23 2013). The Act and the regulations do not address the issue of contesting a notice of pattern of violations.

In *Rushton Mining Co*., 11 FMSHRC 759, 764 (May 1989) the Commission stated that it "is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers." Given that the Commission is "an administrative agency created by statute, it cannot exceed the jurisdictional authority granted by Congress." *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860 (Aug. 2012) (citing *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (Sept. 1988).

A review of the Mine Act reveals no statutory authority for the Commission to hear a contest to a notice of pattern of violations in the context of a dedicated proceeding. Pocahontas has brought this action pursuant to section 105(d) of the Act. Section 105(d) provides mine operators with the right to contest, among a limited number other things, the issuance or modification of citations and orders. 30 U.S.C. § 815(d). Notably, the section does not afford a right to contest written notices. Further, the legislative history, the Secretary's regulations, Commission case law, and the Commission's Procedural Rules do not reveal any language which could be interpreted to grant the Commission jurisdiction to hear a contest of a written notice of pattern of violations.

In addition, the Mine Act and legislative history make clear that written notices are distinct from citations and orders. The Commission has stated that "in considering the meaning of the Mine Act, we must 'give effect to the unambiguously expressed intent of Congress.'" *Revelation Energy*, 35 FMSHRC 3333, 3337 (Nov. 2013) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Here, the distinction between a 104(e) written notice and an order issued subsequent to that notice is clear. The language of the Act makes clear that the written notice is a separate document which must be issued prior to any order issued pursuant to section 104(e). Even if one could read some ambiguity into the language of the Act, Congress clearly intended to distinguish between written notices issued pursuant to section 104(e), which are meant to "indicate to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards…" and orders issued after the operator has been "advised" of the existence of the pattern by way of the written notice. S. Rep. No. 95-181, at 32 (1977), reprinted in Legis. Hist. at 620.

If Congress had intended the Commission to hear contests to written notices of pattern of violations, it would have said so or at least equated the written notices with citations or orders, which are subject to contest proceedings. Instead, Congress differentiated written notices from citations and orders.

Contestant is not without remedy on the issue and may properly challenge the notice of pattern of violations in the context of a contest to an order issued under section 104(e) following the issuance of the written notice of pattern of violations.[1] The Secretary, in his answer to Pocahontas' notice of contest, stated that, while there is "no statutory right to independently contest" the written notice, he "acknowledges that the validity of Notice No. 7219153 is at issue in the Contest Proceedings docketed at WEVA 2014-390-R, 391-R, 392-R, 393-R, 394-R, 395-R, 396-R, 397-R and 398-R" and, "as a component of these Contest Proceedings, the Secretary does not oppose the Commission's review of the validity of Notice No. 7219153. Sec'y Answer n. 2.

Section 105(d), as mentioned above, provides mine operators with the right to contest the issuance or modification of citations and orders. 30 U.S.C. § 815(d). The section then charges the Commission with affording an opportunity for a hearing and then issuing "an order . . . affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief." *Id*. "Section 105(d)'s unambiguous . . . broad grant of . . . authority to direct 'other appropriate relief'" allows the Commission to address a notice of pattern of violations in the context of a contest to an order issued under section 104(e) following the issuance of the written notice of pattern of violations. *See North American Drillers, LLC*, 34

[1] In a somewhat analogous situation, the Commission has acknowledged a mine operator's right to contest the validity of a safeguard in the context of a contest to a citation issued pursuant to a violation of the underlying safeguard. *See e.g., Southern Ohio Coal Co*., 14 FMSHRC 1 (Jan. 1992). Commission judges have declined to review the validity of an underlying safeguard, which is issued via a "notice to provide safeguard," prior to the issuance of a citation for a violation of the underlying safeguard. *Beckley Coal Mining Co.,* 9 FMSHRC 1454 (Aug. 1987) (ALJ); *Colorado Westmoreland, Inc.*, 10 FMSHRC 1236 (Sep. 1988) (ALJ); *Jim Walters Resources, Inc.*, Unpublished Order of Dismissal, Docket No. SE 96-118-R, (Apr. 1996) (ALJ).

FMSHRC 352, 356 (Feb. 2012). There are presently a number of 104(e) orders before me that are related to the notice of pattern of violations and, when those cases are heard, I will hear the arguments regarding the validity of the notice of pattern of violations. If Pocahontas wishes to pursue the arguments set forth in its notice of contest of the written notice of pattern of violations, it may properly do so in the context of those proceedings.

Finally, Pocahontas argues that fundamental principles of due process are violated if it is not able to contest the written notice in its own proceeding and, instead, must wait until a 104(e) withdrawal order is issued and contested. Pocahontas Resp. 15-16. Specifically, Pocahontas asserts that the mere issuance of a notice of pattern of violations causes the operator to "suffer tangible consequences flowing from that designation alone," and that absent a "prompt post-designation review…" it is deprived of a significant property interest in violation of Constitutional due process requirements. *Id*. at 16, 19. Pocahontas cites to the standard language about due process and argues that the mine is deprived of a property interest prior to a hearing and that deprivation is not outweighed by a need of the government. I disagree. Here, the Secretary's need to assure a safe and healthy working environment for miners at a mine that is alleged to have a history of serious violations, outweighs the need of the mine to be heard immediately. Additionally, the mine has another immediate remedy, that of contesting any order issued after the notice of pattern of violations and have that order heard while raising all of the issues associated with the underlying notice. The Secretary has frequently worked with an operator to issue an order immediately when there is a dispute over a roof control or ventilation plan so that the matter may be heard expeditiously.

Due process claims require the Commission to consider three factors when a deprivation to a property interest occurs: (1) "the private interest that will be affected by the official action;" (2) the risk of an "erroneous deprivation of such interest through the procedures used" and the value of additional or substitute procedural safeguards; and 3) the Government's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Due process, as described by the Court in *Mathews*, is "not a technical conception with a fixed content unrelated to time, place, and circumstances," and further, "is flexible and calls for such procedural protections as the particular situation demands." *Id.*(citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)

Pocahontas states that "once a POV notice is issued, an inspector's suspicion of an S&S violation goes from being a mere allegation that may be challenged before an ALJ (with due process protections) to being an automatic withdrawal order that could take months-or years-for the operator to challenge." Pocahontas Resp. 16. Further, it asserts that the issuance of a notice triggers "enhanced SEC reporting requirements," which in turn can have "obvious, adverse consequences on an operator's business". *Id*. at 19.

I find Pocahontas' due process argument to be without merit given its halfhearted attempt to pursue a prompt review of this matter. I do not dispute that Pocahontas initially sought to expedite both this proceeding and the contest proceedings for the 104(e) orders that followed the issuance of the notice of pattern of violations. In response to that request, I set the cases for hearing. However, subsequently the parties moved for stays of the 104(e) cases, and, with regard

to the instant matter of the written notice, Pocahontas asserted that "before determining whether the pattern of violations rule was validly applied to Pocahontas in WEVA 2014-202-R, the Commission will need to issue its decision in *Brody Mining, LLC,* to inform the Secretary and the regulated community as to the extent the rule may be used in future enforcement proceedings." Pocahontas Motion to Stay Further Adjudication of Enforcement Action 7276509, dated January 31, 2014. Given the obvious conflict between Pocahontas' two positions; proceed expeditiously versus wait for the Commission to rule in another similar matter, I reject its argument that dismissal of this matter will amount to a violation of its right to due process. Further, if Pocahontas had wished to proceed expeditiously on its challenge to the notice of pattern of violations, it stands to reason that it could have selected one of the multiple 104(e) orders to advance to hearing in a more expeditious manner. Nevertheless, it chose not do to so, and given the jurisdictional limitations placed on this court, I must dismiss this proceeding.

This docket contains no citations or orders, and rather only the notice of pattern of violations that was issued to the mine, prior to the issuances of any 104(e) citation or order. Any legitimate arguments raised that are directed to the validity of the written notice of pattern of violations will be heard when the subsequently issued 104(e) orders are heard. Therefore, the above captioned contest proceeding is **DISMISSED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution:

Benjamin Chaykin, U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Boulevard, 22nd Floor West, Arlington, Virginia 22209-2247

Robert Huston Beatty, Jr., Dinsmore & Shohl, LLP, P.O. Box 11887, 900 Lee Street, Suite 600, Charleston, WV 25339

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 22, 2014

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

DECISION

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

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

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

Before: Judge Paez

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

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

I. STATEMENT OF THE CASE

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

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

II. ISSUES

The Secretary contends that section 75.203(b) imposes two independent duties. (Sec'y Br. at 6–9.) In addition, he argues that Respondent fulfilled neither duty. (*Id.*) Accordingly, the Secretary claims that the condition was properly cited as a violation and that the allegations underlying the citation are valid. (*Id*. at 14.) Oak Grove denies that a violation existed and rejects the Secretary's allegations regarding the gravity of the violation. (Resp't Br. at 6, 10–11.)

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

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

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

In addition, Oak Grove contends that Citation No. 8519718 is duplicative of two citations that are not before me. (*Id.* at 14–18.)

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

III. FINDINGS OF FACT

A. Safety Principles in Underground Coal Mining

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

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

B. Operations at Oak Grove Mine

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

Respondent also cut "slants" at a forty-five-degree angle from its No. 2 entry through its coal pillars and into every second crosscut. (Tr. 44:3–18, 86:11–87:3, 119:24–120:4, 133:17–21; Ex. R–3.) Slant cuts provide a place for Respondent to store equipment and supplies used on the section. (Tr. 37:18–23, 86:25–87:3, 109:19–20, 123:23–25, 124:14–23.) These slant cuts split a formerly rectangular block of coal into two coal pillars: one large, five-sided block and one small triangular block. (Ex. R–1; Ex. R–3; Ex. R–8; Tr. 87:15–88:9, 119:24–120:4.) Respondent's December 28 Plan limits slant cuts to 20 feet in width. (Ex. R–7 at 1.)

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

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

C. Mine Inspection — March 16, 2011

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

According to Wilkosz, cutting without the required sightlines can result in cuts that exceed the permitted width. (Tr. 34:11–14.) He testified that he looked at the mine roof in

crosscuts 13, 15, 17, 19, 21, 23, 25, and 29 and saw no sightlines on the roof.[4] (Tr. 31:21–32:10, 33:21–25, 40:18–20, 60:6–8.) In addition, Wilkosz testified that no one from Oak Grove pointed out sightlines in the area.[5] (Tr. 32:9–19.)

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

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

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

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

A. 30 C.F.R. § 75.203(b)

The Secretary claims that section 75.203(b) includes two independent duties: (1) use of a sightline or other directional control; and (2) maintenance of the projected direction of mining. (Sec'y Br. at 7–8.) According to the Secretary, "[w]ithout the requirement to maintain the projected direction of mining, sightlines serve no purpose." (Sec'y Br. at 7.) Moreover, the

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

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

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

Secretary claims that such a requirement is "unique to 30 C.F.R. § 75.203(b)" and is "imposed by the plain language of the standard." (*Id.* at 7–8.)

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

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

Next, I must determine whether the Secretary's interpretation is reasonable and entitled to deference. Here, the Secretary interprets maintenance of the direction of mining as an independent duty that is violated when an operator mines an "excessive width." (Sec'y Br. at 7.) Notably, the Secretary's brief neither argues that his interpretation is entitled to deference nor points to any previous interpretive guidance in his Program Policy Manual, Program Information

Bulletins, Program Policy Letters, or Procedure Instruction Letters. In fact, the Secretary's proposed interpretation conflicts with Inspector Wilkosz's testimony that he could not cite Oak Grove under section 75.203(b) if sightlines were present. (Tr. 31:17–20.) CLR Church concurred with Wilkosz's interpretation: "If there is a sightline in place and it's being maintained, [a wide place] would not be a violation of section [75.]203(b)." (Tr. 84:15–20.) Although deference may be accorded to a reasonable interpretation advanced in a legal brief, such deference is inappropriate "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment of the matter in question'" such as "when the agency's interpretation conflicts with a prior interpretation." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citations omitted). I therefore conclude that the Secretary's suggested interpretation is not due any deference.[7] Instead, I determine that section 75.203(b) requires only that a sightline or other directional control be used *to achieve* the intended purpose.

B. Additional Findings of Fact

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

First, the text of Citation No. 8518718, Wilkosz's contemporaneous inspection notes, and the conflicting testimony from Fisher and Jamison each significantly undermine the credibility of Wilkosz's testimony regarding his March 16 inspection. It is uncontroverted that spads are different than sightlines and were not required in Oak Grove's slant cuts. (Tr. 33:2, 89:14–90:19.) However, Inspector Wilkosz alleged in the text of Citation No. 8519718 that Oak Grove did not have "sight spads" in the slant cuts at issue. (Ex. G–2.) His inspection notes likewise refer to "surveyor spads" and "surveyor sights." (Ex. G–1 at 5, 16.) The Secretary argues that in light of his experience Wilkosz's use of "spad" and "surveyor sights" should be read to mean "sightlines." (Sec'y Br. at 6 n.2.) Wilkosz has many years of experience working in and inspecting coal mines, as well specific experience as a topographical surveyor in the U.S. Army Reserve. (Tr. 18:18–24:18.) I also understand that the terms "spad" and "surveyor sights" are sometimes used interchangeably with "sightlines." (Tr. 33:6–7, 89:23–90:1, 90:20–24.) Yet,

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

it is unclear why an inspector aware of the difference between spads and sightlines—as well as the terms of section 75.203(b)—would write "spad" in both his notes and citation unless he was citing Oak Grove for a lack of spads, rather than sightlines. On the contrary, an inspector with Wilkosz's particular experience would seem more likely to be precise in his language. Thus, I do not find convincing the Secretary's explanation that Wilkosz meant sightlines when he wrote spads.

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

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

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

Unfortunately for the Secretary, his burden of proof has not changed. An explanation may often be "simpler" or "more plausible" than others without being "more likely than not." Here, Wilkosz's notes only reflect measurements in the slants for crosscuts 21, 25, 29, and 33. (Ex. G–1 at 12–15.) Notwithstanding Wikosz's measurements showing that two wide places

exceeded the permissible slant width by seven feet, it is unclear that those widths are representative of the wide places he found in crosscuts 13, 15, 17, 19, and 27.

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

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

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

C. Conclusions of Law

In view of the above, I conclude that the Secretary has failed to demonstrate by a preponderance of the evidence that Oak Grove violated section 75.203(b). Because I have not found a violation, I do not need to address the Secretary's S&S and negligence allegations.

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

Moreover, I need not address Oak Grove's assertion that Citation No. 8519718 is duplicative of Citation Nos. 8519719 and 8519720.

VI. ORDER

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

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

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

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

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

/pjv

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-920-8689

May 23, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2011-502-M
Petitioner	:	A.C. No. 54-00001-251949-01
	:	
	:	Docket No. SE 2011-503-M
	:	A.C. No. 54-00001-251949-02
	:	
	:	Docket No. SE 2013-130-M
v.	:	A.C. No. 54-00001-307347
	:	
	:	Mine: Ponce Cement Plant
	:	
	:	Docket No. SE 2011-504-M
	:	A.C. No. 54-00240-251950-01
CEMEX DE PUERTO RICO,	:	
Respondent	:	Mine: Cantera Canas

DECISION AND ORDER

Appearances: Terrence Duncan, Esq., U.S Department of Labor, Office of the Solicitor, New York, NY for the Secretary

Manuel A. Quilichini, Esq., Quilichini Law Offices, San Juan, PR for Respondent

Before: Judge Andrews

STATEMENT OF THE CASE

These cases are before the undersigned Administrative Law Judge on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Cemex de Puerto Rico ("Respondent" or "Cemex") pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d). A hearing was held in San Juan, Puerto Rico on August 5, 2013.

PROCEDURAL HISTORY

MSHA inspector Isaac Villahermosa conducted several inspections of Respondent's various operations. On August 26, 2010, he conducted an inspection of the Cantera Canas Mine and issued a citation under Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977 ("the Act"). On November 23, 2010, he conducted an inspection of the Ponce Cement Plant and issued two citations, one under Section 104(a) and one under section 104(d)(1). Finally, on June 20, 2012, he conducted another inspection of the Ponce Cement Plant and issued an order under 104(b) of the Act. Respondent contested these four issuances and each was placed in a separate civil penalty docket (SE 2011-502-M, SE 2011-503-M, SE 2011-504-M, and SE 2013-130-M). The total assessed penalty for the four citations was $29,711.00. On August 5, 2013 a hearing was held on these citations. The parties submitted Post-Hearing Briefs and the Secretary submitted a Reply Brief.

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.[1] Those stipulations include the following:

1. The Federal Mine Safety and Health Commission has jurisdiction over these proceedings pursuant to Section 105(d) of the Mine Act, 30 U.S.C. §815(d).

2. Respondent Cemex De Puerto Rico was/is a mine within the meaning of Section 4 of the Federal Mine Safety and Health Act, 30 U.S.C. §804, and has/had products which entered interstate commerce within the meaning of §4 at the time of the violations alleged in the citations.

3. Respondent Cemex De Puerto Rico was/is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §801 et seq., at the time of the violations alleged in the citations.

4. Respondent Cemex De Puerto Rico was/is the owner/operator of the Cantera Canas Mine, I.D. #54-00240 and the Ponce Cement Plant, ID No. 54-00001, at the time of the violations alleged in the citations.

5. On or about August 26, 2010, Inspector Isaac Villahermosa conducted an inspection of Respondent's Cantera Canas Mine.

6. At the end of his inspection, Mr. Villahermosa issue (sic) several citations which alleged that Respondent was operating some of its mobile equipment with various defects, some of which allegedly remained uncorrected for extended periods of time.

[1] Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits will be referred as "GX" and Respondent's Exhibits will be referred to as "RX."

7. Respondent did not contest the citations which alleged that violations existed on its Pettibone Cranes Nos. 771 and 774, its Chevrolet Water Truck #37-007, its Caterpillar Dozer No. 2 and its Caterpillar Loader No. 302.

8. Respondent only contested Citation No. 8544130 which alleged that respondent violated 30 C.F.R. §56.14100(c).

9. At the time of inspector Villahermosa's inspection, Horacio Terron was the Mobile and Crushing Equipment Maintenance Coordinator at Respondent's Cantera Canas Mine.

10. Respondent's equipment operators inspected the equipment they operated before each shift and completed pre-shift inspection reports.

11. As Coordinator of Maintenance, Horacio Terron was responsible for correcting the defects identified in the vehicles pre-shift inspection reports.

12. Horacio Terron supervised Crane Operator Edwin Bautista.

13. Edwin Bautista submitted equipment pre-shift inspection reports for the equipment he operated to Horacio Terron.

14. At the time of MSHA's inspection, Guillermo Vazquez was Respondent's Quarry Coordinator at the Cantera Canans (sic) Mine.

15. Guillermo Vazquez supervised the equipment operators who worked at the quarry at Respondent's Cantera Canans (sic) Mine.

16. The equipment operators who worked at Respondent's quarry at the Cantera Canans (sic) Mine inspected the equipment they operated before each shift and completed pre-shift inspection reports.

17. Guillermo Vazquez received and reviewed the equipment pre-shift inspection reports for the equipment that operated at Respondent's quarry at the Cantera Canans (sic) Mine.

18. Guillermo Vazquez was responsible for among other things, taking defective equipment out of operation until the defects were corrected.

19. On November 23, 2010, inspector Isaac Villahermosa visited Respondent's limestone plant to conduct a second inspection.

20. At approximately 1:30 p.m. on November 23, 2010, Mr. Villahermosa went to the No. 11 mill at Respondent's cement plant.

21. On or about November 23, 2010, Juan Martinez used the handrails located on the platform of the No. 11 mill, and then scaled the "mill's structure" to reach the top of the mill.

22. On or about November 23, 2010, Carlos Vargas saw Juan Martinez used (sic) the handrails located on the platform of the No. 11 mill, and then scaled (sic) the "mill's structure" to reach the top of the mill.

Joint Exhibit 1 (*see also* Transcript at 6-7).[2]

MILL NO.11 CITATIONS

I. SUMMARY OF TESTIMONY

Inspector Isaac Villahermosa conducted an inspection of Respondent's cement plant on November 23, 2010.[3] (Tr. 21, 118). On that day, he was initially inspecting Respondent's lime plant.[4] (Tr. 22). During his lunch break at Respondent's Mine Office, a cement plant employee approached him and told him to go to Mill No. 11, but not until after lunch so that miners would be there. (Tr. 22-23, 76-77). He asked the miner why he should go to the mill and the miner said, "Just go there. You'll see." (Tr. 77). He had no idea what he would see. (Tr. 77-78). A trip to the cement plant was not part of his itinerary. (Tr. 22). Villahermosa did not solicit these comments and the miner did not describe the nature of the problem. (Tr. 23, 77).

After lunch, Villahermosa waited for Respondent's safety representative, Carlos Collazo, to join him.[5] (Tr. 23-24, 78). He did not recall who else was at the mine office that day, beyond Collazo. (Tr. 79). However, Collazo did not arrive and, at around 1:15-1:20, Villahermosa went to the area by himself. (Tr. 23-24, 29). He did not try to contact Collazo first. (Tr. 79).

Around the same time, Joel Martinez left lunch and returned to work at Mill 11, as he had that morning.[6] (Tr. 116, 118, 130). That day he was assigned to weld over some cracks that had occurred in the mill spout as a result of wear. (Tr. 116, 171). He did these sorts of repairs once or twice a month and climbed up the equipment each time. (Tr. 116-117, 129-130). At the time of the hearing, he no longer did this kind of maintenance because a new liner had been installed,

[2] Hereinafter the transcript will be cited as "Tr." followed by the page number.

[3] Isaac Villahermosa appeared at hearing and testified for the Secretary. (Tr. 20). Villahermosa had worked as an MSHA inspector for six years and was also a special investigator. (Tr. 21). In that capacity he has performed over 200 regular inspections at quarries and plants. (Tr. 21).

[4] Respondent has three plants: a lime plant, a cement plant, and the Canas quarry. (Tr. 22).

[5] Carlos Alberto Collazo Vasquez appeared at the hearing and testified for Respondent. (Tr. 223). At the time of the hearing Collazo was Respondent's Safety Director and had held that position for about five years. (Tr. 224).

[6] Joel Martinez Torres appeared at hearing and testified for Respondent. (Tr. 114). Martinez had worked for Respondent since 2002 or 2003. (Tr. 114). At the time of the hearing he was a welder/mechanic and had held that position for five years. (Tr. 115). In that capacity he repaired broken structure and manufactured items. (Tr. 115).

making repairs unnecessary. (Tr. 117). The spout was without a liner for a year or two. (Tr. 118). Carlos Vargas was also working at Mill 11 and was standing at ground level.[7] (Tr. 170).

When he left the office, Villahermosa walked down the street towards Mill No. 11.[8] (Tr. 80). To approach the mill, he traveled on a walkway to a platform. (Tr. 24-25). He estimated that the top of the mill was seven feet above the platform and 12 feet above the ground, though he did not measure. (Tr. 25, 95). Martinez estimated that top of the mill was 5 or 6 feet above the platform and 8 or 10 feet from the ground. (Tr. 126, 131-132). The parties agreed that there was spillage around the platform. (Tr. 96, 126). Respondent believed that this material would prevent a miner from falling all the way to ground, but Villahermosa was not sure. (Tr. 96, 126). The top of the mill was rounded and sometimes covered in dust. (Tr. 31-32, 133).

The parties have different accounts as to what happened once Villahermosa reached Mill 11. According to Villahermosa, when he arrived at the cement plant he saw Martinez on top of the mill with no harness. (Tr. 24, 26). When he first reached the walkway, he was far from the mill and could only see someone on top. (Tr. 25). It was not until he was on the platform that he saw that the miner was not tied to a safety line and there was no hand rail. (Tr. 25). Because the condition was unsafe and he feared Martinez would fall, Villahermosa told him to sit down. (Tr. 25).

After the miner sat down, a supervisor, Vargas, approached and Villahermosa explained the situation. (Tr. 26, 34, 259). Villahermosa did not approach Vargas, because he did not know that Vargas was the supervisor. (Tr. 259). Villahermosa told Vargas that they needed to get Martinez off of the mill safely. (Tr. 26). Villahermosa suggested using a ladder. (Tr. 26). Vargas called for a ladder and Martinez was brought down from on top of the mill. (Tr. 26, 28).

When Martinez got off the mill, Villahermosa questioned him. (Tr. 26). Martinez told Villahermosa how he got up on the mill and the name of the supervisor who directed him to perform the task. (Tr. 26-27). Martinez said he used the handrails and the mill structure to climb to the top. (Tr. 27-28, GX-7, p.1-3). There were two handrails on the mill platform. (Tr. 28, 95). The bottom rail was about 20 inches above the platform. (Tr. 257). The top one was 40-44 inches above the platform. (Tr. 31, 95-96). Martinez stated he climbed one rung (the second), and stepped on the bearing cover. (Tr. 96). Climbing onto the structure put Martinez at an even

[7] Carlos G. Vargas Martinez was present at the hearing and testified for Respondent. (Tr. 168). Vargas retired on June 30, 2011, after working for Respondent for 36 years. (Tr. 168-169, 178). His last position at the company was Industrial Mechanic Supervisor. (Tr. 169). In that capacity he oversaw a group of mechanics, including Martinez. (Tr. 169). Since retirement, Vargas had had little contact with Respondent's management, though he remained friends with some of his employees. (Tr. 178). Vargas did not know who issued the subpoena for the hearing. (Tr. 178).

[8] Respondent's counsel asked Villahermosa to review digital photographs of the street (RX-1). (Tr. 81). These photographs were taken just three weeks before the hearing (three years after the citation) by Respondent's counsel. (Tr. 81). They showed that from the angle of the photographs, it was not possible to see the area cited. (Tr. 82-83). Martinez testified that the area shown in these photographs was similar to how it looked three years ago. (Tr. 127). However, he could not authenticate the photographs. (Tr. 161-162).

greater height. (Tr. 31). Martinez stated he climbed to the top with his hands free. (Tr. 265). He stated he did not tie himself off when climbing. (Tr. 96).

Villahermosa believed that the way Martinez traveled to the top of the mill created exposure to serious or fatal injury. (Tr. 30-31). The area was not safe to access. (Tr. 31). As soon as Martinez began to climb the rails, he was not protected and could have been injured in a fall. (Tr. 31, 256). Even the lower handrail posed a hazard, albeit a lesser one. (Tr. 257, 264). The higher the miner climbed, the more hazardous the condition would be. (Tr. 264-265). Standing on the top rail posed a danger because a four-foot fall could cause serious injury. (Tr. 257, 264-266). Once he reached the top of the mill, the surface was rounded, making a slip more likely.[9] (Tr. 31-32, 258). If he fell the 7 feet from that area, the metal in the location could have struck his head causing a serious injury or fatality. (Tr. 31, 258). The resultant broken skull or neck could be fatal. (Tr. 34). The miner could also break an arm or be cut. (Tr. 33).

Martinez was wearing a lanyard and a harness but he told Villahermosa that he did not use it to tie off. (Tr. 28-29). Villahermosa believed that Martinez did not claim he was using the harness and lanyard to tie off until several months later during the 110(c) investigation. (Tr. 29-30). Even if Martinez had been tied off, he would have been exposed to a fall, though perhaps a less severe one. (Tr. 32, 265). In tying off, he would have been standing on the top rail and reaching up, thereby exposing himself to a fall. (Tr. 256-257, 264-266). When a line is tied off, generally the miner would like to tie off at a higher level. (Tr. 32). When climbing, a miner must reach down to unhook the tie and can fall. (Tr. 33, 258). Further, a miner can fall while tied off, and as the lanyard is 5-6 feet long, the miner could still hit structure or walkway. (Tr. 33). Further, he could have fallen while walking to tie off on top of the mill. (Tr. 258).

Respondent's witnesses offered a far different account. According to Martinez, when Villahermosa arrived at the mill, he was still on the platform and had not yet climbed the mill.[10] (Tr. 119). In response to questioning, Martinez told Villahermosa he would be welding. (Tr. 119). Martinez testified Vargas arrived while they were speaking. (Tr. 128). However, Vargas testified that Villahermosa approached him at the ground level and that they had walked together to the platform where Martinez was working. (Tr. 170-171). At ground level, Villahermosa had asked Vargas who was in charge and said that he was in the area because of an imminent danger. (Tr. 170-172). Vargas said he was in charge. (Tr. 170).

Regardless of the order of arrival, Villahermosa asked how Martinez would get to the top of the mill and Martinez explained how he would routinely climb up while tying off. (Tr. 119, 124-125, 130, 134, 172). This was the way he had reached the area that morning. (Tr. 130).

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[9] On cross examination, Villahermosa discussed a guard on top of the mill. (Tr. 97-98). He stated that he could see the top of the guard from below, that it was five and a half feet high, and that he did not observe planks on the guard for a walking surface. (Tr. 97-99). There was no guard on the backside. (Tr. 96-97).

[10] Martinez had seen Villahermosa before the day of the inspection but had never spoken to him before. (Tr. 160-161). He never had any conflict with Villahermosa before that day. (Tr. 161). Vargas had some encounters with Villahermosa before that day. (Tr. 179).

Martinez testified that after the explanation, Villahermosa requested that he demonstrate how he would climb while tying off with his harness. (Tr. 119, 125, 142-143). Vargas testified that Villahermosa interrupted Martinez's explanation in asking for the demonstration. (Tr. 172). The harness was manufactured so Martinez could tie in with two lines. (Tr. 124, 134). He had been trained on how to climb by Respondent. (Tr. 143). He used the handrails to begin. (Tr. 120, 134). He put his feet on the first rail and tied himself to the green lubricant pipe above his head. (Tr. 120-123, 135-136, 173). The pipe was four to five feet above the rail, or 2 to 3 feet above his head. (Tr. 136-139). He was cautious in balancing on the rail. (Tr. 136). Martinez then climbed to the second handrail. (Tr. 139). He then stepped on the bearing for the mill and tied himself to the green pipe. (Tr. 139-140, 156-157, 173). There was also an eyelet he could tie off on. (Tr. 123, 173). When he reached the top, he would tie off on a pipe located there, untie from the green pipe, and his assistant would hand up his tools. (Tr. 131-133, 141-143).

On this day, when he reached the top Villahermosa told him to sit down and not tie off while a ladder was retrieved. (Tr. 119, 124-126, 143-144, 158, 173, 181). Villahermosa told him to untie from the lower pipe as well. (Tr. 158-159). Vargas also saw the inspector tell Martinez to sit. (Tr. 145, 173). Villahermosa ordered Vargas to get the ladder. (Tr. 173-174). When the ladder arrived, Martinez climbed down. (Tr. 127). When he got down, Villahermosa told him that he had come to the mine over a matter of life and death. (Tr. 127). He also said that the work could not be performed until necessary arrangements were made to do the work safely and that the equipment had to be left on top. (Tr. 174). Vargas called his supervisor, the engineer in charge, and said that work could not be done until arrangements were made. (Tr. 175).

Martinez knew it was wrong to sit down without tying off and that doing so placed him in danger. (Tr. 144-145). He followed the order because the inspector told him to do so and he felt that he was safe while sitting. (Tr. 144-145). Vargas agreed that Villahermosa's instructions were unsafe. (Tr. 181-182). An untied miner could fall and receive serious injury. (Tr. 182). Villahermosa testified that he did not order the miner to climb the structure. (Tr. 107).

The parties agreed that later that day, Villahermosa spoke with Martinez, Collazo, and Vargas about the cited condition in a conference room.[11] (Tr. 35-36, 127-128, 174, 226). Vargas testified that he was asked to leave the room when Collazo arrived. (Tr. 174). They went to the room to clarify any misunderstandings. (Tr. 36). Martinez said that the inspector told him stay calm and that no one would fire him. (Tr. 129). Vargas said that Villahermosa gave Martinez a card and said that "no one could touch him; that he was like a god and that no one could fire him." (Tr. 174). Villahermosa told those at the meeting that he had all the information, that he had conducted all the interviews, explained the condition, and noted the condition was an imminent danger for unsafe access. (Tr. 36, 129, 226-228, 243-244). Villahermosa said that Martinez reached the mill through unsafe access and that handrails, access area, and spout at Mill No. 11 could not be used for climbing. (Tr. 227-228).

Villahermosa testified that at the meeting, Callazo and Vargas confirmed that the condition existed. (Tr. 36). He said Vargas had seen Martinez climb on the mill and did not say that Martinez tied off. (Tr. 36, 99). Villahermosa testified that Vargas did not mention "three

[11] Collazo learned about the condition when Villahermosa called him at lunch. (Tr. 226). He arrived 20 minutes later. (Tr. 226). Martinez and Vargas were already there. (Tr. 243).

points of contact"; that issue was not raised until much later. (Tr. 99). At the meeting, Collazo said that the condition should not be aggravated conducted because Vargas did not recognize the hazard. (Tr. 34-35, 37, 99-100). Collazo testified that he believed the access was safe but the inspector said that MSHA did not approve. (Tr. 228). Collazo also testified he had not heard in training that "three points of contact" was no longer authorized by MSHA, so he accepted what the inspector said. (Tr. 228). Villahermosa left after speaking. (Tr. 229).

The unsafe access citation (No. 8629721 (GX-5)) stated that an injury or illness was reasonably likely because Martinez told the inspector that he had accessed the area in the morning and in the afternoon in an unsafe manner. (Tr. 21, 37-38, 45-46). If Martinez were to fall 7 feet, there could be fatal injury, broken or dislocated bones, twisted ankles, or other injuries depending on how he landed. (Tr. 39, 46).

The inspector testified that the citation was marked as S&S because of the combination of the unsafe way Martinez accessed the area and the possible injury he would sustain. (Tr. 39, 46).

Inspector Villahermosa also testified that Respondent engaged in an unwarrantable failure/aggravated conduct because it required Martinez to do a job without safe access. (Tr. 40). He stated that management was aware of the miner in that area and observed him climbing. (Tr. 40-41). He found the violation occurred as a result of high negligence because Respondent was aware of what was required for safe access, having been cited nine times in the past, but failed to provide it. (Tr. 40). In fact, he believed they approved of such access because Vargas said he did not recognize a hazard. (Tr. 40).

Villahermosa also reviewed citation No. 8629720 (GX-12). (Tr. 37-38, 106-107). The miner was wearing a harness but it was not tied off. (Tr. 41, 107). A photograph (GX-13) showed Martinez sitting on the mill. (Tr. 41). There was a green pipe for Martinez to tie off on at the top of the mill. (Tr. 43, 94). Villahermosa learned about this place later and did not see it at the time of the issuance. (Tr. 94-95). He did not ask Martinez if he could tie off. (Tr. 95).

Vargas did not know when he learned that Martinez was cited for not being tied off. (Tr. 181). He testified that he did not speak with Collazo about the violation or the instructions not to tie off on the day of the incident. (Tr. 175, 182, 184). He also did not speak to MSHA or file a complaint about Villahermosa's alleged instruction for Martinez to climb. (Tr. 175-176, 183-184). This was because he was a mechanic's supervisor; safety personnel were supposed to deal with those issues. (Tr. 183-184). Vargas did not talk about the condition at all until a meeting with Collazo three days after the alleged violation in which he learned MSHA had issued a citation. (Tr. 175, 182, 227, 229). At the meeting, Collazo talked about safe access. (Tr. 229, 244). At that time he did not have any evidence to contradict the inspector's assertion that "three points of contact" and that the use of handrails was not safe. (Tr. 229). He told the employees that they would need to change the method of access. (Tr. 229). Collazo heard that Martinez was already on top of the mill when Villahermosa arrived. (Tr. 149). No one said anything to undermine this understanding or the citation, so Collazo accepted the citation and the inspector's explanation. (Tr. 227). Vargas conceded that never spoke with Collazo or recommended letting MSHA know about Villahermosa's actions. (Tr. 184).

Respondent decided that the citation was not accurate and drafted a letter requesting a meeting with the MSHA supervisor, Valentin, at the local office. (Tr. 230-231, 234). This followed the protocol of the Mine Act and occurred 10 days after the citation. (Tr. 230-231, 244). Respondent told Valentin that it had used the "three-points of contact" method, as Martinez had done, for 5-10 years, believed it was safe, and had never been told to discontinue the practice. (Tr. 231-232). Valentin upheld the citations, noting that the use of the handrails as a ladder and using three points of contact was not allowed. (Tr. 231). Villahermosa testified that "three points of contact" was for areas that already had safe access, like a ladder. (Tr. 258, 266). It was for moving hands-free and without falling on safe access. (Tr. 259). It could not be used everywhere. (Tr. 259). It is not for scaling handrails and structures. (Tr. 259). Villahermosa never cited anyone simply for the use of "three points of contact." (Tr. 266-268).

