

April 2014

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Review was granted in the following cases during the month of April 2014:

Secretary of Labor, MSHA v. Black Beauty Coal Company, Docket Nos. LAKE 2009-410, LAKE 2009-412, LAKE 2009-413, LAKE 2009-414, LAKE 2009-415. (Judge Manning, March 10, 2014)

Secretary of Labor, MSHA v. The American Coal Company, Docket Nos. LAKE 2010-759, LAKE2010-408-R, LAKE 2010-409-R. (Judge Miller, March 3, 2014)

Review was denied in the following cases during the month of April 2014:

Secretary of Labor, MSHA v. Blue Diamond Coal Company, Docket Nos. KENT 2008-592, KENT 2008-784, KENT 2009-6. (Judge Paez, February 28, 2014)

Secretary of Labor, MSHA v. Power Fuels, LLC, Docket Nos. VA 2013-403, VA 2013-312-R, VA 2013-313-R, VA 2013-353-R. (Judge Koutras, March 10, 2014)

Secretary of Labor, MSHA v. Taft Production Company, Docket No. WEST 2012-1484-M. (Judge Gilbert, February 26, 2014)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 18, 2014

SECRETARY OF LABOR,	:	Docket No. SE 2010-95-M
MINE SAFETY AND HEALTH	:	A.C. No. 31-02071-197617
	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	
	:	
WAKE STONE CORPORATION	:	

Before: Jordan, Chairman; Young, Cohen, Nakamura, Althen, Commissioners

DECISION

BY THE COMMISSION:

This case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012), involves citations issued by the Secretary of Labor because horns on two of the mine operator’s vehicles did not work. The regulation relied on by the Secretary states that horns shall be maintained in functional condition.¹ However, because the failures were discovered in pre-operational examinations that the mine supervisor insisted on conducting before the Secretary’s inspector started his inspection, the Administrative Law Judge vacated the citations. 33 FMSHRC 1205, 1206-08 (May 2011) (ALJ). The Secretary filed a petition for discretionary review challenging the Judge’s ruling, and we granted that petition.

Based on the plain meaning of the regulation, relevant Commission precedent, and the safety-promoting purposes of the Mine Act, we conclude that the Judge’s interpretation is erroneous. Accordingly, we reverse his decision regarding each citation, and remand for assessment of penalties.

I.

Factual and Procedural Background

Wake Stone operates a crushed stone quarry in Battleboro, North Carolina. On July 14, 2009, an inspector from the Mine Safety and Health Administration (“MSHA”) conducted an inspection of the quarry. He was accompanied by quarry Superintendent Chris Pons. During the

¹ 30 C.F.R. § 56.14132(a) provides that “[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.”

course of the inspection, the inspector asked to examine a Caterpillar 345 B excavator and a Komatsu D65Px dozer. Although neither piece of equipment had been in operation during the shift, the two pieces of equipment were not tagged out and were parked in production areas. Superintendent Pons insisted that the vehicles be taken through the pre-operational examination required under section 56.14100(a) before being operated for the inspection.² The MSHA inspector acquiesced to Pons' demand. 33 FMSHRC at 1205; *see also* S. Br. at 1.

During the examination, it was discovered that the service horns on both vehicles did not work. 33 FMSHRC at 1205. MSHA then issued Citation Nos. 6512366 and 6512367 to Wake Stone, alleging violations of 30 C.F.R. § 56.14132(a) for failure to maintain the service horns in functional condition. Wake Stone contested the citations, and the parties filed cross-motions for summary decision.

The Judge vacated both citations, rejecting the Secretary's assertion that the plain meaning of section 56.14132(a) dictates that if a horn fails to function, it has not been maintained and a violation has occurred. *Id.* at 1206-08. He found that the Secretary's interpretation was "misguided" and reasoned that one of the few ways an operator can determine whether a horn is malfunctioning is by trying the horn. *Id.* at 1207. The Judge stated that "[s]ection 56.14100 [which requires mobile equipment operators to pre-shift their vehicles] was created to catch a malfunctioning vehicle before it has the opportunity to endanger miners' lives." *Id.* He concluded that applying the Secretary's interpretation would trivialize the effect of section 56.14100 and diminish the operator's motivation and incentive to conduct a thorough examination of equipment prior to placing it in service. *Id.* The Judge declined to "place strict liability in this situation" because he believed it would discourage thorough pre-shift examinations. *Id.* at 1208. He concluded that "if an operator discovered a problem with a horn during a pre-shift inspection and subsequently corrected the problem, then the operator has *maintained* the horn." 33 FMSHRC at 1207 (emphasis in original).

II.

Disposition

A. The Plain Meaning of the Standard

The issue before us involves the interpretation of section 56.14132(a) of the Secretary's standards, which provides that:

Manually-operated horns or other audible warning devices
provided on self-propelled mobile equipment as a safety feature
shall be maintained in functional condition.

30 C.F.R. § 56.14132(a).

² 30 C.F.R. § 56.14100(a) provides that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006) (quoting *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citation omitted)); *Alan Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707 (July 2001); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1765 (Nov. 1997).

The Secretary argues that the plain meaning of section 56.14132(a) requires that horns always be maintained in functional condition. We agree. The plain language of the standard requires that horns or other audible warning devices must function at all times unless the equipment has been taken out of service for repair. The Commission has held that the term “‘maintain’ [means] that warning devices shall be capable of performing on an uninterrupted basis and at all times. . . . [and] imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair.” *Nally & Hamilton Enter., Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011); *see also Sedgman*, 28 FMSHRC 322, 329 (June 2006); *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987 (Dec. 2006); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1765 (Nov. 1997). Additionally, the term “functional” in section 56.14132(a) means to be “capable of performing” or “operative.” *See Nally*, 33 FMSHRC at 1763.

It is undisputed that the service horns on both the Caterpillar 345 B excavator and the Komatsu D65Px dozer were not functioning when the MSHA inspector attempted to examine the vehicles. 33 FMSHRC at 1205. Because the service horns were defective at the time of the inspection and the equipment had not been tagged out of service, we conclude that the horns were not being “maintained in functional condition” as required by the language of section 56.14132(a).

Contrary to the Judge’s decision not to “place strict liability in this situation” (33 FMSHRC at 1208), section 110(a) of the Act, 30 U.S.C. § 820(a), imposes strict liability upon operators who are found in violation of the Act. *See Ames Construction, Inc.*, 33 FMSHRC 1607, 1611 (July 2011), *aff’d*, 676 F.3d 1109 (D.C. Cir. 2012). Imposing strict liability under the Mine Act is not optional – it is mandatory. Therefore, we reject the idea that Wake Stone’s strict liability under the maintenance standard is somehow negated by compliance with the pre-operational standard. *See* 33 FMSHRC at 1208. According to the plain meaning of section 56.14132(a) and the principles of strict liability as applied to this regulation, the Secretary need only prove that the service horns were not “maintained in functional condition.”

B. The Effect of the Pre-operational Inspection Requirement

The Judge held that the maintenance requirement of section 56.14132(a) must be read in concert with the pre-operational inspection requirement of section 56.14100(a). This interpretation is inconsistent with the plain meaning of the standard and thus is an impermissible construction. Section 56.14132(a) is devoid of any language that makes its enforcement dependent on another regulation. “To read a limitation into the [regulation] that has no basis in the [regulatory] language” would be impermissible. *See Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1280 (10th Cir. 1995).

In *Alan Lee Good*, the operator similarly argued that the functional braking system requirement of section 56.14101(a)(3) was applicable only to “self-propelled’ mobile equipment to be used during a particular shift” and was qualified by the pre-operational inspection and correction requirements of section 56.14100. 23 FMSHRC at 997. The Commission categorically rejected this approach, reasoning that “[s]ection 56.14101 is clearly a different standard from section 56.14100, with separate requirements.” *Id.*

The same is true here. Sections 56.14100(a) and 56.14132(a) are separate and independent regulations, each with its individual mandate. The text of section 56.14100(a) clearly states that it applies to equipment “to be used during a shift” and requires inspection of said equipment “before being placed in operation.” In contrast, section 56.14132(a) does not contain language limiting its application to equipment only “to be used during a shift” or to equipment that has or has not been “placed in operation.”

Accordingly, we conclude that the Judge’s decision to construe the language of section 56.14132(a) in concert with the language of section 56.14100(a) was in error.

C. The Contention that the Vehicles Were Not in Use

We also reject Wake Stone’s argument that a violation did not occur because the vehicles had not been in use when the defects were discovered, thus entitling it to perform a pre-operational examination prior to the MSHA inspection. The purpose of section 56.14132(a) is to shield miners from the hazards posed by operating defective equipment. *See* 30 C.F.R. § 56.1. Absent specific limiting language, the Commission has consistently determined that standards requiring maintenance in functional condition are enforceable when the cited equipment is not in actual use, unless it has been removed from service. *Alan Lee Good*, 23 FMSHRC at 997; *see Mountain Parkway Stone, Inc.*, 12 FMSHRC 960, 963 (May 1990); *Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843, 844-45 (Apr. 1981).

In *Ideal Basic*, the Commission reversed a judge’s finding that 30 C.F.R. § 56.9-2, which requires that defects be corrected before the equipment is placed in use, had not been violated because the defective coupling in question had not been used. 3 FMSHRC at 843. Finding the Judge’s “interpretation of the standard too narrow,” we held that “use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation.” *Id.* at 844. The Commission further stated that if defective equipment affecting safety that has not been “rendered inoperable” “is located in a normal work area, fully capable of being operated, that constitutes ‘use.’” *Id.* at 845; *see also Alan Lee Good*, 23 FMSHRC at 997 (reinforcing the rule that equipment not tagged out of operation and parked for repairs must be maintained in functional condition, “whether or not the equipment is to be used during the shift.”); *Mountain Parkway*, 12 FMSHRC at 963 (relying on *Ideal Basic* and interpreting the term “used” broadly to include equipment that was parked in the mine in turn-key condition and not removed from service).

In the instant case, the excavator was located in the rockbreaker area of the pit, and the dozer was parked in the pit area of the mine. *See* W.S. Answer to Sec’y’s 1st Req. for Adm. at 2. Wake Stone does not contend that either vehicle had been locked and tagged out of service when the MSHA inspector began his inspection. Because the defective vehicles were located in a

normal work area, were capable of being used, and had not been locked and tagged out, we conclude that the dozer and excavator were in “use” at the time of inspection.

We emphatically reject the Judge’s notion that sustaining these citations for failing to maintain equipment that is in a work area somehow trivializes section 56.14100(a). The operator is not being punished for finding defects during a pre-operational inspection. It is being cited for failing to maintain the horns in an operative condition. Thorough and diligent pre-operational inspections are a key component of assuring that safety equipment will be maintained and functional when equipment is in use. No operator should read this decision as creating anything other than an incentive to conduct thorough pre-operational inspections in order to minimize the chance that equipment will be at the job site in a defective condition.

Indeed, it would be odd if operators could insist on a section 56.14100 pre-operational examination upon learning of an impending MSHA inspection, and thereby avoid liability under section 56.14132(a). The strict liability nature of the Act does not allow for this sort of gamesmanship.³ As we have previously stated, restricting an operator’s liability to hazards identified in pre-shift examinations, or in this case, pre-operational examinations, runs counter to the Act’s safety objectives and would lead to perverse incentives. *Nally*, 33 FMSHRC at 1764. Instead, requiring that operators continuously keep machinery in operational condition encourages more vigilance with regard to instituting and enforcing effective maintenance procedures. *Id.*⁴

Accordingly, we find that the Judge’s interpretation of 30 C.F.R. § 56.14132(a) is invalid and conclude that Wake Stone violated the standard when it failed to “maintain in functional condition” the horns on both the excavator and the dozer. Because we find the standard’s language to be plain and unambiguous, we do not reach the Secretary’s deference argument or the operator’s notice argument. *See Exportal Ltda v. U.S.*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Jim Walter Res.*, 28 FMSHRC at 987; *Jim Walter Res.*, 19 FMSHRC at 1765; *Cannelton Indus., Inc.*, 26 FMSHRC 146, 151 (Mar. 2004); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (holding that when the language of the standard is found to be clear and unambiguous, fair and adequate notice to operators is provided).

³ We note that the operator here only asserted the requirements of section 56.14100(a) after the MSHA inspector announced his intention to inspect the vehicles.

⁴ Wake Stone’s contention that the Secretary’s interpretation of the standard will lead to absurd results, because the Secretary will be required to issue citations when malfunctioning horns are noted in pre-operational examination records, is likewise without merit. W.S. Br. at 11-15. The citations were issued based on the condition of the equipment at the time of the inspection. Further, “as a general matter, the Secretary does not automatically issue a citation based solely on information in examination records.” S. Reply Br. at 4; *see also* Examination of Work Areas in Underground Coal Mines for Mandatory Health or Safety Standards, 77 Fed. Reg. 20700-02, 20703 (2012) (discussing the final rule on examinations of work areas in underground coal mines and stating that “[g]enerally, at the beginning of an inspection, an inspector will review an operator’s examination records). As is the case under the existing standard, recording a violation does not automatically result in a citation.”).

III.

Conclusion

For the reasons set forth herein, we reverse the Judge's finding that Wake Stone did not violate 30 C.F.R. § 56.14132(a) and remand the case to the Judge for assessment of penalties.

/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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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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April 23, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2008-1059
	:	A.C. No. 15-12428-149534-02
v.	:	
	:	
SEQUOIA ENERGY, LLC	:	

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

At issue in this case is whether a Commission Administrative Law Judge erred in his assessment of civil penalties for four citations issued to Sequoia Energy, LLC, relating to mobile equipment defects. 32 FMSHRC 1361 (Sept. 2010) (ALJ). The case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). We conclude that the Judge erred in his assessment of the four penalties by reducing those penalties based upon his consideration of prior penalties that were proposed pursuant to a different penalty regulation. Accordingly, we vacate those penalties and remand them to the Judge for reassessment. On remand, the Judge is also instructed to reconcile seemingly unsupported or inconsistent findings with respect to the four penalties.

I.

Factual and Procedural Background

On February 8, 2008, an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”), Argus Brock, inspected Sequoia’s coal preparation plant in Harlan, Kentucky. 32 FMSHRC at 1362. As a result of the inspection, Inspector Brock issued various citations, including the four at issue in this proceeding. All four citations related to defects on trucks that hauled rock material from refuse bins at the plant to a refuse pile near the plant. *Id.* at 1362, 1363.

A. The Judge’s consideration of prior penalties

With respect to all four penalties, the Judge “note[d] parenthetically” that previous penalties concerning Sequoia’s failure to correct defects on mobile equipment had ranged from \$60 to \$400 compared to the range of \$3,996 to \$5,503 currently proposed for the four citations. *Id.* at 1372. The Judge recognized the Secretary’s concern that Sequoia needs to display greater efforts in maintaining its equipment but stated that his assessments, which were “significantly greater” than previous assessments, adequately addressed the Secretary’s concern. *Id.*

B. Citation No. 7496260: Exhaust pipe and headlights

MSHA Inspector Brock issued Citation No. 7496260, which alleged a significant and substantial (“S&S”)¹ violation of section 77.404(a),² because he observed that a refuse truck’s exhaust pipe had a leak that permitted carbon monoxide to enter the driver’s compartment. *Id.* at 1365-66. The citation was modified to incorporate allegations from a separate citation (which was then vacated) that the high and low beam headlights on the right side of the truck were also inoperative. *Id.* at 1365 & n.2. The inspector indicated in the citation that the operator’s degree of negligence was moderate. Gov’t Ex. 4.

The Judge affirmed the allegations of violation, S&S, and moderate negligence alleged by the inspector on the citation. 32 FMSHRC at 1366-67. However, the Judge assessed a civil penalty of \$1,400, rather than the penalty of \$4,689 proposed by the Secretary of Labor because he reasoned that there were several mitigating factors relating to the degree of gravity that warranted the reduction. *Id.* The Judge found that the hazard caused by the truck’s inoperative right headlights was mitigated by supplemental lighting at the refuse bins and at the refuse pile and on the truck. *Id.* at 1367. Regarding the defective exhaust pipe, he stated that the inspector did not contend that the condition was noted by pre-shift examiners, and that there was no visible hole that made the condition visibly “readily apparent.” *Id.*

C. Citation No. 7496262: Mirrors and headlights

Inspector Brock issued Citation No. 7496262, which alleged an S&S violation of section 77.404(a), because he observed that a refuse truck had a broken upper left side view mirror and a missing lower left side view mirror. *Id.* at 1368. The citation was modified to incorporate allegations from a separate citation (which was then vacated) that the high and low beam headlights on the right side of the truck were also inoperative. *Id.* & n.3. The inspector indicated in the citation that the operator’s degree of negligence was moderate. Gov’t Ex. 7.

¹ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C.

§ 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

² 30 C.F.R. § 77.404(a) provides, “Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

The Judge affirmed the allegations of violation, S&S, and moderate negligence alleged in the citation. 32 FMSHRC at 1369. However, the Judge assessed a penalty of \$1,200, rather than the proposed penalty of \$4,689 because, similar to Citation No. 7496260, he found that there were significant mitigating factors relating to gravity. *Id.* at 1368, 1369. The Judge stated that the same mitigating factors regarding headlights with respect to Citation No. 7496260 were applicable to Citation No. 7496262. *Id.* at 1369. He further noted evidence that the upper mirror was still functional, although it was cracked. *Id.* The Judge also determined that the lower mirror was used to look at the rear tires, and that the missing lower mirror would not normally be relied upon because the truck did not dump in the vicinity of an elevated area. *Id.*

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

Inspector Brock issued Citation No. 7496263, alleging an S&S violation of 30 C.F.R. § 77.1104³ because he observed combustible material, in the form of hydraulic oil, accumulated on the hood of the refuse truck that was also the subject of Citation No. 7496262. *Id.* at 1370. The inspector indicated in the citation that the operator's degree of negligence was moderate. Gov't Ex. 10.

The Judge affirmed the violation and that the violation was S&S. 32 FMSHRC at 1370-71, 1374. He determined that the leaking combustible hydraulic oil in proximity to very hot engine components constituted a hazardous condition, and that the degree of hazard was accentuated by the unpredictability of the directional flow of the oil. *Id.* at 1371. The Judge also recognized that the Secretary alleged that the condition had existed for several shifts and had been noted in the pre-shift examination book. *Id.* He further found that the condition was obvious in that it was readily observable on the hood of the truck. *Id.* The Judge concluded that the evidence reflects "at least a moderately high degree of negligence." *Id.* He then assessed a penalty of \$3,500 rather than the penalty of \$5,503 proposed by the Secretary. *Id.* at 1370, 1371.

E. Citation No. 7496266: Inoperative backup alarm

Inspector Brock issued Citation No. 7496266, alleging a violation of 30 C.F.R. § 77.410(c)⁴ because the back-up alarm on a refuse truck was not maintained in a functioning condition. *Id.* at 1371. The backup alarm had been noted as non-functional for several months. *Id.*; Tr. 291-92, 309-10. Sequoia's mechanic testified that the alarm was covered in mud, which muted its sound. Tr. 130-31, 317. He stated that it was a recurring problem and that he periodically cleaned the alarms, although he did not indicate that he did so in the pre-shift reports. Tr. 319-20. The mechanic stated that, after the citation had been issued, he repositioned

³ 30 C.F.R. § 77.1104 provides, "Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard."

⁴ 30 C.F.R. § 77.410(c) provides, "Warning devices shall be maintained in functional condition."

the alarm so that it would not be filled with mud. Tr. 319-20, 322-23. The inspector indicated in the citation that the operator's degree of negligence was high. Gov't Ex. 11.

The Judge affirmed the allegations of violation and S&S. 32 FMSHRC at 1371-72, 1374. However, he reduced the degree of negligence associated with the violation from high to moderate. *Id.* at 1372. The Judge reasoned that the alarm was exposed to mud, which prevented it from working, and that it was cleaned from time to time, although Sequoia's mechanic did not report the cleaning. *Id.* Concluding that the muddy conditions were a mitigating factor, he assessed a penalty of \$2,200, rather than the penalty of \$3,996 proposed by the Secretary. *Id.* at 1371, 1372.

The Secretary filed a petition for discretionary review challenging the Judge's reduction of the four penalties. The Commission granted the petition.

II.

Disposition

A. Consideration of past penalty amounts

Commission Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i), 30 U.S.C. § 820(i), and the deterrent purposes of the Act. *Id.*

In his penalty assessment, the Judge considered MSHA's standard Assessed Violation History Report, which covered penalties assessed to Sequoia from February 8, 2006, through February 7, 2008. Gov't Ex. 12. The information contained in the report is limited to the standard violated, the date of the occurrence, whether the violation was S&S, the type of enforcement action, the proposed penalty amount, and the amount paid. The Judge referred to the report in order to compare past penalty amounts with the amount of subject penalties proposed by the Secretary, in order to arrive at the appropriate amount of penalty that he should assess for the subject violations. 32 FMSHRC at 1372; Tr. 350-51.

We conclude that the Judge abused his discretion in assessing the four penalties.⁵ The Judge failed to recognize in his decision that the four proposed penalties were significantly impacted by the Secretary's amendments to 30 C.F.R. Part 100, which sets forth the Secretary's

⁵ Our colleagues assert that we should have addressed the "real issue in dispute" – the Secretary's argument that the Judge acted improperly by considering past penalty amounts assessed against Sequoia. Slip op. at 11, 13. However, we need not reach that issue because we find error in the narrower issue of the manner in which the Judge considered the past penalty assessments.

criteria and procedures for proposing civil penalties.⁶ In March 2007, the Secretary amended Part 100 to bring about “an across-the-board increase in penalties.” 72 Fed. Reg. 13592 (Mar. 22, 2007). The higher penalties under the amended scheme became effective on April 23, 2007. Thus, a lower penalty scheme was in effect for many of the prior penalties relied upon by the Judge, but the four proposals at issue were all subject to a higher penalty scheme. Indeed, some of the prior penalties relied on by the Judge in the Assessed Violation History Report (Gov’t Ex. 12) were “single assessments” of \$60, which are not used under the amended system.⁷

⁶ Our colleagues suggest that when we hold in our opinion that the Judge “failed to recognize” the impact of the Secretary’s amendments to the Part 100 regulations, we are saying that the Judge failed to discuss or think about those amendments. Slip op. at 11-12, 16 n.10. However, the Judge’s error was not in the nature of a failure to think about the Part 100 amendments. Rather, the Judge failed to recognize that those amendments, which significantly raised Mine Act penalties, rendered previous penalties essentially irrelevant for purposes of comparison to present penalties.

The Judge’s failure to recognize that the four proposed penalties were impacted by the amendments to Part 100 is evident from the Judge’s treatment of the prior penalties in assessing the four penalties at issue. At the conclusion of the hearing, the Judge described his assessment of the penalties:

And what I’m trying to do here is somehow come to a resolution that is – each side gets sort of half a loaf or whatever. Because if you look at the history of violations, these were a lot of similar violations that are at issue in this case and the proposed penalties . . . that were paid were somewhere between \$60 and 2 or \$300. So occasionally there was a \$400 penalty, but nothing of the magnitude of the total 40,000 penalty and \$4,600 for each citation, 4,689. So in reaching this conclusion, for example, of the 1,400 and 1,200 . . . I want to note that I’m doing it in the context of, I’m significantly raising the previous penalties, but I’m not raising them as much as the . . . Mine Safety and Health Administration has raised them.

Tr. 350-51. Thus, it is clear that the Judge used the irrelevant past penalties as a baseline for his present assessments. This is exemplified in Citation No. 7496263, where the Judge raised the negligence finding from “moderate” to “at least moderately high” but lowered the penalty from \$5,503 to \$3,500.

⁷ We note for illustrative purposes that if, for instance, the former penalty scheme had been used to calculate a proposed penalty for the violation set forth in Citation No. 7496263, the proposed penalty would have been \$629 rather than the proposed penalty of \$5,503 under the amended scheme.

The four proposed penalties in this case precisely reflect amended Part 100, specifically the tables contained in 30 C.F.R. § 100.3.⁸ Obviously, a Commission Judge is not bound by MSHA's proposed assessments of penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). However, the fact that MSHA's proposed assessments in this case were derived from its Part 100 standards shows that the proposed penalties were determined in a manner consistent with the regulations, given MSHA's factual findings as to Sequoia's size, history of previous violations, negligence, the gravity of the violations, and the operator's good faith in achieving compliance.

Moreover, as argued by the Secretary, the Assessed Violation History Report relied upon by the Judge (Gov't Ex. 12) does not contain sufficient information to have permitted a meaningful comparison between the violations described in the document and the violations in this case, for purposes of comparing prior penalties. The Assessed Violation History Report does not indicate the precise levels of negligence and gravity, which were the factors upon which the Judge based his penalty reductions in this case. Thus, the report is only useful as an overview of an operator's history of previous violations.⁹

For these reasons, we conclude that the Judge abused his discretion in assessing the four penalties at issue. Accordingly, we vacate the penalties and remand for reassessment.

In addition to his use of past assessments, the Judge's analysis of the four citations raises other issues which we instruct the Judge to address on remand. Those issues are described in the sections that follow.

B. Citation No. 7496260: Exhaust pipe and headlights

With respect to Citation No. 7496260, the Judge concluded that there were "significant mitigating circumstances related to the degree of gravity" that warranted a reduction in the civil

⁸ The proposed penalties of \$4,689 in Citation Nos. 7496260 and 7496262 are based on a total of 108 penalty points under Table XIV (which converts to \$5,211) with a 10% reduction for good faith in abating the violation. The proposed penalty of \$5,503 in Citation No. 7496263 is based on a total of 110 penalty points (which converts to \$6,115) with a 10% reduction for good faith in abating the violation. The proposed penalty of \$3,996 in Citation No. 7496266 is based on a total of 106 penalty points (which converts to \$4,440) with a 10% reduction for good faith in abating the violation.

⁹ Our colleagues suggest that we are impugning the use of MSHA Assessed Violation History Reports by Commission Judges in assessing penalties. Slip op. at 12-13. Their characterization of our views is incorrect. These Reports are routinely used by Judges in determining an operator's history of previous violations for purposes of section 110(i) of the Act. Their use is proper in that the Reports provide information about the dates of violations, the standards violated and whether the violation was S&S. *See Cantera Green*, 22 FMSHRC 616, 623-24 (May 2000). All we are saying here is that the information about an operator's *previous penalties* contained in the Assessed History Violation Report is not particularly useful because of the limited detail provided.

penalty proposed by the Secretary. 32 FMSHRC at 1367. We conclude that there is considerable evidence in the record that appears to contradict the Judge's findings that mitigating circumstances existed with respect to the defective exhaust pipe. In assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence that "fairly detracts" from the finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

The Judge's discussion of mitigating circumstances for this violation is confusing. Under the heading "Degree of Negligence," he stated that the inspector found a moderate degree of negligence. 32 FMSHRC at 1367. He set forth factors relevant to the operator's knowledge that a defect existed (which is pertinent to whether the operator failed to meet the appropriate standard of care to avoid a violation). But contrary to the Judge's finding that the defective exhaust pipe had not been noted by preshift examiners, Inspector Brock testified that the condition of the exhaust pipe had been noted in pre-operation checklists. Tr. 74, 83. The inspector also testified that the foreman had written in a notebook that he carried with him that the exhaust pipe was defective. Tr. 74, 85. This evidence was not rebutted by the operator.

The Judge also found that although the defect in the exhaust pipe was apparent when the truck engine was started, there was no visible hole in the exhaust system that made the condition readily apparent. 32 FMSHRC at 1367. However, contrary to his finding that the condition was not readily apparent, as the Judge recognized, a layer of soot had built up on the truck because of the fumes caused by the faulty exhaust pipe. *Id.* at 1365, 1366; Tr. 57. Indeed, as the Judge further found, Sequoia's mechanic admitted "that the leak caused soot to accumulate on the frame of the truck." 32 FMSHRC at 1366; Tr. 145-46. There is also evidence that the exhaust could be smelled. Tr. 118. On remand, we instruct the Judge to reconcile this evidence with his finding that there were several mitigating factors in regards to negligence.¹⁰

C. Citation No. 7496262: Mirrors and headlights

The Judge found that there were significant mitigating circumstances related to the degree of gravity that warranted reducing the civil penalty proposed for the cracked upper side mirror and missing lower side mirror described in Citation No. 7496262. 32 FMSHRC at 1369. The Judge stated that although the upper side mirror was cracked, it was still functional. *Id.* He also stated that these haulage trucks were not dumping in the vicinity of an elevated area, and that the lower mirror, which was adjusted to view the position of the rear tires, "is not normally relied on." *Id.*

There is considerable evidence in the record that appears to contradict the Judge's finding that the bottom mirror would not be used. Inspector Brock testified that a driver would use the bottom mirrors to see the truck's tires when backing up, and that a driver would need to see the

¹⁰ We note that when Inspector Brock found "moderate" negligence, this finding recognized the existence of mitigating circumstances. See 30 C.F.R. § 100.3(d), Table X (defining "moderate negligence" as "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances").

bottom back of the tires when backing under the refuse bin. Tr. 156-57, 158. On the date of the inspection, the trucks were using the top refuse bin, which was the bin that trucks had to back under in order to use. Tr. 159-60. The inspector also testified that the cited truck traveled at night, on steep grades, up and down hills, and around other equipment and miners, and that the area of the refuse site was wet and slick. Tr. 71-72, 158-60, 173, 178-79. He stated that a driver would need to back up several times during any shift and put the truck in reverse. Tr. 160-61. On remand, the Judge is instructed to reconcile his gravity findings with such evidence.

