

March 2014

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Review was granted in the following case during the month of March 2014:

Secretary of Labor, MSHA v. Maxxim Rebuild Company, LLC, Docket Nos. KENT 2013-989.
(Judge Miller, February 12, 2014)

No cases were filed in which Review was denied during the month of March 2014.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

March 10, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-336-M
v.	:	A.C. No. 32-00924-311309
	:	
ROOT 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 March 20, 2013, the Commission received from Root Construction, Inc. (“Root”) 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 indicate that the proposed assessment was delivered on January 16, 2013, and became a final order of the Commission on February 15, 2013. Root asserts that its new safety director discovered the delinquency while sorting through his predecessor's documents. 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 Root'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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 10, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2013-351-M
v.	:	A.C. No. 47-03661-305923
	:	
BINDL BAUER LIMESTONE	:	
OF SPRING GREEN, 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 7, 2013, the Commission received from Bindl Bauer Limestone of Spring Green, Inc. (“Bindl Bauer”) 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 November 12, 2012, and became a final order of the Commission on December 12, 2012. Bindl Bauer asserts that it mailed a timely contest on November 12, 2012, and another copy on February 18, 2013, after discovering that the first contest was not received by MSHA. 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 Bindl Bauer'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
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March 10, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2013-415-M
v.	:	A.C. No. 20-02951-311269
	:	
CON-AGG, 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 17, 2013, the Commission received from Con-Agg, Inc. (“Con-Agg”) 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 17, 2013, and became a final order of the Commission on February 19, 2013. MSHA mailed a delinquency notice on April 3, 2013. Con-Agg asserts that it mailed a timely contest on February 4, 2013. The Secretary does not oppose the request to reopen, but states that the only contest MSHA received from the operator on that date was for another case. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Con-Agg'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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 10, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-636
v.	:	A.C. No. 46-01437-310913
	:	
MCELROY COAL COMPANY	:	

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 7, 2013, the Commission received from McElroy Coal Company (“McElroy”) 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 indicate that the proposed assessment was delivered on January 15, 2013, and became a final order of the Commission on February 14, 2013. McElroy asserts that its new safety supervisor was unfamiliar with the contest process and discovered the delinquency on February 20, 2013, after receiving a separate 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 reviewed McElroy'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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

March 10, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-726
v.	:	A.C. No. 46-08932-292862 6RP
	:	
LINCOLN LEASING 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 April 3, 2013, the Commission received from Lincoln Leasing Company, Inc. (“Lincoln Leasing”) 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 June 26, 2012, and became a final order of the Commission on July 26, 2012. MSHA mailed a delinquency notice on September 10, 2012, and referred this case to the Department of Treasury for collection on December 24, 2012. Lincoln Leasing asserts that its office administrator was experiencing health issues which caused the failure to timely contest the assessment. Lincoln Leasing states that it discovered the delinquency on March 13, 2013, after its counsel received a Treasury collection notice. The Secretary does not oppose the request to reopen and strongly urges the operator to adopt procedures to ensure that future penalty contests are timely filed.

Having reviewed Lincoln Leasing'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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 26, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2013-542-M
v.	:	A.C. No. 23-00217-315870
	:	
CONTINENTAL CEMENT COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners¹

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 June 10, 2013, the Commission received from Continental Cement Company, LLC (“Continental”) 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 March 14, 2013, and became a final order of the Commission on April 15, 2013. Continental asserts that it mailed a timely contest and its payment for the uncontested penalties to MSHA's payment center in St. Louis, MO. Continental discovered that MSHA had not processed the contest after receiving MSHA's delinquency notice, dated May 29, 2013, and promptly filed this motion to reopen. The Secretary does not oppose the request to reopen, but notes that the payment center in St. Louis, MO, is only a payment processing office which does not recognize or process contest forms. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the Civil Penalty Compliance Office in Arlington, VA.

Having reviewed Continental'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

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March 26, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2013-782
v.	:	A.C. No. 15-18436-313936
	:	
SOUTH AKERS MINING, LLC	:	

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 May 21, 2013, the Commission received from South Akers Mining, LLC (“South Akers”) 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 February 19, 2013, and became a final order of the Commission on March 21, 2013. South Akers' consultant asserts that he never received the proposed assessment and discovered the delinquency after receiving MSHA's late notice, dated April 11, 2013. The Secretary does not oppose the request to reopen, but notes that MSHA received a contest form from the consultant, dated April 2, 2013, which was 12 days after the final order date. MSHA mailed a delinquency notice on May 6, 2013. The Secretary urges the operator and its consultant to take steps to ensure that future penalty contests are timely filed.

Having reviewed South Akers' 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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

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March 26, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2013-796
v.	:	A.C. No. 15-19325-305763
	:	
CLAS COAL 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 May 24, 2013, the Commission received from Clas Coal Company, Inc. (“Clas”) 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 November 13, 2012, and became a final order of the Commission on December 13, 2012. Clas asserts that it mailed a contest on December 15, 2012, but its payment for the uncontested citations was mistakenly applied to this contested citation No. 8269442. The Secretary does not oppose the request to reopen, but states that the check MSHA received at its St. Louis, MO, payment center, did not include a contest form. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the Civil Penalty Compliance Office in Arlington, VA.

Having reviewed Clas' 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
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/s/ William I. Althen
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 26, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-899-M
v.	:	A.C. No. 02-00024-317010 RUZ
	:	
CLEAN HARBORS ENVIRONMENTAL	:	
SERVICES, 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 June 17, 2013, the Commission received from Clean Harbors Environmental Services, Inc. (“Clean Harbors”) 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 March 28, 2013, and became a final order of the Commission on April 29, 2013. Clean Harbors asserts that it mistakenly believed that it did not need to contest the proposed assessment because it had previously contested the underlying citations. Clean Harbors' counsel discovered the delinquency after receiving MSHA's late notice dated May 16, 2013. Clean Harbors states that it now understands that a separate notice must be submitted to contest a proposed assessment and has taken steps to ensure that this mistake does not happen again. The Secretary does not oppose the request to reopen.

Having reviewed Clean Harbors' 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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 26, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-944
v.	:	A.C. No. 46-05295-313257
	:	
EASTERN ASSOCIATED COAL, LLC	:	

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 May 28, 2013, the Commission received from Eastern Associated Coal, LLC (“Eastern”) 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 February 6, 2013, and became a final order of the Commission on March 8, 2013. Eastern asserts that its safety manager received the proposed assessment on February 14, 2013, and believed that his contest on March 15, 2013 was timely. The Secretary does not oppose the request to reopen, and notes that MSHA received a contest form postmarked March 15, 2013, and a payment for the uncontested penalties, by check dated March 19, 2013. The Secretary urges the operator to adopt procedures to ensure that future penalty contests are timely filed.

Having reviewed Eastern'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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 6, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-1056-M
Petitioner	:	A.C. No. 21-02393-263615
	:	
v.	:	
	:	Mine: Rainier Quarry
BOWMAN CONSTRUCTION CO. INC,	:	
Respondent	:	

DECISION

Appearances: Suzanne F. Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois; Dan L. Venier, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Duluth, Minnesota, for Petitioner; Deborah Bowman, Bowman Construction Company, International Falls, Minnesota 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 Bowman Construction Co., Inc., (“Bowman Construction” or “Respondent”) 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 Duluth, Minnesota. In lieu of filing post-hearing briefs, the parties presented closing argument at the hearing.

Though primarily engaged in the construction industry, Bowman Construction owns and operates the Rainier Quarry (“Quarry”) on its 500 acre property in International Falls, Minnesota (the “Property”). (Tr. 45). Most of the activity at the Property relates to Respondent’s construction business. At the Quarry, Bowman Construction engages in drilling, blasting, and processing aggregate with a crusher, a wash plant, and various screening devices. (Tr. 21). Bowman Construction contested the three citations at issue in this case because it does not believe that MSHA had jurisdiction over the areas cited.

I. THE CITATIONS

On June 13, 2011, MSHA Inspector John Koivisto inspected the Property. He was accompanied by Darwin Johnson, a foreman at the Property. Deborah Bowman, the office manager for Bowman Construction, testified that Bowman Construction has existed for 75 years. MSHA typically inspects the Quarry once each year and Ms. Bowman testified that, until the

present inspection, MSHA only inspected areas in and around the Quarry. She contends that the inspector strayed into areas of the Property that are not subject to MSHA jurisdiction.

Inspector Koivisto issued Citation Nos. 6560616 and 6560617 for conditions he discovered upon a Maxx Super 512 trommel. One citation alleges that guarding was required on both sides of a tail pulley on the trommel and the other alleges that the back side of the trommel was not posted to warn people that they could be hit by falling material. (Exs. G-1, G-5). Citation No. 6560618 was issued for a tripping hazard in a shed. (Ex. G-9). Bowman Construction is not contesting the conditions described in the citations or the inspector's determinations as to gravity and negligence. The Secretary proposed a penalty of \$100.00 for each citation. For the reasons discussed below, I find that the trommel was subject to MSHA jurisdiction at the time of the inspection but the Secretary did not establish that MSHA had jurisdiction over the shed.

II. BASIC LEGAL PRINCIPLES

Section 4 of the Mine Act provides, in part, that "each coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 3(h)(1) of the Act, in pertinent part, defines "coal or other mine" as:

(A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels, and workings, *structures, facilities, equipment, machines, tools, or other property* . . . on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or . . . *used in or to be used in, the milling of such minerals, or the work of preparing coal or other minerals* In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. §802(h)(1) (emphasis added).

The Senate Committee that drafted the Mine Act noted: "What is considered to be a mine and to be regulated under this Act [shall] be given the broadest possible interpretation, and it is the intent of this committee that doubts be resolved in favor of inclusion of a facility within coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative history of the Federal Mine Safety and Health Act of 1977* ("*Legis. Hist.*") at 602.

To further clarify questions of jurisdictional reach, the Secretary of Labor facilitated an interagency agreement ("Interagency Agreement") between MSHA and the Occupational Safety

and Health Administration (“OSHA”). 44 Fed. Reg. 22827 (April 17, 1979). This agreement also provides procedures to resolve general jurisdictional questions between the two agencies.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citations issued at the Trommel

Bowman Construction owned and operated a Maxx Super 512 trommel. A trommel is a large, round, horizontal drum that turns as a short conveyor loads material into it. (Exs. G-6, R-3 at 3). The drum is a screen and the desired material falls through the screen onto a belt that transports the material onto a stack. Larger material is separated from the desired material and falls out of the open end of the drum. The trommel is typically used by Bowman Construction to process black dirt at other locations. When processing black dirt, the trommel is not subject to Mine Act jurisdiction because it is only removing roots and rocks from top soil. During the inspection, the trommel was on the Property but it was not located at or near the Quarry. (Exs. G-17, R-1).

Inspector Koivisto testified that he issued Citation No. 6560616, alleging a violation of section 56.14107(a), after noting that neither side of the 12” diameter self-cleaning tail pulley on the trommel was guarded. (Tr. 14-15). He issued Citation No. 6560617, alleging a violation of section 56.20011, after finding that a dangerous zone below the trommel screen was not properly barricaded, which allowed rocks to fall 15’ onto the ground below. (Tr. 24). Inspector Koivisto testified that he noted a round 4” rock that had fallen into the danger zone. (Tr. 24-26).

Inspector Koivisto testified that he could not cite the trommel if it was processing exclusively recycled material. (Tr. 17). He recognized that MSHA would only have jurisdiction over the trommel when it processes virgin material. (Tr. 17). When asked what the trommel processed the day of the inspection, Inspector Koivisto testified that Johnson described the material as “bank run” from offsite. Inspector Koivisto’s examination of the trommel led him to believe that the material fed into the trommel was pit run material, which afforded jurisdiction to MSHA. (Tr. 20-23, 26, 38, 74). Darwin Johnson told him that at least some of the sand the trommel discharged would be taken to the wash plant for further processing. (Tr. 17). Inspector Koivisto testified that MSHA has jurisdiction over wash plants. (Tr. 38-39). After examining the trommel and talking to Johnson, Inspector Koivisto determined that he had jurisdiction to issue the two citations.

Deborah Bowman emphasized that mining was a very small part of Respondent’s construction business, occupying only 5 acres of the 500 acre Property. (Tr. 41-42, 45). She further testified that Bowman Construction employs two miners, each for 120 days per year. (Tr. 82-83). She testified that the trommel exclusively processed recycled material and that the sand from the trommel was not taken to the wash plant. (Tr. 45-56, 61-62). On cross-examination, Bowman could not explain why Johnson described the material as “bank run” or why he told Inspector Koivisto that the wash plant would be processing the sand. (Tr. 63-65). Bowman also noted that she had no record of what the trommel processed that day. *Id.*

The Secretary argues that MSHA jurisdiction over the trommel is proper because the trommel processed virgin material and the sand exiting the trommel would be sent to the wash plant for further processing. The Secretary relies upon the conditions that the inspector observed as well as statements made by Johnson. The material being processed appeared to consist of the “crude crust of the earth” rather than recycled material and the material exiting the trommel was sand. (Interagency Agreement at Appendix A; Ex. G-6). Bowman Construction’s stockpile of recycled material was a considerable distance from the trommel. In addition, Johnston told the inspector that the pit run material was fed into the trommel and that at least some of the sand was to be taken to the wash plant.

Bowman Construction contests both of these points. It argues that the trommel is outside of MSHA jurisdiction because the trommel processed exclusively recycled material. (Tr. 47). The maps submitted by both parties and Inspector Koivisto’s statements all confirm that the trommel was not located near the Quarry. (Tr. 61-62; Exs. G-17, R-1). Bowman Construction also argued that the trommel was not processing material from the Quarry. Ms. Bowman testified that only angular basalt is found on the Property. (Tr. 44; G-7). The presence of a round rock, therefore, proves that the materials in the trommel came onto the Property from a construction site. (Tr. 46). Similarly, Respondent argued that its pit is not a natural source of sand, so the sand exiting the trommel originated elsewhere. (Tr. 44-46). Bowman explained the origin of these materials by noting that Respondent often recycles sidewalks and excess material from landscaping sites. (Tr. 45, 49). Bowman Construction did not provide specific details about what recyclable material was on the property that day. Finally, Respondent argues that it would not have had any reason to wash the sand produced by the trommel.

Discussion and Analysis

I find that the Secretary established that MSHA had jurisdiction to inspect the trommel. Section 3(h)(1) of the Mine Act defines a mine in broad terms. The Act asserts jurisdiction over the extraction process and also “milling” and “preparing” minerals. 30 U.S.C. § 802(h)(1). Although the Mine Act does not define “milling,” the Interagency Agreement defines it as: “the separation of one or more valuable desired constituents of the crude [crust of the earth] from the undesirable contaminants with which it is associated.” 44 Fed. Reg. at 22829. The term “crude” is defined to mean “any mixture of minerals in the form in which it occurs in the earth’s crust.” *Id.* Thus, MSHA jurisdiction exists, generally, when valuable minerals are separated from earthen material.

The Interagency Agreement also provides examples of milling procedures. Among many other processes, MSHA jurisdiction exists where minerals are “sized” (that is, separated into groups by size) or “washed” (that is, cleaned by flowing water). 44 Fed. Reg. at 22830.

Bowman Construction did not present evidence to establish that the trommel processed exclusively recycled material other than Ms. Bowman’s vague statement that Respondent often recycles material from construction sites. Indeed, she testified that the material that was being fed into the trommel came from the “ground” at an offsite location. (Tr. 46-47). It is irrelevant that the material did not originate in Bowman Construction’s Quarry. The evidence establishes that the material screened by the trommel was excavated from the crude crust of the earth. There

is no evidence to establish that the material being screened was recycled material from another source.¹

The evidence persuades me that Bowman Construction's trommel engaged in milling and sizing at the time of the inspection and was therefore subject to MSHA jurisdiction. As stated above, trommels are rotating cylindrical screens. When a loader or conveyor drops material onto the trommel, the sand sifts through the screen onto a conveyor below, while large rocks, roots, and other material remain captured by the screen. As defined by the Interagency Agreement, this process of separating constituents from a mixture of minerals from the earth's crust triggers MSHA jurisdiction.

In consideration of the foregoing, I **AFFIRM** Citation Nos. 6560616 and 6560617.

B. Citation issued at the Shed.

Bowman Construction also owned a small shed that was a considerable distance away from the Quarry. (Ex. R-2 at 1 and 2). According to Ms. Bowman, the shed stores equipment and supplies used in Respondent's construction business. The jurisdictional issue is whether miners entered the shed.

Inspector Koivisto testified that he issued Citation No. 6560618, alleging a violation of section 56.20003(a), for tripping hazards in what he called a "sign-out" shed located on the Property. (Tr. 28). He noted that the clear path inside the shed was only 16 inches wide and that a distracted employee could easily trip upon the items in the shed. (Tr. 29-31). Inspector Koivisto testified that Johnson told him that miners entered the shed every day to fill out their time sheets and get supplies. (Tr. 29-30). Although Inspector Koivisto recognized that he did not have jurisdiction over the construction employees, he issued the citation because "miners were entering" the shed. *Id.*

Bowman testified that she visited the shed many times and that no mining equipment or supplies are stored therein. (Tr. 59-61). Instead, she stated that the shed exclusively stores construction equipment, rendering it beyond the reach of MSHA jurisdiction. (Tr. 51-52). She testified that miners do not fill out any paperwork in the shed and noted that the shed is on the opposite side of the property from the Quarry. (Tr. 50-53, 59-61). She did not know why Johnson told the inspector that miners use the shed. (Tr. 69-71).

Discussion and Analysis

Inspector Koivisto testified that Johnson told him that miners fill out their time sheets or retrieve items from the shed daily. (Tr. 29-30). Bowman contradicted this testimony by testifying that the shed only stores construction equipment and that no miners use the shed. (Tr.

¹ The Secretary also contends that MSHA jurisdiction is proper irrespective of the material processed by the trommel because the wash plant processed the sand from the trommel. I do not need to reach this issue of fact because it is clear that the trommel screened virgin material from the earth.

59-61). The photos presented by Inspector Koivisto show what appears to be construction equipment. (Ex. G-10, 11,12, 13, 14). Further, the parties agree that the shed is a considerable distance from the mining area. (Tr. 33-37).

The Commission has held that facilities which are available to miners as well as employees who are not miners fall under the jurisdiction of the Mine Act. *See W.J. Bokus Indus.*, 16 FMSHRC 704 (Apr. 1994). I have followed this precedent in other cases. *See e.g. Titan Constructors, Inc.*, 34 FMSHRC 403 (Feb. 2012) (ALJ).

I find, however, that the evidence presented at the hearing does not establish that miners enter the shed and the Secretary, therefore, did not fulfill his burden to show that MSHA had jurisdiction over the shed. There is no evidence, other than the inspector's hearsay testimony, that the shed stores equipment or supplies used in mining. The shed is a considerable distance from the Quarry and the associated screening and crushing equipment. (Exs. G-17, R-1). It seems odd that miners employed by Respondent would be required to travel to this shed to fill out any paperwork. Miners as well as other Bowman Construction employees pass by the scale house/office every day when they enter and exit the Property. Miners would not appear to have any reason to pass by shed. It also does not appear that the shed would be the type of structure where records are kept. (Exs. G-10, 11, 12, R-3).

The only evidence the Secretary offered to establish jurisdiction over the shed was the hearsay testimony of Inspector Koivisto. In contrast, physical evidence observed by the inspector and Ms. Bowman's own testimony helped establish MSHA jurisdiction over the trommel. Without an opportunity to examine Johnson and ask him questions, I cannot determine whether the shed was subject to inspection by MSHA. It is not clear exactly what Johnson told the inspector and Johnson could not be questioned about this issue.² The Secretary bears the burden of proof and I cannot uphold Mine Act jurisdiction over the shed based solely upon the inspector's hearsay testimony that miners enter the shed to sign out at the end of their shift or get supplies. Citation Nos. 6560618 is **VACATED**.

It is important for Bowman Construction to understand that I am not holding that MSHA does not have the authority to inspect the subject shed. I only hold that in this particular case, the Secretary was unable to prove MSHA jurisdiction over the shed. If miners enter the shed, even if only occasionally for short periods of time, MSHA would have the authority to inspect it.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Bowman Construction is a small operator that only employs two miners, both of whom are employed in such capacity on a seasonal basis. Bowman Construction did not receive any citations or orders in the 15 months preceding the subject inspection. The citations were abated in good faith. The penalties assessed below will not affect the company's

² I recognize that hearsay is generally admissible in Commission proceedings, but I believe it imprudent to hold that the Secretary established MSHA jurisdiction in this case solely on the basis of hearsay. I reach this conclusion even though Johnson was a management employee.

ability to continue in business. The gravity and negligence findings are set forth in the citations. The penalties proposed by the Secretary are appropriate for the two citations for the trommel.

V. ORDER

Citation Nos. 6560616 and 6560617 are **AFFIRMED** and Citation No. 6560618 is **VACATED**. Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), Bowman Construction Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$200.00 within 30 days of the date of this decision.³

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

Distribution:

Suzanne F. Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., Room 844, Chicago, IL 60604-1502 (Certified Mail)

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³ 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

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March 7, 2014

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
on behalf of DAVID S. WOOD,	:	PROCEEDING
Complainant	:	
	:	Docket No. KENT 2014-257-D
v.	:	MADI CD 2014-08
	:	
HIGHLAND MINING CO., LLC.,	:	
Respondent	:	No. 9 Mine
	:	Mine ID 15-02709

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances:

Jennifer Booth Thomas, Esq., Malia Lawson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;

Jeffrey K. Phillips, Esq., Candace B. Smith, Esq., Steptoe & Johnson, Lexington, Kentucky, for the Respondent

Before: Judge Moran

This case is before the Court on an application for temporary reinstatement filed on February 11, 2014, by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Highland Mining Co., LLC, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act ("Mine Act" or "Act") of 1977, 30 U.S.C. § 815(c)(2). The Application seeks an Order temporarily reinstating David S. Wood to his former position with the Respondent at its No. 9 Mine, pending the final hearing and disposition of the discrimination complaint. On February 13, 2014, Respondent filed a request for a hearing on the application. Thereafter, pursuant to 29 C.F.R. § 2700.45, a hearing was held in Henderson, Kentucky on March 5, 2014.

For the reasons which follow, for the purposes of temporary reinstatement, the Court finds that the Secretary presented sufficient evidence at the hearing to establish that Mr. Wood engaged in protected activity. It is undisputed that he was thereafter terminated from his employment. Applying the applicable standard of review for such proceedings, the Court finds that a nexus between that activity and the alleged discrimination was established and upon review of the entire record, concludes that the complaint was not frivolously brought. Accordingly, the Court orders that, effective with the date of this decision, Mr. David S. Wood be

reinstated to his former position with the Respondent at its No. 9 Mine, pending the final hearing and disposition of the discrimination complaint.

Applicable Law

The law pertaining to temporary reinstatement proceedings is well-established. As the Commission noted in *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, "Under section 105(c)(2) of the Mine Act, 'if the Secretary finds that [a discrimination] 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.' 30 U.S.C. § 815(c)(2). The Commission has recognized that the 'scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.' See *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). The Mine Act's legislative history defines the 'not frivolously brought' standard as indicating that a miner's 'complaint appears to have merit.' S. Rep. 95-181, at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). The 'not frivolously brought' standard reflects a Congressional intent that 'employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding.' *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 748 (11th Cir. 1990) ("*JWR*"). . . . Courts and the Commission have likened the 'not frivolously brought' standard set forth in section 105(c)(2) with the 'reasonable cause to believe' standard applied in other statutes. *Id.* at 747 ("there is virtually no rational basis for distinguishing between the stringency of this standard and the 'reasonable cause to believe' standard"); *Sec'y of Labor on behalf of Markovich v. Minnesota Ore Operations, USX Corp.*, 18 FMSHRC 1349, 1350, 1352 (Aug. 1996). In the context of a petition for interim injunctive relief under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(j), courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden. See *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001) (citations omitted). Similarly, at a temporary reinstatement hearing, the Judge must determine 'whether the evidence mustered by the miner[] to date established that [his or her] complaint[] [is] nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.' *JWR*, 920 F.2d 744. As the Commission has recognized, 'it [is] not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings.' *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 164 (Feb. 2000) (Marks and Beatty, dissenting)." 34 FMSHRC 1875, 1877-1878 (Aug. 2012).

Findings and Analysis

At the March 5, 2014 hearing, the Complainant, David S. Wood was the sole witness. For the limited purpose of the temporary reinstatement proceeding,¹ the Court found Mr. Wood to be a credible witness. He testified that on October 14, 2013 he made a safety complaint to supervisor Darren Darnell, declining to ride with the supervisor on a mine golf cart, because Mr. Darnell was extremely angry with him over an apparent misunderstanding concerning the means by which he was to be transported to the Number 1 Unit that day. In the supervisor's agitated state, Mr. Wood testified that he did not feel safe riding in the cart with him. According to Mr. Wood, at one point during the angry outburst from Darnell, the supervisor threatened that he would have Wood fired if he did not get on the golf cart. The Complainant's work refusal, refusing to ride in the golf cart with the irate supervisor at the wheel, is the alleged protected activity invoked. Once Mr. Darnell calmed down, Mr. Wood then did ride with him. Tr. 15-25. Following the incident, Mr. Wood continued to work at the mine for the ensuing two weeks, through October 25, 2013. Thereafter, on October 28th, Mr. Wood had a family medical issue, involving an illness that was affecting his entire family. He called in to work, per the mine's policy for illness, one hour before his shift, leaving a voice mail message at the number. In connection with a visit to his doctor on October 31st, which was his second doctor's visit in connection with his own illness, Mr. Wood was advised that, if he felt sufficiently improved, he could return to work on November 2nd. Tr. 26-30, and GX 2.

When Mr. Wood appeared for work on November 1st for his shift which was to begin on November 2nd, he was advised by the third shift foreman that he could not work and that he would have to speak with the mine's human resources director. Tr. 28, 32. He then called the mine and was advised that he was to come to the mine on November 5th for a meeting. He did so and was advised at that time that he was being "suspended with intent to discharge." Tr. 33. He was then told to appear for a second meeting at 9:00 a.m. on November 6th. He did so appear for the second meeting and saw supervisor Darnell that morning. Mr. Wood stated that Darnell "threw a slur" at him and asked if he was looking for a job. Tr. 35. The meeting then followed and the Complainant was told that he violated the mine's leave policy for illnesses and that he was being terminated for that failure. Tr. 40-41. Following his termination, Mr. Wood filed for unemployment compensation and was approved for those benefits. About a week after his termination, Mr. Wood learned that another employee had a similar issue related to the mine's illness policy and what constitutes a satisfactory excuse for such absences. The difference was that the other employee was not terminated. This prompted Mr. Woods to call MSHA, around December 21st or the 22nd, and then he presented his account of the events leading up to his termination, including the altercation with Darnell and the illness issue.

¹ Conflicts in testimony, in this case, raised only putatively in the context of cross-examination of the Complainant as the sole witness at the hearing, are not to be resolved in a temporary reinstatement proceeding. To do otherwise would transform the proceeding into a hearing on the merits. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

Following Mr. Wood's testimony on direct, the Respondent was afforded a full opportunity to conduct a cross-examination of his account of the events. Tr. 60-112. The Court then heard and considered the parties' closing statements.² Tr. 114-119. Following that, the Court announced that it had made its determination and offered that it was willing to state it on the record or, if the parties preferred, it would defer its determination announcement until the issuance of its written decision. The parties opted for the Court to disclose its decision at the proceeding. This decision memorializes that determination.

Remembering that the temporary reinstatement proceeding is a very limited inquiry, the Court stated its finding that it was not a frivolously brought complaint. In the context of hearing testimony only from Mr. Wood, the Court finds that he was a forthright and credible witness in relating his telling of the events in issue. Having made that baseline determination, it is noted that no conflicting testimony was presented and that, in any event, credibility determinations, had there been conflicting accounts, would not be appropriate to resolve at this stage. The facts in the record support the conclusion that Mr. Wood engaged in protected activity when he made his work refusal. This is especially true, when considered in the full context of the testimony, regarding issues about the safety of the golf carts and how they were driven, together with the testimony about the very agitated state of Mr. Darnell.

The Court took note that, in essence, the Respondent was contending that the Complainant's discharge was for failure to follow its sick leave policy and, implicitly that Mr. Cook's safety complaint was invented after the fact. The Respondent has also noted that the Complainant continued to work for two weeks after the incident with Mr. Darnell. The former contention is not ripe for a determination in the context of a temporary reinstatement. As to the latter argument, in addition to the impropriety of finding whether that was the genuine basis for his dismissal or not, it is well-recognized that although an intervening period of time could form the basis to support a non-discriminatory ground for a dismissal, such a brief interval is sufficient to support a finding of an association between the protected activity and the adverse action. Put more succinctly, two weeks is an insufficient interval of time to separate the protected activity from the adverse action. *See, Sec. of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009) and *Sec. of Labor on behalf of Norman Deck v. FTS Int'l Proppants, LLC*, 2012 WL 4753952 (Sept. 2012).

² The Respondent cited the decision of a fellow administrative law judge for its persuasive value in the matter at hand, while acknowledging that it has no precedential effect. However, upon inquiry by the Court, Respondent could not state whether the cited decision, *Brannon v. Panther Mining*, 31 FMSHRC 1533 (Nov. 2009) (ALJ), was a temporary reinstatement proceeding or a full discrimination proceeding on the merits. The Court, in preparing this decision, found that it was not a temporary reinstatement matter, thus negating even the persuasive impact of it.

ORDER

Based on the foregoing, the Court having found that the Complainant's application for temporary reinstatement was not frivolously brought, the Court **ORDERS** that Mr. David S. Wood be reinstated to his former position at the same rate of pay and with all other benefits that he enjoyed prior to his discharge, as of the date of this decision.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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March 10, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2013-403
Petitioner	:	A.C. No. 44-07303-323400
	:	
v.	:	
	:	
POWER FUELS, LLC,	:	Mine: Power Fuel Blending Terminal
Respondent	:	
	:	
	:	
POWER FUELS, LLC,	:	CONTEST PROCEEDINGS:
Contestant	:	
	:	Docket No.: VA 2013-312-R
	:	Citation No.: 8204724; 4/9/13
	:	
	:	
v.	:	Docket No.: VA 2013-313-R
	:	Citation No.: 8204725; 4/9/13
	:	
	:	
SECRETARY OF LABOR	:	Docket No.: VA 2013-353-R
MINE SAFETY AND HEALTH	:	Citation No.: 8274726; 4/9/13
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine: Power Fuel Blending Terminal

DECISION

Appearances: Anthony D. Jones, Esq., U.S. Department of Labor, Office of the Solicitor,
Arlington, Virginia, for the Secretary

Wade W. Massie, Esq., PENN, STUART & ESKRIDGE, Abingdon, Virginia, for
the Respondent

Before: Judge Koutras

STATEMENT OF THE CASE

This civil penalty proceeding pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802, et Seq. (2000), hereinafter the "Mine Act" concerns three Section 104(a) significant and substantial (S & S) citations served on the respondent on April 9, 2013, for alleged violations of the cited safety standards found at 30 C.F.R. 77.410(c), and 77.1605(b). The Secretary petitions the Court for a civil penalty assessment of \$300, for the alleged violations.

In addition to the civil penalty issues presented in this case, the respondent challenges and contests the Secretary's asserted jurisdiction based on its contention that the respondent is not a mine operator, and that its facility is not engaged in any coal mine working activities that fall within the scope and intent of the Mine Act.

Pre-trial Ruling

This case was initially designated as a Simplified Proceeding pursuant to the Commission's rules at 29 C.F.R. 2700.100, et. seq. Subsequently, the Secretary filed a motion to discontinue the "simplified" designation and to continue the matter under conventional rules. In support of the motion, the Secretary cited the jurisdictional issues raised by the respondent that involve complex issues of law and fact. The motion was granted pursuant to Rule 2700.104, without objection by the Court during a pre-trial telephone conference with the parties (Tr. 5-6)

As a result of the Court's ruling as discussed during the aforementioned conference, the respondent file a supplemental disclosure statement regarding the nature of its blending activities, and the Secretary filed a pre-hearing statement with respect to the issues in this matter including arguments in support of Secretarial (MSHA) jurisdiction. These filings and exchanges are part of the record.

Stipulations

- (1) The parties agreed to the admission into evidence of copies of the three contested citations, except as to jurisdiction (Ex. G-1, G-2, G-3; ALJ-1).
- (2) The parties agreed that the proposed civil penalty assessment for the citations will not adversely affect the respondent's ability to continue in business. The parties agreed that a terminalling agreement between the respondent and Virginia Electric Power Company, d/b/a Dominion Power Company, is a true and authentic copy in effect at the time the citations and may be admitted in evidence (Ex. G-4).

At the conclusion of the hearing, the parties agreed that the respondent would be classified as a small mine under the regulations and the respondent's manager confirmed that twelve employees work at the site (Tr. 139).

The Alleged Violations

The two Section 104(a) S & S Citation Nos. 8204724 and 8204726, April 9, 2013, citing C.F.R. 77.1605(b), describe defects in the braking systems on two contractor trucks that haul coal into the respondent's facility "under the direction of the mine operator" (Ex. G-1, G-3). The inspector determined the negligence level as "low" for both citations and the gravity level as "reasonably likely" and "permanently disabling" injuries.

The braking defects described for Citation No. 8204724, concern a steering axle brake out of adjustment on the truck tractor, and an inoperative rear axle brakes on a trailer being pulled by the tractor, with no braking force supplied by the brake pushrods that could not move. The braking defects described for Citation No. 8204726, in part state that the left truck steering axle brake was out of adjustment with a continuous air leak through a defective air brake valve above the center trailer axle being pulled by the truck.

Citation No. 8204725, April 9, 2013. Citing 30 C.F.R. 77.410(c), states that the backup alarm provided on the cited contractor truck was not being maintained in a functional condition in that when the driver placed the vehicle in reverse, the backup alarm failed to function due to a broken wire. The truck is used to haul coal into the facility "under the direction of mine operator" (Ex. G-2). The inspector determined the negligence as "low", and the gravity level as "reasonably likely" and "permanently disabling" injuries.

Mandatory safety standard 30 C.F.R. 77.1605(b), requires mobile haulage equipment to be equipped with adequate brakes. Section 77.410(c) requires mobile equipment such as "tractors" and "trucks" to be equipped with a warning device that gives an audible alarm when put in reverse and be maintained in functional condition.

The Secretary's Testimony

MSHA Inspector Thomas R. Bower testified that he has served in that capacity since January 7, 2007, and he described his education, including a bachelor's degree from the University of Virginia at Wise and his prior mining experience from 2001 through 2006 (Tr. 20-21). He confirmed that his initial visit to the respondent's facility was December 12, 2012, and that he conducted regular mine safety and health inspections over a period of 12 different days and was familiar with the work that is done there (Tr. 22). He observed contractor coal trucks, trailers, and tractors hauling coal, refuse materials, gob coal, and "mids", a coal byproduct from a preparation plant, coming into the site. The materials were weighed and sampled and then taken to designated stockpile areas. The truck drivers were told where to dump their loads by the loader operators and the foreman of the site (Tr. 22-23).

He further explained that the coal was stored, blended, and loaded as needed for Dominion's power plant, then taken back out, weighed again, sampled again, and then shipped to the power plant (Tr. 23). He stated that front-end loaders were used to blend the coal from one stockpile to another that were marked for each type of analysis "so they'll know how to blend it." He confirmed that between the time the coal arrives at the site and the time it leaves, it is

stored and blended in preparation for shipment to the power plant (Tr. 24). He confirmed that he began his second inspection at the site on April 1, 2013, and clarified that he was not at the site for a total of five months, and that his inspections last on and off approximately two to three weeks at a time and that two inspections were performed during two six-month intervals, and that he was at the site over a period of several month several times (Tr. 25).

Mr. Bower identified Exhibit G-1 as Citation No. 8204724, citing a violation of 30 C.F.R. 77.1605(b), for braking defects on a contractor's tractor trailer coal truck. He stated that there were numerous braking defects as stated in the condition or practice noted in item #8 of the citation, on both the tractor and the trailer that he considers as one unit, and he summarized the condition as "faulty brakes" (Tr. 26-27). He confirmed that he discussed the citation and his reasons for issuing it with the site foreman, Mike Hendrickson, and informed him that the truck was traveling the same roadways that mine personnel used and exposed them to the hazards while the truck was operated on the property (Tr. 27). The citation reflects that the truck was taken out of service pending repairs.

Mr. Bower stated he based his "S & S" determination on the fact that the cited truck and tractor unit had a 25 percent loss of braking power that exceed the guidelines fixed by the Commercial Vehicle Safety Alliance that any braking loss over 20 percent reaches its out-of-service criteria (Tr. 27-28, 30). He believed that two persons would be likely exposed to a hazard in the event of any accident, namely the driver and another miner, as well as others who may be on the roadway (Tr. 28-29).

Mr. Bower stated that he based his "reasonably likely" injury determination on his accident investigator experience involving truck accidents under similar defective conditions that resulted in disabling back and traumatic injuries, and broken bones. He agreed these examples are "worst case scenarios" and that lesser injuries were conceivable (Tr. 30-31). He confirmed that foreman Henderson was upset about the conditions of the truck brakes and that he called the trucking company and told them that they had to do better with their equipment (Tr. 31). He confirmed that he based his low negligence finding on the fact that the foreman may travel with the trucks at times during his shift but he did not directly oversee the truck maintenance, and that he also cited the contractor truck operator for the same violation (Tr. 32-33).