Several weeks after the inspection and the Valentin meeting, Jose Figueroa conducted a 110(c) investigation. (Tr. 230, 245-246). It was during the investigation that Collazo first heard information that contradicted the citation. (Tr. 232, 234, 245). Specifically, Martinez stated that he was not at the mill spout when the inspector arrived. (Tr. 148-149, 233). Martinez had not spoken with management about Villahermosa's instructions to not tie off until that time. (Tr. 148-149). He did not know until the investigation that MSHA believed he was caught standing on top of the mill without tying off. (Tr. 164-167). Martinez explained to Figueoroa that Villahermosa had asked him to demonstrate climbing the mill and asked him not to tie off when he reached the top. (Tr. 233-234). He explained that after he demonstrated how he climbed the inspector took the picture. (Tr. 233-234). Vargas corroborated Martinez's story for Collazo. (Tr. 165-166, 234, 246-247). Martinez did not talk to Collazo about the condition until after the MSHA investigation, despite seeing Collazo during the interim. (Tr. 152-153).

During the investigation, Vargas asked Martinez why there was a picture of him not tied off and Martinez explained he was following Villahermosa's instructions. (Tr. 166-167). However, Vargas was present when Villahermosa told Martinez not to tie off, so he was already aware. (Tr. 167). Martinez conceded that in an October 18, 2012 deposition he testified that he did not speak with anyone, including Vargas, about the instructions. (Tr. 150-154).

In an October 17, 2012 deposition, Collazo stated that he filed a verbal complaint against Villahermosa with Figueroa during the investigation. (Tr. 252-253). Specifically, he told Figueroa that Villahermosa had lied and that Martinez's statement was the truth. (Tr. 253-254). Collazo also stated that Respondent did not file a formal complaint with MSHA. (Tr. 253). However, because Respondent had learned about the discrepancies between the citation and events, Collazo wrote a complaint letter to Michael Davis. (Tr. 234-235, 244, 247). He did not receive a response. (Tr. 234-235, 248). During the 110(c) investigation, Figueroa told them that Davis received the letter and that his investigation would cover the citations and the allegations in the letter. (Tr. 235). No further letter was sent to Davis because Collazo believed that one was enough and feared negative repercussions for the company if he did more. (Tr. 235-236). Collazo did not bring a copy of the letter to the hearing, but had one. (Tr. 248).

II. CONTENTIONS OF THE PARTIES REGARDING CITATION NO. 8269720

The Secretary issued two citations following the November 23, 2010 inspection. One citation was issued for an alleged failure on the part of Martinez to tie off on Mill No. 11 when working. (GX-12). The other citation was issued for an alleged failure of Respondent to provide safe access to the top of Mill No. 11. (GX-5).

With respect to Citation No. 8269720 (alleged failure to tie off), the Secretary asserts that Respondent violated 30 C.F.R. §56.15005, that this violation was highly likely to result in fatal injuries to one miner, that the violation was S&S, and that it resulted from high negligence. (GX-12)(*Secretary's Post-Hearing Brief* at 18-24). The Secretary also asserts that a penalty of $9,122.00 is appropriate. (*Id*.)

Respondent asserts this it did not violate the cited standard. (*Respondent's Post-Hearing Brief* at 14). It further avers that if a violation existed, it was unlikely to result in any injury, that any injury sustained would be "lost workday/restricted duty" rather than fatal, and its actions would be better characterized as showing "low" or "no" negligence. (*Id*.) Presumably, Respondent would also prefer a reduction in the penalty.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CITATION NO. 8269720

The findings of fact in this, and other sections, are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the Administrative Law Judge has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the Administrative Law Judge has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Administrative Law Judge's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §56.15005.

On November 23, 2010, Inspector Villahermosa issued a 104(a) Citation, No. 8269720, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> A miner was observed working on top of the #11 Mill without the safety harness and line tied. The miner had the harness on but was not tied. The miner was exposed to falling from approximately 7 feet to the walkway and sustaining serious or fatal injuries. The mine operator was aware the miner was going to

> perform the task but did not ensure the miner had an area where to tie off without being exposed to a falling hazard.
>
> This condition was a factor that contributed to the issuance of order 8629719, dated 11/23/2010. Therefore, no abatement time was set.

(GX-12).

The cited standard, 30 C.F.R. §56.15005 ("Safety Belts and Lines"), provides the following:

> Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

30 C.F.R. §56.15005.

With respect to a 30 C.F.R. §56.15005 violation, "the Commission has held that a danger of falling exists when an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Hunt Martin Materials, LLC*, 2013 WL 1856613, *5 (Sept. 2013)(ALJ Simonton), *citing Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983); *see also United Taconite, LLC*, 2014 WL 1010076, * 12 (Feb. 2014)(ALJ Lewis). Therefore, the issue here is two-fold: was the miner wearing belts or lines and, if not, would a reasonably prudent person recognize a danger of falling. *See e.g. Boart Longyear Company*, 2014 WL 586878, *7 (Jan. 9, 2014)(ALJ Barbour).

In the instant matter, The Secretary presented evidence that Respondent violated the cited standard, as described in the citation. Inspector Villahermosa credibly testified that upon seeing Martinez he noted that the miner was wearing his harness, but was not tied off. (Tr. 24, 26, 28-29). The photographic evidence supports this conclusion. (Tr. 41) (GX-13). Therefore, I find that Martinez was not wearing safety belts or lines in the manner required by regulation.

As a result, the only issue remaining in determining the validity of this citation is whether a reasonably prudent person would recognize a danger of falling. Once again, I find that the Secretary presented credible evidence to prove, by a preponderance of the evidence, that such a reasonably apparent danger existed. Inspector Villahermosa testified that the top of the mill, where the miner was working and standing, was not intended as a walking surface. Specifically, the top of the mill posed a slipping hazard because it was rounded and dusty. (Tr. 31-32, 258). In addition, there was no handrail or other protection to prevent a fall. (Tr. 25). The evidence also showed that the top of the mill was 7 feet above the walkway and roughly 10-12 feet from the top of the mill to the ground below. (Tr. 25, 95). Commission case law has consistently held that a fall anywhere from 7 to 12 feet poses a danger. *See e.g. Grand Western Electric Co.*, 5 FMSHRC at 843 (holding that 12 feet is a substantial height from which to fall); *Morton Company, LP*, 31 FMSHRC 427 (Marc. 2009)(ALJ) (holding that a fall from 7 feet was S&S); *Laramie County Road & Bridge*, 17 FMSHRC 902, 905 (Jun. 1995)(ALJ) (holding that a fall of

8-12 feet was S&S); and *United Taconite, LLC*, 2014 WL 1010076, *supra* (holding that a fall danger of 65-inches constituted a violation of 30 C.F.R. §56.15005).

Both the unsuitability of the mill as a walking surface, the lack of guardrails, and the dangerous height of the mill were obvious indications of danger. Therefore, I find that a reasonably prudent person seeing the cited condition would have recognized that the miner standing on the mill without fall protection was in danger of falling and that belts *and* lines were warranted. As such, the citation at issue here was validly issued.

In its brief, Respondent asserted several arguments to support its claim that this citation was invalid. (*Respondent's Post-Hearing Brief* at 7-9). However, those arguments are not supported by the evidence.

Respondent argued that both Vargas and Martinez consistently testified that Inspector Villahermosa had created the dangerous situation. (*Respondent's Post-Hearing Brief* at 7). Specifically, Respondent's witnesses testified that Villahermosa asked Martinez to climb up the mill. (Tr. 119). Further, they testified that when Martinez reached the top of the mill, his failure to tie off was the result of Villahermosa's specific instructions. (Tr. 119, 124-126, 143-144, 158, 173, 181). Therefore, Respondent argues that it was not responsible for the violation and that the citation was invalid.

I find the testimony of Respondent's witnesses on this point to be incredible. First, I find the accounts given by Respondent's witnesses to be inconsistent. Martinez testified that he was approached by Villahermosa as he was standing on the platform and that Vargas arrived later, as they were speaking. (Tr. 119, 128). Vargas testified that he was working at the ground level when Villahermosa arrived and that he and the inspector approached Martinez together. (Tr. 170-172). Martinez testified that after he explained how he climbed the mill, Villahermosa requested that he demonstrate. (Tr. 119, 125, 142-143). Conversely, Vargas testified that Villahermosa interrupted Martinez's explanation to demand a demonstration. (Tr. 172). Furthermore, Martinez and Vargas' testimony is inconsistent with Collazo's testimony. Specifically, Martinez and Vargas stated that when Martinez reached the top of the mill, Villahermosa told him to sit down without tying off. (Tr. 119, 173). Collazo testified instead that Martinez tied off on the top, but that Villahermosa asked him to untie and then sit down. (Tr. 233-234). Respondent's witnesses cannot agree on the basic facts surrounding this violation.

In addition to these discrepancies, Respondent's witnesses did not behave in a manner consistent with their testimony that Villahermosa ordered the violation. Martinez testified that he knew that Villahermosa's alleged instructions were unsafe, but never objected (Tr. 144-145). More importantly, after the citation was issued, Martinez did not complain about Villahermosa's actions to MSHA or to his supervisors *at that time*. (Tr. 150-154). Similarly, Vargas did not object to Villahermosa placing the miner in danger. (Tr. 99). Also, Vargas did not speak to his supervisor or MSHA about Villahermosa's alleged actions after the citation was issued. (Tr. 175-176-183-184). The fact that each witness passively accepted an admittedly unsafe situation and then neglected to speak about it undermines the credibility of those witnesses. Such action is unnatural and unbelievable.

With respect to informing his supervisors, Martinez testified that he told Vargas about Villahermosa's dangerous instructions several days after the citation. (Tr. 166-167). However, Vargas was present when Villahermosa gave the unsafe instructions. (Tr. 167). This testimony is strange because, if Vargas was present to hear Villahermosa give the dangerous instructions, then there was no need for Martinez to apprise him of that fact several days later. (Tr. 167). Further, Martinez's testimony on this point at hearing directly contradicted his deposition testimony. (Tr. 150-154). Moving up the corporate hierarchy, Vargas and Martinez testified that they did not speak to their supervisor, Collazo, about Villahermosa's alleged actions even when a meeting was held regarding the citation. (Tr. 227). After the citation was issued, Collazo testified that he spoke with Vargas and Martinez and told them they could no longer use the railing to climb the mill. (Tr. 229). However, despite this admonition from their supervisor, neither Vargas nor Martinez took the opportunity to explain that Villahermosa had instigated the violation. (Tr. 227). The fact that neither witness chose to speak seriously undermines the credibility of their testimony.

Collazo's testimony further adds to the problems with Respondent's argument. Collazo testified that he did not learn that Villahermosa directed Martinez not to tie off until a month after the citation, during the 110(c) investigation. (Tr. 232-234). Collazo testified that after receiving this information, he wrote a letter to MSHA. (Tr. 234-236). He testified that he learned that MSHA had received this letter from Figueroa during the 110(c) investigation. (Tr. 234-236). Callazo's testimony is absurd. If Callazo learned about Villahermosa's instructions during the 110(c) investigation, then it was impossible for the investigator to have information regarding a letter Callazo wrote complaining about that instruction. He would have had to write the letter before he learned of a reason for drafting that letter. As Respondent presented no evidence that Callazo was capable of somnambulant psychic letter-writing, no weight can be given to this testimony.

Finally, regardless of the actions or testimony of Respondent's witnesses, I find that there would be no reason for Inspector Villahermosa to ask Martinez to climb the mill. "Once an inspector has identified a violation, there is no requirement in the Mine Act or Commission case law that he endanger himself or a miner by exposure to the conditions giving rise to the violation." *Western Industrial, Inc.*, 25 FMSHRC 449, 453 (Aug. 2003). If Martinez told the inspector that he worked on top of the mill and the inspector felt that doing so was a violation of the Act, he was within his rights to issue a citation. The inspector did not need to place Martinez in danger to justify the issuance of the citation. In short, there was no incentive for Inspector Villahermosa to entrap Respondent.

This inconsistent testimony and inexplicable behavior is insufficient evidence upon which to base a finding that the Inspector framed or had some sort of vendetta against Respondent. Instead the far more likely scenario, and the one supported by the preponderance of the evidence, is the explanation given by Inspector Villahermosa. Specifically, that the inspector arrived at the mill following an anonymous tip and found a miner already standing on top of the mill, untied. (Tr. 24, 26, 28-29). Villahermosa consistently testified to these events at all stages of this litigation and the photographic evidence supports his testimony. This would explain why Respondent's witnesses related different stories and why they did not quickly complain about

Villahermosa's action: there was nothing to complain about. I find that Respondent's witnesses either became confused about events that occurred several years in the past or, perhaps, formulated their stories after the fact for the purposes of litigation.[12]

In a related argument, Respondent contended that the inspector's testimony was unreliable and could not form the basis of a finding that a violation took place. (*Respondent's Post-Hearing Brief* at 7-8). I find that there is no credible evidence to support this claim. I will address each instance of allegedly unreliable testimony from the inspector in turn.

Respondent noted that Villahermosa testified that he saw the miner from a distance, but that photographs submitted by Respondent's counsel showed that he could not possibly see the top of the mill until he was standing on the platform below. (*Respondent Post-Hearing Brief* at 7-8). However, the photographs relied upon by Respondent were admitted only as demonstrative evidence so show what the area looked like. (Tr. 81-83, 127, 161-162). Those photographs did not show Villahermosa's point of view when he entered the area and are not evidence of what he could see. (Tr. 81-83). Villahermosa credibly testified that from where he approached the mill, he could see the miner on top of the mill from a distance. (Tr. 24-26). In fact, one of Villahermosa's photographs shows the miner at a distance. (GX-13). I find Villahermosa's testimony on this point credible and consistent with other evidence in this proceeding.

Respondent contended the Villahermosa was also unreliable because he was unable to recall how he reached the mill area. (*Respondent's Post-Hearing Brief* at 8). In so doing, Respondent refers to an exceedingly confusing section of the transcript (the testimony contained several references to locations situated "here" and "there" with no explanation as to what "here" or "there" meant relative to anything else). (Tr. 82-83). In that section Villahermosa stated that, in reviewing photographs taken by Respondent's counsel, he was unsure of where he had entered the area. (Tr. 82-83). He stated that the inspection had been three years earlier and he was not positive of which route, between two possible avenues, he had taken. (Tr. 83). However, Respondent's counsel conceded that the photographs had been taken just weeks before the hearing. (Tr. 84). No witness ever authenticated these photographs. It is entirely possible that the area looked different in the photographs than it did during the inspection. Further, as stated *supra*, the point of view in the photographs was not the same as the one Villahermosa had during the inspection. (Tr. 81-83). A photograph shown from the angle of his approach may have refreshed the inspector's memory. Perhaps most importantly, I find that even if Villahermosa simply forgot the route he took to reach the mill, this failure to recall would not be grounds upon which to discredit his testimony. Inspector Villahermosa's goal that day was to inspect the mine for violations, not to memorize a route. Inspector Villahermosa sufficiently recalled the substantive aspects of his inspection; failure to recall unnecessary details does not undermine his credibility.

Respondent further contended that Villahermosa was unreliable because on direct examination he did not state that he asked the anonymous informant why he should inspect the

[12] Considering the latter explanation, the obviously ill-conceived and poorly executed *ad hominem* attack on the veracity of Inspector Villahermosa utterly fails. The scheme hatched to place blame on the inspector is readily transparent. Indeed, the idea that a MSHA inspector would order a miner to perform any act prohibited by safety regulations is simply preposterous.

mill, but on cross-examination he stated he did. (*Respondent's Post-Hearing Brief* at 8). Respondent fails to note in its brief that during direct examination, Villahermosa was not questioned about what he stated to the anonymous informant. (Tr. 22-23). Only when Respondent's counsel specifically asked Villahermosa his response to the miner, did the inspector provide that information. (Tr. 77). Villahermosa's testimony was in no way inconsistent and I find no reason to question his credibility on this point.[13]

Respondent also argued that it was strange Villahermosa could remember the details of who he spoke with during this inspection, but could not remember the name of the person who spoke to regarding the BC-N conveyor citation, which occurred two years later. (*Respondent's Post-Hearing Brief* at 8)(Tr. 59). While it is true that Inspector Villahermosa never stated who he spoke with regarding the BC-N conveyor Order, there is a good reason for this. No one asked. The evidence does not show that Villahermosa was unsure who he spoke with, the record is completely silent on that issue. I do not find Villahermosa's testimony is incredible simply because he did not answer a question that was not asked.

Respondent's final argument with respect to Villahermosa's credibility is that the Inspector could remember minute details of the inspection but could not recall where he waited for Respondent's representative after lunch. (*Respondent's Post-Hearing Brief* at 8). As noted *supra*, the Inspector's goal that day was to inspect the mine for violations, not to memorize locations. The fact that the inspector could recall details regarding the violations but could not recall irrelevant details does not undermine his credibility. In fact, it shows that he was focused on the substantive matter at hand.

Respondent attempts to contrast Villahermosa's alleged lack of credibility with Vargas' credibility. (*Respondent's Post-Hearing Brief* at 7-8). Specifically, Respondent noted several times that Vargas no longer worked for Respondent and, therefore, his testimony was unbiased. (*Id*.). As noted *supra*, there are several logical inconsistencies in Respondent's witnesses' testimony that undermine Vargas' credibility, regardless of his level of bias. Further, Vargas testified that he was still friends with several of Respondent's miners. (Tr. 178). Therefore, he was not wholly neutral or disinterested. Perhaps most importantly, even if Vargas were credible, that would not change the fact that Villahermosa was also credible while Martinez and Collazo were not.

Respondent's final argument was that a reasonably prudent person would not perceive this condition as a danger. (*Respondent's Post-Hearing Brief* at 8-9). To that end, Respondent argued that Villahermosa was overly pessimistic regarding the hazard posed by a 7-foot fall. (*Id*.). Further, it noted that pads eyes were present for tie off on top of the mill. (*Id*.). As noted *supra*, relevant case law supports a finding that a 7-foot fall can pose a serious hazard. In fact, the existence of the pads eye shows that Respondent recognized that a 7-foot fall could pose a danger. The danger of a fall was apparent to anyone working for Respondent and this tie-off point was added. Unfortunately, Martinez was not tied off when the Inspector arrived. (Tr. 24,

[13] Respondent's attempt to undermine the credibility of the inspector through misrepresentation of the record has the effect of bolstering the Inspector's testimony and undermining the credibility of Respondent.

26, 28-29). Therefore, the miner was exposed to a fall. A reasonably prudent person would recognize this exposure.

The preponderance of the evidence shows that Martinez was not properly wearing the required belts or lines and that a reasonably prudent person would recognize a danger of falling. Therefore, this citation was validly issued.

2. The Violation Was Highly Likely to Result in a Fatal Injury to One Miner And Was Significant And Substantial In Nature

Inspector Villahermosa marked the gravity of the cited danger in Citation No. 8269720 as "Highly Likely" to result in "Fatal" injury to one person. (GX-12). These determinations are supported by a preponderance of the evidence.

The Mine Act requires that the "gravity of the violation" be considered in assessing a penalty. 30 U.S.C. §820. The Secretary has promulgated a three-factor inquiry to determine the gravity of a citation for purposes of determining the penalty. Those factors are:

> [T]he likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.

30 C.F.R. §100.3(e).

The event against which the instant standard, 30 C.F.R. §56.15005 is essentially stated in the language of the rule. Specifically, the standard is designed to protect miners from situations in which "there is danger of falling." Here, the inspector credibly testified that a fall from the top of the mill was highly likely to result in a fatal injury. Specifically, Inspector Villahermosa stated that the top of the mill, where Martinez was standing, was not intended as a walking surface. Instead, the top of the mill was rounded and dusty, creating a slipping hazard. (Tr. 31-32, 258). Further, there was no handrail or other protection to prevent a fall. (Tr. 25). Finally, the miner was not tied off. (Tr. 24,26, 28-29, 96). Given these conditions, it was highly likely that a miner working and using equipment on top of the mill would eventually slip and fall the 7 feet to the walkway below. A fall from that height could be fatal. Inspector Villahermosa credibly testified that if Martinez fell 7 feet, there could be fatal injury, broken or dislocated bones, twisted ankles, or other injuries depending on how he landed. (Tr. 39, 46). Relevant case law supports a finding that a fall from around this height onto a walkway can be fatal. *See e.g.*, *United Taconite, LLC*, 2014 WL 1010076, *supra*. Therefore, a fall was highly likely to result in fatal injury.

Respondent argued that such a fall would be unlikely to result in a fatality because the tie off points were a reasonable and acceptable safety measure that prevented a fall. (*Respondent's Post-Hearing Brief* at 11). As noted *supra*, the credible evidence shows that the miner was not tied off was highly likely to fall 7 feet onto his head or neck. (Tr. 31-34, 258). Perhaps if the miner had used the tie-off point, the likelihood or the severity of the danger would be lessened.

Unfortunately, Martinez was exposed to a 7-foot fall while standing on a slippery, rounded mill. Respondent's argument is not supported by the evidence.

Finally, only one miner was on top of the mill. (Tr. 24, 26). There was no indication that more than one miner would ever be working on top of this area. As a result, the preponderance of the evidence supports a finding that one person would be affected.

Therefore, I find that the cited violation was highly likely to result in fatal injuries to one miner. I will now turn to the S&S designation in this matter.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is 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., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

> 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984).

With respect to the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. §75.15005.

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – As discussed *supra*, the cited condition contributed to the danger of a fall. The miner was standing on a mill 7 feet above a platform without a tie-off. (Tr. 24, 26, 28-29, 126, 131-132). As has already been stated, this made a fall highly likely.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The preponderance of the evidence establishes that the hazard contributed to in this matter would be reasonably likely to result in injury.

The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("PBS"). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, it clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through

into a flooded adjacent mine would face numerous dangers of injury. *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (*citing Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

If the hazard contributed here were realized, specifically if the miner were to fall off of the mill, an injury would be highly likely. Inspector Villahermosa credibly testified that if Martinez fell 7 feet to the walkway below, there could be a fatal injury, broken or dislocated bones, twisted ankles, or other injuries depending on how he landed. (Tr. 39, 46). Other ALJs have found similar hazards to be sufficiently likely to cause injury to support an S&S designation. *See e.g. Morton Company, LP*, *supra*; *Laramie County Road & Bridge*, *supra*; and *United Taconite, LLC*, *supra*.

Respondent argued that the hazard contributed to by this violation created no likelihood of an injury. (*Respondent's Post-Hearing Brief* at 11). However, this argument was not compelling. Respondent argued that the inspector testified that any fall would be serious, but that this understanding was not "objective." Further, Respondent argued that it used precautions to prevent a fall. The Inspector's understanding of whether a fall would be serious at different heights is immaterial to this issue. The only issue is whether a fall from 7 feet would be reasonably likely to result in an injury. The credible evidence shows that such a fall could result in a multitude of injuries. (Tr. 39, 46). Further, the evidence showed that no "precautions" were used. The miner was standing on top of the mill and was not tied off. (Tr. 24, 26, 28-29). Therefore, the third prong of *Mathies* is met.

Under *Mathies,* the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). As discussed *supra*, the inspector credibly testified that a fall from the mill could result in serious, perhaps fatal injury. (Tr. 39, 46). A fatal injury (or broken bones) would be undoubtedly be serious. As a result, the fourth prong of *Mathies* is met.

As a result of these factors, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

3. Respondent's Conduct Displayed "High" Negligence.

In the citation at issue, Inspector Villahermosa found that the operator's conduct was highly negligent in character. (GX-12).

Standard 30 C.F.R. §100.3(d) provides the following:

> (d) Negligence. Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and

> practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. §103(d), Table X, the category of high negligence is described thusly: "The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances." Conversely, moderate negligence is shown when "[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances." Low negligence is served for situations where there are "considerable" mitigating circumstances.

I find that Respondent knew about the violation and that there were no mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) *see also* 30 U.S.C. §802(e) (an agent is "any person charged with responsibility for the operation of all or part of a…mine or the supervision of the miners in a…mine.").

With respect to the instant violation, the evidence shows that Respondent's agent, Vargas, had actual knowledge of this violation. There is no question that Vargas was an agent. His title was Industrial Mechanic Supervisor and he testified that he oversaw the work of the mechanics like Martinez. (Tr. 169). In fact, Vargas directed Martinez to climb on top of the mill. (Tr. 26-27). Villahermosa testified that when he arrived at the mill, Vargas was watching Martinez. (Tr. 40-41). Martinez and Vargas both conceded that Vargas was present and observed Martinez on top of the mill; albeit with the discredited explanation that Villahermosa caused him to be there. (Tr. 128, 145, 173). As a result, it is clear that Vargas, and therefore Respondent, was aware of the violation.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. I find that none existed. Therefore, I find the Secretary's designation of "high" negligence appropriate.

Respondent argued that there were mitigating circumstances. It noted again that precautions were taken for working atop the mill, including the installation of pad-eyes. *(Respondent's Post-Hearing Brief* at 11-12). While the installation of pad-eyes may have been a mitigating circumstance if they were used, the evidence here shows that the miner was not tied

off. (Tr. 24, 26, 28-29). The mere existence of a tie off point, if unused, does not mitigate Respondent's negligence.

Respondent also argued that Martinez followed all safety precautions until he was required to stop by Inspector Villahermosa. (*Respondent's Post-Hearing Brief* at 12). As noted *supra*, I do not find any reliable evidence exists to support a finding that Inspector Villahermosa framed Respondent. As a result, I cannot find the alleged conspiracy by MSHA to be a mitigating circumstance.

4. Penalty

Under the assessment regulations described in 30 CFR §100, the Secretary proposed a penalty of $9,122.00 for Citation No. 8269720. The Commission has affirmed that ALJs are not bound the Secretary's proposals. *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). However, the Commission also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id*. at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). However, having affirmed the Secretary's determinations in all respects, no deviation is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $9,122.00 with respect to this violation.

IV. CONTENTIONS OF THE PARTIES REGARDING CITATION NO. 8269721

With respect to Citation No. 8269721 (alleged failure to provide safe access), the Secretary asserts that Respondent violated 30 C.F.R. §56.11001, that this violation was reasonably likely to result in fatal injuries to one miner, that the violation was S&S, that it resulted from high negligence, and that it was an unwarrantable failure to comply. (GX-5)(*Secretary's Post-Hearing Brief* at 13-18). The Secretary also asserts that a penalty of $11,900.00 is appropriate. (Id.)

With Respect to Citation No. 8269721, Respondent asserts that the alleged violation was unlikely to result in any injury, that any injury sustained would be "lost workday/restricted duty" rather than fatal, and its actions would be better characterized as showing "low" or "no" negligence. (*Respondent's Post-Hearing Brief* at 14.) Presumably, Respondent would also prefer a reduction in the penalty.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CITATION NO. 8269721

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §56.11001.

On November 23, 2010, Inspector Villahermosa issued a 104(d)(1) Citation, No. 8269721, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> A safe access was not provided to work on top of #11 Mill. A welder climbed the area using the hand rails and mill structure to climb on top of the mill. The welder was exposed to sustaining serious or fatal injuries if he fell from approximately 7 feet to the ground. The Mechanical Supervisor showed a lack of degree of care since he directed the welder to work in the area and observed him access the area without taking any preventative or corrective actions. Mechanical Supervisor Carlos Vargas engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the lack of safe access to the top of the mill and directed the welder to access the area. Mr. Vargas also observed the welder climb using the rails and mill structure and did not take any actions to stop the welder. This was an unwarrantable failure to comply with a mandatory standard. The mine operator has been cited 9 times for this standard.

(GX-5).

The cited standard, 30 C.F.R. §56.11001 ("Safe Access"), provides the following:

> Safe means of access shall be provided and maintained to all working places.

30 C.F.R. §56.11001.

The Commission has held that this standard "comprises the dual requirements of providing and maintaining safe access to working places." *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (July 2002) (citation omitted). The Commission held that the second portion of that duty, to "maintain" safe access" is "an on-going responsibility … to ensure that a means of safe access is utilized." *Id*. In reading and applying the terms of section 56.11001, the Commission has utilized a "plain meaning" approach. *See e.g. Lopke Quarries, Inc.*, 23 FMSHRC 705, 707-708 (July 2001). In determining the plain meaning of 30 C.F.R. §56.11001, the Commission has previously approved of the using the definition of "safe" found in *Webster's Third New International Dictionary 1998* (1993), which defines "safe" as "secure from threat of danger, harm, or loss." *Western Industrial, Inc.*, 25 FMSHRC at 452. Therefore, the existence of a §56.11001 violation turns on whether access to a work area posed a danger to miners. *Id*. Because the cited standard is broadly worded, determining in a given situation whether a danger existed should consider whether "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the" hazard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

In the instant matter, The Secretary presented credible evidence that Respondent violated the cited standard, as described in the citation. There is undisputed evidence that Martinez was assigned to climb up the mill platform to perform repairs. (Tr. 116). Further, there is no question that Martinez used the handrails as a sort of makeshift ladder to climb up the mill. (Stip. 21) (Tr. 26-28, 119-125, 129-130, 173). In fact, Vargas saw Martinez climb up the handrails in this manner. (Stip. 22) (Tr. 35, 173). Villahermosa credibly testified that Martinez did not tie off with his harness as he climbed. (Tr. 28-29). Villahermosa further testified that this condition exposed Martinez to serious or fatal injury from a fall. (Tr. 30-32, 34). Such an injury could have been caused by falling from the handrail or from falling while higher up and hitting his head. (Tr. 119-123). The miner also could have fallen during descent from the mill. (*Secretary's Post-Hearing Brief* at 15).

A reasonably prudent person would have recognized that an untied miner, scrambling up a handrail while untied would face a hazard. Utilizing this method of accessing the top of the mill was unsafe. Therefore, the citation is valid.

In its brief, Respondent asserted several arguments to support its claim that this citation was invalid. (*Respondent's Post-Hearing Brief* at 7-9). However, those arguments are not supported by the evidence.

As with Citation No. 8269720, Respondent argued that both Vargas and Martinez consistently testified that Inspector Villahermosa had created the dangerous situation. (*Respondent's Post-Hearing Brief* at 7). Respondent also contended that Inspector Villahermosa's testimony regarding the access was unreliable. (*Id*. at 7-8). For the reasons discussed with respect to Citation No. 8269720 *supra*, I find that the substantial evidence does not support these arguments. To the contrary, I find that a preponderance of the evidence supports Inspector Villahermosa's credible testimony that Martinez used the unsafe access cited before Villahermosa had arrived at the mill. (Tr. 24, 26, 28-29, 96). Further, I find that Villahermosa's testimony, in contrast to the testimony of Vargas and Martinez, was highly credible.

Respondent also argued that the way in which the miner accessed the work area was safe. (*Respondent's Post-Hearing Brief* at 8-9) Respondent claimed that pads eyes were present and that Martinez claimed that he tied off while climbing. (Tr. 32, 123-124, 141-142) I credit the testimony of Inspector Villahermosa that Martinez was not tied off while climbing. (Tr. 96). I further credit the testimony of the inspector that even if the miner had been tied off, that he would have been exposed to a danger, albeit a slightly lesser one. (Tr. 32, 265). The cited condition occurred at an industrial work site, not at a jungle gym. There was absolutely no reason for a miner to be climbing on handrails or scrambling up the side of a mill. Even if Martinez had been tied off, it would still be inappropriate and unsafe for him to climb on the handrails and structure in this manner. A ladder, like ones provided at other mills at the mine, should have been provided for Martinez.

With respect to safety, Respondent also noted that Martinez's hands were empty as he climbed, that he maintained "three points of contact" and that items were handed up to him (rather than carried during the climb). (*Respondent's Post-Hearing Brief* at 9). The evidence

presented supports these assertions; however these issues are largely inconsequential to the outcome here. Even if Martinez's hands were empty and he was able to maintain "three points of contact" there was still a violation of the cited standard. The issue was that Martinez scrambled to the top of the mill using handrails. Even if his hands were free, he was exposed to a dangerous fall from the mill. Further, as noted by Judge Lewis in discussing a similar standard, "[n]othing in the Act, regulations, or case law provides an exception to the rule based on points of contact. Respondent cites to no legal authority for the proposition that three or four points of contact eliminates an imminent fall danger." *United Taconite, LLC*, 2014 WL 1010076, *supra*. Villahermosa testified that "three points of contact" is a standard used for otherwise safe access, not for scrambling up the side of equipment. (Tr. 258, 266).

Respondent also argued that Inspector Villahermosa's belief about the degree of danger was unreasonable. (*Respondent's Post-Hearing Brief* at 8-9). Specifically, it noted that the Inspector believed that Martinez was in danger of a serious injury even when he was only four feet off the ground. (Tr. 265). I credit the testimony of Inspector Villahermosa that a fall, even from as low as four feet, could pose a serious danger to a miner. However, I further find that this issue is largely academic. The evidence presented shows that the miner was exposed not only to a four foot fall, but a seven foot fall from climbing. As discussed at length with respect to Citation No. 8269720, such a fall would constitute a serious danger. As a result, whether a four-foot fall could cause a serious or fatal injury is irrelevant to the instant matter.

Respondent's final argument is that use of the handrails was not prohibited by MSHA's rules or regulations and that Respondent had used this method to climb for ten years. (*Respondent's Post-Hearing Brief* at 9). While it is true that the standard does not specifically state that climbing on handrails is prohibited, this is because the standard is broadly worded to encompass any unsafe access. The fact that this broad statement does not include a specific reference to climbing up the side of a mill is not fatal to this citation. Further, the Commission has held that the issue with respect to such a broadly worded standard is not actual notice, but whether a reasonably prudent person would recognize the danger. *Ideal Cement Co.*, *supra*. Even if Respondent had no prior notice that scrambling up the side of the mill was unsafe, it should have been readily apparent to anyone watching, including Vargas, that Martinez was in danger of falling. Therefore, Respondent's argument does not undermine the validity of this citation.

The preponderance of the evidence shows that the access provided was unsafe. Therefore, this citation was validly issued.

2. <u>The Violation Was Reasonably to Result in a Fatal Injury to One Miner And Was Significant And Substantial In Nature</u>

Inspector Villahermosa marked the gravity of the cited danger in Citation No. 8269721 as "Reasonably Likely" to result in "Fatal" injury to one person. (GX-5). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §56.11001 is applied is exposure to dangerous conditions while accessing a workplace. Here, the inspector credibly testified that a

fall while climbing up the mill would be reasonably likely to result in a serious, perhaps fatal, injury. (Tr. 30-32, 34). Specifically, Inspector Villahermosa testified that if Martinez had fallen while climbing up the handrails, he could have hit his head or neck. (Tr. 119-123). This type of fall could have resulted in a broken neck or fractured skull. (Tr. 34). Martinez could also have been injured as he reached the top of the mill and fallen from an even greater height. (Tr. 31-32, 34, 133). He could have also fallen during his descent. As the miner was untied and using handrails (and other structure) in an unintended fashion to climb, such injuries were reasonably likely to occur.

Respondent argued that such a fall would be possible, but would be less serious because the miner was tied off. (*Respondent's Post-Hearing Brief* at 12-13). As discussed at length *supra*, I found that Martinez and Vargas to be incredible witnesses as it relates to Martinez accessing the mill. I credit the testimony of Inspector Villahermosa that the miner was not tied-off when he first arrived and further that Martinez conceded that he had not tied off on his climb. (Tr. 24, 26, 28-29, 96). Further, given the unintended use Martinez made of the handrails and the mill, as well as the large amount of equipment and other items in the mill area, I find that even if Martinez was tied-off, he faced considerable hazards. Therefore, I affirm the Secretary's findings with respect to gravity.

Finally, only one miner was on top of the mill. (Tr. 24, 26). There was no indication that more than one miner would ever be working on top of this area. As a result, the preponderance of the evidence supports a finding that one person would be affected.

With respect to S&S, the first element - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. §75.11001.

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. As discussed *supra*, the cited condition contributed to the danger of a fall. The miner was scrambling up the side of a mill using handrails to a work area 7 feet above a platform (10 feet above the ground) without a tie-off. (Tr. 39, 46). The miner was reasonably likely to fall.

Respondent argued that the cited condition did not contribute to a safety hazard because climbing the structure was safe, even if other methods might have been safer. (*Respondent's Post-Hearing Brief* at 12). As discussed at length, Respondent's decision to allow Martinez to scramble up the side of the mill untied exposed the miner to a fall. This is not a conflict between two "safe" options, one preferred by the operator and one by the inspector. Respondent's method did *not* provide the requisite safety to the miner.