The Judge's finding that there were mitigating circumstances relating to gravity also appears inconsistent with his holding that the cracked and missing side view mirrors, alone, provided an adequate basis for designating the violation as S&S. 32 FMSHRC at 1369. The Judge reasoned that side view mirrors protect both the truck operator and miners who may be exposed to the risk of being struck while working in proximity to the truck. *Id.* He also found that it was reasonably "likely that this haulage truck [would] be operated under circumstances that require a lower side view mirror to ensure that the vehicle does not back through a berm installed in an elevated area." *Id.* The Judge did not adequately explain his seemingly inconsistent gravity and S&S findings and is instructed to do so on remand.

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

With respect to the violative hydraulic oil accumulation alleged in Citation No. 7496263, the Judge affirmed the S&S allegations, noted the "serious gravity" of the violation, and raised the level of negligence cited from moderate to "at least [] moderately high." *Id.* at 1371. The Judge characterized the violation as "the proverbial 'accident waiting to happen'" and noted that the condition was obvious in that it was readily observable on the hood of the truck and had existed for several shifts. *Id.* Nonetheless, the Judge assessed a penalty of \$3,500, rather than the penalty of \$5,503 proposed by the Secretary, a reduction of 36%. *Id.* at 1370, 1371.

The Commission has repeatedly recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). The Commission has stated that a Judge "need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his penalty assessments." *Mining & Property Specialists*, 33 FMSHRC 2961, 2964 (Dec. 2011) (citations omitted).

Here the Judge made no findings that would explain a significant reduction in the penalty amount from that proposed by the Secretary. In fact, the reduction seems inconsistent with the Judge's finding that there was a higher degree of negligence than that alleged in the citation. We instruct the Judge on remand to provide an adequate explanation for any penalty reassessed.

E. Citation No. 7496266: Inoperative backup alarm

At the refuse site, trucks dumped a wet mixture of rock and mud. Tr. 307. Sequoia's mechanic, Willie Fee, testified that when a refuse truck dumped its load, it sometimes backed into previously dumped material, and mud pushed into the backup alarm, muting its sound. Tr.

317-18, 321; 32 FMSHRC at 1372. Fee stated, “the situation we had up on the refuse was very messy and muddy. And every time you’d back in, it just kept – it was a continuous problem with mud pushing up into the backup horn.” Tr. 321. Although the cited inoperative backup alarm was noted for several months in the preshift checklist, Fee testified that he periodically washed the backup alarm but did not report that he had cleaned it. Tr. 308-10, 319-20. Fee agreed that the problem with mud packing into the alarm would continue to occur until the horn was moved, which it eventually was. Tr. 322-23.

The Judge determined that the violation of section 77.410(c) resulted from the operator’s moderate, rather than high, negligence.¹¹ 32 FMSHRC at 1372. The Judge reasoned, “[t]he admitted muddy conditions are a mitigating factor, however Sequoia is responsible for maintaining the alarm in functioning condition.” *Id.*

We conclude that the Judge erred in finding that the muddy conditions were a mitigating factor. As the record indicates, the muddy conditions were a recurring condition, and the effect on the alarm of backing into mud was known to the operator. Tr. 317-23. We instruct the Judge on remand not to consider the muddy conditions as a mitigating factor in his penalty reassessment.¹²

¹¹ Although the Secretary has not challenged the Judge’s determination that the level of negligence was moderate (PDR at 20 n.15), the Secretary has challenged the Judge’s finding that the muddy conditions were a mitigating factor (*id.* at 17-18).

¹² Commissioner Cohen would find it appropriate for the Judge to take into consideration Sequoia’s efforts, albeit ineffectual, to keep the backup alarm clean.

III.

Conclusion

For the reasons set forth above, we vacate the penalties assessed by the Judge with respect to Citation Nos. 7496260, 7496262, 7496263 and 7496266, and remand for the reassessment of appropriate civil penalties. On remand, the Judge shall reassess the penalties in recognition that the proposed penalties were impacted by the amendments to Part 100 and reconcile seemingly unsupported or inconsistent findings as discussed in this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Commissioners Young and Althen, concurring:

We concur with the decision to remand this case, but disagree with the majority's reasoning. The majority finds the Judge abused his discretion asserting that the Judge (1) "failed to recognize in his decision that the four proposed penalties were significantly impacted" by the Secretary of Labor's 2007 revised penalty regulations, slip op. at 5, and (2) improperly relied upon the Department of Labor's Mine Safety and Health Administration's ("MSHA's") Assessed Violation History Report. Slip op. at 6.

By remanding on these grounds, the majority avoids a principal argument advanced by the Secretary – that the Judge "abused his discretion by considering a factor outside those listed in Section 110(i), [30 U.S.C. § 820(i),] i.e., the amounts of previous penalties." PDR at 11.

This important question deserves resolution. However, ruling upon that issue requires us to consider in context the use the Judge made of the prior penalties and the Secretary's objections to that specific usage. Consequently, we would remand the case for a more specific explanation by the Judge of the use he made of prior penalty amounts in imposing penalties in this case.

A. The Majority's Reasoning Fails to Reach the Real Issue in Dispute

1. The Judge's failure to expressly mention the changes in the penalty regulation made nearly a year before the violation and three years before his decision does not invalidate his decision.

The majority says the Judge "failed to recognize" the increase in the amounts of penalties. This is a mere assumption, arising from the fact that the Judge did not explicitly mention the increase in his opinion.¹ The failure of the Judge to state explicitly that penalty regulations were amended nearly a year before the violations cited in February 2008 and more than 3 years before the September 21, 2010 decision is hardly remarkable. Indeed, it would be more surprising for an ALJ to mention a revision to the regulations that had occurred three years previously, when this Judge has considered penalties in dozens of cases since the revision.

Just as the failure to cite specific evidence does not mean that it was not considered (*Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)), the failure to discuss explicitly a three-year-

¹ In the same sense, the Secretary also "failed to recognize" the increase in penalties under the revised regulation. The Secretary's counsel did not note the changed penalty regulations on Government Exhibit 12. Nor did we see any place in the transcript where counsel informed or reminded the Judge of any change. Indeed, in demanding that the Judge not refer to prior penalties, the Secretary demands that the Judge ignore evidence the Secretary placed into the record.

old change in the penalty regulations does not mean the Judge was not aware of such changes, did not recognize that the changes had been made, or did not take those changes into account.²

2. Use of the Assessed Violation History is part of, rather than an abuse of, the penalty process.

The majority also apparently finds fault in the Judge's reference to MSHA's Assessed Violation History Report in his assessment of penalties. Whether or not the majority actually intends to impeach the usefulness of the Assessed Violation History, characterizing it as a mere "overview" misapprehends and understates the value of the information contained in the report, including information regarding prior penalties. Further, it avoids altogether any discussion of the Commission's decision in *Black Beauty Coal Company*, 34 FMSHRC 1856 (Aug. 2012) overruling *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552 (Sept. 1996).³

An operator's history of previous violations is a statutory criterion, and MSHA's Assessed Violation History Report was the only evidence introduced at the hearing on this criterion.⁴ To refute the suggestion that the Assessed Violation History Report is of marginal concern, one need only note that the Commission has vacated assessments where the Judge did

² To illustrate its position, the majority states that for one of the penalties the prior penalty scheme would have yielded a penalty of \$629 rather than the Secretary's assessment of \$5,503. A problem with the illustration is that it fails to mention that the Judge's assessment of \$3,500 was five and a half times greater than \$629. Similarly, the Secretary did not appeal the Judge's reduction in the negligence finding for Citation No. 7496266 from high to moderate. That reduction would have reduced the operator's point total by 15 points from 106 to 91 under the current penalty regulations, and the assessed penalty from \$3,996 to \$1,200. However, the Judge assessed a penalty of \$2,200 that was nearly twice the amount under the revised, "enhanced" penalty regulations.

³ The majority's finding that the Assessed Violation History Report does not provide sufficient information to allow a meaningful comparison with the charged violations repeats a criticism by commenters on the history of repeat violations element in the enhanced penalty regulation rulemaking. Those comments were rejected by the Secretary in adopting the regulations. 72 Fed. Reg. 13592, 13608-09 (Mar. 22, 2007). Indeed, the revised regulations aggregated significant and substantial ("S&S") and non-S&S violations for purpose of the history of repeat violations despite arguments that such aggregation ignores an important factual distinction between violations. *Id.*

⁴ The majority does not distinguish between the Assessed Violation History introduced by the Secretary in this case, which contained history from before and after implementation of the revised penalty regulations in April 2007 and the current format for the Assessed Violation History exhibit format. Instead, the majority appears to be commenting upon Assessed History Violation Reports generally.

not give it sufficient consideration. *Sec’y of Labor on behalf of Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 556-57 (Apr. 1996) (“The judge failed to consider the operator’s general history of previous violations submitted into evidence by the Secretary as the Assessed Violation History Report. . . . [W]e conclude that the judge erroneously limited the scope of the history criterion. We therefore remand the matter to the judge to evaluate the operator’s history of violations.”).

Although the Assessed Violation History report does not contain information on the facts underlying prior violations or precise negligence or gravity point information, it does help Judges understand and evaluate the prior performance of the operator. It specifies the date of each prior violation, the specific standard violated, type of action, whether the violation was found to be significant and substantial, and the amount of the penalty.

This information, standing alone, is useful for reviewing the operator’s history of prior violations, but a more refined perspective can easily be gleaned from the data. It is unlikely that the appropriateness to an operator’s size or the effect of a penalty on an operator’s ability to continue in business will have changed significantly, and the history of prior violations is a rolling consideration.⁵ Therefore, although the information regarding negligence and gravity will not be “precise,” a Judge may conclude with a reasonable degree of accuracy the total penalty points assigned for negligence and gravity for prior violations. Such information is not merely credible, quality data – it is often the only available evidence of prior history.

B. The Majority Declines to Address Whether an Administrative Law Judge May Use Prior Penalty Assessments in Imposing a Final Penalty Amount.

There is an important unanswered question at the center of this case – whether Administrative Law Judges may use prior penalty amounts in assessing penalties. Citing *Jim Walter Resources, Inc.*, 28 FMSHRC 579 (Aug. 2006), the Secretary asserts that “an ALJ may not rely on such amounts [past penalties] to arrive at penalties for new violations.” PDR at 11. In *Jim Walter*, we held that a judge could properly “note” the equivalency between penalties assessed and past penalties, but could not use past penalties to calculate an assessment simply because prior assessments were not a relevant factor under section 110(i) of the Mine Act. 28 FMSHRC at 608. The Commission has consistently ruled that, in assessing penalties, a Judge may take into account only the six criteria listed in section 110(i). See *RAG Cumberland Res., LP*, 26 FMSHRC 639, 658 (Aug. 2004) (citing cases), *aff’d sub nom. Cumberland Coal Res., LP v. FMSHRC*, No. 041427, 2005 WL 3804997 (D.C. Cir. Nov. 10, 2005) (unpublished).

Thus, the Secretary asserts a specific limitation upon the Judge’s considerations in setting a final penalty amount. The Secretary contends that “[t]he ALJ . . . abused his discretion by considering a factor outside those listed in Section 110(i), i.e., the amounts of previous penalties.” PDR at 11.

⁵ Good faith may not be assumed. However, based upon the penalty assessment before the Judge, the Judge may be able to make reasonable inference regarding good faith.

We would hold that this issue is not ripe for consideration because the Judge did not identify the reason for his mention of prior penalties, but it is the heart of the Secretary's argument. Armed, following remand, with an understanding of the reason the Judge cited the prior penalties, we may fully evaluate the basis for the Judge's reference to prior penalties.

The Secretary's reliance upon *Jim Walters* may seem doomed by the Commission's decision in *Black Beauty Coal Company*, 34 FMSHRC 1856 (Aug. 2012). In that case, as here, the Secretary contended "that the Judge erred in considering deterrence as a separate component in the Judge's consideration of the appropriateness of the penalties." *Id.* at 1857. The Commission disagreed and found that a Judge may consider the deterrent effect of a penalty as a consideration separate and apart from the six statutory criteria. *Id.* at 1868-69.

However, *Black Beauty* was decided in the context of a settlement, where a hearing record had not been fully developed. Furthermore, the Commission decision was issued without the benefit of a full briefing on the issues or oral argument. The Secretary continues to maintain before us, in this case, that Commission Judges may not base penalties on factors outside the six statutory criteria in section 110(i).

Finally, in *Black Beauty*, the Commission held that "the Judge did not abuse her discretion by considering the deterrent effects of the penalty amounts" *Id.* at 1869. However, the Commission provided no guidance or standards against which this newfound authority might be evaluated. It is thus possible that the decision in *Black Beauty* might be limited to the facts of that case, which overruled our decision in *Ambrosia Coal and Construction Company*.⁶ only "[t]o the extent that the case suggests that a Judge may not explicitly consider deterrence *in the analysis of the six statutory factors and the overall penalty.*" *Id.* at 1868 (emphasis added).

It is unclear how *Black Beauty* would affect the Judge's consideration of the penalty, and how the Secretary might respond to its express application in this case. Thus, on remand we would require the Judge to state whether and how *Black Beauty* applies to control or influence his decision on an appropriate penalty.

We note that *Black Beauty, supra*, did not consider prior penalty amounts as a sub-criterion of the statutory element of history of previous violations. However, penalty amounts

⁶ In *Ambrosia*, a unanimous Commission panel including Chairman Jordan held:

[A]lthough deterring future violations is an important purpose of civil penalties, deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria. *See Dolese Bros. Co.*, 16 FMSHRC 689, 695 (April 1994) (a judge's consideration is limited to the statutory penalty criteria). Deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.

18 FMSHRC at 1565 (footnote omitted).

are included on the Assessed Violation History Report and, therefore, are placed in evidence in virtually every penalty proceeding. As the majority in *Black Beauty* noted, the legislative history of the Mine Act shows that the history of penalty amounts was an important concern of Congress. 34 FMSHRC at 1865-66. Indeed, in addition to the references cited by the majority in *Black Beauty*, the Senate Report contained charts comparing assessed and collected penalties at the Scotia mine, the average penalty assessment per violation, and refers once to the amount of penalties in the context of the penalty criteria being included in the Mine Act. S. Rep. No. 95-181, at 41-45 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629-33 (1978) (hereinafter "*Legis. Hist.*"). The Senate Report further emphasizes the Commission's role in preventing the unwarranted lowering of penalties.⁷ *Legis. Hist.* at 44-45.

This discussion in the Mine Act's legislative history occurs in conjunction with the specific penalty criteria being written into the Mine Act. Further, prior penalty amounts may be seen as relating uniquely to the history of previous violations.⁸ Use of prior penalties as part of consideration of previous violations would thus necessarily be integrated into that one of the six statutory factors and probably would not be given the weight accorded such penalties in a separate, free-standing deterrence consideration. It is therefore crucial that the Judge specify how the prior penalty amounts were used, either as part of his conclusion of the operator's history of violations or as a basis for determining the amount needed to achieve deterrence.

While the Judge may have taken the prior penalties into account as part of a consideration of history of prior violations, his assessment of specific penalties in earlier, discrete sections of his opinion cited mitigating factors other than previous violation history. It therefore seems more likely that the Judge may have used the penalties in considering a deterrence argument by the Secretary or simply as a separate deterrence evaluation.

The Judge's reference to a Secretarial argument of a need for the operator "to display greater efforts" (32 FMSHRC at 1372) is textbook "deterrence" language. Therefore, he may have found it appropriate to accomplish the general purpose of deterrence without imposing an

⁷ The Conference Report states that the Congress acceded to the Senate Report on penalties thereby perhaps confirming that penalty amounts are part of the history of previous violations criterion for assessment of penalties. S. Conf. Rep. No. 95-461, at 58 (1977), reprinted in *Legis. Hist.* at 1279, 1336. Support for this view is found in the Senate Report stating, "That the amount assessed and collected for such violations actually decreased rather than increased raises serious questions in the Committee's mind as to whether MESA was properly following the statutory criteria for the assessment of penalties." *Legis. Hist.* at 630.

⁸ The use of prior penalties is not part of, and would not easily fit within, the Secretary point system for assessment of penalties. However, given that Congress has entrusted the Commission with discretionary authority to set final penalties, it does not seem untoward for the Commission to consider permitting its Judges to take into account a sub-criterion of a statutory penalty criterion that is part of violation history but not amenable to regulatory scoring.

excessive burden upon the operator.⁹ This thesis is consistent with the Judge’s announcement of his preliminary decision at the close of the hearing; wherein he noted that the penalties assessed were “relatively high given the history of violations,” and the previous proposed penalties in the Assessed Violation History Report. Tr. 357. Here, the Judge references both the history of prior violations and, in the same breath characterized the penalties imposed as “really significantly higher than in the past,” which would, indeed, be consistent with the progressive enforcement scheme and deterrent purpose of the Act. Tr. 358.

C. Conclusion

Rather than avoiding the central and important issue raised by the Secretary through a finding of abuse of discretion, we would remand the case for an explanation by the Judge of the reason he cited prior penalties amounts. Such an explanation would provide the Secretary an opportunity to consider his position with respect to those reasons. If the Secretary then continued to assert the Judge could not refer to prior penalties, the Commission could act on the basis of a completely briefed and argued record. For that reason, we would remand this case to the Administrative Law Judge for clarification of the reason he referred to prior violations and the use, if any, he made of them.¹⁰

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

William I. Althen
William I. Althen, Commissioner

⁹ This is a subjective viewpoint invited by the result in *Black Beauty* and would not be any more susceptible to objective review than the result in that case.

¹⁰ Given the majority’s (in our view unwarranted) skepticism, we would also require the Judge to explain whether he was aware of and/or took into account the change in penalty regulations in referring to the prior penalties.

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April 30, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2008-737
	:	A.C. No. 15-18267-144079
v.	:	
	:	
MANALAPAN MINING COMPANY, INC.	:	
	:	
	:	

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

DECISION

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

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”) is before the Commission a second time on appeal from the Judge’s decision on remand. 35 FMSHRC 1377 (May 2013) (ALJ) (*ALJ Dec. II*). The Judge’s initial decision, in relevant part, considered two section 104(d)¹ orders issued by the U.S. Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Manalapan Mining

¹ Section 104(d)(1) of the Mine Act provides in pertinent part:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.

30 U.S.C. § 814(d)(1).

Company, Inc. for combustible coal accumulations in violation of 30 C.F.R. § 75.400.² 32 FMSHRC 690, 701-03, 705 (June 2010) (ALJ) (*ALJ Dec. I*). The Judge affirmed the violations, but determined that they were not the result of the operator's unwarrantable failure to comply with mandatory health or safety standards. *Id.* The Commission granted the Secretary of Labor's petition for discretionary review challenging the Judge's decision. In its initial decision, the Commission vacated the Judge's unwarrantable failure determinations and remanded the matter to him to make findings on all the relevant unwarrantable failure factors and to apply the correct legal standard. 35 FMSHRC 289, 290, 297-98 (Feb. 2013) (*Manalapan I*).³

In his decision on remand, the Judge found that the first of the two violations, Order No. 7511472, resulted from the operator's unwarrantable failure to comply with the Secretary's standard. *ALJ Dec. II*, 35 FMSHRC at 1380. However, he vacated the second violation, Order No. 7511478, concluding that the Secretary had failed to prove a violation, despite the fact that in his initial decision he had ruled that a violation had occurred. *Id.* at 1382-83. The Commission has again granted the Secretary's petition for discretionary review challenging the Judge's decision.

For the reasons that follow, we conclude that by reversing his initial finding of a violation, the Judge violated the "law of the case" doctrine. We therefore reverse the Judge's ruling on the fact of violation for Order No. 7511478, vacate his decision, and remand for further consideration of several factors relevant to the unwarrantable failure issue for that violation.

I.

Factual and Procedural Background

A thorough discussion of the background facts and the Judge's initial decision is found in our *Manalapan I* decision. 35 FMSHRC at 290-293. To briefly summarize, at the time of the subject citation, Manalapan operated an underground coal mine in Pathfork, Kentucky. Coal was extracted from the working face by a continuous miner and transported out of the mine by a series of conveyor belts that were approximately 2,300 feet in total length. The extracted material was transferred in turn from the No. 4 belt at the face to the No. 3 and No. 2 belts and ultimately to the No. 1 belt nearest the surface. The conditions in the mine were constantly wet because of percolation of water through old works and the mine floor and ribs, and by the use of water for dust

² 30 C.F.R. § 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, or on diesel-powered and electric equipment therein."

³ In *Manalapan I*, Commissioner Young dissented in part from the majority opinion. He agreed that the Judge erred with regard to one violation (Order No. 7511472), but concluded that the Judge's decision in the other violation (Order No. 7511478) was supported by substantial evidence and consistent with the law. Hence, he would have affirmed the Judge's decision as to Order No. 7511478. 35 FMSHRC at 299-301.

control at the face. Despite the presence of water pumps, water was never completely removed, and the mine floor remained muddy at all times.

On October 2, 2007, before conducting his inspection of the mine, MSHA Inspector Daniel Lewis reviewed the preshift and onshift examination books. He observed notations under the column entitled “Hazardous,” entered from August 30 through October 2, 2007, noting generally wet and muddy conditions on a daily basis along the four belts. The books noted “working on” and “shoveling” as actions taken to correct the conditions. At the time of the inspection, four men were assigned to work on the beltline.

The issues on appeal in *Manalapan I* involved Belt Nos. 3 and 2, but this appeal concerns only Belt No. 2. Belt No. 2 was 500 feet long. In the order, Lewis noted that the accumulations along Belt No. 2 were one to 12 inches deep and that ten bottom rollers were rubbing on the accumulations. Inspector Lewis testified that the conditions along Belt No. 2 were so wet and muddy that they constituted a “borderline situation” in terms of establishing a violation. Tr. 150-52. Superintendent Miniard testified that there was no coal spillage along the belt. Tr. 337. Photos of the area depicted a “wet, soupy mixture of mud and water.” *ALJ Dec. I*, 32 FMSHRC at 703; R. Ex. 9.

Lewis issued Order Nos. 7511472 (Belt No. 3) and 7511478 (Belt No. 2) for violations of the mandatory safety standard in section 75.400 and designated the cited violations as “significant and substantial”⁴ and attributable to Manalapan’s unwarrantable failure to comply.⁵ The Secretary proposed a \$60,000 penalty for each violation. Upon the issuance of the citation and orders, the belts were shut down, and abatement took 18 employees seven to eight hours.

In his initial decision, the Judge determined that the accumulations along Belt No. 3 were an S&S violation, but declined to find that the violation resulted from an unwarrantable failure. 32 FMSHRC at 700-01. The Judge upheld Order No. 7511478, finding that there was an adequate basis to constitute an accumulations violation. He determined that the violation along Belt No. 2 was not S&S because the testimony indicated that the accumulation was soupy and more liquid than muddy, and thus the hazard posed by the condition was unlikely to cause serious injury. *Id.* at 702-03. The Judge also declined to find that the violation was an unwarrantable failure, relying on the inspector’s testimony that the violation was “borderline,” that it was unlikely to cause a fire, and that the evidence reflected no more than a moderate degree of negligence. *Id.* at 703. Consequently, the Judge modified both orders and assessed penalties of

⁴ The “significant and substantial” (“S&S”) terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

⁵ The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation.

\$12,000 for Order No. 7511472 (Belt No. 3), and \$4,000 for Order No. 7511478 (Belt No. 2). *Id.* at 702, 704.

In *Manalapan I*, the Secretary appealed only the finding that the two orders were not the result of unwarrantable failures. 35 FMSHRC at 293.⁶ The Commission vacated the Judge's unwarrantable failure determinations and remanded the case to him to "explicitly consider and weigh all the relevant factors as to whether Manalapan's conduct constituted unwarrantable failures." *Id.* at 297-98. The Commission decision expressly set forth the unwarrantable failure factors the Judge should have considered and the relevant evidence related to each factor, as well as the necessary findings the Judge would need to make on remand. *Id.* at 294-97.

On remand, with regard to Order No. 7511472 (Belt No. 3), the Judge held that high negligence supported a finding of an unwarrantable failure and increased the penalty from \$12,000 to \$16,000. *ALJ Dec. II*, 35 FMSHRC at 1380-81. As to Order No. 7511478 (Belt No. 2), the Judge stated that reconsidering unwarrantable failure caused him "to revisit the facts surrounding the cited violation." *Id.* at 1382. Believing that he "retained jurisdiction over all elements of Order No. 7511478 since no final decision had been rendered," the Judge did not view "the Commission's remand of the unwarrantable failure issue as a determination . . . concerning the fact of the violation." *Id.* at 1382, n.3. The Judge proceeded to reevaluate the same evidence he had already considered in his first decision, including the inspector's testimony that the conditions on Belt No. 2 were "borderline," and concluded that the Secretary failed to meet his burden of proving the violation. *Id.* at 1382-83. Accordingly, the Judge vacated Order No. 7511478.

II.

Disposition

The Secretary contends that the Judge erred by failing to follow the Commission's remand instructions for Order No. 7511478. Instead of conducting a proper analysis of the unwarrantable failure factors, the Judge reconsidered and reversed his earlier finding that the cited conditions constituted a violation. The Secretary points out that this issue was not appealed by either party and was not addressed by the Commission or remanded to the Judge. As a result, the Secretary argues that the Judge's initial, unappealed finding that the accumulations on Belt No. 2 constituted a violation of section 75.400 became the law of the case and could not be revisited by the Judge on remand.

A. The "Law of the Case" Doctrine

We conclude that the Judge erred by revisiting his earlier finding of a violation of Order No. 7511478 and reversing that finding on remand. His initial ruling upholding the violation constituted the law of the case. That doctrine provides that when a decision is made at one stage of litigation and not challenged on appeal, it continues to govern. *See Concrete Works of Colorado, Inc. v. City and Cnty. of Denver*, 321 F.3d 950, 992-93 (10th Cir. 2003); *United States v.*

⁶ The operator did not seek review of any part of the Judge's decision.

Bell, 988 F.2d 247, 250 (1st Cir. 1993); *see also Pepper v. United States*, 131 S. Ct. 1229, 1250 (2011) (stating that “when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.”). It is clear that here the law of the case principles governed the question of whether the accumulations on Belt No. 2 constituted a violation of section 75.400. In his initial decision, the Judge concluded that the conditions on Belt No. 2 constituted a violation. 32 FMSHRC at 702-03. Neither party appealed this finding to the Commission after the Judge’s initial decision. Thus, this finding was not before the Commission in *Manalapan I*, and was not remanded to the Judge for reconsideration. It is the law of the case. *See Douglas R. Rushford Trucking*, 23 FMSHRC 790, 793 (Aug. 2001) (holding that judge’s original findings of gross negligence and unwarrantable failure were not appealed, were not subsequently remanded, and thus became the law of the case).

The Commission has explained that “[l]aw of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” *E. Ridge Lime Co.*, 21 FMSHRC 416, 421 (Apr. 1999). The doctrine “operates to protect the settled expectations of the parties and promote orderly development of the case. . . . [and] ‘ensures judicial efficiency and prevents endless litigation.’” 18B Wright, Miller & Cooper, *Federal Practice and Procedure* § 4478, at 638 n.7 (2d ed. 2002) (citing *Suel v. HHS*, 192 F.3d 981, 984-85 (Fed. Cir. 1999)).

The doctrine of “law of the case” is not jurisdictional but rather a rule of policy and practice. It permits a “modicum of residual flexibility” in exceptional circumstances. *United States v. Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir. 1991), *cert. denied* 502 U.S. 862 (1991); *United States v. Bell*, 988 F.2d at 251. However, exceptions to the rule are narrow, and are limited to circumstances such as presentation of substantially different evidence, a change in applicable precedent since the issuance of the Judge’s initial decision, or a showing that the prior decision was “clearly erroneous and would work a manifest injustice.” *Rivera-Martinez*, 931 F.2d at 151; *Concrete Works of Colorado*, 321 F.3d at 993.

Neither the Judge nor Manalapan has cited any evidence of extraordinary circumstances warranting revisiting the issue. In fact, the Judge simply reconsidered evidence he had already considered in his first decision. In both decisions, the Judge noted – indeed, he rested his decision upon – the testimony by Inspector Lewis that the conditions along Belt No. 2 were a “borderline situation.” 32 FMSHRC at 702-03; 35 FMSHRC at 1381-83. In the first decision, the Judge found that this testimony “provide[d] an adequate basis for concluding there was [sic] sufficient combustible accumulations, although extremely wet, to constitute a violation of section 75.400.” 32 FMSHRC at 703. In his second decision, the Judge found this same evidence to be “inconclusive,” and that the Secretary had failed to carry his burden of proof. 35 FMSHRC at 1383. The fact that the same evidence might be susceptible to different interpretations does not render the first decision “clearly erroneous” so as to justify an exception to the law of the case doctrine.

While Manalapan claims a manifest injustice in the imposition of a penalty where no violation exists, Manalapan never appealed this finding and thus cannot now claim that it is inherently unjust or plainly erroneous. Accordingly, we vacate the Judge’s decision as to the fact

of violation and reinstate his initial finding that the cited conditions on Belt No. 2 constituted a violation of section 75.400.