Mr. Bower stated that he also issued S & S Citation No. 8204725, a violation of 30 C.F.R. 77.410(c), because the backup alarm provided on a contractor trailer truck failed to function when the transmission was placed in reverse and the alarm did not sound (Ex. G-2, Tr. 33). He stated he determined an injury was reasonably likely because the truck traveled in congested areas, it was observed backing up in congested areas, and it had an obstructed rear view pulling a 34 foot trailer. The truck backs up in congested areas where numerous people and other pieces of equipment are present.

Mr. Bower determined that any injury would be disabling if anyone was backed over by a 150,000 pound unit, and this included crushing injuries. He believed one person among those operating a loader or sampling the coal would be affected, and he also concluded it was an S & S violation because the cited trucker was in congested areas and it was observed backing up in

those areas (Tr. 34). He based his low negligence on the same reason as the prior cited violation because the foreman was not responsible for truck maintenance and confirmed that he also cited the contractor truck operator for the same violation (Tr. 34-35).

Mr. Bower confirmed that he issued Citation No. 8204726 citing a violation of 30 C.F.R. 77.1605(b), because the same truck previously cited for a defective backup alarm had a brake out of adjustment on the tractor and a continuous air leak and defective air valve on the trailer being pulled as a unit (Ex. G-3; Tr. 38-39). He explained that the loss of air pressure would result in a loss of braking force to stop the unit because the brakes would not work as they are designed (Tr. 39).

Mr. Bower stated that he based his reasonably likely injury determination on the fact that a combination of a brake out of adjustment and a continued air leak makes it reasonably likely that a brake failure would occur and cause a wreck. He explained that the truck hauls heavy loads over inclined roads, traveling with other vehicles, and that any loss of brakes could result in a truck runaway over the top of other vehicles resulting in crushing injuries. Under these circumstances, he concluded that the violation was S & S and two persons, the truck driver and any other vehicle driver would be affected (Tr. 39-40). He confirmed that his low negligence determination was based on the same reason for all three citations, namely, the fact that the foreman was not directly responsible for any truck maintenance, but did travel sometime during the shift in the same area traveled by the trucks (Tr. 41).

On Cross-examination, Mr. Bower stated that his inspections were regular inspections, and that even though he is a surface inspector and accident investigator, he was not investigating any accidents when he issued all of the citations. He made no decisions whether the respondent's site was a mine within the meaning of the Mine Act and was simply following his instructions to cite any violations that he found (Tr. 44-45). He confirmed that when he issued the citations, he was not aware of the agreement between the respondent and Dominion, and did not interview anyone at Dominion about the respondent's job performance or operations. He explained that he spoke with the respondent's foreman, Mike Hendrickson, who was at the site on a daily basis, and Mr. Walter B. Crickmer, who has later identified as the manager of Power Fuels, LLC, the respondent (Tr. 45, 79).

Mr. Bower stated that the contractor trucks that he cited were inbound trucks that were bringing solid fuel from any producing facility to the respondent's site. He confirmed that a defective truck entering the site may not necessary, in and of itself, constitute a violation. However, pursuant to MSHA's policy, he is required to make a determination whether or not the respondent's personnel are exposed to any hazard, and if not, the violation would be attributable to the contractor if it did not involve the respondent's employees (Tr. 46-47).

Mr. Bower confirmed that he issued the violations to the respondent because trucks entering its site with defective brakes and a backup alarm potentially involved the respondent's employees. He did not know whether the trucks were contractors for the respondent or contractors for the producing mine entities. He further stated that while he was not aware who

contracted the trucks, he was obligated to inspect them during his inspection at the site and that the question of who contracted them was not relevant (Tr. 48-49).

Mr. Bower did not know who owned the materials hauled into the site by the trucks, and did not believe this was relevant. He estimated that 30 – 40 trucks enter the site daily and that during one of the 12 days of his inspections, he may have randomly selected 10 to 12 trucks to inspect. He does not inspect every truck that comes onto the site and has inspected trucks that did not have any violations. As far as he knew, all of the cited trucks arrived safely while traveling inbound to the site (Tr. 50-51).

Mr. Bower confirmed that his statement in the citations that the trucks are “under the direction of the mine operator”, referred to the respondent’s foreman, Mr. Hendrickson, and because the trucks were on the site (Tr. 51). He stated that he has also observed some wood chips biomass product at the site and that it is handled by the same employees with the same equipment used for handling the solid fuel (Tr. 52-53). In reply to further questions, Mr. Bower stated that the material blending that he observed consisted of “coal, midds, gob, the refuse material blended together”, coal and coal byproducts. He observed wood chips that were stored and never witnessed it being blended with those products (Tr. 53-54). He explained that the coal blending was accomplished by using bulldozers to stockpile the materials and front-end loaders moving it from one stockpile to another (Tr. 55).

Supervisory Special Investigator, Robert D. Clay testified that he has been employed with MSHA for 22 years and is responsible for violations of section 110 of the Act, and other duties as assigned by District 5, in Norton, Virginia. He detailed his prior 16 years of mining experience in the private sector, including mine foreman and equipment operator positions in surface and underground mines. He also performed duties with MSHA as an inspector and field office supervisor, and was familiar with the respondent’s facility (Tr. 57-59).

Mr. Clay stated that he first became familiar with the respondent’s site after an inspector informed the assistant district manager that he observed coal trucks coming off the state road that were not going directly to Dominion’s power plant and were turning off somewhere else. He was asked to investigate the respondent’s operation because there was no known preparation plant at that location. He went to the location on May 22, 2012, and from his vantage point off the property on a country road he observed coal trucks going on the property. He could only observed what he believed was a small sampling unit that appeared to be sampling whatever went through the gate, and a small scale (Tr. 59-60).

Mr. Clay stated that he was approached by the respondent’s foreman, Bobby Ketron, who invited him on the property and took him to the mine office consisting of a small trailer or building. Mr. Kentron then took him to a “yard” area that he called a “blending yard” where Mr. Clay observed signs posted indicating “There was a yard there, a blending facility, signs coming onto the property”. He also observed end loaders, trucks coming on the property, a coal sampling unit, scales, and a water tank on an elevated roadway (Tr. 60-61). Mr. Kentron told him that coal trucks would deliver coal to the yard, dump it and that end loaders would blend the

coal together for a certain specification. It would then be stored and eventually transported to Dominion's power plant directly across the small county road (Tr. 61).

Mr. Clay identified Exhibits G-6 and G-7 as photographs of two signs stating "Virginia City Fuel Blending Terminal, ¼ mile on right", and "Blend Yard Area A", and assumed they were created by the respondent. It was his understanding that the respondent referred to the facility as a blending terminal (Ex. G-6). He stated that what was stored in Area A appeared to be a pile of coal and the sign on the property pointed to the "blend yard storage Area A" (Ex. G-7). He explained that during his visit to the facility he observed several trucks stopping at a sampling area and a sample being removed from the coal truck trailers that drive across a set of scales. The tractor and trailer are then driven to yard storage A where the coal is dumped and pushed together and blended with the front end loaders. The blended coal is placed back in the truck with the same loaders and travel across a set of scales again and travel off the property that he assumes was taken across the road to Dominion's power plant (Tr. 65-66).

On cross-examination, Mr. Clay stated that he could observe portions of the respondent's property while parked by the road, and more of it after he was invited in by Mr. Ketron. He stated that the Dominion power plant was adjacent to the respondent's site across the road, and the trucks he observed were turning onto the respondent's site. He confirmed that he did not conduct any inspection on Dominion's property (Tr. 67-71).

Mr. Clay stated that he was not aware of any other power plants in MSHA's District 5, and that he was only requested to inspect the Dominion location. He speculated that in the event he observed the trucks turning into that plant, he probably would have inspected that area if requested to do so by his supervisor (Tr. 73). He confirmed that he was not aware of any discussions within his district concerning any "debate" about MSHA's jurisdiction over the respondent's site, or any other sites (Tr. 74-75). He confirmed that his inspection did not include any interviews with anyone on Dominion's property, or the producers of the materials that were trucked into the respondent's site because he did not know who they were. He confirmed that he did not observe the handling of any biomass at that site because he was not sure what it was (Tr. 76).

Walter B. Crickmer, the respondent's co-owner and site manager, stated that the site is located on 106 acres across the road from the Virginia City Hybrid Energy Center (VCHEC), owned and operated by the Virginia Electric and Power Company that is commonly known as Dominion Power, of simply "Dominion" (Tr. 79-81). He identified Exhibit R-1 as an aerial photograph of the power plant, as well as the respondent's site labeled "Power Fuels LLC Fuel Handling Facility", and he was unaware of any citations issued on the plant property (Tr. 82-89).

Mr. Crickmer stated that he has a degree in Geology and is a geologist with previous coal mine experience that began in 1970, and served as president of the Clinchfield Coal Company that operated several mines and preparation plants. He also worked for the Pittston Coal Company drilling gas wells and was engaged in other enterprises processing wood chips and rebuilding mine equipment (Tr. 120, 122). For the past ten years he and several partners have owned and operated a business called Gobco that reclaims gob piles, and for the first eight years

it supplied gob coal products to several companies such as Alpha, Taco, United, and Warscho. During that time, the company won many state reclamation awards and a Federal Department of the Interior award for its tree and “green history” (Tr. 121-122).

Mr. Crickmer described the Dominion plant as a 600 megawatt facility placed in operation two years earlier at the same time the respondent’s site was placed in operation. He stated the plant was designed differently from most coal-fired power plants run with high BTU coal content and relies on a very critical BTU low, medium 7500 BTU, or as low as 6500-8000 product that changes daily for the size of the coal product that is going by conveyor belt into the furnaces that produce heat for its generation station. In order to maintain quality fuel, it is critical to maintain the low BTU coal content that supplies the furnaces (Tr. 81-82).

Mr. Crickmer stated that the plant burns 10,000 tons of fuel material a day. An average 8,000 tons is supplied by the respondent’s facility that transports it by trucks to the site, and 2,000 tons is trucked directly to the plant from other locations (Tr. 89). Mr. Crickmer described the fixtures and facilities on the respondent’s property as a terminal office, a set of scales, an auger sampler owned by a contractor. The respondent owns the office and scales, as well as a small block building for storing grease, lubricants and work parts, and a pump house for a water tank used for road dust control. He further confirmed respondent’s ownership of four storage yards, a sediment pond, and a \$40,000 bath house facility required by MSHA (Tr. 90-91). He described the equipment as four rubber-tired end loaders equipped with computerized bucket scales, a dozer, a water truck, street sweeper, a road maintenance truck, a mobile stacking conveyor, and a pickup truck (Tr. 92).

Mr. Crickmer stated that the respondent handles different kinds of fuels purchased by Dominion, including wash coal from preparation plants, run-of-mine-coal, coal refuse, and gob, biomass wood products. Also included is wood products and biomass consisting of trees, “week” and brush that is ground to a certain specification and blended in with solid fuel at Dominion’s furnace. He stated “it’s just wood that’s been ground up, which is critical and it has to be sized properly to work in the plant” (Tr. 93).

Mr. Crickmer described the Dominion Power Plant as “a very special” operation designed to burn coal, biomass, blended in with limestone for emission control”. He explained how the materials are processed and burned with the special specified fuel because all of the materials have to meet the proper specifications to react properly in the furnace burn chamber that may not otherwise be used at other power plants, and this includes coal refuse, gob, and wood (Tr. 94-95). He stated that the respondent currently receives coal or gob from approximately 15 to 16 Kentucky and Virginia producers. He confirmed that the respondent works for Dominion Power under the stipulated terminalling agreement (Tr. 96-98; Ex. G-4).

Mr. Crickmer stated that the respondent does not, and never has, owned any of the coal related materials delivered by contractor trucks to its site. Pursuant to the agreement with Dominion Power, the respondent is paid so much a ton for the materials as weighed at the scales. Further, all of the respondent’s operational costs, including the wages of the foreman and hourly employees, except for the manager, are fully reimbursed by Dominion to the respondent. All

fuel materials delivered to the site are paid for by Dominion directly to the producers (Tr. 100-101).

Mr. Crickmer explained that on any given day, the fuel materials ordered by Dominion Power to be trucked to the respondent's site are weighed and recorded by the computerized scales and sampled by a third party contracted by the respondent, and then trucked to any of four storage yard areas (A through D), where it is dumped, segregated, and stored into one particular pile for particular producers. The fuel delivered for that day is kept segregated for that day because it has a certain quality. This procedure is followed for all 16 producers who delivered the fuel materials that day. Dominion Power and the respondent would receive computerized reports reflecting the exact fuel quality for the fuel delivered that day (Tr. 102-103; Ex. R-3). Mr. Crickmer explained the fuel blending process that takes place as follows at (Tr. 103):

So we keep that fuel segregated for that one particular day because it has a certain quality. And we do this for all 16 producers, whoever we have coming that day. And then we get all the qualities the next day. And then Dominion directs us daily to take this quality coal, so much of this material and so much of that material and so much of this material and blend it together by one bucket of this, two buckets of that. Literally it says that. You have the sheets there that come from Dominion Power that says that into a pile.

In the event the blending samples reflect a need to improve the quality of the material, it will be blended as described by Mr. Crickmer at (Tr. 104):

So we will re-blend the entire pile again based upon their direction, add so much more of this pile to it, be it a higher BTU or a lower BTU, because that is so critical for the firing in the plant, this blended fuel spec, that it has to be right on the mark. So Dominion makes that call. And sometime we'll reblend a pile two or three times to get it exactly what they want before they take it across the street.

Mr. Crickmer stated after the fuel materials are blended at the desired quality range, the respondent uses two or three contractor truckers who are allowed on Dominion Power's property to deliver the desired daily tonnage ranging from 8,000 to 15,000 tons across the street to the plant. He stated that on any normal operating day the respondent will handle 300 to 500 tractor trailers coming in and out of its site and 150 to 200 truckloads a day will go to the plant (Tr. 104-105).

Mr. Crickmer identified Exhibit R-2 as a survey map of the respondent's property showing the locations of the four fuel material storage areas A through D, the truck scales, and the auger samples (Tr. 105-106). He further identified Exhibit R-3, as a typical example of a blending instruction sheet, provided to the respondent from Dominion every day, and sometimes bi-daily, identifying a particular storage pile and instructions to "Mix this blend, and it tells you exactly, and the moisture" (Tr. 107-108). Further examples are stated as follows at (Tr. 108):

THE WITNESS: No, that's okay. This right here says "Please blend 908A –which is our product – "5 buckets of Omega with 4 buckets of Gobco/ETI for pile Aa." BTU should be 7950, 39 percent ash, 5.9 percent moisture. "I have attached a spreadsheet with calculations." In yard B —

Mr. Crickmer cited an example of blending calculations made by the respondent with respect to the fuel purchased by Dominion from all of its producers as follows: (Ex. 3, Tr. 109).

THE WITNESS: This is how many buckets. There's 207.98 buckets in that pile. This is the percent. And in the blended pile they want two buckets of that. They want three buckets of Pevler. They want three buckets of IBCS and one bucket of South East. So it actually gives us a 6.5 moisture, a 39 ash, a .9 sulfur, and 7600 BTU. Now, these are all critical things for that power plant's furnace. That BTU has to be right on the money. That sulfur has to be within the limits required by the law. And, of course, ash is, you know, a byproduct of the BTU. (Ex. R-3; Tr. 109).

Mr. Crickmer further identified information received daily by the respondent from all of the coal fuel producers with respect to the different quality specifications utilized during its blending process. He stated the information is tracked by Dominion's computers "so that all these products are properly blended together" (Tr. 112). He explained that Dominion's plant is not a standard coal-fired plant that utilizes fuel that is blown into a furnace. He described Dominion's plant as "a fluidized bed plant" that utilizes other materials such as limestone for its furnace reaction chambers to insure the required critical combustion and the removal of emissions (Tr. 110-111). He stated that OSHA, EPA, and "DEQ" have jurisdiction over the plant's operations (Tr. 111).

Mr. Crickmer believed that the coal fuel delivered to the respondent's site has been crushed and sized, and he assumed that the producers of the coal have done this prior to its sale to Dominion in order to meet its specifications. No coal crushing, sizing, or washing is done at the respondent's site. He stated that "all we do is take different fuels purchased by Dominion, which they own, and we blend it to whatever specifications they want for the next day to burn at the plant on two days". He confirmed that the coal meets Dominion's preparatory size specifications, and if not, Dominion would reject the coal until it was properly sized (Tr. 114). He explained that the Dominion plant is unique in that all fuel material is trucked in daily, and when its inventory is full, it only has a nine to ten day supply, whereas most coal-fired plants have 60 to 90 day inventory. He stated that the respondent provides a service to Dominion by storing an additional eight days of purchased fuel on its site (Tr. 115).

Mr. Crickmer stated that the respondent has never been in the coal business, and that its site was designed to perform the daily work that he has described. He confirmed that he was familiar with the work performed at coal preparation plants and was responsible for such a plant when he worked at Clinchfield Coal. He explained that a preparation plant washes, screens, and sizes coal pursuant to the specified specifications from the customers it services (Tr. 122-123).

Mr. Crickmer stated that the respondent does nothing to improve the quality of any fuel product, and it never screens, washes, or sizes it “other than take exactly what’s been brought in there by Dominion and put it in a blend to fuel their furnace” (Tr. 123). He explained that the coal was crushed and screened by the coal producers to meet Dominion’s BTU, sulfur, or moisture specifications. He stated that the respondent furnishes approximately 80% of the fuel it handles and delivers directly to the Dominion plant, and that 20% of the material does not come to the respondent’s site and is delivered directly by truckers ordered by Dominion (Tr. 123-124).

Mr. Crickmer stated that the “fine tuning” of the “spec fuel” that arrives at the respondent’s site is not done by any of the coal producers, and the respondent receives a variety of coal blends purchased by Dominion that is to be blended before it can be delivered to its plant. He explained that coal blending, sampling, and analysis takes place at the respondent’s site daily, and changes daily “six days a week all year long” (Tr. 124).

Mr. Crickmer stated that in the event the respondent did not do the blending work, Dominion would have to do it because the plant requires the desired fuel specification (Tr. 125). He explained that when he established the respondent’s site he consulted with the State Department of Mining Minerals and Energy and informed its director that the respondent “would work for Dominion to handle trucks, store their fuel, re-blend it to spec and haul it across the street”. He stated that he was informed that he was not a coal mine, did not need a mine license, was not a wash plant, and was not subject to the State’s jurisdiction, and was referred to OSHA signs, brochures, and forms for visitors to sign, and operated that way until MSHA appeared (Tr. 125-126).

On cross-examination, Mr. Crickmer confirmed that the respondent blends coal on behalf of Dominion, stores it at the respondent’s facility and loads and delivers it across the street to the Dominion plant as directed. He confirmed that the stipulated Terminalling Agreement defines its work responsibilities on behalf of Dominion with respect to the blending and delivery of the coal to the plant. He stated that the respondent is a custom blending facility for Dominion and that the work it performs is done to meet Dominion’s requirements and specifications (Tr. 127-128). He characterized this work and the term “custom” as follows:

A. It makes a buyer’s spec fuel that really changes daily or weekly. And they change it based upon the heat rate of the furnace. It’s a custom fuel. And we do that work for Dominion. We make that spec fuel for them with fuels that they own. They buy fuels from many people and we take those fuels and we make that spec fuel. (Tr. 128).

Mr. Crickmer further confirmed that “solid fuel” is defined by the agreement as coal, coal refuse, and coal midds or gob (Tr. 129). He stated that the biomass handled by the respondent is covered by a separate agreement and it is the only product that it has ever purchased and owned for that business. He confirmed that it provides biomass for Dominion and ground end sized 1,000 truckloads of wood materials in 2012, to Dominion outside of the agreement (Tr. 129-130).

Mr. Crickmer explained that the respondent is not responsible for any erroneous blend or loss in a stockpile, and commented “that is all 100 percent Dominion”, and “if they told me to blend it this way and it came out something they didn’t like, it’s not my responsibility. I only do what I’m told to do”. He confirmed that Dominion can perform re-blending at its site through its reclaim systems that senses sulfur, moisture, or ash in both piles (Tr. 137-138).

The Jurisdictional Issues

The Secretary’s Arguments

The Secretary relies on the testimony of MSHA Inspector Thomas C. Bower, who confirmed his site inspections in December 2012, and April 2013, when he observed the loaded coal trucks transporting the coal onto the property where it was weighed, sampled, and stored in designated areas, and blended using front-end loaders that mixed and combined different types of coal and stored in separate stockpiles to create a custom coal blend.

The Secretary further cites the testimony of MSHA Special Investigator Robert D. Clay, who initially observed coal trucks entering the site, and his further observations after he was invited onto to the property by site foreman Bobby Ketron. Mr. Clay observed front-end loaders, weighing scales, a coal sampling unit, a water tank, and several coal trucks coming onto the property. He testified that Mr. Kentron informed him that coal trucks delivered coal to the blending yard where front-end loaders blended the coal together to meet certain specifications. The blended coal was stored and eventually transported to the Dominion Power Plant across the street from the respondent’s facility.

The Secretary further relies on the testimony of Walter B. Crickmer, the respondent’s co-owner and facility manager who confirmed the Terminalling Agreement between the respondent and Dominion Power specifying the services provided by the respondent, including the blending of solid fuel in accordance with the requirements of the customer, and the loading of trucks and shipment of solid fuel to Dominion’s plant (Tr. 127-128); Exhibit G-4, pg. 4.301(a)(iv)(v)).

The Secretary cites the definition of “solid fuel” in the Agreement as “coal, coal refuse, coal midds, or gob” and refers to Dominion Power as the “Customer” of Power Fuels, LLC (Ex. G-4, at 1, 2; Tr. 129). The Secretary cites Mr. Crickmer’s testimony that the respondent receives daily instructions, sometimes bi-daily, from Dominion Power that directs it on how to create a custom coal blend that meets Dominion Power’s specifications as noted in Exhibit R3.

The Secretary further cites Mr. Crickmer’s testimony that it was “critical” for the respondent to make a custom coal blend that meets Dominion’s precise specifications in order for the power plant furnace to operate correctly and his explanation that “All we do is take different fuels purchased by Dominion, which they own, and we blend to whatever specifications they want for the next day burn at the power plant” (Tr. 114). The Secretary refers to the following testimony and admissions by Mr. Crickmer:

1. The respondent “provides a big service” for Dominion because it stores large quantities of coal, and that since Dominion can only store up to eight days of power-plant-ready coal at its plant, storage at the respondent’s facility reduces Dominion’s storage needs on its own premises (Tr. 115, 126).
2. The respondent’s facility has four different storage areas where trucks are routinely loaded with blended coal and taken to an auger sampler that tests the coal to insure it meets Dominion’s specifications and transported across the street to the Dominion Power Plant (Tr. 102-103, 126; Ex. G-7).
3. The respondent “is a custom blending facility” for Dominion Power, blends coal that it receives from approximately 16 different producing mines, and that the work it performs is done for the purpose of meeting Dominion’s specifications and requirements (Tr. 97, 126, 128).

The Secretary asserts that under the plain language of the Mine Act, the respondent’s blending facility is a “mine” for purposes of Mine Act enforcement jurisdiction. The Secretary cites Section 4 of the Act that each “coal or other mine” whose products affect commerce shall be subject to the Act, and that “Coal or other mine” is defined in Section 3(h)(1) of the Mine Act to include:

(C) lands . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in non-liquid form . . . or used in, or to be used in, the milling of such minerals or the work of preparing coal or other minerals, and includes custom coal preparation facilities (30 U.S.C. 802(h)(i)).

The Secretary cites the definition of “work of preparing the coal” at Section 3(I) of the Mine Act as:

. . . the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of the coal mine (30 U.S.C. 802(i)).

The Secretary asserts that the record in this case makes it abundantly clear that the respondent is a custom coal preparation facility that is “used in” the “work of preparing coal”, and that it undisputed that it mixes, blends, loads, weighs, samples, and stores bituminous coal for the sole purpose of meeting the specifications and requirements of its customer Dominion Power. The Secretary concludes that these coal preparation activities confer Mine Act enforcement jurisdiction over the respondent’s blending terminal, and that a plain reading of Mine Act Section 4 requires the conclusion that the terminal operation is a “custom preparation facility” within 30 U.S.C. 802(h)(1). In this regard, the Secretary cites Mr. Crickmer’s admission that the respondent “is a custom blending facility” for its customer Dominion Power (Tr. 128).

The Secretary cites the Commission's decision in Mineral Coal Sales, Inc., 7 FMSHRC 615 (1985), affirming my jurisdictional finding over a commercial loading facility, a railway siding that the Secretary states performed coal preparation function similar to the work performed by the respondent in the instant matter, namely the blending of different types of coal together to meet customer's specifications and loaded the blended coal for transport activities are specifically listed in the Mine Act as constituting "the work of preparing the coal". In that case, although the Commission stated that merely performing one or more of the statutorily enumerated activities is not solely determinative of whether the facility is properly classified as a "mine", it nonetheless noted that the inquiry must also focus on the nature of the operation performing the activities and whether the work is "undertaken to make coal suitable for a particular use or to meet market specifications".

The Secretary emphasizes that the Commission ultimately concluded that the operations taking place at Mineral Coal Sales, when viewed as a collective whole, indicated that the facility was a "mine" because it performed preparation work to make coal suitable for customer specifications, and rejected Mineral Coal Sales' contention that its work of merely blending different types of coal from different stockpiles under the direction and control of another entity does not constitute coal preparation. The Secretary concludes that the preparation work performed at the Mineral Coal Sales facility is virtually identical to the blending work performed by the respondent and falls within MSHA's jurisdiction.

The Secretary states that assuming arguendo that the court finds that Sections 802(h)(1)(C) and (i) are ambiguous with respect to whether they allow MSHA to assert enforcement jurisdiction over a custom coal preparation plant that engages in further preparation of previously processed coal to meet the specifications of the coal's ultimate consumer, the Secretary's reasonable interpretation of the Act is entitled to deference. Citing Secretary v. National Cement Co., 573 F.3d 788 (D.C. Cir. 2009I) (deferring to MSHA's finding of Mine Act jurisdiction over a road leading up to a cement plant), and Secretary v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984) (deferring to MSHA's jurisdictional determination that a slate gravel processing facility that did not extract slate but processed it for commercial purposes was a "mine" within the meaning of the Mine Act.

The Secretary argues that his interpretation that the work performed at the respondent's blending facility constitutes the "work of preparing the coal" is reasonable and entitled to deference, citing the cases of Mineral Sales, Inc. and Kinder Morgan Operating, *supra* with "strikingly similar facts to the case as bar" with respect to the undisputed statutorily enumerated coal preparation activities performed by the respondent that include the "mixing, storing, and loading of bituminous coal" functions specified in 30 U.S.C. 802(i).

The Secretary maintains that his interpretation of 30 U.S.C. 802(h)(1)(C) and 802(i) is reasonable and that by enacting the Mine Act Congress sought to prevent "unsafe and unhealthful conditions and practices in . . . coal or other mines," 30 U.S.C. Section 801(b), and that it furthers the safety and health goals of the Act to cover, to the maximum extent consistent with the statutory terms, workers subject to the conditions, practices and hazards associated with coal preparation, and that deference to the Secretary's interpretation is additionally warranted

because 30 U.S.C. 802(h)(1)(C) “expressly authorize(es) the Secretary to define what constitutes a “mine.” Otis Elevator Co. v. Secretary, 921 F.2d 1285, 1288 n.1 (D.C. Cir. 1990).

The Secretary states that the respondent introduced no facts or evidence to support its contention that MSHA has no jurisdiction over its blending facility and rejects its principal defense that its mixing, storing, and loading work is not the type of coal preparation work that “is usually done by the operator of the coal mine”, and as such should be treated like the ultimate consumer of the coal instead of a mine operator. The Secretary responds to the respondent’s contention that if it did not perform the custom blending work for Dominion, Dominion would have to perform these coal preparation activities for itself, and takes the position that the respondent seeks to be treated as the ultimate consumer of the coal, instead of the contractor it actually is that prepares the coal to meet the specifications of the ultimate consumer, and that its argument has no basis in fact or logic and should be rejected.

In response to the respondent’s suggestion that the Secretary’s jurisdictional interpretation would expose any place that mixes, stores, or loads coal to MSHA’s enforcement scrutiny, the Secretary states that simply storing or loading coal would not subject the coal end-user to MSHA’s jurisdiction. The Secretary concludes that his asserted enforcement jurisdiction is consistent with the Commissions analysis in Elam, supra, and the reasoning stated in Mineral Coal Sales, supra, and Kinder Morgan Operating, supra.

The Secretary further cites the Third Circuit Federal Court of Appeals decision in RNS Service, Inc. v. FMSHRC, 115 F.3d 182 (1997), concerning a site that processed coal refuse that was delivered to a co-generation facility generating electricity and steam where it was further prepared in a useable form by its ultimate consumer. The Court affirmed the Commission’s functional analysis holding that the loading and transportation of the coal that occurred at the site were sufficient to render the site a mine, and rejected the assertion by RNS Services that the Commission made a per se ruling that simply loading and transporting the coal rendered the site a “mine”.

With respect to the facts supporting the alleged violations, the Secretary relies on the testimony of Inspector Bower as previously noted, including the joint stipulated evidentiary admission of the citations were received for the record, without objection, except as to jurisdiction. Further, the Secretary takes the position that if MSHA’s jurisdictional claims are affirmed, the citations and proposed civil penalty assessments should also be affirmed..

The Respondent’s Arguments:

The respondent argues that the critical question in this case is whether any mixing, storing, or loading of coal is subject to the jurisdiction of the Act, as contended by the Secretary, or whether the mixing, storing, and loading must be the type of work usually performed by the operator of a coal mine. The respondent asserts that if the Secretary is correct that any mixing, storing, or loading of coal is sufficient to establish MSHA jurisdiction, then any consumer who mixes, stores, or loads coal is the operator of a coal mine. Conceding the fact that the Mine Act confers broad jurisdiction on MSHA, the respondent maintains that it does not go that far.

The respondent argues that the work normally performed by coal consumers is not subject to the Mine Act, and that in the instant case the respondent is doing blending work for the consumer of the coal, not for the producers of the coal. The respondent maintains that the work that it performs is the type of work that is generally performed by a consumer, and the fact that the consumer has contracted with the respondent to perform this work, instead of doing it with its own employees, does not change the character of the work or allow MSHA to assert jurisdiction.

The respondent relies on several Commission and ALJ jurisdictional issue decisions in support of its case. Addressing the critical issue with respect to the connection that must exist between the work in question and the usual work of mining, the respondent cites Secretary of Labor v. Oliver M. Jr., Co., 4 FMSHRC 51 (1982I), a case involving an operator of a commercial dock on the Ohio River, and affirming an ALJ decision that Elam's facility was not a "mine" subject to Mine Act jurisdiction.

The respondent states that although Elam crushed and loaded coal onto barges, the Commission held that the dock was not a "coal or other mine," and that just because it handled coal it did not mean it was engaged in "the work of preparing the coal." To fall within the definition, the Commission concluded that the work must involve more than the "breaking crushing, sizing, cleaning, washing, drying, measuring, storing, (or) loading" of coal. The work must be the kind of work "usually performed by the mine operator engaged in the extraction of the coal or by custom preparation facilities . . .".

With regard to Secretary of Labor v. Mineral Coal Sales, Inc., 7 FMSHRC 615 (1985), the respondent points out that the Commission addressed a different situation involving a tipple operator at a siding that stored, mixed, crushed, sized, and loaded coal in order to make it "suitable for a particular use or to meet market specifications." The company processed the coal for brokers, not consumers, and the Commission held that the company's operations were subject to the Act.

Citing my decision in Marion Docks, Inc. v. Secretary of Labor, 10 FMSHRC 1598 (1988), a case involving a coal loading tipple facility that loaded and shipped coal by river barges to several utility customers who purchase the coal from brokers, the respondent points out that the facility was not the consumer of the coal, and did not work for the consumer of the coal, and only worked for brokers who sold the coal to utilities.

The respondent cites my decision in Secretary v. Consolidation Coal Company, 35 FMSHRC 439 (2013), involving a coal loading facility that received processed coal from an adjacent preparation plant. The respondent states that the case involved two facilities, namely (1) a coal loading facility that was essentially an extension of the preparation plant, and (2) a barge onto which the coal was loaded. The respondent states that the loading facility where the work of loading work that included the layering of the coal to meet the mine customer's specifications was held to be subject to the Mine Act, "but the barge was not, . . . and simply transported the loaded coal" (pg. 9, post-hearing brief). The respondent further addresses two Federal Court of Appeals cases relied on by the Secretary with respect to what constitutes a

mine. RNS Services, Inc. v. FMSHRC, 115 v. F. 3d 182 (3d Cir. 1997), and Kinder Morgan Operating, L.P. v. Chao, 78 F. App'x 462 (6th Cir. 2003) (unpublished); (Commission Decision at 23 FMSHRC 1288, 1294 (2001)).

With respect to RNS Services, Inc., the respondent states that RNS loaded coal refuse at a refuse site, and that the Court, in a 2-1 decision, the majority applied a functional analysis focusing on the nature of the work being performed at the site and held that RNS was subject to the Act. Even so, the respondent argues that the majority disclaimed the view that any loading of coal was subject to the Act, and that in order to constitute a mine, the coal must be loaded “at a place regularly used for the purpose, in preparation for further processing, and that the “loading of the coal is a critical step in the processing of minerals extracted from the earth in preparation for their receipt by an end-user. . . .” Id. At 185. The respondent notes the dissent argument that the Commission had applied a per se ruling making any loading of coal subject to the Act. Id. At 192 (Alito, J., dissenting).

With regard to the Kinder Morgan Operating decision, involving a marine loading facility that received and loaded coal, mostly for the Tennessee Valley Authority (TVA), and that the TVA purchased the coal from numerous producers, and that Kinder Morgan stored and blended the coal into different products for different plants. The respondent points out that the Commission split 2-2 on whether the Mine Act applied to Kinder Morgan’s operation, and concedes that the 6th Circuit found MSHA jurisdiction and adopted the reasoning of the two Commissioners who voted to uphold jurisdiction based on their reasoning that Kinder Morgan was performing work “usually performed by the operator of a coal mine by undertaking the activities to make the coal suitable for a particular use or to meet market specifications.” 23 FMSHRC 1288, 1294 (2001).

The respondent cites several additional Court opinions that it believes make it clear that storing, loading, and mixing coal are themselves insufficient to support jurisdiction, and that otherwise, anyone who handles coal would be covered by the Act. The respondent concludes that the storing, loading, and mixing must be part of a mine’s operations. In support of its argument, the respondent cites Herman v. Associated Elec. Coop. Inc., 172 F. 3d 1078 (8th Cir. 1999), stating “not all businesses that perform tasks listed under the ‘work of preparing coal’ in Section 802(i) can be considered mines.” Id. At 1082, and that while utilities may be subject to the Act if they maintain a presence at the mine and assist in mining or loading the coal or if they engage in coal preparation of the type performed by mine operators, “a utility that receives processed coal from a mine does not itself become a ‘mine’ by further processing the coal for combustion.” Id. At 1083. Thus, once a producer delivers processed, marketable coal to a utility, the jurisdiction of MSHA ends, even though the utility may do further blending of the product. Id.

The respondent argues that the Fourth Circuit made this same point in United Energy Services, Inc. v. MSHA, 35 F. 3d 971 (4th Cir. 1994), involving the operator of a power plant that went onto mine property and loaded coal refuse from a pile and transported it to the plant. Id at 973. Employing a functional analysis, the Fourth Circuit found that the plant operator was engaged in the work of preparing the coal. Id. At 975. The respondent asserts that the Court was

careful to rule, however, that the same analysis would not apply once the coal was delivered to the plant.

The respondent asserts that the following facts are not contradicted:

1. Dominion purchases coal from various producers.
2. The coal is delivered to the Power Fuels site by contract truckers for the producers.
3. Dominion owns all of the coal that is delivered to the site.
4. Power Fuels is a contractor for Dominion under a Terminalling Agreement.
5. Power Fuels weighs, samples and stores the coal for Dominion.
6. Dominion instructs Power Fuels how to blend and deliver the coal.
7. Dominion does so to achieve the desired burn for the fuel going into its plant.
8. Dominion is the sole consumer of the coal at the Power Fuels site.
9. If Power Fuels did not store and blend the coal for Dominion, Dominion would have to do the work itself or find another contractor to do it.
10. The work performed by Power Fuels is work that is usually performed by utilities or other consumers of coal. It is not the type of work performed by producers or brokers of coal.

The respondent concludes that the activities listed in 30 U.S.C. Section 802(i) as being part of the “work of preparing the coal” are limited by the phrase “as is usually done by the operator of the coal mine.” If the storing, loading, and mining is the type of work usually performed by the mine operator, the work is subject to the Act. On the other hand, if the work is not of that type, but is work of the type usually performed by a utility or other consumer of the coal, the work is not subject to the Act. In this regard, the respondent asserts that MSHA’s Special Investigator Robert Clay testified that the activities in question occurred on the property of Dominion, MSHA would not have considered the to be within its jurisdiction. In other words, if Dominion had done the work itself, the agency would not have asserted jurisdiction. The respondent concludes that if the activities are not subject to the Act when performed by Dominion, then they are not subject to the Act when performed by a contractor for Dominion, and that any other interpretation would lead to the extreme and unreasonable position that MSHA has jurisdiction over everyone who receives and handles coal.

Findings and Conclusions

Jurisdiction

The essence and focus of the respondent’s jurisdictional argument is the statutory language defining a coal mine, and the meaning of the phrases “work of preparing the coal” , and “such other work of preparing such coal as is usually done by the operator of the coal mine”. At hearing, the respondent’s counsel argued that any work associated with the blending, mixing, and storage of coal does not ipso facto constitute “work of preparing the coal”, and does not necessarily result in MSHA jurisdiction (Tr. 133-134).