Respondent also argued that the cited condition did not contribute to a safety hazard because the miner used "three points of contact" and was tied. (*Respondent's Post-Hearing Brief* at 12). As noted before, the use of "three points of contact" does not transform an otherwise unsafe access into a safe access. As noted by the inspector, "three points of contact" is a safety precaution used for proper forms of climbing, like using ladders or stairs, not for scrambling up handrails. (Tr. 258, 266). Further, as discussed *supra*, I credited the testimony of Inspector Villahermosa that the miner was not tied off. However, I find that even if Martinez

was tied off, the miner's method of scrambling up the side of the mill on the handrails exposed him to a fall, which constitutes a safety hazard. Therefore, even if he were tied off, the second prong of *Mathies* would be met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The preponderance of the evidence establishes that the hazard contributed to in this matter would be reasonably likely to result in injury. As discussed *supra*, in the event of a fall from the side or top of the mill, a miner would be reasonably likely to suffer an injury, including a fractured neck or skull or other serious injuries. (Tr. 39, 46).

Respondent argued that the hazard contributed to by this violation created no likelihood of an injury because the miner was tied off. (*Respondent's Post-Hearing Brief* at 12). Once again, I credited the testimony of Inspector Villahermosa that the miner was not tied off. Further, even if the miner had been tied off, the unsafe climb still exposed the miner to a fall that would have result in an injury. Therefore, even if he were tied off, the third prong of *Mathies* would be met.

The fourth element - that the injury be of a reasonably serious nature - was also met. As discussed *supra*, the inspector credibly testified that a fall from the mill could result in serious, perhaps fatal injury. (Tr. 39, 46). A fatal injury (or a fracture neck) would be undoubtedly be serious. As a result, the fourth prong of *Mathies* is met.

As a result of these factors, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

3. Respondent's Conduct Displayed "High" Negligence and an Unwarrantable Failure.

In the citation at issue, Inspector Villahermosa found that the operator's conduct was highly negligent in character. (GX-5). The substantial evidence supports this designation.

With respect knowledge, the factual situation presented here is substantially similar to that in Citation No. 8269720. Specifically, a supervisor within in the definition provided in 30 U.S.C. 802(e) and *Martin Marietta Aggregates*, *supra*, witnessed the cited action and actually directed it. (Tr. 26-27, 40-41). Therefore, Vargas was clearly aware of the violation. Further, as a supervisor, Vargas' conduct was imputed to Respondent. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. I find that none existed. Therefore, I find the Secretary's designation of "high" negligence appropriate.

Respondent argued that there were mitigating circumstances. However, Respondent addressed those arguments in its brief to the issue of unwarrantable failure. As a result, those arguments will be discussed in the unwarrantable failure discussion *infra*.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding that if there is mitigation, an unwarrantable failure finding is inappropriate). *Emery Mining Corp.*, defines an unwarrantable failure, as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard, intentional misconduct, indifference, or serious lack of reasonable care. *Id*. at 2004; *see also Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995). The Commission formulated a six-factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). While each factor does not need to be present in order to find unwarrantable failure, all six factors must be considered. The Administrative Law Judge will consider each of those factors in turn:

1. Extent Of The Violative Condition

This particular condition occurred on a single, damaged mill at the mine. While Respondent had been cited for similar conditions in the past (as will be discussed *infra*), the instant violation was not particularly extensive.

2. The Length of Time of the Violation Existed

The evidence showed that the condition had existed for some time. The uncontested evidence shows that Martinez climbed the mill twice a month for two years. (Tr. 129-130). Therefore, the condition was quite lengthy.

3. Whether the violation is obvious or poses a high degree of danger

The violation at issue here was obvious and posed a considerable danger. Martinez scrambled up the side of the mill in plain sight and was, in fact, under the observation of Vargas. Climbing on equipment that is not intended for climbing is obviously a violation of the act. As discussed, *supra*, a reasonably prudent person would have been aware that this was a violation of the act.

Similarly, the evidence shows that the condition posed a high degree of danger. As noted in the gravity discussion, this condition was reasonably likely to result in fatal injuries to a miner and was S&S. There is no question that the condition posed a high degree of danger.

Respondent argued that the condition was neither obvious nor posed a high degree of danger because it "took every precaution" to ensure that the employees ascended safely. (*Respondent's Post-Hearing Brief* at 13). Those precautions included the harness, three points of contact, and free hands. (*Id*.). Of course, one precaution that Respondent failed to take was to provide a ladder or some other form of access that was intended to be used for climbing. Instead, the miner was required to scramble up the side of the mill using handrails and structure as a ladder. I find that Respondent exposed the miner to a dangerous fall as a result of this improvised access method. For the reasons discussed at length earlier, the un-tied harness, three points of contact, and free hands did not lessen this danger. Further, they did not make the

danger any less obvious, the miner was still scrambling up the side of the mill with no ladder at a dangerous height. Therefore, the evidence does not support Respondent's argument.

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

Respondent was aware that greater efforts were needed. The Secretary presented evidence that Respondent had been cited nine times in the past for similar violations. (*Secretary's Post-Hearing Brief* at 17). Past citations are relevant to the issue of whether Respondent had notice. *IO Coal* at 1353-1355. Therefore, Respondent had meaningful notice that the cited condition was not permissible and should have taken action to correct it.

Respondent argued that it did not receive notice because it had been climbing in this manner for 10 years without being told that it was unsafe. (*Respondent's Post-Hearing Brief* at 13). There is no requirement that an MSHA inspector explain to an operator each and every action that might constitute a violation of every standard. The nine previous citations should have given Respondent ample notice that it was doing something wrong.

5. The operator's efforts in abating the violative condition

The evidence shows that the condition was abated without delay.

6. Operator's knowledge of the existence of the violation

"It is well-settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition." *IO Coal Co.*, 31 FMSHRC at 1356-1357 (*citing Emery*, 9 FMSHRC at 2002-2004). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) *citing* (*REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). In fact, a supervisor's actual knowledge can be imputed to the Respondent for purposes of determining an unwarrantable failure, in addition to the penalty. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*. As discussed *supra*, the preponderance of the evidence shows that Vargas actually directed and witnessed Martinez's actions. Therefore, his knowledge can be imputed to Respondent. Respondent had actual knowledge of the existence of this violation.

In light of the length of time the violation had existed, the obviousness and high degree of danger posed by the condition, the notice Respondent received, Respondent's knowledge of the cited condition, and the fact that Respondent's actions are best characterized as "high" negligence, I find that this violation was an unwarrantable failure on the part of the operator.

4. Penalty

Having affirmed the Secretary's determinations in all respects, no deviation in the civil penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $11,900.00 with respect to this violation.

Defective Equipment Citation

I. SUMMARY OF TESTIMONY

Villahermosa was at the Cantera Canas Mine on August 26, 2010 and inspected the equipment. (Tr. 46-47). Usually, the person accompanying Villahermosa for the inspection organizes the equipment for examination. (Tr. 49-50). The inspections can occur at the shop area or out on the road. (Tr. 50). During this inspection, Villahermosa and the safety representative, Noe Arroyo, went to the road and waited for the trucks. (Tr. 51). This allowed them to inspect trucks while they were loaded, as required. (Tr. 50-51).

During that inspection Villahermosa issued Citation No. 8544130 (GX-15) for failure to take several pieces of defective equipment out of operation. (Tr. 47-49, 100-101). None of the equipment inspected had tags, markings, or was placed in an area indicating it was out of service. (Tr. 51). Villahermosa informed Arroyo of each violation and that that the overall inspection of mobile equipment was ineffective. (Tr. 57, 59-60). The maintenance shop coordinator, Horacio Terron learned about the conditions later, when he returned to the plant.[14] (Tr. 189). Terron was away from the plant periodically between July and October 2010 for private medical reasons, including the day of the instant inspection. (Tr. 198-199).

Inspector Villahermosa testified that two of Respondent's cranes had non-functioning parking brakes, deteriorated seats, no load charts, missing engine guards, and one had a seat belt unattached and lying on the floor. (Tr. 47, GX-16). When Villahermosa arrived, the seat belt for Crane 771 was located on the tire. (Tr. 55-56). Lack of seatbelt could result in serious injury in a collision. (Tr. 52). If the cranes were to run off the road or hit a berm, a miner could be thrown from the equipment and suffer a fatal injury. (Tr. 52,66). The miner could be run over by the equipment after ejection. (Tr. 66).

Inspector Villahermosa also found that a lack of load charts could result in too much weight being placed on the crane causing a collapse and fatalities. (Tr. 52, 66). However,

[14] Horacio Osvaldo Terron Vanga appeared at hearing and testified for Respondent. (Tr. 185). At the time of the hearing, Terron worked for Respondent and had done so since February 2004. (Tr. 186). He started at Respondent as a maintenance planner for the concrete fleet. (Tr. 186-187). He then worked as maintenance chief for the concrete division, maintenance manager for concrete and logistics, the Dessarrollos Multiples (quarry) division, and the coordinator of the maintenance shop in Ponce. (Tr. 187). At the time of the hearing he was the maintenance planner for the milling and packing division inside the plant. (Tr. 187). On August 26, 2010 he was the coordinator of the maintenance shop in the cement plant. (Tr. 188). In that capacity he would plan maintenance of mobile equipment in the quarry. (Tr. 188-189).

Respondent told Villahermosa that they would not load the cranes to the maximum capacity and he had no information to contradict that claim. (Tr. 106). Further, Terron learned in a personnel meeting that the operator had used the equipment for about 15 years and had not used a load chart in years. (Tr. 195-196). The operator was trained in the equipment and was used to working with it. (Tr. 196).

In Inspector Villahermosa's opinion, defective parking brakes would allow the crane to roll and strike someone if parked on a hill. (Tr. 52-53, 107-108). However, Villahermosa did not know if the equipment was used on grades. (Tr. 108). Further, the mine used "riggers" as brakes and these most likely would have prevented the vehicle form moving. (Tr. 108).

A defective guard on the crane could allow miners to contact moving parts. (Tr. 53).

The broken seats had existed for a long time, perhaps years and were in bad shape. (Tr. 108). Long-term use of seats without cushion could cause back problems. (Tr. 53, 108). Villahermosa did not recall being informed that Respondent sought new seats to comply with the standard. (Tr. 108).

One of the Pettibone cranes, 771, was parked behind the maintenance shop. (Tr. 102, 190-191, 205, 259-260). Terron testified that it was behind the shed since July 2010 because it had a leak on the bottle for the jacks and was waiting on spare parts. (Tr. 191-193). It was still there at the time of the hearing. (Tr. 193). The area behind the shed was where Respondent parked out-of-service equipment. (Tr. 191). This equipment may only be accessed by a certified mechanic under Puerto Rican law. (Tr. 192-193). Terron testified that it had been there, behind a green truck for several weeks before the inspection and had not moved when he returned to work after the inspection. (Tr. 192, 205). Terron testified that he told Bautista that the 771 crane was out of service in July and that he should not use it. (Tr. 200-201, 206). However, Terron could not be certain that Bautista did not use it when he was out. (Tr. 201).

No one told Villahermosa that the machine had been out of service since June 2010. (Tr. 103). Instead, the equipment operator, Bautista, told the inspector that the equipment was used when the other one, 774, was not working. (Tr. 103, 261-262). In fact, that day Villahermosa asked to inspect machines that would be used and Bautista led him to the 771 crane. (Tr. 260, 272). While he knew the equipment was behind the shed, the operator said it was used on more than one occasion, in June and August. (Tr. 260-261, 272-273). The miner's statement contradicted Terron's testimony. (Tr. 270). Villahermosa testified that operators, including Respondent, often argue that equipment is out of service if he is trying to inspect. (Tr. 269).

Whether the equipment was in use was not included in Villahermosa's notes. (Tr. 269). The fact that Bautista said the equipment was used weeks earlier was in the notes, just not the actual statement. (Tr. 269-270). Generally, Villahermosa does not include whether equipment is in use in his notes. (Tr. 272, 275). The operator determines what equipment is in service. (Tr. 273). He asks what will be in service so he can inspect it. (Tr. 272). If an operator says that equipment is out of service, he would ask why. (Tr. 272). He did not recall anyone telling him the equipment could be used on August 24-26. (Tr. 273-274). It was probably not used that day,

but it was used before. (Tr. 271). Further, on the day of the citation, as far as he could tell the 771 crane was ready to be used because it was not tagged. (Tr. 272).

Terron believed that at some point the cabin of 771 was removed. (Tr. 194). Without the cabin, it could not be used. (Tr. 194). He was not sure if anything else was removed. (Tr. 194). Villahermosa believed the crane had a cage when the citation was issued. (Tr. 102-103).

Next, Respondent's front-end-loader did not have safe access. (Tr. 53). Respondent had modified the loader so that it was no longer greased at floor level, but instead at the front of the machine. (Tr. 53-54). In order to reach the front, miners had to climb the loader. (Tr. 54). Some of the miners reached the loader by climbing a ladder or the tire. (Tr. 55). A fall from that point, seven feet high, could cause serious injury or death (depending on how the miner fell). (Tr. 54-55, 65-66, 104). Miners working on this equipment tied themselves to the mirror or handrail, but they could have fallen and hit the structure or, depending on the length of the line, the ground. (Tr. 54-55, 104-106). Such a fall was likely to occur and cause permanently disabling injuries, including severe cuts to the skull or broken bones. (Tr. 105-106). Terron testified that the lubrication technicians could lubricate the equipment by parking the loader close to the balcony and reaching it from there. (Tr. 194-195). However, he never saw anyone perform this task. (Tr. 195).

Respondent had two defective dozers; one was missing a front wiper and another had an uncharged fire extinguisher. (Tr. 66, 107, GX-16). Low visibility from a missing wiper could result in the equipment striking miners or other machinery causing injury to those inside or outside the machine. (Tr. 52, 66). The lack of a charged fire extinguisher could cause serious injury in the event of a fire. (Tr. 67).

Also, Respondent had a water truck with a defective parking brake. (GX-16). If the water truck's parking brake failed, it could result in someone being run over. (Tr. 66-67).

Finally, a haul truck was equipped with a faulty speedometer and fuel gauge. (GX-16).

Terron testified regarding the difficulty he experienced getting additional parts. (Tr. 196-198). While his duties included ordering replacement parts, another department handled the negotiations and purchasing. (Tr. 196). First, Terron would make a request for parts, which had to be authorized. (Tr. 197). Then the request went to the planning department for validation. (Tr. 197). Then the request went to the purchasing department where a negotiator would purchase the part. (Tr. 197). The validation and ordering process took 10 days and then the equipment has to come from the U.S. or another country. (Tr. 197). Then the part would go to the plant. (Tr. 197). Some parts, like for the Caterpillar, arrived more quickly than others. (Tr. 196). There was less support for the Pettibone Cranes because there were no dealers in Puerto Rico and the equipment was old (it was bought used and refurbished 15-20 years ago). (Tr. 197). It is harder to find replacement parts for older, discontinued equipment. (Tr. 198). The replacements were generally new, non-original parts that had to be adapted or modified to work. (Tr. 198). Sometimes the bases or supports had to be modified or adapted. (Tr. 198).

Villahermosa believed the cited conditions were reasonably likely to result in injury because the equipment had defects that affected safety, the conditions were not corrected, and the machines were still being used. (Tr. 65). The equipment operators and miners in the area were those exposed. (Tr. 68). This citation was marked as S&S because there was a lot of equipment with a lot of safety defects, and they were still being used. (Tr. 67).

Villahermosa believed that Terron and Guillermo Vasquez engaged in aggravated conduct because they received daily examination records. (Tr. 60-61, 67). With respect to the cranes, Bautista, completed a "daily inspection report" of the machines and submitted them to Terron as per Respondent's policy. (Tr. 62-63, 199-200). Such an inspection was supposed to occur on all equipment that was to be used that day and was supposed to check the security points (wipers, seatbelts, fire extinguishers, and other devices). (Tr. 199-200, 204, 270-271). Terron, as Bautista's supervisor, was tasked with collecting these reports and coordinating repairs of defective equipment. (Tr. 61-63). Bautista would leave the reports in Terron's office and he would review, but not sign, them. (Tr. 202, 206-207). If Bautista said the equipment was defective, Terron would get a mechanic to inspect it and then take it out of service. (Tr. 202, 207). Terron had the authority to do so. (Tr. 63-64, 202).

Terron reviewed the daily inspection report for the 771 Crane dated August 24, 2010. (Tr. 204). That report showed that the crane was defective. (Tr. 67-68). Specifically, that it had leaks in its hydraulic system, rusted wires, a broken cabin, and a broken seat. (Tr. 207-208). The leak was the reason the crane was removed from service in July. (Tr. 208). However, Terron did not take action to prevent exposure. (Tr. 67-68). In fact, that daily report says that the equipment was available for service. (GX-28, Tr. 204-205, 268-269). Bautista said that equipment was used when reported hazardous. (Tr. 260, 269) There were two crane inspections that day, showing that both cranes, not just 774, were available. (Tr. 262-263, 279).

Vasquez was the quarry coordinator and was a supervisor for other mobile equipment operators. (Tr. 64, 202-203). Vasquez also knew about these defects because his employees had turned in inspection forms. (Tr. 65). Both the miners and Vasquez stated that these forms were turned in. (Tr. 65). He also had authority to remove unsafe equipment from service. (Tr. 203).

Villahermosa believed Respondent was highly negligent because it was aware of the cited conditions and took no corrective action. (Tr. 68). He also believed this condition was an unwarrantable failure to comply because there were defects, Respondent continued to use the equipment, and miners were exposed to hazards. (Tr. 68). The equipment should have been repaired or removed from service. (Tr. 68).

II. CONTENTIONS OF THE PARTIES

The Secretary issued a citation following the August 26, 2010 inspection. This citation was issued for an alleged failure to take defective equipment out of service. (GX-15).

With respect to this citation, No. 8544130, the Secretary asserts that Respondent violated 30 C.F.R. §56.15005, that this violation was reasonably likely to result in fatal injuries to one miner, that the violation was S&S, that it resulted from high negligence, and that it was an

unwarrantable failure to comply. (GX-15)(*Secretary's Post-Hearing Brief* at 24-32). The Secretary also asserts that a penalty of $3,689.00 is appropriate. (*Id*.)

Respondent asserts that the alleged violation was unlikely to result in any injury, that any injury sustained would be non-fatal, and its actions would be better characterized as showing "moderate" negligence. (*Respondent's Post-Hearing Brief* at 16.) Presumably, Respondent would also prefer a reduction in the penalty.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That 30 C.F.R. §56.1400(c) Was Violated.

On August 26, 2010, Inspector Villahermosa issued a 104(d)(1) Citation, No. 8544130, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The mine operator did not ensure that defects on mobile equipment that affect safety were corrected in a timely manner to prevent the creation of a hazard to persons. The mine operator received the inspection reports and did not make any effort to correct the reported conditions. Some conditions were reported for several months without corrections or preventative actions taken while allowing the equipment to be operated with the defects. Not correcting hazards and allowing equipment to be used can lead to serious or fatal injuries. Horacio Terron (Maintenance Coordinator) and Guillermo Vazquez (Quarry Coordinator) engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that of the mobile equipment safety defects and allowed the equipment to be used by miners. This violation is an unwarrantable failure to comply with a mandatory standard.

(GX-15).

The cited standard, 30 C.F.R. §56.14100(c) ("Safety Devices and Maintenance Requirements"), provides the following:

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

30 C.F.R. §56.14100(c).

As Judge Weisberger noted in *Dix River Stone, Inc.*, "to show a violation of Section 56.14100(c) *supra*, the Secretary must establish 1) the existence of a defect, that 2) makes continued operations hazardous to persons, and 3) the machine was not taken out of service." 32 FMSHRC 1779, 1784 (Nov. 2010)(ALJ). In order to find a violation, each of those factors must

be met. *See e.g. North Idaho Drilling, Inc.*, 2013 WL 4140375, *9-10 (Aug. 7, 2013)(ALJ Manning) (finding a violation did not exist when there was a defect, the machine was not taken out of service, but continued operations did not expose miners to a hazard). In discussing a similar standard, the Commission stated that equipment is still in service if it "is located in a normal work area, fully capable of being operated." *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843, 845 (April 1981); *see also Mountain Parkway Stone, Inc.*, 12 FMSHRC 960, 963 (May 1990) (equipment was in use when it was "parked in the mine in turn-key condition and had not been removed from service.") The Commission found that allowing equipment to stay "parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives." *Id*. Therefore, the equipment does not have to be actually used, just be available for use.

In the instant matter, credible evidence establishes that there were several pieces of equipment at the mine that were defective. (*See Secretary's Post-Hearing Brief* at 24-26). Inspector Villahermosa testified at length about the various dangers that would arise from these defects. (Tr. 47, 52-55, 65-67, 104-108). In addition, Respondent was cited 12 times for these pieces of defective equipment and paid the levied fines. (GX-15). The payment of a civil penalty constitutes an admission that the cited conduct actually occurred and renders the citation final. *See Old Ben Coal Co.*, 7 FMSHRC 205, 209 (Feb. 1985). Finally, Respondent explicitly concedes in its brief that it was cited for defects in several pieces of equipment. (*Respondent's Post-Hearing Brief* at 16). Therefore, there is no issue as to whether defects existed or as to whether those defects were hazardous to persons under continued operations. The only question is if the equipment was taken out of service.

The Secretary presented credible evidence to support a finding that the equipment at issue here was not removed from service. Perhaps most persuasively, Respondent had conducted pre-operational examinations of the cited equipment. (Tr. 199-200)(GX-28). This is especially important because Respondent would only conduct pre-operational examinations on equipment that was going to be used that day. (Tr. 204-205). Therefore, under Respondent's protocols, there was no question that the defective equipment was "in use." It had been prepared for operation on the day of the inspection with every indication that it would be used.

Even without the pre-operational examinations, the evidence shows that this equipment was not removed from service. The evidence shows that the cited equipment was sitting in the regular work area. Inspector Villahermosa credibly testified that he conducted his inspection of the equipment in an active work area, so that he could see the equipment while loaded. (Tr. 50-51). Further, none of the equipment was marked "out of service" or placed in an area specifically marked for "out-of-service" equipment. (Tr. 51). Further, when Inspector Villahermosa inspected the equipment, no one told him that the specific pieces he was citing were not being used. (*Secretary's Post-Hearing Brief* at 28). This type of action would be reasonable if he was inspecting equipment that was actually removed from service. In fact, employees told Villahermosa that the equipment was recently operated. (Tr. 260-261, 269-270, 272-273).

Therefore, the preponderance of the evidence shows that the equipment was not removed from service, but actually in a working area, ready for use, and "available" under existing

protocol. In light of the failure to remove this equipment from service, and the fact that the equipment was defective and hazardous, I find that Respondent violated 30 C.F.R. §56.14100(c).

In its brief, Respondent asserted several arguments to support its claim that this citation was invalid. (*Respondent's Post-Hearing Brief* at 8, 16). However, those arguments are not supported by the evidence.

As with the Mill Citations, Respondent contended that the inspector's testimony was unreliable and could not form the basis of a finding that a violation took place. (*Respondent's Post-Hearing Brief* at 8). I find that there is no credible evidence to support this claim. I will address each instance of allegedly unreliable testimony from the inspector in turn.

First, Respondent noted that Inspector Villahermosa could not remember where he inspected the Pettibone Crane No. 771 and did not include that information in his notes. (*Respondent's Post-Hearing Brief* at 8). This assertion is based on Inspector Villahermosa's testimony. (Tr. 102). However, even though Villahermosa was unsure of the location of the Pettibone Crane, I find him credible. The issue for the inspector was whether Respondent violated a safety standard. He found that found that the crane was dangerously defective. (Tr. 47, 52-53, 55-56, 66, 107-108). He also found that it was not tagged out of service and was, in fact, given a pre-shift examination so that it could be used that day. (Tr. 51). Those were the relevant facts needed to find a violation of the cited standard. The location of the crane was not relevant to that issue. I find that it is natural that the inspector would not include the location in his notes and that he would not remember irrelevant details during the three years between the inspection and the hearing.

Respondent also questioned Inspector Villahermosa's credibility because he did not include in his notes that a miner told him the Pettibone Crane No. 771 was being used. Specifically, the inspector stated that a miner told him that the equipment had recently been used, but did not include the miner's actual statement in the notes. (Tr. 268-270). But this is not relevant. The equipment was ready for use and could have been used. In fact, Villahermosa asked Respondent's representative to take him to the active equipment and the miner brought him to the Pettibone Crane No. 771. (Tr. 260, 272). Again, Villahermosa credibly testified to the substantive issues in this matter, his failure to recall irrelevant trivia does not affect that credibility.

In addition to questioning Inspector Villahermosa's credibility, Respondent also argued that the citation was invalid because it was attempting to correct the problem. (*Respondent's Post-Hearing Brief* at 16). It argued that it tried to correct the problems, but did not have time. (*Id*.). There is no evidence, beyond Terron's self-serving testimony, that Respondent made any attempts to correct the cited conditions. (Tr. 196-198). There are no receipts, no work orders, and no invoices to show that repairs were being made. However, even if there were, Respondent would still have violated the cited standard. The standard does not require Respondent to make efforts to repair defective equipment. It requires operators to remove defective equipment from service. Here there was defective equipment that was still available for use. Even if all the replacement parts were sitting at Respondent's mine and there were concrete plans to repair the equipment the next day, Respondent still violated the standard by not removing the equipment

from service while the repairs were pending. Respondent's argument, even if supported by the evidence, would not undermine the validity of this citation.

2. The Violation Was Reasonably Likely to Result in a Fatal Injury to One Miner And Was Significant And Substantial In Nature

Inspector Villahermosa marked the gravity of the cited danger in Citation No. 8544130 as "Reasonably Likely" to result in "Fatal" injury to one person. (GX-15). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §56.14100(c) is applied is exposure to hazards related to defective equipment. Here, the inspector testified credibly testified that various defects in the equipment exposed miners to a reasonable likelihood of serious injury. With respect to the bulldozer, missing windshield wipers, in the event of low visibility or inclement weather, could impair the vision of the operator to the extent that he would be unable to see other miners walking or working in his vicinity resulting in a collision. (Tr. 66). With respect to the crane, the absence of seatbelts could cause an operator to be thrown from the cabin if he went over a berm or down a steep decline. (Tr. 66). Further, if the cranes' booms broke because the operator erroneously lifted loads that exceeded their capacity, the broken booms and the loads could cause serious or fatal injuries if they struck individuals in the vicinity. (Tr. 66). Defective brakes on those cranes or on the water truck could cause the vehicles to roll away and strike miners. (Tr. 66). All of these pieces of equipment were extremely heavy and would cause fatal injuries if they struck a miner. In addition, a defective guard on a crane could allow miners to contact moving parts. (Tr. 53). A miner falling from the front-end loader, even if tied, could suffer serious injury. (Tr. 54-55, 104-106). Deteriorated seats could also cause some long-term injuries to miners. (Tr. 53, 108). In short, the defective equipment exposed miners to a multitude of potential hazards, most fatal, that were reasonably likely to occur while the equipment was in service.

Only one miner would likely be affected by these conditions at any one time.

With respect to S&S, the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. §56.14100(c).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. The cited condition, failure to remove defective equipment from the mine, contributed to several discrete safety hazards. Miners were exposed to being struck by faulty equipment, to being thrown from and crushed by faulty equipment, to being crushed by broken equipment, to contacting moving equipment, to a fall, and to possible long-term back injury. (Tr. 47, 52-55, 65-67, 104-108).

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The preponderance of the evidence establishes that the hazard contributed to in this matter would be reasonably likely to result in injury. As discussed *supra*, if a miner was struck by these large pieces of equipment, the likely result would be a crushing or striking injury. (Tr. 52-53, 107-108, 66-67). Other pieces of equipment, like the

crane with a missing guard, exposed the miners to other types of injury. (Tr. 53-55, 65-67, 104-106, 108).

The fourth element -that the injury be of a reasonably serious nature - was also met. As discussed *supra*, the inspector credibly testified that in the event the hazards here were realized, miners being struck or crushed by large equipment would suffer fatal injury. Other defects exposed miners to serious, if less fatal, injuries. As a result, the fourth prong of *Mathies* is met.

As a result of these factors, I find that the Secretary proved the violation was S&S by a preponderance of the evidence.

Respondent argues that this citation should not be S&S because 10 of the underlying twelve violations were not S&S. (*Respondent's Post-Hearing Brief* at 16). Of course, that means that two of the underlying twelve violations were S&S. If the dangers associated with some of the underlying defects were S&S, then obviously failure to remove the defective equipment from service was also S&S. It would defy logic if the existence of defective equipment was S&S, but the presence and use of that equipment was not.

3. Respondent's Conduct Displayed "High" Negligence and an Unwarrantable Failure.

In the citation at issue, Inspector Villahermosa found that the operator's conduct was highly negligent in character. (GX-15). The substantial evidence supports this designation.

The facts establish that Respondent, through its agent, had actual knowledge of the cited condition. Terron was the coordinator of maintenance and a supervisor within in the definition provided in 30 U.S.C. 802(e) and *Martin Marietta Aggregates*, *supra*. (Stip. 9)(Tr. 188). The same was true of Vasquez, the quarry coordinator. (Tr. 65, 202-203). At the mine, equipment operator's would conduct pre-shift examinations and submit the reports to Terron and/or Vasquez. (Stip. 10) (Tr.65). Terron and Vasquez were responsible for correcting defects found as a result and could remove defective equipment from service. (Tr. 60-64, 67, 203). In the instant matter, the equipment operator, Bautista, submitted forms on August 24, 2010 that clearly stated that the Pettibone Crane No. 771 was defective.[15] (Tr. 67-68). Terron reviewed this report but did not take action to prevent exposure. (Tr. 67-68, 204). In fact, that daily report shows that the equipment was available for service. (GX-28) (Tr. 204-205, 268-269). Bautista stated that equipment was used when reported hazardous. (Tr. 260, 269) Vasquez was also aware of defects in the equipment. (Tr. 65). Therefore, Terron and Vasquez had actual knowledge that hazardously defective equipment was not removed from service. As supervisors, Terron and Vasquez's conduct was imputed to Respondent. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*.

[15] The report showed the crane had leaks in its hydraulic system, rusted wires, a broken cabin, and a broken seat. (Tr. 207-208). The leak was the reason the crane was removed from service in July. (Tr. 208). There were two crane inspections that day, showing that both cranes, not just 774, were available. (Tr. 262-263, 279).

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. I find that none existed. Therefore, I find the Secretary's designation of "high" negligence appropriate.

Respondent argued that there were mitigating circumstances. However, Respondent addressed those arguments in its brief to the issue of unwarrantable failure. As a result, those arguments will be addressed in the unwarrantable failure discussion *infra*.

The Secretary cited Respondent's conduct as an unwarrantable failure to comply with the cited standard. A preponderance of the evidence, as analyzed in through the *IO Coal* factors, supports this determination:

1. Extent Of The Violative Condition

The cited condition dealt with several different pieces of equipment. (Tr. 47-49, 100-101). Further, some of the equipment had more than one defect. (Tr. 47, 53, 68) (GX-16). This equipment was examined and reported to management, but it was placed into service or at least made available for service. (Tr. 67-68). The evidence supports the Secretary's characterization that Respondent had a "culture of neglect" with respect to the equipment at the mine. (*Secretary's Reply Brief* at 16). I find that the cited condition was extensive.

2. The Length of Time of the Violation Existed

The evidence showed that the condition had existed for some time. The evidence showed that, for example, the Pettibone Crane No. 771 was damaged for over a month, but remained in service. (Tr. 67-68, 204-205, 268-269)(GX-28). Further, Inspector Villahermosa testified that some of the deterioration in the equipment that he observed would have taken considerable time to develop. Therefore, the condition was quite lengthy.

3. Whether the violation is obvious or poses a high degree of danger

The violation at issue here was obvious and posed a considerable danger. As discussed at length *supra*, the dangerously defective equipment was highly likely to result in fatal or other serious types of injury. (Tr. 47, 52-55, 65-67, 104-108). Miner could have been struck or crushed by equipment, caught within equipment, thrown from equipment, and falling from equipment. The condition was also obvious. The defective equipment included easily visible conditions like missing seatbelts and warning signs. Further, the defects were actually observed during pre-shift examinations, indicating that they were obvious to a prudent examiner. (Tr. 67-68, 207-208)(GX-28).

Respondent argued that the condition was neither obvious nor posed a high degree of danger because it did its best comply with the standard, but did not have sufficient time. (*Respondent's Post-Hearing Brief* at 16-17). There is some evidence that Respondent had attempted to repair the defects, albeit in the form of self-serving testimony without documentation. (Tr. 196-198). However, Respondent was not cited for failure to repair equipment. It was not required under the cited standard to repair equipment. It was required to

remove defective equipment from service. Repair was optional. There is no indication in the evidence that Respondent made any effort to remove equipment from service. Instead, records show that the equipment was in regular work areas and was marked "available" on pre-shift reports. The evidence does not support Respondent's argument.

Respondent also argued that the equipment did not pose a danger because it was not actually used, notwithstanding the "available" marking on the pre-shift reports. (*Respondent's Post-Hearing Brief* at 17). It asserts that the body of those reports indicated that the equipment was not available. (*Id*.). As discussed *supra*, "removal from service" does not simply turn on whether the equipment is actually used. Even if the equipment cited here was not actually used (though the evidence supports a finding that it was), the violation was that the equipment was sitting in the regular work area in turn-key condition and was in no way marked as "out-of-service." In fact, Respondent's documentation indicated that this equipment was "available" and was examined in a way that only active equipment was examined. I find nothing in the body of any of the documents submitted that indicated that equipment otherwise marked as "available" was actually "unavailable." Therefore, the evidence does not support Respondent's argument.

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

Respondent was aware that greater efforts were needed with respect to the equipment. As noted, Respondent had, just days before the instant citation, been cited 12 times for failure to maintain mobile equipment. (GX-27). Further, Respondent knew from its own records (the pre-shift examinations) that it had extensive problems with its mobile equipment. Respondent had sufficient notice that the equipment it had marked "available" for use on the day of the citation was in no condition to be operated.

5. The operator's efforts in abating the violative condition

The evidence shows that the condition was abated without delay.

6. Operator's knowledge of the existence of the violation

As discussed at length in the negligence section, *supra*, Respondent's agents Terron and Vasquez had actual knowledge of the cited condition from the pre-shift reports. (Tr. 60-61, 67). A supervisor's actual knowledge can be imputed to the Respondent for purposes of determining an unwarrantable failure, in addition to the penalty. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*. Therefore, this knowledge can be imputed to Respondent. Respondent had actual knowledge of the existence of this violation.

In light of the extensive nature of the condition, the length of time the violation had existed, the obviousness and high degree of danger posed by the condition, the notice Respondent received, Respondent's knowledge of the cited condition, and the fact that Respondent's actions are best characterized as "high" negligence, the Administrative Law Judge finds that this violation was an unwarrantable failure on the part of the operator.

4. Penalty

Having affirmed the Secretary's determinations in all respects no deviation in the civil penalty is necessary. In fact, the proposed penalty is appropriate under the Act. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $3,689.00 with respect to this violation.

BCN Conveyor Citation

I. SUMMARY OF TESTIMONY

Villahermosa reviewed Citation No. 8643560 (GX-27), which was issued pursuant to previous violations. (Tr. 68-69). The initial citation, given on March 1, was issued because material was spilled along the BCN conveyor, creating unsafe, hazardous access to the area. (Tr. 68-69, 214). The problem was caused because the chute that lowered raw cement material from the conveyor was damaged, resulting in spillage. (Tr. 212-214).

Imilcen Rivera recalled that after the initial citation, she called someone to close off the area and then put a plan in place for the area to be cleaned.[16] (Tr. 214). Maintenance cleaned the spillage. (Tr. 214). Respondent then made a risk evaluation for the BCN conveyor and developed a protocol to correct the conditions. (Tr. 237). This included reconstruction of the roof of the chute which would take six months and cost $300,000.00. (Tr. 215, 237). It would take time to fix the condition because there was over 20,000 tons of raw material in the warehouse that needed to be emptied before the belt could be reached. (Tr. 215, 238). The contractor's plans were complicated and made on a month-to-month basis while the plant adapted. (Tr. 215). The condition was corrected in August 2012. (Tr. 238-239).

Rivera testified that in the interim, the area was constantly cleaned because if the material too high, it would stop the conveyor. (Tr. 216, 219). They had someone check the conditions each day and clean the mounds of material with a shovel and bucket. (Tr. 219, 242). There were miners in the cited area, but only to prepare the area to be cleaned. (Tr. 239).