B. Consideration of Unwarrantable Failure Factors on Remand

Having reinstated the violation for Belt No. 2, we must once again remand the case to the Judge to address whether the violation amounts to an unwarrantable failure of Manalapan to comply with section 75.400. The Judge has addressed several of the unwarrantable failure factors on remand with regard to the accumulations on Belt No. 3. While he failed to consider the evidence bearing upon those factors for the violation on Belt No. 2 since he vacated that order, his findings with regard to several of the unwarrantable failure factors are equally applicable to both violations and constitute conclusive findings for the Judge's reconsideration of the issue on remand.

Specifically, in his analysis of Belt No. 3, he stated that "the relevant criteria for an unwarrantable failure designation were, for the most part, present. The accumulations were obvious, of significant duration, and known to Manalapan, as evidenced by the pertinent notations in the examination book." 35 FMSHRC at 1379. Hence, the Judge found these factors to be aggravating. Because the notations in the examination books applied to all the belts, the Judge's findings that the obviousness, duration, and the operator's knowledge of the Belt No. 3 violation are aggravating factors apply equally to the Belt No. 2 violation.

Regarding whether the operator had notice that greater efforts of compliance were necessary, the Judge did not explicitly address this factor in reconsidering the unwarrantable failure issue of Belt No. 3 in his decision on remand. However, the record compels the conclusion that the operator was on notice and that this served as an aggravating factor. In *Manalapan I*, we concluded that the Judge had considered Manalapan's history of past accumulations violations in an inconsistent manner. We further stated that, given the Judge's findings in his analysis of Belt No. 4 regarding Manalapan's past history of accumulations violations, the operator's history should likewise be an aggravating factor as to Belt Nos. 3 and 2. 35 FMSHRC at 295-96. The Judge's findings as to Belt No. 4 were unappealed and – like his findings that conditions at Belt No. 2 constituted a violation – are now law of the case. Thus, we conclude that the evidence compels only one conclusion – that the operator was on notice, and that this also is an aggravating factor in the Judge's consideration of the unwarrantable failure designation of the Belt No. 2 violation. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

On remand, the Judge need therefore consider only the evidence related to the factors of the degree of danger, the extent of the violation, and the operator's efforts to abate the violation specifically as to Belt No. 2, as we had explicitly instructed in *Manalapan I*. 35 FMSHRC at 294-97. The Judge should make the requisite findings and determine whether these factors are aggravating or mitigating and then determine whether Manalapan's conduct amounted to an unwarrantable failure to comply with the standard.

III.

Conclusion

For the foregoing reasons, we vacate and reverse the Judge's finding that Order No. 7511478 did not constitute a violation of section 75.400, and reinstate his initial finding of a violation. We remand for reconsideration of the evidence related to the factors of the degree of danger, the extent of the violation, and the operator's efforts to abate the violation related to the unwarrantable failure designation of Order No. 7511478 under the correct legal standard, and for assessment of a penalty as appropriate.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/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

Commissioner Young, concurring in part, dissenting in part:

I agree with the majority's analysis of the law of the case doctrine, but I would not have remanded the case in the first instance. Because I believe the issue was addressed properly in the Judge's original decision, I would vacate his holding of no violation on remand and reinstate his original finding that the violation did not result from the operator's unwarrantable failure and would reinstate the penalty he originally imposed for the violation.

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

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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

April 08, 2014

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

v.

THE DOE RUN COMPANY

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:
:
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:
:
:

Docket No. CENT 2013-605-M
A.C. No. 23-00457-325635-01

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 December 4, 2013, The Doe Run Company (“Doe Run”) filed a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On September 5, 2013, the Chief Administrative Law Judge issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Doe Run’s failure to answer the Secretary’s July 26, 2013 Petition for Assessment of Civil Penalty. The Commission did not receive Doe Run’s answer within 30 days, so the default order became effective on October 7, 2013.

Doe Run asserts that its safety director resigned on October 4, 2013, and its new safety director discovered the delinquency after receiving the Secretary’s Substitution of Counsel notice, dated November 12, 2013. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future answers are timely filed.

The judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision’s issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge’s order here has become a final decision of the Commission.

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

Having reviewed Doe Run’s request and the Secretary’s response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, because this case was assigned to Administrative Law Judge Margaret Miller, we are remanding it to her for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
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/s/ William I. Althen
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April 08, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2013-350
v.	:	A.C. No. 44-06685-299480
	:	
BANNER BLUE 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 May 14, 2013, the Commission received from Banner Blue Coal Company (“Banner Blue”) 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 September 6, 2012, and became a final order of the Commission on October 8, 2012. Banner Blue asserts that its safety director instructed its administrative assistant to file the contest form, but the assistant mistakenly failed to file it timely. Banner Blue states that it discovered the delinquency on MSHA's data retrieval system on May 8, 2013. The Secretary does not oppose the request to reopen based solely on the fact that MSHA received a late contest and a payment for the uncontested penalties dated October 12, 2012. However, the Secretary notes that MSHA mailed a late notice on November 1, 2012, and a delinquency notice on November 21, 2012, but the operator did not file this motion until May 2013.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). In this case, we conclude that sufficient evidence has been presented to suggest that the lack of any procedure to confirm that the required paperwork was timely filed represents an inadequate or unreliable internal processing system.

Banner Blue has not replied to the Secretary's response to its motion. In particular, the operator failed to explain why it took six months after receiving the late and delinquency notices to request reopening. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008); *Highland Mining Co.*, 31 FMSHRC at 1316 n.3.

In considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17 (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the unexplained delay in responding to MSHA's delinquency notice amounted to six months. Banner Blue's statement that it discovered the delinquency on MSHA's data retrieval system on May 8, 2013, does not explain how and why it ignored MSHA's late and delinquency notices in November 2012. Banner Blue has not provided an explanation for filing its motion to reopen more than 30 days after receiving the delinquency notice.

Having reviewed Banner Blue's request and the Secretary's response, we conclude that Banner Blue has failed to establish good cause for reopening the proposed penalty assessment. Accordingly, we hereby deny without prejudice Banner Blue's request to reopen. *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). Should Banner Blue choose to renew its motion, it should provide an explanation for filing its motion to reopen more than 30 days after receiving the delinquency notice. Any renewed request by the operator to reopen this assessment must be filed within 20 days of this order. Any such request filed after that time will be denied with prejudice.

/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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April 11, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2013-739
v.	:	A.C. No. 15-19552-311756
	:	
MOUNTAINSIDE 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 May 8, 2013, the Commission received from Mountainside Coal Company (“Mountainside”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment became a final order of the Commission on February 22, 2013. MSHA mailed a delinquency notice on April 9, 2013. Mountainside asserts that it mailed a timely contest on February 1, 2013, and provided documentation of the mailing of the contest. The Secretary does not oppose the request to reopen, but states that MSHA has no record of receiving the penalty contest.

Having reviewed Mountainside'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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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

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April 11, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2013-973-M
v.	:	A.C. No. 26-00668-320689
	:	
ART WILSON 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 July 16, 2013, the Commission received from Art Wilson Company (“AWCO”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 8, 2013, and became a final order of the Commission on June 7, 2013. AWCO's representative asserts that he placed the contest in the outgoing mail on June 7. The Secretary does not oppose the request to reopen, but notes that the contest form was postmarked June 11, and urges the operator to adopt procedures to ensure that future penalty contests are timely filed.

We note that an Order to Submit Information was issued in error on July 19, 2013. Contest proceedings Docket Nos. WEST 2013-679-RM through WEST 2013-690-RM are incorporated in this matter.

Having reviewed AWCO'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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April 11, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2013-703
v.	:	A.C. No. 15-17216-313707
	:	
WARRIOR 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 April 26, 2013, the Commission received from Warrior Coal, LLC (“Warrior”) 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 13, 2013, and became a final order of the Commission on March 15, 2013. Warrior asserts that due to an unknown error in its internal mail delivery, the assessment was not transferred to its safety department. Warrior was notified of the delinquency by its accounting department. Warrior states that it has taken steps to ensure that the transfer of mail between facilities will not affect future timely filing of penalty contests. The Secretary does not oppose the request to reopen and notes that Warrior filed this motion to reopen before MSHA mailed a delinquency notice on April 30, 2013.

Having reviewed Warrior'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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April 11, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2013-331-M
v.	:	A.C. No. 01-00629-313889 ACR
	:	
G & R MINERAL 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 April 11, 2013, the Commission received from G & R Mineral Services, Inc. (“G&R”) 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. G&R also received a second proposed assessment, which it contested on March 27, 2013. G&R asserts that its safety director mistakenly believed he was contesting both proposed assessments at once. G&R discovered its mistake after conferring with counsel. G&R filed this motion to reopen after receiving MSHA's late notice on April 5, 2013. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.¹

Having reviewed G&R'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

¹ We note that this is the second time within the last three years that G&R has requested reopening of a penalty assessment because of its untimely filing of a notice of contest. *See G&R Mineral Servs., Inc.*, 33 FMSHRC 2070 (Sept. 2011).

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April 11, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2013-761-M
v.	:	A.C. No. 46-04694-293123 7YE
	:	
BECKLEY DRILLING & BLASTING	:	
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 April 11, 2013, the Commission received from Beckley Drilling & Blasting Services, Inc. (“Beckley”) 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).

This case involves Citation No. 8656936, which was included on Proposed Assessment No. 293123 issued by MSHA on June 21, 2012. On June 25, 2012, Beckley's President sent a letter to MSHA contesting the proposed assessment associated with this citation, as well as two other citations contained in a separate proposed assessment. According to MSHA records, Beckley enclosed a contest form for the other proposed assessment but not for Proposed Assessment No. 293123. MSHA's Civil Penalty Compliance Office acknowledged receipt of the contest of the two citations in the other proposed assessment, but not for the contest of the proposed assessment in Citation No. 8656936. Thus, according to MSHA records, the penalty for Citation No. 8656936 became a final order of the Commission on July 27, 2012. On July 30, 2012, Beckley sent a second letter to MSHA contesting the three citations and their associated proposed assessments. Beckley asserts that upon investigating the status of Citation No. 8656936 in the MSHA Data Retrieval System on April 2, 2013, it discovered the alleged delinquency.

The Secretary does not oppose the request to reopen, but notes that the operator never submitted a contest form in this case. The Secretary urges the operator to include MSHA Form 1000-179 with all future contests, as instructed in the proposed assessment.

Having reviewed Beckley'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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April 11, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2013-1945
ADMINISTRATION (MSHA)	:	A.C. No. 46-08864-316833 X626
	:	
v.	:	Docket No. WEVA 2013-1946
	:	A.C. No. 46-08864-319764 X626
MEIGS MINE SERVICE, LLC	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On June 19, 2013, the Commission received from Meigs Mine Service, LLC (“Meigs”) two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2013-1945 and WEVA 2013-1946, both captioned *Meigs Mine Service, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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 proposed assessment No. 000316833 was delivered on March 25, 2013, and became a final order of the Commission on April 24, 2013. Proposed assessment No. 000319764 was delivered on April 30, 2013, and became a final order of the Commission on May 30, 2013. Meigs asserts that three of its safety management personnel were experiencing medical issues, causing the failure to timely contest the assessments. The Secretary does not oppose the requests to reopen and urges the operator to adopt procedures to ensure that future penalty contests are timely filed.

Having reviewed Meigs' requests and the Secretary's response, in the interest of justice, we hereby reopen these matters and remand them 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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April 25, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. LAKE 2010-408-R
ADMINISTRATION (MSHA)	:	LAKE 2010-409-R
	:	Docket No. LAKE 2010-759
v.	:	A.C. No. 11-02752-219590
	:	
THE AMERICAN COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involve an order and citation that were issued to The American Coal Company by the U.S. Department of Labor’s Mine Safety and Health Administration (MSHA) following an inspection of a coal stockpile at American’s mine.¹

On January 19, 2010, MSHA inspectors issued Order No. 8418503 to American pursuant to section 103(k) of the Mine Act after observing what they believed to be a “mine fire” on the stockpile.² The MSHA inspectors also issued Citation No. 8418504 for a failure to timely contact MSHA after the operator knew or should have known that the incident occurred pursuant to the requirements of 30 C.F.R. § 50.10.

Although American contested both the citation and the order, an Administrative Law Judge held an expedited hearing exclusively on Order No. 8418503. On September 28, 2010, the

¹ The Commission consolidated the captioned cases pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, in the Direction for Review that was issued on April 4, 2014.

² Section 103(k) provides that “[i]n the event of any *accident* occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine” 30 U.S.C. § 813(k) (emphasis added). Section 3(k) of the Mine Act defines the word “accident” to “include[] a mine explosion, mine ignition, *mine fire*” 30 U.S.C. § 802(k) (emphasis added).

Judge issued a decision vacating the order and concluding that because the inspectors did not observe a flame on the stockpile, the Secretary failed to establish the occurrence of a “mine fire.” 32 FMSHRC 1387, 1390-91 (Sept. 2010) (ALJ). The Secretary petitioned for review of the Judge’s decision, which the Commission granted.

On February 28, 2013, the Commission issued a decision concluding that a “mine fire” does not require the presence of a flame. 35 FMSHRC 380, 387 (Feb. 2013). The Commission stated that the Secretary reasonably interpreted the term “mine fire” in section 3(k) to include “both events marked by flaming combustion and events marked by smoldering combustion that reasonably has the potential to burst into flames.” *Id.* Accordingly, the Commission vacated the Judge’s decision and remanded the matter for further proceedings.

On remand, the matter was assigned to a second Administrative Law Judge.³ On January 16, 2014, that Judge issued a decision that credited the testimony of the inspectors, found that a “mine fire” had occurred on the stockpile, and affirmed the order. 36 FMSHRC 176, 179-80 (Jan. 2014) (ALJ).

On February 14, 2014, American filed a petition for discretionary review of the Judge’s decision on remand, which the Commission granted. In its petition, American maintains, *inter alia*, that the Judge “denied [its] request for additional briefing before rendering her Decision.” PDR at 20.

On February 19, 2014, the parties filed a list of joint stipulations with the Judge so that she could issue a decision on Citation No. 8418504, which had been issued for American’s failure to timely notify MSHA regarding the mine fire. The parties agreed that their only dispute with respect to the citation was whether a mine fire occurred on the stockpile. 36 FMSHRC ___, slip op. at 2 (Docket Nos. LAKE 2010-409-R and LAKE 2010-759) (Mar. 3, 2014) (ALJ). The Judge relied on the parties’ stipulations as well as her January 16, 2014 decision in which she concluded that a mine fire had occurred. *Id.* She concluded that American violated section 50.10 when it failed to immediately report the accident to MSHA, and therefore she affirmed Citation No. 8418504. *Id.* at 3-4.

The issue of whether a mine fire occurred on the stockpile is common to the captioned proceedings. We conclude that American’s petitions raise issues which should have been more fully presented by the parties and considered by the Judge on remand. In particular, the issues that were presented to the Judge were somewhat unusual because the Secretary had presented a modified definition of the term “mine fire” to the Commission as compared to the definition that he proffered at the initial hearing. 35 FMSHRC at 384-85. We conclude that the Judge should have provided the parties the opportunity to file briefs before issuing her January 2014 decision.

³ The Administrative Law Judge who issued the September 2010 decision retired while the case was on review before the Commission.

Accordingly, the Judge's January 2014 decision regarding Order No. 8418503 is vacated. Because the January 2014 decision formed the basis for the Judge's March 2014 decision regarding Citation No. 8418504, that decision is vacated as well.

These consolidated cases are remanded to the Judge so that the parties may file briefs fully addressing the issues. The Judge shall conduct further proceedings as necessary.

/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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In this case Runyan failed to ask the Judge to certify his ruling for interlocutory review and of course, the Judge has not denied any such request. Thus, Runyan has not followed the necessary procedures to seek interlocutory review.¹

For the reasons set forth above, the petition filed by Runyan is denied.

/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

¹ Even if Runyan had sought interlocutory review from the Judge and been denied, we would conclude that the conditions set forth in Rule 76(a)(2) would not be met. Therefore, it appears at this point that no purpose would be served by Runyan filing a motion for interlocutory review with the Judge.

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Administrative Law Judge William B. Moran
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 3, 2014

SIGNAL PEAK ENERGY, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2012-1063-R
v.	:	Order No. 8475786; 06/13/2012
	:	
	:	
SECRETARY OF LABOR	:	Bull Mountain Mine No. 1
MINE SAFETY AND HEALTH	:	ID No. 24-01950
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2012-1325
Petitioner	:	A.C. No. 24-01950-295463-01
	:	
	:	Docket No. WEST 2012-1326
	:	A.C. No. 24-01950-295463-02
v.	:	
	:	Docket No. WEST 2013-0034
	:	A.C. No. 24-01950-3000928-02
	:	
SIGNAL PEAK ENERGY, LLC,	:	Docket No. WEST 2013-0046
Respondent	:	A.C. No. 24-01950-301628-01
	:	
	:	Docket No. WEST 2013-0048
	:	A.C. No. 24-01950-301672
	:	
	:	Mine: Bull Mountains Mine No. 1

DECISION

Appearances: Jessica Allen, Esq., with Timothy J. Turner on brief, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, and Christopher G. Peterson, Esq., Jackson Kelly, PLLC, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me upon a notice of contest and petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Signal Peak Energy, LLC, 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 Billings, Montana, and filed post-hearing briefs.

Signal Peak operates the Bull Mountains Mine No. 1 (the “Mine”) in Musselshell County, Montana. A total of four section 104(a) citations and one 104(d)(2) order in these dockets were adjudicated at the hearing.¹ The parties settled 15 citations in these dockets.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Order No. 8475786; WEST 2012-1325 and WEST 2012-1063-R

On June 13, 2012, MSHA Inspector Scott A. Markve issued Order No. 8475786 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.364(d) of the Secretary’s safety standards. (Ex. G-28). Order No. 8475786 documented three hazardous conditions that were not corrected immediately: (1) loose rib and roof material inby crosscut 76 covered 24 inches of the walkway, narrowing it to 27 inches, the rib mesh was damaged for 10 feet, and danger tape marked the condition, (2) the second timber outby the seal at crosscut 76 laid on the ground, and (3) the timber that was 15 feet outby crosscut 76 contacted solid ground, but only touched loose roof material and was identified by red danger tape. *Id.* Inspector Markve determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was significant and substantial (“S&S”), resulted from the operator’s high negligence and unwarrantable failure, and that one person would be affected. Section 75.364(d) of the Secretary’s safety standards pertains to weekly examinations and requires in pertinent part that “[h]azardous conditions shall be corrected immediately.” 30 C.F.R. § 75.364(d). The Secretary proposed a penalty of \$13,609.00 for this citation.

For the reasons set forth below, I modify Order No. 8475786.

Discussion and Analysis

I find that the conditions cited in Order No. 8475786 violated section 75.364(d) because Respondent failed to correct the cited hazards immediately. For the purposes of this case, the cited standard has two requirements: (1) at least one hazardous condition must exist and (2) the condition must be corrected immediately. 30 C.F.R. § 75.364(d). I credit Inspector Markve’s testimony, which is supported by his photographs, that the cited area presented a crushing hazard to miners due to roof falls. (Tr. 230-31; Ex. G-30 at 2). A timber lay upon the ground and

¹ At the hearing, the parties also presented evidence concerning two citations in Docket No. WEST 2012-410. (Tr. 6-214). After the hearing, the parties submitted a motion to approve settlement, which I approved by order dated August 28, 2013.

another timber did not touch solid roof. (Tr. 224-26). Mesh was cut open and had loose rock that appeared to be moving toward the open sections. (Tr. 234; Ex. G-30 at 2). Respondent argues that no roof fall hazard existed because the roof was supported with bolts and mesh, relying upon the testimony of Ray Jensen, Respondent's general mine foreman. (Tr. 301-03). The inspector's photos suggest that rock large enough to injure a miner was not supported and I credit the inspector's testimony that roof falls in the cited area posed a hazard to miners. (Tr. 230-32). It is worth noting that at least one timber that Respondent viewed as necessary to support the roof did not do so because it fell upon the ground. (Tr. 321). At least some of the conditions that contributed to roof fall hazard were not corrected immediately because they were noted in previous examinations weeks before the inspector issued the order. (Tr. 238). Jensen testified that the conditions would be addressed in a "somewhat timely manner," which is not immediate. (Tr. 285-86). The roof conditions cited in Order No. 8475786 were not corrected immediately and created a crushing hazard, which violated section 75.364(d).

I find that Order No. 8475786 was S&S because the cited conditions were reasonably likely, but not highly likely, to contribute to a serious injury.² A roof fall could lead to crushing injuries. I credit the inspector's testimony that a weekly examiner might not see that the timber was not in contact with the roof based upon the weekly examiner's usual route, which made the roof fall hazard unlikely to be corrected and more likely to injure a miner. (Tr. 247). The combination of the tripping hazard and the roof fall hazard makes an injury more likely by slowing miner movement through the area and exposing miners to the roof fall hazard for a longer period of time. Most importantly, I find that the photographs taken by the inspector depict hazards that are reasonably likely to injure miners; rocks appear poised to fall onto the walkway where miners travel. (Ex. G-30 at 2). Respondent argues that the cited area was not a work area and was only traveled on a weekly basis; this argument combined with my evaluation of the inspector's photos means that the cited conditions were not highly likely to lead to a serious injury. The conditions were, however, reasonably likely to lead to a crushing injury and Order No. 8475786 was therefore S&S.

² An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). 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).

I find that the violation was the result of Signal Peak's high negligence and its unwarrantable failure to comply with the safety standard.³ An operator that holds a good faith, reasonable belief that a condition is not hazardous does not act with the required knowledge to commit an unwarrantable failure. *IO Coal Co.*, 31 FMSHRC 1346, 1357-58 (Dec. 2009). I credit Jensen's testimony that he did not believe that the conditions were hazardous. The inspector's photographs and testimony, however, reveal a roof fall hazard that existed for weeks. I find that the evidence establishes that Jensen's belief was not objectively reasonable under the circumstances.

I credit the inspector's testimony, as corroborated by his photographs, concerning his high negligence and unwarrantable failure determinations. The inspector testified that the conditions were extensive and obvious. (Tr. 247-49). "You couldn't miss" the material in the walkway, the fallen timber, or the bagging roof mesh. *Id.* The evidence establishes that these hazardous conditions existed for a considerable length of time and that Signal Peak knew or should have known of the conditions through its examiners.⁴ Signal Peak's efforts to abate the conditions did not come close to remediating the hazards. Inspector Markve testified that he previously discussed with management the importance of recording hazardous conditions during weekly examinations and taking steps to immediately correct the conditions. (Tr. 249-50). Although the cited area was not frequently traveled, the violation posed a high degree of danger to those who were in the area. I hold that Signal Peak exhibited high negligence and a serious lack of reasonable care in failing to immediately correct the cited conditions.

Order No. 8475786 is hereby **MODIFIED** to be reasonably likely instead of highly likely to contribute to an injury. A penalty of \$15,000.00 is appropriate for Order No. 8475786.

³ 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).

⁴ The Commission has recognized that the preshift examination requirement in section 75.360 is "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). Weekly examinations are likewise of fundamental importance especially in those areas of the mine that are not subject to preshift examinations. A mine operator must ensure that its examiners are trained to perform thorough examinations and that hazardous conditions are reported, recorded, and corrected.

B. Citation No. 8475790; WEST 2012-1326

On June 14, 2012, Inspector Markve issued Citation No. 8475790 under section 104(a) of the Mine Act, alleging a violation of section 75.384(a) of the Secretary's safety standards. (Ex. G-21). Citation No. 8475790 states that gob piled to within 3 feet of the roof mesh as well as other refuse upon the ground created a stumbling, tripping, or falling hazard in the tailgate travelway for the 2 Right Longwall Section. *Id.* Inspector Markve 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 eight persons would be affected. Section 75.384(a) of the Secretary's safety standards requires:

If longwall or shortwall mining systems are used and the two designated escapeways required by §75.380 are located on the headgate side of the longwall or shortwall, a travelway shall be provided on the tailgate side of that longwall or shortwall. The travelway shall be located to follow the most direct and safe practical route to a designated escapeway.

30 C.F.R. § 75.384(a). The Secretary proposed a penalty of \$4,689.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8475790.

Discussion and Analysis

I find that the Secretary failed to fulfill his burden to show that Respondent violated Section 75.384(a) because he did not show that Entry 2, which Inspector Markve cited for the violation, was designated as the tailgate travelway. I credit the testimony of Jared Lester, Signal Peak's longwall coordinator, that Entry 1 was the designated tailgate travelway due to his first-hand knowledge of the travelways at the mine. The Secretary argued that Entry 2 was designated as the tailgate travelway based upon Inspector Markve's testimony that Entry 2 was a former escapeway, Respondent's upper management informed him that Entry 2 was the tailgate travelway upon termination of another citation, and the presence of white reflective tape in Entry 2. (Tr. 332-33, 336-37). Lester, however, testified that Entry 1 was the tailgate travelway; he was responsible for designating it as such. (Tr. 391). At the time the inspector issued Citation No. 8475790 the mine used green reflective tape to designate the tailgate travelway. (Tr. 379). Green tape hung in Entry 1 and miners were aware that Entry 1 was the tailgate travelway. (Tr. 379). Lester was not aware of the inspector's meeting with upper management (Tr. 381), but he testified that the previous citation incorrectly referenced Entry 2 as the trailhead travelway. (Tr. 387). The conditions cited in the present citation do not constitute a violation of Section 75.384(a) because that standard concerns tailgate travelways at longwall sections and Entry 2 was not such a designated travelway.

The secretary also argued that Entry 1, if it were designated as the tailgate travelway, failed to provide "safe access for miners to escape the tailgate in the event of an emergency." (Sec'y Br. at 20). This argument, however, fails because the inspector cited Entry 2, not Entry 1 and the citation does not reference Entry 1. Lester also testified that he walked through Entry 1

and the conditions did not impede travel. (Tr. 376-77). The Secretary failed to fulfill his burden to show that Respondent violated section 75.384(a). I hereby **VACATE** Citation No. 8475790.

C. Citation No. 8475639; WEST 2013-46

On March 26, 2012, Inspector Mark J. Albrecht issued Citation No. 8475639 under section 104(a) of the Mine Act, alleging a violation of section 103(a) of the Act. (Ex. G-40). Citation No. 8475639 states that Bud Viren “refused to provide the seal compaction tests” for failed seals during the inspector’s investigation of a hazard complaint. *Id.* Signal Peak “made no effort to contact the laboratory” responsible for performing the tests to obtain results. *Id.* The inspector requested the results on Friday, March 23, 2012 and issued the citation on Monday, March 26, 2012. *Id.* Inspector Albrecht determined that there was no likelihood that an injury would occur and an injury would not result in lost workdays. Further, he determined that the operator’s negligence was high. Section 103(a) of the Act charges the Secretary with entering mines “[f]or the purpose of making any inspection or investigation under this act,” and to gather information pertinent to the Act and mandatory health and safety standards. 30 U.S.C. § 813(a). The Secretary proposed a penalty of \$3,000.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8475639.

Discussion and Analysis

I find that that Edward A. (Bud) Viren III, Signal Peak’s vice-president of engineering, did not refuse to provide seal compaction tests for failed seals and therefore did not impede Inspector Albrecht’s investigation in violation of Section 103(a) of the Act. I credit the testimony of both Viren and David John Brown, who was the longwall coordinator when Citation No. 8475639 was issued, that Respondent did not violate section 103(a) of the Act.

Miners construct two metal stoppings that are 4 feet apart in each crosscut as the longwall retreats. The area between the stoppings in each crosscut is filled with a cement material. (Tr. 443-44). This material must “cure” before it becomes sufficiently hard. Miners take two sets of nine samples as the area between the stoppings is filled with the material. After 28 days, Signal Peak sends one set to an independent laboratory for compression (compaction) testing. (Tr. 422, 447-49). Under Signal Peak’s ventilation plan, if any of the initial set of samples sent to the laboratory fails the compression test, the lab asks the mine to send the second set of nine samples for additional testing. The specific test results from the initial set of samples are sent to the mine only if the samples pass the tests. If these samples do not meet the compression criteria, the lab only asks for the second set of samples without providing the specific test results.

On Friday, March 23, 2012, Viren provided Inspector Albrecht with records concerning site inspections of the seals, calibration records, and the results of laboratory compression tests received from the laboratory. (Tr. 407). Late in the day, Inspector Albrecht asked Viren if he had any records for seals that failed the compression test. *Id.* Viren provided an email from the lab that showed that a seal failed the compression test; the email did not give specific results. Viren told the inspector that because it was late Friday afternoon and the lab was closed, he

would not be able to provide him with specific test results until sometime on Monday when he could contact lab personnel. (Tr. 408-09).

Viren testified that he stayed at the Mine throughout the weekend for the purpose of aiding the inspector's investigation of the available records and the inspector testified that Viren was helpful throughout the weekend. (Tr. 485-86, 436). Brown testified that he left voicemails on Friday, Saturday, Sunday, and Monday as well as emails on Monday for his contact at the lab. (Tr. 470, 458-60). He testified that Respondent "did everything in our power to get" the test results. (Tr. 462).