The respondent maintains that “a line must be drawn”, particularly in view of the statutory language requiring a showing that the kind of work performed is the kind that is usually done by a coal mine operator (Tr. 133-134). In support of its argument, the respondent relies on the dissenting judge (now Supreme Court Justice Alioto) in RNS Services, Inc., supra that not every mining, washing, sizing, or trucking of coal is a coal mine, and that the kind of work must be the kind done by the coal operator.

The respondent dismisses any suggestion that the work it performs is done for a customer, or that it was “some kind of a middle man custom blending coal to sell into a market”, and asserts that it is in fact a contractor for the Dominion Power Plant that is not its customer “in a sales sense” (Tr. 137). In response to these arguments, the Secretary maintains that the case law cited and relied on in this case to support MSHA jurisdiction is clear that the line is drawn where the work of mixing, storage, and loading of coal is done to meet a customer’s specifications (Tr. 135).

I reject the respondent’s claim that Dominion Power is not its customer. The terminalling agreement specifically describes Dominion Power as a “customer” numerous times at pages one through eight (Ex. G-4). Further, the respondent’s site manager Walter Crickmer in describing the blending of coal at the site pursuant to the agreement stated this is done “in accordance with the reasonable requirements of the customers” (Tr. 127). He also confirmed that the site is “a custom blending facility for Dominion Power”, and that all work performed “is done to meet the requirements and specifications” of Dominion Power (Tr. 128). Accordingly, I conclude and find that Dominion Power is in fact the respondent’s customer.

The respondent’s assertion that Inspector Clay, at (Tr. 69-72), testified that in the event the trucks he observed were delivering coal directly to Dominion’s power plant, MSHA would not have asserted jurisdiction must be considered in context. In fact, Mr. Clay testified that he had “no idea” because he does not inspect power company property unless MSHA jurisdiction is factually determined, and that was his understanding that MSHA’s claim of site jurisdiction is based on the working activities he only observed taking place at the respondent’s property (Tr. 69-70). Further, when asked if he would be present at the hearing in this case if he had observed the trucks going directly into the plant, inspector Clay stated he probably would be present at the hearing because MSHA’s assistant district manager, his superior, “asked me to look into it and I reported to him what I found” (Tr. 73). Further, in response to whether MSHA has asserted its jurisdiction over other power plants in District 5, he confirmed that the only power plant he was asked to look at was Dominion’s plant jurisdiction there” (Tr. 73).

The respondent’s conclusion that in my Consolidation Coal case, I found the layer loading of coal at the loading dock at that facility location that includes a fixed barge constituted “work in preparing coal” to meet customer specifications is correct. However, the respondent’s assertion that I found that “a barge on which the coal was loaded” was a “facility” not subject to MSHA jurisdiction because “it simply transported the coal is incorrect and mis-leading. I made no finding the barge was a “facility”. The barge in issue was an empty barge on the Ohio River located away from the loading dock location where no layer loading was taking place.

I take particular note of the Court majority in RNS Services, Inc. *supra*, rejecting the dissenting opinion that the Commission applied a *per se* ruling in that case. Indeed, the Court noted that the Commission was cognizant of the fact that coal refuse was loaded at the site in question for delivery to its power generator facility and correctly applied a “functional analysis” test in determining that the coal loaded and store at that site was in fact loaded at a place regularly used for that purpose, and were sufficient to render the sites of these activities a “mine”.

I conclude and find that the resolution of jurisdiction in this case is properly and reasonably made pursuant to a “functional analysis” as described in RNS Services, Inc., and Oliver M. Elam, as well as in Mineral Coal Sales, Inc., Marion Docks, Inc., and Kinder Morgan Operating Supra, decisions that I find persuasive and controlling precedents in this case.

Although the Court decisions in Herman v. Associated Elec. Coop., Inc. and United Energy Services, Inc. v. FMSHRC, *supra*, relied on by the respondent may support its argument that mixing, storage, and loading of coal work are not *per se* operational indicators supporting Mine Act jurisdiction, those cases dealt with consumer electrical power plant sites, and not sites similar to those at the respondent’s facility. In Herman, the Court found its operations to be “manufacturing” subject to OSHA jurisdiction. In United Energy Services, Inc., the Court applied a functional analysis in concluding that a power plant operator that went on mine property and loaded refuse from a pile and transported it to its plant was engaged in coal preparation work that is subject to Mine Act jurisdiction.

I am not persuaded by the respondent’s arguments that the work it performs for Dominion Power is work that is usually performed by utilities or other coal consumers, and is not the type of work performed by coal producers or brokers. The respondent is not a power plant, utility, consumer, or a coal producer or broker, and the fact that it does not engage in those activities is not relevant in this case. The credible evidence and un-rebutted facts in this case clearly establishes that the respondent is a stand-alone coal blending facility identified as such by signs prominently displayed on its property. The site location includes mobile equipment such as several trucks, end-loaders, an office, a bath house, sampling and weight scales, clearly identified storage areas, and a water tank and trucks, all of which provide the logistical support for the employees as they perform their assigned duties related to the receipt, testing, weighing, blending, mixing, storage, and transportation of coal from that site in order to meet the coal specifications that are communicated to the respondent by Dominion Power on a daily continual basis.

I am not further persuaded by the respondent’s argument that if it did not store and blend the coal for Dominion, Dominion would have to do the work itself or find another contractor to do it. In this case, no entity other than the respondent is the subject of MSHA’s asserted jurisdiction and I assume it operates under a mine ID number assigned by MSHA to a mine operator pursuant to 30 C.F.R., Part 41. In any event, pursuant to Section 3(d) of the Mine Act, the definition of an “operator” includes any contractor performing services at a mine. Further, I find that the respondent cannot avoid the Secretary’s enforcement scrutiny because it is contractually obligated to perform these services for Dominion Power.

Although the respondent's site manager, Walter Crickmer, testified that no sizing, screening, or crushing activities take place at the site and has "never done anything to improve the coal quality", he nonetheless admitted that the site does in fact blend the coal together on a daily basis using its end-loaders that mix and blend it "by one bucket of this, and two buckets of that", following the aforementioned detailed specifications as to how the coal should be blended. Contrary to Mr. Crickmer's opinion that the work performed at the site has nothing to do with the quality of the coal it processes, I find the credible evidence with respect to the testing, blending, and re-blending as necessary, are directly accomplished in order to insure and maintain the consistent quality of the coal pursuant to Dominion's quality specifications.

I conclude and find that the working activities taking place at the respondent's site, namely, the mixing, blending, weighing, sampling, storing, loading, and transporting coal to Dominion's plant clearly meets the Mine Act definition of "work of preparing the coal", and that this work is clearly done to meet the specifications of its customer, Dominion Power. I further conclude and find that the respondent's custom coal blending facility is a "coal or other mine" clearly within the statutory definitions found in the Mine Act, and is therefore subject to the Mine Act and the Secretary's enforcement jurisdiction. The respondent's arguments to the contrary ARE REJECTED.

The Alleged Violations

In support of the citations in issue, the Secretary relies on the testimony of MSHA Inspector Thomas Bower that I find credible and un-rebutted. The respondent availed itself of the opportunity to cross-examine the inspector, but focused primarily on questions related to jurisdiction rather than facts related to the conditions or practices that prompted the inspector to issue the citations with his findings noted on the face of the citations. The respondent presented no credible evidence to rebut the Secretary's position with respect to the facts associated to the violations in issue. In this regard, I informed the parties that I expected to hear testimony concerning the three alleged violations, as well as the jurisdictional issue. I further informed the parties that I did not intend to come back to try the three citations and the respondent clearly understood that this was the case (Tr. 19-20). Further, my hearing notice informed the parties that the issues to be addressed included testimony related to the violations.

The respondent's statement at page two of its post-hearing brief that I permitted the parties to file briefs "on the issue of jurisdiction" suggests that I limited any briefing to that issue alone is incorrect. My expectation of briefs was not limited to jurisdictional issues, with the exclusion of any arguments related to the alleged violations. At the conclusion of the hearing, the respondent stated that briefs would be helpful (Tr. 140). Further, when asked if the respondent wished to discuss the violations, the counsel stated "no sir" and "we rest" (Tr. 138). Although the respondent could have called the foreman who received the citations to testify, it did not do so. During opening statements, the respondent stated "We think the citations are relevant on the jurisdictional issues" (Tr. 19). The Secretary stated his intention to initially establish jurisdiction and then proceed to each of the citations (Tr. 20).

The Secretary's assertions at page 13 of his post-hearing brief that "The facts of the alleged violations at issue in these proceedings are not in dispute", citing ALJ Exhibit 1, and the trial transcript at pages 6 and 17 are inaccurate. ALJ Exhibit 1 concerns a joint stipulation with respect to the admission of the citations in issue into evidence "without objection, except to jurisdiction". Each of the citations is described by the citation number, the date of issue, and the cited mandatory safety standard. I find nothing to suggest that the parties agreed that the factual conditions or practices described by the inspector on the face of each of the citations were not in dispute or otherwise agreed to by the parties.

At page 6 of the transcript, I commented that the principal issue concerned jurisdiction, and acknowledged the pre-trial position statement filed by the Secretary on November 15, 2013, with a copy furnished to the respondent. The Secretary's statement includes the intention to call the inspectors who testified in this case, with the expectation of eliciting testimony including the factual basis for the issuance of the citations. At page 3 of the statement, the Secretary acknowledged that the issues to be litigated also included gravity, negligence, and the proposed civil penalty assessments. The Secretary's reference to page 17 of the transcript reflects a comment by the Secretary's counsel stating "and as Mr. Massie said, the facts really aren't in dispute". I also note a statement by counsel at transcript page 11 that "there are going to be disputes about the facts . . . There will be differences about what the facts mean".

Based on all of the aforementioned circumstances, any suggestion that the respondent was not expected to address the fact of violations at the hearing, or was somehow misled, prejudiced, or treated unfairly for not doing so IS REJECTED. I conclude and find that the respondent has waived its right and opportunity to present a defense or to rebut the Secretary's evidence in support of the violations. I further find that the credible and unrebutted testimony of Inspector Bower establishes that the conditions and practices described in the citations constitute violations of the cited mandatory safety standards. Accordingly, the citations ARE AFFIRMED.

History of Prior Violations

Exhibit A to the Secretary's petition for assessment of civil penalties reflects no prior or repeat violations, and no further information was received from the Secretary. Absent any evidence to the contrary, I find the respondent has a good compliance record.

Good Faith Compliance

Based on the timely corrective actions as reflected in the citation termination notices, I find that the respondent abated all of the violations in good faith.

Negligence

Based on the inspector's credible testimony that the respondent's foreman was not responsible for any maintenance of the trucks delivering coal to the site, I accept and adopt his "low negligence" determinations with respect to each of the citations.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Remain in Business

The Secretary characterized the respondent as a small mine operator (Tr. 139), and the parties stipulated that the payment of the proposed civil penalty assessments for the citations will not adversely affect the respondent's ability to continue in business. I adopt and incorporate these agreements as my findings.

Gravity

Inspector Bower confirmed that he was not aware of any difficulties encountered by the cited trucks inbound to the site, and to his knowledge they arrived safely (Tr. 51). While this may be true, the fact remains that his un-rebutted and credible testimony clearly supports the cited truck brake conditions and defective backup alarm. Accordingly, I find that the violations were serious and would reasonably likely result in injuries.

Significant and Substantial Determinations

Inspector Bower determined that all of the citations were significant and substantial (S & S) violations. With respect to Citation No. 820074, he testified that the cited truck braking defects that he characterized as "faulty brakes, resulted in a 25% loss of braking power". He confirmed that the conditions exposed employees who regularly traveled the site roads to injuries, and that employees operating equipment were reasonably likely to suffer broken bones or disabling and traumatic injuries in the event of an accident. He conceded this was "a worst case" scenario and lesser injuries were conceivable (Tr. 30-36).

The inspector cited another truck after determining the brakes were out of adjustment and that a leaking and defective air valve resulted in a loss of braking air pressure that would reasonably likely result in an accident. He stated that a "runaway truck" could result in a collision accident resulting in permanently disabling injuries. (Citation No 8204726; Tr. 39-40)

The inspector cited the same truck after it was observed operating in reverse in congested working areas where employees were present and the back-alarm did not sound. He confirmed that the vehicle had an obstructed view to the rear, and that if it backed up over people working in the area, they would be exposed to crushing and permanently disabling injuries (Citation No. 8204725; Tr. 33-34).

The established case precedents with respect to S & S violations, Cement Div. Nat'l Gypsum Co., 3 FMSHRC 822, 825 (Apr. 1981), Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984), and U.S. Steel Mining Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985), and U.S. Steel Mining Co., Inc., 6 FMSHRC 1574 (July 1984), require proof of the following elements that must be considered in terms of continued mining operations:

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.

I conclude and find that the affirmance of the violations establishes the first Mathies prong. With respect to the second prong requiring a discrete safety hazard contributed to by the violation, I conclude and find that the credible un rebutted testimony of Inspector Bower describing the defective truck braking systems, as well as the cited inoperative trucks backup alarm, presented discrete safety hazards and measures of danger contributed to by the violations pursuant to the second Mathies prong.

The third Mathies prong requires the presence of a reasonable likelihood that the hazard contributed to will result in an injury. The evaluation of the risk of injury necessarily assumes the continuance of normal mining operations. The credible and un rebutted testimony of the inspectors establishes that 30 to 50 loaded trucks arrived and entered the respondent's site on a daily basis with frequent stops at the weighing scale, the storage areas where the coal is dumped and blended by end-loaders. The trucks also traveled over inclined roadways on the property and the same roads used by the work force on foot.

Inspector Bower testified credibly that the trucks backed up in congested areas where workers and pieces of equipment are present, and that the cited facility brake conditions could prevent the truck from stopping as intended or result in a truck "runaway". Based on the brake defects that he found, as well as his accident investigator experience involving truck accidents under similar defective braking systems, he concluded that it was reasonably likely that an accident would occur causing a wreck, with the resulting serious injuries that he described. One of these trucks was also cited for an inoperative backup alarm and the inspector concluded that if it backed over anyone, they would likely suffer crushing and disabling injuries.

I conclude and find that the hazardous defective truck brakes and backup alarm conditions would reasonably likely contribute to an accident resulting in serious injuries to employees at risk in the event they were to continue with their normal working duties. Accordingly, I conclude and find that the third and fourth Mathies prongs have also been established. Accordingly, all of the inspector's S & S determinations ARE AFFIRMED.

ORDER

Based on all of the aforementioned findings and conclusions in this case, including the civil penalty assessment criteria found in Section 110(i) of the Mine Act, all of the citations ARE AFFIRMED. Further, I accept and affirm the proposed penalty assessments of \$100 for each of the citations (8204724, 8204725, and 8204726).

The respondent shall pay a civil penalty assessment of \$300 for the violations within thirty (30) days of the date of this Order. Payment shall be submitted to the Mine Safety and Health Administration (MSHA), U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390, referencing the captioned docket numbers. Upon receipt of payment, these proceedings ARE DISMISSED.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 17, 2014

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. SE 2011-274
 : A.C. No. 01-02901-242524
 :
v. : Docket No. SE 2011-403
 : A.C. No. 01-02901-248080
DRUMMOND COMPANY, :
Respondent : Mine: Shoal Creek Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, Tennessee for the Secretary of Labor

John Church, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, 135 Gemini Circle, Suite 213, Birmingham, Alabama for the Secretary of Labor

Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, Kentucky for Respondent

Damon Jay Boiles III, Esq., Drummond Company, Inc., P.O. Box 10246, Birmingham, Alabama for Respondent

Before: Judge Andrews

These civil penalty proceedings are conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). This matter concerns Citation Nos. 8518691 and 7699789, both issued under Section 104(a) of the Act and served upon Drummond Company, Inc. (“Drummond” or “Respondent”) by the Mine Safety and Health Administration (“MSHA”). A hearing was held on July 10, 2013 in Birmingham, Alabama at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs and informed the undersigned that Respondent withdrew its contest of Citation No. 7699789 and agreed to pay the assessed penalty of \$1,203.00. The assessed penalty for Citation No. 8518691 is \$8,209.00.

PROCEDURAL HISTORY

These dockets collectively contained twenty-nine citations and were assessed penalties totaling \$81,620.00. On June 24, 2011, they were assigned to Administrative Law Judge Jeffrey Tureck. On March 20, 2012, a motion for partial settlement that included twenty-five citations was approved. The Secretary filed a motion for summary judgment concerning Citation Nos. 8518691 and 7699789 on October 9, 2012, which was denied in a decision by Judge Tureck on November 23, 2012. Later, on November 26, 2012, a second motion for partial settlement that covered two unrelated citations was approved, leaving only Citation Nos. 8518691 and 7699789 at issue for hearing. These cases were reassigned to the undersigned on February 12, 2013.

STIPULATIONS

1. Respondent was the operator of the Shoal Creek Mine at all relevant times.
2. The Shoal Creek Mine is a “mine” as that term is defined in Section 3(h) of the Mine Act.
3. Operations at the Shoal Creek Mine involve products which enter commerce or products which affect commerce.
4. Respondent is subject to the Federal Mine Safety & Health Act of 1977.
5. The Citations attached to Exhibit A of the Secretary’s Petitions were issued to Respondent.
6. The penalty assessed for the alleged violations are appropriate to the size of the operator.
7. The operator demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violations.
8. The penalties assessed will not affect the operator’s ability to continue in business.

THE CITATION

On November 15, 2013, MSHA Inspector Stanley Frank Wilkosz (“Wilkosz”) issued Citation No. 8518691 for a violation of 30 C.F.R. § 75.1506(g). The Condition or Practice stated:

At all times, the site and area around the refuge alternative shall be kept clear of machinery, materials and obstructions that could interfere with the deployment or use of the refuge alternative. The refuge alternative on the G-9 long wall section #31 brattice had coal, rocks and blocks 1.5 feet deep by 8 feet wide from the side of the chamber and toward the door.

GX-1.¹ Wilkosz designated this violation as reasonably likely to result in fatal injuries to ten miners and significant and substantial (“S&S”) in nature. He further evaluated Respondent’s negligence as moderate.*Id.* The citation was terminated on November 17, 2013 when the refuge alternative was moved to the 34 cross cut, which was well rock-dusted, had adequate roof and rib conditions, and was free from obstructions. *Id.*

LAW AND REGULATIONS

Wilkosz cited Respondent for a violation of 30 C.F.R. § 75.1506(g). This regulation, entitled “Refuge alternatives,” states, “[a]t all times, the site and area around the refuge alternative shall be kept clear of machinery, materials, and obstructions that could interfere with the deployment or use of the refuge alternative.” 30 C.F.R. § 75.1506(g).

Wilkosz found that this violation was S&S in nature and was the result of moderate negligence. A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

[i]n 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) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language

¹ Hereinafter, Government exhibits will be referred to as “GX” followed by a number. Respondent’s exhibits will be referred to as “RX” followed by a number. Cites to the transcript will be labeled “Tr.” followed by the page number(s).

of section 104(d)(1), 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., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

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.” 30 C.F.R. § 100.3(d). “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.” *Id.* 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. *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, the operator is guilty of reckless disregard where it “displayed conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d).

CONTENTIONS OF THE PARTIES

The Secretary contends that Respondent violated 30 C.F.R. § 75.1506(g) when it did not remove the material that accumulated in front of the RA when it was moved. He argues that the citation was correctly designated as S&S because miners could trip over the accumulation, lose the lifeline and become disoriented interfering with their ability to retreat to the RA. He also states that the alleged violation was the result of moderate negligence because the RA was in an area of high travel, so a foreman should have noticed the material.

Respondent argues that no violation of 30 C.F.R. § 75.1506(g) occurred because nothing interfered with the use or deployment of the RA. In the alternative, it contends that the alleged violation is neither S&S nor the result of moderate negligence. In support, it states that the material acted as a sort of ramp to the entrance of the RA and would actually help miners in the event of an emergency situation. It also argues that the RA had been moved after the preshift examination and had only been in place for a couple of hours at the time that the citation was issued.

SUMMARY OF THE TESTIMONY

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have 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, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my 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). I have also fully considered the contents of the Official File including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

1. Testimony of Stanley Frank Wilkosz

Wilkosz is an inspector who has worked for MSHA for approximately five years. Tr. 15. He began work in the coal industry in 1969 at the Renton Coal Mine in Renton, Pennsylvania where he worked for about twelve years. Tr. 16. During this time, he was a general laborer, an equipment operator and a fire boss. Tr. 17. After a twenty year hiatus, Wilkosz returned to the industry with Respondent at the Shoal Creek Mine in 2005 as a face foreman. Tr. 17, 19. In this capacity, he was responsible for taking air readings, conducting gas checks and conducting preshift and onshift examinations. Tr. 19. He continued in this position until joining MSHA in 2008. Tr. 20.

Wilkosz issued Citation No. 8518691 on November 15, 2010, while at the mine conducting a regular quarterly inspection. Tr. 20-21; GX-1. He was traveling a return air course with Safety Director Larry Armstrong ("Armstrong") and Union Representative Joe Weldon when he noticed a pile of rocks along the side of the refuge alternative ("RA"). Tr. 21-23; GX-3. According to Wilkosz, the RA is a man-made structure that supports life by facilitating communications with the outside, supplying its own oxygen supply, filtering incoming air and supplying food and water. Tr. 22. In the event of a disaster, this is where the miners retreat to as a last resort. Tr. 22. Because it is required to be within a certain distance of the face, it must advance and retreat with the miners. Tr. 23.

Wilkosz testified that the RA, including the door, was blocked by coal and rocks, as well as blocks that had been used to build the stopping behind it. Tr. 27, 36; GX-3. When asked, he did not recall Armstrong opening the door. Tr. 28. He stated that the average depth of the debris was one and a half feet, which he measured using a measuring tape at the beginning and looking toward the wall. Tr. 41. According to Wilkosz, it could have been deeper, but he did not dig. Tr. 41. He theorized that the debris pile was created as the RA was pushed along the roadway by a heavy-duty forklift. Tr. 39-40. He did not attempt to open the door because the RA is actually sealed until an emergency situation occurs. Tr. 43. He testified at the hearing that if miners cannot get into the RA, it is not considered to be "deployed." Tr. 45. In his opinion, tripping hazards constitute an interference or obstruction with escaping or getting to a refuge alternative. Tr. 47.

During cross-examination, Wilkosz acknowledged that refuge alternatives were not required when he was employed at Respondent's Shoal Creek Mine. Tr. 44. Therefore, he has no experience in examining them. Tr. 45. He further admitted that during his deposition he stated that he did not see anything that interfered with "deployment," but he did see obstructions that he did not measure. Tr. 46, 54. During the hearing, he also stated that regardless of debris or obstructions, miners must step up into the RA anyway. Tr. 48-49.

Wilkosz determined that the violation was reasonably likely to result in injury and S&S because miners would be following the lifeline in a disaster or emergency situation in which they can't see. Tr. 30, 38. If they hit tripping hazards, which can reasonably be assumed to cause broken legs, etc., it is likely that miners would not make it into the RA. Tr. 30. If miners were to lose the lifeline by tripping over the debris, they could become disoriented because the environment is totally black, according to Wilkosz. Tr. 37, 40. In this environment, head lamps and cap lights would be useless because of the smoke and dust in the air.² Tr. 30. Given this situation, he found that injuries would most likely be fatal because miners would not be able to get into breathable airspace. Tr. 36. He explained that fires on a belt line or in coal creates noxious gases and takes oxygen out of the air. Tr. 37.

Wilkosz further designated the negligence as moderate. Ex. 1. He testified that the longwall coordinator stated that the RA had been moved that morning. Tr. 38. Wilkosz acknowledged that the RA would have been moved after the preshift examination and admitted that he had no evidence that a person of responsibility had seen the condition; although, he testified that someone should have. Tr. 38-39, 51, 53. He stated that it was a heavily trafficked with foremen passing it several times throughout the shift. Tr. 51. He did not withdraw the miners or take the RA out of service because Armstrong represented that Respondent would move the RA. Tr. 62.

2. Testimony of Larry Armstrong

Armstrong possesses a Bachelor's as well as a Master's degree in Counseling. Tr. 67. He worked in the mining industry from approximately 1972-1988 as an inside laborer, equipment operator and electrician for Jim Walter Resources before leaving the industry entirely to pursue a career in counseling. Tr. 68. He returned to mining at Drummond in 2004 as a safety inspector. Tr. 68. In this capacity, he travels with inspectors during their inspections, including during Wilkosz's inspection on November 15, 2010. Tr. 69, 74. He makes notes of what he sees and points out mitigating circumstances. Tr. 69. He also tries to correct any conditions that may not be citable, but need correcting nonetheless. Tr. 69. Outside of official inspections, he inspects the mine himself, including the belts and mine ARCS³. Tr. 69. Armstrong testified that he is certified in installing and examining refuge alternatives. Tr. 71.

According to Armstrong, a refuge alternative is a safe place for miners to gather in case of an emergency such as a fire, an ignition or an explosion. Tr. 72. It provides the miners with fresh air. Tr. 72. He explained that the RA has a step up into it which measures approximately

² During his employment with Drummond, Wilkosz testified that he experienced a belt fire and the limitations of sight to which he testified. Tr. 31-33.

³ This is another term for a refuge alternative. Tr. 69.

eleven and three quarters inches from floor to door. Tr. 74. During the inspection, he described the debris as coal and dirt that had “kind of tapered up into an incline.” Tr. 75. Armstrong stated that the area was smooth and neither he nor Wilkosz had any difficulty walking in the area. Tr. 79-80. In his opinion, the depth was nine inches at the most because it started even with the floor and was not over the top of the step. Tr. 75. He admitted that he did not take any measurements, but he stated that he did not see Wilkosz take any either. Tr. 76-77. Armstrong further disputed Wilkosz assertion of the location of material around the RA. Tr. 78; GX-3.

Armstrong testified that he did open the door to the RA during the inspection, and he did not have push any material aside to do so. Tr. 80, 82. He did this because Wilkosz made that the comment that the door may have been obstructed. Tr. 81. However, Armstrong stated that Wilkosz turned and walked away just as he was demonstrating that the door could be opened. Tr. 81. He was certain of these events because it was the first refuge alternative that he had ever opened. Tr. 81. Armstrong stated that it was possible that Wilkosz had not heard him say that the door would be opened. Tr. 82.

Armstrong explained that a branch line of the lifeline was physically attached to the RA door on both the left and right sides. Tr.82-84; GX-3. He said that the material began approximately three feet from the RA, and he believed that, in the event of an emergency, the debris was such that, rather than interference, it may have actually helped miners by acting as a sort of ramp. Tr. 85, 89-90. Even if a miner were to trip and lose the lifeline, he explained that he or she would then likely reach up and to the right for the lifeline at which time the RA would be found. Tr. 89. Armstrong’s boss, Randy Clements (“Clements”) also inspected the RA approximately sixteen hours after the citation was issued. Tr. 90-91. According to Armstrong, Clements also commented that the material did not interfere with the use of the door. Tr. 91.

During cross-examination, Armstrong admitted that he did see “some” rocks and blocks in the area, as well as the coal and dirt that was even with the step. Tr. 101; GX-12. He later stated that the blocks had been moved out of the way by hand into the corners to create a pathway for the movement of the RA, and they would not have interfered with miners seeking refuge. Tr. 101, 106, 108. Further, while Armstrong testified that he actually asked Wilkosz if he wanted to see the door a second time, he generally described Wilkosz’s reaction as non-responsive. Tr. 103-104.

3. Testimony of Kenneth Randy Clements

Clements started in the mines at Jim Walter Resources in 1979. Tr. 114. Here, he basically operated every type of equipment, including the miner, roof bolter, shuttle car and scoop. Tr. 114. While transferring between mines, he became a safety inspector, then a safety superintendent. Tr. 114-115. At the time that the citation was issued, he held the title of Safety Superintendent for the Shoal Creek Mine. Tr. 115. In this capacity, Clements oversees all safety aspects of the mine such as dust sample collection and maintenance calibration. Tr. 115. He reviews all citations that are issued to the Mine and determines which should be contested. Tr. 115.

Clements explained that at the time that the instant citation was issued, refuge alternatives were a new requirement and a “touchy issue” with operators. Tr. 116. According to Clements, as a new legal requirement, operators were trying to make sure that everything was “right.” Tr.

116. He too was trained and certified by Jim Walters Resources in maintaining and examining the RA. Tr. 122. Sixteen hours after Citation No. 8518691 was issued, Clements accompanied Armstrong to the RA. Tr. 118. He averred that the conditions were the same as the time of issuance because he could see the pathway of the machinery around the RA, which would not have been viewable if the miners had begun to shovel the area out. Tr. 118. Given the conditions as they existed, Clements testified that he did not understand why the citation was issued. Tr. 117.

Clements stated that he was able to open the door to the RA with no obstruction or pushing of material. Tr. 117. He further testified that he actually walked on the material and did not see anything in the travelway that would constitute a tripping hazard. Tr. 119. He did see some blocks on the left-hand side of the travelway; however, he argued that it did not interfere with his approach to the RA. Tr. 119-120. At the time of the hearing, Clements could not recall whether the lifeline was attached in this particular instance, but stated that it usually is now. Tr. 120-121. He admitted that Respondent did not comply with the requested termination time, but he argued that it is not uncommon for MSHA to set a time that it knows cannot be met. Tr. 123.

ANAYLYSIS AND CONCLUSIONS

1. Validity

I find that the Secretary has met his burden of proving a violation of 30 C.F.R. § 75.1506(g). Wilkosz credibly testified that there was material laying in front of the door to the RA. In fact, Respondent does not dispute this fact. Instead, it argues that the material did not interfere with the use or deployment of the RA. At hearing, Wilkosz testified that the material was blocking the door. However, this information is not located in the narrative or the citation, and Wilkosz later acknowledged that, in his deposition, he stated that the material was not blocking the door. In light of this, I discredit the testimony that the door was blocked.

Regardless, I find that the material interfered with the use of the RA. In training for emergency situations, miners were taught to follow the lifeline and branch line. At the end of this branch line, they anticipated a step up into the RA. If a miner were to trip over the unexpected material and lose the lifeline, he could become very disoriented. In his search for the RA, he would be expecting to find a step if he were on his hands and knees. The material (as described by both Wilkosz and Armstrong) would prevent this discovery.

Respondent argues that the “ramp” would actually be helpful to the miners in that they would not have to step up into the RA in the low visibility. I find this unpersuasive. If a miner were in an emergency situation, his training would presumably guide him in how to proceed. Given this fact, the “ramp” would serve to confuse rather than guide. As such, I discredit this argument and find that the Secretary has proven a violation of the regulation.

2. S&S

I further agree that the Secretary has proven that this violation is S&S in nature. As stated above, a violation of the regulation has been found. This violation contributes to the hazard of a miner falling during an emergency situation, becoming disoriented and failing to find the RA. If this were to happen, it is reasonably likely that he could suffer inhalation or burn

injuries depending on the particular emergency requiring evacuation. There is no doubt that these injuries could lead to fatalities. In light of this, I find that the violation is S&S in nature.

Like the lifeline regulation, I find that 30 C.F.R. § 75.1506(g) is an emergency regulation. Indeed, refuge alternatives are a last-resort means of survival. To apply the regulation in any other situation than an emergency is to defy the basic meaning of it. *Secretary of Labor v. Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2367 (Oct. 2011), *aff'd Cumberland Coal Resources, LP v. Secretary of Labor*, 717 F.3d 1020 (D.C. Cir. 2013). I do not rule that every interference with a refuge alternative is S&S; however, given the circumstances as they exist in this particular situation, I find that in an emergency situation, the material would have been reasonably likely to result in the reasonably serious injury, including fatalities, to miners.

2. Negligence

I do not, however, find that the Secretary has proven that the violation was the result of Respondent's moderate negligence. As stated before, moderate negligence occurs when the operator new or should have known about the condition, but there are some mitigating factors. While I agree that Respondent should have known about the condition, there are considerable mitigating factors here. First, Wilkosz received information from the longwall coordinator and acknowledged at hearing that the RA was moved after the preshift examination occurred that morning. Second, Wilkosz admits that he had no information whatsoever to suggest that any agent of Respondent had knowledge of the material. Wilkosz based his designation on the idea that the area was heavily trafficked and foreman would have passed it several times during the shift. However, there was no evidence provided because the inspector had none. Given all of this information, I find that the condition was the result of Respondent's low negligence.

4. Penalty

Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties the Commission and its judges shall consider the six statutory penalty criteria, found at Section 110(i) of the Act:

[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.

Id.

The Secretary and Respondent stipulated to the appropriateness of the penalty, the effect on the operator's ability to continue in business and the demonstrated good faith in achieving rapid compliance. As stated above, I have affirmed the gravity designation and decreased the

negligence. Having considered each of the six criteria and given that I decreased the negligence attributable to Drummond, I find that the penalty for Citation No. 8518691 should be decreased to \$7,000.00.

ORDER

In light of the foregoing, it is **ORDERED** that Citation No. 8518691 is **MODIFIED** to reduce the negligence attributable to the operator from “Moderate” to “Low.” Citation No. 7699789 remains as issued. It is further **ORDERED** that Drummond Company, Inc., **PAY** the Secretary of Labor the sum of \$8,203.00 within 30 days of the date of this Decision.⁴ Upon receipt of payment, these cases are hereby **DISMISSED**.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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/kmb

⁴ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 19, 2014

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2012-237-DM
on behalf of CARLOS LOPEZ,	:	Case No. SC-MD-11-23
Complainant	:	
	:	
v.	:	
	:	
SHERWIN ALUMINA, LLC,	:	Mine: Sherwin Alumina
and its SUCCESSORS,	:	Mine ID: 41-00906
Respondent	:	

DECISION

Appearances: Elizabeth M. Kruse, Esq., Josh Bernstein, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, on behalf of Complainant;

Christopher V. Bacon, Esq., Vinson & Elkins, LLP, Houston, Texas, for Respondent.

Before: Judge Bulluck

This case is before me upon a Discrimination Complaint brought by the Secretary of Labor (“Secretary”) on behalf of Carlos Lopez (“Lopez”) against Sherwin Alumina, LLC, and its Successors (“Sherwin”), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(c). The Secretary contends that Sherwin unlawfully suspended Lopez on or about September 21, 2011, and terminated him on or about October 19, 2011 from its Gregory, Texas Plant, because Lopez engaged in certain activities that were protected under the Act.

On September 28, 2011, Lopez filed a Discrimination Complaint with the Secretary’s Mine Safety and Health Administration (“MSHA”) under section 105(c)(2) of the Act.¹ MSHA

¹ 30 U.S.C. § 815(c)(2) states, in relevant part:

Any miner or applicant for employment or representative of miners 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

(continued...)

special investigator Jerry Anguiano conducted an investigation and, consequently, the Secretary determined that a violation of section 105(c) had occurred. On December 27, 2011, the Secretary filed a Discrimination Complaint on behalf of Lopez, alleging that Sherwin illegally terminated him for engaging in activities protected under section 105(c) of the Act, including making hazard complaints to MSHA, making safety complaints to Sherwin management, and publically advocating an increased MSHA presence at the Plant. A hearing was held in Ingleside, Texas.

For the reasons set forth below, I conclude that the Secretary has established a *prima facie* case of discrimination under the Act, and that Sherwin has failed to rebut the Secretary's *prima facie* case or defend its actions by proving that it would have terminated Lopez for his unprotected activity alone.

I. Stipulations

The parties stipulated to the following:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this action, pursuant to section 113 of the Mine Act, 30 U.S.C. § 823.
2. This action is brought by the Secretary pursuant to the authority granted by section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).
3. At all relevant times, Sherwin Alumina, LLC, Respondent, was an operator as this term is defined by section 3(d) of the Mine Act, 30 U.S.C. § 802(d).
4. At all relevant times, Respondent was also a person within the meaning of sections 3(f) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(f), 815(c).
5. Respondent produces products that enter commerce or has operations or products that affect commerce, all within the meaning of sections 3(b), 3(h) and 4 of the Mine Act, 30 U.S.C. §§ 802(b), 802(h) and 803.
6. At all relevant times, Respondent employed Complainant as a maintenance mechanic at the Sherwin Alumina, LLC, facility.

(...continued)

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.

7. At all relevant times, Complainant was a miner within the meaning of section 3(g) of the Mine Act, 30 U.S.C. § 802(g).

8. At the time of his termination, Lopez was earning \$32.55 an hour.

9. Pursuant to the settlement agreement on temporary reinstatement, Lopez was economically reinstated on November 21, 2011, and has been paid as if he had been working 48 hours a week: 40 hours at his regular rate of pay of \$32.55 an hour, and eight hours at his over-time rate of \$48.33. Lopez has been receiving all employee benefits, including health benefits.

10. Complainant engaged in protected activity within the meaning of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), when he reported safety hazards and violations to agents at the mine on or about September 12, 2011, and when he filed a Complaint with MSHA on September 29, 2011.²

11. Respondent was aware of Complainant's protected activity.

12. Complainant's tags were properly placed and visible.

Tr. 48-50.

II. Factual Background

Sherwin Alumina processes bauxite to produce smelter grade alumina at its Plant in Gregory, Texas. Tr. 551-52; Ex. C-18 at 7. Carlos Lopez worked at the Plant as a maintenance mechanic since 1974, and served on Sherwin's TIDES committee.³ Tr. 206; Ex. R-30 at 36-37. In 2008, Lopez called MSHA to report a safety hazard involving a displaced valve in the Clarification section. In 2009, he contacted MSHA about an improperly drained tank in the Digestion section and, in 2010, he reported overhead bridge drains in Digestion that had fallen and landed dangerously close to miners. Tr. 207-10. Also in 2010, Lopez warned his supervisor, unit manager Michael Douglas, that he would call MSHA if Sherwin did not fix certain leaking valves. Tr. 211-12, 394-95.