Respondent received five time abatement extensions because it was unable to correct the problem. (Tr. 69). Rivera testified that several inspections found that the condition still existed. (Tr. 215-216). Each time, Respondent closed and cleaned the walkway. (Tr. 216, 237-238). After the fifth extension, and a month before the instant citation, Villahermosa saw that the material was still present and footprints were in the material so he issued an Order. (Tr. 70-71, 241). Respondent had placed yellow tape around the area, but there were still footprints in the material. (Tr. 71). Collazo felt that the abatement periods given were too short, especially considering Respondent told MSHA the condition would take six months to repair. (Tr. 241). Collazo testified that the inspector knew on each of these subsequent inspections what

[16] Imilcen Rivera appeared at hearing and testified for Respondent. (Tr. 210). Rivera worked at Respondent as a Safety Coordinator and had done so for a year and eight months. (Tr. 210). Before that he had worked as a safety coordinator for Marlin, a contractor, for nine years. (Tr. 210-211). Rivera's nickname is Emily, which appears on some forms. (Tr. 211-212).

Respondent was trying to do. (Tr. 238). If miners were required to leave this area until MSHA verified that the condition was corrected, Respondent's business would grind to a halt. (Tr. 241).

With respect to Citation No. 8643560, Villahermosa once again observed footprints in the material and broken tape. (Tr. 71-74, 216). The area was not closed off and there was about two feet of material with footprints in it (though they did not measure it). (Tr. 216-217). Rivera testified that there were two footprints; the first was at the beginning of the pile and maybe half an inch deep and the second was farther in, but shallower and partial. (Tr. 217-218, 220-221). Rivera believed that someone had stepped in, not put their full weight in, and stepped out (she was not present to see them made and could not be sure). (Tr. 218, 220-222). There was no third footprint in the material. (Tr. 221). Villahermosa saw more than two; he saw a trail. (Tr. 263). Collazo told Villahermosa that the footprints were present because miners went over the area to clean it. (Tr. 264). Villahermosa told Collazo that this was improper because it exposed miners to the hazard and that miners should have begun cleaning at the front. (Tr. 264). Respondent had not complied with the Order. (Tr. 71).

Miners could have slipped and hit structure or twisted an ankle or wrist. (Tr. 75). Laborers and mechanics were affected when traveling through the area. (Tr. 74-75).

Respondent was highly negligent because miners continued to access the area in an unsafe manner. (Tr. 74).

II. CONTENTIONS OF THE PARTIES

The Secretary issued a citation following the above-described inspection. This citation was issued for an alleged failure to correct or limit exposure to a previously cited hazard. (GX-27).

With respect to this citation, No. 8643560, the Secretary asserts that Respondent violated Section 104(b) of the Act, that this violation had no likelihood to result in injuries to a miner, and that it resulted from high negligence. (GX-27)(*Secretary's Post-Hearing Brief* at 32-34). The Secretary also asserts that a penalty of $5,000.00 is appropriate. (*Id*.)

Respondent asserts that the alleged violation would be better characterized as showing "low" negligence. (*Respondent's Post-Hearing Brief* at 19.) Presumably, Respondent would also prefer a reduction in the penalty.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. <u>The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That 30 U.S.C. §814(b) Was Violated.</u>

On June 20, 2012 Inspector Villahermosa issued a 104(a) Order, No. 8643560, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The mine operator continued to allow personnel to transit along conveyor BC-N with approximately 2-1/2 feet of spilled material even though a 104(b) Order No. 8643534 for non-compliance was issued by MSHA on May 24, 2012. His order required the walkway next to the conveyor to withdrawn from service until the spilled material was removed and a safe access is obtained. Foot prints were observed on top of the spilled material indicating a person or persons transited the area. Area was not closed off. This condition has not been designated "significant and substantial) because the conduct violated a provision of the Mine Act rather than a mandatory Safety or health standard

(GX-27).

The cited Section, 30 U.S.C. §814(b) ("Citations and Orders") provides the following:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds(1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and(2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. §814(b).

The Secretary presented credible evidence that Respondent was issued a 104(a) citation regarding the BCN conveyor on March 1. (Tr. 68-69, 214)(GX-27). Further, Inspector Villahermosa credibly testified that, despite five extensions, Respondent failed to totally abate the cited condition and was issued a 104(b) Order on May 24, 2014. (GX-27). A follow-up inspection showed Respondent had not complied with the 104(b) Order, leading to the instant Order. In its brief, Respondent did not contest the validity of this Order and explicitly stated that it did not intend to dispute any finding by the Secretary, save for the negligence designation. (*Respondent's Post-Hearing Brief* at 18). In light of this fact, and the evidence presented, I find that this citation was valid.

2. <u>The Violation Posed No Likelihood of Injury.</u>

Inspector Villahermosa marked the gravity of the cited danger in Citation No. 8643560 as "No Likelihood" to result in "No Lost Workdays" injury" to a miner. (GX-27). The evidence supports this designation. (Tr. 68-69, 74-75, 214). In its brief, Respondent did not contest gravity designation of this Order and explicitly stated that it did not intend to dispute any finding by the Secretary, save for the negligence designation. (*Respondent's Post-Hearing Brief* at 18). Therefore, I find the preponderance of the evidence supports the Secretary's findings.

3. Respondent's Conduct Displayed "High" Negligence.

In the citation at issue, Inspector Villahermosa found that the operator's conduct was highly negligent in character. (GX-27). The preponderance of the evidence supports this finding.

With respect to knowledge, Respondent absolutely knew the condition existed. Inspector Villahermosa testified that he had issued the initial citation for the messy walkway over a month earlier and further, had been back to the mine five times to extend the abatement period. (Tr. 68-69, 214). Further, Respondent's witness, Rivera, testified that they were attempting to correct the condition but, for various reasons, were unable to do so. (Tr. 214-215, 237-239). Rivera was the Safety Coordinator for Respondent and therefore a supervisor. (Tr. 210). Her knowledge of the cited condition is imputed to Respondent. Therefore, there is no question that Respondent had knowledge that it had failed to abate the cited condition and had failed to comply with the previous Order.

Therefore, the only issue remaining is whether there were any mitigating circumstances. The preponderance of the evidence shows that there is not. Respondent simply failed to comply with the Order and failed to abate the initial citation.

Respondent presented several putative mitigating factors with respect to this order. However, none of those arguments were compelling.

First, Respondent argued that it "did its best" to cordon off the area and keep miners out. (*Respondent's Post-Hearing Brief* at 18). Respondent noted that some miners had been in to bar the area or correct conditions. (Tr. 216, 219, 242, 239). This is not a mitigating factor. Under the 104(b) Order issued on May 24, 2014, Respondent was not permitted to access the cited area until the spilled material was removed and safe access maintained. Its failure to do so is the crux of the citation. Any efforts to cordon off the area were wholly ineffectual. Miners were entering the area and leaving footprints. (Tr. 71-74, 216, 241). This condition occurred on two separate occasions. (Tr. 70-74, 216). When actions taken to prevent, correct, or limit exposure to hazards are grossly inadequate, this is not mitigation. *See e.g. Maple Creek Mining, Inc.*, 26 FMSHRC 539, 555 (Aug. 2005)(ALJ Bulluck). Therefore, Respondent's efforts here were not mitigation.

Next, Respondent argued that a high negligence designation was inappropriate because there were only a few footprints in the material. (*Respondent's Post-Hearing Brief* at 18). However, Inspector Villahermosa credibly testified that there was a "trail" of footprints through the area. (Tr. 263). Therefore, the preponderance of the evidence does not support Respondent's assertion. Perhaps more importantly, this was the second time Respondent had failed to keep miners from this area. The number of times miners were exposed to danger is far more significant that the number of footprints in the material. Finally, the argument seems to be that Respondent only violated that May 24, 2014 104(b) Order a little bit and therefore was less negligent. This, of course, is not mitigation. Respondent is required to comply with all health and safety standards as well as the Order issued pertaining to them.

Next, Respondent argued that it was impossible for the mine to close the plant, because it needed to get 20,000 pounds of "clinker" out of the warehouse before the damaged chute could

be serviced. (*Respondent's Post-Hearing Brief* at 19). Respondent was never ordered to close the entire mine. Respondent was ordered to keep the walkway closed. (Tr. 70-71, 241) (GX-27). Respondent could have had full use of the walkway if, at any time, it had demonstrated to MSHA an ability to keep the walkway clear and safe for miners or completely barred. This could have been as easy as keeping a miner at the walkway to shovel it clean (without climbing on top of the material). In fact, Respondent received five extensions in its efforts to achieve this goal and was unable to do so. Further, even if Respondent was forced to close its plant, I see no reason why this would mitigate its negligence in failing to keep the area clean. Therefore, this is not mitigation.

Finally, Respondent argued the economic situation in Puerto Rico was dire and closing the plant would cause hardship. (*Respondent's Post-Hearing Brief* at 19). Once again, Respondent was not required to close its mine; it was required to keep a single walkway clean or barred. More importantly, this argument is completely unrelated to negligence. The economic situation could, in fact, be dire and Respondent could still be liable under the Mine Act. Respondent presented no evidence that this order or the penalty flowing from it would prevent the company from staying in business. Perhaps most importantly, the health and safety of miners (the "most precious resource" in the mining industry) is not an economic commodity that fluctuates in value with the markets. 30 U.S.C. §801(a). There is no ticker symbol on the Dow Jones for miners' lives. The lives of miners are as valuable in good economic times as bad. I see no reason to find mitigation on these grounds.

In light of the foregoing, I affirm the inspector's finding of "high negligence."

4. Penalty

In light of the fact that the Administrative Law Judge has affirmed the Secretary's citation as issued, it is appropriate to affirm the assessed penalty as issued. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $5,000.00 with respect to this violation.

ORDER

It is hereby **ORDERED** that Citation/Order Nos. 8629720, 8629721, 8544130, and 8643560 are **AFFIRMED**.

Respondent is **ORDERED** to pay civil penalties in the total amount of $29,711.00 within 30 days of the date of this decision.[17]

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

[17] 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

Distribution:

Terrence Duncan, Esq., U.S Department of Labor, Office of the Solicitor, 201 Varick Street Room 983 , New York, NY 10014

Manuel A. Quilichini, Esq., Quilichini Law Offices, PO Box 194321 San Juan, PR 00919-4231

/tjb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th St., Suite 443
Denver, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

May 23, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDINGS Docket No. SE 2013-50-M A.C. No. 40-03094-303407
v.	:	Docket No. SE 2013-64-M A.C. No. 40-03094-304286
WINN MATERIALS LLC, Respondent.	:	Mine: Winn Materials, LLC
WINN MATERIALS LLC, Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. SE 2012-76-RM Citation No. 8637419; 11/17/11
	:	Docket No. SE 2012-77-RM Order No. 8637420; 11/17/2011
	:	Docket No. SE 2012-78-RM Order No. 8637421: 11/17/2011
v.	:	
	:	Docket No. SE 2012-79-RM Order No. 8637422; 11/17/2011
	:	Docket No. SE 2012-80-RM Order No. 8637423; 11/17/2011
	:	Docket No. SE 2012-81-RM Order No. 8637424; 11/17/2011
	:	Docket No. SE 2012-82-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION (MSHA), Respondent.	:	Order No. 8637425; 11/17/2011 Mine ID: 40-03094 Mine: Winn Materials, LLC

DECISION

Appearances: Angele Gregory, Office of the Solicitor, U.S. Department of Labor
618 Church Street, Suite 230, Nashville, TN 37219 for Petitioner

Justin Winter, Adele Abrams P.C.,
4740 Corridor Place, Suite D, Beltsville, MD 20705 for Respondent

Nicholas Scala, Adele Abrams P.C.,
4740 Corridor Place, Suite D, Beltsville, MD 20705 for Respondent

Before: Judge Simonton

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Winn Materials, LLC at the Winn Materials mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). These cases include seven citations and orders with a total proposed penalty of **$547,100.00**. The parties presented testimony and documentary evidence at the hearing held in Nashville, TN beginning January 8, 2014.

I. INTRODUCTION

Winn Materials, LLC (Respondent) operates an above ground limestone aggregate mine, the Winn Materials mine (the "mine") in Clarksville, Tennessee. Tr. 25. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Winn Materials, LLC is the operator of the mine and that its operations affect interstate commerce and it is subject to the jurisdiction of the Mine Act. Tr. 9-10.

An anonymous caller filed a hazard complaint at 7 PM on November 16, 2011, alleging multiple safety violations at Respondent's Winn Materials mine, including unguarded tail pulleys on the "west side" of the plant. Tr. 11, 27. Acting on the report, MSHA Inspector Michael Hollis inspected the mine the next afternoon, November 17, 2011. Tr. 34-35. Although Hollis was unable to confirm any of the other hazard complaints, he did identify seven tail pulley locations that were either inadequately guarded or completely missing the required guard. Tr. 150. At the time of the inspection, only one of the unguarded belts was allegedly running and no workers were observed in the vicinity of any of the missing guards. Tr. 107, 157. However, none of the conveyor belts were locked or tagged out prior to the inspection. Tr. 311. On the basis of these observations, Hollis issued one 104 (d)(1) citation, five 104 (d)(1) orders for alleged violations of 30 CFR § 56.14107(a) and one 104 (d)(1) order for an alleged violation of 30 CFR § 56.14112(b). Tr. 13-14. During the penalty review process, Hollis eventually determined that all of the violations were the result of Respondent's reckless disregard for the Mine Act and worker safety. Tr. 179-80. Hollis and MSHA supervisors also determined that

Citation No. 8637419 and Orders Nos. 8637420 and 8637422 were 110(b)(2) flagrant violations. Tr. 13.

Respondent filed a notice of contest for each of the seven alleged violations on November 22, 2011. At hearing, Respondent did not contest any of the underlying violations, but did contest the gravity, negligence, unwarrantable failure and flagrant designations. Resp. Br., 1-2. Respondent also argued that the assessed penalties are highly excessive. Resp. Br., 2.

I have prepared a Statement of Law outlining the Commission's instructions regarding: 1) Statute Interpretation; 2) Burden of Proof; 3) Significant and Substantial (S&S) violations; 4) Unwarrantable Failure; 5) Flagrant Violations and 6) Civil Penalty and Special Assessment. I have followed these guidelines for each of the seven contested violations. As the parties generally constructed their arguments regarding the gravity, negligence, 104(d)(1) and 110(b)(2) designations in a cumulative fashion within their post-hearing briefs, I have set forth my findings by citation element rather than by individual citation.

For the reasons stated within, I affirm the underlying violation for all seven citations, but find that the Secretary failed to show, in light of Respondent's credible evidence to the contrary, that any of the violations were S&S or the result of reckless disregard on behalf of Respondent. As such, I have modified all seven citations and orders from 104(d) (1) actions to 104(a) citations. Additionally, having found that Citation No. 8637419, Order No. 8637420, and Order No. 8637422 were neither S&S nor the result of Respondent's' reckless disregard, I have also removed the 110(b)(2) penalty designations from these citations. After accounting for these findings and considering the six statutory penalty criteria, I have ordered Respondent to pay a total civil monetary penalty of $44,000.00**.**

II. STATEMENT OF LAW

A. Statute Interpretation

The Commission has stated that:

> the operator is entitled to the due process protection available in the enforcement of regulations... When a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.

Energy West Mining Co., 17 FMSHRC 1317-18 (internal citations omitted).

However, the Secretary is not required to provide the operator actual notice of its interpretation of a mandatory safety standard, rather:

> "the Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. The Commission has summarized this test as '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."

Energy West Mining Co., 17 FMSHRC 1318 (internal citations omitted).

In the context of guarding violations, the Commission has stated,

> "We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis."

Thompson Bros. Coal, 6 FMSHRC 2094, 2097 (Sept 1984).

B. Burden of Proof

The Commission has long held, "In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation." *Jim Walter Resources, Inc*., 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992).

The Commission has described the Secretary's burden as:

> the burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence.

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153. Any such inference, however, must be inherently

reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ Feldman).

C. Significant and Substantial

A violation is Significant & Substantial (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 Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981) (holding that S&S language of Section 104(d) of the Mine Act was not surplusage and required more than a showing of the violation itself.)

In order to uphold a citation as S&S, the Commission has held that 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. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operation. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). However, the Secretary "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (holding that failure to maintain emergency equipment was S&S despite low likelihood of emergency occurring); See also *Musser Engineering, Inc. and PBS Coals*, 32 FMSHRC 1257, 1280-81 (Oct. 2010)(stating that the third element of the Mathies test requires a showing that the hazard contributed to by the violation is reasonably likely to result in an injury).

The Commission has mandated that ALJs perform a full analysis of all four *Mathies* factors based on specific evidence, including the likelihood of an injury producing event occurring. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678 (Dec. 2010). The Commission has also maintained that an S&S determination must be based on more than a showing that a violation 'could' result in an injury. *Wolf Run Mining Co.*, 32 FMSHRC 1678 (quoting *Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995)).

As the Commission decided to analyze the hazards of unguarded tail pulleys on a case-by-case basis in *Thompson Bros. Coal*, recent S&S determinations involving 56.14107(a) violations appear to turn primarily upon the degree of exposure created by the lack of guarding. *See e.g. Stanley Mineral Resources*, 34 FMSHRC 1500, 1507 (ALJ Barbour) (June 2012) (holding 56.14107(a) a violation was S&S when employee was observed cleaning underneath an unguarded pulley with a shovel); *Holcomb*, 33 FMSHRC 1435, 1447 (ALJ Manning) (June

2011) (holding a 56.1407(a) violation was non- S&S when operator satisfactorily demonstrated that all cleaning activities were conducted between shifts).

D. Negligence

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X. Deliberate action contrary to the Mine Act with the conscious knowledge that such activity may seriously endanger workers constitutes reckless disregard. *Roxcoal, Inc.*, 36 FMSHRC 625, 634 (ALJ Barbour) (March 2013) (finding reckless disregard when electrical foreman disabled safety switch to a high voltage electrical panel so that workers could access panel components while they were energized).

E. Unwarrantable Failure

Section 104(d)(1) of the Mine Act states:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard,… and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "willful intent", "indifference," or the "serious lack of reasonable care." *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 193-94 (February 1991).

The Commission considers the following factors when determining the validity of 104(d)(1) and 104(d) (2) orders: (1) the length of time that the violation has existed and the extent of the violative condition, (2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator's efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

F. Flagrant Violations

Under Section 110 (b)(2) of the Mine Act, the Secretary may assess a civil monetary penalty of up to $220,000.00 for "flagrant" violations. Section 110 (b) (2) defines a "flagrant" violation as a:

> "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

30 USC § 820(b).

To date, the most comprehensive analysis of Section 110 (b)(2) of the Mine Act is set forth in *Stillhouse Mining*, 33 FMSHRC 778, 802 (March 2011)(ALJ Paez). Relying upon the language of the statute, the ALJ stated that the Secretary must show the following four elements in order to sustain a 110(b)(2) action: (1) A reckless or repeated failure to make reasonable efforts; (2) A known violation of a mandatory health or safety standard; (3a) That substantially and proximately caused; or (3b) Reasonably could have been expected to cause; (4) Death or serious bodily injury. *Stillhouse Mining*, 33 FMSHRC 802.

For the purposes of 110(b)(2) actions, reckless behavior is defined as a conscious or deliberate disregard of an unjustifiable risk of death or serious bodily injury. *Id.* at 805. The Secretary need not establish that MSHA had previously cited the operator for the violative condition. However, the Secretary does need to demonstrate than an individual "in a position to protect employee safety failed to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Cougar Coal, 25* FMSHRC 513, 517 (Sept. 2003). The likelihood of a resulting serious injury is evaluated under the specific set of circumstances present during the violation. *Id.*

G. Penalty Assessment

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider six statutory penalty criteria:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) 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).

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that includes consideration of negligence and gravity finding and permits proposed penalty assessments up to $70,000.00 per citation. 30 CFR 100.3: Table 1- Table XIV. In these cases, the Secretary has relied upon 30 CFR 100.5, and submitted specially assessed penalties for each citation, relying upon the multiple unguarded pulleys found at the mine as justification for the increase in penalty amount beyond the standard penalty calculation. Sec'y Proposed Assessment Docket SE 2013-50 & 64: Narrative Findings For A Special Assessment. Additionally, the Secretary has relied upon Section 110(b)(2) to designate Citation No. 8637419 and Order Nos. 8637420 and 8637422 as flagrant violations and assigned penalty amounts in excess of the Section 110(a)(1) cap of $70,000.00. Sec'y Proposed Assessment Docket No. SE 2013-64: Narrative Finding for a Special Assessment; Sec'y Br. 30-31.

For all penalty assessments, the Secretary bears the burden of establishing the proposed penalty is appropriate based upon the statutory criteria of Section 110(i) of the Act. *In re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 239, 241 (ALJ Broderick) (January 1992) (Order). Similarly, for specially assessed penalties in excess of the standard penalty calculation, the Secretary has the burden of establishing the existence of aggravating factors to justify such an increase. *S&M Construction, Inc.*, 18 FMSHRC 108, 1052-53 (ALJ Koutras) (June 1996); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172, 181 (ALJ Miller) (January 2013).

III. PLANT OPERATION

Respondent's above ground limestone mine includes a maintenance shop, office, scale house, pit quarry, secondary plant and stockpiles. Tr. 25, 203-04. Raw shot rock is transported from the quarry pit to the primary crusher. Tr. 191. The majority of the processed shot rock is then transported to the secondary plant for further processing into commercial finish products. Tr. 192. The secondary plant has a number of conveyor belts, screens, and crushers. Tr. 191, 218, 235. The secondary plant is divided into a wet and a dry side and different conveyor belts can be run independently depending on what products are desired. Tr. 57. It is not necessary for all belts to run in order for the plant to "operate". Tr. 57. The wet side of the plant uses water to process the material and the ground surrounding some conveyor belts is saturated to the point that is difficult to walk in certain areas. Tr. 307, 314.

The secondary plant is staffed by seven or eight workers during a normal shift. Tr. 203-04. The secondary plant operator controls the plant from an elevated control room where switches control all the conveyors and crushers. Tr. 203-04. Two skid steer operators work continuously to clean the spillage around crushers and conveyor belts. Tr. 204, 207. The skid steer operators are enclosed in a protective cab and use an extended rake attachment to clean around underneath the conveyor equipment. Tr. 207; Resp. Ex. 4, 3-4. The skid steer is more efficient than manually cleaning by hand. However, with the extended rake, the sensitivity of the controls lead to frequent guard damage. Tr. 214, 304, 329-30.

Front end loader operators load out finished product from stockpiles at the perimeter of the secondary plant to customer trucks. Tr. 204. A water truck operator applies water to both the haul paths and occasionally uses a water cannon to clean out from underneath conveyor belts.

Tr. 208. Due to the high pressure of the water cannon, the water truck does not have to come closer than 30' to the conveyor belt. Tr. 209. No employees walk the secondary plant on a regular basis but foot traffic is not specifically prohibited by Respondent's Safety Policy. Tr. 209, 215, 274.

Routine maintenance and greasing of the conveyor belts is performed between shifts while the belts are de-energized. Tr. 200. All conveyor belts are equipped with extended grease ports that allow the rollers to be greased without removing the guard. Tr. 223. The maintenance team generally travels the secondary plant in a work truck and only approaches a belt for repairs after it is de-energized and locked out. Tr. 220. The maintenance crew has the authority to lock out belts when needed and is expected to initiate necessary repairs without waiting for upper management approval. Tr. 303.

A belt is shut down when the control switch at the control tower is turned off and the belt is not moving. Tr. 259. A belt is de-energized when the controlling circuit breaker is switched off and power is not available to drive the belt even if the control tower switch is put into drive mode. Tr. 259. A belt is locked out and tagged out when the controlling circuit breaker is switched off and locked out with a physical lock. Tr. 259. Respondent conducts regular weekly safety meetings and had discussed lock-out tag-out procedures and conveyor belt safety in the months prior to the November 17 hazard complaint. Tr. 197-99; Resp. Ex. 3, 1-6. At the time of the inspection, the on-site foreman for the secondary plant was Jeremy Childress. Tr. 188. Sean Cotham was the area operations manager with ultimate responsibility for Respondent's mine at the time of the inspection. Tr. 187-88.

IV. TESTIMONY

A. The Secretary

Inspector Hollis testified regarding his observations at the mine and interactions with Respondent's management on November 17, 2011. Hollis stated that on Nov 17, 2011, his field office notified him of a hazard complaint. Tr. 27. Hollis explained that he reviewed the complaint documents and then met with the complainant who asked to remain anonymous. Tr. 28-29. The complainant claimed, among other allegations, that tail pulleys at the west side of the plant were not guarded. Tr. 29; Sec'y Ex. 1. Hollis then traveled to Respondent's plant and first notified Foreman Childress and then shortly thereafter, Operations Manager Cotham of the hazard complaint. Tr. 32-33. Hollis, accompanied by Cotham and Childress, proceeded to inspect the wet side secondary plant and first identified a missing guard at the tail pulley of the "10's" belt. Tr. 36. Hollis stated that the guard for the 10's belt was completely missing and that he issued Citation No. 8637419 for this condition which is a violation of 56.14107(a). Tr. 41.

Hollis stated that when he asked Cotham why the tail pulley was not guarded, Cotham responded "production needs," but also indicated that materials had been ordered to replace the 10s guard. Tr. 62-63. Hollis stated that the 10's belt was a fluted tail pulley located 6 inches off the ground. Tr. 46-47. Hollis explained that fluted tail pulleys are particularly dangerous as the flutes will draw a worker's entire body into the conveyor belt if a worker becomes entangled in the belt. Tr. 58-59. Hollis stated that the muddy and sloppy ground around the 10's belt

increased the possibility of a worker tripping and falling into the unguarded conveyor belt. Tr. 48. Hollis stated that while the 10's belt was not running at the time of the citation, Cotham informed him the belt was not locked out. Tr. 56.

Hollis also issued the following orders:

Order No. 8637420 for the lack of guarding at the wet side return conveyor. Tr. 76. Hollis testified that the fluted tail pulley at this location was completely unguarded and located approximately two and a half feet above ground level. Tr. 77. Hollis indicated that this conveyor belt was not running at the time of the inspection but that the belt was "operable." Tr. 78.

Order No. 8637421 for an alleged violation of 30 CFR 56.14112(b) after observing an insufficiently guarded tail pulley on the return wash-plant conveyor belt. Tr. 93, 98. Hollis stated that while the sides and top of the conveyor belt guard were intact at this location, the back of the guard was missing at the return point and referenced an inspection photo taken of the return wash plant conveyor belt. Tr. 93; Sec'y Ex. 13. Hollis stated that the belt was not running at the time of the inspection but that the belt was operable. Tr. 98.

Order No. 8637422 for an unguarded tail pulley at the blend conveyor belt. 102, 105. Hollis testified that this conveyor belt was moving rapidly at the time of the inspection and that the belt was located approximately two feet above ground level. Tr. 107-108. Hollis explained that there was some partial guarding on one side of the conveyor belt but that the majority of the tail pulley was unguarded. Tr. 109-110.

Order No. 8637423 for a partially unguarded tail pulley at the "1/2" belt. Tr. 119. Hollis referenced an inspection photo and explained that although the belt had guarding installed, it did not fully prevent contact with the bottom of conveyor belt. Tr. 119; Sec'y Ex. 21. Hollis believed that workers could fall into the conveyor belt by accident or during greasing or belt training operations. Tr. 120. Hollis stated that he did not observe any adjustment bolts at the tail pulley, that he did not actually know how the ½ conveyor belt was adjusted, and that it may have been possible to adjust the conveyor belt from the head pulley. Tr. 121.

Order No. 8637424 for a partially unguarded tail pulley at the "4's" belt. Tr. 129. Hollis referenced an inspection photo and testified that on the right side of the tail pulley, the guarding was damaged to the point that a worker could inadvertently contact the conveyor belt and become entangled. Tr. 131; Sec'y Ex. 25. In reference to this damaged guarding, Hollis stated that "no one is purposely is going to stick their hand in there." Tr. 131. On cross-examination, Hollis stated that the inspection photo did not show the entire guarding and mainly depicted only the exposed area of the conveyor belt. Tr. 167-68; Sec'y Ex. 25.

Order No. 8637425 for an insufficiently guarded tail pulley at the dry side return conveyor belt. Tr. 135, 141. Hollis stated that he initially observed the deficient guarding from the west side of the plant and walked across to inspect the conveyor more closely. Tr. 142. Hollis referenced an inspection photo and explained that there was some limited guarding in place at the time of the inspection but that the tail pulley was exposed. Tr. 142; Sec'y Ex. 29.

Hollis also stated that there were footprints within several feet of this conveyor belt and that when asked, Mr. Cotham did not offer any explanation regarding the footprints. Tr. 144-45.

For Order Nos. 8637420-8637425, Hollis stated that Manager Cotham did not offer any explanation for the lack of guarding, indicate that the plant was currently shut down, or offer evidence of repair plans and/or purchases. Tr. 149, 175. Hollis stated that all of the unguarded conveyor belts were very visible and should have been identified during a proper workplace exam. Tr. 152-53.

On cross-examination, Hollis stated that while he observed workers cleaning miscellaneous trash around the secondary plant, he did not see or find evidence of workers walking near any of the tail pulleys. Tr. 157-58. Hollis also stated that prior to the November 17, 2011 inspection, Respondent had not received any 104(d) unwarrantable failure orders during the mine's recorded inspection history. Tr. 155. In regards to the ½ belt cited in Order No. 8637423, Hollis confirmed that he had previously inspected the mine and had not found a reason to issue guarding violations at this belt. Tr. 165-66. Hollis additionally stated that he did not observe any belt adjustment or maintenance work at the time of the inspection and did not question Respondent's management regarding their belt maintenance procedures. Tr. 162.

When questioned by the Court on the difference between high negligence and reckless disregard, Hollis stated:

> "Reckless disregard, you know, is – is, again, the operator displays essentially a total lack of concern of what they've got there… High negligence is, okay, I knew about it—the mine operator knew about it. They haven't taken steps to take care of it immediately, but they have taken steps to take care of it in the long term, over the – a longer period of time.
>
> They knew about it; they haven't taken care; but maybe they've ordered the parts. Maybe they've ordered the material to fix it. …"

Tr. 181.

B. Respondent

Operations Manager Sean Cotham testified for Respondent regarding the November 17 inspection and conveyor belt operations at the mine. Cotham confirmed that he accompanied Inspector Hollis and he agreed that the tail pulleys cited in Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, and 86374255 were not properly guarded at the time of the inspection. Tr. 223, 229,231, 236, 250. For Order Nos. 8637423 and 8637424, Cotham stated the guarding present at those tail pulleys had always been installed in that manner and had recently been inspected by MSHA in August 2011 without adverse action or warnings. Tr. 244, 248.

Cotham stated that he had previously accompanied MSHA inspectors on other inspections at other operations and at Respondent's plant. Tr. 189. However, he testified that he had never previously been involved in a hazard complaint or 104(d) unwarrantable failure action. Tr. 191, 225. Cotham stated that he informed Inspector Hollis during the inspection that the guards had likely been damaged by skid-steer cleaning. Tr. 230. Cotham maintained that neither he nor Forman Childress told Inspector Hollis that the guards were not being repaired due to "production needs". Tr. 224. Cotham testified that he was unfamiliar with the consequences of a 104(d) order and that he decided to say as little as possible after Inspector Hollis informed him that he intended to issue 104(d) orders for the missing guards. Tr. 224-25.

Cotham also testified in detail regarding conveyor belt operation, clean up, and maintenance work at Respondent's secondary plant. Cotham stated the vast majority of clean-up operations were performed by the two skid steer operators assigned to that specific duty. Tr. 207. Cotham explained that maintenance and supervision personnel traveled the secondary plant in trucks. Tr. 218. Cotham maintained that while foot traffic was not prohibited in the secondary plant, there was no reason to walk through the secondary plant. Tr. 217-218. Cotham also testified that greasing and routine maintenance tasks were performed between shifts with the main electrical disconnect to the plant locked and tagged out. Tr. 216-17. On re-direct, Cotham stated that prior to the November 17 inspection, Respondent had both hired an extra maintenance worker and purchased additional expanded metal to better respond to ongoing problems with damaged guards. Tr. 296.

On cross-examination, Cotham maintained that if a bearing had to be replaced mid-shift due to sudden breakdown, the entire plant would be shut down for the repair. Tr. 275. Cotham explained that the extended grease port was used to avoid taking the guard off during routine greasing and that he had never observed anyone grease a conveyor belt while the belt was moving. Tr. 289. Cotham did state that at other mines he had observed belts adjusted with the tail pulley guard off and the belt running. Tr. 289. However, Cotham maintained that he had never directed such work at any mine and he that he had never observed or directed it at Respondent's mine. Tr. 287-88. Cotham also stated that particularly during the night shift, it was possible for a skid steer operator to damage a guard without realizing it. Tr. 241-42.

Current Quarry Foreman Jimmy Maclin testified regarding repair efforts at Respondent's plant. At the time of the November 2011 inspection, Maclin was the lead mechanic in charge of plant and mobile equipment repair. Tr. 301. Maclin testified that no one worked on foot in the secondary plant while it was operating. Tr. 302. Maclin stated that equipment was first shut down from the operator control room and then physically locked out before inspection and repairs were started. Tr. 303.

Maclin stated that in the weeks preceding the Novemeber 17, 2011 inspection, Respondent had been working long double shifts. Tr. 304. Maclin noted that a substantial number of guards had been damaged during this time, particularly during the night shift. Tr. 305. Maclin testified that he had instructed the skid steer operators to slow down and be more careful around the guards. Tr. 305. Maclin also stated the maintenance crew changed the attachment system for the guards to decrease damage and also provided additional lighting at the secondary plant to increase visibility. Tr. 305-06. Maclin stated that in the weeks preceding the

November 17 inspection, guards were "constantly getting tore up" and guarding repairs were necessary every day. Tr. 304-305.

Maclin testified that during pre-shift maintenance checks on November 17, the maintenance crew observed that the 10's tail pulley guard was damaged. Tr. 307. Maclin testified that the muddy conditions made it difficult to get close to the tail pulley itself, but that the crew removed the damaged guard to take measurements and begin repairs. Tr. 307. Maclin stated that no other guards were reported damaged that morning. Tr. 308. Maclin stated that the secondary plant did operate for approximately an hour until the primary crusher broke down when a piece of metal got into the crusher. Tr. 308, 313. Once the primary crusher broke down, the operator shut down the secondary plant and the primary crusher itself was both de-energized and locked out by the maintenance crew. Tr. 308-09.

Maclin confirmed that none of the conveyor belts at the secondary plant were locked out until Inspector Hollis directed him to do so at approximately 2:30 PM. Tr. 311-12. However, Maclin maintained that the 10's belt was not running during the Nov 17 morning shift and that conditions were so soft at the 10's belt in particular that it was very difficult for someone on foot to get near the 10's tail pulley. Tr. 314, 317. Maclin stated that prior to November 17, he had told Foreman Childress that the mine needed to hire different skid steer operators to avoid persistent guard damage, but that he was not aware of any corrective actions taken by Foreman Childress. Tr. 321.

V. ANALYSIS

A. The Violations

30 CFR § 56.14107 mandates that:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces

30 CFR § 56.14112(b) requires that:

> Guards shall be securely in place while machinery is operated, except when testing or making adjustments which cannot be performed without removal of the guard.

The Secretary has presented testimony and photos demonstrating that tail pulley guards were missing, loose, or insufficient at seven different locations. The testimony of Respondent's maintenance foreman Maclin, indicates that the conveyor belts at these locations were not locked or tagged out prior to the inspection. Tr. 308-09, 311-12. Thus, the Secretary has presented

sufficient evidence to support his allegations that six separate violations of 30 CFR 56. 14107(a) and one violation of 30 CFR 56.14112(b) occurred on Nov 17, 2011 at the Respondent's mine. Respondent has conceded that the missing and incomplete guards violated the cited standards. Resp. Br., 1. As such, I **AFFIRM** the underlying violations contained in Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, 8637423, 8637424, 8637425.

I must next determine the following issues:

1) Did the lack of guarding at the tail pulleys create a reasonable likelihood of a serious injury and constitute significant and substantial violations?

2) Did Respondent display a total lack of care in maintaining pulley guards and thus demonstrate a reckless disregard for the requirements of the Mine Act?

3) Were the violations an unwarrantable failure to comply with a mandatory safety standard?

4) Were Citation No. 8637419 and Order Nos. 8637420 and 8637422 the result of Respondent's flagrant disregard for miner safety?

B. Significant and Substantial

Inspector Hollis testified specifically about the physical conditions of each guard individually and the Secretary re-iterated these findings within her post-hearing brief arguments concerning the S&S determinations. Sec'y Br., 20-23. However, when testifying about repair, greasing, foot traffic, and possibility of injury at the secondary plant, Inspector Hollis testified primarily in general terms that applied to all seven of the cited conditions. As such, I have combined the S&S analysis of the seven cited conditions in one section. I have considered and noted all relevant specific evidence in making my individual S&S findings for each citation. Nonetheless, I find that the Secretary has not demonstrated a reasonable likelihood of a serious injury resulting at any of the cited locations.