Respondent provided the test results to the inspector on Monday, March 26, 2012, but only after Inspector Albrecht issued Citation No. 8475639. Viren testified that the inspector harassed and frustrated him throughout the weekend. (Tr. 484, 487). The inspector testified that Viren told him, using harsh language, "you need to talk to Dave Brown" and that helping him was not Viren's job, which led to the issuance of Citation No. 8475639. (Tr. 413, 431). The inspector testified that Viren's manner of speaking contributed to his decision to issue Citation No. 8475639 and when asked if he would have issued the citation if Viren had addressed him in a different way, the inspector replied, "[p]robably not, no." (Tr. 437).

I find that Respondent exerted its best efforts to obtain the test results that the inspector requested and provided those results as soon as possible. Although it is inadvisable for an operator's agent to speak to an inspector in an unpleasant manner, it is not necessarily a violation of the Act to do so.⁵ I find that Signal Peak did not impede MSHA's investigation of the section 103(g) complaint.⁶ I therefore **VACATE** Citation No. 8475639.

D. Citation No. 8476307; WEST 2013-34

On July 23, 2012, Inspector Wayne Johnson issued Citation No. 8476307 under section 104(a) of the Mine Act, alleging a violation of section 75.364(h) of the Secretary's safety standards. (Ex. G-37). Citation No. 8476307 states that "[d]uring the weekly exam dated 7/22/2012, the hazardous seals located in 2RT at cross cut 86 and cross cut 95 were not noted in the weekly examination book by the examiner. Failed seals with low oxygen behind them are hazardous to miners." *Id.* Inspector Johnson determined that an injury was unlikely occur, but that any injury would be permanently disabling. Further, he determined that the operator's negligence was high and that one person would be affected. Section 75.364(h) of the Secretary's safety standards requires in pertinent part that "[a]t the completion of any shift during which a

⁵ Viren denies that he swore at the inspector or told him that helping an inspector was not his job.

⁶ The Secretary argues that the inspector was entitled to immediate access to the information that he desired in accordance with 103(g) to investigate an anonymous complaint and Respondent purposely delayed his access. I reject this argument. The inspector's testimony, as well as that of Brown and Viren, suggests that Respondent did its best to provide information to the inspector throughout the weekend. The test results were in an independent lab and delaying the inspector's access to those test results served no purpose to Respondent since the passage of a few days would not change the results.

portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations” shall be recorded. 30 C.F.R. § 75.364(h). The Secretary proposed a penalty of \$499.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8476307.

Discussion and Analysis

I find that Respondent did not violate section 75.364(h) because the Secretary failed to fulfill his burden to show that Respondent did not record hazardous conditions in its weekly examination records. Section 75.364(h) generally requires that operators must make records documenting weekly examinations and specifically requires that hazards must be included in these records. 30 C.F.R. § 75.364(h). The Commission recently summarized section 75.364(h) as requiring that “hazardous conditions be recorded during weekly examinations.” *Mach Mining, LLC*, 35 FMSHRC 2937, 2938 (Sept. 2013). The standard does not require that all conditions be recorded. I credit Brown’s testimony that the cited conditions were not hazardous.

The Secretary argues that Respondent noted failed seals in the preshift and onshift reports but did not note the condition in its weekly examination records.⁷ Brown, however, testified that the test results were recorded in the “remarks” section of the preshift and onshift reports and not the hazard section because the cited seals were not hazardous. (Tr. 533, 538; Ex. G-39). The test results showed that there were soft spots in the exterior areas of the seals that were not completely cured. (Tr. 528). The air behind the seals was inert, with safe methane, oxygen, and nitrogen levels. *Id.* The inspector did not examine the seals himself and admitted that the oxygen levels behind the seals were safe. (Tr. 518). The seals are not hazardous while curing and are therefore not hazardous when soft spots fail to completely cure, especially when the seals do not serve to separate miners from unsafe atmosphere. At the time the citation was issued the outby “seals” were still curing and the cited seals functioned as stoppings rather than seals. (Tr. 528). I credit Brown’s testimony that the seals were not leaking and functioned to separate the two atmospheres. (Tr. 529). The Secretary, furthermore, did not present any evidence to show that the cited condition was a hazard but relied upon the fact that conditions recorded in the preshift and onshift examination books were not recorded in the weekly examination book. Although this condition was worth noting during preshift and onshift examinations, I find that it was not a hazard and Signal Peak did not violate Section 75.364(h). I hereby **VACATE** Citation No. 8476307.

E. Citation No. 8464892; WEST 2013-48

On November 5, 2011, Inspector Johnson issued Citation No. 8464892 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary’s safety standards. (Ex. G-33). Citation No. 8464892 states:

⁷ The Secretary acknowledges that the conditions were recorded in the preshift and onshift reports and states that Citation No. 8476307 was a paperwork violation even though “[b]oth pre-shift and on-shift were essentially part of the weekly examination.” (Sec’y Br. at 32).

In 3 right section entry 3 xc5 to xc6, a roof fall occurred that measured approximately 20 feet wide by 20 feet long by 12 feet high. The area was not controlled to protect persons from hazards related to falls of the roof. Uncontrolled roof strata had water penetration of the upper coal and parting seams that was not controlled. This exposed miners that travel this entry each shift to roof fall injuries that would be fatal.

Id. Inspector Johnson determined that an injury was highly likely to occur and that such injury would be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 75.202(a) of the Secretary's safety standards requires, in pertinent part that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The Secretary proposed a penalty of \$70,000.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8464892.

Discussion and Analysis

I find that Respondent did not violate section 75.202(a) because the roof control initiated by Respondent is what a reasonably prudent person would have provided. The Secretary's roof-control standard 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission has held that "[t]he adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Cannon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987). An examiner at the Mine recognized the hazard imposed by the roof, which led to Signal Peak's efforts to repair it. (Tr. 557). Jensen as well as Ben Harcourt, the underground shift foreman, testified that Respondent shut down and dangered off the area, only allowing entrance to examiners and miners working to support the roof. (Tr. 579-80, 573-76). Intending to rebolt the roof, Respondent first set timbers. (Tr. 583). When the timbers did not solve the problem, Respondent set breaker rows going toward the hazard from both directions to stop a roof fall from spreading if it occurred. (Tr. 583). These timbers and breaker rows did not reach the area where the roof fall occurred, however, because miners left the area hours before the roof fell when they heard cracking and popping. (Tr. 551-52). Leaving the area was both safe and prudent for these miners.

I reject the Secretary's argument that the occurrence of the roof fall alone shows that the condition violated Section 75.202(a). Section 75.202(a) imposes upon Respondent the duty to maintain safe roof conditions in the manner that a reasonably prudent person would do. For an operator to support or control a roof, it must first identify any hazards and address those hazards in a safe manner. Here, Respondent identified a hazardous section of roof that it needed to rebolt. Respondent dangered the area and set timbers. When timbers were inadequate to control the roof, it set breaker rows. When the cited hazard became too dangerous for Respondent to approach it to set the timbers and breaker rows, Respondent evacuated the area. Respondent

approached its duty to support and control the roof under section 75.202(a) in a cautious and logical manner that limited risk to miners. It sought to bolt the roof, but approached the task in a way that protected miners from a roof fall. The Secretary argues that Respondent misunderstood the roof structure and should have amended its roof plan,⁸ but I find that in this situation, a reasonably prudent person would have taken the same steps as Respondent did to meet the protection intended by the standard. The Secretary, furthermore, did not present any evidence to show that these actions were unreasonable. I hereby **VACATE** Citation No. 8464892.

II. SETTLED CITATIONS

A number of the citations at issue in these cases settled. By order dated July 3, 2013, I approved the parties' settlement of Citation No. 8475644 in Docket No. WEST 2012-1325 and ordered Signal Peak to pay a penalty of \$12,000.00. By order dated February 26, 2014, I approved the parties' settlement of eight citations issued under section 104(a) of the Mine Act in Docket No. WEST 2012-1326 and ordered Signal Peak to pay a penalty of \$7,484. By order dated February 26, 2014, I approved the parties' settlement of six citations issued under section 104(a) of the Mine Act in Docket No. WEST 2013-34 and ordered Signal Peak to pay a penalty of \$1,034.

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 have considered the Assessed Violation History Report, which was submitted by the Secretary. (Ex. G-20). At all pertinent times, Respondent was a large mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Signal Peak Energy, LLC, to continue in business. The gravity and negligence findings are set forth above.

⁸ Respondent was completing the process of amending its roof plan when the citation was issued. (Ex. R-27). Section 75.223, not 75.202(a), addresses the need to revise a roof control plan when conditions warrant.

IV. ORDER

For the reasons set forth above, I **VACATE** Citation Nos. 8464892, 8476307, 8475639, and 8475790 and I **MODIFY** Order No. 8475786. Signal Peak Energy, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$15,000.00 within 30 days of the date of this decision.⁹

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

Distribution:

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⁹ 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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April 4, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-1180
Petitioner	:	A.C. No. 46-09163-327526-01
	:	
	:	Docket No. WEVA 2014-375
	:	A.C. No. 46-09163-338106-01
	:	
v.	:	Docket No. WEVA 2014-376
	:	A.C. No. 46-09163-338106-02
	:	
	:	
ELK RUN COAL COMPANY	:	Mine: Roundbottom Powellton Deep Mine
Respondent.	:	

DECISION AND ORDER

Appearances: Pollyanna E.F. Hampton, Esq., U.S Department of Labor, Office of the Solicitor, Arlington, VA for the Secretary

Eric L. Silkwood Esq., Hardy Pence PLLC, Charleston, WV for Respondent

Before: Judge Steele

STATEMENT OF THE CASE

These cases are before the undersigned Administrative Law Judge on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Elk Run Coal Company (“Respondent” or “Elk Run”) pursuant to Section 104 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). A hearing was held in Charleston, West Virginia on January 9 and 10, 2014. The parties subsequently submitted post-hearing briefs.

PROCEDURAL HISTORY

On April 18, 2013, MSHA inspector Jack Dempsey conducted an inspection of Roundbottom Powellton Deep Mine (“Powellton Mine”) and issued several citations. Respondent contested many of these issuances, four of which (three citations and an order) were

placed in three civil penalty dockets (WEVA 2013-1180, WEVA 2014-375, and WEVA 2014-376).¹ The total assessed penalty for the three citations and orders was \$197,386.00. On January 9 and 10, 2014 a hearing was held on these remaining citations.

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.² Those stipulations include the following:

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Federal Mine Safety and health Act of 1977 ("the Act").
2. Roundbottom Powellton Deep Mine, located in Boone County, West Virginia, is where the citations and orders at issue in this matter were issued.
3. Roundbottom Powellton Deep Mine was operated by Elk Run on April 18, 2013.
4. Roundbottom Powellton Deep Mine is a mine as that term is defined in section 802(h) of the Act.
5. Elk Run was an "operator" as defined in Section 3(d) of the Act at the coal mine at which the citations and order at issue in this proceeding were issued.
6. Elk Run is considered a large mine operator and Roundbottom Powellton Deep Mine is considered a large mine for purposes of 30 U.S.C. 820(i)
7. The products of the mine at which the citation and order at issue in this matter were issued entered commerce, or the operator or products therefore affected commerce, within the meaning and scope of Section 4 of the Act.
8. Operations of Elk Run at the coal or other mine at which the citations and orders at issue in this proceeding were issued are subject to the jurisdiction of the Act.
9. The penalty which has been assessed for these violation pursuant to 30 U.S.C. § 820 will not affect the ability of Elk Run to remain in business.

¹ WEVA 2014-376 also included four citations (Citation Nos. 8156352, 8156059, 8156062, and 8156063), that were not issued on April 18, 2014 and were unrelated to the instant matters. On March 31, 2014 Chief Judge Lesnick severed these four citations from WEVA 2014-376 and placed them in a new docket, WEVA 2014-749. That docket will be disposed of separately.

² Hereinafter the Joint Exhibits will be referred to as "JX" followed by the number. Similarly, the Secretary's Exhibits will be referred as "GX" and Respondent's Exhibits will be referred to as "RX."

10. The individual or individuals whose signatures appear in Block 22 of the citations and orders at issue in this matter were acting in their official capacity and as an authorized representative for the Secretary of Labor when the citations and order were issued.
11. None of the exhibits the parties intend to offer into evidence and that were exchanged prior to hearing will be subject to objection as to authenticity. This stipulation does not mean that either party stipulates to the truth of any allegation in the exhibits but merely to their authenticity.
12. True copies of the citations and order at issue in this matter, with any and all modification and abatements, were served on Elk Run or its agent as required by the Act.
13. The citation and order at issue in this matter, along with any and all modifications and abatements, were issued on the dates stated therein and were issued by a duly authorized representative of the Department of Labor, MSHA.
14. The citations and order at issue in this matter contained in Exhibit A attached hereto are authentic copies of the citations and order at issue in this matter, including any and all modifications and abatements.
15. The information contained in Exhibit A attached to the Secretary's Petition for Assessment of Civil Penalty regarding the mine tonnage of Elk Run accurately reflects tonnage production at Roundbottom Powellton Deep Mine.
16. The citations at issue in this matter were timely abated.
17. The citations and order at issue in his matter, along with any and all modifications and abatements, may be admitted into evidence, without objection, although Respondent may dispute specific allegations contained within the citations and order.
18. The approved roof control plan in effect on April 18, 2013 required entries to be a maximum of 20 feet wide in the area at issue in Citation No. 8154925.
19. The approved roof control plan in effect on April 18, 2013 required spacing between roof bolts to be a maximum of 60 inches in the area at issue in Citation No. 8154925.
20. The mesh screening panels at issue in Order No. 8154928 measured five feet by twelve feet and were provided to Elk Run by Jenmar.

Joint Exhibit 1 (*see also* Transcript I, at 8).³

³ Hereinafter the transcript will be cited as "Tr." Followed by the page number. There are two volumes of transcript here so, the first volume will be denoted "Tr. I," and the second, "Tr. II,"

Citation No. 8154925

I. ISSUES

With respect to Citation No. 8154925, the issues to be determined are whether Respondent's alleged violation of the Act on April 18, 2013 was significant and substantial ("S&S"), whether it was reasonably likely to result in fatal injury to 14 miners, whether it was the result of high negligence, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

MSHA Inspector Jack Dempsey conducted an inspection of Roundbottom on April 18, 2013.⁴ (Tr. I, 20). He was accompanied by Safety Representative Terry Peterson.⁵ (Tr. II, 30-31,

⁴ At hearing Jack Arnold Dempsey appeared and testified for the Secretary. (Tr. I, 14). Dempsey graduated from High School in 1972 and attended more than three years of college. (Tr. I, 14-15). He started in the coal industry for Cannelton Coal in 1974. (Tr. I, 15-16). He worked at Bethlehem Steel Corporation in 1977 to October 1992 as certified electrician. (Tr. I, 16-17). He was a certified electrician underground, surface, and prep plants and was certified for surface and underground mining. (Tr. I, 16, 18). He worked as a scoop operator, shuttle car operator, roof bolter operator, continuous miner operator, ran a motor, and acted as a general laborer. (Tr. I, 17). He also worked for a coal transportation company. (Tr. I, 17). From March 2009 until the hearing, Dempsey worked for MSHA as an inspector. (Tr. I, 14). He received classroom training at the Mine Academy and on-the-job training from seasoned inspectors. (Tr. I, 18). This training included instruction on roof control, ribs, and ventilation. (Tr. I, 19). As an inspector, Dempsey would travel airways, conduct and examine rock dust surveys, conduct noise surveys, examine equipment, observe work practices, and review records. (Tr. I, 20). He was not a certified foreman and had never conducted or assisted with an examination. (Tr. I, 114).

⁵ At hearing, Peterson was present and testified for Respondent. (Tr. II, 20). He had worked in the industry for 37 years, starting in 1974. (Tr. II, 20-21). He had acted as a roof bolter, run miners, run cars, and worked on longwalls. (Tr. II, 20-21). In his career, he acted as section boss, mine foreman, superintendent, fire boss, airway examiner, and safety representative. (Tr. II, 21). Peterson received 2 years of mine technology training from Community College. (Tr. II, 21). He was certified as a limited instructor by the government, taught classes at Elk Run, had annual retraining, and was certified as a foreman. (Tr. II, 21-22). Training would include instruction on areas where equipment was run, MMUs, ventilation, roof control plans, and first aid. (Tr. II, 23). He was involved in the UBB investigation, checking airways and working areas for the investigation team. (Tr. II, 24). In April 2013, Peterson was a safety representative and in would travel with the MSHA inspector, double check the work of examiners, and do paperwork. (Tr. II, 24-25, 28). When the inspector was not present, he would look for areas out of compliance. (Tr. II, 27-28). Peterson also worked with the anonymous complaint system, known as "Running Right". (Tr. II, 25). Both Peterson and Phillip Saunders testified at length regarding this anonymous safety reporting system. (Tr. II 25-27, 77-79).

35, 60). Dempsey had already been inspecting the mine for two weeks.⁶ (Tr. I, 115). Dempsey began inspecting Roundbottom when he was in training. (Tr. I, 20). However, the April 2013 quarter was his first assignment there. (Tr. I, 114). When Dempsey arrived at the mine he informed the operator, reviewed the books and mine maps, considered possible hazards, and reviewed plans where he will travel that day.⁷ (Tr. I, 19, 21, 119). He would look at the roof, ribs, bolt spacing, entry widths, and the general condition. (Tr. I, 19). He also tried to coordinate with the safety representative to ensure they were able to get as much done as possible in the least amount of time. (Tr. I, 20-21, 119, 121). The mine had three active sections and two portals. (Tr. I, 115). Another inspector, Andy Sparks, was also inspecting the mine and had entered the mine that day from another portal. (Tr. I, 115-116).

Dempsey and Peterson entered the mine from the portal but did not make it to the working section.⁸ (Tr. I, 26, 29, 31). During an inspection, the inspector must travel each air course in its entirety and using a ride expedites the process.⁹ (Tr. I, 25). However, vehicles cannot fit in some overcasts, so in those areas the inspector must walk. (Tr. I, 25).

From the portal, they traveled in the entry toward a set of double doors. (Tr. I, 26, II, 30-31). No citations or hazards were observed on the way to the doors. (Tr. II, 36). These doors led to the primary escapeway. (Tr. I, 26, 122, II, 31). This was the first day Dempsey inspected the primary escapeway. (Tr. I, 116). The primary escapeway is the main exit from the mine for miners in the event of a disaster.¹⁰ (Tr. I, 30). In case of smoke or fire, the primary escapeway contained a lifeline with directional cones leading to the surface and SCSRs. (Tr. I, 30). This area should be clear of hazards as miners' lives depend on it. (Tr. I, 30).

⁶ Earlier, Dempsey inspected the secondary escapeway (track entry) and found no violations, despite looking for them. (Tr. I, 116-118, 121-122).

⁷ At hearing, Dempsey reviewed the mine map (GX-7), showing the airways traveled during the inspection. (Tr. I, 22). A map is produced each quarter by the operator. (Tr. I, 22). Dempsey took a copy of the map with him to keep track of areas inspected. (Tr. I, 22). He used a color-coded legend to show different kinds of entries and the details of the examination. (Tr. I, 22-23). On the map, the numbers mark where citations occurred. (Tr. I, 22-23). No. 1 was Citation 8144925, No. 2 was Citation No. 8154926, and No. 3 was Order No. 8154928. (Tr. I, 24, 42-43). The green line showed Dempsey's path that day in the escapeway. (Tr. I, 24, 27). The pink line was the return air course. (Tr. I, 27). The blue line was the mine track, which is usually the secondary escapeway. (Tr. I, 27-28). The yellow line was the secondary escapeway. (Tr. I, 28). The orange line was the beltlines. (Tr. I, 28).

⁸ There was a panel to the right of the portal called the McAllister Mains. (Tr. I, 29). A roof fall had occurred in this area indicating pressure. (Tr. I, 29).

⁹ The four-wheel vehicle is a golf cart with a metal frame and no top. (Tr. I, 26). The vehicle used on the day the instant citations were issued was nicknamed Ethel. (Tr. I, 26).

¹⁰ Earlier, Dempsey inspected the secondary escapeway (track entry) and found no violations, despite looking for them. (Tr. I, 116-118, 121-122).

The four instant violations were issued in this escapeway. (Tr. I, 24, 31). Citation No. 8154925 was issued between the No. 23 and No. 24 crosscuts.¹¹ (Tr. I, 33-34, 43). The first condition cited was an entry that was 23 1/2 feet wide for a distance of 8 feet. (Tr. I, 34, 124, 130-131, II, 31, 36-37, 60). According to the roof plan the entry should have been no more than twenty feet wide. (Tr. I, 35, 39). The area had been timbered with 6-inch posts on the right side facing outby, spaced 4 or 5 feet apart. (Tr. I, 34-36, 131, 156 II, 36). The 23 1/2-foot width was measured from the rib on the left to the timbers, meaning the area was wide even with the timbers. (Tr. I, 35, 37-38, 131, 135 II, 31). The timbers stretched the entire block but the wide area was in the center. (Tr. I, 37). There was 3 to 4 feet of open space between the timbers and the rib, meaning the original cut in 2008 was 27-28 feet wide. (Tr. I, 36, 124, 262, II, 7). Dempsey hoped the timbers were placed when the area was cut, but he was not sure. (Tr. I, 124-125). The block of coal where this wide area was located was probably sixty feet square. (Tr. I, 122-123).

Generally, roof control plans determine the width of entries.¹² (Tr. I, 204). According to that plan, Respondent was permitted to mine some belt entries and slopes 22 feet wide, but not this entry. (Tr. I, 125, 151-152, II, 113). Dempsey did not recall any mine where entries were wider than 25 feet. (Tr. I, 152). He never required an operator to add a shelter hole in a track entry or slope. (Tr. I, 152). Some safeguards allow such shelter to be 5 feet in excess of the track entry.¹³ (Tr. I, 153-154). Phillip Saunders testified that some mines have 3 1/2 foot wide, six

¹¹ Dempsey reviewed Citation No. 8154925 (GX-1) and the notes he took that day (GX-5). (Tr. I, 31-32). His notes included the weekly examination record for the week of the citation, a record of a fire drill in the area April 15 and April 16, 2013, and a small map. (Tr. I, 32-33).

¹² Roof control plans are mine specific. (Tr. I, 153-154, 204). Before a roof control plan is made, an engineering study is used to determine ground cover, the seam, and the types of pressure applied. (Tr. I, 204). Weight is determined using a computer program. (Tr. I, 204). The weight is used to create a safety factor. (Tr. I, 204). For example, a safety pillar of 2.0 means the pillars are capable of supporting twice the weight that is being applied. (Tr. I, 205). In a situation like Roundbottom where there is multiple seam mining, another computer program is used to determine the different loads. (Tr. I, 205). Then, roughly every six months, the roof control department or an inspector will determine if the plan is adequate. (Tr. I, 204).

¹³ Safeguards are directives issued to a mine concerning transportation at that mine. (Tr. I, 203-204). A safeguard allowing wider entries had not been used since the 1990's. (Tr. I, 203).

foot deep shelter holes.¹⁴ (Tr. II, 112-113). He stated that small areas where the roof exceeds the plan are permitted. (Tr. II, 113).

Peterson and Saunders testified that the timbers were placed in this area to narrow the wide entry so it would comply with the roof control plan. (Tr. II, 36, 70). They also noted that if an area is timbered, the examiner would assume it was the proper width. (Tr. II, 37, 113-114).

Dempsey believed the condition, several extra feet of width in the entry, would be obvious. (Tr. I, 137). This was because there were additional bolts and timbers in this area. (Tr. I, 38, 129, 137, II 60). There was not simply an additional row of bolts; instead each row of bolts in this particular area had an additional bolt. (Tr. I, 127-128). There should have been four bolts in each row, but there were five to six. (Tr. I, 38-39, 129). The extra bolts and timbers were installed during development, therefore the operator knew about the condition. (Tr. I, 127-128, 137, II, 70). However, even after the timber was added, the entry was still too wide and obvious. (Tr. I, 137-138).

Harding never noticed the condition before and did not think it was obvious. (Tr. I, 266, II, 19). He learned from the citation that there was an 8-foot area that was too wide. (Tr. I, 266). He knew timbers indicated a wide entry, but he did not set any additional timbers. (Tr. II, 12).

The hazards associated with the cited condition would include roof fall resulting in fatal accident. (Tr. I, 39). The cited standard is one of the “rules to live by” that is a root cause of fatal injuries. (Tr. I, 40). There was also danger of total collapse. (Tr. I, 39). However, the additional bolts and the timbers provided additional beam support for the entry. (Tr. I, 132).

¹⁴ At hearing Phillip Saunders appeared and testified for Respondent. (Tr. II, 71). Saunders worked at Alpha Natural Resources as a Vice President of Operational Improvements, a job he held from July 2012. (Tr. II, 71, 73). Saunders began working in the coal industry in 1994 for Massey Energy and worked several engineering jobs. (Tr. II, 71-73). Saunders had a professional engineering license in West Virginia, mine foreman’s papers, and AMT card, mine rescue certification, MSHA trainer’s card, and a PE license a black hat. (Tr. II, 71-73). He had worked as section foreman, mine foreman, examiner, superintendent, and then over to management for various projects at Massey. (Tr. II, 72-73). Saunders was at Roundbottom on April 18 to supervise an operational improvement team. (Tr. II, 74). They had been at the location for five weeks. (Tr. II, 75). The goal of the team was to improve compliance, safety, and productivity. (Tr. II, 75). During trips, Saunders liked to discuss violations, condition changes, things at the face, and training with mine management. (Tr. II, 75). The team observed activity at the face like loading of coal, cut depths, dust procedures, ventilation, processes for supplying equipment operators, bottom conditions, communications, and practices at the mine from start of the shift to the end. (Tr. II, 76-77). They ask for 15 to 20 minutes at the start of the shift to talk to the crews, give them updates on changes conditions, ensure they are going over the methane dust control plan, the roof control plans, and make sure everyone knows what the plans are. (Tr. II, 77). The crew provides hands-on training in the face area. (Tr. II, 77).

Dempsey was not sure how long this condition had existed. (Tr. II, 47). He believed it had been some time because the timber had begun to decay. (Tr. I, 37, 47). Further, moss had grown on the timbers. (Tr. I, 37, 47). The timbers had not recently been placed. (Tr. I, 48). The area was developed in 2008 or 2009. (Tr. I, 36, 124, 139).

The second condition cited in this area was one bolt spaced 70 (rather than the required 60) inches from another bolt.¹⁵ (Tr. I, 34, 39-40, 126, 268). In a 60-foot entry, 26-27 feet wide; Dempsey would expect bolts every four feet, with no more than five feet between rows. (Tr. I, 126-127, 129). This condition could be fixed by setting a timber. (Tr. I, 266-267).

The condition was somewhat obvious. (Tr. I, 40). Dempsey noticed it because he was alerted by the wide entry and was measuring. (Tr. I, 40). Examiners were trained to look for this kind of condition, so it was obvious. (Tr. I, 40). Examiners and inspectors had missed this condition since the area was developed. (Tr. I, 140).

Only one set of bolts was found over-spaced. (Tr. I, 268). Harding testified that one over-spaced bolt would be difficult to see. (Tr. I, 267, II, 19). There were roughly 1,200 bolts between this area and the location of the final citation issued. (Tr. I, 267-268).

The hazards associated with the bolt spacing would include being crushed by a roof fall. (Tr. I, 41). A fatal roof fall injury occurred at Kingston Resources No. 1 when the bolt spacing was just inches off. (Tr. I, 41-42). Dempsey conceded that one bolt spaced 10 inches too wide did not, by itself, make an accident likely. (Tr. I, 134-135). However, it might lead to an injury based on geological conditions. (Tr. I, 135). Here, the top appeared solid without skin issues, straps, or pie pans at the time of the citation. (Tr. I, 135). The pillars were stable. (Tr. I, 135).

This condition had existed since the area was bolted, as bolts were set during the mining cycle. (Tr. I, 48). It had been years since mining occurred in this area. (Tr. I, 48). Other than this one area, there were no other problems with bolt spacing. (Tr. I, 133).

The final condition in this area was loose draw rock. (Tr. I, 34, 29-30, 128, II, 38, 60). Draw rock is generally slate that breaks loose from the roof. (Tr. I, 133, II, 40, 83). Most of the roof is solid sandstone. (Tr. II, 39). Different kinds of stone do not stick together well, so if there is a layer of shale "skin" a few inches deep below the sandstone, then draw rock develops. (Tr. I, 133, II, 38-9, 82-83). It is caused by temperature, barometric pressure, seasonal change in the mine, drying conditions, and the velocity of intake air. (Tr. I, 236, 261, II, 38, 40-41). Draw rock occurs all the time and can change daily or from entry to entry. (Tr. II, 40-41). This mine had draw rock everywhere. (Tr. I, 133). Areas under a stream or hollow, as the cited area was, can produce draw rock quickly. (Tr. I, 265, II, 83-85). When draw rock is found it must be scaled (pulled down) or dangled off and supported. (Tr. I, 236-237, II, 39).

¹⁵ Harding testified that torque tension bolts were used in this area (and in most of the primary escapeway). (Tr. I, 265). The plan requires 4-foot resin bolts. (Tr. I, 265). The torque tension bolts were longer and provided more support than the required bolts. (Tr. I, 265-266). All of the bolts in this entry would have been installed on advance. (Tr. I, 266).