In August 2011, Sherwin held a series of informational meetings in which it delivered a presentation to its workforce entitled the "MSHA Threat." Tr. 370-75; Ex. R-29 at 19. In each of several sessions, eighty to ninety miners were made aware that Sherwin was receiving a high number of citations which, if continued, could place the company in a Potential Pattern of

² Lopez filed his Complaint on September 28, and MSHA notified Sherwin on September 29. Ex. C-7 at 1-2.

³ TIDES is the acronym for Total Involvement Drives Employee Safety. Tr. 51.

Violations (“PPOV”) status. Sherwin was extremely concerned about this situation, since PPOV status is the precursor to substantially increased fines and heightened oversight by MSHA. Tr. 370-71. During the presentation that Lopez attended, Lopez publically voiced a view contrary to the intended message of the meeting, that “it [would] be a good thing for MSHA to be on-site.” Tr. 221.

On September 12, 2011, Lopez, working in the Digestion department on the B shift, was assigned to blind the valves of the 5-8 heater to prepare it for cleaning. Tr. 223-24; Ex. R-16.⁴ Before he began the task, Lopez, in accordance with Sherwin’s lockout/tagout policy (“LO/TO”), placed “Do Not Operate, Men Working” tags on the heater’s valves at the three levels from which the heater can be accessed. Stip. 12; Tr. 73, 226; Exs. C-5 at 1, C-14. At some point during the job, Lopez advised the team resource coworker, Isaac Jaramillo, that he was encountering difficulty completing the task because vapor valves on top of the heater were leaking. Tr. 224-25. Lopez continued working at ground level, standing on a platform to work on the condensate feed valve, when his immediate supervisor, Larry Mayfield, walked past him and traveled up the stairs to the third level of the heater. Mayfield inserted a homemade air ejector into a vent valve, forcing air into the tagged-out system. Tr. 226, 234, 303; Ex. R-3. The introduction of air into the heater caused condensate to blow out of the flange, spraying Lopez on his back and causing him to jump from the platform. Tr. 228-32.⁵ As Mayfield was coming back down to ground level, he saw Lopez get sprayed, and told him that he would get a safety system trainer (“SST”) to address the accident.⁶ Tr. 234. Thereafter, Mayfield and SST Eugene (“Gene”) Carter returned to where Lopez was working, proceeded up to the third level and, again, breaching the tags, Mayfield, at Carter’s instruction, re-enacted insertion of the air ejector. Tr. 235, 338, 410. This time, however, no condensate was released. Tr. 236, 338. Thereafter, as a result of the incident, Lopez, Mayfield and Carter went to Carter’s office, and Lopez was sent to the medical unit to get checked-out. Tr. 237.

Two days after the condensate release, on September 14, Lopez, Mayfield, Carter, their supervisor Douglas, TIDES facilitator John Gomez, safety manager Gus Aguirre, and union president Terry Howard participated in a Root Cause Analysis (“RCA”) meeting as part of an investigation of the incident. Tr. 51, 75-77, 144, 404. Douglas and Aguirre asked Lopez, Mayfield, and Carter to give accounts of the incident. Tr. 406-10. While the accounts were similar, Mayfield stated that when he first arrived on the scene, he invited Lopez to accompany him to the third level to install the air ejector, but Lopez told him that using the ejector was a stupid idea that would not work. Tr. 407. Lopez’s version of events did not include Mayfield’s alleged invitation. Two days later, Douglas, refinery manager David Buick, and administration

⁴ Blinding a valve refers to opening up the space between the valve and the pipe flange, and inserting a plate between them to prevent leakage. Tr. 223-24, 228-29.

⁵ Condensate is hot water. Tr. 229.

⁶ SSTs conduct internal safety investigations, communicate with employees, and assist MSHA with site investigations. Tr. 336.

director John Vazquez, troubled by the discrepancy between Mayfield's and Lopez's versions of the initial breach, decided that they needed to meet with Lopez again to give him "the opportunity to put his . . . story on the table." Tr. 563.

On September 19, Douglas and operations coordinator Joe Contreras met with Lopez and his union representatives Terry Howard and Tim Galvan. Tr. 153, 415, 417. Douglas gave Lopez, Howard and Galvan unsigned copies of Lopez's, Mayfield's and Carter's written statements. Tr. 415-17; Exs. R-2, R-3, R-4. Douglas and Contreras left the room while Lopez and his representatives reviewed the statements. Tr. 417. When they re-entered, Douglas asked Lopez whether the handwritten statement was, in fact, his, and Lopez replied "can't answer that." Tr. 417-18. Douglas then discussed Mayfield's and Carter's statements with Lopez and his representatives, who underlined the parts of the statements which they believed to be inaccurate. Tr. 421-23; Ex. R-5 at 2-3. Douglas then asked Lopez to submit another written statement. Tr. 424. Howard responded that Lopez was in no shape to give a statement, because he was stressed out from discovering that Sherwin had locked him out of the Plant earlier that morning. Tr. 424. After a short break, Lopez signed the original statement. Ex. R-2.

The next day, Douglas held a meeting with Buick and other managers to discuss the results of the investigation and discipline for Mayfield, Carter and Lopez. Tr. 433-34, 437. Because Douglas was their supervisor, he presented information to the managers about the incident and their disciplinary records. Tr. 434; Ex. R-30 at 76. After Douglas' presentation, the managers agreed to recommend that Mayfield be suspended with a view toward termination, that Carter be suspended only, and that Lopez be suspended pending further investigation which, as in Mayfield's case, was intended to result in termination. Tr. 436, 438, 447. After the meeting, Buick summarized the managers' discussion in an email. Ex. R-31.

On September 21, Sherwin issued to Lopez an Hourly Personnel Action, which notified him that he was suspended for five days pending further discipline for "failing to notify co-workers of the red tag status of 5-8 heater and obstructing an ongoing safety investigation into the 5-8 heater incident." Tr. 472; Ex. R-16. Pursuant to the managers' recommendation that Lopez be terminated, Vazquez reviewed the documentation, including Lopez's personnel file, and concurred with the recommendation; Sherwin terminated Lopez on October 19, 2011. Tr. 564-65, 574.

III. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complainant must prove by a preponderance of the evidence "(1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity."⁷

⁷ 30 U.S.C. § 815(c)(1) states, in relevant part:

No person shall discharge or in any manner discriminate . . .

(continued...)

Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The Commission has noted 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. on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: 1) coincidence in time between the protected activity and the adverse action; 2) knowledge of the protected activity; 3) hostility or animus toward the protected activity; and 4) disparate treatment. The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2510.

Once the complainant has established a *prima facie* case, "[t]he operator may attempt to rebut [the] *prima facie* case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). The operator may also affirmatively defend its actions by proving, by a preponderance of the evidence, that it was motivated by both the miner's protected and unprotected activities, and would have taken the adverse action for the unprotected activity alone. *Robinette*, 3 FMSHRC at 818. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has explained that "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). However, the Commission has also stated that "[its] judges should not substitute for the operator's business judgment [their] views of "good" business practice." *Chacon*, 3 FMSHRC at 2516.

⁷(...continued)

against . . . any miner . . . 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 . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this chapter.

A. Prima Facie Case

For the reasons set forth below, I find that the Secretary has successfully made out a *prima facie* case by showing that Lopez engaged in protected activity and was terminated, at least in part, because of his protected activity.

Sherwin concedes that the following events constitute protected activity: 1) Lopez made three hazard complaints to MSHA between 2008 and 2010; 2) Lopez reported a leaking valve to MSHA in the Fall of 2010; 3) Lopez publically expressed his opinion in the “MSHA Threat” meeting that MSHA’s presence at the Plant would be a “good idea;” 4) Lopez reported that Mayfield had breached his tags on September 12, 2011; and 5) Lopez filed a Discrimination Complaint with MSHA on September 28, 2011. Stip. 10; Resp’t Br. at 14-15; Ex. C-7 at 2.

The Secretary relies upon circumstantial evidence to prove that Sherwin discriminatorily terminated Lopez because of his protected activity. As will be discussed fully, I find that the Secretary has established a temporal nexus between Lopez’s protected activity and his termination, that Sherwin’s management knew of Lopez’s protected activity and demonstrated animus, and that Lopez was subjected to disparate treatment.

The Commission has found that a discharge occurring approximately two weeks after protected activity is sufficiently coincidental in time to support a finding of discriminatory motive. *Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 959 (Sept. 1999). This case presents an even stronger temporal connection, since Sherwin’s managers initiated the first step of Lopez’s termination on September 20, i.e., recommending that he be suspended pending further investigation, a mere eight days after Lopez had reported the breach of his tags. Tr. 358-59. The recommendation to suspend Lopez also came in the month following the “MSHA Threat” presentation, where his suggestion for increased MSHA oversight fed his plant-wide reputation as a whistleblower. Tr. 59-62, 191-92, 307-08, 333, 394-96, 470. Considering that Sherwin was in a damage-control mode to avoid PPOV status, the impetus to silence an established complainer is evident.

Sherwin has acknowledged that it was aware of Lopez’s protected activity. Stip. 11. The Commission has recognized that an operator’s knowledge of protected activity “is probably the single most important aspect of a circumstantial case.” *Chacon*, 3 FMSHRC at 2510.

CEO Tom Russell’s and David Buick’s reactions to Lopez’s complaints establish Sherwin’s hostility toward Lopez’s protected activity at the senior management level. In *Morgan v. Arch of Illinois*, the Commission reversed the judge for failing to consider circumstantial evidence indicating the unlikelihood that a lower-level decision maker was oblivious to the animus of an upper-level manager toward a miner who had engaged in protected activity. 21 FMSHRC 1381, 1390-92 (Dec. 1999). Specifically, the upper-level manager’s dislike of the miner was so well-known, that it became the subject of jokes by several miners. *Id.* at 1390. I fully credit Howard’s testimony that Russell viewed Lopez so negatively, that he believed Lopez to have intentionally created safety hazards to bring MSHA to the Plant. Tr.

148. Since Russell had expressed his disdain for Lopez to hourly workers such as Gomez, it is highly probable that he made disparaging remarks about Lopez to supervisors such as Douglas and Buick. Tr. 59-60. Buick's disdain for Lopez's tendency to contact MSHA rather than address his safety concerns through Sherwin's internal procedures, as well as his public advocacy for MSHA presence at the Plant, also indicate hostility. Tr. 63-65; Ex. R-30 at 44, 60-61, 90. Moreover, the Commission has recently reasoned that presumptively negative characterizations of employees such as "difficult," are indicative of hostility toward protected activity. *Turner v. National Cement*, 33 FMSHRC 1059, 1069 (May 2011). Buick's characterization of Lopez as a "crusty old bloke," given Lopez's reputation as a complainer, takes on a negative connotation. Ex. R-30 at 91.

While Russell and Buick did not initiate the decision to terminate Lopez, it is highly likely that their negative opinions of Lopez influenced Douglas, their subordinate. Douglas stated that he made the initial decision to terminate Lopez and, since he controlled the information imparted to the other managers about the investigation, it is highly likely that he influenced their recommendation. While Vazquez reviewed and concurred with Lopez's recommended discipline, his paper review was merely cursory. Thus, I find that Douglas was the management official responsible for Lopez's termination. Tr. 448-449, 513, 572; Ex. R-30 at 76. Additionally, despite Lopez's recognition that Douglas is a "gentleman" who has treated him fairly and respectfully, Lopez's thinly veiled threat to contact MSHA about problems at the Plant provides ample motivation for animus on the part of Douglas, as exemplified by Douglas' urging that Lopez give Sherwin an opportunity to fix the problems about which he complained. Tr. 249, 394-95.

Sherwin's discriminatory motivation is also evidenced by its disparate treatment of Lopez in assessing discipline for the three employees involved in the condensate release incident. Mayfield, who was serving a one-year probationary period for performance issues, including concerns that he worked unsafely, was fired, and clearly got his due. Tr. 434-35. Carter, however, is an entirely different matter. Carter, a safety supervisor tasked with training employees in safe work procedures, demonstrated highly egregious conduct. He directed a subordinate supervisor to repeat his breach of Lopez's tags on the 5-8 heater, thereby placing Lopez in harm's way a second time. Alarming, Carter did not recognize that his conduct violated Sherwin's LO/TO policy until he was verbally reprimanded by his supervisors. Tr. 345-48. Carter's lack of awareness of the company's LO/TO policy - - a safety policy that he should have been overseeing - - was apparently of little concern to Sherwin, as demonstrated by its amplification of Carter's clean disciplinary record, as well as his contriteness and admission that his breach was the result of a "brain-fade." Indeed, Sherwin gave Carter a slap on the wrist by placing him on a one day suspension and four days administrative leave. Tr. 542; Exs. R-30 at 24-26, R-31. If anything, some of Sherwin's managers believed that the sentence was too heavy-handed, questioning whether Carter should receive any discipline at all, since, after all, he was just investigating the initial breach. Tr. 438-440. On the other hand, Lopez, the non-supervisory employee, was held responsible for his supervisors' lack of safety protocol, and fired.

While Buick testified that Sherwin's expectations of salaried employees, and particularly SSTs, are greater than for hourly workers, Sherwin's respective treatment of Carter and Lopez would seem a reversal of expectations. Ex. R-30 at 84. The operator virtually excused Carter's offense while, on the other hand, blowing out of proportion Lopez's minor, if any, involvement. The only reasonable rationale for such lopsided treatment is Lopez's reputation as a whistleblower, and Carter's as a team player.

Therefore, I find that the Secretary has established that Sherwin's termination of Lopez was motivated by his protected activity. I also find that Sherwin has not proven that it was in no way motivated by Lopez's protected activity in its decision to terminate him and, therefore, that it has failed to rebut the Secretary's *prima facie* case.

B. Affirmative Defense

The Hourly Personnel Action specifies two reasons for suspending Lopez pending further discipline: failure to warn co-workers of the red tag status of the 5-8 heater and obstructing the investigation. Ex. R-16. At hearing, however, Sherwin changed horses in midstream, by abandoning the first charge and shifting its defense exclusively to the second charge, that Lopez was not forthcoming with information and obstructed the investigation. Resp't Br. at 21-23; Tr. 531-32.

After the September 20 management meeting, Buick's email, approved by Douglas, stated that Lopez's failure to "take action to prevent his supervisor breaching TOLO [LO/TO] procedures," was his "first offense," and the fact that he "stood by and did not take action to stop area SST breaching tagging procedures," was his "second offense." Ex. R-31; Tr. 540-42. Indeed, Buick testified at his deposition that the managers partially based their recommendation on the fact that Lopez knowingly and willfully allowed others to breach his tags. Ex. R-30 at 28. At hearing, however, Douglas testified that Lopez would not have been terminated and, in fact, no offense would have been committed, if he had just admitted that he had allowed his supervisors to breach his tags. Tr. 531-32. Moreover, in its post-hearing argument, Sherwin abandons the failure to warn defense and relies solely on the obstruction charge to justify Lopez's termination:

What ultimately drove Douglas to recommend Lopez's termination was his belief that Lopez was untruthful during the investigation, not because he believed that Lopez had knowingly allowed Mayfield to breach his tags. In fact, Douglas agreed that he would not have recommended termination had Lopez admitted that Mayfield's version of events was accurate.

Resp't Br. at 21-22. Sherwin's abandonment of the failure to warn charge is easily explained, given that the charge unreasonably saddles Lopez with the burden of bearing responsibility for his supervisors' unsafe and reckless conduct. Such logic turns the hierarchical structure upside down, such that the student takes on the role of the teacher. I find that the failure to warn charge is simply unworthy of credence and, based on Sherwin's shift from that claim, it appears that the

operator has drawn the same conclusion. Consequently, my analysis now focuses on the second charge, that Lopez obstructed the investigation.

Sherwin claims that it was very troubled by Lopez's lack of cooperation in the ensuing investigation. Resp't Br. at 21. It bases its conclusion primarily on the discrepancies between Mayfield's and Carter's accounts on the one hand, and Lopez's account on the other, as well as Lopez's "can't answer that" response to Douglas when presented with a handwritten statement for his verification; Sherwin fully credits the supervisors' accounts that Lopez knew what Mayfield was planning to do. Resp't Br. at 21-23; Tr. 443; Exs. R-3, R-4, R-5. According to Sherwin, it was forced to make a credibility determination as to whether Lopez was lying. Resp't Br. at 22. In support of its argument, it cites *Sec'y of Labor on behalf of Owens v. Drummond Co., Inc.*, a case in which the judge found that the operator affirmatively defended its firing of miners who had engaged in protected activity, because it reasonably believed that they were stealing company property and/or selling drugs. 25 FMSHRC 594, 608-10 (Oct. 2003) (ALJ Weisberger). Similarly, Sherwin reasons, since Douglas' belief that Lopez was untruthful was reasonable, it was justified in terminating him. The reasonableness of Douglas' belief is highly suspect, however, given that the evidence of the alleged pre-breach verbal exchange between Mayfield and Lopez essentially boils down to Mayfield's word against Lopez's. It would seem that it never occurred to Douglas that Mayfield and Carter had reason to modify their accounts of the incident in order to mitigate the egregiousness of their respective breaches; this is especially true of Mayfield, who was already on probation.

In *Turner*, the Commission set forth three ways in which a complainant may challenge the credibility of an operator's affirmative defense. A complainant may establish that the operator's proffered reasons have no basis in fact, i.e., they are factually false. 33 FMSHRC at 1073. A complainant may show that the proffered reasons did not actually motivate the discharge, i.e., a complainant admits the factual basis underlying the employer's proffered reasons and that such conduct could motivate dismissal, but attacks the credibility of the proffered reasons indirectly by showing circumstances which tend to prove that an illegal motivation was more likely than the legitimate business reasons proffered by the employer. *Id.* Finally, a complainant may show that the employer's proffered reasons were insufficient to motivate termination, i.e., other employees were not terminated even though they engaged in conduct substantially similar to the conduct which formed the basis of the complainant's termination. *Id.* The evidence clearly demonstrates that the defense Sherwin elected to advance, that Lopez was untruthful and uncooperative, did not actually motivate his discharge and, under the second *Turner* approach, is unworthy of credence.

Any adverse conclusion that Sherwin drew respecting Lopez's behavior is based on a sham investigation that amounted to a witch hunt designed to fire Lopez. Starting with the RCA Meeting on September 14, Sherwin demonstrated to Lopez that it was skewing the facts against him, despite management's claim of wanting to give him opportunities to tell his side of the story. Tr. 78, 411, 563. In fact, Sherwin had already decided to fire Lopez before meeting with him again on September 19. Sherwin had locked Lopez out of the Plant prior to that meeting. Moreover, I credit Howard's testimony that he observed Douglas and Contreras in possession of

the Hourly Personnel Action in that meeting, which leads to a reasonable conclusion that the document officially terminating Lopez had been written up prior to the conclusion of the investigation. Tr. 153, 156, 158-59, 424; Ex. R-16. That document, itself, is telling. Douglas mischaracterized Lopez's suspension as "pending further *discipline*" rather than "pending further *investigation*" and, again, he made the same mistake at hearing, then corrected his terminology. Ex. R-16, Tr. 447-48. Barring Lopez's access to the Plant on the morning of September 19, in conjunction with credible evidence that the written disciplinary action existed, at least, as of that date, is compelling evidence that Sherwin had already settled on its course of action and Lopez's fate had been pre-determined. In light of Sherwin's obvious attempt to transfer the lion's share of the blame from the offenders, Mayfield and Carter, to Lopez, the victim of the condensate release, Lopez's reticence during the so-called investigation is not only explainable, but reasonable; any cooperation on his part would have amounted to ammunition for his undoing.

Beginning with the September 20 management meeting, Sherwin was unconcerned with objectively assessing discipline, and was solely focused on crafting rationales for salvaging Carter, while terminating Lopez. Despite Carter's role as a safety supervisor and his obvious LO/TO breach, the managers were slow to recognize that he had done anything wrong at all, and made much ado about his clean record and service to Douglas' as his "right-hand safety man." Tr. 438, Ex. R-30 at 24. Moreover, Sherwin's management as a whole was largely dismissive of Carter's lack of awareness of safety protocol and endangerment of Lopez. Regarding Lopez, however, the company glossed over his good work record and, appreciating the flimsiness of requiring him to supervise his supervisors, put all its weight behind characterizing him as a liar in its sham investigation. Given that Lopez was essentially being railroaded, I find that his behavior was prudent rather than uncooperative.

Douglas elected to bypass Sherwin's progressive discipline policy to fast-track Lopez's firing, ostensibly based on the severity of Lopez's misconduct. However, not only was Lopez's responsibility for the condensate release, an event that could have seriously injured him, negligible, but it would have been very difficult to fire him utilizing progressive discipline, given his admittedly clean disciplinary record. Tr. 521-23.

Despite Sherwin's attempt to abandon its "failure to warn" charge during the course of this proceeding, it was, nevertheless, officially documented as one of the two reasons for Lopez's termination. I find, similarly, that it fails, but under the third *Turner* approach. Carter not only failed to warn Mayfield against breaching Lopez's tags but, in fact, directed him to do so; for this infraction, Carter was afforded the utmost leniency.

If Douglas really believed either or both of the charges, that Lopez had a duty to warn his supervisors and that he was being untruthful and uncooperative, it was unreasonable to forego progressive discipline and terminate him based upon those beliefs. Lopez's infractions, under any reasonable standard, could not have been more egregious than the actual breaches, themselves.

Therefore, based on my finding that the reasons Sherwin gives for terminating Lopez, that he failed to warn his supervisors against breaching his tags and that he lied during the ensuing investigation, are unworthy of credence, Sherwin has failed to establish an affirmative defense for firing Lopez. The sheer weight of the circumstantial evidence makes it far more likely than not that Sherwin's reasons for terminating Lopez were pretextual.

In conclusion, I find that the Secretary has established a *prima facie* case of discrimination under section 105(c) of the Act. I also find that Sherwin has failed to either rebut the Secretary's *prima facie* case or affirmatively defend its termination of Lopez. Therefore, based on a thorough review of the record, I conclude that the Secretary has proven, by a preponderance of the evidence, that Sherwin discriminatorily terminated Lopez, and that Lopez is entitled to relief.

IV. Penalty

While the Secretary has proposed a civil penalty of \$30,000.00 for this violation, the judge must independently assess the appropriate penalty based on the statutory penalty criteria. *Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). Sherwin is a large operator and, absent any contention by the operator to the contrary, I find that the proposed penalty will not affect its ability to continue in business. Sherwin's relevant history of violations contains no charges under section 105(c) of the Act and, therefore is not an aggravating factor in assessing an appropriate penalty. The willful decision to terminate Lopez, a well-known safety advocate who had a history of reporting safety concerns to management and contacting MSHA, was blatant and influenced by the highest levels of Sherwin's management. Therefore, the violation was very serious, since it not only deprived an otherwise good worker of employment, but also served as a chilling effect on other miners who would consider raising safety concerns within the company or with MSHA. Therefore, based on the seriousness and willfulness of Sherwin's unlawful treatment of Lopez, I find that a penalty of \$45,000.00 is appropriate.

ORDER

Based on my conclusion that Sherwin Alumina, LLC, and its Successors discriminated against Carlos Lopez when he was suspended on September 21, 2011, and terminated on October 19, 2011, the Discrimination Complaint is **GRANTED**. Sherwin Alumina, LLC, and its Successors are **ORDERED TO REINSTATE** Carlos Lopez to the same position he held prior to his discharge or to a similar position at the same rate of pay and with the same or equivalent duties assigned to him. Additionally, within ten days of the date of this Decision, counsels for the Secretary and Sherwin Alumina, LLC, and its Successors are **ORDERED TO CONFER** to determine the appropriate back pay and interest to be awarded to Carlos Lopez for any days lost due to his suspension and termination. The parties shall also confer and agree regarding any other appropriate relief required to make Carlos Lopez whole for the period that he was illegally suspended and terminated. Within 15 days of the date of this Decision, counsels shall report to

me jointly in writing the results of their discussions, which shall result in a Final Decision and Order awarding the agreed-upon relief. If counsels are unable to agree, they shall advise me jointly in writing within 15 days of the date of this Decision, which shall result in issuance of an Order regarding submission of additional evidence on the issue of relief.

Further, and effective immediately, Sherwin Alumina, LLC, and its Successors are **ORDERED TO CEASE AND DESIST** from interfering with the section 105(c) rights of Carlos Lopez while he remains in their employ, expunge from Carlos Lopez's employment records all references to the circumstances giving rise to his unlawful discharge, and provide a neutral employment reference for Carlos Lopez, if requested.

Further, within 30 days of the date of this Decision, Sherwin Alumina, LLC, and its Successors are **ORDERED TO PAY** a civil penalty of \$45,000.00 for the violation of section 105(c) of the Act.⁸

Carlos Lopez's **TEMPORARY REINSTATEMENT SHALL REMAIN IN EFFECT** until a **FINAL DECISION ON RELIEF** is issued.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

⁸ 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. Please include Docket number and case number.

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/ss

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 19, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2012-1031
Petitioner	:	A.C. No. 15-18986-287861-01
	:	
v.	:	Mine: Balkan
	:	
	:	Docket No. KENT 2012-1248
NALLY & HAMILTON ENTERPRISES,	:	A.C. No. 15-19076-290524
INC.,	:	
Respondent	:	Mine: Chestnut Flats

DECISION

Appearances: Joseph B. Lockett, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN for the Secretary

Stephen Thomas Hamilton, Jr., Esq., Saltsman & Willett, 212 East Stephen Foster Avenue, P.O. Box 327, Bardstown, KY for Respondent

Before: Judge Steele

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor (the “Secretary”), acting through the Mine Safety and Health Administration (“MSHA”) against Nally & Hamilton Enterprises, Inc. (“Nally” or “Respondent”) at its Balkan and Chestnut Flats mines 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”). The Secretary seeks civil penalties in the amount of \$10,922.00 for three alleged violations of the Secretary’s mandatory safety standards for underground, surface or other mines. The parties presented testimony and documentary evidence at the hearing which was conducted on May 29, 2013 in London, Kentucky. At the conclusion of the evidence, Respondent withdrew its contest of Citation No. 8369110 and agreed to pay \$900.00, as assessed by the Secretary. For the reasons set forth below, I vacate Citation Nos. 8369111 and 8369121.

STIPULATIONS

1. Nally & Hamilton Enterprises, Inc. is subject to the Federal Mine Safety and Health Act of 1977.

2. Nally & Hamilton Enterprises, Inc. has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
3. Nally & Hamilton Enterprises, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.
4. Nally & Hamilton Enterprises, Inc. operates the Balkan Mine, I.D. No. 15-18986.
5. The Balkan Mine had 181,090 hours worked in 2011.
6. Nally & Hamilton Enterprises, Inc. operates the Chestnut Flats Mine, I.D. No. 15-19076.
7. The Chestnut Flats Mine produced 385,017 tons of coal in 2011.
8. A reasonable penalty will not affect Nally & Hamilton Enterprises, Inc.'s ability to remain in business.

Government Exhibit 1.¹

CITATION NO. 8369111

Citation No. 8369111 was issued under Section 104(a) of the Act on December 8, 2011 at 7:20 a.m. and was based upon the inspector's observation of a violation of 30 C.F.R. § 77.1607(b). This safety standard, entitled "Loading and haulage equipment; operation," states, "[m]obile equipment operators shall have full control of the equipment while it is in motion." *Id.*

In his narrative, the inspector found [All errors copied as written]:

Due to the slick haul road with 10 to 14 inches of muddy material (the determined responsibility of the operator to maintain), equipment including personnel vehicles and coal truck operator, observed hauling on the slick haul road, were not in full control while the equipment was in motion. At a test speed of 5 miles an hour a personnel vehicle slide (like a sled) thru the intersection, into oncoming traffic including Tractor and Trailor Coal Trucks and a swivel tail rock truck.

Note: This citation was one of the contributing factors that contributed to the issuance of imminent danger order #8369109 issued on 12-08-2011. therefore no abatement time was set.

GX-3.

¹ Hereinafter, the Secretary's exhibits will be referred to as "GX" followed by a number. Similarly, Respondent's exhibits will be referred to as "RX" followed by a number. The transcript will be referred to as "Tr." followed by the corresponding page number.

The inspector noted that the risk of injury or illness was reasonably likely and significant and substantial (“S&S”) in nature. *Id.* The injury could be reasonably expected to result in lost workdays or restricted duty and would affect one person. *Id.* The negligence was assessed as moderate. *Id.* The Citation was terminated when the road was graded and a berm of correct height was constructed. *Id.* The Secretary proposed a penalty of \$900.00 for the alleged violation.

1. The Secretary’s Evidence²

MSHA inspector John Sizemore (“Sizemore”) testified that the roadway had between ten to fourteen inches of muddy material that was very slick and extended up the road for approximately 100-150 feet. Tr. 20-21. This measurement was obtained by tape measure in four or five different locations. Tr. 21. In order to test the conditions, he decided to drive his four-wheel drive Jeep Laredo down the hill. Tr. 20-21. When he hit the brakes at a speed of five to ten miles per hour, he testified that he slid through the entire area, including a stop sign at the bottom of the hill. Tr. 21, 33.

Sizemore explained that the hazard associated with the condition is that a vehicle would try to stop and slide through the intersection at the bottom of the hill. Tr. 22. During his inspection, he observed a fully loaded back-dump³ hauling to and from the preparation plant to the lower level of the mine. Tr. 22-23. He testified that he stopped the driver, Herschel Collett (“Collett”), and questioned him about the road conditions. Tr. 23. According to Sizemore, Collett stated, “I look both ways before I go down that area and then I don’t touch my brakes, and that’s the way I get through there without – and maintain control.” Tr. 24. Aside from Collett, Sizemore observed several vehicles on the main road which would be used in excess of seventy-five to one hundred times a day. Tr. 23. At that time, Collett issued the citation at issue because Respondent is required to maintain the roadway so that a person could have full control of his/her vehicle. Tr. 24-25.

Sizemore determined that the condition was reasonably likely to result in a reasonably serious injury and S&S because, according to him, the roadway was very slick, and there was no

² The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have 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, I have also relied on his demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on my 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).

³According to Sizemore, a back-dump is an articulating truck used to haul materials. It appears that this refers to an articulated hauler, which is a heavy duty dump truck composed of two basic units: the front section called the tractor and the rear section called the dump body. It is typically used on rough terrain.

control of a vehicle in this area. Tr. 25. He further testified that there was no berm on the outer bank of the road, a fact confirmed by Collett. Tr. 26, 49. The haul road would likely be traveled ten or more times a day. Tr. 26. He theorized that a vehicle veering off the road was likely to result in broken bones or lacerations, which are lost workdays or restricted duty type injuries. Tr. 26. He believed that the condition was the result of Respondent's moderate negligence because the condition was in plain view, even to the casual observer. Tr. 25. Further, Sizemore testified that the gravel was located a few hundred yards from the cited area, and all of the equipment was at the preparation plant ready to be used. Tr. 36-38.

At the same time, Sizemore issued an imminent danger order under Section 107(a) of the Act because he believed that an injury would occur before the condition could be corrected.⁴ Tr. 27-28. His concerns were that the roadway was very slick, a tandem coal truck was traveling down the roadway, the berm was insufficient or nonexistent in a crucial area, and an accident could occur if travel was allowed to continue. Tr. 27-28. For this reason, Sizemore stopped the truck that was actively working and asked the driver, Hershel Collett ("Collett") to park above the slick area. Tr. 29. The citation, as well as the imminent danger order, were terminated when the mud was removed, gravel was laid and the berm was constructed. Tr. 29-30. Plant Manger Wes Thomas worked with Sizemore to abate the condition. Tr. 29, 38-39.

2. Respondent's Evidence

Hershel Collett hauls coal for Respondent, but is self-employed. Tr. 40-41. On the day that the citation was issued, he was operating his M800 tandem truck, which can haul approximately thirty-eight tons of coal at a time. Tr. 41-42. In a typical day, he makes eight to ten runs hauling coal to the preparation plant from a mine belonging to a different operator. Tr. 42.

When stopped by Sizemore, Collett estimated that he was stopped forty to fifty feet above the slick area, which he surmised was steeper than the road in question. Tr. 42-43. He did not recall telling Sizemore that the road was slick and, in fact, testified that he had made one earlier run and had no problems with sliding. Tr. 43-44. He also stated that he had not noticed as much mud on the road as Sizemore. Tr. 43. While he testified that there was gravel on the road, he stated that it had been raining for four or five days and some of the gravel had "disappeared." Tr. 43. Sizemore, on the other hand, could not recall whether it had been raining either on the day that the citation was issued or in the previous days. Tr. 36. Regardless, Collett stated that he had no trouble hauling coal or slowing down. Tr. 43-44. If he had, Collett said that he would not have hauled the coal in dangerous conditions and would have alerted Respondent to the conditions as he had in the past. Tr. 44, 47-48.

In explanation of what Collett said to Sizemore about the brakes, Collett testified that he does not touch his brakes because the truck is "geared down," and the cited area of the road is not particularly steep. Tr. 45, 49. When fully loaded, the truck typically travels at three to four miles per hour on the road. Tr. 46. He argued that he would not use the brakes even in the best

⁴ The specific circumstances of the 107(a) order are not at issue here, and I make no judgment as to its validity. It is only referenced to give perspective to Inspector Sizemore's observation of the conditions.

possible conditions in order to prevent the brakes from getting hot. Tr. 45. According to Collett, the lower the gear that the truck is in, the less the brakes are used because they become very hot and would eventually fail. Tr. 45. Further, it was unnecessary for Collett to stop at the bottom of the hill because he has the right of way and traffic proceeding from the other direction must stop. Tr. 49. Finally, he added that, the vast majority of the time, he is the only coal truck operating on the road. Tr. 46. He only asked for help when he was behind. Tr. 46.

3. Contentions of the Parties

The Secretary contends that, regardless of whether the inspector actually observed a vehicle out of control, Respondent is required to maintain the roadway in a condition allowing for full control of a vehicle. Because the roadway was slick, traveled in excess of ten times a day and no berm existed, he states the citation was correctly designated as reasonably likely to result in a reasonably serious injury and S&S. In support, the Secretary argues that if an accident were to occur, broken bones and lacerations would be the minimum injury. Finally, although the inspector did not know how long the condition existed, the Secretary states that the road was in plain view, and even the most casual observer would see the condition. Therefore, he asserts that Respondent's negligence was moderate.

Respondent argues that no evidence was presented to suggest that any of Respondent's employees or contract employees failed to maintain full control of a vehicle; therefore, the citation should be vacated. It states that the presence of ten to fourteen inches of mud on the roadway and Collett's failure to use brakes do not substantiate the Secretary's claims. In the event that the citation is found to be valid, Respondent states that the violation is not S&S because the first two prongs of the *Mathies* test have not been met.

4. Findings of Fact and Conclusions of Law

I find that the Secretary has not proven his case and, therefore, Citation No. 8369111 is vacated. Sizemore cited Respondent for a violation of 30 C.F.R. § 77.1607(b) which requires equipment and vehicle operators to maintain full control of vehicles at all times while in motion. As proof of this, Sizemore conducted his own experiment in which he testified that he lost control of *his own* vehicle. He fully admits that he never observed any of Respondent's employees on the roadway, but explains that, given the unsafe nature of the road, he did not have to actually witness a vehicle out of control. I do not, however, agree with this assessment.

The plain language of 30 C.F.R. § 77.1607(b) states that an operator shall have full control of a vehicle while it is in motion. As further evidence of the regulation's intent, it is specifically entitled "Loading and haulage *equipment; operation.*" 30 C.F.R. § 77.1607(b)(emphasis added). Other than Collett's truck, which was stopped prior to reaching the section of the road at issue, Sizemore did not observe a single vehicle operating on the roadway. At hearing, he testified that his only proof of lack of vehicle control was the operation of his own Jeep. Allowing MSHA to conduct its own experiments in the absence of any witnesses to prove the existence of violations is a dangerous course of action. Given that none of Respondent's employees were observed having difficulty with vehicle control, I find that the Secretary is unable to prove his case, and the citation must be vacated.

To be clear, I am not suggesting that slick roadbeds are not a violation of the regulations; rather, I find that slick roadbeds are not a violation of this particular standard. In the instant case, Respondent could have been cited for any of the regulations pertaining to roadway maintenance. 30 C.F.R. § 77.1605(k) requires that berms be provided on elevated roadways. Further, 30 C.F.R. § 77.1605(m) requires, among other things, that roadbeds be maintained in a manner consistent with the speed allowed and type of haulage done. While the Secretary may have been able to prove his case under either of these regulations, he did not cite Respondent for these nor did he request an amendment to the cited regulation. Given all of the information presented and the testimony at hearing, I am constrained to find that the Secretary did not prove his case.

CITATION NO. 8369121

Citation No. 8369121 was issued under Section 104(d)(1) of the Act on December 16, 2011 at 8:00 a.m. and was also based upon the inspector's observation of a violation of 30 C.F.R. § 77.1607(b).

In his narrative, the inspector found [All errors kept as written]:

The operator has not maintained the entire length of the haul road from the contract coal mine to the preparation plant. 1 to 4 inches of muddy material was present along the haul road and equipment including personnel vehicles and coal truck, were observed hauling on the slick haul road, were not in full control while the equipment was in motion. At a test speed of 10 miles an hour a personnel vehicle slide (like a sled) in straight areas and in the curves at different areas of the haul road. The operator has posted a speed limit of 35 mph. along this road.

Note: This citation was one of the contributing factors that contributed to the issuance of imminent danger order #8369120 issued on 12-16-2011. therefore no abatement time was set.