I have already found that the Secretary has established the underlying violation in each of the seven involved orders. Additionally, as none of the belts were locked out prior to inspection, the lack of guarding at these locations contributed to the discrete safety hazard of exposed and energized movable parts.

The Secretary has argued that this exposure was reasonably likely to cause a serious entanglement injury through one of three work practices: 1) routine greasing; 2) belt repair and adjustment; and 3) accidental trips and falls by workers travelling on foot. Sec'y Br., 18-19. Inspector Hollis felt that an injury was likely in this situation, in part, because he had previously observed greasing and maintenance operations performed at other mines with the conveyor belt moving. Tr. 94-95.

However, Operations Manager Cotham credibly testified that the conveyor belts were only greased between shifts when the belts were locked and tagged out. Tr. 217. Cotham and Maclin also testified that the belt repairs were only made with the belts de-energized and locked

and tagged out. Tr. 192-93; Tr. 302-03. Safety meetings conducted in the months previous to the November 17 inspection directing workers to lock and tag out machinery before attempting any repairs support this testimony. Resp. Ex. 3, 1-6.

Inspector Hollis testified that he did not observe anyone greasing or performing maintenance work on an operable or moving conveyor belt during the November 17 inspection. Tr. 157. Hollis did not claim to have seen this type of activity in his previous inspections of the mine or to have been notified of such activity by other inspectors or inspection records. The hazard complaint does not allege that repair work or greasing was being performed on moving or energized conveyor belts. Sec'y Ex. 1.

Thus, the Secretary has not provided any specific evidence refuting Respondent's credible testimony that greasing was performed through extended grease ports between shifts with the belts shut off and repairs were only conducted with the belts locked and tagged out. Furthermore, Inspector Hollis stated, that if "a miner de-energized a conveyor and shut it down, there's no entanglement hazard present." Tr. 159-160. Additionally, Hollis himself testified that MSHA regulations allowed belts to be adjusted with the belt moving under controlled conditions and that the guard would have to be removed in most situations regardless of whether it had been damaged or not. Tr. 96. Cotham similarly testified that when a belt was trained, all other belts were locked out to minimize exposure. Tr. 275-76. As such, I find that Inspector Hollis's testimony regarding past observations at other mines are not sufficient to establish the reasonable likelihood of an injury occurring during greasing or repair work at Respondent's mine.

Given the evidence referenced above, I find that it was not reasonably likely for an injury to occur during greasing or repair work at any of the seven cited locations. Accordingly, I proceed to analyzing the likelihood of foot travel occurring at the cited locations and resulting in an injury.

Respondent argues, in essence, that workers simply do not walk in the secondary plant except for repair or greasing work when the belts are shut down and locked and tagged out. Tr. 206-07, 216-17, 302. The photos entered into evidence demonstrate that Respondent does indeed use an enclosed skidsteer with an extended rake to clean underneath tail pulleys. Resp. Ex. 4, 3-6. Additionally, Operations Manager Cotham credibly testified, and the Secretary has not disputed, that the belts are operated from an elevated control tower. Tr. 206. Cotham further testified that pre-shift inspections were conducted by a drive through inspection and that the front-end loader operators worked at the outside rim of the secondary plant. Tr. 218, 269. Cotham also testified that the only time any workers cleaned the secondary plant on foot was "whenever the plant was down, something was broke down. And of course obviously the plant would be locked and tagged out." Tr. 215.

Inspector Hollis stated that during his inspection there were workers picking up garbage around the secondary plant but he did not see anyone walk or work near the tail pulleys. Tr. 157. The presence of workers on foot cleaning miscellaneous trash on November 17 is reasonably explained by Maclin's credible testimony that the primary crusher broke down earlier that day and the plant was idled. Tr. 313. Maclin's testimony that the plant was idled is also substantially corroborated by the fact that only one of the seven belts was moving at the time of

the inspection and Hollis did not observe any skid steer traffic. I do note that while the majority of secondary plant belts were shut off, it appears Respondent did not follow its own policy in locking and tagging out the secondary plant while cleanup work was performed on foot. Tr. 308-09. However, having already found that the missing and inadequate guards constituted a violation, this evidence is most properly considered in my negligence findings.

Additionally, the mere presence of workers on foot within some areas of the secondary plant does not automatically make a guarding violation reasonably likely to result in an injury. An ALJ has previously found guarding violations to be non-S&S when the Secretary did not show a likelihood or reason for workers to travel near exposed tail pulleys. *Bob Bak Construction*, 28 FMSHRC 817, 830 (ALJ Manning)(Sept 2006)(finding guarding violation non-S&S when majority of work in area was performed from within protected skidsteers and loaders but some foot traffic occurred). A Commission ALJ has even relied upon the 7 foot exception of 56.14107(b) and entirely vacated a 56.14107(a) citation when the judge credited an operator's testimony that only skid steers were used to clean up accumulations underneath exposed rollers while a belt was in operation. *C&E Concrete, Inc.*, 34 FMSHRC 2987, 2991-92 (ALJ Tureck)(November 2012) (vacating 56.1407(a) citation and holding that while workers were on foot in the general area they did not approach within 30 feet of moving conveyor belt per their training). An ALJ has found a guarding violation to be S&S when the majority of cleanup work was performed by a skid steer, but in that case the ALJ relied on the fact that the main roadway of that mine passed within 10 feet of the exposed pulley, the inspector observed a beaten path passing by the exposed pulley, and there was a shovel leaning up against a trailer within five feet of the exposed pulley. *Crimson Stone*, 27 FMSHRC 980, 985-86 (ALJ Melick)(December 2005).

In this case, Inspector Hollis observed workers within the secondary plant cleaning up trash, but he did not observe any of them near any of the exposed tail pulleys. Tr. 157. For Citation No. 8637419, Inspector Hollis testified that the area surrounding the 10's tail pulley was muddy and sloppy, increasing the possibility of a worker tripping and falling into the exposed tail pulley. Tr. 48. However, while Maintenance Foreman Maclin similarly described this area as wet and soft, he stated that this condition made it very difficult for workers to approach the tail pulley on foot, even if they tried to. Tr. 307, 314. After reviewing the testimony and entered photos regarding this area, I find that as workers had no specific reason to approach the 10's tail pulley, the saturated ground conditions made it even more unlikely for workers to travel near the 10's tail pulley either inadvertently or purposefully. Sec'y Ex. 5; Tr. 314.

Inspector Hollis did observe footprints near an inadequately guarded tail pulley on the dry side of the secondary plant. Tr. 144. However, as Manager Cotham credibly testified that greasing operations were conducted before every shift with the belt de-energized, the presence of footprints at that area is not surprising or indicative of foot travel while the belt was operating. Tr. 274-75, 289.

The Secretary has argued, in essence, that as Inspector Hollis traveled within several feet of the moving belt cited in Order No. 8637422, it is reasonably likely that Respondent's workers could and would have done the same. Sec'y Br., 22. I do not agree. The inspection photo of this tail pulley does not indicate that there is a build-up of material or even that the belt is

conveying material. Sec'y Ex. 17. As such, the Secretary has not shown that at this location workers had a production reason to approach this conveyor belt. Manager Cotham credibly testified that workers were trained and warned about the dangers of pinch points and moving conveyor belts. Tr. 197-98. Respondent has introduced records of safety meetings focusing on the dangers of conveyor belts in the months prior to the November 17th inspection. Resp. Ex. 3, 1-6. None of the pictures presented by the Secretary showed trash in the area of the tail pulleys. Sec'y Ex. 5, 8, 13, 17, 21, 25, 29. As such, I find that Respondent's workers on temporary clean-up duty did not have a reason to approach the tail pulleys and had recently been specifically warned about the dangers of conveyor belts. Tr. 197-98. Therefore, I find that the Secretary has not shown that workers traveled, or would travel, near enough to any of the cited tail pulleys for there to be a reasonable likelihood of an injury occurring.

While the *Thompson Bros* decision instructed ALJs to consider the vagaries of human conduct, including carelessness, in determining whether a guarding violation in fact occurred, the Secretary has not shown a confluence of factors existed at any of the cited locations that made an injury reasonably likely to occur. *Thompson Bros. Coal*, 6 FMSHRC 2097 (upholding violation and S&S designation when Commission found mechanics were likely to make adjustments with engine and unguarded cooling fan running). In making my S&S findings, I am not requiring the Secretary to show that it was reasonably likely for a worker on foot to actually contact the exposed tail pulley while it was energized. However, the Secretary has not shown anything more than a remote possibility of a worker on foot even entering the area around the exposed tail pulleys in which in injury could occur.

In making this ruling, I am aware Commission precedent emphasizes that a worker's exercise of caution does not mitigate the S&S nature of a violation. *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992)(rejecting ALJ's ruling that extensive water accumulation ranging from 16 to 48 inches deep in an entry way subject to mandatory examinations was non S&S because examiner could step cautiously while wading through murky water). However, in that case, an examiner had to enter the deep pool of water where injury was reasonably likely to occur in order to comply with the inspection requirements of the Mine Act. *Id*. at 1121. The facts of this case present a much different degree of exposure, as the Secretary did not show that workers on foot were required or reasonably likely to enter the area in which an entanglement injury could occur. Furthermore, the Respondent has presented credible evidence demonstrating that workers do not travel on foot near the tail pulleys during operation. Tr. 206-07, 215, 302; Resp. Ex. 4, 3-6.

Therefore, I find that the Secretary has not established a reasonable likelihood of an injury occurring at any of the cited locations. As such, the likelihood of injury for Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, 8637423, 8637424, 8637425 is hereby **MODIFIED** from "reasonably likely" to "unlikely." Additionally, Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, 8637423, 8637424, 8637425 are also **MODIFIED** from "S&S" to "non-S&S."

C. Gravity

For Citation No. 8637419 and Order Nos. 8637420, 8637421, 8637422, 8637423, and 8637425, Inspector Hollis testified that the exposed fluted tail pulleys at these areas were likely to cause a fatal injury if a worker became entangled as a worker's entire body could be dragged in. Tr. 58-59, 76-77, 101, 112, 122-23, 146. For Order No. 8637424, Hollis determined that because the wings of the No. 4 tail pulley were bent, that while a worker could lose a hand or arm, he did not believe this tail pulley could hold someone in long enough to cause a fatal injury. Tr. 133. Respondent did not directly contest the severity of injury designations for these citations at hearing or within their post-hearing brief. After reviewing the parties' testimony and inspection photos, I find the Secretary has produced sufficient testimony and evidence for me to uphold Inspector Hollis's severity of injury determinations for all six orders and one citation as written.

D. Negligence

The Secretary has alleged that the violations found at each of the seven cited locations were the result of Respondent's reckless disregard for the Mine Act and Worker Safety. Respondent disputes this finding and argues, in essence, that it acted with, at most, moderate negligence for all of the violations.

The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X. The Secretary and Respondent both set forth their negligence arguments in a general cumulative fashion. Sec'y Br. 23-27; Resp. Br. 15-17. However, I have analyzed the specific circumstances and operator's level of knowledge regarding each location individually and have set forth my negligence findings separately for each citation.

1. Citation No. 8637419

Inspector Hollis testified that when he asked Operations Manager Cotham why the missing guard at the 10's belt had not been replaced, Cotham replied "production needs" and indicated that he had been aware of the missing guard prior to the inspection. Tr. 62-63; Sec'y Ex. 2, 5-6. After reviewing Inspector Hollis' inspection notes, it appears that Hollis incorporated this alleged statement into the text of every other citation. Sec'y Ex 2. 5-6; Sec'y Exs. 7, 11, 15, 19, 23, 27. Hollis did testify that although he did not observe any ongoing repairs at the time of the inspection, Cotham informed him that he had previously instructed his staff to "get the guards fixed." Tr. 63; Sec'y Ex. 2, 4-5. Inspector Hollis's testimony that Foreman Childress told Hollis that he knew guards had been missing for "two to three" days is supported by Hollis's general inspection notes. Tr. 151; Sec'y Ex. 2, 6.

Cotham testified that he was not aware of the cited missing guards prior to the inspection and that he never told Inspector Hollis "production needs" had prevented the guards from being replaced. Tr. 223-24. Maintenance Foreman Maclin testified that he first learned that the 10's guard was damaged early on the morning of November 17. Tr. 307. Maclin stated that his maintenance crew began fabricating a new guard for this location until repair efforts were directed to the primary crusher when it broke down. Tr. 308. Maclin maintained that although some areas of the wet plant operated briefly on November 17, the 10's belt did not run on the morning of November 17. Tr. 317. Foreman Childress, who was responsible for pre-shift inspections at the secondary plant, did not testify at the hearing. Tr. 326.

After reviewing the parties testimony and Inspector Hollis's inspection notes, I find that when Cotham and Childress stated they knew about "guards" being off prior to the inspection, they were most likely referring to their general knowledge of the ongoing problem of skid steers damaging guards and requiring repair rather than to longstanding knowledge of any specific missing guard.. Sec'y Ex. 2, 4-5; Tr. 280; Tr. 304. I also find that any comment from Cotham referencing "production needs" was most likely a statement explaining how the guards were damaged in the first place, given Cotham's belief that using skid steers to clean around the tail pulleys was both the most safe and efficient method. Tr. 287. It is simply not credible to conclude that Cotham, given his reticence and concern about saying something to Hollis that would make matters worse, would claim "production needs" trumped safety repairs in such an inflammatory and self-incriminating statement. Tr. 255.

Nevertheless, it is clear that the 10's guard was completely torn off the tail pulley prior to the beginning of the November 17 morning shift. It is unclear whether Foreman Childress took any action or even noted this obvious condition during his required pre-shift inspection. Tr. 256-57. However, Foreman Maclin credibly testified that the maintenance crew began fabricating a new guard once they noted the problem during pre-shift maintenance check, and maintained that the 10's belt was not run that morning. Tr. 317. However, neither Childress nor Maclin locked and tagged out the 10's belt or barricaded the belt from access. Tr. 311, 314. As such, I am left to determine whether uncompleted repair efforts and a failure to lock and tag out a conveyor belt with a known missing guard constitutes reckless disregard for worker safety. In these specific circumstances, I find that due to Respondent's credible evidence of general safety measures and specific repair attempts on the 10s guard, the Secretary has not shown that Respondent's management acted with a complete absence of care for worker safety at this location.

As a general matter, Respondent presented credible and undisputed evidence that it took considerable efforts to protect workers from entanglement hazards prior to the November 17 inspection. Management conducted safety talks emphasizing the importance of avoiding pinch points and locking and tagging out conveyor belts when movable parts needed repairs. Tr. 197-98. Skid steers and water trucks were used for routine cleaning at tail pulleys, distancing workers from the tail pulleys. Tr. 204, 209. When night work led to an increase in guard damage, additional light towers were brought in as an attempt to prevent further damage. Tr. 305-06. Due to the increase in guard damage, the maintenance crew began installing quick repair panels. Tr. 305-06. While not determinative, I note these measures and Respondent's clean accident and inspection history leading up to this inspection in finding that the Secretary

has not shown that Respondent had a history of operating with indifference to MSHA regulations or worker safety. Resp. Br. 17.

After identifying the missing 10's guard on November 17, Foreman Maclin apparently did not believe the unguarded tail pulley at the 10's belt needed to be locked and tagged out because the belt was not running that morning and miners did not normally work on foot in this area. Tr. 317, 322. This attitude failed to consider the remote possibility of unplanned foot traffic and the 10's belt being inadvertently energized and fell below the high standard of care imposed by the Mine Act on operators. However, I find Maclin's action did not demonstrate a complete absence of care for worker safety. Maclin did promptly direct his crew to fabricate a new guard and under normal conditions the 10's guard would have been replaced within several hours if not for the primary crusher breaking down. Tr. 308. This type of corrective action, albeit incomplete, corresponds with Inspector Hollis's explanation of the difference between high negligence and reckless disregard:

> Reckless disregard, you know, is – is, again, the operator displays essentially a total lack of concern of what they've got there. … High negligence is, okay, I knew about it—the mine operator knew about it. They haven't taken steps to take care of it immediately, but they have taken steps to take care of it in the long term, over the – a longer period of time.
>
> They knew about it; they haven't taken care; but maybe they've ordered the parts. Maybe they've ordered the material to fix it.

Tr. 181.

The Secretary has urged me to discount Respondent's testimony regarding ongoing and planned guard repairs prior to Hollis's inspection. The Secretary has essentially argued that as Respondent failed to detail these repair efforts during the inspection or closeout meeting, these claims lack credibility. Tr. 151, Sec'y Br., 26. I disagree. Inspector Hollis himself testified and recorded in his inspection notes that Operations Manager Cotham informed him that he had previously requested maintenance workers to repair damaged guards. Tr. 63; Sec'y Ex. 2, 4-5. Operations Manager Cotham testified credibly that he was not specifically aware that the 10's guard was missing prior to the inspection, and as he was offsite on the morning of November 17, it is not surprising that Foreman Maclin had started repairs, according to company policy, without notifying Cotham or other management officials. Tr. 190, 223, 303. At hearing, Cotham named Dwight Sisk without hesitation as the extra individual hired prior to the November 17 inspection to assist with guard repairs. Tr. 296-97. As such, Cotham and Maclin testified with sufficient specificity and corroboration by Inspector Hollis's own testimony for me to conclude that repair efforts had actually started on the 10's belt prior to Hollis's inspection.

Furthermore, although the secondary plant operated some belts for approximately an hour before the primary crusher broke down, all evidence indicates that the 10's belt was deactivated and the only workers who may have traveled in that general area were skid steer operators enclosed in a protective cab. Tr. 317, 322. The 10's belt was not running at the time of Hollis's

inspection while the plant was idled and I have held that the saturated ground conditions made it highly unlikely for workers on foot to approach the unguarded tail pulley. Tr. 55, 307. Thus, the possibility of injury was extremely remote under these specific circumstances. Most critically, as I have held that Respondent made genuine, if incomplete efforts to repair the 10's guard, I find that Respondent did not act with deliberate disregard for an unjustifiable risk of harm. As such, the negligence designation for Citation No. 8637419 shall be **MODIFIED** from "reckless disregard" to "high."

2. Order No. 8637420

Inspector Hollis testified and referenced inspection photos showing that the guard at the wetside return conveyor was completely missing. Tr. 76; Sec'y Ex. 9. Although maintenance Foreman Maclin testified that he was not aware of any missing guards other than at the 10's belt, the submitted photo depicts a clearly obvious exposed tail pulley. Tr. 308; Sec'y Ex. 9. As such I hold that Respondent's management, notably Foreman Childress, should have identified the missing guard during the November 17 pre-shift examination. Tr. 153-54. However, as I have held earlier that all cleaning work during operations was performed from within a protective cab and workers relied on their training and did not approach the tail pulley on foot when the plant was idled, the Secretary has not shown that Respondent deliberately disregarded an unjustifiable risk of harm. I also again take note of Respondent's general proactive measures of conducting safety meetings focused on the dangers of moving parts, increasing lighting, and attempting to install more resilient guards. While these measures are not sufficient specific mitigating circumstances to reduce the negligence level to moderate, they do demonstrate that Respondent took measurable efforts in preventing entanglement injuries. As such I hold that the negligence designation for Order No. 8637420 shall be **MODIFIED** from "reckless disregard" to "high."

3. Order No. 8637421

Inspector Hollis testified and introduced an inspection photo showing that the back of the guard at the 6x16 tail pulley was missing. Tr. 93; Sec'y Ex. 13. In the inspection photo, the tail pulley is approximately 6 inches above the ground with the top of and sides of the guard intact thus appearing to substantially guard the tail pulley from incidental contact. Sec'y Ex. 13. This defect could have been missed during a routine pre-shift examination due to ordinary human error or an imperfect inspection angle rather than a total absence of care. Furthermore, the tail pulley is set back from the top and side guards approximately six inches and the extended grease fitting is clearly intact. Sec'y Ex. 13. As such, it appears that only a deliberate attempt to access the tail pulley with the conveyor belt moving in violation of Respondent's safety provisions could result in an injury. I find the fact that this guard was substantially intact and the defect was not readily apparent from all angles to be mitigating factors. Therefore, I find that the failure to identify and correct this condition shall be **MODIFIED** from "reckless disregard" to "moderate" negligence.

4. Order No. 8637422

Inspector Hollis testified and introduced a photo showing that the guarding at the blend conveyor belt tail was insufficient. Tr. 107; Sec'y Ex. 17. Hollis testified and the inspection

photo appears to show that the blend conveyor belt was running at the time of the inspection. The photo shows that there is only some partial guarding on one side of this tail pulley and the tail pulley is exposed on the top, bottom, and near side. Sec. Ex. 17; Tr. 107. Operations Manager Cotham confirmed that the guard was missing at the time of the inspection but maintained that workers did not walk in the area of this tail pulley and all cleaning during operations were performed by a skid-steer or water truck. Tr. 236. As noted above, Inspector Hollis testified that he did not see any workers walking in the area of any of the cited conveyor belts, including the blend conveyor belt at issue in this order. Tr. 157.

As both Cotham and Maclin credibly testified that they did not know that this particular guard was missing prior to the inspection, I find that Respondent's management did not have actual knowledge that this guard was missing. Tr. 237, 308. However, the area of exposure was obvious enough that Respondent's management, namely Foreman Childress, should have identified this condition during the November 17 pre-shift inspection. Tr. 153-54. Still, as cleaning operations were performed from within a protective cab and workers relied on their training and did not approach the tail pulley on foot when the plant was idled, the Secretary has not shown that Respondent deliberately disregarded an unjustifiable risk of harm in failing to identify and correct this condition. I also again take note of Respondent's general proactive measures of conducting safety meetings focused on the dangers of moving parts, increasing lighting, and attempting to install more resilient guards. While these measures are not sufficient specific mitigating circumstances to reduce the negligence level to moderate for this citation, they do demonstrate that Respondent took measurable efforts in preventing entanglement injuries. As such, I hold that the negligence designation for Order No. 8637422 shall be **MODIFIED** from "reckless disregard" to "high".

5. Order No. 8637423

Inspector Hollis testified and introduced an inspection photo showing that while the ½ tail pulley was guarded on the top, sides, and rear, the side guards failed to cover approximately two to three inches of the bottom of the tail pulley. Tr. 119; Sec'y Ex. 21. Operations Manager Cotham credibly testified that this guard had been in place as pictured during previous inspections by Mr. Hollis and other MSHA inspectors as recently as August 2011. Tr. 245-46. Hollis confirmed that he had previously inspected Respondent's plant without issuing guarding violations but maintained he would have issued a citation if he had observed this condition. Tr. 165. After reviewing the inspection photo and the language of the standard, I find that as there is a visible area of limited exposure, Inspector Hollis was within his authority to determine that additional guarding was needed. However, the bottom rail of the side guard is intact, indicating that this guard had not been recently damaged and was likely in this condition during previous MSHA inspections. Sec'y Ex. 21. As such, the pre-existing guard reduced the risk of contact all but entirely and it was reasonable for Respondent to conclude on the basis of previous inspections that the guard was sufficient. Having found that the minor deficiencies of the pre-existing guard were not apparent during a regular pre-shift inspection, I hold that the negligence designation for Order No. 8637423 shall be **MODIFIED** from "reckless disregard" to "low."

6. Order No. 8637424

Inspector Hollis testified and referenced an inspection photo showing that the guarding at the 4" tail pulley had an opening in the right side of the guarding. Tr. 130; Sec'y Ex. 25. Inspector Hollis did not testify or list in his notes how large this opening was but did state that it was large enough to allow for accidental contact. Tr. 130; Sec'y Ex. 24. The inspection photo does not show the entire guard or the opening itself, but shows a close-up view of the tail pulley. Sec'y Ex. 25. The photo appears to have been taken very close to the guard as the expanded metal webbing of the guard is visible in extreme close-up on the left hand side of the photo. Sec'y Ex. 25. On cross examination, Inspector Hollis maintained that he did not take the photo from inside of the guard and that he took the photo from that point because he wanted to show the exposed tail pulley. Tr. 167. Manager Cotham testified that he considered the tail pulley at this location substantially guarded, and stated that this guard had been in the same condition during recent MSHA inspections and had not been cited. Tr. 248. Although Inspector Hollis stated that he believed the opening was large enough for accidental contact to occur, without an estimation of the size of the opening or a picture of the opening itself, I cannot conclude that the opening was large enough to be readily apparent during a pre-shift inspection. In fact, the inspection photo and both parties testimony indicate that the tail pulley was substantially, if not completely guarded, and the opening was of limited size and exposure. Sec'y Ex. 25. As the Secretary has not shown that the violative condition at this location was readily apparent, I find that the negligence designation for Order No. 8637424 shall be **MODIFIED** from "reckless disregard" to "low".

7. Order No. 8637425

Inspector Hollis testified and referenced an inspection photo showing that the guarding at the dry side return belt was insufficient. Tr. 143; Sec'y Ex. 29. In the inspection photo, only one side of the tail pulley is visible but it appears that this belt was only guarded with small side guards at the time of the inspection. Sec'y Ex. 29. Manager Cotham credibly testified that he was not aware that the guarding was damaged at this area prior to the inspection and stated additional guarding was normally present at this location. Tr. 249-50. Cotham's statement is seemingly corroborated by Inspector Hollis testimony that there was some additional guarding hanging from the conveyor structure at the time of the inspection. Tr. 143-44. While the partial guarding visible in the inspection photo did provide some degree of protection from incidental contact, the area of exposure is apparent enough that Respondent's management should have identified this condition during a pre-shift examination. Tr. 153-54. However, the only workers who entered this area during operation were skid-steer operators enclosed in protective cabs and Respondent had begun efforts to completely rebuild all guards in the secondary plant. Tr. 249, 297. Thus, the Secretary has not shown that Respondent disregarded an unjustifiable risk of harm or acted with a complete absence of care in failing to identify and correct this condition. As such, I find that the negligence designation for Order No. 8637425 shall be **MODIFIED** from "reckless disregard" to "high."

E. Unwarrantable Failure

Section 104(d)(1) of the Mine Act requires a finding that the underlying violation is of a significant and substantial nature. 30 U.S.C. 814(d)(1). As I have found that the Secretary failed to show that any of the seven violations were S&S, I find that Citation No. 8637419, shall be **MODIFIED** from a 104(d)(1) citation to a 104(a) citation and Order Nos. 8637420, 8637421, 8637422, 8637423, 8637424, 8637425 shall be **MODIFIED** from 104(d)(1) Orders to 104(a) citations.

F. Flagrant Violation Penalty Assessment

As outlined in the *Stillhouse* decision, the Secretary may only assess penalties in excess of $70,000.00 per citation per Section 110 (b)(2) of the Mine Act when he has shown the violation was a reckless or repeated failure to correct a hazard that was reasonably likely to result in serious injury. *Stillhouse Mining*, 33 FMSHRC 802. For the six orders and one citation in these dockets before me I have held that Respondent did not act with reckless disregard. I have also found that the underlying violations in these actions were not reasonably likely to result in an injury. As such, the Secretary has not shown two of the elements necessary to support penalty assessments under Section 110(b)(2) of the Mine Act. Therefore, I find that none of the violations at issue before me to be flagrant.

VI. PENALTY

In determining the appropriate penalty for a violation, 30 CFR 100.3 generally directs me to consider:

> (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Additionally, per 30 CFR 100.5, the Secretary determined that all six orders and one citation warranted a special proposed penalty assessment with penalties in excess of the standard penalty tables contained in 30 CFR 100.3. However, the submitted special assessment narrative forms for the citations and orders simply noted that other guarding violations had been identified on the same day and restated the gravity and negligence determinations of Inspector Hollis. As such, these forms do not provide me with a detailed basis to determine the appropriateness of the specially assessed penalties. Still, the Secretary has argued, in essence, throughout the hearing and her brief that the multiple guarding violations found at Respondent's mine demonstrated such a high degree of negligence that enhanced penalties are needed. Tr. 13.

The Secretary's proposed assessments indicate that the Respondent had a total violation rate of 1.2 per inspection day with zero repeat violations of the guarding violations at issue.

Sec'y Proposed Assessment Docket SE 2013-50 & 64, Exhibit A. The Secretary stated at hearing that MSHA had previously issued two guarding citations in 2010, but later informed the Court that that the two citations were not final when Inspector Hollis issued the November 17 104(d) citations and orders. The Secretary's proposed assessment also indicates that Respondent's mine is an average size and that Respondent is a small operator. Sec'y Proposed Assessment Docket SE 2013-50 & 64, Exhibit A; 30 CFR 100.3, Table III-IV. Although Respondent has argued that the Secretary has proposed unjustifiably high monetary penalties, Respondent has not argued or presented any evidence indicating that the proposed penalties would affect their ability to continue business operations. I have discussed the gravity and negligence of each citation within my analysis. Both parties agreed that Respondent abated the violations by constructing and installing appropriate guards by the next day, November 18, 2014. Tr. 89; Tr. 316. I also note that Jeremy Childress, the foreman responsible for conducting pre-shift examinations at the secondary plant at the time of the inspection, was apparently relieved of his management duties at some point after the November 17 MSHA inspection. Tr. 251, 322.

Using the 30 CFR 100.3 penalty tables as a starting basis, I find that after accounting for my gravity and negligence findings, the standard penalty calculation would result in approximate penalties of $1,995.00 for Citation No. 8637419, Order Nos. 8637420, 8637422, and 8637425, $601.00 for Order No. 8637421, $270.00 for Order No. 8637423, and $121.00 for Order No. 8637424. However, I believe that increased penalties, specifically due to those guarding violations that should have been identified during a diligent pre-shift inspection and because the inadequately guarded tail pulleys had not been locked and tagged out at the time of the inspection, are warranted in these specific circumstances. After considering all six statutory penalty criteria, including the effect on Respondent's ability to continue operations, I believe that the following penalties are appropriate:

Citation No. 8637419- $10,000.00

Order No. 8637420- $10,000.00

Order No. 8637421- $2,500.00

Order No. 8637422- $10,000.00

Order No. 8637423- $1,000.00

Order No. 8637424- $500.00

Order No. 8637425- $10,000.00.

Furthermore, I am confident these penalties further the purpose of the Mine Act in motivating Respondent and other operators to adequately conduct pre-shift inspections and promptly lock and tag out unguarded tail pulleys, regardless of the likelihood of injury:

The complete summary of my judgment and penalty determinations is as follows:

Citation No.	Originally Proposed Assessment	Judgment Amount	Modification
SE 2013-50			
8637421	$42,600.00	$2,500.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "Moderate"
8637423	$42,600.00	$1,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "Low"
8637424	$31,100.00	$500.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "Low"
8637425	$42,600.00	$10,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "High"

SE 2013-64			
8637419	$129,400.00	$10,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "High"
8637420	$129,400.00	$10,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "High"
8637422	$129,400.00	$10,000.00	Reduce Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove Significant and Substantial Designation Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from "Reckless Disregard " to "High"
Total	**$547,100.00**	**$44,000.00**	

VII. ORDER

Winn Materials, LLC is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$44,000.00** within 30 days of this order.[1]

David P. Simonton
Administrative Law Judge

Distribution: (First Class U.S. Mail)

Angele Gregory, Office of the Solicitor, U.S. Department of Labor
618 Church Street, Suite 230, Nashville, TN 37219 for Petitioner

Justin Winter, Adele Abrams P.C.,
4740 Corridor Place, Suite D, Beltsville, MD 20705 for Respondent

[1] 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
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 28, 2014

KIP ALLEN KEIM,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2013-442-D
v.	:	MSHA Case No. DENV-CD-2013-02
	:	
CORDERO MINING LLC,	:	Mine: Cordero Mine
Respondent	:	Mine ID: 48-00992
	:	

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before:Judge McCarthy

I. Procedural Background

This case is before me upon a discrimination complaint filed by Kip Allen Keim, ("Keim" or "Complainant") pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).[1] Complainant's November 14, 2012 pro se discrimination complaint filed with the Mine Safety and Health Administration (MSHA) alleges that on October 26, 2012, Complainant was fired for making an alleged safety complaint to Respondent's internal reporting hotline. Complainant seeks back pay, compensatory damages for pain and suffering to self and family, and reinstatement to his former position as a welder in Cordero's rebuild shop.

[1] Complainant's brother, Ronald E. Keim ("Ron"), filed a separate pro so complaint of discrimination against Respondent in Docket No. WEST 2013-537-D. As discussed below, my Notices of Hearing consolidated the brothers' discrimination cases for hearing. Respondent filed a Motion for Summary Decision in both cases. On April 16, 2014, I issued a Order Granting Respondent's Motion for Summary Decision in Ron Keim's discrimination case. In my order, I severed the previously consolidated cases and dismissed Ron Keim's case for failure to establish any genuine issue of material fact that the adverse discipline taken against him was motivated, at least in part, by any protected activity in which he engaged, or that management harbored any animus toward such activity.

On March 1, 2013, Respondent filed an Answer denying that Keim engaged in any protected activity, denying that Keim suffered any adverse action motivated by any protected activity, and alleging that Keim was disciplined for unprotected activity, specifically, for insubordination.

By letter dated January 16, 2013, MSHA determined that the facts disclosed during the investigation did not constitute a violation of Section 105(c). By letter dated February 1, 2013, Keim appealed MSHA's determination of no discrimination to the Commission and claimed that review would establish that he had been "treated unfairly" and that Respondent's justification for his termination was based on faulty assumptions.

This case was assigned to the undersigned on March 28, 2013. The next day, I instructed Keim to provide a copy of his original complaint to MSHA, which set forth his allegations of discrimination or adverse treatment and any instances of protected activity in which he engaged. In response, Keim provided an undated letter addressed to MSHA, and a copy of his statement provided to MSHA during the course of its investigation.

On May 2, 2013, my office issued a Notice of Hearing for August 27, 2013 in Gillette, Wyoming. On August 9, 2013, the hearing location was moved to Casper, Wyoming. In the interim, several conference calls were held with the parties regarding pre-hearing issues and discovery matters. Upon agreement of all parties, an Amended Notice of Hearing issued on August 20, 2013 setting this matter for hearing on October 15, 2013 in Casper, Wyoming.

On September 5, 2013, the undersigned ordered the disclosure of all documents related to an internal investigation of a related workplace harassment complaint at Cordero Mine. The allegations that prompted the investigation blamed Complainant and members of his family for creating a hostile work environment and for making threats of violence towards a coworker, David Alaniz. After reviewing the documents in camera, it was apparent that the documents contained information relevant to these proceedings. Given the sensitive nature of Cordero's investigation, the discovery of such documents was subject to a Confidentiality Order.

On September 10, 2013, Respondent filed a Motion for Summary Decision, with attached exhibits. In its motion, Respondent argued that Keim had not engaged in any protected activity and that Keim cannot prove that Cordero had knowledge of his alleged protected activity. Respondent submitted affidavits and other supporting documentation showing that between September 1, 2012 and February 27, 2013, calls to Cordero's internal reporting hotline were mistakenly routed to The Network, a call-monitoring company employed by Cordero's former owner, Rio Tinto. As such, Respondent argues that it was not aware of the hotline complaint that Keim relies on to establish that he engaged in protected activity. Even if Cordero had knowledge of the hotline call, Respondent argues that Keim has failed to demonstrate that his hotline complaint involves a health or safety concern that would qualify as protected activity under the Mine Act.

On September 20, 2013, a conference call was held with the parties and the undersigned to discuss the Motion for Summary Decision and the upcoming hearing. During the call, I requested that Respondent provide additional information regarding the processing of Keim's hotline complaint. In particular, Respondent was asked to provide the names of The Network employee who took Keim's call, and the Rio Tinto officials who investigated Keim's complaint, so that they could be subpoenaed to testify at hearing. Counsel for Respondent agreed to look into the matter and report back to the undersigned.

On September 26, 2013, Respondent filed the First Supplement to its Motion for Summary Decision. The First Supplement sets forth Respondent's general understanding about how the call-routing problem was discovered, and argues that Complainant has not offered any evidence of Cordero's hostility to the concerns raised in Keim's hotline complaint.

On September 27, 2013, a subpoena duces tecum was issued to Joseph Foltz, registered agent of The Network, upon the application of Respondent. The subpoena ordered The Network to produce by October 3, 2013, the name of the individual who took Keim's hotline call and all records, correspondence, emails, and/or documents related to Keim's call.

On September 8, 2013, Keim filed a letter in response to Respondent's Motion to Dismiss. In his letter, Keim sets forth circumstantial evidence that he believes demonstrates that Cordero management was aware of his hotline complaint. In particular, Keim alleges that after he made his hotline complaint to management, Doug Nutting, human resources site manager for Cordero, held an unprecedented meeting with D crew to discuss the issues that Keim had raised in the hotline call.[2] Keim also informed the undersigned of personnel changes that Cordero made after his termination which Keim believes is somehow evidence of discriminatory intent.[3] Keim, however, does not offer any evidence directly refuting Respondent's claim that calls to Cordero's hotline were inadvertently forwarded to a third party, or supporting his assertions that the changes in Cordero personnel were related to his termination or to these proceedings.