The citation did not state whether one location or many needed scaling. (Tr. I, 128). It also did not say where this spot was in relation to the other conditions. (Tr. I, 128). Harding testified that this condition was not present during his examination. (Tr. II, 19).

The condition was obvious; there was draw rock on the bottom and some draw rock on the top that needed to be scaled. (Tr. I, 34, 39, 42). Dempsey and Peterson would not proceed past the condition. (Tr. I, 34). They stopped and scaled, measured, and evaluated. (Tr. I, 34). The number of bolts in the area indicated roof control problems. (Tr. I, 34). The mine had a history of draw rock issues in intakes and returns. (Tr. I, 42). However, other than this area, there was only minor sloughage during the inspection. (Tr. I, 130).

The hazard associated with draw rock is that it can fall and pull down the lifeline or break the lifeline, which can constitute a hazard when smoke is present. (Tr. II, 115). It can also be a tripping hazard, which would be important in an emergency escapeway. (Tr. I, 248-249, II, 115). Finally, the draw rock itself can be a striking hazard. (Tr. I, 42, II, 116).

With respect to all three conditions, miners would work or travel in the area. (Tr. I, 43). An examiner would travel this air course weekly. (Tr. I, 43). The last examination occurred a day before the citation. (Tr. I, 44). The area would also have to be available in case of an emergency. (Tr. I, 43-44). Further, quarterly evacuation drills were conducted at the mine for all three shifts. (Tr. I, 43, 242-243). The drills alternated escapeways, so miners would evacuate this area twice a year. (Tr. I, 43, 154, 242). A lifeline went directly through this area, though Dempsey could not recall where. (Tr. I, 44-46). He did not believe it ran under the draw rock. (Tr. I, 47). In Dempsey's experience, when miners evacuate they walk side by side. (Tr. I, 46). On April 15, 2013, 14 men, including a supervisor, participated in a fire drill here. (Tr. I, 45). On April 16, 2013, 12 men, including a supervisor, did so. (Tr. I, 44). Therefore examiners and drill participants were exposed to the cited conditions. (Tr. II, 45-46). However, the fact that the fire drill occurred two days before this citation was a coincidence. (Tr. I, 154). The citation would not have been issued in the same manner if the drill had not just occurred. (Tr. I, 154).

Harding testified that other than the weekly exam, no one would be in the cited area for two months or more. (Tr. I, 242-243). He did not believe miners normally worked or traveled in this area, it was not a "main track." (Tr. I, 243). He also testified that during fire drills he would hold onto the lifeline. (Tr. II, 15-16). However, in his deposition testimony (GX-10) he conceded that he did not hold onto lifelines during fire drills. (Tr. II, 17). Saunders testified that goal of a fire drill was to make a life-like simulation. (Tr. II, 109-111).

This condition was marked S&S because it violated a safety standard, the violation contributed to a hazard, and there was a reasonable likelihood that the hazard would cause injury. (Tr. I, 51-52). There was exposure to the condition from miners traveling in the area regularly. (Tr. I, 52). The injury would be significant, perhaps fatal crushing injuries. (Tr. I, 52).

Dempsey believed an injury would be reasonably likely, assuming continued mining operations. (Tr. I, 52). The entry was wide, there were widely spaced bolts, the pillar size was reduced and there was draw rock in the area that could result in a roof collapse. (Tr. I, 52, 151). Wide entries cause the beam to stretch over a wider area. (Tr. I, 151). However, Dempsey did not

do any analysis to determine whether the pillars could hold the roof. (Tr. I, 151). A wide entry is automatically a hazard. (Tr. I, 151). The likelihood is not based on odds, instead it is based on the fact that it is known that fatal roof falls in the mining industry are caused by wide entries and therefore the “reasonably likely” finding was appropriate. (Tr. I, 155-156, 200-201). Also, coal is 80 pounds per cubic foot and rock is 120 pound per cubic foot, so it would not take a large roof fall to weigh hundreds of pounds. (Tr. I, 52-53).

The cited condition would affect 14 persons because the drill record showed that 14 miners were exposed to a total collapse of the entry during an escapeway drill. (Tr. I, 53, 155-156).

This citation was marked for high negligence; however Dempsey struggled with the negligence determination. (Tr. I, 53, 142, 145). At first, he believed Respondent displayed moderate negligence because there was an attempt made to correct the condition and because it was not overly obvious. (Tr. I, 53, 55, 143-144). Dempsey’s notes show that, “some efforts were made by timbering but found that effort was improperly performed. (Tr. I, 144). This was based on the examination Jesse Harding conducted the day before.”¹⁶ (Tr. I, 49, 54-55, 119-120, 259-260, II, 7-8). That record stated that the top was scaled, a wide bolt found, a rib to bolt was wide, timbers were set, areas dangered off, and the lifeline was repaired in several places. (Tr. I, 49, I, 232-233). Dempsey also noted that he did not deem the condition “high or reckless.” (Tr. I, 144).

However, he then reconsidered his negligence determination and no longer believed there were mitigating circumstances. (Tr. I, 144-145, 56-57). Dempsey did not see any indication that the correction noted by Harding actually occurred. (Tr. I, 51,53, 57, 148). The record did not indicate where scaling occurred, where the lifeline was worked on, where new timbers were set, the width of the entry, or if the wide bolts were corrected. (Tr. I, 50-51, 53). Also, Dempsey did not know where timbers were dangered off. (Tr. I, 50). There was an incomplete effort to repair,

¹⁶ Jesse Glen Harding was present at the hearing and testified for Respondent. (Tr. I, 217). Harding started in the mining industry in 2007 and worked for Performance Coal and Logan’s Fork on longwalls before Respondent. (Tr. I, 217). At Roundottom and worked on the move crew, production, shuttle car, in that capacity he examined gas levels, roof, ribs, trip hazards, roadways, and ventilation controls. (Tr. I, 218-219). He then worked as outby foreman and did so at the time of the citations. (Tr. I, 218, 220). In that postion, he conducted pre-shift examinations, added mesh or support, set belt heads, checked belts, checked the track, check wide entries, checked bolt spacing, and checked the roof and ribs. (Tr. I, 219, 224, II, 6-7). Harding took care of any hazards outby to ensure safe work and travel. (Tr. I, 219, 224). If he identified a hazard he dangered it off and recorded it in the exam book. (Tr. II, 6-7). Harding had a West Virginia foreman, mining, gas, and dust cards and had conducted examinations since he was an apprentice. (Tr. I, 220-221, II, 6). He received annual refresher training, including an eight-hour class on plans, roof control, MMUs, violations, accidents, escapeway methods, and rescuers. (Tr. I, 221-222). He received foreman recertification every other year where law, plans, and violations were discussed. (Tr. I, 222-223). Further, Alpha had an examiners class that included instruction on the law and a mine simulator. (Tr. I, 223). He received step-by-step instruction on bolts, roof, ribs, trip hazards, and lifelines. (Tr. I, 223). The course also covered pre-shift, weekly, and supplemental examinations. (Tr. I, 223).

but only a full repair would be sufficient. (Tr. I, 57, 145, 148). The partial repair indicated that there was awareness of the cited condition. (Tr. I, 57). The use of timbers in other areas of the mine did not mitigate the lack of effort here. (Tr. I, 57, 149). At hearing, Harding could not recall which areas were scaled. (Tr. I, 264).

Dempsey also considered the mindset of an examiner and realized he should be looking for things that were not overly obvious. (Tr. I, 55-56, 142, 145). Harding was trained and should have been alert. (Tr. I, 55, 142). Further, management knew the condition existed as extra bolts and timbers were added. (Tr. I, 56). The condition had existed for some time (though Dempsey could not verify the time). (Tr. I, 142).

In addition, Dempsey felt Respondent's history of roof falls should have provided warning that roof control problems occurred at this mine. (Tr. I, 202-203). Respondent should have had heightened awareness to the dangers posed by the cited conditions. (Tr. I, 203). Respondent was lucky no roof falls had occurred here, it was a matter of time. (Tr. I, 203).

The fact that there was an inadequate examination did not effect the high negligence designation. (Tr. I, 154). However, Dempsey conceded that if the condition had existed since 2008 and this area was a primary escapeway since that time, then the high negligence finding would be undercut. (Tr. I, 142-143). Harding testified that this area had been the primary escapeway since 2008 because the location allowed miners to walk in fresh air. (Tr. I, 262, II, 11-12). Dempsey also conceded that a wide entry is not *per se* high negligence. (Tr. I, 149).

Dempsey also noted that Peterson did not offer any mitigating circumstances at issuance. (Tr. I, 57). To mitigate the condition without correcting it, Respondent could have hung danger tags, noted the condition in the exam book, or made marks for new timbers. (Tr. I, 150). The danger tags would inform miners that the condition existed. (Tr. I, 150). The tags could have been placed where the area was wide and where the bolts were misplaced. (Tr. I, 150).

The condition was abated when the draw rock was pulled down and the timbers were reset between the left rib and the right timber line. (Tr. I, 57-58). No timbers were moved, two or three were added where the entry and bolts were too wide. (Tr. I, 54, 156-157). The abatement occurred between the issuance and noon on April 23. (Tr. I, 58).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and the Administrative Law Judge's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the Administrative Law Judge has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the Administrative Law Judge has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Administrative Law Judge's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law

judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That 30 C.F.R. §75.202(a) Was Violated.

On April 18, 2013, Inspector Dempsey issued a 104(a) Citation, No. 8154925, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The Operator has failed to properly support the primary escapeway to the #1 working Section. Between #23 and #24 xcuts adjacent to #9 beltline the following conditions exist: 1) Entry is 23.5' wide for a distance of 8', 2) Bolt pattern measures 70" between bolts in one spot at this location, 3) Loose draw rock is present that needs scaled.

Standard 75.202(a) was cited 73 times in the two years at mine 4609163 (73 to operator, 0 to contractor).

(GX-1).

The cited standard, 30 C.F.R. § 75.202(a) ("Protection from falls of roof, face and ribs"), provides the following:

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

30 C.F.R. § 75.202(a).

The Secretary presented credible evidence that Respondent violated the cited standard, as described in the citation. (Tr. I, 34, 29-30, 39-40, 124, 126, 128, 130-131, 268, II, 36-38, 60). In its brief, Respondent acknowledges the existence of the violation. (*Respondent's Post-Hearing Brief* at 19). In light of this fact, and the evidence presented, the Administrative Law Judge finds that this citation was valid.

2. The Violation Was Reasonably Likely to Result in a Fatal Injury And Was Significant And Substantial In Nature

Inspector Dempsey marked the gravity of the cited danger in Citation No. 8154925 as "Reasonably Likely" to result in "Fatal" injury to 14 persons. (GX-1). These determinations are supported by a preponderance of the evidence.

The Mine Act requires that "gravity of the violation" be considered in assessing a penalty. 30 U.S.C. §820. The Secretary has promulgated a three-factor inquiry to determine the gravity of a citation for purposes of determining the penalty. Those factors are:

[T]he likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.

30 C.F.R. § 100.3(e).

The event against which the instant standard, 30 C.F.R. § 75.202(a) is stated directly in the language of the rule. Specifically, the standard is designed to protect miners from the “hazards related to falls of the roof, face or ribs and coal or rock bursts.” Those hazards include crushing injury from rock fall or roof collapse, disorientation during an emergency from the severing of a lifeline, or tripping injury from fallen rock. (Tr. I, 39-42, 248-249, II, 115-116). Inspector Dempsey credibly testified that the cited conditions (the wide entry, the improperly spaced bolt, and the draw rock) made these hazards reasonably likely. Specifically, Dempsey testified that miners worked and traveled in this area regularly. (Tr. I, 43-44, 52). Those working in the area would include the examiner and also miners from the section using the escapeway during a fire drill or actual emergency. (Tr. I, 43, 242-243). In fact, Dempsey testified that these conditions occurred near the lifeline, the area where miners would be most likely to move. (Tr. I, 44-46). Therefore, the undersigned finds that miners were reasonably likely to be exposed to the cited condition.

Dempsey also credibly testified that this exposure would be reasonably likely to result in injuries to no fewer than 14 miners. He testified that the cited condition could have caused rock falls or roof collapse to harm miners during a fire drill or actual emergency. (Tr. I, 53, 155-156). Dempsey testified that that fatal roof falls in the mining industry are known to be caused by wide entries and therefore the “reasonably likely” finding was appropriate. (Tr. I, 155-156, 200-201). Also, he noted that coal is 80 pounds per cubic foot and rock is 120 pound per cubic foot, so even a small roof fall could weigh hundreds of pounds, increasing the chances of a fatality. (Tr. I, 52-53). With respect to the person affected, the evidence shows that as many as 14 miners participated in fire drills or would actually be working on the section in the event of an emergency. (Tr. I, 45, 53, 155-156). Dempsey credibly testified that in the event of a roof fall or collapse, all of these miners would be affected. (Tr. I, 53, 155-156). Therefore, the Administrative Law Judge finds that the preponderance of the evidence supports the Secretary’s gravity designations.

Respondent argued that this citation (as well as Citation No. 8154927 and Order No. 8154928) should not have been marked as affecting 14 persons. This argument is not supported by the evidence.

Respondent argued that the cited entry was an escapeway, rather than a regular travelway for the section crew, and that only one miner (the examiner) would regularly be in this area. (*Respondent’s Post-Hearing Brief* at 31). The uncontested testimony supports a finding that up to 14 miners would be in this area no fewer than twice a year, during fire drills. (Tr. I, 43, 45, 154, 242). More importantly, this area would always be available to miners in the event of an emergency. The area must be available for use every day because at any given time an event might occur that would require its use.

The Administrative Law Judge finds this situation to be analogous to the situation in *Cumberland Coal Resources, LP*, 33 FMSHRC 2357 (2011). In that case, the Commission held that with respect to emergency standards, when a violation is issued, “presumably no emergency exists at the moment...if an emergency does occur, it is imperative that the requirements of the evacuation standard be met at that time.” *Id.* at 2367. While it is true (as Respondent notes) that the cited standard was not an “emergency standard,” those standards are meaningless if the escapeway entry is not safe. Miners cannot use a lifeline or breathe through an SCSR if those items (or the miners) are trapped under a collapsed roof. Furthermore, this entry would not have been set aside or inspected if not for the fact that it was to be used in an emergency.

Respondent also argued that, even if this violation is considered in light of the emergency standards, that all 14 miners would not be affected because a roof fall would not harm everyone. (*Respondent’s Post-Hearing Brief* at 32-33). It argued that the testimony of the inspector to the contrary was “pure speculation.” (*Id.*). The undersigned found the Inspector’s testimony to be credible. In the event of a massive roof fall or entry collapse, all of the miners would be affected and injured by the fall. Further, if the fall occurred during an emergency miners could be trapped in treacherous conditions without the ability to escape. Therefore, the cited condition affected 14 miners.

Respondent also offered several arguments asserting that an injury was unlikely. However, as Respondent discussed those arguments in relation to the S&S designation, they will be discussed *infra*.

Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S “if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984).

With respect to the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. § 75.202(a).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – Inspector Dempsey credibly testified that the violation contributed to the safety hazard of a miner be crushed or struck in a

roof fall or collapse. (Tr. I, 51-52). The inspector testified that each of the individual conditions at issue here would contribute to some hazard.

Specifically, the wide entry increased the chances of roof fall and added to the danger of a total collapse. (Tr. I, 39-40, 52, 151). The condition contributed to this danger because wide entries cause the support “beam” of the roof to stretch over a wider area, creating additional stress. (Tr. I, 151). Therefore, a wide entry is automatically a hazard. (Tr. I, 151). *See United Mine Workers of America v. Dole*, 870 F.2d 62, 559 (D.C. Cir. 1989)(Holding that roof falls pose one of the most serious hazards in the mining industry); *see also Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984), *Eastover Mining Co.*, 4 FMSHRC 1207, 1211 n. 8 (Jul. 1982), and *Halfway Incorporated*, 8 FMSHRC 8, 13 (Jan. 1986) (noting the inherently dangerous nature of mine roofs). Dempsey also noted that this condition was one of the “rules to live by” that has been found by MSHA to be the root cause of fatal injuries. (Tr. I, 40). The wide bolt also contributed to crushing injury from roof fall. (Tr. I, 41). Dempsey noted a fatal roof fall injury occurred at Kingston Resources No. 1 when a bolt was spaced just inches off the approved roof plan. (Tr. I, 41-42). Finally, the draw rock contributed to the hazard of tripping or severing the lifeline, which could cause fatal injury in an emergency. (Tr. I, 248-249, II, 115). The draw rock was also evidence that rock was falling from the top, creating a striking hazard. (Tr. I, 42, II, 116). In addition to these individual hazards, the cumulative effect of the conditions heightened the contribution. (Tr. 52, 151). In light of these facts, the Administrative Law Judge finds that the cited condition contributed to a discrete safety hazard.

Respondent argued that this condition did not contribute to a safety hazard. However, this argument was not compelling. Specifically, Respondent asserted that the cited conditions did not contribute to a hazard because, despite their existence for seven years, the entry showed no signs of instability. (*Respondent’s Post-Hearing Brief* at 21). Respondent noted the fact that the area was lined with properly spaced roof support timbers and roof bolts to ensure stability. (*Id.*). Further, it noted that the cited conditions were in the center of the entry, rather than at the intersection, where stress is the greatest. (*Id.* at 21-22). It argued that these supplemental measures withstood roof stresses for numerous years without incident and therefore did not contribute to a hazard. (*Id.*)

The fact that a roof fall had not occurred in this area does not mean that the condition did not contribute to the hazard of a roof fall. *See, e.g. Rushton Mining Company*, 9 FMSHRC 800, 810 (Apr. 1987)(ALJ Broderick) (“The fact that an injury did not occur here is hardly evidence that the violative practice did not contribute to a hazard likely to result in injury.”) As discussed *supra*, Inspector Dempsey credibly testified as to the ways that the cited conditions made a roof fall more likely. While these conditions did not guarantee that a roof fall would happen, they contributed to the possibility of that hazard. Further, the Administrative Law Judge is not as sanguine about the conditions in the cited area as Respondent. In addition to the wide entry and wide bolt, draw rock was found uncontrolled in this area. (Tr. 34, 29-30, 128, II, 38, 60). Perhaps more importantly, several months after the citation was issued, a rock fall occurred in this same entry. Further, as discussed with respect to the number of persons affected, this entry would be used in the event of an emergency. It is reasonable to believe in such a situation that usual or extreme pressure would be placed on this area, exacerbating the hazard. The Administrative Law

Judge finds this to be persuasive evidence that the cited entry was less stable than indicated by Respondent.

Furthermore, the existence of the roof control plan attests to the fact that the cited conditions contributed to a hazard. Inspector Dempsey credibly testified regarding the procedure by which operators, and MSHA, determine the maximum width of entries and the spacing of bolts. (Tr. I, 153-154, 204-205). There is no question that the operator exceeded these limits. (Tr. 34, 124, 130-131, II, 31, 26-37, 60, JX-1). Presumably, if it were safe for entries in Roundbottom to be 23 ½ feet wide or for bolts to be spaced 70-inches apart, the plan created by the Respondent and approved by MSHA would reflect those distances. That the plan dictates entries of 20 feet and bolts spaced at 60-inches indicates that the cited conditions are inherently unsafe and would contribute to the hazard of a roof collapse or fall. Therefore, the second prong of *Mathies* is met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. The preponderance of the evidence establishes that the hazard contributed to in this matter would be reasonably likely to result in injury.

The Commission clarified the third element of the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“PBS”) (affirming an S&S violation for using an inaccurate mine map). The Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury.” *Id.* at 1281. Importantly, it clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

If the hazard contributed here were realized, specifically if a roof fall or total roof collapse were to occur, an injury would be reasonably likely. If the roof fell, miners could be struck by extremely heavy falling material and could even be crushed. (Tr. I, 39-42, 248-249, II, 115-116). As miners worked or traveled in this area (both examiners and miners evacuating in a drill or emergency) there was exposure to the hazard. (Tr. I, 43-44, 52, 155-156). There is no question that miners being struck or crushed by rock would be injured.

Respondent also argued that the hazard contributed to created no likelihood of an injury. However, this argument was not compelling. Specifically, Respondent asserted that the cited conditions created no likelihood of injury because the condition had existed for a long time and was stable. (*Respondent’s Post-Hearing Brief* at 21). It noted that under continued normal mining operations that the ribs and roof were competent and that there was no evidence or stress or that the hazard would contribute to an event that would lead to an injury. (*Id.* at 22).

As noted *supra*, the Administrative Law Judge found that the cited condition would contribute to a roof fall. As further noted, there is no question that a roof fall would be

reasonably likely to result in an injury. The issue at this stage of the inquiry is whether the hazard contributed to by the violation, in this case a roof fall, would result in injury. The third element presupposes that the roof fall is realized and asks whether an injury would be expected to result. See *PBS Coals* at 1280-81 *see also United Taconite, LLC*, 2014 WL 1010076, *12 (Feb. 2014)(ALJ Lewis)(explaining that the third element of *Mathies* presupposes the hazard is realized). Respondent's argument does not aid the Administrative Law Judge in determining whether a roof fall or collapse would, or would not, result in an injury.

Under *Mathies*, the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). It cannot be credibly argued that an injury caused by a roof fall or mine collapse would be anything other than serious. In fact, a fatal injury is the most likely result.

As a result of these factors, the undersigned finds that the Secretary proved the violation was S&S by a preponderance of the evidence.

3. Respondent's Conduct Did Not Display "High" Negligence.

In the citation at issue, Inspector Dempsey found that the operator's conduct was highly negligent in character. (GX-1).

Standard 30 C.F.R. § 100.3(d) provides the following:

(d) Negligence. Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care. When applying this criterion, MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.

In 30 C.F.R. § 103(d), Table X, the category of high negligence is described thusly: "The operator knew or should have known of the violative condition or practice and there are no mitigating circumstances." Conversely, moderate negligence is shown when "[t]he operator knew or should have known of the violative condition or practice, but there are some mitigating circumstances." Low negligence is served for situations where there are "considerable" mitigating circumstances.

The Administrative Law Judge finds that while Respondent should have known about the violation, there were mitigating factors. With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for

penalty assessments and unwarrantable failure determinations. See *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) see also 30 U.S.C. § 802(e) (an agent is "any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine.").

With respect to the instant violation, the evidence shows that Respondent had some knowledge of at least one of the cited conditions, the wide entry. Specifically, evidence shows Respondent was aware of the fact that the entry was wide at development, because it had put in timbers and extra bolts. (Tr. I, 36, 124-125, 262, II, 7). For some reason, in placing the timbers Respondent only narrowed the entry to about 23 feet, rather than the required 20 feet. (Tr. 36, 124, 262, II, 7). However, that does not change the fact that Respondent, at one time, knew the condition existed. Perhaps more importantly, Respondent should have known the condition was present. The wide entry and the widely spaced bolt had existed for around 7 years. This area was inspected weekly by Respondent's agent and had been inspected by Harding just the day before the instant citation. (Tr. I, 43-44, 49). Harding and the other, previous examiners were tasked with finding just the types of conditions found here. (Tr. I, 55-56, 142, 145). Therefore, Respondent should have known about the cited condition.

While the Administrative Law Judge affirms the inspector's finding that Respondent was negligent, the evidence does not support a finding that this negligence was high; there were mitigating circumstances.

Inspector Dempsey noted that one of the reasons he found the cited conditions to be the result of high negligence was that the cited conditions were obvious. However, he also noted that he struggled with this determination and that he initially did not believe the condition was obvious. (Tr. I, 53, 55, 143-144). The Administrative Law Judge finds that the Inspector's initial determination was better supported by the evidence. The cited condition occurred in a relatively small area, an eight-foot area in the center of an entry. (Tr. I, 34, 124, 130-131, II, 31, 26-37, 60). Further, the earlier, incomplete attempts to correct the condition (setting timbers, adding additional bolts) probably masked the fact the condition persisted. (Tr. I, 144, II, 37, 113-114). Perhaps most importantly, this area had been the primary escapeway since it was developed in 2008. (Tr. I, 262, II, 11-12). That means that the condition was inspected weekly by examiners and quarterly by MSHA inspectors. No examiner had ever noticed these conditions and no inspector had ever cited it. See *Virginia Drilling Company, LLC*, 2013 WL 1856608 (Mar. 2013) (holding that the fact that Respondent had not been cited in the past could be a mitigating circumstance). Even inspector Dempsey stated that if the area had always been the primary escapeway, his determination regarding the obviousness of the condition and Respondent's negligence would be undermined. (Tr. I, 142-143). As a result, the evidence supports a finding that the condition was less than obvious.

Furthermore, evidence suggests that Respondent made some efforts to correct the cited condition. Respondent had installed additional bolts and had installed a row of timbers in the area to provide support and narrow the entry. (Tr. I, 144, II, 37, 113-114). While these repairs

were incomplete, they showed that Respondent had made some effort to control the condition. An operator's reasonable attempts, even if not totally adequate, to correct or prevent a violative condition constitute a mitigating factor with respect to negligence. *Hidden Splendor*, 2012 WL 7659707 (Dec. 2013)(ALJ Manning).

In light of these mitigating circumstances, Respondent's actions are best characterized as showing "Moderate" rather than "High" negligence.

The Secretary argued that there were no mitigating circumstances in this case. However, this argument was not compelling. The Secretary noted improper efforts to correct a condition did not constitute a mitigating circumstance. (*Secretary's Post-Hearing Brief* at 28 citing *Peabody Coal*, 14 FMSHRC 1258, 1261-64 (Aug. 1992) and *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 489 (Mar. 1997)).

As noted supra, the Administrative Law Judge found that Respondent efforts to correct the cited condition mitigated Respondent's negligence. Respondent had seen that it developed the condition too wide and made some effort to eliminate the hazard. However, even if this were not a mitigating circumstance, the evidence would still support a finding of moderate negligence. The Secretary's own witness, Inspector Dempsey, testified that if this area was a primary escapeway since 2008 that the condition was not obvious and the high negligence designation was undermined. As it was shown at hearing that the area had been an escapeway, all of the witnesses at hearing agreed that there was at least one mitigating circumstance. A high negligence designation is inappropriate where there are any mitigating circumstances. Therefore, a finding of moderate negligence is warranted.

4. Penalty

Under the assessment regulations described in 30 CFR §100, the Secretary proposed a penalty of \$63,000.00 for Citation No. 8154925. A recent Commission decision, *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) reaffirmed that neither the ALJ nor the Commission is bound by the Secretary's proposed penalties. (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). However, the Commission in *Performance Coal* also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id.* at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). The ALJ finds that a substantial deviation from the Secretary's proposed assessment is warranted herein

and will evaluate the factors contained in 30 U.S.C. §820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – The evidence shows that Respondent had an extensive history of §75.202(a) violations.¹⁷ (GX-1)(GX-9).

(2) The appropriateness of the penalty compared to the size of the Operator's business – The parties have stipulated that Respondent is a large operator and Powellton is a large mine. (JX-1).

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence, rather than the high negligence cited by the Secretary.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1)

(5) The gravity of the violation – As previously shown, this violation was reasonably likely to result in fatal injuries to 14 persons.

¹⁷ Following the conclusion of the hearing, Respondent filed a "Motion to Supplement the Record" to include evidence regarding the mine's history. Specifically, Respondent wished to include evidence regarding Alpha Natural Resources purchase of the Elk Run Coal Company on July 1, 2011. (*Respondent's Post-Hearing Brief* at 34). Respondent argued that it had changed ownership on July 1, 2011 and that considering evidence regarding history before that point punished Alpha Natural Resources for the wrongs committed by the previous owner, Massey Energy. The Secretary opposed this motion because this information was not submitted before the hearing concluded. (*Secretary's Opposition* at 1-4). In the interest of fully addressing all of the issues at play in this case, the Administrative Law Judge considered Respondent's proffer of evidence.

However, that evidence did not change the ultimate determination of the operator's history. Most importantly, the operator in this case, Elk Run Coal Company, has been in operation at this location since 2006. (*Secretary's Opposition* at 5). While the controller has changed, the operator has remained the same. The relevant history is the Operator's, not the controller's. Therefore, Elk Run's history is open to scrutiny; even if it had been controlled by Massey for some of that time and even if some management changes were made along with the change in controller. Further, the amount of time between the purchase of Elk Run and the instant citations was 22 months and 18 days. Therefore, the vast majority of Elk Run's history dealt with the period during which it was controlled by Alpha Natural Resources (specifically, the period in contention here is roughly six week). Finally, the Administrative Law Judge is not bound by the Secretary's proposed penalty; the assessed penalty is based on the totality of the factors at issue, of which history is only a small part.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The parties stipulated that the condition was abated rapidly and in good faith. (JX-1)

In light of the Administrative Law Judge’s decision to modify the negligence from “High” to “Moderate” and to eliminate the unwarrantable failure designation, a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$45,000.00 with respect to this violation.

Citation No. 8154926

I. ISSUE

With respect to Citation No. 8154926, the issues to be determined are whether Respondent’s alleged violation of the Act on April 18, 2013 was the result of high negligence, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

The next Citation, No. 8154926 (GX-2), was issued 15 feet in by the No. 18 crosscut in the primary escapeway, around six crosscuts from the previous citation. (Tr. I, 58-59, 64-65, 70). There, Dempsey saw a piece of draw rock measuring 7.5 feet long, 2 feet wide, and 4 inches thick had gapped down over the lifeline. (Tr. I, 59, II, 41-42, 61). Peterson believed it was two to four inches thick. (Tr. II, 41). The dimensions cited were taken after it was pulled down, so it may have been longer or shorter. (Tr. II, 42).