Note: This same type citation (#8369111) and resulting imminent danger order (#8369109) was issued for this same condition, at as different location, along this same haul road on 12-08-2011, and was a factor in the consideration of high negligence classification of this citation.

Note: The operator has engaged in aggravated conduct constituting more than ordinary negligence in that the operator was aware that the haul road was wet slick and muddy and that contract employees were traveling this haul road. This violation is an unwarrantable failure to comply with a mandatory standard.

GX-5.

The inspector noted that the risk of injury or illness was highly likely and S&S in nature. *Id.* The injury could reasonably be expected to result in permanently disabling injuries affecting one person. *Id.* The negligence was assessed as high, as well as an unwarrantable failure to

comply with a mandatory standard (“Unwarrantable Failure”). *Id.* The Citation was terminated when the operator applied gravel and graded the roadway from the preparation plant to the mine. *Id.* The inspector observed that the operators should not be able to maintain control. *Id.* The Secretary assessed a penalty of \$9,122.00 for the alleged violation.

1. The Secretary’s Evidence

Sizemore testified although the citation was issued to a different mine, the entire road is three to four miles long and runs from the Chestnut Flats Mine to the Balkan Preparation Plant. Tr. 53-54. The road is designed to have steep inclines followed by level areas where brakes can be cooled. Tr. 54. According to Sizemore, the road had one to four inches of mud in spots, several of which were on inclines. Tr. 54-55. Again, this measurement was taken by with a tape measure. Tr. 54. The posted speed limit on the haul road was thirty-five miles per hour; however, Sizemore testified that he slid at a test speed of ten miles per hour. Tr. 55.

Sizemore asserted that the road was wet and muddy, and there was no visible gravel on it. Tr. 55. When he went around curves in the road, the truck would slide out and he’d have to employ the “turn-the-wheel-the-same-way” maneuver to get out of the spin. Tr. 55. Collett and the miners traveling to the A&M Coal Company would use this road every day. Tr. 56. By Sizemore’s estimate, approximately twenty miners would access it for the day shift, eighteen to twenty for the second shift and three to five for the third shift. Tr. 56. Further, he observed a Mack truck hauling thirty to forty tons of coal down the incline. Tr. 56. When discussing the road with one of Respondent’s employees, Sizemore stated that the outside man told him that he slid all the way along the road. Tr. 57. The miner also explained that Respondent graveled the haul road when it was first built, but it had not been touched since that time. Tr. 57.

Based on Sizemore’s observation, he testified that Respondent violated the standard when it did not maintain the road so that the operator of a vehicle would have full control. Tr. 57. The three to four miles affected by the condition contained steep inclines and different terrain. Tr. 62. Sizemore believed it was reasonably likely or highly likely that an accident would occur if the condition was left uncorrected. Tr. 62-63. He asserted that a vehicle traveling over the embankment or colliding with another vehicle would likely result in broken bones, including the possibility of the neck or back, or lacerations, which he categorized as permanently disabling injuries. Tr. 63. Because he only saw one person on the road at the time of issuance, he believed that only one miner would be affected. Tr. 63.

Sizemore further designated the citation as high negligence and an unwarrantable failure to comply with a mandatory standard under Section 104(d)(1) of the Act. Tr. 58. He reasoned that the condition extended for three to four miles. Tr. 58. The preshift examination indicated that the haul road was slick; therefore, management knew about the condition. Tr. 60, 79; GX-6. Further, when discussing the issue with General Manager Ted Helton, Sizemore testified that Helton stated that at \$17.00 per ton, he would shut the mine down before he would gravel the road. Tr. 60-61, 78-79. Finally, he had issued a prior citation and imminent danger order to the Balkan Mine. Tr. 59, 77.

Given the conditions, Sizemore also issued a 107(a) imminent danger order to stop travel on the road. Tr. 64.⁵ When Sizemore left the mine, he used the roadway, which was in the process of being graded. Tr. 66. He did not terminate the citation and order at that time, however, because there was more work that needed to be done. Tr. 66. The citation and order were terminated later that day when Respondent graded and graveled the road. Tr. 65. Sizemore received information from an unknown source that it had taken ninety to a hundred truckloads of gravel to abate the condition. Tr. 79.

When asked at hearing whether employees of A&M Coal Company traveled the road during the inspection, Sizemore testified that he did not see them. Tr. 68, 71. He stated that only Collett asked permission to travel the haul road and Sizemore denied his request. Tr. 68-69. He further explained that in terms of A&M Coal Company employees, he worked with the owner of the mine, Mark Dotson, and informed him that the road was shut down. Tr. 70. Collett acknowledged that there was a side road that the miners typically used when entering and exiting the mine. Tr. 90, 92.

In response to the video taken by Respondent, Sizemore testified that it did not accurately depict the conditions as they existed. Tr. 113. He explained that the road was graded prior to his departure on December 16th, so the tire tracks present must have been there from vehicle travel after it was graded. Tr. 114-115.

2. Respondent's Evidence

Collett testified that the haul road had been shut down before his arrival that day, but he entered using it because he did not know that an imminent danger order had been issued. Tr. 87-88. While he admitted that it was muddy, he stated that he was not concerned for his safety while driving. Tr. 87-88. Although there was a side access road, he asserted that he saw miners entering and exiting the road and believed that Sizemore was still at the mine at that time. Tr. 89. When he was returned to his vehicle by the owner's son, they used the road and Collett did not notice anything wrong with it. Tr. 88. While Sizemore could not recall whether it was raining on that day, Collett testified that it was. Tr. 55, 93.

Respondent's Safety Coordinator Tracey Creech ("Creech") testified after receiving information about the citation and order, he arrived at the mine using the haul road between 8:00-8:30 a.m. Tr. 101. He stated that he drove his two-wheel drive truck and never slid. Tr. 97. In the afternoon, he took video of himself driving the road at approximately twenty to twenty-five miles per hour. Tr. 100; RX-1. According to Creech, even though there was a lapse in time, the road looked essentially as it did upon his arrival. Tr. 102. The gravel trucks were working, but the road had not been graded at that time. Tr. 109. Based on his experience, he did not believe that emergency vehicles would have any problem accessing the mine if needed. Tr. 103.

Creech stated that it took forty-one loads of gravel to abate the condition, not ninety to one hundred as asserted by Sizemore. Tr. 97. He further testified that this was not the first time

⁵ The imminent danger order is not at issue in this case, and I make no judgment as to its validity.

that the road had been gravel, even by MSHA's own records; therefore, the information given to Sizemore was completely false. Tr. 107-108. He also affirmed Collett's testimony that Collett alerted Respondent when the road needed to be graveled for safety reasons. Tr. 106-107. When he heard about the comments made by Helton to Sizemore, Creech contacted the vice president of operations who told him to gravel the road and Helton's comments would be addressed by management. Tr. 104-105.

3. Contentions of the Parties

The Secretary argues that Respondent has the responsibility to maintain the roadway in a condition allowing for full control of a vehicle. Observing a vehicle out of control is not a necessity. The Secretary further states that the video taken by Respondent does not depict the conditions as they existed and should not be credited. He contends that a vehicle operator was highly likely to lose control and that broken bones and cuts would be the most likely result of an accident. Given this, the Secretary argues that the violation was also S&S. Finally, he argues that Respondent's negligence was high and the violation was an unwarrantable failure because the condition was extensive, an imminent danger order had been issued on the road a short time before, and Respondent had been advised that the road needed work. The Secretary adds that the inspector had to issue an imminent danger order to prompt Respondent to abate the condition.

Respondent contends that the Secretary failed to provide any demonstrable evidence that any of its employees or contract employees operated a vehicle that was not in full control; therefore, the citation should be vacated. It states that even if a violation existed, it was not S&S because the first two prongs of *Mathies* were unproven. It further argues that even if the violation is found to be S&S, there is no evidence to support a designation of unwarrantable failure. As evidence of this, Respondent points to preshift reports in which the examiner states that everything was in good shape, but more rain was expected. It asserts that this shows its good faith belief that the condition of the road was acceptable.

4. Findings of Fact and Conclusions of Law

For the same reasons as above, I find that the Secretary has failed to prove that Respondent violated 30 C.F.R. § 77.1607(b). Sizemore admitted that he did not observe any vehicles operating on the roadway and, therefore, did not observe any equipment that was out of control. Again, I find that the Secretary may have been able to prove a violation of a standard pertaining to the maintenance of the roadbed itself, but he did not prove that vehicles were operated without full control.

Although not determinative to the outcome of this case, I would also caution the Secretary in issuing 104(d) citations based upon, at least in large part, a citation issued to a different mine. While I understand that the haul road serves two mines owned by the same operator, Section 104(a) of the Act empowers the Secretary to issue a citation to *a mine* for a violation of the Act or its standards. 30 U.S.C. § 814(a)(emphasis added). Nowhere in its language does it permit MSHA to issue more serious violations to one mine based on the aggravating circumstances found in another.

ORDER

It is **ORDERED** that Citation No. 8369110 remains as issued. It is **ORDERED** that Citation Nos. 8369111 and 8369121 are hereby **VACATED**. It is further **ORDERED** that Nally & Hamilton Enterprises, Inc., **PAY** the Secretary of Labor the sum of \$900.00 within 30 days of the date of this Decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 24, 2014

EMERALD COAL RESOURCES, LP,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. PENN 2009-383-R
v.	:	Citation No. 8007661; 03/06/2009
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 36-05466
ADMINISTRATION, (MSHA),	:	Mine: Emerald Mine No. 1
Respondent,	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2009-496
Petitioner,	:	A.C. No. 36-05466-183943-02
	:	
v.	:	
	:	
EMERALD COAL RESOURCES, LP,	:	Mine: Emerald Mine No. 1
Respondent.	:	
	:	

SECOND AMENDED DECISION AND ORDER¹

Appearances: Patrick W. Dennison, Esq., & Jason P. Webb, Esq., Jackson Kelly, PLLC, Pittsburgh, PA for Respondent

Pamela Mucklow, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, CO for the Secretary

Before: Judge Steele

STATEMENT OF THE CASE

This proceeding is before me on a petition for civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration against Emerald Coal Resources, LP (hereinafter “Respondent” or “Emerald”) at the Emerald Mine No. 1 pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (hereinafter “the Mine Act” or “the Act”), the Secretary seeks penalties in the amount of

¹ The original decision stated that the assessed penalty for Citation No. 8006753 was \$3,493.00 instead of the correct amount, \$3,143.00.

\$12, 265 for two alleged violations of the Secretary's mandatory safety standards for underground mines. The Secretary originally charged Respondent with 10 alleged violations. Four were settled prior to the hearing, three were settled during the hearing, and one was dismissed as the Respondent agreed to accept the violations as written leaving the remaining two alleged violations for decision in Docket No. PENN 2009-496. The three citations that were settled during the hearing were Nos. 8006756, 8006758, and 8006759.² The terms of the settlement were set forth in a written motion, which terms were approved by the court. The parties presented testimony and documentary evidence at the hearing conducted on November sixth, seventh, and 8th, 2012 in Pittsburgh, PA.

For the reasons set forth below I affirm Citation Nos. 8006753 and 8007661 and find a non-S&S violation of the latter. I also assess civil penalties of \$3,143.00 and \$5,000.00 respectively.

STIPULATIONS

The Secretary and Respondent agreed that the following stipulations should be included in the record:

1. Emerald is an "operator" as defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the coal mine at which the Citations at issue in this proceeding were issued.
2. Operations of Emerald at the coal mine at which the Citations were issued in this proceeding 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 designed Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
4. The individuals who signatures appear in Block 22 of the Citations at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor when the Citations were issued.
5. True copies of the Citations at issue in this proceeding were served on Emerald as required by the Mine Act.
6. Emerald demonstrated good faith in the abatement of the Citations.
7. The penalties that have been proposed will not affect Emerald's ability to continue in business.

² A Decision Approving Partial Settlement for these eight settled citations was issued separately.

THE REMAINING CITED VIOLATIONS

1. Citation No. 8007661

This 104(a) citation was issued on March 6, 2009 at 5:53 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. §77.200. This safety standard states:

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

In his narrative, the inspector found:

Three structural support columns located on the sixth floor of the prep plant were not being maintained in good repair. The second column in the second row from the MCC room showed approximately 30 percent width loss on the creek side flange were (sic) a seventh floor beam connects to it. The fourth column in the same row was found to have 7 areas of width reduction ranging from approximately 30 to 50 percent. The fifth column in the same row was found to have approximately 30 to 50 percent reduction on all four sides and two holes ranging from ½ inch to 1 inch. 2 previous violations of this standard in the past 2 year.

(Government Exhibit 1).³

The inspector noted that the risk of injury or illness for this violation was "reasonably likely," "fatal," "S&S," and would have affected 10 persons. He further noted that Respondent exhibited "moderate negligence." The proposed penalty for this citation was \$8,209.00. The citation was extended on four occasions and was terminated on April 21, 2009 when the repairs were completed on the three cited columns.⁴ The inspector also issued a 107(a) imminent danger order which was vacated or terminated following an inspection by an MSHA civil engineer.

ISSUES

Did Respondent violate 30 C.F.R. §77.200 and, if so, were these violations significant and substantial? What was the degree of gravity and negligence?

³ Hereinafter Government Exhibits will be cited as "GX" followed by the number and Respondent's Exhibits will be cited as "RX" followed by the number.

⁴ The inspector also noted that, "[t]his citation is a contributing factor to the issuance of the 107(a) Order No. 8007662." This imminent danger Order is no longer in contest, but will be discussed as necessary in this decision.

THE SECRETARY'S EVIDENCE

1. Testimony of Tom McCort

Mr. McCort is an inspector trainee for MSHA having just returned to MSHA after approximately four years as a surface and mine inspector. His second stint with MSHA began approximately one month before this hearing. His private sector experience includes approximately three and a half years doing shaft and slope construction maintenance and underground maintenance and repair. Additionally, Mr. McCort worked for Local 549 of the Ironworkers out of Wheeling for approximately three to three and a half years doing construction and maintenance of steel structure, maintenance on building reinforcing bars and generally anything related to steel and iron. (Tr. 33-37).

Inspector McCort issued this citation because he found some structural columns on the sixth floor that had some severe thinning and holes in them and a general thinning of some of the structural members that he examined. (Tr. 40). The building examined was a prep plant which is a building that is used to clean coal. This prep plant was constructed of steel members, concrete floors, concrete floor beams, and sheeting for siding. He believed the plant had 13 levels. (Tr. 40). The primary focus of the examination was the sixth floor of the prep plant and McCort was accompanied by Floyd Campbell, a union representative, and Tim Drone who the inspector believes was the maintenance manager of the plant at the time. (Tr. 41). Mr. McCort went to the plant on March 6, 2009 in response to a 103(g) hazard complaint.⁵ (Tr. 42).

The examination of columns on the sixth floor eventually focused on three columns and those columns were iron and steel. They were located in the second row and were identified by McCort as the second, fourth, and fifth columns from the plant control room on the creek side of the plant. (GX 3). (Tr. 43-46). In examining the columns, McCort used a hammer to clean off the columns and also to sound the columns.⁶ In one particular instance the column was so thin that the hammer went through it. (Tr. 46). The examination of the three columns continued with the taking of measurements. With the exception of column five, anyplace that McCort saw noticeable thinning of the columns, he measured the thickest part of the column and the thinnest part of the column to determine how much structure was lost on the column. (Tr. 47).

⁵ A 103(g) hazard complaint enables miners to make complaints on safety or health hazards when there are reasonable grounds to believe that a violation of the Act or a mandatory health or safety standard exists. This section of the Act creates a right to an immediate inspection by the Secretary. 30 U.S.C. §813(g)(1). In this case there were five complaints about conditions on the sixth floor. All five were investigated and four resulted in negative findings. One complaint resulted in a positive finding which noted that seven contractor employees were conducting repairs. (Tr. 109-111). The positive finding concerned three structural support columns located on the sixth floor of the prep plant which were determined to be not maintained in good repair. (Respondent Exhibit 11).

⁶ Sounding the columns is a way to tell if a column is solid or if it is thinning.

On column 2 of row 2, McCort saw section loss on the flange at the top of the column as well as a lot of severe rust. Measurements were taken showing that the flange measured 3/8 of an inch at the bottom and 1/4 of an inch at the connection point. (Tr. 50-51). The quarter inch measurement was taken because it was visibly thinner and appeared to be the thinnest portion in that area. The 3/8 measurement was taken because it appeared to be the thickest part of the column. The amount of loss to the flange at the top of this column was approximately 30%. (Tr. 52).

In the fourth column, McCort observed multiple spots that indicated flange thinning and web thinning. He also sounded this column with a hammer and could hear this difference indicating thinning. Again, McCort took measurements of the thickest and thinnest parts of this column. The thickest part measured 5/8 of an inch and the thinnest part 1/8 of an inch thick, which meant that the measured flange loss was half an inch. McCort also testified from his notes that column five showed significant structural loss in five places and severe structural loss on the hillside above the hub column. (Tr. 53-57).

On the fifth column of row two, McCort observed conditions similar to column four, but there were holes in the base of this column and exceedingly severe web and flange thinning. He observed a 1 1/2 inch hole and a 1/2 inch hole in the web. The measurement of 1/4 inch to 3/8 of an inch would be compared with the 5/8 of an inch thickness which McCort found upon his observation and recollection from earlier measurement. (Tr. 58-60).

If a flange is thinner than it originally was then it is coming out of design specs and indicates weakness in that column. (Tr. 61). Because water all over the sixth floor would have caused the deterioration of the steel columns following his examination of March 6, 2009, McCort issued an imminent danger order.⁷

On the day of his inspection the third column of the row was under construction and being repaired. McCort noted that at the top of that repair that a hole in the webbing could be seen. That hole was 12-14 long and 2-3 inches wide. (Tr. 64).

Later that afternoon following completion of the examination of the sixth floor, McCort requested that an MSHA engineer evaluate the structure. Bob Newhouse, McCort's supervisor, requested the engineer, Jarrod Durig. Durig, appeared and sounded columns, took measurements, and did other things with which McCort was not familiar. Durig concluded that he did not believe there was an imminent danger but that the columns did need repair. (Tr. 69-70).

The hazards created by the condition of the prep plant, according to McCort, were that should the columns fail there would be falling material, falling miners, and multiple injuries, including fatalities. Also, in the event of column failure, the seventh floor could collapse on the sixth floor involving potential injuries to miners on the seventh floor. (Tr. 71). In explaining

⁷ The order was based on his opinion and a few miners who said they had noticed excessive plant shaking and vibration not noticed before. (Tr. 62-65).

why column failure and partial plant collapse was reasonably likely, McCort opined that the specific columns cited were all in the same column line, on the same plane. (Tr. 74-75).

At the request of McCort, an MSHA engineer, Michael Marawski visited the plant in August, 2008, examined the plant and prepared a written report which was admitted as GX 26. Significant section loss was observed in the flanges on the upper column at the common splice connection in the column adjacent to cyclone A-5⁸ – Repairs to the column splice at Cyclone A-5 along with any other column splices on the sixth floor that were in a similar condition were recommended. (GX 26). McCort never saw the plans to repair the columns in the sixth floor, but the plans were explained to him by Tim Drone, maintenance manager of Emerald and McCort saw repair work being implemented. (Tr. 105-106).

2. Testimony of Jarrod Durig

Mr. Durig is a supervisory civil engineer with the Pittsburgh Safety and Health Technology center, or MSHA technical support group, and is the chief of the geotechnical branch overseeing the work of seven other engineers. Included in the types of duties he performs are structural assessments of preparation plants. Mr. Durig has worked for MSHA from 1995-2000 and from 2003 to the present. He has a bachelor's degree in civil engineering from West Virginia University and a master's degree in civil engineering from the University of Pittsburgh. He is licensed as a professional engineer in the Commonwealth of Pennsylvania. (Tr. 124-126).

Mr. Durig was called to the Emerald prep plant on March 6, 2009 to provide an assessment of conditions there and to make a recommendation regarding an imminent danger order. He was asked to look at three columns on the sixth floor and looked at a fourth column after inspecting the first three. They were designated columns 2B, 2C, and 2D. Durig later looked at 3D.⁹ (see GX 5).

⁸ This column is also referred to as the third column in the second row. (Tr. 85).

⁹ The column Durig designated as 2B is McCort's No. 3, 2C is McCort's No. 4, and 2D is McCort's No. 5. (See Tr. 20 opening statement by counsel for the Secretary). However, this statement of explanation does not conform to the citation. The sixth floor of the prep plant was examined by a myriad of individuals who employed their own methods of identifying the columns which were the subjects of this citation. The inspector trainee for MSHA, Tom McCort, identified the columns as being in the second row from the raw coal side, and he numbered the columns as the second, third, fourth, and fifth columns from the creek side. (Tr. 45). The MSHA civil engineer, Jarrod During, identified the columns as 2B, 2C, and 2D. The columns cited in the citation are actually columns 2, 4, and 5 in McCort's version. Yet another numbering system is employed by Emerald and identified as row H that which is McCort's row 2, and listed the columns as 12H, 13H, and 14H. McCort's column 2 is Durig's 2B and Emerald's 12H; McCort's column 4 is Durig's 2C and Emerald's 13H; and McCort's column 5 is Durig's 2D and Emerald's 14H as represented by counsel for the Secretary. (Tr. 269-270). There is a slight variation provided by counsel for Respondent. (see *Amended Post-Hearing Brief* at p. 3).

In his examination of the columns, Durig performed a visual examination, used a chipping hammer for cleaning and sounding purposes, and used a tape measure to try to size the columns and also to measure the thickness of the flanges of the columns. After completing the evaluation he felt that the prep plant was not in imminent danger of collapse. (Tr. 135-136). Durig also felt that the prep plant was not in good repair based on the columns that he evaluated. (Tr. 136). Column 2D was in the process of repair. However, the area above the repair was in very poor shape due to substantial holes in the web along with thinning of the flanges in the same area. Durig would characterize column 2D as failed even with the repair work that was done. (Tr. 139-150).

Insofar as column 2B is concerned, Durig did not see any visible deformation but did recognize thinning of the flanges. He took measurements of that thinning to the bottom of the column. The flange thickness at 6 inches above the floor was between 3/8 of an inch and half an inch thick. Measurements were also taken of the column itself so that by consulting a steel design manual he could determine that the size of the column at the time it was constructed or at the time it was put in place. (Tr. 153). By consulting the manual (GX 13) Durig determined that Column 2B had over a 50% loss in thickness for the flange. (Tr. 161). Durig took four measurements and all fell within this range, except where those locations that measured 3/8 of inch would have indicated over 60% flange loss at that location.

Column 2C was also examined that day and found to be not in good repair due to the thinning of the flange and the condition of the bottom of the column. Again, by consulting manual and his measurements, Durig determined that the percentage loss in thickness of the flanges along the bottom of column 2C would be approaching 40%. (Tr. 164-166)

RESPONDENT'S EVIDENCE

1. Testimony of Ralph Layfield

Mr. Layfield is an operational manager with Alpha Natural Resources and has been at Emerald for 14 years. Prior to Emerald, Layfield was employed for 22 years by Industrial Resources of Fairmont, West Virginia as a field manager and construction manager. His duties as a construction manager included the building of preparation cleaning plants, coal cleaning plants, rebuilding plants, and operations related with coal facilities. As such, he has approximately 35 years experience with preparation plants. (Tr. 222-223).

Mr. Layfield was part of the inspection party that eventually resulted in the issuance of citation No. 8007661. He does not remember seeing any holes in the structure or the beams that McCort was inspecting. He did not see any problems or issues with the structure. (Tr. 225-226).

2. Testimony of Douglas Montgomery

Mr. Montgomery is employed at Emerald as a processing engineer and has been employed there since April 2003. Before that he worked at Cumberland Coal, Peabody Coal Company, American Electric Power, Southern Ohio Coal Company, U.S. Steel, and American Bridge. Over the years his various capacities have included being a foreman, engineer, plant

manager, construction estimator, design draftsman, and detail draftsman. Mr. Montgomery has a master's degree in metal process engineering from West Virginia University, a bachelor's degree in mining engineering from the University of Pittsburgh, and an associate's degree in mechanical engineering from Penn State. (Tr. 230-232).

By the time of the inspections which resulted in this citation, Emerald was in the process of repairing columns on the sixth floor.¹⁰ Lincoln Contracting, whose field man was Mike Yoder, was working with Emerald. (Tr. 235-236). Several exhibits were offered and accepted to show that repairs were underway: RX-6 – materials used; RX-7 – Time sheets; RX-8 – invoice from Lincoln Contracting for work performed; RX-4 – Floor plan; RX-5 – time and materials invoice; summary of time sheets, and a change order; RX-9 – 2009 log book for completed repairs.

3. Testimony of John Leach

John Leach is a project manager, estimator, and engineer for Lone Pine Construction, a construction company that does mine work. He holds a professional engineering license from the Commonwealth of Pennsylvania. On numerous occasions, Emerald Mine has called Lone Pine to do several projects, including prep plant renovations. Lone Pine investigates, prepares an estimate, submits a bid, and is sometimes awarded the job and sometimes not. (Tr. 270-273). Mr. Leach believed that this prep plant was one of the better cleaning facilities that he has seen. (Tr. 273).

On the day the citation was issued, Lone Pine was performing work at Emerald Mine and Mr. Leach was asked to evaluate three columns on the sixth floor of the pre plant, and to prepare a report. He did not believe that the structure was in any imminent danger of collapse. (Tr. 274-279). Column 14H (2D) was under construction at the time Leach performed his examination. The repairs involved adding bent channel plates to form the inside of the flange as well as the web on both sides of the column and flange plates were added on the outside of the flange of the column. Mr. Leach believed that this was an exceptional way to repair that column and the load capacity of that column probably doubled or tripled by the way construction was performed. (Tr. 281-283).

On March 6, 2009, Leach observed a quarter-sized hole in the center of the web on column 12H (2b) and that hole could have been put there for a purpose. While it was possible that the hole was there because it was a loss of thickness of the web, it was not likely. (Tr. 297-298).

4. Testimony of William Schifko

Mr. Schifko works for Emerald Mine, Alpha Resources and began in May or June of 1978. He is currently the manager of compliance. This position involves educating employees

¹⁰ Through this witness we learned that a third means of identifying rows and columns was employed. Row H is McCort's row 2.

about new laws and new regulations for compliance purposes and also education about safety and accident prevention. (Tr. 305).

Mr. Schifko does not believe there was a violation of 30 C.F.R. §77.200 because hitting the columns with a small sledge hammer did not produce any problems and there was no danger of an imminent collapse. Money is budgeted for maintenance and examination by the professionals. (Tr. 319-320). Mr. Schifko fundamentally disagreed with the degrees of gravity and negligence and thought there were considerable mitigating factors which should have affected MSHA's degree of negligence. (Tr. 324).

CONTENTIONS OF THE PARTIES

1. The Secretary's Contentions

- a. Due to the deteriorated columns on the sixth Floor, Emerald failed to maintain the prep plant in good repair and thus violated 30 C.F.R. §77.200
- b. In reaching this conclusion the inspector visually inspected the columns, did sounding tests with a hammer, and performed measurements with a tape measure to determine the extent of column, flange, and web thinning.
- c. Additional confirmation of thinning was provided by an MSHA engineer who contrasted the present condition of the columns with their original construction or installation.
- d. While there were repairs on the inspector's third column, such repairs had not been completed and the column was not in good repair.
- e. The percentage of thinning indicates a column's loss of ability to support its intended weight.
- f. The S&S designation was appropriate because the evidence established that the four core components of S&S had been met, particularly the reasonable likelihood of column collapse resulting in injuries of a reasonably serious nature, and Emerald did not adequately rebut the S&S allegation.
- g. The degree of negligence of Emerald was high with no mitigating circumstances.

2. Respondent's Contentions

- a. There was no violation of 30 C.F.R. §77.200 because there was no evidence of disrepair or that the condition presented a hazard. The conditions of the sixth floor of the plant were a result of normal wear of steel structures and posed no hazard.

- b. Emerald was in the process of retrofitting columns on the sixth floor with one column having been retrofitted with other columns having been identified as needing attention, and professional contractors and engineers had been hired to design and complete the work.
- c. The inspector's measurements of the three columns identified in the citation were unreliable.
- d. This case focuses on the conditions on the sixth floor. However, substantial amount of weight had been removed on the seventh floor directly above the area in question and the removed weight was approximately 1,180 tons, less than what had originally existed. Also, smaller columns were used from above the sixth floor because of reduced load. Thus the Secretary fails on the hazard arguments presented.
- e. The S&S designation is inappropriate as the evidence does not establish a hazard, or even meet the test of a reasonable likelihood of an event in which an injury could occur, and reasonable likelihood of injury should be made assuming continued mining operations.
- f. There is no evidence that Emerald was in any way negligent or aware that the condition of the columns on the sixth floor posed a hazard and substantial mitigating circumstances existed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Validity

30 C.F.R. §77.200 requires all mine facilities to be maintained in good repair to prevent accidents and injuries to employees. The evidence in its totality requires a conclusion that the columns on the sixth floor were not being maintained in good repair. Measurements, soundings, and consultation with manuals all confirmed the visual observations of both Tom McCort, the inspector, and Jarrod Durig, a professional engineer, that significant thinning had taken place and in such percentages to indicate that the prep plant was not in good repair.

Documentary evidence also leads to that conclusion. For example, Respondent's Exhibit 11, a 103(g) hazard complaint, states that there were positive findings for the cited areas in that three structural support items were not being maintained in good repair. Also, GX 15, a report prepared by Durig, who was called to evaluate the efficacy of an imminent danger order, noted that the columns in question displayed extensive corrosion, delaminations, and section loss and recommended that they be retrofitted or replaced. The Secretary has established by a preponderance of the evidence that Respondent violated safety standard 30 C.F.R. §77.200.

2. Gravity and S&S Discussion

With respect to gravity, as noted above, the inspector felt that the risk of injury or illness for this violation was “reasonably likely,” “fatal,” and would have affected 10 persons. However, I credit the evidence presented by Respondent that showed that the possibility of injury from this condition was unlikely. Three engineers stated that there was no threat of immediate collapse and, further, that weight had been removed from the seventh floor, limiting the possibility of collapse.¹¹

More importantly, the burden of proving the likelihood of injury was on the Secretary. I do not believe that the incomplete and contradictory evidence regarding the likelihood of collapse provided by the Secretary was sufficient to show that the risk of injury was anything more than “Unlikely.” For example, Durig testified that he believed that collapse would occur if 2B, 2C, and 3D were allowed to deteriorate to the condition seen at the top of 2D. (Tr. 214). However, he did not testify that those three columns definitely, or even probably, would deteriorate in the same way as 2D. McCort testified that the cited conditions were reasonably likely to result in structural failure due to the fact that the specific columns cited were all in the same column line and the thinning and damage were all in the same plane of the column. (Tr. 74). However, he also believed the columns were in imminent danger of collapse, a conclusion that was not only refuted by Respondent’s witnesses but also by Durig, the MSHA civil engineer. (Tr. 117, 135-136). Therefore, I believe that the gravity was more accurately described as possible but “Unlikely.”

However, given the serious danger posed by the collapse of a building, I find that if the unlikely event were to occur, the injuries could be fatal.

In order to establish S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard 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 factor, it has already been established that there was a violation of a mandatory safety standard. As noted above, Respondent failed to maintain the prep plant in good repair when it allowed three structural support columns to deteriorate.

While the evidence presented by the two witnesses for the Secretary (inspector trainee McCort and civil engineer Durig) established the violation of the safety standard, the S&S requirement that the violation contributed to a hazard has been judged by me and found wanting. Therefore, the Secretary has failed to establish the second factor of *Mathies*.

¹¹ Respondent also argued that it was in the process of retrofitting the conditions to prevent further deterioration.

The evidence presented by the Secretary does not show a realistic hazard existed at the time of the citation. Further, the evidence shows that no hazard would be contributed to in this case because, even before this citation was issued, Respondent had begun repairs on the columns. Respondent's ability to present evidence in defense of the charge of S&S is not a new and novel development in Commission jurisprudence. For example, in *Secretary v. Consolidation Coal Co.*, 5 FMSHRC 890, 899 (June 1986), the Commission held that, given the legislative history of the mine Act a presumption of S&S existed when excessive respirable dust exceeded the minimums established by 30 C.F.R. §70.100(a). However, the Commission further held that the presumption of S&S may be rebutted by the operator's showing that miners were not exposed to the hazard of excessive dust through the use of personal protective equipment. In essence, the Commission held that even if there is a presumption of S&S, the details of the specific situation, including preventative measures taken, must be considered. In *Consolidation Coal*, the Commission found S&S was because the operator could not rebut the presumption. Here, however, exposure to a hazard was unlikely because Respondent had already taken preventative measure; specifically it had begun repairs of the cited columns.

In *U.S. Steel Mining Co.*, 7 FMSHRC 1135, 1130 (Aug. 1985) the Commission held that S&S must be resolved in terms of 1) the circumstances as they existed at the time the violation was cited and 2) as they might have existed had normal mining operations continued. Here, as has been shown, on the day Citation No. 8007661 was issued, repairs were underway on one column and planned for the others. Thus, it was not the citation that triggered the repairs and, at the time of the citations, Respondent was already eliminating the possibility of a future hazard. Therefore, the condition was unlikely to lead to any hazard.

Even the hazard suggested by the Secretary shows that it was unlikely at the time of the citation. For example, Inspector McCourt couched his language regarding column failure and its effect on the seventh floor in terms, "*could* collapse on the sixth floor," and in response to a question of "what *might* happen" if any of the columns failed the answer was, "*it could* potentially be a domino effect." (emphasis added) (Tr. 71). McCort did testify that it was reasonably likely that a portion of at least some of the columns would fail and a portion of the prep plan would collapse. (Tr. 74). It was clear that the dangers McCort discussed did not consider repairs already underway at the time of the citation. However, McCort was aware of these actions as he characterized the negligence as moderate (or the borderline of high) due to the implementation of a repair schedule and the fact that what he found was not plain to the eye. (Tr. 86-87). Further, in extending the original termination date, Investigator McCort noted that the "operator has a plan in place to repair all of the columns on the sixth floor and evidently has 7 contractor employees conducting the repairs."

In a report submitted by civil engineer Durig dated April 30, 2009, and introduced and accepted as GX 15, Durig's focus was to evaluate the imminent danger order which he vacated or terminated (he was not sure of the requirements of each). (Tr. 177). But his testimony is related to the S&S issue. In response to the court's question of what could happen, Mr. Durig answered "...ultimately a structure failure," and "there could be tripping, a fall hazard in the location." (Tr. 208). Durig further testified that unless conditions were improved, unless a repair was done, it would collapse. And if columns 2B, 2C, and 3D had been allowed to deteriorate to the degree 2D had been allowed to deteriorate it was reasonably likely that over a

period of time there would have been some kind of failure. (Tr. 215). However, the reality here is that the cited columns had not been allowed to deteriorate in such a way and were in the process of repair even before the citations were written. Durig stated that “the retrofit that was witnessed on column 2D appeared to be adequate in restoring a sufficient amount of steel to transfer the applied loads through the Column.” (GX 15)

As the Secretary has failed to establish that the condition contributed to a hazard given the repair work already in progress, I do not deem it necessary to consider the third or fourth *Mathies* factors. This citation was not S&S.

3. 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.” 30 C.F.R. § 100.3(d). “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.” *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, an operator exhibits reckless disregard where it displays “conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d). Mitigating circumstances may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

In this case, Respondent knew or should have known that it violated C.F.R. §77.200. Respondent was under a continuing obligation to examine working areas of the prep plant and should have seen the deteriorating columns. It could not have been particularly difficult to see that the columns had deteriorated to the point that a hammer could drive through the metal. Furthermore, on September 25, 2008, MSHA engineer Murawski issued a report that found serious structural problems with the columns and Emerald did not adequately correct the conditions before the inspection at issue here. Respondent suggest that this report did not place it on notice of the conditions because the report dealt with splice connections, not flange thinning or holes in webbing. I do not find that argument to be particularly compelling. The report indicated to Respondent that care and attention was needed for the supports on the sixth floor.

The Secretary claimed in his brief that there were no mitigating circumstances in this instance. However, this position is in direct contradiction to the Inspector’s testimony. The Secretary acknowledged that McCort found Respondent guilty of “between” moderate and high negligence, but stated the evidence suggested it was high. However, with respect to negligence, I found the Inspector’s testimony to be credible, including his testimony regarding mitigating circumstances. Specifically, McCort testified that Respondent had implemented a repair schedule and that the conditions were not apparent to the naked eye. As a result of these

mitigating circumstances, I cannot find high negligence. With that noted, I would not characterize these mitigating circumstances as “considerable.” Therefore, I find that Respondent exhibited Moderate Negligence.

4. Penalty

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$8,209 for Citation No. 8007661. While the Secretary’s proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will not evaluate each of those factors in turn with respect to penalty for Citation No. 8007661:

- a. The operator’s history of previous violations – Respondent was twice cited under Section 77.200 in the past two years.
- b. The appropriateness of the penalty compared to the size of the Operator’s business – Emerald Mine No. 1 produces 6,343,350 tons of coal annually and Respondent produces 69,624,256 tons of coal annually in all its operations. According to MSHA’s penalty assessment guidelines this gives Emerald Mine No. 1 15 “mine size points” out of a possible 15 and Respondent 10 “controller size points” out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.
- c. Whether the Operator was negligent – as previously shown, the operator exhibited moderate negligence.
- d. The effect on the Operator’s ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent’s ability to remain in business.
- e. The gravity of the violation – as previously shown, this violation, given the repair work, is unlikely to cause injury, but if it did it could result in permanently disabling or even fatal injuries to ten persons.
- f. The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was rapidly abated in good faith and this was so stipulated.