[2] Keim fails to add that Nutting's meeting with D crew came on the heels of an investigation of Alaniz's hostile workplace complaints made to MSHA and Wyoming mine inspectors. At the conclusion of Cordero's investigation, management informed Alaniz that they would discuss "a few concerns with the shop" with the intent "to provide additional training regarding what CPE expects." R. Mot. for Protective Order, Ex. B, at 39.

[3] Keim alleges that Nutting was either terminated or resigned after Keim told Respondent's counsel that Nutting made false representations concerning whether Keim resigned or was terminated. Letter from Kip Keim (Oct. 8, 2013). Keim also alleges that his manager, Clint Cooper, and supervisor, Tim Bishop, were transferred to new positions at Cordero. *Id.*

On October 11, 2013, Respondent filed a Second Supplement to its Motion for Summary Decision. The Second Supplement stated that The Network had refused to comply with the aforementioned subpoena duces tecum on the grounds that it was unreasonable in scope and gave The Network insufficient time to respond. In lieu of the requested information, The Network provided the sworn statement of Thomas Kelly, Director of Professional Services. In his statement, Kelly sets forth the procedures that The Network's interview specialists employ when speaking to a caller, but Kelly does not provide any additional information related to Keim's call. In addition, the Second Supplement included sworn declarations from Peggy Leonard and Adam Bennett, who manage Rio Tinto's compliance hotline from Brisbane, Australia.

Thereafter, the federal government shutdown compelled the rescheduling of the October 15, 2013 hearing. After consultation with the parties, the undersigned issued an Amended Notice of Hearing setting this matter for hearing on February 18, 2014 in Casper, Wyoming.

On October 28, 2013, Keim filed a letter in response to Respondent's Motion for Summary Decision and supplements in support thereof. In the letter, Keim called into question the credibility of the sworn statements of the employees of Cordero, Rio Tinto, and The Network, but did not offer any contrary evidence. In addition, Keim moved that this administrative tribunal compel "everyone immediately involved in this case [to submit to] a poly graph [sic] test so you know who is telling you the truth."

On November 6, 2013, in consideration of Complainant's pro se status, I issued a subpoena duces tecum to Foltz pursuant to my authority under Commission Procedural Rule 60(a). *See* 29 C.F.R. § 2700.60. The subpoena ordered The Network to produce the name of the individual who took Keim's hotline call, and all records, correspondence, emails, and/or documents related to Keim's call. On November 14, 2013, The Network filed an objection to the subpoena duces tecum on the grounds that it seeks proprietary and confidential information, is burdensome and unreasonable, and seeks information that The Network has already produced in this matter.

On November 21, 2013, Respondent filed its Response in Opposition to Complainant's Motion to Compel Respondent's Agents to Submit to Polygraph Examination. Respondent argued that Complainant's Motion to Compel should be denied because polygraph evidence is unnecessary in Commission proceedings and is inherently unreliable. Respondent further argued that Complainant's letters in response to the Motion for Summary Decision and supplements in support thereof failed to include a concise statement of each genuine issue of material fact necessary to be litigated, or supporting affidavits or other verified documents. *See* 29 § C.F.R. 2700.67(d).

During a conference call on January 24, 2014, the parties agreed to reschedule the hearing until May 8, 2014 to enable the parties to complete outstanding discovery requests and to allow Respondent to depose Thomas Kelly. Additionally, Keim was asked to further explain his request that witnesses be compelled to submit to polygraph tests. Essentially, Keim justified his

polygraph motion by arguing that he thought that a polygraph test would likely to lead to the discovery of admissible evidence, but that he could not afford to pay for the polygraph tests. Finding no authority under the Act, Commission Procedural Rules, or legal precedent for the Commission to authorize, much less underwrite, the administration of polygraph tests, Complainant's Motion to Compel was denied orally during the conference call.

On February 4, 2014, Respondent filed a Third Supplement to its Motion for Summary Decision, attaching the transcript of Respondent's telephonic deposition of Kelly. Complainant did not participate in the deposition, although he was afforded an opportunity to do so.

On February 7, 2014, an Amended Notice of Hearing issued setting this matter for hearing on May 8, 2014 in Casper, Wyoming. On April 28, 2014, the hearing was continued during pendency of my consideration of Respondent's Motion for Summary Decision and supplements in support thereof.

For the reasons that follow, Respondent's Motion for Summary Decision is granted.

II. Stipulations

Pursuant to their respective pre-hearing reports, the parties have agreed to the following stipulations:

1) Respondent is an operator within the meaning of the Mine Act.

2) Cordero Mining LLC; Cordero Mine, Mine I.D. No. 48-00992, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. §§ 801 *et seq*.

3) At all times relevant to this proceeding, Complainant, Kip Allen Keim ("Kip Keim"), was a "miner" within the meaning of Sections 3(g) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(g) and 815(c).

4) The Administrative Law Judge has jurisdiction in this matter.

5) Kip Keim began working at the Cordero Mine on September 11, 2006.

6) Kip Keim was a welder at the time of termination in October 2012.

7) On or about November 14, 2012, Kip Keim filed a discrimination complaint with MSHA under § 105(c) of the Mine Act.

8) Kip Keim's employment was terminated effective October 26, 2012.

III. Factual Background

Cordero Mine is a surface coal mine in Gillette, Wyoming. On September 11, 2006, Kip Keim and his father, Scott Keim, were hired by Rio Tinto to work as welders in Cordero's rebuild shop. Kip Keim Depo. at 11:9; 15:12-23, 18:10. A year later, Cordero hired Kip's brother, Ron Keim, as a welder in the Cat Rebuild Bay. *Id.* at 17:24-18:23.

In 2009, Cloud Peak Energy Resources, LLC ("CPE") purchased Cordero Mine from Rio Tinto. R. Mem. of Points & Authorities, Ex. A., at 1. Keim alleges that Rio Tinto initially told him that he could work on the same crew as his father. Sometime thereafter, however, Keim and his father were assigned to separate crews when a mew manager, Bill Hopson, took over. Kip Keim Depo. at 19:7-20:9.

In the years preceding his termination, Keim acted in an unofficial capacity as the primary step-up lead for B Crew. Kip Keim Depo. at 22:7-24:20. As unofficial step-up lead, Keim would direct B Crew when the leadman and official step-up lead were unavailable or while those positions were vacant. *Id.*; R. Mem. of Points & Authorities, Ex. B., at 3. Serving in an unofficial capacity did not require additional training, did not result in a permanent change in pay grade, and was not viewed as a desirable position by other welders on B Crew. Kip Keim Depo. at 24:14 ("nobody else wanted the headache" of being unofficial step-up lead), 33:6-13. Keim, however, did receive an increase in pay during the time he actually worked as leadman. R. Mem. of Points & Authorities, Ex. B., at 2.

When a position as official step-up lead became available, Keim's supervisor, Tim Bishop, and others encouraged Keim to apply for the job. Kip Keim Depo. at 26:8-14. Keim stated in his deposition, however, that he did not seek the promotion or the prerequisite training because the pay raise would increase his child support obligations. *Id.*; Kip Keim Depo. at 24:13-25:4. Although Chuck Burgess was ultimately promoted to official step-up lead under leadman Kent Thurman, Keim continued to serve as unofficial step-up lead when Thurman and Burgess were unavailable. Kip Keim Depo. at 39:17-41:6.

A. The Keim-Alaniz Feud

David ("Dave") Alaniz is a welder in Cordero's rebuild shop. Alaniz was assigned to D crew with Keim's brother, Ron Keim, during 2012. Keim alleges that for three years, welders in the rebuild shop have had trouble working with Alaniz. Kip Keim Depo. at 108:18-25. Keim states that Alaniz quickly developed a reputation as a "super document-taker" and that he regularly brought complaints against his coworkers to the attention of management. *Id.* In particular, Keim alleges that Alaniz's complaints to management specifically targeted his brother, and Keim blames Alaniz's complaints as the impetus for a disciplinary warning and action plan that his brother Ron was given. Kip Keim Depo. at 109:20-110:8. Keim avers that he and other miners had made complaints to management about Alaniz's behavior, but management never took any action against Alaniz. *Id.* at 112:16-113:7; 137:18.

On or about October 2, 2012, Alaniz filed a letter with MSHA and Wyoming mine inspectors complaining of harassment and physical intimidation by Kip, Ron, and Scott Keim. R. Mot. for Protective Order, Ex. B, at 3. In his letter, Alaniz sought the aid of inspectors to defuse a situation that he believed would "lead to extreme violence without [their] intervention." *Id.* Alaniz alleged that the Keim family, in particular Ron and Scott, had unfairly disparaged the quality of his welds, made threats of violence against him and others, and brought weapons and ammunition onto mine property. *Id.* at 3-8. Alaniz's letter further alleges that Ron Keim created a hostile work environment by playing sexually explicit music in the shop and disparaging Matthew Shepard, whose brutal murder in Laramire, Wyoming drew national attention to the issue of bias-motivated violence. *Id.; see also* James Brooke, *Gay Man Dies from Attack, Fanning Outrage and Debate*, N.Y. Times, Oct. 13, 1998, www.nytimes.com/1998/10/13/us/gay-man-dies-from-attack-fanning-outrage-and-debate.html.

On October 5, 2012, during the shift change, Ron and several miners complained to Kip Keim that "they were just completely sick and tired of [Alaniz's] crap." Kip Keim Depo. at 141:10-17. When Alaniz joined them upstairs, Keim alleges that Alaniz sat on his lunch box, exposing his genitals through the holes in his pants. *Id.* This incident prompted Keim to call what he believed to be Cordero's internal complaint hotline to report Alaniz's behavior. R. Mem. of Points & Authorities, Ex. E. Keim's hotline complaint, as set forth in the Ethics and Compliance Report, states in pertinent part:

> **WHO:** Caller, KIP KEIM, reported DAVID ALVAREZ.[4]
> **WHAT:** Bullying/Harassment
> **WHEN:** ONGOING SINCE 2010, EXACT DATE UNKNOWN
> **WHERE:** IN THE SHOP, IN THE BREAKROOM
>
> **Incident Description**
>
> . . .
>
> **10/5/2012 3:46:10 PM - Original Call**
>
> Caller, KEIM, reported that ongoing since 2010, exact date unknown, Welder, David ALVAREZ, has created a hostile work environment. Keim stated that ALVAREZ is looking for any opportunity to sue the company so that he does not have to work anymore. KEIM stated that the employees feel that they cannot say anything without ALVAREZ finding it offensive and reporting them to Human Resources. KEIM stated that the employees have been called racist because they were talking about Mexican and

[4] Although the Ethics and Compliance Report refers to David *Alvarez*, it is undisputed that Keim's hotline complaint was referencing David *Alaniz*.

Chinese food.[5] KEIM also stated that ALVAREZ specifically picks on the younger employees, names DECLINED. KEIM asked ALVAREZ to stop picking on the younger employees and ALVAREZ told him, "They are f*cking working here became I let them f*cking work here." KEIM also stated that ALVAREZ has done things to purposely provoke the employees to say something to him.

KEIM stated that in 2011, exact date unknown, he reported the issues with ALVAREZ to Supervisor, Tim BISHOP. KEIM stated that no action was taken by BISHOP. KEIM does not want to report BISHOP.

KEIM stated that several employees will be seeking legal help in regards to the issues. KEIM would like for ALVAREZ to be terminated.

How does the caller know about the incident?: Witnessed

What documentation is available?: None

Involved Parties

Reported Individuals:
Name: DAVID ALVAREZ
Title: WELDER

Management Notified: YES[6]

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[5] Keim mentions the incident concerning Mexican and Chinese food multiple times in his complaints and deposition, but does not give an explanation or provide a context for those incidents. *See* R. Mem. of Points & Authorities, Ex. E, at 1; Kip Keim Depo. at 91:19, 104:4-6, 107:8-20. According to Cordero's investigation into Alaniz's complaints, Alaniz objected to comments by his coworkers that perpetuate the racial pejorative that Chinese food always contains cat and/or dog meat. R. Mot. for Protective Order, Ex. B, at 16.

[6] During conference calls with the parties and the undersigned, Keim suggested that the words "Management Notified: YES" indicated that the hotline complaint was forwarded to Cordero. Read in context of the complete Compliance Report, however, it is clear that these words merely restate Keim's allegations that he had notified Bishop sometime in 2011 of Alaniz's behavior. *See* R. Third Supplement to Mot. for Summary Decision, Ex. A, at 22:7-24 (confirming that this section of the report is a summary of the information set forth in the incident description).

Date: 2011, EXACT DATE UNK **Phone:** [blank]
Name: TIM BISHOP
Title: SUPERVISOR
Action Taken: None.

Involved/Aware Parties: YES
Name: NAMES DECLINED
Title: EMPLOYEES
Role: Alleged Victim
Title: YOUNGER EMPLOYEES
. . .
Escalation Information
IS ONLY: Is there the potential for a serious threat to life to occur in the next 48 hours? NO

Id.[7]

The hotline number that Keim called was listed on posters or brochures distributed throughout the mine, and Keim believed that such calls would be forwarded to Cordero's top management officials. *Id.*; Kip Keim Depo. at 90:19-91:3. Due to a routing mistake, however, Cordero's hotline number was directed to The Network, the company that manages the ethics and compliance complaint hotline for Cordero's former owner, Rio Tinto, and not to In Touch, the contractor hired to manage CPE's complaint hotline. R. Second Supplement to Mot. for Summary Decision, at 2.

On October 6, 2012, Keim's complaint was forwarded to Adam Bennett, Group Counsel Investigator for Rio Tinto in Brisbane, Australia. R. Second Supplement to Mot. of Summary Decision, Ex. C. According to Bennett's sworn affidavit, he was unsure where the complaint had originated because the caller specified a Gillette, Wyoming location, but Rio Tinto no longer had any mines in Gillette. *Id*. Bennett was able to locate a Rio Tinto employee with a similar name in France. *Id.* Upon his belief that the call originated in France, Bennett posted a response to Keim advising, "Dear caller, the laws of the EU and France do not permit us to accept a

[7] The Network instructs interview specialists who document employee hotline complaints to employ what they call a "three pass-system." Thomas Kelly Depo at 8:1-9:18. Under this system, the interview specialist begins by asking the caller to explain what happened. *Id.* Based on this initial information, the interview specialist classifies the type of complaint (i.e., harassment, fraud, etc.) and will ask the caller additional questions that relate to the complaint's classification. *Id.* Next, the caller will ask a series of questions that have been requested in advance by their client. *Id.* Throughout the call, the interview specialist repeats back the information provided by the caller, allowing the caller an opportunity to confirm the accuracy of the interview specialist's report. *Id.*

speak-OUT report for matters other than financial, accounting, banking, competition/antitrust law and anti-bribery. If you wish to continue with this complaint please do so via your normal management/HR processes." *Id.*

Although Keim has no evidence that his hotline complaint was forwarded to Cordero, Keim believes that Bishop knew about the hotline complaint and was angry at Keim for raising his concerns above the heads of his immediate supervisors. Kip Keim Depo. at 153:10-13; 154:9-11. Keim claims that after the hotline call, he noticed a marked change in Bishop's attitude towards him. *Id*. at 70:15-17. Keim further alleges that on October 15, 2012, Bishop told his father and Chad Zurowski that "he hated that everyone liked [Keim]." R. Mem. of Points & Authorities, Ex. B., at 5.

B. Keim's Termination

In the six months prior to Keim's termination, Thurman was out on medical leave, and Burgess and Keim were alternating as B Crew lead. R. Mem. of Points & Authorities, Ex. B., at 3. According to Keim, Burgess had advised Keim in advance that he planned to take off four night shifts for a hunting trip beginning on October 19, 2012. *Id.*; Kip Keim Depo. at 38:16-24.

On the morning of October 18, 2012, Keim sent a text to Burgess asking him if he needed Keim to fill in as lead. Kip Keim Depo. at 42:7-44:4. Later that day, at 7:10 p.m., Keim received a text message from Dan Oliver, another welder on B Crew, stating that Bishop had asked Oliver to come in early to work and fill in as step-up lead on October 19, 2012. R. Mem. of Points & Authorities, Ex. B., at 4. At 7:24 p.m., Keim received a text from Burgess responding, "yes, you do" or "yes, you need to come in." Kip Keim Depo. at 42:7-44:4.

Confused, Keim called Clint Cooper, rebuild shop manager, at 7:27 p.m. to seek further guidance. R. Mem. of Points & Authorities, Ex. B., at 4. Cooper, however, was unaware of the situation and suggested that Keim should contact Bishop. *Id.* At about 7:29 p.m., Keim called Bishop twice and left a voice mail asking Bishop to explain who was expected to fill in as lead the next day. *Id.*; Kip Keim Depo. at 47:17-48:3.

Later that evening, Keim met with Oliver at the Montgomery Bar in downtown Gillette, Wyoming. Kip Keim Depo. at 48:4-13. Oliver confirmed that Bishop had sent him a text message instructing Oliver to fill in as step-up lead during the evening shift the next day. *Id.* at 48:4-7. Oliver, however, drew Keim's suspicion when he told Keim that Oliver had erased the text message from Bishop. *Id.* at 54:12-55:8. After discussing the problem, Oliver ultimately conceded that he did not want to go in as step-up lead and suggested that he would be more comfortable if Keim took his place. R. Mem. of Points & Authorities, Ex. B., at 4. Keim recalls Oliver saying, "Well, if you want to do it, go ahead." Kip Keim Depo. at 48:17-20. Keim replied, "No problem, dude. I've done it before. No problem." *Id.*

On October 19, 2012, at 9:40 a.m., Keim received a text message from Bishop confirming that he wanted Oliver to fill in as B Crew lead. R. Mem. of Points & Authorities, Ex. B., at 4. Keim sent Bishop two follow-up text messages seeking an explanation for the change in step-up lead policy and informing Bishop that Oliver did not want to assume the responsibility of lead. *Id.* When Bishop did not respond, Keim decided it was too late to ask Oliver to come in early. Instead, Bishop went to the mine at noon to serve as B Crew leadman. *Id.*; Kip Keim Depo. at 49:1-21.[8]

When Keim arrived at the rebuild shop, Cooper came out of his office and told Keim, "Yeah, I spoke to Tim [Bishop] and he was telling me that he wants to get more people familiar with doing the step-up lead." Kip Keim Depo. at 59:12-20; 60:9-14. Keim replied, "Oh, that makes total sense. You bet. I am so sorry . . . I didn't even – I didn't hear back from Tim until it was too late." *Id.* Keim, however, did not tell Cooper about the text message from Bishop that he had received that morning. *Id.* at 61:8-24.

After working as step-up lead on October 19, Keim continued to work the position for the next two night shifts. Kip Keim Depo. at 38:24. On the morning of October 22, 2012, Bishop returned to the rebuild shop to discover that Keim, not Oliver, was filling in as step-up lead of B Crew. *Id.* at 64:11-65:11. Bishop pulled Keim and Oliver aside and asked them why they had not followed his instructions. Keim replied that he had done so because he never heard back from the texts that he had sent Bishop on October 19, adding "a little bit of communication would be great." *Id.* According to Keim, Bishop responded by stepping in close, jabbing his finger in his chest, and yelling at Keim, "I do not have to communicate with you." *Id.*; R. Mem. of Points & Authorities, Ex. B., at 4. Keim replied, "ok, if that's how you want it, that's fine" and walked away in an effort to defuse the situation. R. Mem. of Points & Authorities, Ex. B., at 4.

Keim worked the night shift on October 22, 2012, and then was off for three days. Kip Keim Depo. at 68:23-69-2. On October 26, when Keim returned to work, Keim was called into a meeting with Bishop, Cooper, and Nutting. R. Mem. of Points & Authorities, Ex. D., at 3. During the meeting, Keim was given a chance to explain why he had disregarded Bishop's instructions and assumed the role of step-up lead. Kip Keim Depo. at 74:22-76:19. When Keim offered his explanation that he had done so because Bishop's text came too late, management asked Keim why he continued to work as step-up lead on subsequent nights. *Id.* Keim responded, "I couldn't tell you." *Id.* At the end of the meeting, management concluded that Keim would be suspended and that they would recommend that he be terminated for insubordination. R. Mem. of Points & Authorities, Ex. D., at 3. On October 29, 2012, Cooper called Keim to tell him that he had been terminated. *Id.*

[8] Keim explained that the leadman is required to arrive at the mine at noon, well in advance of the start of the evening shift, so that the morning shift can apprise the leadman of the status of any ongoing projects. Kip Keim Depo. at 49:1-21. Keim went to bed early the night before, but was unsure if Oliver had done so. *Id.* at 51:6-14; 67:21-67:1.

On or about November 14, 2012, Keim filed a discrimination complaint with MSHA alleging that he was terminated because he had engaged in protected activity. R. Mem. of Points & Authorities, Ex. C., at 1. In his letter to MSHA, Keim essentially claims that he was fired for his October 5 hotline complaint and that the allegations of insubordination were pretextual. R. Mem. of Points & Authorities, Ex. D., at 1. Keim's letter to MSHA explained:

> This is my safety concern: Dave [Alaniz] has created such a hostile work environment in the last four years. Clint [Cooper], which is our manager and Tim, who is our supervisor, also Doug Nutting, head of HR has known about what is going on and to the best of my knowledge no action has been taken. Therefore I felt compelled to call the hot line.
>
> The few things that have taken place: start with the mental anguish I have witnessed on D crew. It is just unbelievable. It becomes a Safety Issue when these young men can not keep their minds on the job, because of the constant worry of loosing (sic) their jobs. It has gotten so bad that they can't even text or talk about Mexican food at break time, because it offends Dave and he will take them to HR. There is documentation of this! With the job of working in the Rebuild shop you have to be so alert and focused on the task at hand because dealing with the massive size of shovel dippers, dragline buckets, and haul truck beds that are unforgiving if handled improperly.
>
> The next concern is on several occasions Dave has come to work with holes in improper areas in his clothing which expose his genitals. Witness to Dave's actions are all of D crew and others from other crews. Dave looks for anything to take anyone to HR. Also Dave has told other co workers and I quote "They f------ work here because I f------ let them! Also I will f------ fire any one I want." Meaning everyone who works at CPE.
>
> With all of this said Dave is still employed with CPE.

R. Mem. of Points & Authorities, Ex. D., at 1.

In his letter to MSHA, Keim also briefly discussed two other "safety concerns" that occurred in 2011. *Id.* at 2. Keim does not allege that he reported these events to MSHA or management. Rather, Keim appears to intend to use these allegations of unsafe practices to show that Cordero has attempted to cover up safety hazards and does not discipline miners responsible for creating such hazards. *Id.*

IV. Principles of Law

A. Summary Decision

Under Commission Rule 67, "a motion for summary decision shall be granted only if the entire record . . . shows: (1) [t]hat there is no genuine issue as to any material facts; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) ("[A] party must move for summary decision and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law."); *see also Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (holding that summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law).[9]

Summary judgment is an extraordinary procedure that must be entered with care because erroneous invocation denies a litigant the right to be heard. Thus, when considering a motion for summary decision, the judge must draw all "justifiable inferences" from the evidence in favor of the non-moving party. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The judge should only grant a summary decision "upon proper showings of the lack of a genuine, triable issue of material fact." *Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp.*, 477 U.S. at 322).

In reviewing the record on summary judgment, I evaluate the evidence in the light most favorable to the Complainant. *See Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller*, 368 U.S. at 473). Any inferences drawn from the underlying facts contained in the materials supporting the motion have been viewed in the light most favorable to the Complainant. *See Hanson Aggregates*, 29 FMSHRC at 9 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

[9] Summary judgment is proper only if there is no reasonably contestable issues of fact that are potentially outcome determinative. *See, e.g., Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997). This standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). Under that standard, the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986) (citing *Brady v. S. Ry. Co.*, 320 U.S. 476, 479-480 (1943); *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949)).

B. Commission Discrimination Precedent

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act.[10] The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" by 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 [that] they might suffer as a result of their participation." S. Rep. No. 95-181 at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) (quoted in *Sec'y of Labor on behalf of Anderson v. Stafford Constr.*, 732 F.2d 954, 960 (D.C. Cir. 1984)).

In order to establish a prima facie case of discrimination under section 105(c)(1) of the Mine Act, a miner alleging discrimination must show: 1) that he engaged in protected activity, and 2) that the adverse action complained of was motivated in part by that protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). Such a burden is "lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Jayson Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065 (May 2011). To establish a prima facie case, a complainant need only provide evidence from which the trier of fact could infer employer retaliation for protected activity. *Id.*

In determining whether a mine operator's adverse action was motivated by protected activity, a judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Factors to be considered in assessing whether a prima facie case exists include: 1) the operator's knowledge of the protected activity; 2) hostility or "animus" towards the protected activity; 3) coincidence in time between

[10] Section 105(c)(1) of the Act provides that, "[n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act."

the protected activity and the adverse action; and 4) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510.

A mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987). The Commission has also held that judges may conclude that [such] justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. *Chacon*, 3 FMSHRC at 2516.

V. Analysis

A miner engages in protected activity when, inter alia, making a complaint "under or related to" the Mine Act. 30 U.S.C. § 815(c). The Mine Act provides that no miner shall be discriminated against when making a complaint of an "alleged danger or safety or health violation . . . ." *Id*. Keim alleges that his termination was motivated by a complaint made to an internal hotline that Cordero promotes as a means of voicing concerns to management.[11] After careful examination of Keim's hotline complaint, however, I find that the concerns that Keim attempted to share with management do not relate to violations of health and safety standards or more generally to the safety of his fellow miners. Rather, Keim's concerns were that of a personality dispute arising from an ongoing conflict between members of the Keim family and Dave Alaniz. Even viewing the facts in the light most favorable to Keim, Keim has failed to show that he engaged in protected activity, a necessary element to establish a prima facie case of discrimination under the Act.

While Keim's post-termination complaint to MSHA is couched in terms of a safety complaint, Keim's underlying hotline complaint did not voice *any* safety or health concerns. The complaint report compiled by The Network did not mention that Keim believed that Alaniz posed a danger to the health and safety of miners. R. Mem. of Points & Authorities, Ex. E. Instead, the report was classified as a bullying/harassment complaint, where Alaniz had created a hostile work environment by zealously bringing complaints about coworkers to human resources.

[11] Keim's concerns about Alaniz's exposed genitals falls beyond the scope of this administrative tribunal's inquiry. Keim has not expressed a belief that the holes in Alaniz's pants posed a safety risk to himself or others. Rather, Keim alleges that Alaniz's purposely exposed himself thereby creating a hostile work environment. Without passing on the validly of Keim's concerns, it is noteworthy that such matters, if related to a protected class, appear to fall within the purview of Title VII to the Civil Rights Act of 1964, not the Mine Act.

Id. The only instance where safety was even mentioned was in a question posed by The Network operator. That is, when Keim was asked by the interview specialist whether Alaniz's behavior created a potentially serious threat to life in the next 48 hours, Keim replied, "No." *Id.*

It was not until Keim complained to MSHA that his hotline complaint morphed into a potential safety complaint whereby Keim expressed concern that the young men in the Rebuild shop were unable to "keep their minds on the jobs, because of the constant" fear of losing their jobs when Alaniz complained about them to management.[12] Keim cannot transform a quintessential personality dispute into a protected activity simply by invoking the word "safety" in his subsequent complaint to MSHA. For this reason alone, Keim is unable to establish that he engaged in protected activity under the Mine Act prior to his termination.

Even if Keim's hotline complaint could be construed as an attempt to characterize Alaniz's behavior as a safety concern, it is apparent that his hotline complaint was not "under or related to" the Mine Act. For Keim's complaint to fall within the protection of the statute, the subject of his complaint must concern an "alleged danger or safety or health violation" under or related to the Mine Act. Any claim of protected activity not grounded in an alleged violation of a health or safety standard must result in some hazardous condition or practice that the operator is responsible to correct. *See Bryant v. Clinchfield Coal Co.*, 4 FMSHRC 1380, 1421 (1982) (ALJ) (citing *Kaestner v. Colorado Westmoreland, Inc*., 3 FMSHRC 1994 (1981)(ALJ)).

Keim's hotline complaint did not allege that Alaniz was violating a mandatory safety or health standard nor did it allege a hazardous condition or practice that Cordero was responsible for correcting. In his hotline complaint, Keim requested that management terminate Alaniz because of Alaniz's zealous reporting of alleged obscene, racist, anti-gay, and threatening comments and actions to management, Wyoming mine safety inspectors, and MSHA. There is, however, nothing inherently unsafe about Alaniz reporting such issues to management, Wyoming mine safety inspectors, or MSHA. In fact, such reporting is clearly endorsed by the Mine Act or other legislative schemes established to encourage and protect employees who bring workplace complaints to management or state or federal officials. *See, e.g.,* Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a); National Labor Relations Act §§ 7, 8, 29 U.S.C. §§ 157, 158(a)(1).

In these circumstances, extending the protections of the Mine Act to Keim would frustrate both the Mine Act and Title VII since Keim essentially seeks the termination of Alaniz, an activity unprotected under the Mine Act, because Alaniz engaged in arguably protected activity under Title VII. In the same breath, Keim seeks both the protections afforded to miners under section 105(c), while simultaneously asking management to terminate Alaniz for exercising Alaniz's rights to bring workplace complaints to the attention of management and

[12] As noted, Keim's MSHA complaint also alluded to unrelated safety concerns that arose back in 2011, but Keim did not report these concerns to management or MSHA.

inspectors. While Congress directed the courts and the Commission to construe "protected activity" broadly, the term should not be interpreted to thwart the Act's objectives or those under other federal laws. *Cf. Collins v. FMSHRC*, 42 F.3d 1388, 1994 WL 683938, at *5 (6th Cir. 1994) (unpublished per curiam table decision) (finding that a miner did not engage in protected activity when he documented safety hazards "for the sole purpose of protecting his own job should he ever be confronted with his own violations"). The Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies, except when those policies conflict with rights granted under section 105(c) of the Mine Act. *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (citing *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc*., 12 FMSHRC 1521, 1532 (Aug. 1990)); *Mullins v. Beth-Elkhorn Coal Corp*., 9 FMSHRC 891, 899 (May 1987) (citing *Local Union No. 781, Dist. 17, UMWA v. E. Assoc. Coal Corp*., 3 FMSHRC 1175, 1179 (May 1981)).

In sum, Keim did not engage in protected activity under the Mine Act.

V. Order

Complainant, Kip Allen Keim, has failed to establish any genuine issue of material fact that he engaged in protected activity under the Mine Act. Accordingly, Respondent's Motion for Summary Decision is **GRANTED**. This case is **DISMISSED** with prejudice.

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

Distribution:

Kristin R.B. White, Esq., Jackson Kelly, PLLC, 1099 18th Street, Ste. 2150, Denver, CO 80202

Kip A. Keim, P.O. Box 3172, Gillette, WY 82717

/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 29, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2010-1284 A.C. No. 15-19053-222236
v.	:	
JAMES RIVER COAL SURFACE COMPANY, Respondent	: : :	Mine: Bear Branch Surface

DECISION AND ORDER

Before: Judge Gill

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). Pursuant to Section 2700.67 of the Federal Mine Safety and Health Review Commission's Procedural Rules, 30 C.F.R. § 2700.67, Respondent, James River Coal Service Co. ("James River"), moved for summary decision on the grounds that there is no genuine issue of material fact and Respondent is entitled to summary decision as a matter of law. Having considered Respondent's Motion for Summary Decision, Petitioner's Response, Respondent's Reply, and the deposition transcripts, I hereby GRANT Respondent's Motion for Summary Decision.

FACTS AND ISSUES

On March 30, 2010, Mine Safety and Health Administration ("MSHA") Inspectors James Daniels and Robert Ashworth traveled to James River's Bear Branch Surface Mine to continue an ongoing quarterly inspection. Tr. 10 (Daniels).[1] The operations at the mine were almost completed and the company was finishing up its reclamation work. Tr. 5-6 (Ashworth); Tr. 6 (Slone). The only electrical equipment present at the mine was a light plant with a ground rod located in the parking lot and a portable welder located on the back of a truck. Tr. 25-26, 32 (Daniels); Tr. 14-15 (Ashworth).

Daniels and Ashworth reviewed the record book for the monthly examinations of electrical equipment and determined that an examination had been entered for March 2010 and for April 2010. Tr. 12 (Daniels). Upon noticing the April entry, Daniels and Ashworth

[1] Citations to the deposition transcript will be denoted by "Tr.," followed by the page number(s), with the name of the deponent in parentheses.

contacted Kevin Slone, Mine Foreman. The record book for the monthly electrical examinations is not required to be counter-signed, and Slone was not aware that an entry had been made for April. Tr. 15, 17 (Daniels); Tr. 7-8 (Ashworth); Tr. 9, 14 (Slone). James River telephoned the electrical examiner, who was not on the mine property at the time, and asked him to come to the mine to provide an explanation. Tr. 8 (Jackson).

When the examiner arrived at the mine site, he explained that he had conducted an examination of all of the electrical equipment at the mine on March 28, 2010. He was not able to explain why the examination book already contained an entry for April. Tr. 13-14 (Daniels). As a result, Daniels issued 104(d)(1) Citation No. 8358737 (the Citation"), alleging a violation of 30 C.F.R. Section 77.502. The narrative of the Citation states as follows:

> The certified electrician is not conducting adequate monthly electrical exams at this mine site. The record book for the monthly examination of electrical equipment indicates that the certified electrician conducted a monthly electrical exam for the following electrical installations and equipment: office building (not in use at this time), welders (o.k. at inspection), light plant (o.k. at inspection) and ground rod (o.k. at inspection). The record indicates that this examination was conducted 4-2010. Section 110(f) of the "Federal Mine Safety and Health Act of 1977" states that "whoever knowingly makes any false statement, presentation, or certification in any application, record, report, plan or other document filed or required to be maintained pursuant of [sic] this act shall upon conviction be subject to a civil penalty, imprisonment or both." The certified electrician recorded an electrical examination for the month of April, 2010 in the record book as per today, 3-30-2010.

Section 77.502 of the MSHA regulations requires that electrical equipment be frequently examined. 30 C.F.R. § 77.502. Section 77.502-2 defines "frequently" for purposes of Section 77.502 as "at least monthly." 30 C.F.R. § 77.502-2; Tr. 12 (Daniels) ("It's a monthly exam, so he just has to do it once a month."). Respondent contends that, because an electrical examination was performed in March and because the April examination was not yet due, no violation of Section 77.502 occurred.

DISCUSSION AND CONCLUSIONS OF LAW

Daniels and Ashworth confirmed that Section 77.502 requires monthly examinations of the electrical equipment, meaning that an examination must be conducted once per calendar month. Tr. 12 (Daniels); Tr. 17-18 (Ashworth). There is no dispute that the examiner performed an adequate examination of all of the electrical equipment for the month of March. Tr. 26 (Ashworth). The inspectors had also conducted an examination of all of the electrical equipment within a couple of days prior to March 30 and there were no violations or hazards on any of the electrical equipment. Tr. 31-32 (Daniels); Tr. 13-14 (Ashworth).

Ashworth testified as follows:

Q. So for the month of May it wouldn't be a violation until you had passed the last day of May?
A. A monthly exam requirement he can do it on the first day of one month, and the very last day of the next month and he's not violated 30 CFR.
Q. Okay. So for May it wouldn't be a violation until June 1st?
A. Right.
Q. So for April it wouldn't be a violation until May 1st?
A. Right.

Tr. 16-17 (Ashworth). Likewise, Daniels testified that Respondent did not violate Section 77.502 because a March examination was conducted and the Citation was issued before the month of April had even begun. Tr. 23-24 (Daniels).

The Citation was premised upon the allegation that an April examination had not been conducted, even though the examination book reflected an entry for April. I conclude that, because an examination had been conducted in March, and because Respondent still had the entire month of April to perform an electrical examination, Respondent did not violate Section 77.502. S*ee, e.g., Secretary v. Consolidation Coal Co.*, 4 FMSHRC 1610, 1613 (Aug. 1982) (ALJ) (holding that the standard requiring monthly examinations is not violated where, at the time the citation was issued, four days were left in the calendar month and the exam could be performed during that timeframe).