The only thing preventing the rock from falling was a 1-inch thick, 6-inch wide fly board that was oriented across the entry and sagging under the weight of the rock. (Tr. I, 59-61, II, 42, 61). About $\frac{3}{4}$ of the rock was lying on the fly board. (Tr. II, 43). The 7 $\frac{1}{2}$ foot portion of the draw rock ran the same direction as the fly board. (Tr. I, 159). The draw rock extended over both sides of the board for a total of 18 inches to 2 feet. (Tr. I, 61-63, 159, II, 61).

Dempsey did not believe the board was supporting the draw rock because it was not intended to hold up heavy items or support rock; it was used to hang ventilation curtains. (Tr. I, 60, 63, 158-160). However, at that time it was keeping the rock from falling. (Tr. I, 159, 162). Peterson believed that the board was supporting the rock. (Tr. II, 43). He had to break the board to get the rock to fall. (Tr. II, 42). Harding testified that if he had encountered the condition during his examination he would have tried to pull it with a slate bar or dangled it off. (Tr. I, 260). He also would have moved the lifeline. (Tr. I, 260).

The fly board was bolted to the roof. (Tr. I, 63). Dempsey did not recall any part of the draw rock being bolted. (Tr. I, 161). Peterson testified that one bolt was through the draw rock attaching it to the top. (Tr. II, 41-43, 61). The bolt had a little bit of the rock. (Tr. II, 43).

Dempsey did not issue any other citations regarding the top or bolting. (Tr. I, 161-162).

Dempsey felt the cited condition was obvious and that a casual observer would see it. (Tr. I, 60, 259-260). Harding was not sure where the fly board was located. (Tr. I, 260).

The hazard associated with the cited condition was crushing injury from rock fall if the board broke or the rock tilted. (Tr. I, 60). Dempsey believed that despite the board, these hazards could have happened at any time. (Tr. I, 63). Rock is 120 pounds per cubic inch. (Tr. I, 63-64). Here the draw rock was 5 cubic feet or roughly 600 pounds. (Tr. I, 64).

Dempsey believed that it would take some time for the draw rock to separate from the roof and lay down gently on the board in a way that prevented a fall. (Tr. I, 66-68). Dempsey estimated the cited condition had existed before the last exam based on the way the rock was laid on the board, visual observation, and experience. (Tr. I, 66, 69, 162). If it had occurred all at once during the last shift it would have fallen to the side. (Tr. I, 68). Dempsey believed it had occurred more than 2 weeks earlier and would have been present during the escapeway drill. (Tr. I, 166-167). Harding testified that he did not see the rock during his examination. (Tr. I, 259). It could have developed from one day to the next. (Tr. I, 260-261). Peterson saw dust on the rock and concluded the rock was on the fly board for awhile. (Tr. I, II, 43-44).

Miners were exposed because the drills and examinations passed through this area. (Tr. I, 65-66). Also, Dempsey believed the lifeline passed directly under the draw rock. (Tr. I, 66). Peterson believed the rock was to the side of the lifeline. (Tr. I, 41).

The cited condition was S&S because there was a violation of a mandatory safety standard, there was a hazard contributed to by this violation (a draw rock falling on an individual), and a reasonable likelihood of significant injury. (Tr. I, 68).

The cited condition was reasonably likely to cause crushing injuries, which can be fatal. (Tr. I, 68-69). Eventually, the sagging rock would gap onto the board, cause the board to sag, and then break through or roll to the side. (Tr. I, 160-161). The rock had not yet reached the floor, but this did not make a fall unlikely. (Tr. I, 205-206). Only one person would have been injured if this particular rock fell, even if 14 miners were walking through the area. (Tr. I, 69).

The citation was marked as “high” negligence because the area was examined by an agent of Respondent and the examiner should have a heightened awareness as a result of the roof falls in the intake entries and this area. (Tr. I, 69, 162, 164-165). Further the condition was obvious, extensive, and existed at the last examination. (Tr. I, 69, 166). Dempsey believed Harding should have sounded the roof and observed the gap. (Tr. I, 163). While he recognized that an examiner may miss a hazard without automatically being highly negligent, there is no “human error” allowance for one citation. (Tr. I, 165-166). There were no mitigating circumstances and Peterson did not mention any. (Tr. I, 69-70).

Abatement took ten minutes and involved Peterson pulling down the rock (Tr. I, 71).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That § 75.202(a) Was Violated.

On April 18, 2013, Inspector Dempsey issued a 104(a) Citation, No. 8154926, to Respondent. Section 8 of that Citation, Condition or Practice, reads as follows:

The mine operator has failed to protected miners from loose draw rock in the primary escapeway for the #1 working section. 15' inby the #18 xcut adjacent to #9 beltline a section of draw rock measuring 7.5' long and 2' wide and 4" in thickness is gapped down immediately over the primary escapeway lifeline. The only thing holding up this draw rock is 1" fly board which is sagging under the weght of the rock.

Standard 75.202(a) was cited 74 times in the two years at mine 4609163 (74 to operator, 0 to contractor).

(GX-2).

The cited standard was, again, 30 C.F.R. § 75.202(a).

The Secretary presented credible evidence that Respondent violated the cited standard, as described in the citation. (Tr. I, 59, II, 41-42, 61). In its brief, Respondent did not contest the validity of the violation. (*Respondent's Post-Hearing Brief* at 22-23). In light of this fact, and the evidence presented, the Administrative Law Judge finds that this citation was valid.

2. The Violation Was Reasonably Likely to Result in a Fatal Injury to One Miner And Was Significant And Substantial In Nature

The Secretary presented credible evidence to support a finding that the cited condition was reasonably likely to result in fatal injury to a miner. (Tr. I, 68-69). Further, the Secretary supported the contention that the violation was S&S. (Tr. I, 68).

In its brief, Respondent did not argue against the inspector's gravity and S&S designations in Citation No. 8154926. The Administrative Law Judge finds that Respondent conceded that it violated the standard. In light of this fact, and the evidence presented, the Administrative Law Judge finds that the preponderance of the evidence supports the Secretary's gravity and S&S designations.

3. Respondent's Conduct Did Not Display "High" Negligence

Respondent knew or should have known about the cited condition. There is no question that a piece of draw rock measuring 7.5 feet by 2 feet, by 2-4 inches was hanging directly over the lifeline. (Tr. I, 59, II, 41-42, 61). Further, there is no question that at the time of the inspection, the condition was obvious. (Tr. I, 60, 259-60). Inspector Dempsey credibly testified

that the cited condition was only supported by a fly board. (Tr. I, 59-61, II, 42, 61). He also credibly testified that the condition would have developed over time, perhaps over the course of two weeks. (Tr. I, 66-68, 166-167). Respondent's agents, namely the airway examiners, were in this area as the condition developed. (Tr. I, 65-66). As a result, Respondent should have been aware that the condition was present and should have corrected it. Therefore, Respondent was negligent.

While the Administrative Law Judge affirms the inspector's finding that Respondent was negligent, the evidence does not support a finding that this negligence was high; there were mitigating circumstances. Specifically, Harding credibly testified that the condition was not obvious the day before during the airway examination. (Tr. I, 259). An Administrative Law Judge has a duty, if possible, to resolve conflicts in the testimony without determining that a witness committed perjury. *See The American Coal Company*, 2013 WL 6529525, FN 29 (Sept. 2013)(ALJ Lewis). The most likely explanation is that the condition existed for roughly two weeks, the draw rock slowly separating from the roof and then settling onto the fly board. However, the condition did not become obvious until April 18, when the slab of rock gapped fully away from the top and settled where it was discovered by the Inspector. This explanation would conform both Dempsey's and Harding's observations. It would also accord with Harding's testimony that he did not see the condition on April 17 and would also follow Dempsey's testimony that the condition occurred gradually.

Therefore, the Administrative Law Judge finds that the condition, while present, was not obvious during the April 17, 2013 examination. Therefore, a finding of high negligence is not appropriate. A finding of moderate negligence is best supported by the evidence.

4. Penalty

The ALJ finds that a substantial deviation from the Secretary's proposed assessment of \$21,422.00 is warranted herein and will evaluate the factors contained in 30 U.S.C. § 820(i) to explain that deviation. Those factors are as follows:

(1) The Operator's history of previous violations – As discussed previously, Respondent had a long history of these types of conditions.

(2) The appropriateness of the penalty compared to the size of the Operator's business – As discussed previously, Respondent is a large operator and Roundbottom is a large mine.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited moderate negligence, rather than the high negligence cited by the Secretary.

(4) The effect on the Operator's ability to remain in business – The parties have stipulated that the Orders at issue here would not affect Respondent's ability to remain in business. (JX-1)

(5) The gravity of the violation – As previously shown, this violation was reasonably likely to result in fatal injuries to one person.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The parties stipulated that the condition was abated rapidly and in good faith. (JX-1).

In light of the Administrative Law Judge’s decision to modify the negligence from “High” to “Moderate” and to eliminate the unwarrantable failure designation, a reduction in the assessed penalty is appropriate. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$15,000.00 with respect to this violation.

Order No. 8154928

I. ISSUE

With respect to Order No. 8154928, the issues to be determined are whether Respondent’s alleged violation of the Act on April 18, 2013 was significant and substantial (“S&S”), whether it was reasonably likely to result in fatal injury to 14 miners, whether it was the result of high negligence and an unwarrantable failure, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

Dempsey reviewed Order No. 8154928 (GX-4). (Tr. I, 71). The cited condition was outby the overcast near the No. 8 head in the escapeway.¹⁸ (Tr. I, 72). This condition was found ten crosscuts from the condition observed in Citation No. 8154926. (Tr. I, 93).

Before the Order was issued, Respondent had identified draw rock issues in this area. (Tr. I, 167-168). The order was issued because the operator failed to protect miners in the escapeway from draw rock. (Tr. I, 71-72). Specifically, wire mesh designed to control the draw rock was bowed, sagging, and separated under the weight of a large amount of rock and was failing to protect miners. (Tr. I, 72, 74-75, 80-81, 92, II, 45, 61).

Mesh is commonly used in mines to control draw rock and bolt it to the roof. (Tr. I, 80, 246). The mesh was inadequate because it was not pressing against the roof, the parts of the mesh did not overlap, and the installation used substitute material, like tie wires. (Tr. I, 174, 178). Together, these conditions create a greater hazard. (Tr. I, 174-175). This particular mesh installation would not hold much more rock and it was already failing. (Tr. I, 184). The mesh was separating because it was loaded with rock. (Tr. I, 185, II, 45, 54). There was lots of draw rock of various sizes, some of which had fallen to the bottom. (Tr. I, 73, 80, 177, II, 45). As more rock collected, more wires would break and the structure would fail. (Tr. I, 185). It could have failed at any time. (Tr. I, 176-178). Peterson’s first thought upon seeing the mesh was that some corrective action needed to be taken. (Tr. II, 61-62).

¹⁸ An overcast is an area where one air current is allowed to pass over another. (Tr. I, 72). They are constructed of cinderblock and have a roof. (Tr. I, 72). There are usually some beams across it and some tin. (Tr. I, 72). The top is lower here. (Tr. I, 72).

Respondent's witnesses believed the draw rock was controlled by the mesh and that miners passing under the mesh would be protected. (Tr. II, 46, 50, 62, 100-101). Saunders testified that it was time to change the mesh because the material had recently fallen, but the mesh was still protecting miners. (Tr. II, 106-107). They conceded the center of the entry was impassable. (Tr. II, 46).

If an operator has trouble with draw rock, wire mesh installation is a good method of control. (Tr. I, 102, 168). Mesh is put up to control localized draw rock, not to support main top. (Tr. II, 95). There are several ways to properly install mesh. (Tr. I, 82, 206-207). Operators have set up beams, installed false roofs with roof cribs, sealed the roof, and rebolted roofs. (Tr. I, 102, 206). Every manufacturer of mesh will provide the product with an installation manual. (Tr. I, 183-184). However, if a different method of installation provided the same level of protection as the manufacturer's method, it is proper. (Tr. I, 184). Most of the time, mesh is installed by the roof bolter during the cycle. (Tr. I, 82, II, 14-15, 47, 96). If it is installed off the cycle, a machine can be brought in and the mesh can be hung with push plates.¹⁹ (Tr. I, 82-83, II, 47, 95). The mesh should have an overlap of one square of mesh, or four inches. (Tr. I, 83, 77, 184). Peterson testified that if the push plates could not be installed, the mesh was to be overlapped and tied together. (Tr. II, 47).

Dempsey would not say that he would prefer that this area be scaled rather than meshed; that was not his role as inspector. (Tr. I, 175, 182). As long as the hazard is removed any method was fine. (Tr. I, 175-176).

Dempsey did not believe the mesh in the cited location was properly installed. (Tr. I, 91, 93, 99). However, he conceded that in some areas of the mine, mesh was installed properly. (Tr. I, 102). On the other hand, Peterson testified he was not sure if the mesh was properly installed, while his deposition testimony stated that it was improper. (Tr. II, 66-67).

An open seam in between mesh panels was held together with a clevis. (Tr. I, 74, II, 67, 102). Dempsey testified that clevises were not appropriate for connecting panels because it allows the mesh to sag and add additional draw rock and weight. (Tr. I, 89-90). Further, the edges of this seam did not overlap, there was a gap. (Tr. I, 75-76, 79, 83). Lack of overlap is improper installation because it does not support the draw rock. (Tr. I, 83-84, II, 15). There was some overlap in other areas, but not at the seam. (Tr. I, 77). There was no push plate near the seam. (Tr. I, 76). Saunders testified a clevis was used because a plate could not be used. (Tr. II, 102).

Clevises are generally used for light duty lifting work and are not rated for the load placed on it here. (Tr. I, 85, II, 103). Dempsey did not know how much weight these clevises could hold but they were small compared to the screen. (Tr. I, 169). They are used to lift something very small from an anchoring point. (Tr. I, 85).

¹⁹ Off cycle means that an area has been mined and the machinery has been moved to another place. (Tr. I, 83). It does not make sense to move the mining equipment back to install the mesh, so another machine is brought in to perform the work. (Tr. I, 83).

Clevises were not included by the mesh manufacturer for installation. (Tr. I, 85). Saunders had been to seminars about the correct way to use mesh to control draw rock and read material on proper installation. (Tr. II, 116). However, he testified that mines do not necessarily follow the manufacturer guidelines. (Tr. II, 107). The cited location would be difficult to reach with a roof bolter, so the clevis would be easier. (Tr. II, 107-108). He stated that while using clevises was not the best installation method but it serviced the purpose. (Tr. II, 106). However, he conceded that the use of clevises was not recommended by the manufacturer. (Tr. II, 117).

With respect to loads, there are barrel-type and screw-type clevises and they range in strength from 3/4 of a ton to 4 or 5 tons. (Tr. II, 103). A document provided by Respondent showed that a 3/4-inch clevis could hold a vertical load of 4 3/4 tons. (Tr. I, 179). However, the cited clevises were less than 3/4-inch so the load limits are irrelevant. (Tr. I, 179, 207). Dempsey believed that it was a 1/4 inch or 3/16 inch clevis as measured from the diameter of the pin. (Tr. I, 170-171). Harding had not measured the clevises, but had looked at them before and saw the stamp for their size, though not at this time. (Tr. II, 13-14). Peterson did not measure the clevises but he had used them before and they were 1/4-inch. (Tr. II, 67-68).

Regardless of the size, a clevis can lift the greatest load when vertical. (Tr. I, 86). Changing the angle of the hoist requires a load reduction. (Tr. I, 86, 103-104). The clevis here was on its side, meaning that the load would have to be reduced from the manufacturer's direct vertical load. (Tr. I, 86-87, 179). Respondent's document listing the vertical load at 4 3/4 tons for a 3/4-inch clevis did not include the side loading application limits. (Tr. I, 179-180, 207-208). Peterson testified that he had seen a document that included the lateral load, but he did not recall the amount at hearing. (Tr. II, 68). Saunders testified that the strength of the clevis is six times the working load and that when the application is lateral there is a loss of 50 percent of capacity. (Tr. II, 104). He testified that this would still be several tons of strength. (Tr. II, 104). The cited clevises had a capacity of around 6,000 pounds, maybe slightly less. (Tr. II, 105). Harding did not know the lateral load for the clevises. (Tr. II, 14).

In addition, Saunders testified the mesh itself was between 1/8 and 1/4 inch of steel. (Tr. II, 105). The strength of the carbon steel the mesh is made of is 65,000 PSI. (Tr. II, 105-106). Each strand of steel would hold around 1,000 pounds, so the clevis was stronger. (Tr. II, 106).

Dempsey testified that each clevis is designed with a different strength of steel and construction can change the load it can hold. (Tr. I, 180). Peterson did not know what the clevises were made of. (Tr. II, 67).

In another spot, a clevis was not even suspended or anchored; it was just being used as a "glorified" tie wire. (Tr. I, 88-89). When a clevis is used, it is anchored to something and then a load is suspended from it. (Tr. I, 88). The clevis had no "load limit" when not anchored because it was used improperly. (Tr. I, 89).

There were no other locations in the mine where the mesh was connected with clevises. (Tr. I, 82, 169). There was no evidence that clevises were broken. (Tr. I, 171). Dempsey did not count the clevises in this area. (Tr. I, 169).

In several places the open seams in the mesh were secured with tie wire, which would not support the load. (Tr. I, 72, 76-78, 90, 172-173, II, 62). In these locations there was no overlap or bearing plate. (Tr. I, 76, II, 62). The seam opened because the installation could not hold the rock. (Tr. I, 90). Rock fell down the seam onto the bottom. (Tr. I, 78-79, 80, 173). Draw rock falling through the seam would be no different than if it fell from the ceiling. (Tr. I, 173). Dempsey observed mesh in other locations at the same mine but none were connected with tie wire and none had non-overlapping seams. (Tr. I, 81-82).

Harding and Peterson conceded that panels were held together with tie wire, even during the examination. (Tr. II, 13, 54). Peterson testified that it was proper to use tie wires to prevent a gap given the amount of rock present. (Tr. II, 64, 66). Peterson reviewed his sworn, signed deposition testimony on page 69, line 15 (GX-11). (Tr. II, 63). In that testimony, Peterson stated that a particular tie wire was not doing its job because the weight of the rock had crushed it. (Tr. II, 63-64). He also stated that it was improper installation to have the seams. (Tr. II, 64).

In another area, the mesh was tied to a roof bolt plate with a tie wire rather than rebolts. (Tr. I, 78, II, 53-54, 62). Dempsey did not recall if he saw tie wires on plates in other places. (Tr. I, 81). There were no other locations in the mine (or in other mines) where the mesh panels were connected to the roof with tie wires. (Tr. I, 82, 90-91). At first, Harding testified that he did not see tie wires attached to the top, but later conceded that mesh was connected to the top during his examination. (Tr. II, 13)(GX-6, p. 4). Peterson testified that this installation was used because the roof bolt's thread had broken and therefore would not accept a plate. (Tr. II, 53-54).

Tie wire is generally used to hold roof bolts in place and hold other materials together, like gluts or wedges. (Tr. I, 84, II, 65). Tie wire was not supplied by the mesh manufacturer for installation. (Tr. I, 84, II, 65). Manufacturers provide information about proper installation because they have liability. (Tr. I, 84-85). The tie wire here was old, a little rusty, and broken apart. (Tr. I, 84). The mesh itself had some rust on the surface. (Tr. I, 91). Peterson testified that the purpose of tie wire is to support areas where mesh overlaps and no push plate can be installed. (Tr. II, 52-53). The ties keep the edges from rolling back where they could hit someone in the face. (Tr. II, 53).

If the clevises and tie wires were used as they were here, but the seams had not burst, there would still be a violation. (Tr. I, 98-99). The installation ensured that the roof would fail. (Tr. I, 99). This was like having an unsupported roof; the rock was uncontrolled. (Tr. I, 99). Saunders conceded that this was not proper installation and that clevises and tie wires were not supposed to be used. (Tr. II, 117).

Rather than clevises or tie wires, push plates should have been placed where they would support the screen and hold it against the roof. (Tr. I, 183). These kinds of plates are installed over the bolts that had extended threads. (Tr. I, 183). In fact, some bearing plates were present in the cited area. (Tr. I, 77, 82, 172). Peterson and Saunders testified that there were seven or eight push plates in the cited mesh. (Tr. II, 48, 90, 96). Neither Dempsey nor Harding was sure of the number. (Tr. I, 169, 189, 258). However, there were no push plates in the center of the entry. (Tr. I, 171-172, II, 49). Respondent's witnesses testified that there was no plate because the threads on the end of the bolt had broken off. (Tr. I, 254, II 102). Peterson did not recall seeing push

plates directly over the lifeline but believed that the area was supported. (Tr. II, 48). Saunders believed most of the plates were along the life line. (Tr. II, 90). However, he arrived at the overcast after they cut down the mesh. (Tr. II, 89-90, 94).

Harding and Saunders testified that the push plates were rated for 6,000 pounds (Dempsey was not sure). (Tr. I, 171, 252, II, 95-96). Dempsey did not see any evidence that any push plates had loosened, failed, or stopped performing. (Tr. I, 171). But, because of the cited condition, he could not get near the push plates to observe closely. (Tr. I, 171-172). Peterson did not see any plates that were stressed or over-weighted. (Tr. II, 56-57).

In addition to using the proper materials, the mesh was supposed to be installed tight to the roof to prevent the air from cutting more draw rock. (Tr. I, 174, 178). Here Dempsey believed the mesh was not tight, allowing more rock to fall and add unsupportable weight to the mesh. (Tr. I, 174, 178). However, Respondent's witnesses testified that the mesh above the lifeline was still tight to the roof and that only the area opposite the lifeline was loose. (Tr. I, 254-255, 258, II, 45-46, 100).

Dempsey did not know how much rock was in the mesh. (Tr. I, 179-180). According to Peterson, when they cut the mesh down, the loose rock was about four feet in diameter, most of it small. (Tr. II, 55). Based on that measurement, Dempsey determined there was 1,507 pounds of rock. (Tr. I, 208-210). Peterson testified that the amount of rock in the mesh would be enough to fill a wheel barrow or a little bit more. (Tr. II, 55). He believed it weighed 300 rather than 1,500 pounds. (Tr. II, 55-56). He was not concerned that the amount of rock would cause a failure of the mesh. (Tr. II, 57-58). The wire mesh is not designed to hold up the mound, it is just to collect the loose material that falls off to prevent it from reaching the bottom. (Tr. II, 57-58).

Dempsey believed the hazard associated with this condition was falling draw rock. (Tr. I, 92). If the condition were allowed to continue, other portions of the roof would deteriorate, fall, and break through the seams in the mesh. (Tr. I, 92). Ultimately the entry where miners work and travel would fail. (Tr. I, 92). He did not believe that the fact that the rock was caught and suspended indicated that miners were protected from falling rock. (Tr. I, 181). In fact, the mesh made the area more dangerous as it was gathering rocks. (Tr. I, 92, 168). The screen was being loaded with more stone every day and all the weight would fall at once when the mesh failed. (Tr. I, 168, 182). Further, if the mesh were gone, individual rocks could be spotted and pulled down; the gob of rocks prevented observation and understanding of the roof. (Tr. I, 181-182). However, Dempsey conceded that without the mesh, each piece of rock would have fallen to the floor and could have hit a mine (if not scaled). (Tr. I, 168-169).

Peterson testified that the only hazard was where the mesh had separated because someone could walk into it. (Tr. II, 58). If Peterson had been the airway examiner he would have recommended that someone tighten the gap. (Tr. II, 58). He would have also recommended cutting the mesh and letting some rock fall out and then resetting. (Tr. II, 58-59).

According to Dempsey, the cited condition existed for "quite a while" because of the deterioration that had taken place. (Tr. I, 94, 187). The metal had oxidized and time would be needed for the cited rock to accumulate. (Tr. I, 94). The condition had existed since the mesh

was installed, which was more than a week ago and probably before November 2012. (Tr. I, 95, 245-247). It was possible that there was a time when pieces falling did not weigh enough to separate the seam. (Tr. I, 181). It would be hard to tell when the different pieces of rock had fallen. (Tr. I, 180-181).

The day before the instant citation, Harding traveled from the surface to the section. (Tr. I, 188-189). At the time of issuance, Harding stated that, "it was not like that yesterday." (Tr. I, 178, 187, 251). Dempsey replied that he found it hard to believe that the sagging mesh had not been present the day before. (Tr. I, 187-189). Harding testified that on April 17th the wire mesh was not sagging and that there was maybe 50 pounds of rock in the mesh. (Tr. I, 244-245, 247-248, 253, II 12, 18). Further, the mesh was not separated from the seam and there was no draw rock under the lifeline or mesh. (Tr. I, 248-249, 253). He believed the rock was controlled. (Tr. I, 248). On the day of the citation, Harding and Peterson believed most of the rock in the mesh was fresh. (Tr. I, 255-256, II, 51, 55). Old rocks that are exposed to the air appear lighter, dry, and dusty while fresh rocks are dark and wet. (Tr. I, 255-256, II, 51-52, 86-87). The rock here was dark gray and wet. (Tr. II, 52, 100-101). The cited material would have struck Harding in the nose and neck, meaning it would be hard for an examiner to walk under it. (Tr. I, 188-189, 245). If he had seen this condition, he testified that he would have remedied it but it was not present. (Tr. I, 245, 249, 254).

This condition was in the primary escapeway where the fire drill occurred. (Tr. I, 93). There must be six feet of travel area to accommodate a lifeline, in case a disabled miner would need to be transported to the surface on a stretcher. (Tr. I, 94). The lifelines passed directly under the mesh panels. (Tr. I, 77, 94). If the condition of the mesh existed on the 15th or 16th, Dempsey would have expected one of the men to report the condition. (Tr. I, 186). However, Dempsey did not recall talking to any of the miners. (Tr. I, 187). Further, a weekly examiner would have traveled in this area on the 17th. (Tr. I, 93-94).

The citation was marked S&S because there was a violation of a mandatory safety standard, the violation contributed to the hazard of draw rock, and there was a reasonable likelihood that this hazard would result in a substantial injury to a miner. (Tr. I, 95).

This citation was marked "fatal" because draw rock can crush a person. (Tr. I, 96). The mesh had not yet completely failed, but this did not make a fall unlikely. (Tr. I, 206). Also, the 14 miners in the fire drill would be affected as they all could have been killed. (Tr. I, 96, 182).

The condition was cited for "high" negligence because it should have been observed and repaired long before the inspection. (Tr. I, 96). Someone recognized that there was a problem, but the mesh was installed incorrectly. (Tr. I, 96-97). Respondent also knew that the mesh was held together with tie wire. (Tr. I, 96). Further, this area was examined and supervisors passed through. (Tr. I, 96). Dempsey did not believe there were any mitigation circumstances because the installation was improper, it was set up to hurt people rather than help. (Tr. I, 97). Further, when a supervisor directs a miner to do work, he is required to examine the work and ensure that it is done correctly and protects health and safety. (Tr. I, 99).

Dempsey did not see any mitigation and Respondent did not bring any up. (Tr. I, 97). In fact, Dempsey stated that Peterson agreed with the citation. (Tr. I, 100-101). The mesh was not a mitigating factor because it made matters worse rather than better. (Tr. I, 183).

Dempsey believed this conduct was an unwarrantable failure. (Tr. I, 72). A UWF can be intentional or be the result of indifference. (Tr. I, 97). The cited condition was obvious, extensive, had existed for a while, and it had been examined by Respondent's agent. (Tr. I, 97-98). The cited condition was plainly visible as it hung down below the edge of the overcast. (Tr. I, 72-73). The rock was hanging and suspended from the mesh. (Tr. I, 73). Any observer (trained or not) should have seen this condition. (Tr. I, 91). Dempsey described the situation as a "bomb" that would fall on someone and he did not want to walk under it. (Tr. I, 91-92, 98).

As a result of this condition, a D-Order was issued, pulling the miners out by the 9-head. (Tr. I, 249-250). The order was issued at 11:00 and was terminated at 1:10. (Tr. I, 101). It took 15 miners to make the repairs. (Tr. I, 101). The condition was abated when Respondent took down the wire mesh, cleaned the draw rock, and set two rows of roof jacks in the area. (Tr. I, 101, 251, II, 69). Respondent cut off the mesh at the corner with a grinder, let the rocks fall, raked them off the mesh, and threw everything away. (Tr. I, 257, II, 49). Peterson testified that if there had been a lot of rock they would not have used a grinder because it would have been hazardous. (Tr. II, 59). Dempsey did not observe or direct the repairs. (Tr. I, 101-102, 179).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That § 75.202(a) Was Violated.

On April 18, 2013 Inspector Dempsey issued a 104(d)(1) Order, No. 8154928, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

The operator has failed to protect miners who travel the intake/primary escapeway from the fall of roof material (draw rock). The primary escapeway is deemed unsafe to travel in the area immediately outby the overcast near #8 head. Wire mesh has been used to control draw rock. This wire mesh is bowed and separated under the applied load. Several points were secured w/simple tired wire which will not support the applied load. The operator has engaged in aggravated conduct constituting more than ordinary negligence. The violation is an unwarrantable failure to comply with a mandatory standard.