As I have decided to modify the gravity of this citation from “Reasonably Likely” and “S&S” to “Unlikely” and “Non-S&S,” I believe that it is necessary to also reduce the proposed penalty. Considering all of the factors listed above, Respondent is ordered to pay \$5,000.00 with respect to this citation.

CITATION NO. 8006753

This 104(a) citation was issued on March 9, 2009 at 9:15 p.m. and was based upon the inspector's observation of a violation of 30 C.F.R. §75.1714-7(a). This safety standard states:

(a) Availability. A mine operator shall provide an MSHA-approved, handheld, multi-gas detector that can measure methane, oxygen, and carbon monoxide to each group of underground miners and to each person who works alone, such as pumpers, examiners, and outby miners.

In his narrative, the inspector found:

The mine operator failed to provide an MSHA-approved, handheld, multi-gas detector that could measure methane, oxygen, and carbon monoxide to each group of underground miners and to each miner who works alone. Four miners were observed working in C-1 (032-0 MMU) number 2 entry, 184' inby the longwall face without a multi-gas detector. The longwall was operating at the time of my inspection.

(GX 19). The inspector noted that the risk of injury or illness for this violation was reasonably likely, the injury/illness could reasonably be expected to be fatal, the violation was significant and substantial, and it would affected four miners. Negligence was assessed as moderate. The proposed penalty for this citation was \$3,143.00.

This citation was terminated on March 9, 2009 at 9:30 a.m. as a representative of the miners was provided with a multi-gas detector for this group of contractors.

ISSUES

Did Respondent violate 30 C.F.R. §75.1714-7(a) and, if so, were these violations significant and substantial? What was the degree of gravity and negligence?

THE SECRETARY'S EVIDENCE

1. Testimony of Charles Reidmann

Reidmann is an underground coal mine inspector employed by MSHA for the past seven years. (Tr. 351). He had over 30 years of experience in coal mining before joining MSHA. (Tr. 351-354).

On the day citations were issued, Reidmann saw four miners working on the No. 2 Entry of the C-1 Longwall. Those miners were employed by High Tech, a contractor that conducted foreman work at Emerald Mine. (Tr. 359-360). Inspector Reidman spoke to the miners who were there to install pumpable supports. They were on the day shift, which began at 8 a.m. An MSHA-approved multi-gas detector was not provided. Inspector Reidmann was told that they usually have a person who traveled with them as an escort but no escort was provided that day.

(Tr. 360). When questioned, the miners were located at the No. 2 Entry in by the long wall face. A canvas check was up and the miners were in there about a block, 180 to 184 feet. (Tr. 361).

The hazard that the cited standard was intended to prevent was to protect miners in case of fire or to warn miners in the event of methane or low oxygen. (Tr. 361). A multi-gas detector protects miners who are in the presence of low oxygen, carbon monoxide, or methane. When within a certain range, a light will appear and an audible alarm will sound. (Tr. 361). The miners would know to come out of the area. Oxygen, carbon monoxide, and methane are odorless. Exposure to low oxygen and carbon monoxide results in the danger of loss of consciousness. The risk provided by the presence of methane is an explosive mix. (Tr. 361-363).

The likelihood of a methane explosion in the mine could have been reasonably likely as Emerald No 1 mine is on a 5-day methane spot and liberates over a million cubic feet of methane in 24 hours. Emerald No. 1 is a gassy mine. Face to face ignitions have occurred before on the longwall. The miners would not have been safe in their location if there had been an explosion at the longwall face, where the methane ignition would have been. The methane ignition could also have been at the head gate. (Tr. 367-368).

Inspector Reidmann further testified in cross-examination that not everyone needs to wear a multi-gas detector. (Tr. 374). Anyone working alone would need a multi-gas detector, but the term “alone” is not defined. Reidmann was instructed in MSHA training that “alone” means “by yourself.”¹²

Production was occurring on the longwall face and 5 or 6 miners were on the longwall face. There was also a headgate operator who works on the headgate side where the curtain is located. Inspector Reidmann did not check with anyone to see how many had a multi-gas detector. (Tr. 381).

Respondent introduced, through Reidmann, Respondent’s Exhibit 22, which were the field notes Reidmann produced stating that the on the day of the inspection and citation the methane reading was 0, with 20.8% oxygen and that these were good readings. (Tr. 383). However, on re-direct examination, Reidmann testified that the presence of methane at the face or longwall can change in minutes. (Tr. 385). If a person on the longwall had a multi-gas detector that had alarmed, it could not have been heard by the four contract miners. (Tr. 394).

RESPONDENT’S EVIDENCE

1. Testimony of Gary Bochna

Gary Bochna is employed by Emerald Coal Resources as a senior safety representative and has held that position for 32 years. (Tr. 400).

¹² The four miners here were working together, none was by himself or in any way “alone.”

Bochna testified that he accompanied inspector Reidmann on an inspection the day Citation No. 8006753 was issued. The citation was served on Bochna. In the course of the inspection, Bochna observed four working contractors on the C1 section. More specifically, they were working in by the No. 2 Entry, about one block in by the longwall face. It takes a minute to walk one block. Production was occurring at that time and about 12 people were working on the longwall, and various people on that crew would have had a multi-gas detector. (Tr. 401-402). The four contractors came in with the crew and therefore the crew would have known that the contractors were there. (Tr. 402-403). Other miners were near the longwall face in the No. 2 Entry. A headgate operator was in the No. 3 Entry on the face, about 2 blocks away. It would take about two minutes to walk two blocks. Various miners, including the headgate operator, mechanics, and the foreman would have a “gas meter.” (Tr. 403-404).

Bochna went to the area where the contractors were to check for ventilations and insofar as the readings were concerned he “did not think we had anything.” (Tr. 405). It is Emerald’s practice to send a miner with a multi-gas detector along with the contractors depending on where they are working. If they are away from a group of people they would have someone with a detector with the group and would not need one. (Tr. 410-411). But if there was a person on the longwall section with a multi-gas detector, the alarm would not be heard by, in this case, the four contractors. (Tr. 421). This is also true of the MGD that the headgate person used. (Tr. 422).

2. Testimony of William Schiffko

Schiffko testified for Respondent with respect to Citation No. 8007661 as well.

Schiffko decided to contest this citation due to confusion with regulations promulgated by MSHA and the portion of the regulations that caused confusion was the definition of “alone.” Schiffko asked for compliance assistance from several people including MSHA field inspectors and from the District Office. (Tr. 434). Someone from MSHA referred to a series of questions and answers prepared by MSHA and specifically question No. 35, which is part of Respondent’s Exhibit 27. Schiffko testified that the question stated, “Are several miners who work individually but are normally located within a maximum of five minutes walking distance from all the miners in this group are each required to have a multi gas detector?” And the answer provided is, “No, if it is practical and logical for these miners to quickly assemble prior to evacuation, only one gas detector to (sic) required for this group.” (Tr. 437).

Schiffko further testified that that in a policy issued to all contractors, that he expected them to provide their own safety equipment including detectors. In the past, Emerald had lent detectors out to people and not gotten them back, which is expensive. (Tr. 438-439). There are a lot of occasions where miners do not have their detectors or have forgotten them and Emerald has allowed them to borrow the equipment. Schiffko makes them sign for the equipment. (Tr. 439). Loaner detectors were available. (Tr. 440).

The High Tech employees typically work at the long wall because that is the only place where pumpable cribs are built. Pre-shift organizational meetings are held where assignments are given and everyone is told where to go. The Emerald “responsible person” knows where everybody is going to go. (Tr. 440-441).

Insofar as a potential ignition on the longwall face is concerned, Schifko testified that they had never had any ignition in the C Block. Further, whether or not there was an ignition would not be influenced based on whether the contractors had detectors.

Schifko disagreed with the testimony attributed to inspector Reidmann that if you cannot see or hear somebody else, that someone was alone. Although he does not believe that Inspector Reidmann was given a lot of guidance from MSHA. (Tr. 445). There is no question in Schifko's mind that someone with a multi-gas detector was within 900-1000 feet and therefore within five minute walking distance. (Tr. 447-448). Furthermore, it is Schifko's testimony that the four contractors were in the same group as the people working on the longwall. (Tr. 450).

SECRETARY'S ADDITIONAL EVIDENCE

1. Testimony of Robert Newhouse

Following Respondent's Final witness, the Secretary moved to re-open the record, which motion was granted and the Secretary then presented witness Robert Newhouse.

Newhouse is employed by MSHA as the supervisory coal mine inspector for the Ruff Creek Field Office and has been as supervisor since 1985. He has been an inspector of underground coal mines since 1977. (Tr. 501). Newhouse was designated as the Secretary's Representative and sat at counsel table for all proceedings.

Newhouse testified that he read all of the questions and answers regarding multi-gas detectors in RX 27 and had been involved in the issuance and development of the standard. He was familiar with the standards, why they were enacted, and their purpose. In his opinion, the question about distance and a five minute walk is irrelevant. The key is air pressure. A group of miners or an individual miner walking in an area that can have bad air, is being inundated with smoke, needs to be protected with a detector. (Tr. 502-503).

Newhouse testified that due to the check curtain the intake air was split, creating different areas where the air pressure was different. In the longwall mining area, the rock fell back across the shields as mining occurred and normal roof falls occur. The rock displaces air in that area forcing the air to come out through the entries as it has to go somewhere. Thus, there is a buildup of pressure in the areas where there is no fall, creating a void, or a potential void. That void has methane, low oxygen, dust, and other "things" in it. The four contractors and the other people in the mine would not necessarily know. They would know if a roof fall occurred, but their air would not change. That is why they have a union person with a detector normally assigned to the contractors who are inexperienced. (Tr. 503-505).

CONTENTIONS OF THE PARTIES

1. The Secretary's Contentions

The four contract miners working underground were a group and Respondent was therefore obligated to provide a multi-gas detector to the group.

2. Respondent's Contentions

The four contractor miners working underground were not a group, but were instead part of a larger group that was equipped with a multi-gas detector. The fact that the contract miners were within a five minute walk from Respondent's miners satisfies MSHA's question and answer publication which clarifies the requirements of 30 C.F.R. §75.1714-7(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Validity

Respondent was cited because the inspector found four contractors working together in the mine without a multi-gas detector. Furthermore, there were other miners within a five minute walk of the four contractors, though not working directly with them, who had multi-gas detectors. These facts are not in contest. The cited standard, 30 C.F.R. §75.1714-7(a) requires all individual miners or groups to have a working multi-gas detector. Therefore, the primary issue with respect to this violation is whether the four contractors were members of a discrete "group" that were not supplied with a multi-gas detector or were part of a larger "group" that included miners who had the required multi-gas detector. To a large extent, this topic boils down to the definition of the word "group."

Under well-settled Commission precedent, where the language 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 leave to absurd results. *Sedgman*, 28 FMSHRC 322, 329 (June 2006); and *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *Id.*

Here, the term "group" is not given a statutory definition. The Merriam-Webster dictionary defines a group as, "two or more figures forming a complete unit in a composition" and "a number of individuals assembled together or having some unifying relationship." *Merriam-Webster Dictionary* (11th Ed. 2003). In the context of the standard, there is no real question as to the meaning of the term. "Group" in the context of §75.1714-7(a) cannot mean anything other than two or more workers acting together as a unit, in a discrete area, with knowledge that they are members of a group. In this situation, the four contractors functioned as a discrete and separate unit. They acted together to perform foreman work. There is no other way to describe the four contractors as anything other than a "group." At the same time, it would be absurd to consider other employees, even those employees working nearby, to be considered a part of their "group." There is no evidence in the record that they interacted with Respondent's

direct employees on the Longwall or in any way coordinated their work. The plain meaning of the word “group” will not support such a contention.

Beyond the plain meaning of the word group, considering the four contractors as part of the longwall group would have a negative effect on the safety of miners. The Commission has interpreted that the plain meaning of a term along with the overall purpose of the Act. *Local union No. 5817, District 17, United Mine Workers of America v. Monument Mining Corp. and Island Creek Coal Company*, 9 FMSHRC 209, 211-212 (Feb. 1987); *see also* 30 U.S.C.A. § 801(a) (“the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner.”) I credit the testimony of Inspector Reidmann that the contractors would not have heard the multi-gas detector alarm on the longwall. Furthermore, I credit Newhouse’s testimony that the contractors and the miners on the longwall were breathing different air, meaning that even if the longwall miners’ multi-gas detector did not go off, the contractors could be experiencing dangerous atmosphere. An understanding that miners breathing different air and outside of the range of the alarm are part of the same “group” as the longwall miners would place a technical reading of the term “group” over the Act’s primary goal of miner safety.

As I have decided to apply the plain meaning of the term “group,” there is no need to consider the level of deference accorded to the Secretary in this instance. Furthermore, there is no need to discuss whether Respondent had “fair notice” of the interpretation because the meaning of the standard was clear.¹³

¹³ Respondent presented several arguments to support its claim that the Secretary’s interpretation was not entitled to deference. Specifically, it claimed that the Secretary was inconsistent in his interpretation, that its current interpretation is a post-hoc rationalization, and that the interpretation would be absurd. However, it is only when the meaning is ambiguous that the judge is to consider the reasonableness of the Secretary’s interpretation. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must “look to the administrative construction of the regulation if the meaning of the words used is in doubt”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal LTDA v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (“Deference ... is not in order if the rule's meaning is clear on its face.”) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984); *see also Jim Walter Res.*, 28 FMSHRC 983, 987 (Dec. 2006); *Jim Walter Res.*, 19 FMSHRC 1761, 1765 (Nov. 1997); *Cannelton Indus.*, 26 FMSHRC 146, 151 (Mar. 2004). As I found that the meaning of the word “group” in the context of the standard was not ambiguous, there is not need to consider the deference accorded to the Secretary.

However, even if this definition of “group” simply were the Secretary’s interpretation, I do not believe Respondent’s arguments attacking the reasonableness of that definition are compelling. For example, Respondent’s argument relies on the 2007 Emergency Mine Evacuation Final Rule Questions and Answers. That document included a question asking if individual miners working within a five minute walking distance were each required to carry a detector. The answer said, “No, if it is practical and logical for these miners to quickly assemble

(continued...)

2. Gravity and S&S Discussion

With respect to the gravity of this citation, I credit the testimony of Inspector Reidmann. He presented evidence that if the four contractors encountered dangerous conditions; they would be unaware of the danger. As a result, those miners could have been trapped in an area with low oxygen and/or carbon monoxide and loss of consciousness or even been injured by a methane explosion. The possibility of low oxygen or carbon monoxide is a real danger in a coal mine.

¹³(continued...)

prior to evacuation, only one multi-gas detector is required for this group.” Respondent argues that it this means the four miners were part of the longwall group. However, Respondent ignores the fact that individual miners are only considered part of a group if, “it is practical and logical for these miners to assemble quickly prior to evacuation.” As already shown, the Secretary’s witnesses credibly testified that the contractors would not have heard the alarm. Therefore, it would not have been practical for those contractors to quickly assemble in order to evacuate. Instead, miners on the longwall that heard the alarm would have had to immediately act as a rescue crew and go searching for the contractors rather than themselves safely assembling for evacuation. Further, as those miners were in different air, there was no practical way for the contractors to know if they were experiencing dangerous atmosphere and were in need of evacuation.

In a related argument, Respondent contends that the Secretary’s interpretation of the term “group” has been inconsistent in light of the above “answer” and that its use of the interpretation urged at hearing was a post-hoc rationalization. However, as shown above, the Secretary’s position at hearing, as well as the 2007 Question and Answer, are consistent with the language of the standard and with one another. If anything, it appears that the Respondent is the party engaging in post-hoc rationalization of its position. The evidence clearly showed that at all other times, Respondent provided an escort with a multi-gas detector to the contractors. (Tr. 360, 410-411). It was only when they were cited in this particular instance that it argued that these miners were part of a larger group.

Finally, Respondent argues that the Secretary’s interpretation is absurd because it would be unclear whether a group is determined by “minimum distance” or “common task.” It noted that miners working on separate tasks but “within arms reach” might not be considered a group and require a separate multi-gas detectors. I do not believe there is any uncertainty. The issue is not whether “minimum distance” or “common task” denotes a group; those are two equal aspects of the definition of “group.” Miners at a distance from other miners are not part of the same “group” for the reasons discussed already, namely different air courses and inability to hear an alarm. At the same time, miners working on a different task, even if close by, are not part of a “group” because, as they are not part of a unit working together, they may leave the area without being noticed or accounted for at any time. In essence, miners working in a group share a known responsibility towards a particular task and also for one another. A miner outside of that shared task could easily be left outside of the group’s sense of reasonability as well. That is why a worker conducting an unrelated task, even if close, might be considered outside of a “group.” There is nothing absurd about that result.

Furthermore, this was a gassy mine on a five-day spot with a history of face ignitions, making a face ignition possible. (Tr. 367-368). As a result, I agree with the Secretary's findings that this hazard was reasonably likely and possibly fatal.

As stated previously, in order to establish S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard 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 at 3-4.

As shown above, there was an underlying violation of the mandatory safety standard.

With respect to the second factor, Respondent argues that the failure to provide the contractors with a multi-gas detector did not contribute to a safety hazard because the contractors were not engaged in an activity that risked ignition.¹⁴ (*Respondent's Post-Hearing Brief* at 48-49). It may be true that the contractors were not engaged in an activity that risked ignition but that does not change the fact that they were near the face where mining activity was taking place. In the event of an inundation of methane, those contractors would have no warning. Further, in order to be S&S, a violation need not be shown to cause a hazard, it need only contribute to a hazard. The fact that the miners did not have a multi-gas detector would contribute to the hazard of explosion in some way, regardless of the possible causes of ignition. Finally, methane ignition is not the only hazard possible. The miners could enter an area with carbon monoxide or low oxygen and lose consciousness, regardless of the presence of explosive gases.

Respondent also argues that, in the event of an incident, the contractors would have been among the first warned of danger because of their location. This would only be true if the contractors happened to be in a location where they could be easily warned. There is no evidence to suggest that evacuating miners would definitely come in contact with the contractors. Even if they would, that protection would only help those contractors if they were in the same atmosphere as the miners with multi-gas detectors. If the contractors were in an area with methane, low oxygen, or carbon dioxide while the other miners were not, there would be no warning. Therefore, the failure to provide multi-gas detectors to the miners contributed to the hazard of exposure to explosion or to asphyxiation.

With respect to the third and fourth factors of *Mathies*, There is no question that an explosion or asphyxiation would cause an injury to the contractors. Furthermore, such an injury would be serious, perhaps even deadly. As a result, I hold that this violation was S&S.

¹⁴ Respondent also argues that there was no danger of ignition because there was no methane was present. (*Respondent's Post-Hearing Brief* at 48). However, as Respondent is apparently aware based on other arguments in the brief, as an emergency standard, an event is assumed when considered the S&S nature of the violation. *Cumberland Coal Resources, LP*, 33 FMSHRC 2537 (Oct. 2011).

3. Negligence

Respondent knew or should have known that the contractors should have been provided with a multi-gas detector. In fact, the Secretary presented evidence that Respondent had always sent the contractors with an escort in the past equipped with a multi-gas detector. (Tr. 360, 410-411). This shows that Respondent was aware that these miners were a “group” and that they were required to provide a multi-gas detector for them. I credit Reidmann’s testimony that Respondent’s actions were only moderately negligent because they had attempted to comply with the standard in the past. (Tr. 370-372).

4. Penalty

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed a penalty of \$3,143.00 for Citation No. 8006753. While the Secretary’s proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will not evaluate each of those factors in turn with respect to penalty for Citation No. 8006753:

- a. The operator’s history of previous violations – Respondent was cited four times under Section 75.1714-7(a) in the past two years.
- b. The appropriateness of the penalty compared to the size of the Operator’s business – Emerald Mine No. 1 produces 6,343,350 tons of coal annually and Respondent produces 69,624,256 tons of coal annually in all its operations. According to MSHA’s penalty assessment guidelines this gives Emerald Mine No. 1 15 “mine size points” out of a possible 15 and Respondent 10 “controller size points” out of a possible 10. *See* 30 CFR § 100.3(b). Thus, Respondent is a very large operator with a very large mine.
- c. Whether the Operator was negligent – as previously shown, the operator exhibited moderate negligence.
- d. The effect on the Operator’s ability to remain in business – the parties have stipulated that the citations at issue here would not affect Respondent’s ability to remain in business.
- e. The gravity of the violation – as previously shown, this violation was reasonably likely to cause injury, or illness that could reasonably be expected to be fatal.
- f. The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was rapidly abated in good faith.

I **AFFIRM** Citation No. 8006753 as issued as well as the Secretary's proposed penalty assessment of \$3,143.00.

ORDER

Respondent, Emerald Coal Resources, LP, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$8,143.00 within 30 days of the date of this decision.¹⁵

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

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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

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March 27, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2010-39
Petitioner	:	A.C. No. 12-02010-197503-01
	:	
v.	:	Docket No. LAKE 2010-106
	:	A.C. No. 12-02010-200613-03
	:	
BLACK BEAUTY COAL COMPANY,	:	
Respondent	:	Air Quality #1 Mine

DECISION

Appearances: Nadia A. Hafeez, Esq., and Matthew M. Linton, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Author M. Wolfson, Esq., and Page Jackson, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, and Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Black Beauty Coal Company, owned by Peabody Midwest Mining, LLC (“Peabody”) 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”). The parties introduced testimony and documentary evidence at a hearing held in Evansville, Indiana, and filed post-hearing briefs.

Peabody operated the Air Quality #1 Mine in Knox County, Indiana. A total of three section 104(a) citations and four 104(d)(2) orders of withdrawal were adjudicated at the hearing. Two orders and 49 citations settled in these dockets.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8421043; LAKE 2010-106

On August 28, 2009, Inspector Philip Douglas Herndon issued Citation No. 8421043 under section 104(a) of the Mine Act, alleging a violation of section 75.1403-5(g) of the Secretary’s safety standards. (Ex. G-3). The citation stated that the walkway around the Main South slope tail was not being maintained because the walkway was covered in a layer of mud

that was about 1 foot deep, 5 feet wide, and 9 feet long. The citation stated that the muddy conditions made travel around the tail slick and hazardous. Inspector Herndon determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was significant and substantial (“S&S”), the operator’s negligence was high, and that one person would be affected. Section 75.1403-5(g), which is a safeguard criterion, states that “a clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970.” 30 C.F.R. § 75.1403-5(g). The Secretary proposed a penalty of \$3,689.00 for this citation.

Background

Inspector Herndon testified that the mud he encountered made the travelway slick and created a hazard to miners traveling in the area. (Tr. 30-31). He determined that the conditions violated Safeguard Notice No. 7591942. The conditions made it reasonably likely that a miner traveling in the area would slip, fall, and come into contact with sharp objects in the area such as the belt structure or the tailpiece. (Tr. 21-32). He concluded that any injuries would likely result in lost workdays or restricted duty. He determined that Peabody’s negligence was high because mine examiners were required to walk through the area to conduct examinations. (Tr. 33). Peabody previously received citations for muddy conditions in the same location. (Tr. 33-35). Indeed, the inspector testified that he previously fell in the cited area as a result of muddy conditions. *Id.*

Safeguard Notice No. 7591942 was issued on May 7, 2003, and was modified on August 9, 2007. (Ex. G-1). The safeguard was issued because rib coal and rib rock fell into the travelway along each side of the 2-A conveyor belt at crosscut 17. The safeguard notice required Peabody to maintain a 24 inch travelway on both sides of all belt conveyors. The safeguard notice was modified in August 2007 to include a requirement that “the 24 inch travelway shall be clear of mud and water.” *Id.*

Discussion and Analysis

Peabody maintains that this safeguard notice, as modified, is invalid and should be vacated. I previously held that Safeguard Notice No. 7591942 is valid and enforceable as modified. *Black Beauty Coal Co.*, 36 FMSHRC ____, slip op. at 23, No. LAKE 2009-414 (March 10, 2014).¹ For the reasons set forth in that decision, I affirm my holding that the safeguard notice was validly issued and modified.

Inspector Herndon testified that he observed mud on the right side of the tail that presented a slipping hazard. (Tr. 31). He did not measure the muddy area, he simply estimated the dimensions. (Tr. 42). At the hearing, the inspector did not testify about the width of the travelway or how much of the travelway’s width was compromised by mud and water.

¹ Commission Judge Miller also determined that this safeguard notice was valid including the modification. *Black Beauty Coal Co.*, 33 FMSHRC 1504, 1517-18 (June 2011) (ALJ).

Randall Hammond was Peabody's escort during Inspector Herndon's inspection of the mine on August 28, 2009. He testified that the citation was issued at the tail of the Main South Slope belt, which is a transfer point between the Main South Belt and the Main South Slope belt. (Tr. 48). The area is often wet because water is applied to the belts, scrapers wipe water from the bottom belts, and the area is frequently washed to clean up accumulations. Peabody constructed a 24 inch wide wooden bridge on the left side of the tail area parallel to the transfer point. (Tr. 48-49; Ex. R-2, R-3). Peabody also placed wooden pallets at the cross-under point of the Main South belt to create a walkway. *Id.* Hammond testified that the travelway on the right side of the tail structure was 10 feet wide and there was room for safe passage despite the presence of mud and water. (Tr. 51, 57). He said that he walked through the area during the inspection without stepping in mud or water. He took measurements in the area. At least 5 feet of the 10 foot travelway was clear of mud and water. (Tr. 52, 58).

Peabody maintains that Citation No. 89421043 should be vacated because the Secretary did not establish a violation of the safeguard. Peabody does not dispute that there was mud on the right side of the tail, but argues that the presence of mud does not establish a violation because the safeguard notice requires that a "24-inch travelway shall be clear of mud and water." (Ex. G-1 at 3). Hammond testified the muddy area was near the corner of the tail so that there was at least a clear 24-inch wide walkway provided between the muddy area and the rib. (Tr. 53; Exs. R-2, R-3). Consequently, the Secretary failed to prove a violation.

I credit the testimony of Hammond as to the measurements that he took. I also note that Inspector Herndon did not compare the width of the subject travelway to the width of the wet and muddy area to see if 24 inches of clearance was provided.² The presence of mud in a travelway does not establish a violation of the safeguard notice unless there is not a clear 24-inch path along the travelway. The Secretary bears the burden to establish a violation of a safeguard notice. *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1785-86 (Nov. 1997). The Secretary assumed that the presence of mud in the travelway established a violation due to the hazards presented. Although the Secretary's authority to issue safeguards is broad, the language of a safeguard must be construed narrowly. *Cyprus Cumberland*, 19 FMSHRC at 1785; *Southern Ohio Coal Co.*, 7 FMSHRC 590, 512 (April 1985).

Citation No. 8421043 is therefore **VACATED**.

B. Order No. 8421014; LAKE 2010-39

On August 5, 2009, Inspector Herndon issued Order No. 8421014 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.400 of the Secretary's safety standards. (Ex. G-6). The order states, in part, that the Main South Slope Belt was operating

² Both Inspector Herndon and Hammond are experienced miners. The inspector had about 27 years of coal mining experience including 3 years as an MSHA inspector. (Tr. 27). Hammond also had about 27 years of coal mining experience including several years as director of the Indiana Bureau of Mines. (Tr. 47).

while in contact with an accumulation of coal fines that was 6 feet wide and 10 feet long. The coal fines were black in color and dry. The inspector alleged that the accumulations should have been obvious to the “most casual of observers.” *Id.*

Inspector Herndon determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator’s negligence was high, and that three people would be affected. Section 75.400 states that “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” 30 C.F.R. § 75.400. The Secretary proposed a penalty of \$15,971.00 for this order.

Background

This order was issued in the same area as Citation No. 8421043, discussed above. At this location the Main South belt dumped coal onto the Main South slope belt, which transported coal out of the mine.³ Inspector Herndon observed that the Main South slope tail was running and the belt was contacting an accumulation of coal fines. (Tr. 61). The accumulation was about 18 inches deep. (Tr. 65-66). The guard around the tail was packed with accumulations so that when the guard was removed, about three feet of fines were released. (Tr. 66). Inspector Herndon determined that the coal fines took a significant amount of time to accumulate in the area. He was especially concerned because the coal fines were compacted and conformed to the shape of the belt. (Tr. 67; Ex. G-6). The fines were dry where the rollers contacted them. (Tr. 63, 89).

Timothy Thompson, a safety technician for Peabody, accompanied Inspector Herndon on August 5, 2009. He testified that the area cited by the inspector was wet. (Tr. 93). The slope belt tail was installed upon a concrete pad and water tended to accumulate in the area because it was in a low lying area. (Tr. 94). Thompson testified that there is water is on the South Slope belt and water sprays were directed at the head roller on the Main South Belt. (Tr. 95). This water tends to drip down toward the tail piece of the South Slope belt. (Tr. 96; Ex. G-7 at 11). There were also CO sensors inby the location of the tail for the South Slope belt that notify the control center on the surface in the event of an increase in carbon monoxide levels. (Tr. 97-98).

The Secretary argues that the violation was S&S because the evidence establishes that the moving belt and turning rollers contacted dry coal fines. (Sec’y Br. 17; Tr. 63, 73, 75). The discrete safety hazards created were the inhalation of smoke and burns suffered by miners fighting a fire. It was reasonably likely that a fire would start and seriously injure a miner in the area.

The Secretary also maintains that the inspector’s unwarrantable failure determination is supported by the evidence. The inspector determined that Peabody knew about the condition for five production shifts because it was recorded in the belt books that long. (Ex. G-8). Peabody

³ At the time of the hearing, Peabody was no longer using the South Slope and the Main South belts. It had consolidated its operations to the west side of the mine.

was also warned about accumulations in this area many times. The operator was deliberately ignoring the problem.

Peabody, on the other hand, contends that the violation was not S&S because a confluence of factors that would make a fire reasonably likely was not present. The material cited was wet and much of it was made up of noncombustible material. The evidence establishes that the area was consistently wet and, assuming continued normal mining operations, it would have remained wet. (Peabody Br. 17; Tr. 73, 93). In addition, three miners were shoveling in the area so it can be inferred that the condition would have been cleaned up in a short period of time. It was not reasonable likely that a fire would start or that anyone would be seriously injured if the material began to smolder.

Peabody also maintains that the Secretary did not establish that the violation was the result of its unwarrantable failure to comply with the safety standard. The evidence shows that the accumulation was not extensive; it would not have been present for a long period of time; and it did not pose a high degree of danger. Peabody was in the process of removing the accumulation and it was not on notice that additional efforts were needed to remove accumulations at the mine.

Discussion and Analysis

I find that the violation was serious but the Secretary did not establish that the violation was S&S.⁴ I find that it was unlikely, taking into consideration continuing mining operations, that the cited condition would have ignited or created a fire. I reach this conclusion for several reasons. First, I find that the evidence establishes that the material in the area was wet and much of it was incombustible mud and rock. Although I credit the inspector's testimony that the material that contacted the belt was dry, the remaining material was too wet to burn and would not have dried out quickly. It was not reasonably likely to ignite. Second, it was not reasonably likely that anyone would suffer smoke inhalation or burns because it was unlikely that the condition would have led to an event in which significant smoke was produced. Although there was a remote possibility that some smoldering would have occurred in the event the accumulations were not removed, the evidence establishes that it would have been localized and

⁴ 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). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). 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 mine's firefighting team would not have been exposed to the hazards of burns or smoke inhalation. Third, Peabody's Belt & Roadway Inspection Reports (the "Inspection Reports") establish that during many shifts when the examiner discovered accumulations in the cited area, actions were taken to remove them. During the shifts immediately preceding the inspection, Inspection Reports note that there were mud and fines at the tail and that either work was in progress to remove the mud and fines or that the area was washed down. (Ex. G-8). Peabody did not ignore the accumulations. Miners were shoveling accumulations in the area at the time of the inspection. There was no methane present; other sources for an ignition were not present; and the area was a long distance from working sections of the mine. The gravity was serious.

I also find that the Secretary did not establish that the violation was the result of Peabody's unwarrantable failure to comply with the safety standard.⁵ Peabody was negligent with respect to this violation but its negligence did not rise to the level of aggravated conduct. The violation was obvious because Peabody knew that it was common for coal fines, muck, and mud to accumulate at the bottom of the South Slope belt. The area was consistently wet, however, and was frequently cleaned. Although accumulations had been present for several shifts, the area was cleaned regularly and miners were shoveling in the area. It is not clear how long the particular accumulation discovered by the inspector was present. Peabody, through its examiners, knew that material frequently accumulated around the tail of the South Slope belt. The condition did not pose a high degree of danger as discussed above. The accumulation was mostly wet and included mud and muck. Peabody was aware that MSHA issued many citations for accumulations along belt lines over the previous few years. (Ex. G-26). MSHA instituted a belt initiative following the fire at Aracoma Coal Company's Alma Mine belt fire. MSHA routinely warned mine operators, including Peabody, to do a better job of keeping their belts clean.

In a previous case, I came to the same conclusion with respect to two accumulation violations issued in February 2009 near the tail of the South Slope belt and along the outby end of the Main South belt. *Black Beauty Coal Co.*, 36 FMSHRC _____, slip op. at 12-18, No. LAKE 2009-413 (Mar. 10, 2014). I determined that Peabody violated section 75.400 and that the violations were serious but were not S&S or the result of an unwarrantable failure. My reasoning in this case parallels my reasoning with respect to those violations.

⁵ Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir. 1995). 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 e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

Order No. 8421014 is **MODIFIED** to a section 104(a) non-S&S citation with moderate negligence. The violation was serious. A penalty of \$12,000.00 is appropriate for the present violation.

C. Order No. 8420824; LAKE 2010-39

On August 5, 2009, Inspector Anthony DiLorenzo issued Order No. 8420824 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.363(a) of the Secretary's safety standards. (Ex. G-10). The order states that the conditions described in Citation No. 8420822 existed since July 28, 2009, and no apparent effort was made to correct the conditions. The order states that the conditions described in the citation were extensive, obvious, existed for a significant length of time, and were included in the Inspection Records since July 28, 2009. The underlying section 75.400 violation described in the citation occurred along the 5 C belt and consisted of an accumulation of combustible material from crosscut 0 to crosscut 13.⁶

Inspector DiLorenzo determined that an injury was unlikely, but that any injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was not S&S, the operator's negligence was high, and that four people would be affected. Section 75.363(a) states, as relevant here, that any "hazardous condition found by a mine foreman or equivalent mine official . . . [including mine examiners] . . . shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected." 30 C.F.R. § 75.363(a). The Secretary proposed a penalty of \$4,000.00 for this order.

Background

Inspector DiLorenzo testified that the 5 C belt advances with the working section as it progresses further into the mine. (Tr. 106). The accumulations consisted of loose coal, coal fines, and float coal dust that were black in color. The coal dust was upon all surfaces and structures. Piles of coal and coal fines were under the head and tail in an area that was 2 feet wide, 3 feet long, and 16 inches deep. *Id.* Loose coal and rib rolls were also present along both ribs up to 20 inches deep, 2 feet wide, and 15 feet long. This condition was continuously listed in the Inspection Reports since the day shift of July 28, 2009. (Tr. 107; Ex. G-12). At the hearing, Inspector DiLorenzo went through the Inspection Reports to show where the entries were made for belt 5 C and what the entries said. (Tr. 108-09). The inspector believed that an ignition or fire was unlikely because there were no friction or ignition hazards. (Tr. 110).

Hammond explained that on the front page of each Inspection Report for a particular shift, the examiner records any "violations or hazardous conditions" that are discovered along a beltline. (Tr. 127). The examiner records on the back of the page any actions taken to remedy the hazards or violations recorded on the front of the page and also may add additional remarks concerning the conditions he observed along the belts. These remarks are "conditions that are observed by an examiner which he deems are not hazardous conditions or violations." *Id.* By

⁶ Peabody paid the Secretary's proposed penalty for this citation so the conditions described therein are deemed admitted.

company policy, any conditions recorded in the “Violations or Hazardous Conditions” column on the front of the page are to be corrected immediately. (Tr. 128). Conditions listed in the “Remarks” column do not require immediate attention.

Hammond did not dispute that the conditions described in Citation No. 8420822 by Inspector DiLorenzo existed on August 5, 2009. (Tr. 129-30; Ex. R-16). Nevertheless, he does not believe that the conditions set forth in the citation created a hazard because there were no ignition sources that could ignite the accumulations. (Tr. 130). He testified that the presence of coal in a coal mine does not constitute a hazard because “coal in itself is not a hazardous condition.” *Id.*

Discussion and Analysis

Peabody contends that all the references in the Inspection Reports to areas along the 5 C belt that needed to be cleaned were in the remarks section on the back page for each shift. These entries did not document hazardous accumulations that needed to be immediately removed but documented conditions that needed attention but were not hazardous. When the inspector issued the underlying citation, he determined that the accumulations were unlikely to result in an injury, which confirms the examiners’ conclusion that the conditions did not present a hazard. Peabody argues that section 75.363(a) was not violated because “hazardous conditions” were not “found” by the mine examiners. The conditions that the examiners found and recorded in the comments section were not required to be immediately corrected because they were not hazardous.

The Secretary argues that the conditions the inspector observed created the safety hazards of inhalation of smoke and burns. A violation need not be S&S to create a hazardous condition. The lack of ignition sources, while relevant when considering whether the cited condition was S&S, is not relevant when considering whether a hazard existed. (Sec’y Br. 23). The Secretary states that any injuries resulting from the accumulations “could reasonably be expected to result in lost workdays or restricted duties.” Sec’y Br. 21.