ORDER

Citation No. 8358737 is VACATED and this case is DISMISSED with prejudice.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution:

Willow Fort, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

Melanie J. Kilpatrick, Esq., RAJKOVICH, WILLIAMS, KILPATRICK & TRUE, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

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
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

May 1, 2014

FRED ESTRADA,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2013-311-DM
v.	:	SC-MD 2013-06
	:	
	:	
RUNYAN CONSTRUCTION,	:	Mine ID 29-00159
Respondent	:	Mine: Tyrone Mine
	:	

ORDER DENYING STAY and FURTHER ORDER REGARDING DAMAGES

Before: Judge Moran

In this section 105(c)(3) discrimination proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (2012) ("Mine Act," or "Act") the Court issued its Decision on Liability on March 31, 2014. That decision directed the parties "to confer in order to determine if there can be agreement as to the terms of relief for Mr. Fred Estrada. Section 105(c)(3) of the Act provides, in pertinent part: ['']Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner … for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.' Some issues related to the relief were raised by Complainant's Counsel in its post-hearing brief.[1]

[1] The Decision on Liability added in a footnote that "Complainant's post-hearing brief addresses the subjects typically included for the relief aspects of established discrimination claims. In this regard it lists the following: '1. Expunge from Mr. Estrada's personnel file any negative references relating to this matter. 2. Reimburse Mr. Estrada for all reasonable and related economic losses or expenses incurred in the institution and litigation of this case. This amount shall include damages in an amount equal to full backpay, all employment benefits, attorneys' fees and costs, all medical and hospital expenses and any and all other damages suffered and incurred by Complainant as a result of his discriminatory discharge. Furthermore, interest shall be added to backpay and other expenses, from the date of discharge until the date of payment, at the adjusted prime rate announced semi-annually by the Internal Revenue Service. 3. Post this decision at all of its mining properties in conspicuous, unobstructed, places where notices to employees are customarily posted, for a period of 60 days. 4. Restore Mr. Estrada to his former position as a bird hazer or to a similar position, at the same rate of pay, same shift assignment, and with the same or equivalent duties.' It then addresses the procedural aspects related to determining if an agreement can be reached on these issues: The Parties are ORDERED TO CONFER within 21 days of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts

(…continued)

Typically, reinstatement to Mr. Estrada's former position, if sought, back pay with an appropriate interest rate, medical expenses, if any, benefits, such as pension contributions, if any, and lost overtime, are among the remedial matters that may be present. In addition, the remedies typically also include: expungement from Fred Estrada's personnel file of all references to the unlawful disciplinary action taken against him, including any such references to the events and circumstances associated with his wrongful termination from any other records maintained by the company; and a posting of this decision at all of its mining properties where Runyan operates, placed in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days, together with a posting by Runyan at such properties that it will not violate the Mine Act." Decision on Liability at 25-26.

Unnecessary delay has followed. Respondent filed a Motion to Stay on April 17, 2014. The Court responded, via email, on April 18, 2014, advising that "[i]t is probably true that parties are free to file petitions for discretionary review as they choose, but it is my understanding that any petition for discretionary review filed by Runyan is premature, as my decision was not a final decision, and that such petition will be denied on that basis. Rather my decision was titled as the Court's 'Decision on Liability.' Further, the Court noted in that decision that it 'retains jurisdiction in this matter until the specific remedies to which Mr. Estrada is entitled are resolved and finalized. Following the issuance of the final order, this case will be referred to MSHA for assessment of a civil penalty. [footnote omitted] Accordingly, this decision will not become final, and therefore not appealable, until an order granting specific relief and awarding monetary damages has been entered. Counsel are directed to discuss the issues of the appropriate relief and to report the results of their discussions in writing to the Court within 20 calendar days of the date of this order.' As the Commission noted recently in *Secretary obo Shemwell v. Armstrong Coal Company*, 2013 WL 4140416 at *1 (June 2013), 'Ordinarily, a judge's decision finding a violation under the Mine Act is not final until the judge issues a penalty against the operator under section 105(d) of the Mine Act, 30 U.S.C. § 815(d). In his Decision in this case, quoted above, Judge Feldman explicitly stated that the decision does not become final until the judge issues a Decision on Civil Penalty and Supplemental Decision on Relief. Thus, the Commission lacks jurisdiction to entertain Armstrong's Petition for Discretionary Review and must reject it.' Though the Commission's decision was speaking broadly to the subject of petitions for discretionary review, their *Shemwell* decision happened to involve a discrimination matter too. Accordingly, [the Court's] instructions in the email [ ] sent earlier today remain[s] intact. In that earlier email to the parties [the Court] stated: Runyan's Motion to Stay is DENIED."

[1](…continued)

Runyan shall undertake and pay to carry out this Order. If an agreement is reached, it shall be submitted with 30 days of the date of this decision. If an agreement cannot be reached, the parties are FURTHER ORDERED to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within thirty (30) days of the date of this decision. For those areas involving monetary damages on which the Parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case, the Parties should so state. C's Br. at 33-34. The Court views this as a reasonable outline for the parties to use in their discussions." Decision at n.39.

Subsequent to the Court's April 18, 2014 email, the Commission issued an Order, dated April 29, 2014, denying Runyan's "document entitled "Petition for Discretionary Review." Entitled was the correct description as the Commission noted that such filing was premature, agreeing with this Court's April 18th email Order which made that observation, as noted above.[2]

The Court's March 31st decision on liability instructed the parties to "discuss the issues of the appropriate relief and to report the results of their discussions in writing to the Court within 20 calendar days of the date of this order." On April 21, 2014, Counsel for Mr. Estrada provided a "Joint Update to the Court," advising that it would advise the Court by May 2, 2014 whether a settlement could be achieved.

The Court orders that, absent a complete settlement as to all aspects of damages by May 2, 2014, the parties are to email a joint submission to the Court by Friday, May 16, 2014, setting forth each category of damages. For *each* separately identified category of damages, the parties are to note whether there is an agreement and to separately list the amount agreed upon for each category. In instances, if any, where there is a dispute as to the dollar amount for a given category of damages, the parties are to identify whether the dispute concerns the subject of category being included as damages and/or whether the dispute is limited to the dollar amount. Accordingly, the parties are to identify is there are factual disputes pertaining to any given category of damages or whether the dispute is strictly over a legal determination, challenging the appropriateness of inclusion of a particular item of damages. In this regard, the Court notes that damages are discussed in *Simpson v. Kenta Energy, Inc.* 7 FMSHRC 272, 278-285 (Feb. 1985)(ALJ) and that the decision may provide some guideposts for the parties. That decision addresses back pay, any interim earnings and interest, computed on a quarterly basis, attorney's fees, including the appropriate hourly rate, hours reasonably expended, and various other expenses incurred. Other items may include: medical expenses that would have been covered by the Complainant's medical insurance, if applicable; unemployment compensation payments; vacation pay, if applicable; Fred Estrada's reasonable expenses associated with the November 19, 2013 hearing; and whether reinstatement is sought. Further, the Commission has spoken to the computation of backpay and interest in *UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (1988). The need for a hearing to resolve factual disputes over damages is a rare event.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

[2] The Commission also preemptively advised the Respondent that had it instead attempted to seek interlocutory review, which was the correct way to seek review of the Court's Decision on Liability, it would conclude that the conditions for such review would not be met. Commission Order at 2, citing Rule 76(a)(2), 20 C.F.R. § 2700.76.

Distribution:

Ben Furth, Esq., The Furth Law Firm, P.A., The Furth Building, 780 South Walnut # 5, Las Cruces, NM 88001

Jason M. Nutzman, Esq., Dinsmore & Shohl, LLP, 900 Lee Street, Suite 600, Charleston, WV 25301

Nathan Gonzales, Esq., Gonzales Law, 925 N. Hudson, Silver City, NM 88061

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

May 7, 2014

CHRISTOPHER PULLIAM, Complainant,	:	DISCRIMINATION PROCEEDINGS
	:	Docket No. KENT 2013-1045
v.	:	MSHA Case No.: SE-MD 13-26
STERLING MATERIALS, Respondent	:	
DEBORAH L. PULLIAM, Complainant,	:	Docket No. KENT 2014-238 MSHA Case No.: SE-MD 13-25
v.	:	
STERLING MATERIALS, Respondent	:	Mine ID: 15-18068 Mine: Sterling Materials

ORDER TO SUBMIT AUDIO TAPE AND TRANSCRIPT FOR *IN CAMERA* INSPECTION

Before: Judge Lewis

These discrimination proceedings are before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). On April 16, 2014, Respondent filed a Motion to Compel Production of Audio Recording. The Motion arose after Complaint, Christopher Pulliam, refused to produce an audio recording in response to Respondent's discovery request. On April 24, 2014, Complainant filed an Omnibus Response to Respondent's Motion to Compel Production of Audio Recording and Motion for Protective Order.[1]

The Complainant referred to 29 C.F.R. §2700.61 ("Rule 61" or the "miner informant rule"), 29 C.F.R. §2700.62 ("Rule 62" or the "miner witness rule"), and 29 C.F.R. §2700.5(d) ("privacy considerations") as the basis for refusing to produce the requested audio tape. Complainant argues that the miner's name is on the recording, as well as his or her distinctive voice, and that disclosing such information would expose the miner to instant retaliation. The

[1] In addition to arguing against production of the audio tape, Complainant's response also argues against Respondent's pending Motion for Protective Order, which was also filed on April 16, 2014.

Complainant states that it intends to play the tape at the hearing, as well as call the person speaking on the tape as a witness.

Complainant's presentation of Rule 61 and Rule 62 for purposes of not producing the audio tape is problematic and often conflates the two privileges. The miner informant rule only applies to the government, and may not be asserted by a private party. In *Bright Coal Co*., the Commission stated that the "informer's privilege is the well-established *right of the government* to withhold from disclosure the identity of persons furnishing information of violations of the law to law enforcement officials." 6 FMSHRC 2520, 2522 (Nov. 1984) (emphasis added); *see also Asarco, Inc*., 12 FMSHRC 2548 (Dec. 1990) (reaffirming the rule in *Bright Coal Co*.). The Commission further stated that the "purpose of the privilege is to protect the public interest by maintaining a free flow of information *to the government* concerning possible violations of the law and to protect persons supply such information from retaliation." *Bright Coal*, 6 FMSHRC at 2522-2523 (emphasis added). In the instant case there is no indication that the tape is a recording of a miner acting as an informant to the government. Therefore, the reliance on Rule 61 is inapposite.

In drafting the Mine Act, Congress repeatedly placed in the statute provisions that protect miners from discrimination. In addition to Rules 61 and 62, Section 105(c) protects miners in making health and safety complaints, as well as engaging in other protected activities. 30 U.S.C. §815(c). Additionally, §103(g)(1) protects the names of miners and representatives of miners when making complaints to the Secretary concerning violations of the Act or imminent dangers in the mine. 30 U.S.C. §813(g)(1). Though the miner informant rule may only apply to the Secretary, Congress made clear that as a general policy matter, miners who report violations of the Act should be protected.[2]

Complainant makes it clear that it "fully intends to play this tape at the trial, and call this person as a witness." *Complainant's Response*, at 9. Therefore, it is more properly Rule 62 that is at issue. Rule 62 states, "A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness." Rule 62 applies to all miners who are called as witnesses, and are not limited to miners who are informants. *Secretary of Labor obo Richard M. Bundy v. Kennecott Utah Copper Corp*., 2002 WL 1969243, *6. Complainant uses Rule 62 as a blanket exception from releasing any information on the audio tape. However, "it is the *name* of the informant, not the *contents* of his statements, that is protected, unless disclosure of the contents would tend to reveal the identity of an informant." *MSHA v. Don Dewild & Keith Buescher, Employed by Mobile Premix Sand & Gravel*, 19 FMSHRC 220 (Jan. 1997) (ALJ) (emphasis added).

Complainant's reliance on Rules 61 and 62 in turning over any of the contents of the audio tape is misplaced. Though the miner witness rule certainly applies in this instance, it only protects the name and identifying information of the miner. Based on the submissions of the

[2] It should be noted that participating in a Commission proceeding is a "protected activity" under the Mine Act, and if any miner suffers discrimination as a result, he or she would have recourse under Section 105(c).

parties, this Court is not able to determine what part of the contents of the tape should be turned over to the Respondent at this stage. As such, an *in camera* review of the materials is necessary.

Therefore, it is **ORDERED** that Complainant shall, within 7 days from this Order, transcribe the audio tape and submit both the tape and transcription for *in camera* review. The transcription of the audio tape shall be on done on pages with line numbers, and Complainant may submit to this Court a recommendation of information to be redacted should the judge rule in favor of the Motion to Compel, with reference to specific line numbers. Each recommendation should be accompanied by a specific reason, which the judge will consider in making a final decision.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

Kenneth R. Reed, PSC, 241 Elm Street, Ludlow, Kentucky 41016

Kevin L. Murphy, Esq., & Jeffrey Landen, Esq., Graydon Head, 2400 Chamber Center Dr., Suite 300, Ft. Mitchell, KY 41017

Richard G. Griffith, Esq., Josheph A. Bilby, Esq., & Elizabeth S. Muyskens, Esq.,
Stoll Keenon Ogden PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507

/mzm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 13, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. KENT 2013-959 A.C. No. 15-17691-325489-01
v.	:	Docket No. KENT 2013-960 A.C. No. 15-17691-325489-02
ALDEN RESOURCES, LLC, Respondent	:	Docket No. KENT 2013-563 A.C. No. 15-17691-313350
	:	Docket No. KENT 2013-118 A.C. No. 15-17691-331536
	:	Mine: No. 3

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge McCarthy

These cases are before me upon four Petitions for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This matter is set for hearing in London, Kentucky on June 24, 2014.

On April 28, 2014, Respondent filed a Motion for Summary Decision concerning Citation No. 8378384 in Docket No. KENT 2013-960.[1] Respondent alleges that on undisputed facts, the defective lifeline violation of 30 C.F.R. § 75.380(d)(7)(vii) cited in Citation No. 8378384 does not form the basis for an "inadequate pre-shift examinations" violation under 30 C.F.R. § 75.360(b)(1) because it does not involve the presence of methane, lack of oxygen and/or improper airflow, and does not involve hazardous conditions and/or violations relating to the nine mandatory health or safety standards in paragraph 75.360(b)(11). R. Mot., 2.

On May 5, 2014, the Secretary filed a Response in Opposition. The Secretary alleges that the mine's lifeline was missing several components for nine days, that the defective and deficient lifeline was a hazardous condition that exposed miners to fatal injuries, and that mine examiners did not recognize the hazardous conditions and were not performing adequate

[1] Respondent mistakenly cited Citation No. 8378383 instead of the correct Citation Number 8378384.

examinations as required by 30 C.F.R. § 75.360(b)(1). The Secretary argues that 30 C.F.R. § 75.360(b)(1) requires Respondent to look for hazardous conditions and not simply for the presence of methane, lack of oxygen and/or improper airflow (and/or the violations of the nine standards referenced in § 75.360(b)(11)), as Respondent contends. Sec'y Opp., 2-3.

Commission Rule 67(b), 29 C.F.R. § 2700.67(b), provides that: "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." The Commission has long held that:

> Summary decision is an extraordinary procedure. If used improperly it denies litigants their right to be heard. Under our rules, a party must move for summary decision and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law.

Missouri Gravel Co., 3 FMSHRC 2470, 2471 (Nov. 1981) (footnote omitted). It "is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

Genuine issues of material fact and law exist, including the legal issue of whether the Secretary's interpretation of 30 C.F.R. § 75.360(b)(1) is entitled to *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). Accordingly, Respondent's Motion for Summary Decision is **DENIED.**

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

Distribution:

Ryan Pardue, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5710

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, 151 N. Eagle Creek Drive, Suite 310, Lexington, KY 40509

Peggy Langley, CLR, U.S. Dept. Of Labor, MSHA, 3837 S. U.S. Hwy 25E, Barbourville, KY 40906

Adron Wilson, CLR, U.S. Dept. Of Labor, MSHA, 3837 S. U.S. Hwy 25E, Barbourville, KY 40906

Gary W. Oliver, CLR, U.S. Dept. Of Labor, MSHA, 3837 S. U.S. Hwy 25E, Barbourville, KY 40906

Sam Brashears, Alden Resources, LLC, 332 W. Cumberland Gap Parkway, Ste. 100, Corbin, KY 40701

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

May 13, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. LAKE 2011-13 A.C. No. 11-02752-232235
v.	:	
THE AMERICAN COAL COMPANY, Respondent	: :	Mine: New Era Mine

ORDER DENYING MOTION FOR APPROVAL OF SETTLEMENT UPON SECRETARY'S MOTION FOR RECONSIDERATION

Before: Judge William B. Moran

Introduction

Quis custodiet ipsos custodes? Who will guard the guardians?

The Secretary has again filed its motion for settlement of this matter. The motion does not alter the terms of the original settlement motion, nor does it provide further explanation to justify its terms. Instead, the Secretary contends that it need not amend its motion and that the Court and the Commission must accept it as originally presented. The Secretary believes that the Commission's role in reviewing proposed penalties, which have been contested before it, is a perfunctory and hollow process. The words of section 110(k) of the Mine Act, 30 U.S.C. § 820(k), the legislative history for that provision, and the decisions of the Federal Mine Safety and Health Review Commission each refute that claim.

Additionally, of grave concern, and by itself a compelling demonstration of the need for the Commission's continued substantive oversight of settlements, per section 110(k), the Secretary's Motion contains *not a single word about the safety and health of miners*. The absence of any mention in its motion as to the impact which removal of Commission oversight would have on the protection of miners, highlights that the Commission's substantive role in the review of settlements, as specifically directed by Congress, must remain intact. To protect miners, as Congress recognized, it is the Commission which must guard the guardians. Thus, for the reasons which follow, upon the Court's reconsideration of this seriously misguided motion, the settlement is once again DENIED.

The Secretary's Motion for Reconsideration and Supporting Brief[1]

The Secretary's Motion announces that *it* has "reviewed all of the citations, the inspector's notes, and the exchange of positions between the parties during the original negotiations . . . [and that it] fully endorses the settlement as originally proposed . . . [and that it further] moves for the Court to reconsider its legal conclusions that Section 110(k) compels the Court to reject the proposed settlement *for lack of factual support*, and [the Court's conclusion] that Section 110(k) does not permit the Secretary to negotiate settlement agreements structured as a uniform percentage reduction of civil penalties." Motion at 1 (emphasis added).

At least at the start of its motion, the Secretary does acknowledge the words of the Mine Act which pertain to this issue, noting that section 110(k) of the Mine Act provides, as applicable here:[2]

> No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.

30 U.S.C. § 820(k).

The Secretary goes on to relate that the mine operator and the Secretary, acting through a conference and litigation representative ("CLR") reached an agreement which called for an across-the-board cut in each of the 32 citations involved with this docket and for which they admit each of the 32 citations were cut by 30 percent. Once the Court rejected the settlement motion, the Secretary transferred the docket to an attorney within the Solicitor's Office. That attorney, in turn, filed the subject motion for reconsideration.

In maintaining that the original settlement motion should be upheld, the attorney stated that she "exercised her professional judgment, . . . considered the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going through a trial." Motion at 4. In the larger context, however, the Secretary is contending that section 110(k) does not impede its authority to "negotiate settlement agreements structured as a uniform percentage reduction of civil penalties." *Id.* at 4.

To deal with the language of section 110(k), which literally provides that there can be no compromise, mitigation or settlement *except with the approval of the Commission*, the Secretary simply dismisses those words, contending that they don't count because the section "does not

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[1] It should not come as a surprise that the Respondent does not oppose the Secretary's Motion. After all, the original motion was a joint enterprise.

[2] The balance of the provision, which is not pertinent here, goes on to state that "[n]o penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the Court."

provide any meaningful standards for judicial review." The Secretary then obfuscates the separate roles that it and the Commission have in settlements, by asserting that "Section 110(k) [ ] cannot be read to prevent the Secretary from negotiating, or the Commission from approving, settlements [structured as a uniform percentage reduction of civil penalties]."[3] Motion at 4.

In its naked attempt to make the command of section 110(k) meaningless, the Secretary asserts that any attempt by the Commission to go beyond its "role," either through its precedent or procedural rules, is an *ultra vires* act. Under the Secretary's reading of the section, the Commission's "approval" role is "simply a procedural mechanism to ensure that [ ] settlement agreements negotiated by the Secretary are clear, transparent to the public, and in accordance with any otherwise applicable law."[4]

Elaborating upon its contentions, the Secretary speaks first to its argument that section 110(k) provides no meaningful standards to limit the Secretary's prosecutorial discretion to settle Mine Act enforcement actions. In support of this, the Secretary begins in an odd manner, by noting that for *other* statutory schemes, an agency's enforcement authority is within its absolute discretion and that *generally* that discretion is unreviewable. Motion at 6. Of course, this issue is about the Mine Act's statutory scheme, not some *other* schemes. Carrying this rather unusual argument further, the Secretary adds that, why *were it not for section 110(k)*, it would not even have to be making this argument, as the general rule that the enforcement agency's discretion is unreviewable would apply. This is pure gobbledygook but it does not deter the Secretary from proceeding down that path with its irrelevant observations that *other* agencies, such as EPA and OSHA, can settle their enforcement actions without review.

Returning to the Mine Act, which is the subject of this litigation, the Secretary nods that its foregoing arguments don't apply "if Congress has otherwise provided." This brings the Secretary back to the nettlesome language of section 110(k). Effectively conceding that the general rule is not applicable because of that section, the Secretary then maintains that the provision is without effect unless the statute indicates an intent[5] to circumscribe the general rule of unfettered agency discretion *and* the statute also provides "meaningful standards for defining the limits of that discretion." Motion at 8.

Accordingly, it is the Secretary's position that if that statutory provision provides no "*meaningful* standards" for judicial review, then the provision becomes a nullity and the Commission's role is reduced to a *meaningless* standard of review, requiring it to approve any negotiated agreement as long as its terms are stated (i.e. "transparent") and providing that the

[3] The bracketed language replaces the "settlements like the one proposed here" wording employed by the Secretary in its motion because it more precisely describes the type of settlement the Secretary believes is unreviewable, notwithstanding Congress' words in section 110(k).

[4] Ironically, the Secretary's statement that settlements must be "in accordance with any otherwise applicable law" apparently excludes section 110(k) as an applicable provision.

[5] Thereafter, the Secretary avoids further discussion of the "intent" argument, focusing instead on its "meaningful standards" contention.

agreement is "in accordance with any otherwise applicable law," whatever that means.[6] Only where the provision "provides 'clearly defined factors' to guide an enforcement agency's decision [may] the presumption of unreviewability [ ] be overcome," says the Secretary. Motion at 9.

Noting that the second sentence of section 110(k) employs the same language when an Article III court is reviewing a final order of the Commission—that no such Commission penalty assessment shall be compromised, mitigated, or settled except with the approval of the Court—the Secretary submits that the Commission should act "as a generalist court," and not examine the Secretary's prosecutorial discretion. *Id.* at 10. Beyond that section, the Secretary asserts that the Act's overall structure supports its contention that "the decision to settle" is within its prosecutorial discretion.[7]

The Secretary, continuing with its theme that, if there is an absence of meaningful standards, then the Commission's section 110(k) review authority is titular and its review under that provision ministerial, then asserts that section 110(i) of the Mine Act, the provision setting forth *the Commission's authority to assess all civil penalties* under the Act, cannot be a source of such meaningful standards. That section, it must be noted, states that, in assessing civil monetary penalties, the *Commission* is to 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.

In what amounts to a representation that, in the Court's view, crosses an ethical line for the limits of proper advocacy, the Secretary, distinguishing the Commission's statutory role in assessing civil penalties from its statutory role in approval of proposed penalties, asserts that section 110(k) "governs the Commission's '*approval*' of 'proposed penalties . . . *compromised, mitigated, or settled'* by the Secretary." Motion at 11. (ellipsis and italics in the Secretary's Motion). This gross rewording and reordering of section 110(k) so distorts Congress' command that it must be repeated here that the section actually provides: "No proposed penalty which has

[6] The Secretary displays the emptiness of the hollow "in accordance with any otherwise applicable law" phrase, as it offers no examples of its effect.

[7] The Court would note that the Secretary's *decision* to settle is not mutually exclusive from *the Commission's authority to review* settlements to determine if their approval is consonant with the Mine Act's overarching goals.

been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission."[8]

The Secretary's Brief continues to knock down straw men, asserting that the "role of an adjudicator is typically narrower when reviewing a proposed compromise because the adjudicator cannot assume from the existence of the compromise that the enforcement agency's underlying allegations are correct, or that the regulated entity did in fact fail to meet its statutory obligations." Motion at 12. This contention, as with many of the Secretary's arguments, sidesteps the language of section 110(k). Further, the Commission makes no assumption from the proposed settlement. Rather, it requires that the basis to support it be supplied, not merely that it be asserted to be meritorious. Continuing to miss the point, the Secretary notes that "parties are free to admit or to deny the fact of a violation in settlement agreements." *Id.* at 13 (citing *Amax Lead Co*., 4 FMSHRC 975, 977 (1982) ("*Amax Lead*")).

From this, the Secretary deduces that "a Commission administrative law judge cannot apply Section 110(i) to contested citations to determine whether the compromise penalty is 'appropriate' in light of the statutory penalty factors because the allegations . . . cannot be treated as if they were findings of fact and conclusions of law after trial." But, no one is contending that the allegations are being so treated. Instead, the Commission, per section 110(k), must be advised as to the basis for the compromise so that it can fulfill its statutory obligation and Congress' expressly stated concern that settlements not be based on the need to save litigation and collection expenses and that those factors should play no role in determining settlement amounts. *See* legislative history references, *infra.* Further, the Commission, in the cited 1982 *Amax Lead* decision, there noted "it is clear that section 110(k) confers upon the Commission the statutory authority either to approve or reject settlements in contested penalty

[8] In trying to divorce the applicability of the statutory criteria for assessing a civil penalty from proposed penalties contested before the Commission, as those criteria provide obvious and explicit factors for assessing civil penalties, the Secretary asserts that those criteria cannot provide a meaningful standard in the context of section 110(k) approvals by the Commission. Motion at 12. In the latter situation, the Secretary contends that the Commission's role is limited to "simply approv[ing] or reject[ing] the compromise before it. . . ." *Id.* Despite this assertion, the Secretary acknowledges that the parties "may agree to disagree about the factual or legal disputes giving rise to the proceeding in the first place." *Id.* But that is exactly the point—the parties' settlement motion needs to relate the factual or legal disputes that underpin their decision to settle. Here, the Secretary acknowledges implicitly that such disputes don't exist, or at least they don't see fit to inform the Commission about them. Instead, on the basis of the Secretary's unenlightening review, it contends only that "the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going to trial" need to be asserted in order for its 30% across-the-board reduction to be justified. Of course, Congress has specifically stated that such considerations are *not* to be part of the equation where settlements are concerned. It is also noted that the requirement to provide the factual and/or legal basis for a settlement motion is not burdensome and that settlement motions *routinely* provide this kind of information. *See* Appendix to this Order, *infra.* It is through the submission of that information, factual, and/or legal, that the Commission is able to appreciate the basis for the presented compromise or mitigation and thereby carry out Congress' direction of its role in such matters.

proceedings. As we observed in *Co-op Mining Company*, 2 FMSHRC 3475, 3475-3476 (1980), '[S]ection 110(k) of the Mine Act places an affirmative duty upon us to oversee settlements.'" *Amax Lead*, 4 FMSHRC at 977. The focus in *Amax Lead* was over the inclusion of exculpatory language, but consistent with this Court's earlier remarks about the Commission's role in approving settlements, in affirming the judge's rejection of the settlement the parties submitted to him, its review of the proposed settlement included whether it would weaken the agency's enforcement capabilities and thereby "*jeopardize the health and safety of miners*." *Id.* at 978 (emphasis added).

Thus, unlike the Secretary's present motion, bereft as it is of any stated concern for the health and safety of miners, the Commission, now for more than 34 years, has kept its eye on the overriding focus of the Mine Act, our Nation's miners, just as Congress intended.

Apart from the discussion of the Commission's decision in *Black Beauty Coal Company*, 34 FMSHRC1856 (Aug. 2012), little more needs to be discussed about the Secretary's Motion. It does contend that its analysis of section 110(k) trumps the Commission's procedural rule regarding settlements, 29 C.F.R. §2700.31, again on its theory that no procedural rule can rescue the lack of meaningful standards for limiting its prosecutorial discretion to settle. As this is simply a rehash of its earlier argument, it need not be addressed a second time. Similarly, section "II" of its Motion is nothing more than a wind up of its earlier stated contentions.[9] Motion at 18-19.

[9] As part of the process of reviewing the Secretary's Motion, the Court of course reviewed cases cited by the Secretary in support of its claims. A few of those are discussed, briefly, but the bottom line is that the Court considers those cases as inapposite or distinguishable. *Heckler v. Chaney*, 470 U.S. 831(1985), for example, involved a decision *not* to take *enforcement* action. The Commission acknowledges that the decision to vacate a citation is not reviewable. Thus, the "presumption of unreviewability," which presumption the Court does not apply in any event where the Mine Act is concerned, was raised in *Heckler v. Chaney* only in that limited context. Besides, the Court emphasized that its decision was "only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue. How to determine when Congress has done so is the question left open by *Overton Park*." *Id.*at 832-833.

As another example, in *Secretary of Labor v. Twentymile Coal Co.*, 456 F 3d 151 (D.C. Cir. 2006), the Court was addressing a very different context, namely the Secretary's authority to cite either the owner-operator, the independent contractor, or both for a contractor's violation. That decision also focused on the charging decision and the court there noted that "the *decision to prosecute* is particularly ill-suited to judicial review." *Id.* at 157. (emphasis added). Remembering that that the decision to prosecute is a special category, the D.C. Cir. also noted that "there is a strong presumption that agency action is reviewable . . . [and that] [i]n *Overton Park*, the Supreme Court declared that this exception to the presumption of reviewability applies 'in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply. 401 U.S. at 410' " and further that "[i]n determining "whether a matter has been committed solely to agency discretion, [the court] consider[s] both the nature of the administrative action at issue and the language and structure of the statute that supplies the

(…continued)

Applying *its* construction of section 110(k), the Secretary concludes its Motion by asserting that it meets its test for approval, per *its* definition of that test. In this last section, the Secretary continues to mischaracterize the 110(k) review process, asserting that "evaluating the wisdom or sufficiency of the compromise is not the adjudicator's role." Motion at 20. The Commission does not evaluate the *wisdom* of the compromise, but it does require that the basis for it be provided. This is routinely done and this Court has reviewed many, many, such submissions where the information is easily supplied. Examples of this follow in the Appendix to this Order.

Further Discussion

I. The Commission's Decision in *Black Beauty Coal Company*, 34 FMSHRC 1856 (Aug. 2012).

Although the Secretary has attempted to overcome the Commission's Decision in *Black Beauty Coal*, its arguments are not worthy of prolonged discussion, as that decision cogently sets forth the basis for the Commission's role where proposed penalties have been contested before it. Reduced to its essence, the Secretary contends that the legislative history is now old, as if it had a shelf life expiration date on it. The motion also tells half the story about that history, focusing on Congress' remarks about the process being "carried out in public" and "on the record." Motion at 16. Apparently, the Secretary has the authority to pick and choose which parts of the legislative history are too old for it, while simultaneously pointing to old sections it likes. Or it may view the Congressional expressions as reflecting some sentient moments, followed by lapses into a fog. *See* Motion at 17 (asserting that Congress contradicted itself from one sentence to the next).

In its decision in *Secretary of Labor v. Black Beauty Coal Co.,*34 FMSHRC 1856, 2012 WL 4026640 (Aug. 2012) ("*Black Beauty*"), the Commission concluded that it "is clearly authorized by the Mine Act to review a proposed settlement of a contested penalty and to require parties to submit the factual support necessary for that review. Although the Commission's review authority may not extend to certain areas of the Secretary's enforcement authority, Congress emphatically authorized the Commission to review proposed settlements of contested penalties and to assess all penalties provided under the Act." *Id*. at 1860.

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[9](…continued)
applicable legal standards for reviewing that action." *Id.* at 156 (citing *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir 2002)).

Other cases cited by the Secretary are simply inapplicable to the matter at hand. For example, *Swift v. United States,* 318 F. 3d 250 (D.C. Cir 2003) involved a qui tam action alleging False Claim Act violations. Though holding that there was no implication of judicial review of the government's decision to dismiss the action, it is hardly instructive to the Mine Act or the provision in issue. Other cases, such as *Drake v. Federal Aviation Administration*, 291 F. 3d 59 (D.C. Cir), finding that the FAA's action "was equivalent to a decision not to commence an enforcement action" are of that unhelpful ilk. *Id*. at 70.

In reaching that conclusion, the Commission first took note that "the plain language of section 110(k) of the Mine Act explicitly authorizes the Commission to review a proffered settlement of a contested penalty . . . [and that section] unambiguously sets forth the Commission's exclusive authority to approve the compromise, mitigation or settlement of penalty after it has been contested." *Id.* at 1860-1861. That plain language is enough to eviscerate the Secretary's entire argument in its Motion.[10]

While the plain language ends the Secretary's contentions, the Commission went on to observe that the "legislative history of section 110(k) explains that Congress intended the

[10] In *UMWA v. Maple Creek* Mining, 29 FMSHRC 583, 2007 WL 2161858 (July 2007), the Commission spoke to the plain meaning issue, noting: "Although the parties do not refer to the terms of the Mine Act to support their competing positions, we must start there to determine whether Congress spoke directly to the question presented. The first inquiry in statutory construction is 'whether Congress has directly spoken to the precise question at issue.' *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc*., 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Moreover, 'in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.' *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether 'Congress had an intention on the precise question at issue,' which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted). If, however, the statute is ambiguous or silent on a point in question, a second inquiry is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to 'an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable.' *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The Commission is clearly charged with administering the provisions of sections 105(a) and 105(d) of the Mine Act, which address the challenge of enforcement actions of the Secretary, the initiation of cases before the Commission, and the Commission's administration of hearings concerning the validity of those enforcement actions. *See Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 53, 56-59 (D.C. Cir. 1988) (where language of Mine Act was indecisive, court deferred to Commission's interpretation of section 104(d) regarding the issuance of withdrawal orders). As the Supreme Court stated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994), the Commission was established as an independent review body to 'develop a uniform and comprehensive interpretation' of the Mine Act (citing Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n before the Senate Comm. on Human Res., 95th Cong. 1 (1978)). Moreover, the question of how the procedures set forth in sections 105(a) and 105(d) are to mesh and how the Commission will conduct hearings involves a major policy component, which the Commission is uniquely qualified to establish. Section 111 is also one of the provisions of the Mine Act the Commission is 'charged with administering.' 30 U.S.C. § 821 ('The Commission shall have the authority to order compensation due under this section ….'); *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 775-80 (D.C. Cir. 1990). Consequently, we need not defer to another agency's interpretation of the statutory language at issue here." *Id.* at *5-*6. Here, the Secretary concedes that the language is plain about the Commission's role but that Congress' words were meaningless and empty.

settlement of a penalty to be a transparent process that is open to public scrutiny and that the Commission is authorized to approve contested penalties offered for settlement [and that] [t]he Senate Report recognized, in particular, the importance of an Administrative Law Judge's review of a proposed settlement of a penalty:

> In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny…. Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and the Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge.

Black Beauty, 34 FMSHRC at 1861 (citing S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632 (1978) ("Legis. Hist.")).

The Commission then explained that "Congress intended that the settlement of a penalty be open to scrutiny in order to better serve the purpose of civil penalties, that is, to encourage operators' compliance with mandatory standards, noting that [t]he Senate report provided: 'The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.' *Id*. at 1862 (citing Senate Report at 632).

The Commission then observed that Congress specifically addressed that section 110(k) was part of the Mine Act "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest, [and for that reason] Congress authorized the Commission to approve the settlement of civil penalties." In this regard, the Senate Report explains: To remedy this situation, section 111(l) [later codified as section 110(k)] provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission…. By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. *It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties*. *Id*. (emphasis in Commission Decision).