Standard 75.202(a) was cited 75 times in the two years at mine 4609163 (75 to operator, 0 to contractor). The violation is an unwarrantable failure to comply with a mandatory standard.

(GX-4).

The cited standard was, again, 30 C.F.R. § 75.202(a).

The Secretary presented credible evidence that Respondent violated the cited standard, as described in the citation. (Tr. I, 71-75, 80-81, 92, II, 45, 61). In its brief, Respondent did not contest the validity of this Order. (*Respondent's Post-Hearing Brief* at 24-26). In light of this fact, and the evidence presented, the Administrative Law Judge finds that this citation was valid.

2. The Violation Was Significant And Substantial In Nature And Reasonably Likely to Result in Fatal Injuries to 14 Persons

Inspector Dempsey marked the gravity of the cited danger in Order No. 8154928 “Reasonably Likely” to result in “Fatal” injury to 14 person. (GX-9). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. § 75.202(a), was directed, as stated in the standard, are “hazards related to falls of the roof, face or ribs and coal or rock bursts.” Those hazards include being struck by falling rock as well as walking into the mesh used to control the draw rock. (Tr. I, 92, II, 58). In the instant location, Inspector Dempsey credibly testified that the wire mesh was improperly installed, creating the possibility that the rocks collected therein would fall on miners. (Tr. I, 72, 74-75, 80-81, 92, 184, II, 45, 61). The mesh was improperly installed because it used devices other than those provided by the manufacturer, namely tie wires and clevises. (Tr. I, 72, 74, 76-78, 90, 172-713 II, 62, 67, 102). Tie wire was also used, instead of the recommended push plates, to attach the mesh to the top. (Tr. I, 78, II, 53-54, 62). Also, the pieces of mesh were not overlapped, as is best practice. (Tr. I, 75-76, 79, 81-84, II, 15). Finally, the installation did not keep the mesh close tight to the roof as required. (Tr. I, 174, 178). As a result, rock filled the mesh, caused it to bow out and then split. (Tr. I, 185, II, 45, 54). This allowed some rock to fall and created the likelihood that the entire mesh structure would fall. (Tr. I, 185). As discussed *supra*, rock falls are inherently dangerous. Therefore, a preponderance of the evidence supports the Inspector’s finding that a fatal injury was reasonably likely.

For the same reasons as discussed with respect to Citation No. 8154925 *supra*, this was an area miners worked and traveled, especially during fire drills or emergencies. Therefore, a preponderance of the evidence supports the Inspector’s finding that 14 miners would be affected in the event of a massive roof fall.

Respondent provided several arguments asserting that an accident was unlikely. As Respondent addressed those arguments as they related to the S&S designation, they will be discussed *infra*.

Order No. 8154928 was marked by Inspector Dempsey as S&S. (GX-4). It has already been established that the first element of the *Mathies* S&S analysis, the underlying violation of a mandatory safety standard, has been established with respect to this order. As discussed *supra*, Respondent violated 30 C.F.R. § 75.202(a).

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation, is also met. The preponderance of the evidence shows that the cited condition, an improperly installed wire mesh, contributed to the hazard of a roof

fall. The wire mesh suspended several pieces of rock above the escapeway floor and, upon failure, would have allowed hundreds of pounds of rocks to fall. (Tr. I, 185, 208-210, II, 55-56). The evidence suggests that there were several safer ways to control draw rock in the area. Inspector Dempsey credibly testified that, if installed correctly, the mesh would have prevented a rock fall. (Tr. I, 102, 168). Further, there were several other methods of roof control that would have made a roof fall very unlikely. (Tr. I, 175-176). Therefore, the improperly installed mesh made a roof fall more likely and contributed to a hazard.

Respondent argued that this condition did not contribute to any hazard. However, this argument is not persuasive. Respondent argued that the mesh did not contribute to a safety hazard, but was installed to prevent and remedy a safety hazard related to falling material and tripping hazards. (*Respondent's Post-Hearing Brief* at 26). It argued that the mesh prevented material from falling to the ground. (*Id.*). There is no question that properly installed mesh will prevent a hazard, rather than contribute to one. (Tr. I, 102, 168). However, Inspector Dempsey credibly testified that the condition of the cited mesh actually increased danger. Rather than allowing Respondent to see and then scale draw rock (as it would if there was no mesh), the mesh obscured visibility. (Tr. I, 92, 168, 182). And rather than hold the rock (as it would if the mesh were improperly installed), the mesh created a "time bomb" that would eventually go off when the weight of the mesh proved too great to hold. (Tr. I, 91, 92, 98). Therefore, it is possible that the condition was less safe than if Respondent had completely ignored the area. Rather than smaller pieces of rock falling occasionally (still a considerable hazard), the mesh created the probability of a large collapse. Therefore, the Administrative Law Judge finds that the second prong of *Mathies* is met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also met. In the event of a split or collapse in the mesh, there is no question that a massive rock fall would occur. All the witnesses agree that there was rock in the mesh and that it posed a danger. (Tr. I, 72, 74-75, 80-81, 92, II, 45, 61). I credit the testimony of Inspector Dempsey that over 1,500 pounds of material was caught in the mesh. (Tr. I, 185, 208-210). Further, more might have collected in the mesh before the ultimate failure. For the reasons discussed *supra*, I find that miners were exposed to this condition. As a result, I find that in the event that the mesh failed, injuries would be reasonably likely.

Respondent argued that this condition did not contribute to any hazard. However, this argument is not persuasive. Respondent cited to Judge Zielinski's decision in *Ohio County Coal Co.*, for the proposition that in order to find an injury causing event was likely, both the likelihood of both a miner being in the area and a roof fall occurring at the same time must be considered. 31 FMSHRC 1486, 1491 (2009)(ALJ Zielinski). Judge Zielinski's decision was issued before the Commission clarified the *Mathies* test in *Musser Engineering, Inc., and PBS Coal Inc.*, *supra*. The issue is no longer whether there could simultaneously be a roof fall and a miner in the area. Instead, the roof fall is presumed to happen and the question is whether anyone was exposed. For the reasons discussed *supra*, the Administrative Law Judge found that miners regularly worked and traveled in this area, including miners on regular fire drills or in an emergency. Therefore, there was exposure and, if there was a roof fall, injuries would be reasonably likely.

The fourth element - a reasonable likelihood that the injury in question will be of a reasonably serious nature – is also met. As discussed with respect to Citation No. 8154925, injuries resulting from a rock fall would be serious. Therefore, the cited condition was S&S.

3. Respondent's Conduct Displayed "High" Negligence And Was The Result Of An Unwarrantable Failure To Comply With the Standard.

In the citation at issue, Inspector Dempsey found that the operator's conduct was highly negligent in character. (GX-4). The preponderance of the evidence supports this finding.

With respect to knowledge, the evidence shows that Respondent knew, or should have known, about the cited condition. Inspector Dempsey credibly testified that the wire mesh had been improperly constructed since it was first installed. (Tr. I, 91, 93, 99). The evidence is not clear on when the mesh was installed, but it was at least several months before the instant citations. (Tr. I, 95, 245-247). Therefore, Respondent's examiners had been traveling through the area weekly and should have noticed that the installation was inadequate and taken steps to correct the problem.

Further, there were no mitigating circumstances. Inspector Dempsey testified that he did not see any mitigating factors and that Respondent did not offer any at issuance. (Tr. I, 97). According to Dempsey, Peterson agreed with the issuance of the order. (Tr. I, 100-101). The Administrative Law Judge finds that Respondent should have known about the cited condition and did nothing that would constitute a mitigating factor of that negligence.

Respondent presented several putative mitigating factors with respect to this order. However, none of those arguments were compelling.

First, Respondent argued that the area had been previously identified as being susceptible to draw rock and it had installed steel mesh to alleviate the hazard. (*Respondent's Post-Hearing Brief* at 25). Further, Respondent argued that the mesh was achieving the goal of preventing draw rock from falling to the ground. (*Id.* at 26). While identifying areas that experience draw rock is positive, Respondent's actions here were not a mitigating circumstance. Inspector Dempsey testified that the mesh actually made conditions in the area worse and therefore, was not a mitigating circumstance. (Tr. I, 183). As discussed *supra*, the inspector credibly testified that the nature of the installation made the condition a "time bomb" rather than a protective measure. (Tr. I, 191). Therefore, the installation of the mesh was not a mitigating factor.

Next, Respondent argued that it did not know and had no way to know that the condition was present. It argued that the mesh panels had been in place for a year and that no one (including MSHA inspectors) indicated that the installation method was hazardous. (*Respondent's Post-Hearing Brief* at 25). I credit the testimony of Inspector Dempsey who stated that cited condition was obvious. (Tr. I, 97-98). Unlike with respect to Citation No. 8154925, Inspector Dempsey did not qualify his determination of obviousness based on how often the area was examined. I find that the condition, mesh panels installed directly over the head of the examiner that were loose from the top and held together with tie wires and clevises would have been obvious. This is not a mitigating circumstance.

Next, Respondent argued that the mesh over the lifeline was secured to the roof with push plates (which were rated to hold 6,000 pounds each). (*Respondent's Post-Hearing Brief* at 25). The Administrative Law Judge does not believe the evidence would support such a finding. The only witness who stated that there were push plates life line was Saunders. (Tr. II, 90). However, Saunders arrived at the overcast after the mesh had been cut down. (Tr. II, 89-90, 94). He did not see the condition as it appeared when the order was issued. Further, Peterson, Respondent's only witness who was at the overcast when the order was issued, testified that he did not recall seeing push plates over the lifeline. (Tr. II, 48). The Administrative Law Judge credits this testimony, as well as the testimony of Inspector Dempsey who stated that the cited mesh was not supporting the top. (Tr. I, 71-75, 80-81, 92, II, 45, 61). This is not a mitigating circumstance.

Next, Respondent argued that push plates were used on all roof bolts that would accept them and that clevises were used when they would not. (*Respondent's Post-Hearing Brief* at 25). It also noted that these clevises were designed to hold nearly the same weight as the push plates. (*Id.*). The exact number of push plates used was unclear. Peterson and Saunders testified that there was seven or eight. (Tr. II, 48, 90, 96). Neither Dempsey nor Harding was sure. (Tr. I, 169, 189, 258). It is uncontested that there were no plates in the center of the entry. (Tr. I, 171-172, II, 49). Further, it is unclear how many clevises were used and how much weight they could hold. However, the Administrative Law Judge is certain that the clevises did not hold as much weight as the push plates. The statistics used by Respondent to prove the strength of the clevises all dealt with larger clevises being used properly as hoisting devices. (Tr. I, 179-180, II, 67-68). The clevises used here were much smaller and were being used as clamps or tie wires. (Tr. I, 88-89, II, 67-68). While it is unclear how much the clevises could hold, it was clearly less than proposed by Respondent.

Regardless of the number of plates or the strength of the clevises, it was clear from the result support was insufficient. In essence, the proof is in the pudding. Respondent's installation had failed to control the draw rock. Even Peterson stated, upon seeing the mesh when the order was issued, that something needed to be done. (Tr. I, 100-101, II 61-62). If the clevises and the push plates had been sufficient to control the roof, the mesh would not have been leaking rock and been on the verge of collapse. This is not a mitigating circumstance.

Next, Respondent argued that the tie wire was used for "cosmetic purposes" to keep the ends of the mesh panel from rolling down or becoming a hazard to walk into. (*Respondent's Post-Hearing Brief* at 25). The Administrative Law Judge credits the testimony of Inspector Dempsey that there was at least one seam on the mesh that was held together by tie wire. (Tr. 72, 76-78, 90, 172-173, II, 62). The photographic evidence supports this testimony. (GX-6, photographs 2, 3, & 5). Far from being cosmetic, this installation using materials not provided by the manufacturer was one of the reasons the roof conditions were so hazardous. This is not a mitigating circumstance.

Finally, Respondent argued that most of the rock was fresh and the seam and split apart since the previous examination. (*Respondent's Post-Hearing Brief* at 26). The Administrative Law Judge credits the testimony of Inspector Dempsey that the rock had been present for some time. (Tr. I, 187-189). However, even if that were not the case, this would still not constitute a

mitigating circumstance. The roof was not controlled because the mesh was improperly installed. Even before the rock began to collect in the mesh, the panels were held together with tie wires and clevises in a way that prevented the mesh from maintaining its position close to the top. When the rock fell, it made this improper installation more obvious, but the rock itself was not the cited condition. The rock was the *result* of the improper installation, the danger that the mesh should have prevented. This condition would have been a violation even if no rock had fallen. Even if the rock had fallen just five minutes before the order was issued, the improper installation had occurred months earlier. Therefore, this is not a mitigating circumstance.

In light of the foregoing, the Administrative Law Judge affirms the inspector's finding of "high negligence."

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) (remanded because a finding of high negligence without a corresponding finding of unwarrantable failure was "seemingly at odds.") *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding that if there is mitigation, an unwarrantable failure finding is inappropriate). *Emery Mining Corp.*, defines an unwarrantable failure, as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard, intentional misconduct, indifference, or serious lack of reasonable care. *Id.* at 2004; *see also Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995). The Commission formulated a six factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). While each factor does not need to be present in order to find unwarrantable failure, all six factors must be considered. The Administrative Law Judge will consider each of those factors in turn:

1. Extent Of The Violative Condition

This particular condition was a large piece of mesh, around 240 square feet, that was improperly installed. It covered the entire width of the entry. Therefore, it was extensive.

2. The Length of Time of the Violation Existed

While the exact date of the installation is not clear from the record, there is no question that it was there for several months. (Tr. I, 95, 245-247). Inspector Dempsey credibly testified that the mesh was rusty, indicating that installation was not recent. (Tr. I, 91). Therefore, the cited condition had existed for quite a while.

3. Whether the violation is obvious or poses a high degree of danger

The violation at issue here was obvious and posed a considerable danger. As discussed *supra*, this condition was reasonably likely to result in fatal injuries to 14 miners. I credit the testimony of the inspector that the condition was obvious and should have been observed by a trained or untrained observer. (Tr. I, 91-92).

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

The evidence suggests that Respondent had problems with roof falls in this mine. (Tr. I, 42, 202-203). In fact, several months after these citations were issued a roof fall occurred in the cited entry. (Tr. I, 107). Further, Respondent had an extensive history of § 75.202(a) violations. Therefore, Respondent had meaningful notice that roof conditions were a serious problem in the mine. Respondent should have taken action to correct this condition.

5. The operator's efforts in abating the violative condition

The parties stipulated that the condition was abated quickly and in good faith. (JX-1).

6. Operator's knowledge of the existence of the violation

“It is well-settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition.” *IO Coal Co.*, 31 FMSHRC at 1356-1357 (citing *Emery*, 9 FMSHRC at 2002-2004). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure determination. See *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) citing (*REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). As discussed above, the preponderance of the evidence shows that Respondent should have known of the condition. Harding, and other examiners, traveled through this area and actively searched for violative conditions. These examiners should have seen the condition and corrected it.

In light of the size of the violation, the length of time it had, the obviousness and high degree of danger posed by the condition, the notice Respondent received regarding the need to control the top, Respondent's knowledge of the cited condition, and the fact that Respondent's actions are best characterized as “high” negligence, the Administrative Law Judge finds that this violation was an unwarrantable failure on the part of the operator.

4. Penalty

In light of the fact that the Administrative Law Judge has affirmed the Secretary's citation as issued, it is appropriate to affirm the assessed penalty as issued. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$70,000.00 with respect to this violation.

Citation No. 8154927

I. ISSUE

With respect to Citation No. 8154927, the issues to be determined are whether Respondent's alleged actions on April 18, 2013 were a violation of §75.364(a)(1) and, if so,

whether that violation was significant and substantial (“S&S”), whether it was reasonably likely to result in fatal injuries to 14 miners, whether it was the result of high negligence and an unwarrantable failure, and the appropriate penalty for the violation.

II. SUMMARY OF TESTIMONY

Citation No. 8154927 (GX-3) was issued because Respondent failed to conduct an adequate weekly examination of the intake/primary escapeway. (Tr. I, 102-103, 268). Specifically, between the No. 26 crosscut to the overcast near the No. 8 belt, three obvious and extensive conditions were found. (Tr. I, 103, 190). There was only about 1,200 feet, from the first citation to the order. (Tr. I, 190). However, Dempsey already considered that this have been an inadequate examination after the second condition.²⁰ (Tr. I, 195).

Weekly examinations are conducted to ensure that hazardous conditions are identified and corrected. (Tr. I, 104). Examiners must look for the standards in the examination books as well as roof and rib conditions. (Tr. I, 104-106, 134, 219-220, II, 79). Examiners must be familiar with the roof control plan. (Tr. I, 106). Examiners must have experience and training to identify hazards like wide entries, draw rock, rib sloughage, damaged bolts, and rib rolls, rib sloughage, and bottom pressure. (Tr. I, 106, 134, 219-220, II, 24, 79-80). An examiner should sound the top, take measurements, check the lifeline (including tripping hazards), check the SCSR caches, refuge chambers, examine stoppings, check ventilation control, and spend additional time on suspicious areas. (Tr. I, 134, 219-220, II, 79-81). With the lifeline, he would look for cones (facing the proper direction and properly spaced), proper connections, proper location, reflector spacing, balls for the mandoor signs, and the signs themselves so miners can use the lifeline if there is no visibility. (Tr. I, 220, II 79-80). Examiners focus on things that changed from the previous week. (Tr. II, 114). However, it is possible for some conditions to be missed on an examination and for that examination to be adequate. (Tr. I, 196, II, 113).

When an examiner sees a condition, he should immediately report it and correct it. (Tr. I, 106, 227, II, 81). If a condition cannot be corrected, it should be dangered off. (Tr. I, 106, II 28, 81). To danger an area off, a marker board or danger tape is hung at eye level around the hazard. (Tr. I, 237). If there is a lifeline in the area, it is moved to where conditions are safe. (Tr. I, 237-238). Then he would let management know about the condition so it could be corrected. (Tr. II, 28). There is no situation where an examiner must identify a hazard but is not required to correct the condition. (Tr. I, 106). If no hazard is found, that is also entered in the book. (Tr. I, 227). As a result, all weekly examinations are recorded. (Tr. I, 227).

At the mine, it was Peterson’s job to follow-up on recorded hazards and to double check airway examinations. (Tr. II, 28-29). In order to double check airway examinations, Saunders would look at footprints on the bottom. (Tr. II, 81). Footprints should zig-zag and be near

²⁰ Citation No. 8154927 was issued five minutes before Order No. 8154928. (Tr. I, 104-105). After seeing the fly board Dempsey told Peterson that if he saw another condition he would issue a citation for an inadequate examination. (Tr. I, 104-105). Once he saw the third condition, it did not matter which violation he issued first. (Tr. I, 105). Peterson did not recall Dempsey commenting about a possible inadequate examination after the second citation. (Tr. II, 44-45).

crosscuts and doors. (Tr. II, 82). He would know someone was making corrections if he saw re-bolts, draw rock piled down, rib sloughage removed, material moved from under the life line, new signage and new timbers. (Tr. II, 81-82). In short, he would look at everything that the examiner would inspect and then check the book to see if it matched. (Tr. II, 82).

At the time of the instant citations, there were five day examiners. (Tr. I, 225). All of the examiners were qualified to examine airways. (Tr. I, 226). Work was divided between these examiners with each airway assigned on a specific day. (Tr. I, 225-226). Harding had inspected the primary escapeway on April 17. (Tr. I, 226, II, 11).

Harding testified that when preparing to make an examination, he would review the books for the prior examination and discuss it with management. (Tr. I, 238, II, 8). He did this to determine if there were any changes in conditions or to look at anything that was added. (Tr. I, 238). The previous week's information allowed him to make a more detailed exam. (Tr. I, 239). Sometimes things on prior examinations would alert him to hazards. (Tr. I, 238-239). He knew that there were draw rock issues at the time. (Tr. II, 8).

On the day of the examination, Harding traveled 2.5 miles from the portal through the primary escapeway at issue. (Tr. I, 240, II, 8). He walked from the portal inby to the double doors. (Tr. I, 39, II, 8). Some of the exam would be walked, but the rest would be on a ride. (Tr. I, 241). The area where the citations were issued was walked. (Tr. I, 233-234, 241-242).

Harding traveled to all of the areas where conditions were cited in Citation Nos. 8154925, 8154926, and 8154928. (Tr. II, 8-9). All of his notes were in the record for the week ending April 20, 2013. (Tr. II, 9-10). He examined the seals, refuge chamber, and caches. (Tr. II, 9). Harding carried a "pry bar" to sound the top and pull down draw rock. (Tr. I, 233-234). When sounding the top, he listened for a drumming or hollow sound. (Tr. I, 234). A hollow sound meant an area needs to be scaled. (Tr. I, 234, 236). Harding also examined the roof for damaged bolts. (Tr. I, 234-235). As he inspected the escapeway, he moved in a zig-zag pattern looking at the lifeline, roof, and ribs near the lifeline. (Tr. I, 235-236). He also looked at the ventilation controls at each crosscut. (Tr. I, 236). When inspecting mesh, Harding checked to make sure that nothing was lying in the mesh that could cause leaks of a fall. (Tr. I, 257). At the area with the timbers, Harding checked to see if the timbers were tight, if any had fallen, and made sure there was no draw rock. (Tr. I, 261-263). He also looked for signs of stress and cracks in the roof and ribs and for sloughage. (Tr. I, 263-264).

An examination of the primary escapeway would take 1.5 to 2.5 hours. (Tr. I, 240-241, II, 9). Harding was given a much time as necessary to complete it. (Tr. I, 270). Some days it takes substantially longer than others due to conditions discovered. (Tr. I, 270). Harding had the necessary resources to remedy any condition observed or, at least, to danger it off. (Tr. I, 270-271). Harding took examinations, including the examination on the 17th, very seriously because in case of an emergency, he is responsible for the safety of every man in the mine. (Tr. I, 270).

On the 17th, Harding had no concerns about men using the area during a fire drill, the lifeline was intact. (Tr. I, 256-257, 270). Further, before a fire drill, the foreman would make a supplemental examination of the entire area the miners would travel. (Tr. II, 111). The foreman

would look for conditions that could affect miners during a fire drill. (Tr. II, 111). An extra examination might also be done if a crew were going to work in the area. (Tr. II, 112). Dempsey would not expect an extra exam before a fire drill. (Tr. I, 167).

Dempsey stated that the number of conditions that Harding failed to find that made this examination inadequate.²¹ (Tr. I, 191). Citation No. 8154925, Citation No. 8154926, and Order No. 8154928 were not included in the examination record. (Tr. I, 108-109). Any casual observer could have seen a majority of the problems, and a trained examiner should have seen the rest. (Tr. I, 109). However, Dempsey conceded that no citations were issued for lifelines, ventilation controls, cones on safety lines, or mandos in the 1,200 feet between the first citation and the order. (Tr. I, 193-194). Also, the roof bolt spacing was in the single area. (Tr. I, 194).

Harding reviewed his examination record. (Tr. II, 10). That record did not show that the entry was wide as cited in Citation No. 8154925. (Tr. II, 10-11). It also did not show that the bolts were widely spaced or that there was draw rock in the area. (Tr. II, 11). The record also did not show that there was draw rock on the fly board as cited in Citation No. 8154926. (Tr. II, 11). Finally, the record did not note the mesh panels cited in Citation No. 8154928. (Tr. II, 11).

After the citation, Saunders walked the rest of the escapeway, from the mesh to the portal, to determine if there were any other causes for concern. (Tr. II, 90-91). He looked for water accumulations, dust, foot prints, and date boards. (Tr. II, 92). Some date boards were signed more than required by law. (Tr. I, II, 92-93). He saw old and new timbers, footprints zigging and zagging, and good signage. (Tr. II, 93). The lifeline indicators were good, there were several rebolts, fallen rock was thrown away from the lifeline or the lifeline itself was moved to avoid hazards, and the dusting was good. (Tr. II, 93). No other citations were issued. (Tr. II, 93). Saunders believed that the walkway had been very adequately examined. (Tr. II, 94). It looked like there was good examinations with good follow up. (Tr. II, 94).

Dempsey believed all of these conditions existed at the time of the examination on the 17th. (Tr. I, 109). However, he could not say for sure what day Harding examined the cited escapeway because Respondent varied areas. (Tr. I, 195-196). His analysis of the time was based on his mining and MSHA experience and mine conditions. (Tr. I, 110).

The wire mesh condition had existed for a considerable time. (Tr. I, 109). Harding failed to find the improperly installed mesh and accumulated draw rock, creating a "time bomb." (Tr. I, 191). Dempsey had no doubt the condition existed when Harding was in the area. (Tr. I, 197). Harding testified he did not observe this condition. (Tr. I, 269-270). Had he seen it he would have corrected it. (Tr. I, 270). He did not believe the condition existed the previous day. (Tr. I, 244-245, 247-248, II, 12, 18). Further, Harding and Peterson believed most of the rock in the mesh was fresh. (Tr. I, 255-256, II, 51, 55). Finally, the cited material would have struck Harding in the nose and neck, meaning it would be hard for an examiner to walk under it. (Tr. I, 188-189, 245).

²¹ Dempsey conceded that he was not an examiner and had never conducted an airway examination, but as an inspector it was not his job to do a workplace examination. (Tr. I, 202).

The draw rock on the fly board eased down over time. (Tr. I, 109). Dempsey believed that condition was present at Harding's exam. (Tr. I, 195). Harding should have sounded the roof and pulled down the rock here. (Tr. I, 109-110, 191). Haring testified that he did not observe this condition and that it was not present. (Tr. I, 259, 269, II, 18). It could have developed from one day to the next. (Tr. I, 260-261). Peterson saw dust on the rock and concluded the rock was on the fly board for a while. (Tr. I, II, 43-44). Harding would have dangerous it off and fixed it if it had been present. (Tr. I, 269).

The wide entry, improperly spaced bolts, and draw rock had "without a shadow of a doubt," existed when the exam was made; the bolts and entry had existed for years. (Tr. I, 110, 191, 195, 197). However, it is possible for draw rock to occur in the hours after an examination. (Tr. I, 191-192). The amount of time it takes for draw rock to become apparent varies; it is hard to make generalizations. (Tr. I, 192-193). Dempsey believed this draw rock had been in the cited location since the day before because it gapped down and had fallen. (Tr. I, 192). Harding testified that he did not observe or ignore this condition. (Tr. I, 268-269). Harding was looking for many things and this could cause a condition to be overlooked. (Tr. I, 269).

All of the conditions that led to the issuance of this citation occurred in the primary escapeway.²² (Tr. I, 106-107). The lifeline traveled through each of the areas. (Tr. I, 107). Dempsey testified that miners work and travel there. (Tr. I, 110). Harding did not believe miners normally worked or traveled in this area, it was not a "main track." (Tr. I, 243).

The citation was marked S&S because there was a violation of a standard that contributed to a hazard. (Tr. I, 110-111). The intent of the examination is to correct conditions and this was not done. (Tr. I, 111). There was a reasonable likelihood of a significant injury. (Tr. I, 111).

The citation was marked as "fatal" because rock falls could cause crushing injuries. (Tr. I, 111). Also, the 14 miners in the fire drill would be affected. (Tr. I, 111).

The citation was marked as "high" negligence because the conditions were obvious, extensive, examined by an agent and supervisor, and there was a degree of risk to the miners. (Tr. I, 111-112). Dempsey believed there were no mitigating circumstances. (Tr. I, 112). Dempsey could not recall a situation where an examiner missed something and he did not feel there was high negligence. (Tr. I, 196).

This condition was an unwarrantable failure, or aggravated conduct. (Tr. I, 112, 197-198). The standard was similar to what Dempsey looked for in high negligence. (Tr. I, 112). It was inexcusable to allow the conditions to exist in an escapeway that miners depend on for their lives in an emergency. (Tr. I, 112). The condition was obvious, extensive, had existed for a long time, and should have been caught. (Tr. I, 198). Dempsey maintained that the wide entry was open and obvious even though his notes stated it was not overly obvious. (Tr. I, 914). The area with the wide entry condition would have had 280 weekly examinations since development. (Tr.

²² A roof fall occurred in this area on 8/21/2013. (Tr. I, 107, II, 69). This roof fall was caused by bad roof. (Tr. II, 69). Efforts were taken to strengthen this area by setting cribs, posts, and narrowing down the area. (Tr. II, 69).

I, 198). The obviousness is not undercut because this may not always have been the primary intake. (Tr. I, 198-199). Even if it was always the primary intake, Dempsey believed the condition was easy to spot. (Tr. I, 199).

Dempsey conceded that before the instant inspection, he had no reason to question the adequacy of examinations at Powellton. (Tr. I, 117). The previous inspector at the mine did not express any concern over this issue. (Tr. I, 117-118). Dempsey does not recall any earlier roof control citations, S&S, or “high” negligence citations. (Tr. I, 118).

Dempsey also conceded that some examination was performed because he saw a signed date board. (Tr. I, 120-121) He had no reason to question whether it was performed. (Tr. I, 120). Harding’s notes state that he set timbers, scaled the top, and repaired a lifeline. (Tr. I, 120-121). These are to some extent the notes Dempsey would expect, but he wanted to see the areas correctly identified. (Tr. I, 120).