In *Black Beauty Coal Co.*, Commission Judge Miller set out the following test for analyzing whether the safety standard has been violated:

In order to establish a violation, the Secretary must first demonstrate that “hazardous conditions” existed. Next, she must establish that the hazard had not been corrected or posted. Hence, the Secretary has the burden of demonstrating that the conditions listed by [the inspector] are a hazard, that they can cause damage or accidents. Once the existence of a hazard has been established, the focus shifts to the actions, if any, taken to remediate the condition.

33 FMSHRC 1504, 1511 (June 2011) (ALJ).

Whether the conditions observed by Inspector DiLorenzo were hazardous is a close question. In Citation No. 8420822, the underlying citation that was issued under section 75.400

for the accumulations, was marked as non-S&S, and an injury or illness was marked as “unlikely.” The accumulations were extensive, but there were no ignition sources in the area.

In *Enlow Fork Mining Co.*, the Commission considered a similar issue under section 75.360(b). 19 FMSHRC 5 (Jan. 1997). That safety standard requires that persons conducting preshift examinations “shall examine for hazardous conditions and violations of mandatory health or safety standard . . .” 30 C.F.R. § 75.360(b). There is no indication that the Secretary intended the term “hazardous conditions” to have a different meaning in section 75.360(b) than in section 75.363. In *Enlow Fork*, the Commission held:

Section 75.360(b) requires that a preshift examiner “examine for hazardous conditions.” We reject Enlow’s argument that, because the judge concluded the . . . accumulations were not S&S, they were not “hazardous” within the meaning of section 75.360(b). The plain language of section 75.360(b) does not support Enlow’s construction. Section 75.360(b) does not specify that hazardous conditions are only those reasonably likely to result in serious injury, nor does that section repeat the S&S language from section 104(d) of the Act, requiring that the conditions be “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard”

Section 75.360(b) does not define the phrase “hazardous condition.” However, the Commission recognized in *National Gypsum* that, based on its dictionary definition, a “hazard” denotes a measure of danger to safety or health. 3 FMSHRC at 827 & n.7. The Commission has approved the definition of “hazard” as “a possible source of peril, danger, duress, or difficulty,” or “a condition that tends to create or increase the possibility of loss.” *Id.* (citing *Webster’s Third New International Dictionary* 1041 (1971)). Accumulations of combustible materials have been recognized by Congress and this Commission as representing hazardous conditions. (citations omitted).

19 FMSHRC at 14. The Commission concluded that “accumulations of combustible materials qualify as hazardous conditions that should be recorded by a preshift examiner when found.” *Id.* at 15. Although I conclude that there may be accumulations that should not be considered a hazardous condition, I credit that testimony of Inspector DiLorenzo that the accumulations were obvious and extensive. (Tr. 111-12). Consequently, the accumulations were a hazardous condition that was required to be immediately removed.

The Inspection Reports indicated that accumulations were “found” along the 5 C Belt for several shifts between July 28, 2009, and August 5, 2009. (Ex. G-12). These conditions were recorded in the comments section of the Inspection Reports. The issue is whether Peabody took actions to immediately remove the hazardous conditions after they were found. Peabody argues that it did, as recorded in the Inspection Reports:

July 29, 2009, midnight shift: “cleaned tail” (Ex. G-12 at 180).
July 31, 2009, day shift: “Drive pressings-cleaned” (Ex. G-12 at 195).
August 1, 2009, midnight shift: “Drive pressings-cleaned” (Ex. G-12 at 197).
August 1, 2009, afternoon shift: “Drive pressings-cleaned” (Ex. G-12 at 199).
August 3, 2009, day shift: “Cleaned tail” (Ex. G-12 at 209).

(Peabody Br. at 25). The Secretary does not dispute these notes, but contends that there are no similar notations for other shifts and, more importantly, there is no indication that the entire beltline was completely cleaned during this period. The inspector testified that the accumulation extended for about 13 crosscuts along the beltline and that he observed different types of combustible material along the belt including loose coal, coal fines, and float coal dust. (Tr. 106). Given the size of the accumulation, Inspector DiLorenzo believed that it had existed for a lengthy period of time.

I find that although Peabody had performed some cleanup work, the Secretary established that Peabody failed to remediate the condition. I find that the Secretary established a violation of 75.363(a) because it did not immediately remove the accumulation.

The Secretary maintains that all the factors relevant to high negligence and unwarrantable failure findings are met. The violation existed for one week. The underlying violation was obvious and extensive, with accumulations along the belt for 13 crosscuts. Peabody was placed on notice that greater efforts were necessary to comply with section 75.400. Peabody knew of the violative conditions, as documented in the Inspection Records, but allowed them to continue for many days. The underlying condition presented a discrete safety hazard.

Peabody contends that the Inspection Reports demonstrate that it cleaned areas along the belt at least five times between July 29 and August 5, 2009. The evidence establishes that Peabody took deliberate steps to keep its beltlines clean. The cited condition did not present a high degree of danger because there were no ignition sources present. Indeed, in both the underlying citation and the subject order the inspector determined that an injury was unlikely. The company’s examiners acted in good faith when they reasonably determined that, because no ignitions sources were present, the accumulations did not create a hazardous condition.

Although the Secretary established some of the unwarrantable failure elements, I find that Peabody’s conduct did not demonstrate an unwarrantable failure to comply with section 74.363(a). Peabody regularly examined the 5 C belt and carefully monitored conditions along the belt. It removed accumulations near the head and tail as needed. It reasonably and in good faith believed that a hazardous condition does not exist unless ignition sources are present. If accumulations were close to the bottom of the belt or rollers and pulleys, it immediately cleaned the accumulation.

In *Kellys Creek Resources, Inc.*, the Commission held that “if an operator acted on the good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was *objectively reasonable under the circumstances*, the operator’s conduct will not be considered to be the result of unwarrantable failure when it is later determined that the operator’s

belief was in error.” 19 FMSHRC 457, 463 (Mar. 1997) (emphasis added). I credit the testimony of Hammond that Peabody did not consider that the conditions along the 5 C belt created a hazard because there were no ignition sources that could ignite the accumulations. (Tr. 130). Coal is everywhere in a coal mine with the result that its mere presence does not necessarily create a hazard. Consequently, Peabody reasonably believed an accumulation was not a “hazardous condition,” as that term is used in the safety standard, if no ignition sources were present.

It is difficult to ascertain how long the accumulations Inspector DiLorenzo observed had existed. More than likely some of the accumulations existed for a shift or longer. I find that Peabody’s violation of section 75.363(a) was not the result of its unwarrantable failure to comply with that standard. I find that the violation was serious and was a result of low negligence.

Order No. 8420824 is **MODIFIED** to a section 104(a) citation with low negligence. A penalty of \$2,000.00 is appropriate for this violation.

D. Citation Nos. 8420857 and 8420858; LAKE 2010-106

On August 31, 2009, Inspector DiLorenzo issued Citation No. 8420857 under section 104(a) of the Mine Act, alleging a violation of section 75.403 of the Secretary’s safety standards. (Ex. G-13). The citation stated that two out of 13 samples collected along the 2 Right, 3 Right, 4 Left in the 4 Main North intake and return air courses contained less than the percent of incombustible content required by the standard. Inspector DiLorenzo determined that an injury was unlikely to occur. Further, he determined that the violation was not S&S, the operator’s negligence was high, and that 10 people would be affected.

At the time this citation was issued, section 75.403 stated that where rock dust is required, “it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum.” 30 C.F.R. § 75.403. The Secretary proposed a penalty of \$3,405.00 for this citation.

On August 31, 2009, Inspector DiLorenzo issued Citation No. 8420858 under section 104(a) of the Mine Act, alleging a violation of section 75.403 of the Secretary’s safety standards. (Ex. G-14). The citation stated that 12 out of 33 samples collected along a different area of the 1 Right, 3 Right, 4 Left in the 4 Main North intake and return air courses contained less than the percent of incombustible content required by the standard. Inspector DiLorenzo determined that an injury was unlikely to occur. Further, he determined that the violation was not S&S, the operator’s negligence was high, and that 10 people would be affected. The Secretary proposed a penalty of \$3,405.00 for this citation.

Background

Inspector DiLorenzo testified that he took samples only from the floor of different areas off the 4 Main North entry (MMU-005) because the roof and ribs were too wet to take samples.

(Tr. 143). He did not specify in his notes why he only took floor samples. (Tr. 154-55). Two of the first 13 samples collected contained less than the required percentage of incombustible material when tested by MSHA's laboratory. (Tr. 142-43; Ex. G-16). He issued Citation No. 8420857 based upon these noncompliant samples.

Inspector DiLorenzo then traveled to a different area of MMU-005 and took 33 samples off the 4 Main North. The inspector testified that he took all these samples except one from the floor of the mine because the ribs and roof were too wet. (Tr. 148; Ex. G-16). Again, the inspector's contention that the roof and ribs were too wet to sample is not documented in his contemporaneous notes. MSHA's laboratory determined that 12 of the 33 samples collected contained less than the required amount of incombustible material. *Id.* He issued Citation No. 8420858 based upon these noncompliant samples.

When taking samples under section 75.403, MSHA inspectors generally take band samples. Samples are taken from the roof, ribs, and floor following a procedure set forth in MSHA's General Coal Mine Inspection Procedures Handbook. (Ex. R-22 at 33-39). Steven Kattenbraker, a mine safety consultant and former MSHA Field Office Supervisor, testified on behalf of Peabody and described the procedures used by inspectors to determine if sufficient rock dust has been applied; samples should be taken from representative areas of the roof, ribs, and floor and the inspector should note if an area is too wet to sample. (Tr. 183-95). He believed that it was unusual for the roof and ribs to be too wet to sample at a given location when the floor is sufficiently dry to sample. (Tr. 193). Typically, if the roof and ribs are too wet, then the floor is too wet as well. *Id.*

Discussion and Analysis

Peabody contends that because the inspector did not take a band sample and only took spot samples from the floor, the rock dust survey was deficient and the citations must be vacated. There is no question that Inspector DiLorenzo did not take band samples as specified in the Coal Mine Inspection Procedures Handbook because all the samples except one were taken from the mine floor. The issue is whether that fact alone should invalidate the samples.

The safety standard does not require that band samples be taken. In *Consolidation Coal Co.*, Commission Judge Jerold Feldman held “[w]hen an MSHA inspector departs from recommended procedure by collecting floor samples instead of band samples as representative of mine conditions, the Secretary must bear the burden of demonstrating the samples are representative.” 22 FMSHRC 455, 465-66 (Mar. 2000) (ALJ). Judge Feldman vacated the order alleging a violation of section 75.403 because the inspector sampled areas on the mine floor that the inspector believed looked “really bad” rather than random samples. *Id.*

I find that the conditions described in Citation Nos. 8420857 and 8420858 violated section 75.403. I agree with Judge Feldman's analysis of the issue. I find that the evidence establishes that Inspector DiLorenzo took random samples from the floor. (Tr. 140-42, 151). There is no evidence that he looked for areas where the layer of rock dust appeared to be especially thin and that he collected the samples from those locations. He followed the inspection handbook except he did not sample from the ribs and roof. There is nothing in the

record to suggest that, in following this procedure, he obtained results that were unrepresentative of the mine environment. I find that the Secretary established a violation in each instance.⁷

The violations were non-S&S. At the hearing, Inspector DiLorenzo agreed that only one miner would be affected and not ten as he alleged in the citations. (Tr. 144, 149). I reduce the gravity of the violations.

I find that the Secretary did not establish that the violations were the result of Peabody's high negligence. Both violations occurred in return air courses. These areas are only regularly traveled by weekly examiners, who are required to travel the length of one entry. (Tr. 148, 162, 165). There is no evidence as to how long the cited conditions existed. The inspector did not issue the citations based upon his visual observations. He did not determine that the area needed to be sampled because the rock dust levels appeared to be low. When the area became return air courses, the area was no longer active but coal dust could have been deposited in the area. The only justification for the high negligence determination was Inspector DiLorenzo's general testimony concerning Peabody's compliance history under section 75.403. (Tr. 145-46; Ex. G-26).

The citations are **MODIFIED** to reduce the number of people affected by the violations and to reduce the negligence to moderate. A penalty of \$2,000.00 is appropriate for each of these violations.

E. Order No. 8416329; LAKE 2010-39

On June 17, 2009, Inspector DiLorenzo issued Order No. 8416329 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.364(b)(4) of the Secretary's safety standards.⁸ (Ex. G-19). The order states, in part, that an inadequate examination was conducted of the Main West seals on June 15, 2009. He determined that there were 12 inches of water at the #3 seal, 17 inches of water at the #6 seal, 14 to 17 inches of water at the #7 seal and up to 44 inches of water at the #8 seal. The order states that the pumps were de-energized at the time of the inspection.

Inspector DiLorenzo determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 75.364(b)(4) requires that at least once every seven days, "an examination for hazardous conditions" shall be made by a certified person "at each seal along return and bleeder air courses and at each seal along intake air courses. . . ." 30 C.F.R. § 75.364(b)(4). The Secretary proposed a penalty of \$4,099.00 for this order.

⁷ Peabody did not argue that there were insufficient numbers of noncompliant samples to establish violations of the standard.

⁸ The subject order is dated June 18, 2009, but Inspector DiLorenzo testified that his inspection was actually on June 17, 2009. (Tr. 215).

Background

Inspector DiLorenzo testified that the water at the #8 seal spanned the entire entry and spread outby toward the #7 seal for a distance of 45 feet. (Tr. 199; Ex. G-19). The water pumps in the area were de-energized and all the power cords were unplugged. (Tr. 204, 242). The inspector checked the record books which indicated that flooding was reported in the area on June 8, 2009, but the record for the most recent examination on June 15, 2009, reported no hazards in the area. (Tr. 203; Ex. G-20). Inspector DiLorenzo assumed that an adequate examination of the seals did not occur on June 15 because the water he observed on June 17 must have been present on June 15. (Tr. 215).

Peabody presented testimony concerning the chronology of events leading up to the time of the inspection. Peabody presented evidence that during a weekly examination of the area on June 8, 2009, Andrew Herndon, an examiner for Peabody, discovered that the area in front of several seals was flooded, including the #7 and #8 seals. (Tr. II 48).⁹ He recorded this condition in the record book. It was later documented in this book that pumping in the area was “in progress.” (Ex. G-22). Herndon’s next examination of the area was during the midnight shift on June 15. The water that was present on June 8 was no longer present; there was no water in the area at the time of his examination. (Tr. II 48). He was able to examine the face of the #8 seal and he put the date, time, and his initials upon the card at the seal face. (Tr. II 47).

During the midnight shift on June 16, Pumper John Lane was in the area to do permissibility examinations of the pumps. (Tr. II 19-20). He testified that the pumps were running and there was no flooding in front of the #8 seal. He de-energized the pumps in the area because he saw a broken discharge line just inby the main sump. (Tr. II 20-21). He needed to take this action to repair the discharge line, which took about two hours. (Tr. II 21-22). He restarted the pumps before he left the area.

Lane returned to the area on the midnight shift of June 17 to complete his permissibility examinations. He testified that the pumps were running and the area was not flooded. (Tr. II 23). He examined the explosion-proof, permissible electrical box called the “suitcase” and the surrounding electrical cables. (Tr. II 23-24). He wrote the date, time, and his initials upon the suitcase. The pumps were running and the area was not flooded when he left the area. *Id.*

Inspector DiLorenzo conducted an inspection of the Main West seals during the afternoon shift on June 17. His escort was Randall Hammond. (Tr. II 58). As the inspection party entered the area, Hammond noticed that the cat heads (plugs) at the electrical distribution box were disconnected and laying on top of the box. (Tr. II 59-60). When the inspection party arrived at the seals, the pumps were not working and the area was flooded. The flooding that was present at the time of MSHA’s inspection was not present the last time Lane was there on the midnight shift earlier that day. (Tr. II 25-26).

⁹ The transcript was renumbered the second day of the hearing. Transcript references designated with “II” refer to the second day of the hearing.

Discussion and Analysis

The area at the #8 shield was about 6 miles from the closest active area of the mine. This cited area was the lowest point at the mine and the #8 seal was at the bottom. A series of pumps were present to pump water out of the area, which was a continuous process. (Tr. II 10). If the pumps do not operate, the area will flood. (Tr. II 14-15). If water in front of seals impedes the examiner's ability to safely perform his weekly examination, a violation of section 75.364(b)(4) is established.

I find that the Secretary did not establish a violation of section 75.364(b)(4). The fact that the area was flooded at the time of Inspector DiLorenzo's inspection does not establish that the area was flooded during the previous weekly examination. The Secretary did not establish that the area was flooded at the time examiner Herndon conducted his examination on June 15.¹⁰ Inspector DiLorenzo assumed that the water that was present on June 17 was present on June 15. (Tr. 215). Proof that conditions existed at the time of an MSHA inspection is, by itself, insufficient evidence to infer that the condition existed at the time of the examination. *See e.g. Big Ridge, Inc.* 33 FMSHRC 718-19 (March 2011) (ALJ).

I credit the testimony of John Lane, Andrew Herndon, and Randall Hammond as to the chronology of events between June 8 and June 17. I find that their testimony was lucid, logical, and trustworthy. I find that the cited area was not flooded during Herndon's previous weekly examination and the area was not flooded when Lane left the area on June 17. The evidence establishes that Herndon conducted a proper weekly examination of the seals and that he placed the date, time, and his initials in the area. The Secretary did not establish that there were hazardous conditions present at the time of Herndon's examination. Consequently, Order No. 8416329 is **VACATED**.

F. Order No. 8416348; LAKE 2010-39

On July 1, 2009, Inspector DiLorenzo issued Order No. 8416348 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.364(b)(4) of the Secretary's safety standards. (Ex. G-23). The order states, in part, that an inadequate examination was conducted of the Main

¹⁰ At the hearing, the principal focus was on the #8 seal because that seal is at the lowest elevation and water in the cited area flows down to the #8 seal. (Tr. 198, 213). In his brief, the Secretary for the first time focused on the #6 seal. (Sec'y Br. 29-34). He argues that the water Inspector DiLorenzo discovered at the #6 seal on June 17, 2009, could not have developed to a depth of 17 inches in the time since the Lane and Herndon were in the area. He argues that a significant amount of water must have been present at the #6 seal when the last examination took place. He bases this argument on the configuration of the pumps, water lines, and sumps. I reject this argument because there is not enough evidence in the record to make this finding. The Secretary bears the burden of proof. It also presupposes that water would simply sit in front of the #6 seal and not flow down to the lower seals. Herndon credibly testified that, when the pumps were de-energized, the area in front of the seals would flood within a matter of hours. (Tr. II 16, 22).

West seals on June 29, 2009. A water level line with condensation below it was observed over 5 feet high on the #8 seal causing the surface plaster to crack and flake off. Water was leaking from the face of the seal and the condition of the mortar between the blocks evidenced that the cited condition existed for an extended period of time. The #4, #5, #6, and #7 seals were also observed with waterlines and condensation created by water impounded behind the seals. No hazards were listed in the weekly examination book.

Inspector DiLorenzo determined that an injury was reasonably likely and that any injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The Secretary proposed a penalty of \$4,099.00 for this order.

Background

When Inspector DiLorenzo traveled to the #8 seal on July 1, he saw that it leaked water. (Tr. 225). The surface plaster on the seal was cracking and flaking off up to the water line. There were also red/orange deposits running down the front of the seal. (Tr. 209). Other seals also had water lines with condensation below these lines. He determined that water had backed up behind several seals. The inspector concluded that Peabody's examiners were not performing adequate examinations because the hazard was not recorded and the conditions present would prevent an examiner from conducting an examination.

Lane conducted a weekly examination of the area on June 22, 2009, and he observed no hazards. (Ex. G-25). Andrew Herndon conducted another weekly examination on June 29 and he testified that he did not observe any hazards. (Tr. II 50). At the time of Herndon's examination, water was flowing out of the drain pipe at the bottom of the #8 seal. (Tr. II 51). Herndon testified that he did not observe any water leaking out of the seal and he did not see any water lines upon the seals, which would indicate that water was building up behind the seals.

Discussion and Analysis

Based upon the evidence it presented, Peabody maintains that the Secretary failed to establish a violation of the safety standard. Inspector DiLorenzo issued the order because water was present behind the seals and was leaking through the mortar on July 1, 2009. (Tr. 209). He believed that Peabody should have known of the condition and that the weekly examiner failed to record the condition and immediately correct it. Herndon testified that when he conducted the weekly examination on June 29, 2009, water was coming through the pipe at the bottom of the seal and was not leaking through the mortar. (Tr. II 51). There was no sign that water was building up behind any of the seals. (Tr. II 51, 54). Any water lines visible across the face of the seal were from water that previously accumulated in front of the seals when the area flooded. There had been a flood in front of the seals on June 17. (Tr. II 30, 54).

As with the previous order, I find that the Secretary did not establish a violation. I incorporate my analysis of Order No. 8416329 into my analysis of the present order. Peabody does not dispute that if water is leaking out of the face of a seal or if water backs up behind a seal a hazardous condition is present that must be reported and corrected. (Peabody Br. 59; Tr. II 51).

As with the previous order, I credit the testimony of Peabody's witnesses as to the chronology of events. The #8 seal is at the lowest point in the area and there is a pipe at the bottom of that seal that drains water from the area behind the seals. This pipe functioned correctly on June 22 and June 29 when weekly examinations were conducted. When Inspector DiLorenzo inspected the area on July 1, something prevented the water from flowing through the pipe and water backed up behind the seals. I credit the testimony of Peabody's witnesses that this condition did not exist at the time of the weekly examinations and that the area can flood in a matter of hours if the pumping and drainage systems are not working.¹¹ For the reasons discussed above, Order No. 8416348 is **VACATED**.

II. SETTLED CITATIONS AND ORDERS

A number of the citations and orders at issue in these cases settled. By order dated June 14, 2013, I approved the parties' settlement of Order Nos. 8416419 and 8421022 in Docket No. LAKE 2010-39 and ordered Peabody to pay a penalty of \$13,632.00. By order dated June 14, 2013, I approved the parties' settlement of 49 citations issued under section 104(a) of the Mine Act in Docket No. LAKE 2010-106 and ordered Peabody to pay a penalty of \$122,920.00.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I reviewed the Assessed Violation History Report, which is not disputed. (Ex. G-26). At all pertinent times, Peabody was a large mine operator and the controlling company, Peabody Energy Corporation, was also a large operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Peabody's ability to continue in business. The gravity and negligence findings are set forth above.

¹¹ The Secretary argues that Peabody should have known that the drainage system that was in place "was not draining the water behind the seals efficiently enough and that excessive pressure was being placed on the #8 seal, which could damage it." (Sec'y Br. at 37). That issue is beyond the scope of this proceeding. The issue before me is whether the Secretary established that Peabody violated section 75.364(b)(4) by failing to perform an adequate weekly examination.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
LAKE 2010-39		
8421014	75.400	\$12,000.00
8420824	75.363(a)	2,000.00
8416329	75.364(b)(4)	Vacated
8416348	75.364(b)(4)	Vacated
LAKE 2010-106		
8421043	75.1403-5(g)	Vacated
8420857	75.403	2,000.00
8420858	75.403	2,000.00
TOTAL PENALTY		\$18,000.00

For the reasons set forth above, the citations are **MODIFIED**, or **VACATED** as set forth above. Black Beauty Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$18,000.00 within 30 days of the date of this decision.¹²

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

¹² 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.

Distribution:

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RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 4, 2014

MARK GRAY, : DISCRIMINATION PROCEEDING
Complainant :
 :
 : Docket No. KENT 2010-430-D
 : BARB-CD-2009-13
v. :
 :
 :
NORTH FORK COAL CORPORATION, : Mine ID: 15-18340
Respondent : Mine: Mine No. 4

ORDER GRANTING IN PART RESPONDENT’S MOTION TO AMEND NOTICE OF HEARING; DENYING COMPLAINANT’S MOTION TO ALLOW PRESENTATION OF ADDITIONAL LAY AND EXPERT EVIDENCE AT RE-TRIAL; AND RESERVING RESPONDENT’S MOTION TO COMPEL DISCOVERY

Before: Judge Rae

This case is before me upon a Complaint of Discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Respondent has filed a Motion to Amend the Notice of Hearing and a Motion to Compel Discovery. The Complainant has filed a Response in Opposition to the Motion to Amend the Notice of Hearing, and a Motion to Allow Presentation of Additional Lay and Expert Evidence at Re-Trial.

Procedural History

Gray petitioned for remand of my decision issued on October 20, 2011 based upon my pre-trial order of December 8, 2011 in which I denied Gray’s request to introduce the written reports and testimony of Larry Miller and Peter Belcastro, two handwriting experts. Gray’s brief in support of his petition for remand filed with the Commission on January 17, 2012 states that “the ALJ improperly prohibited two expert witnesses from testifying ... about two purported written warnings” issued by North Fork to Gray. In his brief, Gray goes on to state that his case was “heavily dependent on the expert testimony” and that their exclusion was an abuse of discretion, their exclusion warranting a new trial. The only two witnesses identified or referred to in his assignment of error and request for remand at the Commission level were Miller and Belcastro. No issues other than the exclusion of this evidence were raised in Gray’s brief or his petition for remand filed on November 29, 2011.

The issue of the exclusion of the two handwriting experts was accepted for discretionary review by the Commission. On August 22, 2013, the Commission issued a remand directing

further proceedings in accordance with its ruling. It agreed with Gray that “the excluded evidence is the ‘centerpiece of [the] case.’” In its decision, the Commission went to great lengths to discuss the exclusion of the testimony of these two identified handwriting specialists as being improper. The majority hypothesized that potentially different credibility determinations would have been made by me with respect to management and non-management witnesses for North Fork and against Gray had there been evidence that the two written counseling warnings issued to Gray had involved forgery. Despite the fact that there was non-documentary evidence that supported the testimony of management and non-management personnel regarding verbal counseling as well as poor performance issues, the majority¹ opined that the expert testimony concerning a possible tracing of a signature on the written warnings would have led to a different outcome. In sum, the majority of the Commission issued a remand order on the sole issue of whether the two handwriting experts should have been allowed to testify which they answered in the affirmative. No other issue was accepted for remand, raised *sua sponte* or included in its remand order.

Following a conference call I held with counsel on January 13, 2014, counsel for North Fork raised the issue of the scope of the hearing to be held pursuant to the remand order. See Ex. 1 Trans. CC. During that conference, I stated that it was my intention to take the testimony of the two expert witnesses and any witness(es) North Fork deemed necessary to rebut the expert testimony. Counsel for Gray disagreed with this interpretation of the remand order and indicated that he wished to call additional lay and expert witnesses. Thereafter, North Fork submitted a motion on January 22, 2014 to amend the Notice of Hearing to state with more specificity that the issue for hearing will be limited to the expert testimony from Belcastro and Miller and any rebuttal North Fork may have thereto. On January 24, 2013, a second conference call was held with counsel during which Gray’s attorney raised the issue of the scope of the hearing once again, indicating he had both a lay witness and one expert witness he wished to present at hearing. I informed counsel that a responsive pleading to North Fork’s motion would suffice to raise the issue for a ruling by the court. He requested until February 12 to file his response. Counsel for North Fork agreed to extend the due date of the response until February 12 and I so ordered his response and any other motions to be filed by February 12, 2014. Ex. 2 Trans. of CC. Two days beyond the ordered due date, on February 14, 2014, Gray submitted his Response in Opposition to North Fork’s Motion to Amend the Notice of Hearing and filed his own motion to allow the presentation of additional lay and expert testimony. Both Gray’s Response and Motion raise the same issues and are consolidated in this Order.²

¹ Chairman Jordan issued a dissenting opinion in which she opined that the majority’s finding that a different result would have obtained had the handwriting experts testified was “highly speculative.” She points out that Belcastro’s opinion was equivocal at best as to whether there was a forgery. The opinion goes on to state that even the testimony of an individual involved in the alleged forgery could be credited as to other aspects of his testimony and that the alleged forgery has no relation to the testimony of management and non-management employees who are not linked to the written warnings, particularly as it relates to the consistent statements that no deep cuts were made at the mine or that Gray was a poor performer.

² North Fork also raised the issue of discovery of documentation of Gray’s attorney’s fees at the conference calls and in its Motion to Amend as well as in a Motion to Compel. I reserve ruling on the issue of discovery at this time as more fully explained below.

Discussion and Analysis

Scope of Review

As set forth above, Gray filed a petition and supporting brief for discretionary review raising the exclusion of Miller and Belcastro as witnesses at hearing. Grays' requested relief was a reversal of the decision and remand "for the taking of additional evidence, including the testimony of Gray's expert witnesses" and a new trial. In support of his requested relief, Gray addresses squarely and solely the importance of the handwriting expert testimony to his case and the inability to present his case without it. This is the issue that the Commission accepted for review. While the majority opinion speculates on the possibility of a differing assessment of credibility of witnesses and outcome, it does so only to the extent that the two expert witnesses should have been permitted to testify and their reports admitted. The remand was issued in accordance therewith. No other issue was discussed or raised by the Commission *sua sponte*.

Commission Procedural Rule 2700.70(g) provides "review shall be limited to the issues raised by the petition, unless the Commission directs review of additional issues pursuant to §2700.71."³ 30 U.S.C. §823(d)(2)(A)(iii). The Commission has held that the Mine Act and procedural rules preclude the consideration of issues raised even in briefs filed in support of review not included in the petition as outside the scope of review. *Saab v. Dumbarton Quarry*, 22 FMSHRC 491 (Apr. 2000). *See also Broken Hill Mining Co.*, 19 FMSHRC 673 (Apr. 1997); *Fort Scott Fertilizer-Cullor Inc.*, 19 FMSHRC 1511 (Sept. 1997) and *Rock of Ages*, 20 FMSHRC 106 (Feb. 1998). "Sweeping" language contained in a petition for review will not broaden the scope of review where the issue is exclusion of evidence. *Saab* at 495. Those issues not accepted for review or raised by the Commission are considered final as of the date of the ALJ's decision and become the final decision of the Commission within 40 days thereof if not accepted for review. 30 U.S.C. §823(d)(1).

Gray's petition for review was based upon the exclusion of the expert testimony. The first mention of presentation of any other specific evidence upon rehearing beyond that of the two handwriting expert witnesses was during the January 13, 2014 conference call. The new witnesses proposed by Gray in no way involve the issue of whether Gray's signature on the written counseling forms are forgeries which was the issue upon which the experts would have provided testimony and written reports. Thus, these additional witnesses relate to issues which became final 40 days after issuance of my decision of October 20, 2011, well over two years ago. In accordance with the decision in *Saab*, there is no rational analysis under which Gray's general

³ Commission Procedural Rule 2700.71 provides: "[a]t any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented. The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review." 29 C.F.R. §2700.71.

prayer for a “new trial” broadens the scope of review beyond the issue of the inclusion of the expert witness testimony from Miller and Belcastro.

The lay witness who Gray specifically named and has provided an affidavit of his expected testimony, supposedly will now testify years later to the issues of whether Gray complained to management of deep cuts. Michael Creech will also supposedly testify as to whether Gray was a poor worker or whether management wanted to be rid of him for making safety complaints. Gray also seeks to introduce the expert testimony of Tracy Stumbo regarding “mine safety.” There is a statement in Gray’s motion that miners “ordinarily” do not tell inspectors about unsafe conditions and that deep cuts would be bolted before an inspector would know of them. However, lacking is an affidavit or statement of expected testimony confirming what exactly Stumbo would testify to.

The Commission made clear in its decision remanding the case that the issue on review was that Gray should have been permitted to pursue the issue of credibility of North Fork’s witnesses “**by presenting the expert testimony at the hearing.**” (Emphasis added.) Assuming Stumbo would testify regarding the issue of deep cuts and complaints made to inspectors generally, these issues as well as the ones raised by the proposed lay witness are not within the scope of review directed by the Commission and must be denied.

F.R.C.P. 59 and 60(b)

In addition to asserting that the scope of the remand order embraces the right to call additional witnesses, Gray argues that Federal Rules 59 and 60(b)(2) should allow for a new trial based upon newly discovered evidence.⁴ Gray’s Mot. at 6.

Fed. R. Civ. P. 59(a) empowers the judge to grant a new trial, to take additional testimony, amend findings of fact or conclusions or make new ones. In order to seek a new trial, the movant must file a motion with affidavits within 28 days of entry of judgment. The opposing party is then provided 14 days to file opposing affidavits. Fed. R. Civ. P. 59(b). My decision was issued on October 20, 2011. Gray’s motion to allow additional witnesses was filed on February 14, 2014, 28 months later. Gray’s petition for discretionary review was filed on November 21, 2011, also more than 28 days after my decision was issued. Even if one were to interpret the rule to mean that the motion could be filed within 28 days to the Commission rather than the trial court, Gray’s petition for review would not have met the statutory requirements of a motion for new trial under Rule 59. Not only was it filed more than 28 days after the decision was issued but it did not include affidavits from the proposed witnesses from whom Gray would elicit new evidence. Gray’s motion fails under Fed. R. Civ. P 59.

Rule 60(b) affords grounds for relief from a final judgment or order under certain circumstances. Gray seeks relief under Rule 60(b)(2) for newly discovered evidence not discovered in time to move for a new trial under Rule 59(b). One of the requisite elements of filing for a new hearing under Rule 60(b)(2) is that the request is made no more than one year

⁴ Gray also cites Commission Procedural Rule 54 in support of reopening the hearing. That rule pertains to providing notice of hearing at least 20 days prior to hearing and is not applicable here.

after the entry of judgment or order or the date of the proceeding. Fed. R. Civ. P. 60(c)(1). The Commission and federal case law interpret the time limitation as an absolute requirement. *Tolbert v. Cheney Creek Coal Corp.*, 12 FMSHRC 615 (Apr. 1990); *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000).

The testimony Gray seeks to introduce at rehearing, other than that of Belcastro and Miller, addresses issues not raised in his request for review or embraced within the scope of the Commission's order for review. It is, therefore, time-barred as final judgment as to all other issues was entered 40 days after the issuance of the October 20, 2011 decision by operation of law. 30 U.S.C. §823(d)(1). *See also Pittsburg & Midway Coal Mining Co., Supra.*

In addition to the time requirement, Rule 60(b) imposes several other statutory requirements to obtain a new trial based upon newly discovered evidence. The evidence must have been in existence at the time of trial but not in the movant's possession. It could not have been obtained in time for trial or in time to move for a new trial under Rule 59 even by exercising due diligence, the evidence must not be merely cumulative and, finally, it must be shown that it would change the result. Fed. R. Civ. P. 60(b)(2); *Darwin Stratton & Son, Inc.*, 26 FMSHRC 787 (Oct. 2004).

Michael Creech is the lay witness named in Gray's motion. Creech states in his affidavit that he was employed by North Fork for 2 years and worked with Gray for some time before Gray was fired, had seen deep cuts being taken and had been told to bolt faster than Gray to make him look "bad." He "heard" an unidentified member of management say they wanted to be rid of Gray because of his complaints. Creech stated he did not come forward with the information at the time Gray was discharged because he was still working at the mine and he was in fear of losing his job. Creech Aff. Gray states in his motion that he spoke with Creech and other unidentified employees prior to trial who "would not tell the truth about deep cuts." Gray's Mot. at 5 n.4. Examining these facts, it appears that Gray was likely in possession of this information prior to trial, particularly Creech's information.

Gray makes no claim, nor is there any evidence that he attempted to subpoena Creech at hearing or secure his presence or testimony in any other manner. Moreover, since Creech was employed by North Fork for 2 years and was working at the mine prior to Gray's discharge which occurred on May 15, 2009, he would no longer have been employed there by May 2011, at the latest. His fear of reprisal would no longer have been present. His date of departure from North Fork preceded the date of my decision of October 20, 2011 by approximately 5 months. Gray still had 28 days thereafter to file for a new hearing under Rule 59 based upon Creech's information. Gray makes no claim that he attempted in any way to secure an affidavit from Creech within this time frame or at any other time prior to his signing his February 11, 2014 affidavit - just 2 days before Gray submitted his motion. Not only does it appear that Gray failed to exercise due diligence in procuring Creech's testimony for hearing, but he also failed to exercise due diligence in procuring it in a timely manner to seek a new trial under Rule 59 after the decision was issued. No explanation is given by Gray for this failure. It also appears that the information was in his possession at the time he sought discretionary review with the Commission in November 2011 and he did not raise the issue there either in support of his request for a new trial. It appears on its face that the need for Creech's testimony, including

hearsay statements, is an idea that bloomed as an afterthought in view of the court's and Commission's decisions. Reopening of litigation on the grounds that the Complainant could not have foreseen a claim made by him would be rejected by the court without an absent witness is inappropriate. See *Hoyt R. Matisse Co. v. Zurn*, 754 F.2d 560, 568 n.14 (5th Cir. 1985); *Washington v. Patlis*, 916 F.2d 1036 (5th Cir. 1990).

A motion for a new trial is an extraordinary form of relief. *Washington v. Patlis, Supra*. Assuming Creech's testimony was deemed admissible, it cannot be concluded that it would change the outcome. There are no indicia of reliability attached to Creech's affidavit. It does not indicate when the purported deep cuts were made that he observed, who in management was aware of them, who ordered them, or on what shift they occurred. Similarly, he does not indicate which member of management purportedly told him to work faster than Gray or to whom or when Gray made safety complaints. The hearsay statement that he "heard a member" of management say the company wanted to fire Gray for his complaints also lacks sufficient specificity. The affidavit as a whole lacks any specific information or facts that would lend it any credibility despite the fact that Creech made his affidavit long after any fear of reprisal was removed and for the specific purpose of assisting Gray in seeking the extraordinary relief of a new trial.