Given the plain statutory language, not to mention the affirmatory legislative history, the Commission observed that "[t]o carry out this responsibility, the Judge must have information sufficient to establish that the penalty reduction does, in fact, protect the public interest." *Id.*

The Commission took pains to explain the Congressional design for this provision, noting that it "has long recognized, after 'an operator contests the Secretary's proposed assessment of

penalty, . . . *Commission* jurisdiction over the matter attaches.' *Sellersburg Stone Co*., 5 FMSHRC 287, 291 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984) (emphasis in original). It is clear that the Commission's jurisdiction attaches to a proposed penalty after it has been contested due to the language of section 110(k), which specifies that '[n]o proposed penalty which has been contested before the Commission under section 105(a)' shall be settled without the approval of the Commission. 30 U.S.C. § 820(k) [ ]. In addition, section 110(i) designates the Commission as the agency authorized to 'assess all civil penalties provided in this Act.' 30 U.S.C. § 820(i) [ ]. The assessment of such penalties clearly includes contested penalties that are the subject of a settlement agreement." *Id.*

The Commission then noted that with "this statutory mandate to approve or disapprove proposed penalty reductions, [it] has promulgated procedural rules which require parties to submit *factual support* for a proffered settlement agreement." *Black Beauty*, 34 FMSHRC at 1862-1863 (emphasis added). Driving home the point that has apparently eluded the Secretary in this motion, the Commission explained that its "Procedural Rule 31 provides that a 'proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion,' and expressly requires a party seeking the approval of a settlement to submit '[f]acts in support of the penalty agreed to by the parties.' 29 C.F.R. § 2700.31(b)(3). Rule 31 further provides that any 'order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record.' 29 C.F.R. § 2700.31(c). Rule 65 provides in part that a 'Judge may require the submission of proposed findings of fact.' 29 C.F.R. § 2700.65. Thus, a Judge's authority to reasonably request additional information to justify a proposed settlement is fully supported by both the Act and the Commission's procedural rules." *Id.* at 1863.

Following that explication, the Commission then spoke to "[w]hether a Judge may consider the deterrent purposes of the statutory penalty scheme in reviewing a settlement proposal." *Id.* at 1864. It observed in that regard that "that section 110(k) "contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal. Thus, Congress provided a broad mandate to the Commission (and its Judges), charging it with reviewing and approving all settlements of penalty cases pending before it and imposing no explicit limits on what should be considered in this review." *Id.* at 1865.

Unlike the Secretary, who contends that the Commission cannot look to the obvious relevance of the statutory penalty criteria in section 110(i),[11] the Commission noted the importance of penalties as deterrence to future violations. Speaking particularly to a key contention of the Secretary in this motion for reconsideration, the Commission pointed out that the legislative history anticipated the claim, noting that "[w]hile the reduction of litigation and collection expenses may be a reason for the compromise of assessed penalties, the Committee

[11] That section expressly provide that "the Commission *shall consider* the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. §820(i). (emphasis added).

strongly feels that since the penalty system is not for the purpose of raising revenues for the Government, and is indeed for the purpose of encouraging operator compliance with the Act's requirements, *the need to save litigation and collection expenses should play no role in determining settlement amounts*." *Id*. at 1866 (quoting Senate Report at 629-33) (re-ordered emphasis added by this Court).

Given all those considerations, the Commission concluded that the assessment of a civil "penalty is 'is bounded by proper consideration of the statutory criteria *and* the deterrent purpose underlying the Act's penalty assessment scheme.'" *Id.* at 1866-1867 (quoting *Sellersburg Stone,* 5 FMSHRC at 294). Clearly Congress viewed civil penalties as a mechanism to promote operator compliance with health and safety mandates, to discourage operators from violating health and safety regulations and laws in the future.

II. The Settlement Denial in this matter

The Secretary concedes that in some instances there are modifications to civil penalty contests but, repeating its arguments, contends that it also has the "prosecutorial discretion to negotiate percentage-reduction settlements" and that it is under no obligation to do more than to announce that the Commission. Motion at 22.

Apart from the fact that the Secretary's own civil penalty assessment regulations provide, per section 30 C.F.R. § 100.7(b)(2), that "[w]hen MSHA receives the notice of contest, it advises the Federal Mine Safety and Health Review Commission (Commission) of such notice [and that] [N]o proposed penalty which has been contested before the Commission shall be compromised, mitigated or settled except with the approval of the Commission." The Secretary's Motion, as noted, asserts that the Commission's approval authority is a ministerial task. That a uniform across-the-board reduction is within the Secretary's authority to present to the Commission and with the Commission, according to the Secretary, unauthorized to do anything except approve such a settlement, as long as it is clear and transparent to the public, the Secretary, without more, may always enter a uniform percentage reduction, apparently of any amount.[12]

Remembering that the Secretary has merely asserted that its across-the-board, unelaborated, 30% reduction is justifiable, it is worth examining the context in which this claim is made by returning from the theoretical realm to the real world of the citations involved here. A few examples from the citations will be noted, but one should bear in mind that *none* of the 32 citations have been modified; there is no contention, for example, that the citations' descriptions of the conditions or practices are challenged or just plain wrong. Nor is there a contention that the gravity or negligence should really be something other than what the issuing inspector marked for any of those citations. Instead, the Secretary contends that the private exercise of its professional judgment, the private valuation of the proposed compromise associated with that judgment, the prospects of coming out better, or worse, after a full trial, and the Secretary's

[12] Here, it happens to be a 30% reduction but there is no indication that Secretary would be hindered from a higher percentage across-the-board reduction, and those too would not require more information from the Secretary than it offers here.

resources that would need to be expended in going through a trial, combine to justify this 30% uniform reduction.

The following examples of some of the citations within this docket serve to demonstrate the need for additional information in order for the Commission to carry out Congress' directive under section 110(k). In the Court's original decision denying the settlement motion, it noted the absence of any legitimate basis to reduce any of the citations and the motion admitted this, announcing that there were *no changes* in gravity or negligence for *any* of the *32* citations. The court's original decision, denying the settlement motion, noted that included within these were:

* A haul truck seriously leaking oil, a condition which was made worse because its engine could not be shut down (Citation 8424013); the inspector listed the violation as significant and substantial;

* Up to 5 feet of water, rib to rib, in a longwall bleeder (Citation 8424511) was cited as a violation of the mine's approved ventilation plan. That plan required water pumps when water depth exceeded 12 inches and the effectiveness of the system was gauged by the depth *not* exceeding 24 inches of water. More than a week later, with more pumps having been installed, the water level still exceeded the standard and it took nearly *a month* (from July 29 to August 24) to remove the water;

* Inadequate roof and rib support, a problem which had been cited some 107 times at this mine in the past 2 years, (Citation 7579878). The inspector listed the condition as a significant and substantial violation, noting that the ribs were rashing out, and also that the distance from the last row of roof bolts was six to seven feet. With these findings, the inspector concluded that the roof and ribs were inadequately supported to protect miners from falls;

*Another roof control violation was found, as set forth in Citation 8159274. This condition, the result of a rib roll, involved an excessive entry width continuing for 20 feet. The Inspector listed the violation as significant and substantial. Abatement required the installations of 6 x 6 posts;

*Still another roof control violation, identified as significant and substantial, was found. (Citation 8427401). This one, also the result of rib rashing, found ineffective rib bolts, bolts more than six feet away from the ribs and one that was seven feet from a rib corner. As with Citation 7579878, this standard had been cited at this mine more than one hundred times in the past two years.

*An outdated escapeway map and an incompletely installed life line in the primary escapeway (Citations 8424508 and 8424509). The importance of escapeway life lines cannot be gainsaid;

*Coal accumulations up to 20 inches in depth, and 18 feet wide for a distance of 165 feet, and another, similar, such situation was found as set forth in Citations 8424967 and 8424502. Regarding Citation 842967, the inspector listed the violation as significant and substantial, noting that the accumulations existed over the full width of conveyor belt and were packed under

the drive and snub rollers for a distance over 10 feet with a 12 inch depth. The belt had to be removed from service;

*Two diesel powered scoops were being used to transport a loading machine without the use of proper couplings, as set forth in Citation 8418394. The practice was in violation of a safeguard which had been issued eight years earlier and which safeguard had been cited 72 times in the past two years at this mine. As in 2002, a belt chain, which is not a proper coupling, was being used. Both the Inspector and his supervisor recommended a special assessment, but the recommendation was turned down by the District Manager. Therefore, it was this regularly assessed violation for which the Secretary seeks an unexplained 30% reduction;

*An oxygen tank pressure gauge was not maintained in safe condition, as it lacked a protective cover and when that gauge was tested, its needle did not move. (Citation 8424002) Listing the violation as significant and substantial, a new set of gauges had to be installed on the tank;

*An energized power cable for a shuttle car was found to have two holes so that it was no longer adequately insulated. (Citation 7579858) For one of those holes, exposed, energized inner bare wires were present. The Inspector listed the violation as significant and substantial with a permanently disabling injury reasonably to be expected;

The point of describing these violations is not to establish that the proposed penalties could not be reduced. Rather, it is to demonstrate that *information* is needed to justify any reductions. This Court has explained that, under a "principle of proportionality," the greater the reduction sought for a proposed penalty, the greater the amount of information that should be provided to explain the basis for the reduction. In the Court's estimation, contrary to the Secretary's assertion, *not* altering any of the citations is a factor cutting *against* the across-the-board reduction, as opposed to supporting it. The practical effect of the Secretary's position, that it may blithely present across-the-board percentage reductions, without justifying such reductions beyond its "because we can" mantra, effectively creates a new provision within Part 100. Besides contravening section 110(k)'s language, any mining company litigator would understandably insist that it too should have such reductions applied to proposed penalties under the vagaries of litigation and expenses of trial theory of penalty reduction.

Conclusion

In the Court's estimation, the Secretary's Motion for Reconsideration with its supporting brief is effectively an exhibit. By the submission of that exhibit, it is an admission against interest, unwittingly demonstrating that it does not grasp Congress' plain expression of its will regarding proposed penalties which are contested before the Commission and its directive that no such matters may be compromised, mitigated, or settled except with the Commission's approval. With no mention of the best interests of miners, nor reference to its client, the Mine Safety and Health Administration, nor any mention of Congress' concern about the deterrent effects of penalties, the Secretary, in what is little more than a power play, has demonstrated a disregard for any of these voices and by so doing underscored the wisdom of Congress' command that the Commission must approve such matters.

In addition, the Court has researched the provision which the Secretary seeks to eviscerate and has found no like statutory provision employing such terms. Nor, it is noted, has the Secretary pointed to such a like statutory provision for any other agency. Therefore, it is concluded that the section 110(k) provision is unique among federal agency statutes. Perhaps that is why Congress took pains to explain, in the legislative history, what was already plain in the text of the statute. That it is unique should not come as a surprise because the Federal Coal Mine Health and Safety Act of 1969, the Federal Mine Safety and Health Act of 1977 (Mine Act), and its most recent iteration, in 2006, with the Mine Improvement and New Emergency Response Act (MINER Act), were all prompted by mining disasters. These disasters moved Congress in each instance to re-examine the federal safety and health mining laws, brought about ever more serious Congressional treatment of mining, and formed the basis for the statement that mine safety laws and standards have been written in blood. These Congressional changes to our Nation's mine safety laws included that the Commission, through section 110(k), be entrusted to guard the guardians, where proposed penalties contested before the Commission are sought to be compromised, mitigated, or settled.

Accordingly, upon reconsideration, the Secretary's Motion for Reconsideration is DENIED. Within 30 (thirty) days of this Order, the Secretary is directed to either submit a supported motion for approval of settlement or to prepare for trial on the matters in this docket.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

APPENDIX

Settlement Example 1

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, DC 20004-1710

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA:	:	**CIVIL PENALTY PROCEEDINGS**
	:	DOCKET NO. KENT 2011-1521
	:	A.C. NO. 15-05484-000264844 VP2
Petitioner,	:	
	:	Mine: Prep Plant
	:	
	:	DOCKET NO. KENT 2011-1522
v.	:	A.C. NO. 15-18978-000264876 VP2
	:	
	:	Mine: Buckeye Highwall Miner
	:	
	:	DOCKET NO. KENT 2011-1523
RIDGEWOOD TRUCKING, INC.,	:	A.C. NO. 15-19542-000264895 VP2
	:	
Respondent.	:	Mine: Bear Branch Mine
	:	

MOTION TO APPROVE SETTLEMENT AND ORDER PAYMENT

The Acting Secretary certifies that prior to filing this Motion, a copy was provided to Respondent, Ridgewood Trucking, Inc., through its representative for review, and Respondent consents to the granting of the Motion and the entry of the proposed Decision Approving Settlement and Order to Pay filed herewith. The Acting Secretary hereby moves as follows:

1. These matters arise from inspections of the Prep Plant, Buckeye Highwall Miner, and Bear Branch Mine ("the Mines": conducted in June and July 2011. At the time of the inspections, Respondent was a contractor at the Mines. These dockets are comprised of Respondent's contest of seventeen (17: citations issued during those inspections pursuant to the Federal Mine Safety and Health Act of 1977 ("the Act":, as more specifically set forth in the paragraphs below. The civil money penalties for the citations were assessed at $25,651.00.

2. With respect to Citation Nos. 8395302, 8370015, 8370018, 8395504, 8344550, 8344551, 8344554, and 8344555, Respondent has agreed to accept these citations as written and pay the penalties as assessed. The specific penalties identified in paragraph 5, below.

3. Discovery and preparation for the hearing in this matter has revealed the following as to the parties' positions regarding the remaining citations at issue in these dockets:

(a: Citation Nos. 8370014, 8370016, and 8370017: Respondent was cited for violations of 30 CFR § 77.404(a:. Specifically, the International coal haulers, Unit Nos. 36 (VIN 46194:, 44 (VIN 552866:, and 35 (VIN 469192: were not maintained in safe operating condition. The Unit No. 36 International coal hauler had an exhaust leak in the second coupling after the turbo charger and the left side tie rod end, attached to the driver's side wheel unit, was worn and loose (Citation No. 8370014:. On the Unit No. 44 International coal hauler the right side tie rod end had excessive vertical movement (Citation No. 8370016:. On the Unit No. 35 International coal hauler the rear right side drag link was excessively worn and loose and the rear inner tire showed signs of the inner side wall separating from the tire (Citation No. 8370017:. Regarding Citation No. 8370014, Respondent argues that the tie rod was not worn and only one person drives the truck. Regarding Citation No. 8370016, Respondent argues that the tie rod was not excessive, some slack is normal, and only one person drives the truck. Regarding Citation No. 8370017, Respondent argues that one worn tire out of eighteen does not create an unsafe condition and only one person drives the truck. Respondent therefore argues that the gravity and persons affected were lower than that asserted by the Secretary. Petitioner reviewed the citations, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to reductions of the proposed civil money penalties. The specific penalty reductions are identified in paragraph 5, below.

(b: Citation No. 8395503, 8395506, and 8395508: Respondent was cited for violations of 30 CFR § 77.1605(b:. Specifically, the right front tandem-axle brake shoe assembly and brake drum on the blue International coal hauler (Company No. 38, Vin # 463195:

(Citation No. 8395503:, the left front tandem-axle brake shoe assembly and brake drum on the red Western Star coal hauler (Company No. 1: (Citation No. 8395506:, and the right rear tandem-axle brake shoe assembly and brake drum on the red Western Star coal hauler (Company No. 28, Vin # 356615: (Citation No. 8395508: were saturated with oil, apparently from defective axle seals. Respondent argues that all other braking systems were operating and therefore it was not reasonably likely that a reasonably serious injury would occur. Respondent therefore argues that the gravity was lower than that asserted by the Secretary. Petitioner reviewed the citations, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to reductions of the proposed civil money penalties. The specific penalty reductions are identified in paragraph 5, below.

(c: Citation No. 8395507: Respondent was cited for a violation of 30 CFR § 77.404(a:. Specifically, on the red Western Star coal hauler, Company No. 1, the trailing end of the left side steering system drag link contained excessive movement at its connection point with the left front wheel spindle and the rear yoke of the front drive shaft of the drive line assembly

was cracked in the area where the universal joint is held in place. Respondent argues that this citation was duplicative of Citation No. 8395506. Respondent therefore argues that the citation should be vacated. Petitioner reviewed the citation, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to a reduction of the proposed civil money penalty. The specific penalty reduction is identified in paragraph 5, below.

(d: Citation No. 8344552: Respondent was cited for a violation of 30 CFR § 77.404(a:. Specifically, there was a crack in the frame on both sides of the red International Pay Star tandem coal truck, Unit No. 29, where the hoist jack is located. Respondent argues that it was unlikely that a reasonably serious injury would occur and that the inspector notes that only the driver should have known. Respondent therefore argues that the gravity and negligence were lower than that asserted by the Secretary. Petitioner reviewed the citation, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to a reduction of the proposed civil money penalty. The specific penalty reduction is identified in paragraph 5, below.

(e: Citation No. 8344553: Respondent was cited for a violation of 30 CFR § 77.1104. Specifically, there was an accumulation of oil on both sides of the engine of the red International Pay Star tandem coal truck, Unit No. 46. Respondent argues that it was unlikely a fire would occur and that the inspector notes that only the driver should have known. Respondent therefore argues that the gravity and negligence were lower than that asserted by the Secretary. Petitioner reviewed the citation, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to a reduction of the proposed civil money penalty. The specific penalty reduction is identified in paragraph 5, below.

4. The Acting Secretary has considered the criteria set forth at Section 110(i: of the Act and has determined that the proposed penalties are appropriate in light of these criteria and promote the purpose of the Act. Information pertaining to the operator's history of previous violations and size is contained in Exhibit A, which was filed by the Secretary along with the petition in the above-captioned proceeding.

5. The following chart summarizes the citations and associated penalties and the reductions to the penalties, as applicable. The penalty reductions are to be effective upon the approval of this settlement agreement by the Federal Mine Safety and Health Review Commission.

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
DOCKET NO. KENT 2011-1521			
8395302	N/A	$207.00	$207.00
8370014	N/A	$2,901.00	$1,422.00
8370015	N/A	$585.00	$585.00
8370016	N/A	$2,901.00	$1,422.00
8370017	N/A	$2,901.00	$1,422.00

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
8370018	N/A	$285.00	$285.00
	Subtotal:	**$9,780.00**	**$5,343.00**
DOCKET NO. KENT 2011-1522			
8395503	N/A	$1,795.00	$990.00
8395504	N/A	$121.00	$121.00
8395506	N/A	$1,795.00	$990.00
8395507	N/A	$3,996.00	$2,001.00
8395508	N/A	$1,795.00	$990.00
	Subtotal:	**$9,502.00**	**$5,092.00**
DOCKET NO. KENT 2011-1523			
8344550	N/A	$540.00	$540.00
8344551	N/A	$540.00	$540.00
8344552	N/A	$2,678.00	$1,107.00
8344553	N/A	$1,944.00	$896.00
8344554	N/A	$127.00	$127.00
8344555	N/A	$540.00	$540.00
	Subtotal:	**$6,369.00**	**$3,750.00**
		Total Amended Penalty: $14,185.00	

6. The parties have agreed that no modifications to the citations are to be made.

7. Respondent agrees to withdraw its contest to the penalties as modified herein. Respondent's withdrawal of its contest is to be effective upon the approval of this settlement by the Commission.

8. Respondent is/was a contractor at a surface coal mine.

9. Respondent exhibited good faith in abating the cited violations.

10. Payment of the proposed penalties will not impair Respondent's ability to continue in business.

11. The parties agree to bear their own attorney's fees, costs, and other expenses incurred by the parties in connection with any stage of the above referenced proceedings, including attorney's fees which may be available under the Equal Access to Justice Act, as amended.

12. Upon the Commission's approval of this settlement, the Acting Secretary further agrees that the total penalty amount shall be payable in twenty-four (24: installments. The first payment in the amount of $615.00 will be due on October 1, 2013. Subsequent payments, in the amount of $590.00 each, will be due on the 1st day of each month thereafter. Failure to make any payment within 30 days after its due date may result in the entire, unpaid balance becoming immediately due and payable, together with such court costs as may be incurred by the U.S. Department of Labor in collecting such amounts, pursuant to the practices and procedures of the

Mine Safety and Health Administration, U.S. Department of Labor, Payment Office. Payments shall be made by Respondent to the MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390. The Assessment Control Numbers and Docket Numbers, as set forth in the heading of this document, shall be included on each payment. Payments shall be considered to be "made," as that term is used in this paragraph, on the date payment is placed in the U.S. mail, first class postage prepaid.

WHEREFORE, the parties move the Commission to approve the above settlement agreement pursuant to 29 C.F.R. § 2700.31, Rules of Procedure, FMSHRC, and to order payment of the amended proposed penalties of $14,185.00 as set forth in the payment plan described above.

Respectfully submitted this 18th day of July, 2013.

M. Patricia Smith
Solicitor of Labor

James E. Culp
Regional Solicitor

John Rainwater
Associate Regional Solicitor

Gregory W. Tronson
Manager, Denver Backlog Project

Natalie E. Lien
Trial Attorney
U. S. Department of Labor
Attorneys for Petitioner

Settlement Example 2

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

HILDA SOLIS, Secretary of Labor,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	**(JUDGE WILLIAM MORAN:**
ADMINISTRATION (MSHA:,	:	
	:	DOCKET NO. WEVA 2011-1449
Petitioner,	:	A.C. NO. 46-05121-249736
	:	
v.	:	DOCKET NO. WEVA 2011-1451
	:	A.C. NO. 46-05121-249736
	:	
ROCKSPRING DEVELOPMENT INC.,	:	MINE: CAMP CREEK MINE
	:	
Respondent.	:	

JOINT MOTION TO APPROVE SETTLEMENT

The parties propose the following settlement of the civil money penalties in the subject cases, as set forth below.

I

The Secretary proposed penalties totaling $13,992 against Rockspring Development Inc. (hereinafter referred to as the Respondent: for the violations alleged in Docket Number WEVA 2011-1449. The parties have agreed to settle that docket for penalties totaling $8,500. The Secretary proposed penalties totaling $56,621 for the violations alleged in Docket Number WEVA 2011-1451. The parties have agreed to settle that docket for penalties totaling $40,000. These dockets do not contain any citations that are the subject of a notice of contest.

II

The Respondent is very large in size, producing 2,986,909 tons of coal in 2010.

III

The proposed penalty is appropriate to the size of the Respondent's business and will not affect the operator's ability to continue in business.

IV

The Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

V

The parties have agreed that the Respondent's history of previous violations has not affected the terms of this Joint Motion to Approve Settlement.

VI

The Respondent, as demonstrated by the signature of its representative or attorney set forth below, certifies that it has reviewed the provisions of this Joint Motion to Approve Settlement and agrees to the statements and representations herein and to the amount of the penalty compromise. On this basis, the Respondent waives its right to the five-day notice requirement set forth in 29 C.F.R. § 2700.31(d:(3: and requests that the Administrative Law Judge enter an immediate order approving the parties' proposed settlement of the citations at issue in these cases.

VII

Docket Number WEVA 2011-1449

The Secretary originally proposed penalties totaling $13,992 for the violations alleged in Docket Number WEVA 2011-1449, and the parties have agreed to settle that docket for penalties totaling $8,500.

The Respondent has agreed to pay the penalty proposed by the Secretary for the violation alleged in the following citation:

Citation Number	Penalty
8116757	$6,996

The basis for the settlement of the remaining citation at issue in this docket, including the individual settlement amount, is set forth below:

Citation Number 8116755 **30 U.S.C. § 876(b:(2:(F:(ii:**

Basis of compromise of penalty: Negligence.

At hearing, the Respondent would present evidence that there is an exception in its emergency response plan which provides, "zones of discontinuous communications coverage may exist for limited distance and/or duration throughout the working section in areas such as, but not limited to, behind pillars around equipment, etc." It argues that this exception excuses its failure to provide communication in the outside entries of the #2 section. Therefore, it argues that the level of negligence is mischaracterized and should be modified to "moderate negligence," and the number of persons affected should be modified to "7 persons," with a corresponding penalty reduction.

The Secretary, in reply to the Respondent's statements and contentions, states that she recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. Therefore, she agrees to modify this citation to "moderate negligence," and "7 persons affected," and to accept a reduced penalty.

Amount of the penalty proposed by the Secretary: $6,996.

Amount of the penalty agreed on by the parties: $1,504.

Docket Number WEVA 2011-1451

The Secretary originally proposed penalties totaling $56,621 for the violations alleged in Docket Number WEVA 2011-1451, and the parties have agreed to settle that docket for penalties totaling $40,000.

The Respondent has agreed to pay the penalties proposed by the Secretary for the violations alleged in the following citations:

Citation Number	Penalty
8118642	$1,412
8118643	$1,203
8122264	$3,143
8118645	$807
8122273	$873
8122277	$1,111
8127165	$3,143
8122279	$1,530
8122280	$807
8122281	$1,530
8122283	$946
8127164	$3,143
8122284	$873
8122285	$873
8122287	$1,026
8122286	$873
8122289	$1,944
8127168	$2,901

The bases for the settlement of the remaining citations at issue in this docket, including the individual settlement amounts, are set forth below:

Citation Number 8118640 **75.503**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the leads were insulated and only the outer jacket was torn on the rear light of the #4 maintenance ride, located on the #4 section. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,026.

Amount of the penalty proposed by the parties: $526.

Citation Number 8122266 **75.1713-7(c:**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that although the first aid supplies on the #5 working section were individually wrapped in airtight plastic bags and stored in the bin. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial," "1 person affected," and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely," "1 person affected," and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $4,689.

Amount of the penalty proposed by the parties: $3,611.

Citation Number 8122268 **75.400**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the 995-volt motor and pump on the coal feeder, located on the #2 section, would not get warm enough to ignite combustible material. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,412.

Amount of the penalty proposed by the parties: $1,212.

Citation Number 8122270 **75.400**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the operating temperature of the pump motor compartment of the #8358 Fletcher roof bolter, located on the 014 MMU of the #2 section, does not get hot enough to ignite coal or hydraulic oil. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,530.

Amount of the penalty proposed by the parties: $250.

Citation Number 8122271 **75.400**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the operating temperature of the pump motor compartment of the #7320 Fletcher roof bolter, located on the 011 MMU of the #2 section, does not get hot enough to ignite coal or hydraulic oil. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not

significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,530.

Amount of the penalty proposed by the parties: $252.

Citation Number 8122274 **75.400**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the operating temperature of the pump motor compartment of the #35 Powell scoop, located on the #2 section, does not get hot enough to ignite coal or hydraulic oil. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,530.

Amount of the penalty proposed by the parties: $251.

Citation Number 8122275 **75.1403**

Basis of compromise of penalty: Fact of violation.

The Respondent would present evidence at hearing that the underlying safeguard (Number 7154568: was improperly issued because it fails to identify the hazard at which

it is directed. It further argues that the underlying safeguard does not identify any hazard, and thus makes the safeguard and subject citation invalid. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,026.

Amount of the penalty proposed by the parties: $526.

Citation Number 8122276 **75.400**

Basis of compromise of penalty: Fact of violation.

The Respondent would present evidence at hearing that the loose coal along the ribs and cross-cuts in the track entry near the #2 working section was material produced in the normal course of mining, and not an accumulation for the purpose of 30 C.F.R. § 75.400. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,657.

Amount of the penalty proposed by the parties: $379.

Citation Number 8123746 **75.1505(b:**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that, although the refuge alternative was shown in the wrong location on the escapeway map for the #005 section, everyone on the working section had been trained on the location of both escapeways. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $3,143.

Amount of the penalty proposed by the parties: $307.

Citation Number 8123747 **75.1505(a:(3:**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that although the refuge alternative was shown in the wrong location on the escapeway map for the #005 section, everyone on the working section had been trained on the location of both escapeways. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $3,143.

Amount of the penalty proposed by the parties: $308.

Citation Number 8116759 **75.512**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the door to the starting box, used to supply 480 volts to the #4-B belt head, was closed, but simply did not have a lock. It further argues that there was no methane in any areas of the working section as supported by the examination reports. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $3,143.

Amount of the penalty proposed by the parties: $1,864.

Citation Number 8122282 **75.1731(b:**

Basis of compromise of penalty: Fact of violation.

The Respondent would present evidence at hearing that this citation is duplicative of Citation Number 8122280 because both enforcement actions addressed the same condition and required the same action to abate. It further argues that aligning the 5a belt cured the cited condition. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $807.

Amount of the penalty proposed by the parties: $307.

Citation Number 8122290 **75.517**

Basis of compromise of penalty: Negligence.

At hearing, the Respondent would present evidence that the bare red lead wire on the 480-volt power cable on the #58 scoop charger had likely occurred since the previous electrical examination. Therefore, it argues that the level of negligence is mischaracterized and should be modified to "low negligence," with a corresponding penalty reduction.

The Secretary, in reply to the Respondent's statements and contentions, states that she recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. Therefore, she agrees to modify this citation to "low negligence," and to accept a reduced penalty.

Amount of the penalty proposed by the Secretary: $946.

Amount of the penalty agreed on by the parties: $446.

Citation Number 8127167 **75.333(h:**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the small holes in the stoppings on the left side return of the 9 south belt line had no effect on the mine ventilation. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $2,901.

Amount of the penalty proposed by the parties: $1,623.

VIII

Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding including, but not limited to, attorney fees and costs which may be available under the Equal Access to Justice Act, as amended.

IX

It is the parties' belief that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act, as amended.

Therefore, the parties request that this Motion be granted and that an order approving settlement and directing payment, according to the parties' agreement, be issued.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

STANLEY E. KEEN
Regional Solicitor

CHRISTIAN P. BARBER
Supervisory Trial Attorney

/s/ Patrick W. Dennison
PATRICK W. DENNISON
Attorney

Rockspring Development Inc.
Attorney for Respondent

/s/ J. Malia Lawson
J. MALIA LAWSON
Attorney

U.S. Department of Labor
Attorneys for the Secretary

Settlement Example 3

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710
Telephone: (202: 434-9971/ Fax: (202: 434-9949

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA:,	:	Docket No. WEVA 2010-468
Petitioner	:	A.C. No. 46-08885-202527
v.	:	
	:	Mine: Poplar Ridge No. 1 Deep Mine
	:	
BROOKS RUN MINING CO., LLC,	:	
Respondent	:	
	:	

ORDER APPROVING SETTLEMENT

Before: Judge Moran

These cases are before the Court upon a petition for assessment of a civil penalty under Section 105(d: of the Federal Mine Safety and Health Act of 1977 (the "Act":. The Secretary has filed a Motion for Decision and Order Approving Settlement to which Respondent has agreed. The Court has considered the six statutory civil penalty criteria contained at § 110(i: of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 820(i:, and finds that the proposed penalty amount is appropriate. It is hereby ORDERED that:

1. The citations and orders involved in these cases are affirmed, modified, or vacated as follows:

Citation No. 8089450 was issued to the Respondent on October 20, 2009 and alleged a violation of 30 C.F.R. § 75.517 and 104(a: of the Act, 30 U.S.C. § 814(a:. The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $499.00. The Respondent contends that the likelihood of injury and level of negligence alleged are excessive, and states that at hearing it would present evidence that the individual leads of the allegedly damaged cable were insulated, that there was no damage to the inner power or ground conductors and that the condition had existed for only a short time and would have been discovered during the next examination. In light of the contested evidence, the Secretary has agreed to modify the likelihood from "reasonably likely" to unlikely," to modify the citation from "significant and substantial" to not significant and substantial," to modify the negligence from "moderate" to "low," and to reduce the penalty to $275.00.

Citation No. 8089451 was issued to the Respondent on October 22, 2009 and alleged a violation of 30 C.F.R. § 75.220(a:(1: and 104(a: of the Act, 30 U.S.C. § 814(a:. The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that two persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $540.00. The Respondent contends that the likelihood of injury alleged is excessive, and states that at hearing it would present evidence that the roof in the cited entry was too high for the automated temporary roof support system to effectively control the roof, the roof conditions were good and the top was solid, stable and secure and that any roof sloughage was addressed by the installation of "pizza pans" and 6-foot torque tension bolts. The parties agree that this citation will remain as issued with no modifications, but in light of the contested evidence, the Secretary has agreed to reduce the penalty to $475.00.

Citation No. 8089453 was issued to the Respondent on October 22, 2009 and alleged a violation of 30 C.F.R. § 75.1101-2 and 104(a: of the Act, 30 U.S.C. § 814(a:. The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was not significant and substantial; that eight persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $285.00. The Respondent contends that the level of negligence and the number of persons alleged to have been affected are excessive, and states that at hearing it would present evidence that the deluge-type fire suppression system only provided substantial protection, covering 42 of the 50 feet of conveyor belt that it was supposed to cover, and that air flowed outby across the belt and therefore only one supply man and one belt man would have been affected. In light of the contested evidence, the Secretary has agreed to modify the negligence from "moderate" to "low," to modify the number of persons affected from "eight" to "two," and to reduce the penalty to $100.00.

Citation No. 8071617 was issued to the Respondent on October 23, 2009 and alleged a violation of 30 C.F.R. § 75.1914(h:(1: and 104(a: of the Act, 30 U.S.C. § 814(a:. The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was not significant and substantial; that eight persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $285.00. The parties agree that this citation will remain as issued with no modifications. Accordingly, the Respondent has agreed to pay the proposed penalty of $285.00.

Citation No. 8089455 was issued to the Respondent on October 30, 2009 and alleged a violation of 30 C.F.R. § 77.400(a: and 104(a: of the Act, 30 U.S.C. § 814(a:. The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $499.00. The Respondent contends that the likelihood of injury alleged is excessive, and states that at hearing it would present evidence that visibility and lighting were good and that there were no tripping hazards along the walkway where the cited roller was located, and that the mine

had chained off the area around the walkway to prevent miners from coming into contact with the roller. In light of the contested evidence, the Secretary has agreed to modify the likelihood from "reasonably likely" to unlikely," to modify the citation from "significant and substantial" to not significant and substantial," and to reduce the penalty to $300.00.

Citation No. 8089456 was issued to the Respondent on November 4, 2009 and alleged a violation of 30 C.F.R. § 75.370(a:(1: and 104(a: of the Act, 30 U.S.C. § 814(a:. The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was not significant and substantial; that ten persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $392.00. The Respondent contends that the level of negligence alleged is excessive, and states that at hearing it would present evidence that the alleged reverse in the direction of airflow had resulted, unbeknownst to mine management, from recent adjustments to the ventilation controls that accompanied a move to a new section and simply had not yet been corrected. In light of the contested evidence, the Secretary has agreed to modify the negligence from "moderate" to "low," and to reduce the penalty to $250.00.

Citation No. 8089458 was issued to the Respondent on November 4, 2009 and alleged a violation of 30 C.F.R. § 75.1502 and 104(a: of the Act, 30 U.S.C. § 814(a:. The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was not significant and substantial; that ten persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $392.00. The Respondent contends that the level of negligence alleged is excessive, and states that at hearing it would present evidence that the alleged condition -- inadequate volume of the automatic fire sensor and warning device system -- had not existed during the most recent weekly examination. The parties agree that this citation will remain as issued with no modifications, but in light of the contested evidence, the Secretary has agreed to reduce the penalty to $325.

Citation No. 8089459 was issued to the Respondent on November 6, 2009 and alleged a violation of 30 C.F.R. § 75.517 and 104(a: of the Act, 30 U.S.C. § 814(a:. The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $499.00. The Respondent contends that the level of negligence alleged is excessive, and states that at hearing it would present evidence that the alleged condition -- damaged outer jackets of cables -- did not exist at the time of the last weekly examination and that the cable's ground fault wire was working properly. In light of the contested evidence, the Secretary has agreed to modify the negligence from "moderate" to "low," and to reduce the penalty to $300.00.

Citation/Order No.	Assessment Amount	Settlement Amount
8089450	$499.00	$275.00
8089451	$540.00	$475.00
8089453	$285.00	$100.00
8071617	$285.00	$285.00
8089455	$499.00	$300.00
8089456	$392.00	$250.00
8089458	$392.00	$325.00
8089459	$499.00	$300.00
Totals	**$3,391.00**	**$2,310.00**

2. The proposed penalty amounts are reasonable given the circumstances surrounding the violations.

3. The criteria set forth at Section 110(i: of the Act have been considered and the penalties are appropriate in light of these criteria and promote the purposes of the Act. The gravity of the violations and the operator's alleged negligence are set forth above. The violations were abated in good faith. Information pertaining to the operator's history of previous violations and size are contained in Exhibit A which was filed by the Secretary along with the petition in this matter. Payment of the proposed penalties will not adversely affect the operator's ability to continue in business.

4. Each party agrees to bear its own attorney's fees, costs and other expenses incurred by such party in connection with any stage of the above-referenced proceeding including but not limited to, attorney's fees and costs which may be available under the Equal Access to Justice Act, as amended.

5. Within 30 days of the date of this Order, Respondent shall send a check in the amount of $2,310.00, made payable to "U.S. Department of Labor/MSHA" to P.O. Box 790390, St. Louis, MO 63179-0390.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

Distribution:

Matthew D. Ross, Esq., MSHA Litigation Backlog Project, Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor, Arlington, VA 22209-2247
ross.matthew@dol.gov

Kelby T. Gray, Esq., Dinsmore & Shohl LLP, PO Box 11887, Charleston, WV 25339
kelby.gray@dinsmore.com

Distribution:

Suzanne F. Dunne, Esq., U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

Gary Broadbent, Esq., Murray Energy Corporation, 46226 National Road, St. Clairsville, OH 43950

/cts