Aside from the issue of credibility, Creech's information would not necessarily change the outcome for other reasons. I did not assess the credibility of North Fork's witnesses over Gray's based solely on the fact that they testified consistently with one another. Without reiterating my findings in detail here, some of the facts that I looked at were that each of the miners who would have been involved in making and/or bolting the alleged deep cuts denied one had been made, that Gray's bolting partner had been verbally counseled along with Gray for his poor performance, that Gray had told his partner that he had been counseled in the past for poor performance not related to slow bolting, that his partner had never heard Gray make any safety complaints or fail to perform unsafe work, that based upon the geological conditions cuts were not made in excess of 20 feet, and that the very day Gray was terminated he did not make a complaint to MSHA Inspector Doan who was inspecting Gray's bolter on Gray's shift. Five of the witnesses who testified for North Fork had no involvement with the alleged forgery or the counseling warnings. There was independent documentary evidence that Gray was counseled for poor performance not only limited to slow bolting. Additionally, Gray made statements to his roof bolting partner that he had an attorney who would file discrimination charges if he was fired and denied unemployment benefits, providing motive to falsely report deep cuts. In sum, there is no indication that Creech's testimony would change any of my credibility determinations or the ultimate outcome either on the issue of whether Gray engaged in protected activity or on North Fork's affirmative defense.

For the foregoing reasons, I find that Gray's request to present the testimony of Creech (or any heretofore unnamed miners) under Rule 60(b) must be denied.

Gray also requests the appearance of Tracy Stumbo who he identifies as an expert in mine safety. While an affidavit of Stumbo's testimony is not offered, Gray alludes to his testifying that deep cuts could have been made in the mine despite the geologic conditions. In the conference call of January 13, 2014, counsel stated that there was no evidence on the issue

from the complainant at trial and they wish to call an expert witness “just generally about taking deep cuts and whether or not that means you will have a roof fall.” Trans. of CC Jan 14, 2014. Again, this appears to be an afterthought of Gray’s in light of the decision that perhaps he should have addressed that issue at hearing. This is not a proper basis for granting extraordinary relief. Furthermore, there is nothing in Gray’s motion regarding his proposal to tender Stumbo as a witness that meets the requirements of Rule 60(b). Gray does not address the issue of whether he was in possession of Stumbo’s expected testimony prior to trial or why he could not have presented this testimony at hearing through Stumbo or another witness had he exercised due diligence. There is nothing offered to lead to the belief that the information Gray seeks to introduce now is unique and known only to Stumbo. Counsel’s representations during the conference call suggest his information would be general in nature and known to any person familiar with the geologic conditions and mining practices in Kentucky. This issue could easily have been addressed at trial. There is also no reason to find that the information would have changed the result. The information is only one basis upon which I made credibility determinations of the witnesses who appeared at trial. Even assuming taking a deep cut would not have caused a roof fall, it would not affect my credibility determinations or relate to whether Gray engaged in protected activity or that North Fork presented a substantiated affirmative defense. It would serve, at most, only to impeach testimony on a non-determinative point. Evidence offered only for impeachment purposes is not the type of newly discovered evidence upon which to grant a new trial. *See Bruno*, 11 FMSHRC at 153; *Baxter Int’l, Inc. v. Morris*, 11 F.3d 90 (8th Cir. 1993); *Durango Gravel*, 21 FMSHRC 1079 (Oct. 1999).

In sum, Gray has not met the requirements of Rule 59 or Rule 60(b) granting a new trial to present additional testimony or evidence from any witness other than Miller and Belcastro. The scope of the remand was limited to the testimony (and written reports) of these two handwriting experts based upon a finding that their exclusion was improper. It allows for additional discovery and further proceedings directly related to the testimony of Belcastro and Miller. I interpret that to include the identification and discovery pertaining to any witnesses North Fork may offer in rebuttal to Belcastro’s and Miller’s testimony as well as introduction of any experts’ written reports. All other issues became final after 40 days of issuance of the October 20, 2011 decision.

North Fork has requested an Amended Notice of Hearing to specify that the scope of the rehearing is limited to the testimony of Miller and Belcastro. North Fork also requests that Gray be held to a requirement that he state with certainty within 60 days of hearing whether or not Belcastro will testify. It also asks for an order to compel a response to discovery propounded upon Gray.

ORDER

For the foregoing reasons, Gray's Motion to Allow Presentation of Additional Lay and Expert Evidence at Re-Trial and his general request for a new trial or trial de novo is DENIED.

North Fork's Motion to Amend the Notice of Hearing to limit the trial to the testimony of Miller and Belcastro and their written expert reports being offered by Gray and evidence in rebuttal thereto by North Fork is GRANTED.

North Fork's request that Gray be compelled to confirm that Belcastro will testify at hearing 60 days prior to hearing is GRANTED.⁵

North Fork's request in its Motion to Amend and its Motion to Compel discovery is RESERVED at the present time in view of this decision and order.⁶

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

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⁵ The hearing is currently scheduled to commence on May 6, 2014. In order to afford both parties ample opportunity to complete discovery and preparation, the hearing may be continued upon motion by either party.

⁶ Because this Order limits the issues at hearing to the handwriting experts and rebuttal thereto, discovery shall also be so limited. The Respondent may desire to tailor its discovery accordingly. I will withhold ruling on that portion of Respondent's Motion to Amend and its Motion to Compel and Complainant's Response thereto until this Order becomes final. Respondent may renew its motion to compel thereafter. The issue of penalties, should Gray prevail, will be addressed post-hearing, however, I tend to agree with Complainant that his attorney's fees at this stage of the proceedings are not discoverable unless Respondent can offer authority to the contrary.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 4, 2014

ELK RUN COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2013-1298-R
	:	Notice of Safeguard No. 8154999;
v.	:	08/01/2013
	:	
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Mine: Powellton Deep Mine
ADMINISTRATION (MSHA),	:	Mine ID: 46-09163
Respondent	:	

**ORDER DENYING THE SECRETARY OF LABOR'S
MOTION TO DISMISS NOTICES OF CONTEST**

Before: Judge Steele

The instant proceeding is before me on Elk Run Coal Company's ("Elk Run" or "Contestant") "Notice of Contest," regarding a safeguard (No. 8154999) issued by the Secretary pursuant to Section 314(b) of the Act (30 U.S.C. §874(b) and 30 C.F.R. §75.1403-1. The Secretary of Labor, Mine Safety and Health Administration ("Secretary") filed a "Motion to Dismiss Notices of Contest" on September 27, 2013. After consideration of the arguments of the parties and for the reasons set forth below, the Secretary's Motion is hereby **DENIED**.

The Notice of Contest was filed with respect to Safeguard 8154999 was issued on August 1, 2013. The inspector allegedly noted bottom irregularities at the mine and issued the safeguard to prevent mud, ledges, and water accumulation in travel-ways.

The Mine Act permits the Secretary to issue "safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials..." See 30 U.S.C. § 874(b). "Once issued, the safeguard operates as a mandatory standard for that mine." *Oak Grove Resources, LLC*, 2013 WL 4140414, *3 (July 25, 2013). That is, from that point forward, failure to comply with safeguard will result in a citation or order just as if the operator had violated a promulgated mandatory standard.

There is no question that the Commission has jurisdiction to decide on the validity of a safeguard after the issuance of a citation or order related to that safeguard and the proposal of a civil penalty. See e.g. *Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992); see also *Secretary's Motion to Dismiss* at 3-6. The issue in this proceeding is whether the Commission has

jurisdiction to determine the validity of a safeguard if no subsequent citation or order has been issued.

The undersigned finds that Congress granted the Commission the necessary authority to hear this contest. The Mine Act confers upon Commission Judges jurisdiction to hear a variety of cases. See 30 U.S.C. §815(b)(2)(temporary relief orders); (30 U.S.C. §817(e)(contests to imminent danger orders); 30 U.S.C. 815(c)(complaints of discrimination); 30 U.S.C. §821(complaints for compensation). In this instance, the relevant jurisdiction is authorized in Section 105(d) (30 U.S.C. §815(d)).¹

Further, “where the statute creates Commission jurisdiction, it endows the Commission with a plenary range of adjudicatory powers to consider issues, to make findings of fact and conclusions of law, and to render relief – in short, to dispose fully of cases committed to Commission jurisdiction.” *Drummond Company, Inc.*, 14 FMSHRC 661, 674 (May 1992).

There is no explicit grant of authority in the Mine Act empowering the Commission to consider the validity of safeguards. However, in addition to explicit authority, the Commission possesses implied authority to hear related issues. For example, the Commission has held (with Court of Appeals concurrence) that section 105(d) grants implied authority to grant declaratory relief, as appropriate, in contest proceedings. *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1171 (Sep. 1988); and *Climax Molybdenum Co. v. Secretary*, 703 F.2d 447, 452 (10th Cir. 1983).

¹ That section states:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination or any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary’s citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

Similarly, the Commission held in *Drummond* that it had the implied authority to examine an MSHA Program Policy Letter based, in part, on the Mine Act's grant of power to review "question[s] of law, policy or discretion," and to direct review *sua sponte* of matters that are "contrary to...Commission policy" or that present a "novel question of policy." *Drummond* 14 FMSHRC at 674-675 citing 30 U.S.C. §823(d)(2)(A)(ii)(IV) & (B).

I find that the instant proceeding presents just such an instance of implied authority. The authority to hear a citation or order implies the authority to examine the underlying safeguard. In this way, a safeguard is analogous to the situation in *Drummond*, where the Commission found that the ability to hear contest proceedings implied the authority to examine a Program Policy Letter issued by the Secretary which informed MSHA's decision in proposing penalties. 14 FMSHRC at 673-676. If a policy issued by the Secretary can form the basis for a citation or order then, under Section 105(d), the Commission has authority to hear a challenge to that issuance. Here, a safeguard serves as the first step in the issuance of a citation and as a threat of civil penalty. In fact, with the requirement that an operator correct the hazardous condition, a safeguard is analogous to a non-assessable citation. In light of this close nexus between a safeguard and a citation or order, I find that the Commission has authority to hear this case.

Furthermore, due process and public policy also weigh in favor of finding Commission authority to hear such cases.

In considering due process, it is important to note that even if no citation or order is issued with respect to a safeguard, that safeguard is already constraining or otherwise adversely affecting the operator. As noted *supra*, the safeguard acts as a mandatory standard at the subject mine. The operator is required to take potentially time-consuming or expensive actions to ensure that it complies with this new "standard." In short, the Secretary's actions with respect to a safeguard place some burden on the rights of a private individual (in this case a private corporation). I am concerned that without recourse to the Commission, an operator would have no way to challenge this government action and would suffer some harm to its rights.

In the instant case, Contestant was required to change its behavior and to take potentially expensive and time-consuming actions based on a mandatory directive by a federal inspector. As a result, there must be some forum at which Contestant can apply for relief. It is impossible that an individual can be constrained by the government and maintain no avenue of appeal.

In light of this infringement on an operator's prerogatives, there must be some court or agency with jurisdiction over a safeguard even if there is no citation or order. If the Commission does not have jurisdiction to grant relief in this matter, then the Contestant must have recourse to an Article III tribunal. For the reasons stated *supra*, it is clear that Congress intended that the Commission, rather than a federal court, have jurisdiction over this matter. The federal courts agree. As the D.C. District court stated, when the "Secretary acts in a manner which adversely affects an operator, the proper procedure for review of that act [is] to proceed first to the Commission and then to the appropriate Court of Appeals." *See Bituminous Coal Operators' Ass'n, Inc. v. Marshall*, 82 F.R.D. 350, 353 (D.D.C. 1979). Therefore, in the interest of due process, the Contestant must have some recourse to judicial review and that judicial review should come from the Commission.

Beyond serving the interest of due process, the Commission's exercise of authority over the instant proceeding also supports the purpose of the Act. As Congress noted, "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. §801(a). Mandatory standards, safeguards, and other protections afforded by the Act should be implemented in light of this goal to protect the health and safety of miners.

In the instant situation, if the validity of the safeguard cannot be challenged until a citation or order is issued, an operator is confronted with a perverse incentive. If the operator believe that the safeguard is invalid it must choose to either comply with the safeguard and sit on its rights indefinitely (incurring delay and costs as a result) or to willfully violate the safeguard to gain access to the Commission. Under the latter approach, it is possible that miners would needlessly be exposed to hazards that might not otherwise arise. In order to protect its rights, an operator may be forced to place miners in harm's way. Surely the Mine Act does not require such an absurd result. Exercising authority to hear the challenge to the safeguard now prevents such a situation from occurring.

Finally, the Commission's exercise of authority over the instant proceeding ensures that the validity of the safeguard is determined in a timely manner. If the Commission waits until a citation or order has been issued pursuant to a safeguard, the delay between the issuance and the challenge can be extreme. For example, in *Oak Grove Resources, LLC, supra*, the time between the issuance of the safeguard and the subsequent challenge was 22 years. Over the course of years an operator could spend large amounts of money complying with an invalid safeguard. More importantly, when the operator can finally challenge the standard, the inspector and everyone involved with the safeguard could be retired or deceased making the issue impossible to properly adjudicate. Therefore, the Commission's ability to hear this case now protects the interest of fair and timely adjudication.

The Secretary presented several arguments for why I do not have authority to hear this challenge to the safeguard. However, I do not find any of these arguments to be compelling. I will address each argument in turn.

First, the Secretary cited *Kaiser Coal Corp.* for the proposition that the Commission is an adjudicatory agency of limited jurisdiction. (*Secretary's Brief* at 3 citing 10 FMSHRC at 1169). Based on this holding, the Secretary averred that Section 105(d) delineates the scope of Commission authority to hear cases. (*Id.*). Specifically, the Secretary noted that Section 105(d) lists the situations in which the Commission has authority to hear a case and that, based on the principle of *expressio unius, exclusio alterius*, failure to specifically list safeguards shows that Congress did not intend the Commission to hear those cases. (*Id.* at 4 citing *Marx v. Gen. Revenue Corp.*, --- U.S. ---, 133 S. Ct. 1166, 1181 (2013)).

The Secretary is correct that a safeguard is not amongst the areas over which the Commission has explicit authority under Section 105(d). A safeguard is not a citation, order, or a violation. However, as noted *supra*, a safeguard forms the basis for a citation, order, or a civil penalty and therefore the Commission maintains the implied authority to consider it.

It should be noted that my authority to hear matters not explicitly stated in Section 105(d) is not only supported by relevant Commission case law, but also by the Secretary's position in this case. In its brief, the Secretary argued that the validity of a safeguard is reviewable by the Commission (albeit after a citation or order is issued). (*Secretary's Brief* at 3-6). Nowhere in the Mine Act does Congress explicitly grant the Commission the right to review the validity of a safeguard. The Commission has determined that this authority is implied based on the fact that citations and orders are written pursuant to safeguards.

If, as the Secretary argues, the Commission can only consider issues explicitly stated in Section 105(d), then the Commission must never have authority to consider the validity of a safeguard. Presumably if that were the case, the Commission could determine the validity of a citation or order issued pursuant to a safeguard (under the express grant of authority to do so in Section 105(d)) but lacks any authority to consider the validity of the underlying safeguard. This would be analogous to the more common situation, when a citation is issued with respect to a mandatory safety standard. In such a case the Commission may rule on the propriety of a citation or order but the validity of the underlying standard is reserved for the Federal Courts.

However, as even the Secretary recognizes, the Commission does have authority to hear challenges to safeguards. Therefore, there must be implied authority outside the list in Section 105(d). Further, I see no statutory reason for the proposition that this implied authority should be limited to situations where a citation or order has already been issued. The implied authority to consider a safeguard exists and therefore may be exercised now.

The Secretary next argued that Commission precedent supports his interpretation that I have no authority to consider the validity of the safeguard at this time. (*Secretary's Brief* at 8). However, in doing so the Secretary first concedes that the Commission has never directly addressed that issue. (*Id.*). Despite this, the Secretary notes that historically, the Commission has only considered the validity of a safeguard when a citation is being contested. (*Id.*). Specifically, the Secretary pointed to several decisions where ALJs summarily refused to review safeguards without subsequent citation or order. (*Id. citing Beckley Coal Mining Co.*, 9 FMSHRC 1454 (Aug. 1987)(ALJ Melick); *Colorado Westmoreland, Inc.*, 10 FMSHRC 1236 (Sep. 1988)(ALJ Morris); and *Jim Walters Resources, Inc.*, 18 FMSHRC 380 (Mar. 1996)(ALJ Merlin).

While I recognize that, as a general matter, Commission ALJs have historically waited for a citation or order to be issued pursuant to a safeguard before discussing the validity of that safeguard, I do not believe that there was a statutory necessity for this restraint. As noted *supra*, the implied authority to consider the validity of a safeguard exists at issuance. To the extent that Commission ALJs chose not to exercise their authority over challenges to safeguards, I believe they failed to fully appreciate the extent of the Commission's authority in these matters. As a result, I do not find these cases to be persuasive.

Finally, the Secretary argued that the Commission has implied that a review of a safeguard is not available until a citation has been issued. (*Id. citing Southern Ohio Coal Co.* 14 FMSHRC at 13 ("An operator may challenge a safeguard's validity in a contest or civil penalty proceeding arising from the issuance of a citation or order based on that safeguard.")).

Contrary to the Secretary's reading of *Southern Ohio Coal Co.*, I do not believe that the Commission has implied that it does have authority to hear challenges to the validity of safeguards at any time. In *Southern Ohio Coal Co.*, the Commission stated that the validity of a safeguard is reached after a citation or order is issued, but it did not intend to make a sweeping declaration regarding its rights and powers. The section cited by the Secretary was merely dicta explaining how the issue generally arises in a portion of the decision discussing the burden of proof. No issue in that case turned on the timing of the challenge as an order had already been issued on the subject safeguard. 14 FMSHRC at 2-3. As the Secretary has conceded, the Commission has never decided on the issue of whether a citation or order is needed to challenge the validity of a safeguard (though perhaps it is time for the Commission to weigh in). Further, as noted *supra*, such authority exists at the time of issuance. I do not believe the Commission intended to deny the existence of that authority in a single sentence of a decision where the ultimate issue here was not in contention.

For the reasons set forth above, the Secretary's Motion to Dismiss Contestant's Notices of Contest is hereby **DENIED**. The parties are directed to mutually agree to a discovery and deposition schedule so that a hearing can be set.

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

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March 6, 2014

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. CENT 2013-541-D
of J. DON ARNOLD,	:	Case No. DENV-CD 2013-11
Complainant	:	
	:	
v.	:	
	:	
BHP NAVAJO COAL COMPANY,	:	
AND ITS SUCCESSORS,	:	Mine: Navajo Mine
Respondent	:	Mine ID: 29-00097

ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION

Before: Judge Lewis

STATEMENT OF THE CASE

This case is before me upon a complaint of discrimination filed by J. Don Arnold (“Arnold” or “Complainant”) against BHP Navajo Coal Company, and its successors (“BHP” or “Respondent”) pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Act”), 30 U.S.C. § 815(c).

On November 7, 2013, Respondent entered its Motion for Summary Decision. In such, Respondent states that there are no genuine issues of material fact, and the real question as a matter of law is the narrow issue of whether holding an employee out of service while the alleged conduct is investigated with no delay in pay or benefits is an “adverse action” as contemplated by the statute. By motions dated November 26 and November 29, 2013, the Secretary requested that the original complaint be amended to include the fact that Arnold’s performance review was modified from “meets requirements” to “needs improvement,” and he was issued a written warning concerning the alleged conduct. The Secretary responded to Respondent’s Motion on December 16, 2013. He argues that Respondent’s Motion should be denied because the actions taken by Respondent do constitute adverse action, and Respondent’s motion should accordingly be denied.

LAW

According to 29 C.F.R. 2700.67(b),

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers 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.

The Commission “has long recognized that [] ‘summary decision is an extraordinary procedure,’ and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007)(quoting *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary judgment, the court must evaluate the evidence in “the light most favorable to...the party opposing the motion.” *Hanson Aggregates* at 9 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). Any inferences “drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motions.” *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *Unites States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

ISSUE

The issue is whether Respondent’s suspension of Complainant with no loss in pay or benefits during the completion of an investigation into Complainant’s alleged failure to follow safety procedures, Respondent’s issuance of a written warning regarding such, and/or Respondent’s modification of Complainant’s performance review from “meets requirement” to “needs improvement” singly or in combination constitute “material adverse action” raising a cognizable claim under § 105(c) of the Act.

CONCLUSIONS OF LAW

Under Section 105(c) of the Act,

No 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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment 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 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, representative of miners or applicant for employment is subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative

of miners or applicant for employment 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, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

A complainant alleging discrimination under the Act establishes a *prima facie* case of prohibited discrimination by presenting evidence to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd* on other grounds *sub nom.*; *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (Apr. 1981). In 2006, the Supreme Court stated that the adverse action must be “material adverse action.” *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006). The employee “must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from [engaging in protected activity].” *Id.*

The legislative history for 30 C.F.R. § 815(c) is clear in its intentions:

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant 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. 95-181, at 35-36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). The undersigned also acknowledges that the chilling effect on employees cannot be presumed; rather, it must be made on a case-by-case basis taking into consideration both objective and subjective evidence. *Secretary of Labor on behalf of Poddey v. Tanglewood*, 18 FMSHRC 1315, 1320-1321 (Aug 1996). Based on the law and circumstances, the undersigned finds that while any of the actions taken by Respondent in isolation may not have constituted material adverse action, the totality of these actions do.

Respondent argues that the Complainant suffered no material adverse action because 1) he suffered no termination of employment or economic loss, 2) the change in his evaluation did not affect his overall rating, and 3) the written warning given to him was minor. *See* Respondent’s Motion for Summary Decision, p. 1; Respondent’s Supplemental Motion for Summary Judgement, p. 1-2; Respondent’s Reply in Support of Motion for Summary Decision, p. 3. First, while it is true that Complainant was neither terminated nor did he suffer any lapse in pay or benefits, Respondent fails to mention that Arnold was first suspended indefinitely *without* pay pending an investigation. *See* Secretary’s Response to Motion for Summary Decision. It was not until later that Complainant learned that there would be no delay in his pay. Arnold

stated that although he was eventually paid, he was worried during the investigation that he would be unable to support his family. *See* Declaration of J. Don Arnold, ¶ 18.

Second, Respondent argues that the change in Arnold's evaluation did not affect his overall rating and, regardless, the evaluations are not kept in an employee file; but, interestingly, Respondent was able to provide multiple performance evaluations in support of its case. *See* Respondent's Supplemental Motion for Summary Decision. This includes an evaluation done seven months prior to the one at issue here. *Id.* If Respondent is not keeping these forms for any personnel purposes, it begs the question of why Respondent would be able to produce it.

Finally, Respondent contends that the warning issued to Arnold was minor. However, the Secretary points out that the written warning is considered a "strike" against Arnold in Respondent's progressive discipline system. Secy's Resp., p. 10. This was confirmed by Arnold, who states that he feels like he has a target on his back. Dec. of Arnold, ¶ 11. Further, this "minor warning" will remain in Arnold's personnel file throughout the remainder of his employment. Secy's Resp., p. 10. Respondent conveniently fails to mention this.

Respondent also argues that this case should be dismissed in light of judicial economy since, it argues, Arnold has suffered no material adverse action. However, as Congress so eloquently stated, miners are the best means for effectively maintaining safety in the mines. Actions which serve to chill their participation must be closely evaluated. In his Declaration, Arnold states that other employees have told him that they will now think twice before making safety complaints. ¶ 17. Given all of the foregoing, the undersigned finds that Respondent's action, *in toto*, may very well deter a reasonable employee from engaging in protected activity.

ORDER

It is hereby **ORDERED** that Respondent's Motion for Summary Decision is **DENIED**. The parties are further **ORDERED** to **PROVIDE** a few mutually agreeable dates for hearing to the office of the undersigned within 20 days of the date of this Order.

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

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March 19, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2013-301
Petitioner	:	A.C. No. 01-00851-315187-01
	:	
	:	Docket No. SE 2013-352
v.	:	A.C. No. 01-00851-317727
	:	
	:	Docket No. SE 2013-368
	:	A.C. No. 01-00851-319550
OAK GROVE RESOURCES, LLC,	:	
Respondent	:	Docket No. SE 2013-399
	:	A.C. No. 01-00851-320606-01
	:	
	:	Mine: Oak Grove Mine

ORDER SCHEDULING BRIEFING

Before: Judge Feldman

The hearing in the captioned civil penalty matters filed against Oak Grove Resources, LLC (“Oak Grove”) is currently scheduled for September 16, 2014, in Birmingham, Alabama. Docket No. SE 2013-368 concerns 104(d)(2) Order No. 8520664,¹ issued on October 3, 2012. The order alleges a repeated flagrant violation under Section 110(b)(2) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 820(b)(2), of the mandatory safety standard in section 75.400, that is attributable to high negligence.²

¹ Docket Nos. SE 2013-301, SE 2013-352 and SE 2013-399 have been consolidated with Docket No. SE 2013-368 because they contain citations that are relevant to Order No. 8520664.

² 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.

Section 110(b)(2) provides:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000.³ 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) (emphasis added).

Although the Commission addressed questions concerning appropriate considerations for determining repeated flagrant violations in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013), many issues concerning the application of section 110(b)(2) essentially are matters of first impression and remain unresolved. In *Wolf Run*, the Commission concluded that the plain language of section 110(b)(2) supports that past violative conduct may be considered in determining whether a cited condition represents a “repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard” 35 FMSHRC at 541, *citing* 30 U.S.C. § 820(b)(2). However, the Commission did not address whether such previous violations must concern unwarrantable violations of the same mandatory standard, as well as the time period for the occurrence of such previous violations. The Commission had no basis for doing so as the Secretary did not clearly articulate during oral argument the required parameters concerning prior conduct.⁴

In *Wolf Run*, the Commission noted the Secretary’s obfuscation. The Commission stated:

The Secretary’s interpretation [of a repeated flagrant violation] has changed several times during the course of this litigation [W]hile still before the judge, the Secretary broadened the proposed standard to include previous non-S&S and non-unwarrantable failure violations, and also seemingly narrowed the standard to require that at least some of the previous violations be “substantially similar” His interpretation before the Commission has evolved again [The Secretary’s briefing now includes a] “fail[ure] to make reasonable efforts to eliminate at least one previous violation prior to failing to make reasonable efforts to eliminate the violation alleged to be flagrant.”

35 FMSHRC at 539 n. 5. The absence of a clearly articulated proffered standard for determining a repeated flagrant violation based on prior conduct precluded the Commission from addressing whether the Secretary’s application of section 110(b)(2) was a reasonable interpretation of its

³ The maximum civil penalty for a violation that is not designated as flagrant is \$70,000.00.

30 U.S.C. § 820(a)(1).

⁴ In *Wolf Run*, the Commission remanded the proceeding to Commission ALJ Barbour. The parties now have advised Judge Barbour that they have reached a settlement agreement.

provisions, or whether the Secretary's enforcement standard required a notice and comment rulemaking.

The subject Order No. 8520664, alleging a repeated flagrant violation, states:

Combustible material in the form of float coal dust and dry hard packed coal fines were allowed to accumulate on the roof, ribs, footwall, and belt structure of the Main North 3 belt entry. The hard packed coal fines were in contact with moving roller[s] on the belt line in multiple locations along the belt entry. The float coal dust existed on the roof, ribs, footwall, and belt structure from the Main North 3 Tail Pieces extending outby to crosscut 27. This is an approximate distance of 2100 feet. Due to the extensive amount of accumulations and that this belt is examined every shift this constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard.

Standard 75.400 was cited 92 times in two years at mine 0100851 (91 to the operator, 1 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Even if the Secretary ultimately prevails with respect to the issues of the fact of the violation and the significant and substantial ("S&S") and unwarrantable designations for the cited condition in Order No. 8520664, the hearing in this matter cannot proceed without determining the proper evidentiary requirements for demonstrating a repeated flagrant violation under the statutory provisions of section 110(b)(2). Determining the evidentiary requirements for a repeated flagrant violation will materially advance the disposition of these matters. Accordingly, **IT IS ORDERED** that the Secretary file a brief addressing in detail the following questions:

- (1) **The degree of gravity is determined by the seriousness of the violation. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citations omitted). Is the degree of gravity required for a flagrant designation under section 110(b)(2) of the Act, 30 U.S.C. § 820(b)(2), greater than the degree of gravity required for an S&S designation under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1)?**

The Commission long ago noted that the "Act's overall enforcement scheme . . . provides for the use of increasingly severe sanctions for increasingly serious violations or operator behavior." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981). Section 104(d)(1) provides, in pertinent part, that an S&S violation is any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." Section 110(b)(2) provides, in pertinent part, that a flagrant violation is "a known violation . . . that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

The Secretary should address the distinction, if any, between the statutory language in sections 110(b)(2) and 104(d)(1). In addressing this issue, the Secretary should be mindful of the Commission's S&S criteria in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Commission noted the proper analysis under its third *Mathies* criterion concerning the likelihood of injury "requires that the *hazard contributed to* [by the violation] will result in an event in which there is an injury." *U.S. Steel Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984), *citing* 3 FMSHRC at 3-4 (emphasis added). This analysis is based on a variety of changing conditions normally encountered during continued mining operations in the presence of an unabated hazard. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (Aug. 1985), *citing* 6 FMSHRC 1573, 1574 (July 1984).

In addressing the difference, if any, between the degrees of gravity associated with S&S and flagrant violations, the Secretary should address whether a flagrant violation must constitute a clear and present danger that requires more than considerations with respect to continued mining operations. In this regard, the Secretary should be mindful of the Commission's holding in *Musser Eng'g, Inc.*, 32 FMSHRC 1257 (Oct. 2010), discussing the indicia for an S&S designation:

The test under the third element [of *Mathies*] is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury. The Secretary need not prove a reasonable likelihood that the violation itself will cause injury

32 FMSHRC at 1280-81.

(2) Is the degree of gravity the same for both reckless designations and for repeated designations under section 110(b)(2)?

The Secretary should address whether his reliance on a history of previous violations as a predicate for a repeated flagrant violation relieves the Secretary's burden of demonstrating that the subject violation was, or reasonably could have been expected to be, the substantial and proximate cause of death or serious bodily injury.

(3) Can a repeated flagrant violation be attributed to less than a reckless degree of negligence in view of the statutory language requiring that it be a *known violation* that will substantially and proximately cause death or serious bodily harm?

In addressing this question, the Secretary should consider whether the *inexcusable failure* (as required for unwarrantability) to eliminate a known violation that can reasonably be expected to cause death or serious bodily injury can be attributable to less than a reckless disregard. See *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (defining unwarrantable conduct as "not justifiable" or "inexcusable").

(4) What parameters does the Secretary propose for determining which violations serve as predicates for a repeated flagrant designation?

In this matter, the Secretary alleges that the subject flagrant violation is based on a history of previous violations.⁵ The Secretary should address, with specificity, his proposed parameters for previous violations with respect to: whether such violations must be attributable to an unwarrantable failure; whether the violations must be of the same mandatory standard; whether settled violations lacking an evidentiary record with regard to their nature and extent are appropriate predicates; and the operative time period during which these prior violations must have occurred.

(5) The provisions of section 110(b)(2) of the Act are essentially repeated in section 100.5(e) of the Secretary's implementing regulations. 30 C.F.R. § 100.5(e). The Commission traditionally resolves questions of deference by applying the two step test in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984). Are section 110(b)(2) of the Act and section 100.5(e) of the regulations ambiguous, and if so, is the Secretary's interpretation reasonable?

The "flagrant" penalty assessment provision of section 110(b)(2) of the Mine Act was added by section 8(a) of the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"). Section 8(b) of the MINER Act required the Secretary to promulgate rules to implement the provision. Pub. L. No. 109-236, § 8, 120 Stat. 493 (2006). On March 22, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") published a final rule revising its penalty regulations and "implement[ing] the civil penalty provisions of the [MINER Act]." 72 Fed. Reg. 13592. Although the Secretary has been delegated with the authority to promulgate a regulation implementing section 110(b)(2), section 100.5(e) of the regulations simply reiterates the language of section 110(b)(2) of the Act. In addressing the appropriate level of deference to be accorded to the Secretary's interpretation of section 100.5(e) given that it repeats the statutory language, Commission ALJ McCarthy has noted:

An agency deserves no deference for an interpretation of its own regulation when the regulation merely parrots the language of the statute, without implementing it. *Gonzales, supra*, 546 U.S. at 257 (2006). In such cases, the agency is not using its expertise to interpret the law. It is merely copying or paraphrasing the statutory language. *Id.* at 258.

⁵ Although the Secretary has identified three prior alleged generic unwarrantable failure violations of section 75.400, two of which have settled, the Secretary has not articulated why these violations were selected as predicates with regard to the nature and extent of the violations and the time period for their occurrence.

American Coal Co., 35 FMSHRC 2208, 2257 (July 30, 2013) (ALJ), *citing Gonzales v. Oregon*, 546 U.S. 243 (2006). As previously noted, in *Wolf Run* the Commission did not address the reasonableness of the Secretary's criteria for considering prior conduct. Assuming section 110(b)(2) is ambiguous with respect to the necessary predicates for a repeated flagrant violation, the Secretary should address the reasonableness of his proffered interpretation.

(6) Does implementation of the Secretary's proffered criteria with respect to predicates for a repeated flagrant violation require a notice and comment rulemaking?

It is well established that a notice and comment rulemaking is required where a regulation is substantive as opposed to procedural. *See Drummond Co.*, 14 FMSHRC 661, 683-85 (May 1992) (noting that, pursuant to 5 U.S.C. § 553(b)(3)(A), substantive or legislative rules require advance notice and public comment, while interpretative rules, general statements of policy, or rules of agency procedure or practice do not). The Secretary should address whether his proffered basis for a repeated flagrant violation is substantive or procedural.

ORDER

IT IS ORDERED that the Secretary shall provide a response to the above questions within 30 days from the date of this Order. **IT IS FURTHER ORDERED** that Oak Grove shall respond to the Secretary's submission within 21 days thereafter. **IT IS FURTHER ORDERED** that the Secretary shall have leave to file a reply within 21 days of Oak Grove's response. The parties should provide case law, regulatory provisions, and legislative history to support their respective positions. The parties may provide any relevant additional arguments outside the parameters of the above questions that they deem relevant.

As a final matter, the MINER Act was promulgated in June 2006. Despite having had more than seven years to do so, to my knowledge the Secretary has yet to present a cogent and/or consistent interpretation of the requisite factors contemplated by section 110(b)(2) to establish a repeated flagrant violation. Consequently, requests for extension of this briefing schedule may not be favorably entertained.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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March 25, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2013-185
	:	A.C. No. 15-19358-303177
Petitioner	:	
	:	
v.	:	
	:	
ARMSTRONG COAL CO, INC.,	:	
	:	
Respondent	:	Mine: Parkway Mine

AMENDED ORDER DISMISSING 24 CITATIONS FOR FAILURE OF THE SECRETARY TO COMPLY WITH AN ORDER OF THE COURT¹

Before: Judge Steele

On the 14th day of January, 2014, Respondent filed a Motion for an Order to Show Cause, stating that the Secretary had been unresponsive to an Order of the Court. The Court had ordered the parties to confer on stipulations in a pending Motion for Partial Summary Decision, which concerned jurisdictional matters in 24 of 49 citations issued in Docket No. KENT 2013-185.²

As noted in Respondent’s Motion for an Order to Show Cause, a telephone hearing was held on July 23, 2013, in which the Court informed the parties that more factual information was required in order to make a ruling on the pending Motion for Partial Summary Decision. After discussion of the issues, the parties agreed that perhaps certain joint stipulations could be submitted that would assist the Court in the determination of essential facts. Based on this agreement, the Court ordered the parties to confer and submit joint stipulations within 45 days, or by September 6, 2013.

¹ This Order has been amended to list the 24 of 49 citations that were referenced in the March 24, 2014 order.

² These citations are 8509488, 8509500, 8509756, 8509489, 8509759, 8509757, 8509751, 8509490, 8509752, 8509491, 8509760, 8509758, 8509753, 8509492, 8509493, 8509754, 8509494, 8509495, 8509496, 8509497, 8509761, 8509498, 8509755, and 8509499.

The record does not indicate that the Secretary made any attempt to confer with the Respondent within the timeframe ordered. The Order was issued in the summer. Summer became autumn, and autumn turned into winter. The Secretary remained unresponsive.

Finally, Respondent filed a Motion for an Order to Show Cause on January 14, 2014. In his response, the Secretary stated, incorrectly, that Respondent's Motion was predicated on the Secretary's refusal to agree to stipulations proffered by Respondent, and admitted that there was a delay in notifying the Court regarding "the acceptance, or not, of these proposed stipulations..." The Secretary stated in his response that only two of the 10 proposed stipulations of Respondent were acceptable and again acknowledged the delay, stating that it "takes responsibility for the delay."

On March 11, 2014, the Court issued an Order to Show Cause, directing the Secretary to show good cause within 11 days for the reason there was a failure to comply with the 45-day deadline. The Secretary's only response to this Order was a retransmission of the response to Respondent's Motion for an Order to Show Cause. There has yet to be an explanation to the Court as to why there has been no compliance.

In a prehearing Order, dated February 13, 2013, the parties were obligated to communicate with each other in good faith regarding substantive issues. The Order stated that failure to do so was grounds for dismissal of the offending party's case. Moreover, 29 C.F.R. § 2700.1(b) provides that a judge may be guided by the Federal Rules of Civil Procedure (FRCP) on procedural matters not regulated by the Commission's rules. Rule 41(b) of the FRCP provides for the involuntary dismissal of the action, or any claim, where the plaintiff (here the Secretary) has failed to comply with a court order.

It is therefore **ORDERED** that the 24 citations which are the subject of Respondent's Motion for Order to Show Cause be dismissed for failure to comply with the Court's Order to Confer regarding stipulations.

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

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