Harding testified he had been accompanied by MSHA inspectors (Hartenstein, Dishman, and Van Dulan) during previous examinations (Tr. I, 271). During those inspections the mesh, the wide entry, and the wide bolt would have been present. (Tr. I, 271-272). None of these inspectors stated that the condition of the mesh was unsafe or that it was installed improperly. (Tr. I, 273). Further, Peterson was present for the “close-out” conference the prior quarter with inspectors Bane and Dishman. (Tr. II, 29). They were concerned about the roof, and corner bolts. (Tr. II, 29-30). They went over the violations written that quarter. (Tr. II, 30). They did not discuss specific issues with the primary escapeway or the installation of mesh. (Tr. II, 30).

Dempsey could not say if another inspector should have issued a citation earlier because it was possible this entry was not formerly the primary escapeway. (Tr. I, 125, 138). He did not know the function of this particular air course in the four or five years after development. (Tr. I, 126, 138). If the entry was not being used, no one would inspect it. (Tr. I, 147). It is also possible the condition was not discovered. (Tr. I, 125). If this area was a primary escapeway since development, then it would have been examined weekly since 2008 and inspected quarterly by MSHA inspectors. (Tr. I, 136). If that were the case, the condition went unnoticed by examiners and MSHA inspectors. (Tr. I, 139-140, II, 19). Dempsey would expect his fellow inspectors to notice the condition. (Tr. I, 136, 140, 146-147). However, they were not highly negligent, an inspector sometimes misses conditions. (Tr. I, 141). He noted that even if MSHA missed conditions in the past, Respondent was still required to follow the law.²³ (Tr. I, 202). Harding testified that this area had been the primary escapeway since 2008 because the location allowed miners to walk in fresh air. (Tr. I, 262, II, 11-12).

This condition was abated when a supplemental examination was conducted by Peterson on the primary escapeway from the section to the surface. (Tr. I, 112, 251). It was conducted

²³ According to Dempsey, Harding’s role as the examiner and agent of Respondent was to ensure that the escapeway was safe if needed in an emergency. (Tr. I, 146). MSHA role when conducting an inspection is to look for hazards, ensure the company is doing adequate examines, and ensuring the safety of employees who may work or travel in the area. (Tr. I, 146). Those roles are similar with respect to examining the primary escapeway. (Tr. I, 146).

immediately, but Dempsey did not fill out the form until he saw the examination record. (Tr. I, 112-113). Harding was not ordered to be re-trained as part of abatement. (Tr. I, 197).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That § 75.364(a)(1) Was Violated.

On April 18, 2013, Inspector Dempsey issued a 104(d)(1) Citation, Citation No. 8154927 to Respondent. Section 8 of that Citation, Condition or Practice, reads as follows:

The Operator has failed to conduct an adequate examination of the intake/primary escapeway for the #1 working section. Between #26 xcut along #9 beltline to the overcast near #8 Belt head 3 obvious and extensive violations were found. These violations include, 1) a wide entry w/excessive bolt spacing and loose draw rock, 2) 20 unsupported broken draw rock held up by a 1" fly board, and 3) Wire mesh bowed down by the weight of draw rock it is supporting @ overcast near #8 head (Portions of the wire mesh are secured with tie wire instead of the proper plates. This violation is an unwarrantable failure to comply with a mandatory standard.

(GX-3).

Standard 30 C.F.R. §75.364(b)(1) ("Weekly Examination") provides the following:

(b) Hazardous conditions and violations of mandatory health or safety standards. At least every 7 days, an examination for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(8) of this section shall be made by a certified person designated by the operator at the following locations:

(1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.

30 C.F.R. §75.364(b)(1)

Examinations are of "fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (1995). Examiners are required to examine for roof conditions, rib conditions, wide entries, draw rock, sloughage, damaged bolts, rib rolls, bottom pressure, problems with the top, issues with the lifeline (including tripping hazards and directional symbols), SCSR caches, refuge chambers, stoppings, ventilation controls, and suspicious areas. (Tr. I, 104-106, 134, 219-220, II, 24, 79-81). With respect to the instant citation, there is no question that Respondent's examiner, Harding, conducted a weekly examination the day before the three conditions at issue here were found. (Tr. I, 226, II, 11). Therefore, the only question is whether that examination was adequate.

The hazardous conditions cited in Citations/Order Nos. 8154925, 8154926, and 8154928 were all located in the primary escapeway that Harding inspected on April 17. (Tr. I, 226, II, 11).

For the reasons stated *supra*, all of those issuances were upheld as valid and S&S. However, these conditions were not included in the weekly examination record. (Tr. I, 107-109). In fact, Examiner Harding confirmed that these conditions were no included in the record. (Tr. II, 10-11). For the reasons already given *supra*, these conditions (particularly the improperly installed mesh) were at least somewhat obvious. The Administrative Law Judge credits the testimony of the inspector that those conditions should have been included in the record of the weekly examination. (Tr. I, 103-104). Therefore, the preponderance of the evidence shows Respondent's weekly examination was inadequate.

Respondent presented several arguments for the proposition that the examination was adequate. However, those arguments were not supported by the record.

First, Respondent argued that the mesh condition was not obvious because the draw rock was fresh and had not been sagging the previous day. (*Respondent's Post-Hearing Brief* at 29). As noted in the discussion of that order, Inspector Dempsey credibly testified that the condition was obvious. (Tr. I, 97-98). Further, the issue was the inadequate installation, not necessarily the time at which the rock fell. The inadequate installation had been obvious since the mesh was installed. Therefore, it should have been noted in the weekly examination.

Next, Respondent argued that the piece of draw rock was not present the day before. (*Respondent's Post-Hearing Brief* at 29). As discussed previously, Inspector Dempsey credibly testified that the condition existed for some time before the citation was issued. (Tr. Tr. I, 66-68). It might have been less obvious than at the time of the citation. However, an examiner still should have known the condition was present and corrected it or dangered it off.

Finally, Respondent argued that the wide entry and misplaced bolt were not obvious and that other examiners, including MSHA inspectors, did not notice this. (*Respondent's Post-Hearing Brief* at 29). Respondent also notes that Inspector Dempsey was not a certified examiner. (*Id.*). As noted in the discussion regarding the underlying citation, this condition was not overly obvious. However, Inspector Dempsey, despite his lack of examining credentials, noticed this condition (which Respondent concedes existed). Therefore, someone with all of the proper training should have seen the condition and noted it in the examination record.

Therefore, the Administrative Law Judge finds that the instant citation was validly issued.

2. The Violation Was Significant And Substantial In Nature And Reasonably Likely to Result in Fatal Injury to 14 Miners

Inspector Dempsey marked the gravity of the cited danger in Citation No. 8154927 "Reasonably Likely" to result in "Fatal" injury to 14 persons. (GX-12). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §75.364(b)(1) is contact by miners with correctable hazards. For the reasons discussed with respect to each individual citation, the hazards present here posed a reasonable likelihood of fatal injury to miners. Further,

for the reasons discussed with respect to Citation No. 8154925, up to 14 miners would be exposed to these hazards.

Citation No. 8154927 was also marked as S&S. (GX-12). It has already been established that the first element of the *Mathies* S&S analysis, the underlying violation of a mandatory safety standard, has been established with respect to this citation. As discussed *supra*, Respondent violated 30 C.F.R. §75.364(b)(1).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation, the preponderance of the evidence shows that the violation created a tripping hazard. The Commission has recognized examinations as “of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal*, 17 FMSHRC at 15; *see also Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). Chairman Jordan and Commissioner Marks have referred to the preshift inspection requirement as “the linchpin of Mine Act safety protections.” *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1391 (August 1996) (Jordan and Marks, concurring and dissenting in part). MSHA requires several layers of examinations, including on-shift, preshift, and weekly examinations, in order to ensure miner safety. “These examinations are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or unsafe conditions in the mine.” *Coal River Mining, LLC*, 34 FMSHRC 1087, 1095 (May 2012) (ALJ Andrews).

While much of the reasoning in these cases discusses pre-shift, rather than weekly, examinations, they are sufficiently analogous for our purposes here. The Commission has been clear that examinations act as first line of defense with respect to hazards. Here, the failure of Respondent to conduct an adequate examination contributed to the miners’ exposure to the hazards discussed with respect to Citations/Order Nos. 8154925, 8154926, and 8154928

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is also met. In the event that any or all of the hazards at issue here were realized, miners would be fatally crushed by falling roof material. (Tr. I, 110-111).

Respondent argued that there was no evidence that an injury could result from this violation. Specifically, it argued that the underlying conditions were not likely to result in injury for the same reasons discussed with respect to each citation or order. Once again, with respect to the third element of *Mathies*, the issue is whether someone would be injured if there was a roof collapse in this area. As discussed with respect to each of the underlying issuances, in that event injuries would occur.

The fourth element - a reasonable likelihood that the injury in question will be of a reasonably serious nature – As noted *supra*, rock fall injuries are inherently severe.

3. Respondent's Conduct Displayed "High" Negligence And Was The Result Of An Unwarrantable Failure To Comply With the Standard.

The instant citation was marked as "high negligence." Inspector Dempsey credibly testified that this determination was made because the three underlying conditions were obvious, extensive, and were examined by an agent and supervisor. (Tr. I, 111-112). Therefore, Respondent knew or should have known that the condition existed. For the reasons discussed above, Respondent was either highly or moderately negligent with respect to all three of the

Dempsey also credibly testified that there were no mitigating circumstances. (Tr. I, 112). He believed that any time an examiner missed these sorts of conditions it should be high negligence. (Tr. I, 196). One of the underlying issuances, Order No. 8154928, was affirmed as having no mitigating factors for the reasons discussed *supra*. Therefore, the Administrative Law Judge finds that there were no mitigating circumstances here.

Respondent argued that there were several mitigating factors. (Respondent's Post-Hearing Brief at 28-30). This argument was not supported by the evidence.

Respondent asserted that all of the arguments it made with respect to validity were equally persuasive with respect to high negligence and unwarrantable failure. Specifically, it argued that none of the conditions (the entries, the wide bolts, the draw rock, or the improperly installed mesh) were obvious. For the reasons set forth in the discussion of validity, the evidence does not support this contention. There were not mitigating factors.

The evidence presented also supported the Secretary's determination that Respondent's actions were an unwarrantable failure. With respect to that determination, the Administrative Law Judge will consider each of the *IO Coal* factors in turn:

1. Extent Of The Violative Conditions

The evidence, as discussed at length above, shows that three reasonably likely, fatal, S&S conditions existed in a quarter mile area of the mine. These conditions affected the entire width of the entry in places. Therefore, the preponderance of the evidence shows the condition was extensive.

2. The Length of Time of the Violation Existed

The conditions missed by the examiner existed for widely variable amounts of time. The wide entry and misplaced bolts had existed for years. (Tr. I, 110, 191, 195, 197). The draw rock had existed for quite a while (though that condition might not have been overly obvious until the day of the citation). (Tr. I, 192). Finally, the improperly installed mesh had existed for at least several months and maybe longer. (Tr. I, 95, 245-247). Therefore, Respondent had conducted inadequate examinations for several years, with conditions deteriorating further over time.

3. Whether the violation is obvious or poses a high degree of danger

The violation at issue here posed a considerable danger. As discussed *supra*, this condition was reasonably likely to result in fatal, injuries to 14 miners. The inadequate examination failed to notice or correct these conditions. Further, for the reasons discussed extensively, the conditions were obvious, especially the mesh. Therefore, the inadequate examination should have noted these conditions and corrected them.

4. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

Respondent had an extensive violation history with respect to §75.202(a). Further, it was well known that this mine had trouble with draw rock. (Tr. I, 42). Respondent also had history with roof falls. (Tr. I, 42, 202-203). Therefore, Respondent was on notice that its examinations of these conditions should have been thorough and focused on roof control.

5. The operator's efforts in abating the violative condition

The parties stipulated that the condition was abated quickly and in good faith. (JX-1).

6. Operator's knowledge of the existence of the violation

As discussed at length, Respondent knew or should have known about the underlying conditions. Therefore, it knew or should have known that its examinations were inadequate.

In light of the size of the violation, the length of time it had, the obviousness and high degree of danger posed by the condition, the notice Respondent received regarding the need to control the top, Respondent's knowledge of the cited condition, and the fact that Respondent's actions are best characterized as "high" negligence, the Administrative Law Judge finds that this violation was an unwarrantable failure on the part of the operator.

4. Penalty

In light of the fact that the Administrative Law Judge has affirmed the Secretary's citation as issued, it is appropriate to affirm the assessed penalty as issued. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of \$42,944.00 with respect to this violation.

ORDER

It is hereby **ORDERED** that Citation/Order Nos. 8154925, 8154926, 8154927, and 8154928 are **AFFIRMED** as modified herein.

Respondent is **ORDERED** to pay civil penalties in the total amount of \$172,944.00 within 30 days of the date of this decision.²⁴

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

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/tjb

²⁴ 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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April 8, 2014

SECRETARY OF LABOR, MINE	:	TEMPORARY REINSTATEMENT
SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, on behalf of	:	
CHARLES RIORDAN,	:	Docket No. VA 2014-199-D
Complainant	:	NORT-CD 2014-02
	:	
v.	:	
	:	
KNOX CREEK COAL CORP., a	:	Mine: Tiller No. 1
subsidiary of ALPHA NATURAL	:	Mine ID 44-06804
RESOURCES, INC.,	:	
Respondent	:	

DECISION AND ORDER REINSTATING CHARLES RIORDAN

Appearances:

Karen M. Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor.

Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Complainant.

Stephen M. Hodges, Esq., Penn Stuart, Abingdon, Virginia, for the Respondent Knox Creek Coal.

Before: Judge Moran

A temporary reinstatement hearing was held in this matter on April 2, 2014, in Pikeville, Kentucky. For the reasons which follow, the Court finds that the application was not frivolously brought and consequently it is ordered that Charles Riordan be reinstated to his former position with all attendant benefits, effective immediately.

Temporary Reinstatement Under the Mine Act

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine Act],” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible

discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

Section 105(c)(2) of the Mine Act provides in relevant part that “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 complaint with the Secretary alleging such discrimination. . . . [I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.”

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624-25 (1978). In addition to Congress’ “appears to have merit” standard, the Commission and the courts have also equated “not frivolously brought” to “reasonable cause to believe” and “not insubstantial.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990) (“*JWR*”). *Sec. obo Piper, Complainant, v. Kenamerican Resources, Inc.* (June 2013) (Judge Andrews), 2013 WL 3865343 at *2.

The Commission itself “has repeatedly 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.’ [*JWR supra*] 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 on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). In reviewing a judge’s temporary reinstatement order, the Commission has applied the substantial evidence standard. *See, id.* at 719; *Sec’y on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). *Id.* at n. 2” *Sec. obo Rodriguez v. C.R. Meyer and Sons Co.* 2013 WL 2146640 at *5 (May 2013).

“Temporary Reinstatement is a preliminary proceeding, and narrow in scope. The plain language of the Act states that ‘if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.’ 30 U.S.C. § 815(c)(2). The judge must determine whether the complaint of the miner ‘is supported substantial evidence and is consistent with applicable law.’ *Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). Neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (“*Chicopee Coal*”). A temporary reinstatement hearing is held for the purpose of determining ‘whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.’ *Jim Walter Resources*, 920 F.2d at

744. ‘Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered.’ *Sec’y of Labor, on behalf of Curtis Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 233, 237 (ALJ)(Feb. 2000).” *Sec. obo Piper, Complainant, v. Kenamerican Resources, Inc.* (June 2013) (Judge Andrews), 2013 WL 3865343 at *2.

Findings of Fact and Conclusions of Law

At the hearing, the Complainant, Charles Riordan, testified. Mr. Riordan stated, quite credibly in the Court’s estimation, that he made several safety complaints to members of Knox Creek management about recurring problems with the mine’s ventilation. Complainant Riordan has been a coal miner for 32 years and a foreman for 25 of those. In 2013, until the date of his termination on December 13th of that year, he worked as an outby and as a fill-in foreman. During 2013 he made several safety complaints, most of which pertained to a lack of adequate ventilation. He voiced these complaints to Mark Jackson, the mine foreman and to the mine superintendent. Tr. 19-21. In September of 2013, while attending a company quarterly picnic held at the mine site, he again voiced his concern about the mine’s inadequate ventilation on the sections to Ron Patrick, general manager of Knox Creek. The following day, Mr. Jackson, according to Mr. Riordan’s account, told Riordan that he had “thr[own] him under the bus” by informing Patrick of the ventilation problems. Tr. 24-25. Though Complainant was told that his termination was due to market conditions, to the best of his knowledge, no one else was fired that day, nor was there a reduction in the workforce at the mine.¹ Tr. 26.

During cross-examination, counsel for Respondent inquired, among various areas of questioning, about Mr. Riordan’s complaints concerning inadequate ventilation.² Complainant advised that he was essentially complaining about “inadequate ventilation going to the sections.” Tr. 35. Riordan stated that during this period, 2013, he did note hazardous conditions and there

¹ It should be noted that the Respondent presented no witnesses from Knox Creek Coal Corporation, nor its parent Alpha Natural Resources, Inc. to testify on the subject of terminations or workforce reductions. Even had there been witnesses testifying about such events, the temporary reinstatement application is not the time to sort out and resolve such conflicts regarding the reason for a miner’s termination. Instead, the inquiry is whether there was credible testimony on the issue of protected activity and whether adverse action followed that activity within some reasonable period of time after it.

² Mr. Riordan stated that the mine’s ventilation shortcomings were not limited to line curtain problems. Tr. 45. He elaborated that his biggest ventilation problem pertained to air going down the beltline and not exiting down the return. While he was able to address a given inadequacy, these fixes were more in the nature of band-aids as the steps he took then created air problems on the opposite side of the section. Tr. 46-49.

were occasions when he noted in pre or on-shift inspection books about ventilation problems. Tr. 37-38. Riordan, while maintaining that during this time period there was an occasion when there was inadequate airflow at the last open crosscut, never noted that in the inspection books. He also asserted that there were times when there was inadequate air at the face. For this issue too, he did not note this problem in his pre or on-shift reports. Tr. 42.

These answers suggested that Mr. Riordan was being remiss, however he advised that, when encountering these inadequacies, he would take the steps needed to fix the problem. Further, the Court would note that the focus must remain on whether the Complainant engaged in protected activity and the Court finds that the record establishes, through Mr. Riordan's credible testimony, that he did so engage in that activity and did so on more than one occasion. The record also establishes that there was animus expressed on the part of Mr. Jackson over his displeasure concerning the Complainant's safety complaints. To that, there was the undeniable adverse action of Mr. Riordan's termination. Certainly, the time frame of his termination was sufficiently close to his safety complaints for one to make an association between the two events. In the context of determining whether the application for reinstatement was non-frivolous, it is therefore reasonable to conclude that a nexus was established between the Mr. Riordan's complaints and his termination.

Following the testimony of Complainant Riordan, his representatives advised that they had no other witnesses to call, concluding their evidence for the application. Respondent then sought to call the MSHA Special Investigator for this case, David Smith. As Counsel Hodges expressed it, "[o]ur main purpose of calling [the special investigator] is to elicit more of his investigation than what he put in his affidavit." Tr. 69-70. Counsel asserted that this was "in some sense . . . part of the factual basis for the relief that's sought." Tr. 70. Counsel continued that he wanted to inquire about "other things [the special investigator] does; and they have to deal with these issues about the layoffs in the other mines . . ." Tr. 70. It will be recalled that Knox Creek's competing narrative is that the Complainant was "terminated" for business contraction reasons. Respondent's Counsel added that he wanted to inquire about aspects of his investigation which were *not* included in the special investigator's affidavit. In sum, it was the contention of Respondent's Counsel that part of the basis for the assertion that this application was not frivolously brought is the investigator's affidavit and from that premise, the Respondent then maintains that the affidavit was "incomplete in a very significant way." Tr. 71.

The Court noted two things about the Respondent's approach to establishing frivolousness. First, the Secretary's case, at hearing, was based on the testimony of Complainant Riordan. Second, *for the purposes of a temporary reinstatement proceeding*, the Court had misgivings about permitting cross-examination over what was *not* in the special investigator's affidavit. Tr. 72. As the Secretary's Counsel noted, the affidavit was based upon information gathered by the special investigator from the Complainant and Respondent had a full opportunity to cross-examine the Complainant in the proceeding. Tr. 73. In this regard the Court would note that 29 C.F.R. §2700.45(d) states that the "Secretary may limit his presentation to the testimony of the complainant," which is what occurred here. Although the same provision states that the Respondent "may present testimony and documentary evidence in support of its position that the complaint was frivolously brought," this right is subject to appropriate objections and limitations.

The Secretary contended that questions concerning what was *not* included in the affidavit fits within such objections. The Court agrees because, although permitting questions about what was *not* included in the affidavit could, potentially, present competing testimony about the reason for the Complainant's termination, such possible alternative contentions are not to be resolved in the temporary reinstatement proceeding. Instead, they must await the full discrimination proceeding which may ensue.³ *Chicopee Coal*, 21 FMSHRC at 719.

The Court, upon hearing objections to Respondent's Counsel's intentions, ruled that questions could only be asked about what was within the four corners of the special investigator's affidavit. That affidavit was entered into the record as Exhibit 1. However, for the most part, the questions which ensued were attempts to inquire about matters not within the affidavit and objections to those questions were all sustained. Tr. 79, 80, 81.

In summary, the Court finds that the Respondent did not present evidence, either directly, or through cross-examination, to dispel the evidence establishing that this application was not frivolously brought. The Court does not buy into Respondent's claim that links in the evidentiary chain were missing. Respondent contended, in its closing statement, that evidence linking the protected activity with the person or persons who had to decide which people would be terminated was missing. Along this theme, it asserted that evidence was needed to establish the role of Mr. Jackson in the termination that affected the Complainant and that a showing of non-frivolousness requires showing "that the people who were complained to were the people who made the decision that resulted in the adverse activity." Tr. 86-87. In the Court's view, the Respondent is incorrect. The contentions it asserts have their place in a full discrimination proceeding, but not here in the temporary reinstatement context.

Conclusions

Having noted that the testimony on the subject of protected activity, and whether adverse action was motivated in any part by such activity, came solely from the Complainant, Mr. Riordan, and that he was a forthright and credible witness, it is accurate to observe that there really was no conflicting evidence on those elements, in determining whether the complaint appears to have merit. It is not an oversimplification to state that most of the Respondent's challenge to the application was, in truth, an attempt to present a competing narrative, through the Complainant, that he was not really fired but let go, that is, "terminated," to use the term employed by Respondent's Counsel, as part of a realignment with sister mines owned by Alpha Natural Resources, Inc. However, the fundamental problem with that approach, putting aside for the moment that the sole source for the competing narrative was derived solely through the

³ The Court believes that this conclusion would also be correct, even if, instead of trying to make its contention through what was *not* included in the special investigator's affidavit, the Respondent had marched up several Knox Creek management witnesses, each of whom testified that Riordan was terminated for economic contraction reasons. The reason for the Court's conclusion remains the same; competing narratives over the reason for an employee's termination are not to be resolved at the temporary reinstatement proceeding. Instead, the focus is upon whether the claim is non-frivolous.

Complainant, is that the temporary reinstatement application is not the proceeding for the resolution of such a competing narrative. Rather, the Court must focus upon whether there is credible substantial evidence presented to show that protected activity occurred, that adverse action resulted and that there was evidence of a nexus between those events. Here, as noted, the court finds that the record at the application proceeding provided substantial evidence of the Complainant's engaging in protected activity, voicing his concerns over ventilation problems, on several occasions, that the Complainant made these concerns to management and thus there was awareness of the concerns, that at least one member of management expressed hostility toward the Complainant over his voiced ventilation concerns, and that adverse action, in the form of termination occurred within a time frame thereafter which was sufficiently close in time to establish, on this record, and within the context of temporary reinstatement, that the application was not frivolously brought.

ORDER

On the basis of the foregoing, the Court finds that the Secretary and Complainant's private counsel presented sufficient evidence at the hearing to establish that this discrimination complaint is non-frivolous. Accordingly, it is **ORDERED** that the Respondent immediately re-instate the Complainant, Charles Riordan, as of the date of this ORDER, to his former position, or equivalence, at the same rate of pay and benefits that he was receiving at the time of his termination. The Secretary is directed to provide a status report of its discrimination investigation within 30 days of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
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April 10, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2012-1311
Petitioner	:	A.C. No. 48-00993-293531
	:	
v.	:	
	:	Rawhide Mine
PEABODY CABALLO MINING, LLC,	:	
Respondent	:	

DECISION

Appearances: Daniel McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Meredith A. Kapushion, Esq., Jackson Kelly, PLLC, Denver, Colorado, 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 Peabody Caballo 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 “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Gillette, Wyoming, presented closing arguments, and submitted case summaries.

The Secretary proposed a total penalty of \$734.00 for two citations adjudicated at the hearing. Both citations were issued at the Rawhide Mine, a surface coal mine in Campbell County, Wyoming. For the reasons expressed below, I modify Citation No. 8475874 and vacate Citation No. 8475971.

On May 16 and 17, 2012, MSHA Inspector Wayne Johnson inspected the Rawhide Mine. Inspector Johnson has worked as a Mine Safety and Health Inspector for more than 7 years. (Tr. 15). He earned an Occupational Safety Degree from Marshall University and graduated from the Mine Safety and Health Academy. *Id.* Inspector Johnson testified that he has twenty-six years of experience in coal mining. He was accompanied by Jeff Wheeler, safety representative at the mine site, during the inspection. (Tr. 19).

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation 8475874

Inspector Johnson issued Citation No. 8475874 on May 17, 2012, for an alleged violation of section 77.206(e) of the Secretary's safety standards. (Ex. G-1). The citation alleges that a roof access ladder upon the MCC building did not have sufficient toe clearance at the ninth rung. Inspector Johnson determined that an injury was reasonably likely to occur, that such an injury could reasonably be expected to result in lost workdays or restricted duty, and that one person would likely be affected. Further, he determined that the violation was significant and substantial ("S&S") and the operator's negligence was moderate. Section 77.206(e) of the Secretary's safety standards provides that "[f]ixed ladders shall be anchored securely and installed to provide at least 3 inches of toe clearance." 30 C.F.R. § 77.206(e). The parties agree that the fixed ladder at issue was anchored securely. The Secretary proposed a penalty of \$634.00 for this citation.

Inspector Johnson testified that the ninth rung was approximately 8 feet above the ground and there was 1 to 1 1/2 inches of toe clearance behind the rung. (Tr. 22-23). Inspector Johnson testified that Wheeler agreed that the measurements were accurate. (Tr. 24-25). Inspector Johnson testified that two horizontal insulated pipes, which ran perpendicular to the ladder, contacted the ladder at the same level as the ninth rung, thus interfering with the toe clearance on that rung. (Tr. 26-27). Inspector Johnson further testified that the insulation of the piping showed signs that miners' feet contacted the pipes while using the ladder. (Tr. 27-28).

Inspector Johnson chose to cite the ladder after learning that miners used it to maintain the heating and air conditioning system ("HVAC") upon the roof of the building. (Tr. 23-24). Adding to the danger posed by this allegedly hazardous condition, Inspector Johnson testified that miners carried large HVAC filters up the ladder every month. (Tr. 30, 68, 80-82). Because miners climbing the ladder could fall approximately 8 feet onto the hard ground below, Inspector Johnson testified that the injury could be permanently disabling. (Tr. 29). He marked the gravity as "lost workdays or restricted duty" in the citation. (Ex. G-1; Tr. 75-76).

Duane Myers, the Safety Manager for the Mine, testified that he had 35 years of experience in coal mining. (Tr. 114). He testified that miners could maintain three points of contact while ascending the ladder. (Tr. 129). He did not believe that miners climbed the ladder holding a HVAC filter; instead, they dropped a rope to raise the filter after climbing the ladder. (Tr. 153). He also disputed the measurement of space between the ladder rung and the insulated pipe, testifying that 3 inches of toe clearance existed if the measurement was taken at a slight angle. (Tr. 136-137). Myers admitted that if he were consulted when the ladder was installed, he would advise that it be placed where the pipes would not interfere with any of the rungs. (Tr. 141).

For the reasons set forth below, I uphold Citation No. 8475874 but reduce the level of negligence.

Parties' Arguments

The Secretary argues that the cited condition reflects a clear violation of the toe clearance requirement. The standard requires at least 3 inches, yet the inspector testified that the interfering pipes allowed no more than 1 1/2 inches. (Tr. 11). The Secretary argues that an injury was likely due, in part, to the severe weather that occurs in Wyoming. (Tr. 11, 30-31). The inspector believes that miners who climb the ladder are frequently carrying HVAC filters or tools. (Tr. 24, 30).

Peabody argues that there was insufficient evidence to support the violation. (Tr. 186). Peabody maintains that indentations upon the lower pipe insulation at the ninth rung prove that miners had sufficient toe clearance. It argues that these indentations establish that there was plenty of toe clearance when standing on the ninth rung of the ladder. (Tr. 186). There was no showing that miners were unable to maintain three points of contact at all times.

Peabody also disputed how much clearance between the rung and the pipe actually existed. (Tr. 109). Peabody noted that Inspector Johnson was the only person who climbed the ladder and took the measurement. (Tr. 64). Peabody also argues that a backguard surrounded the ladder, which prevented anyone from falling backwards. Peabody contends that the Secretary did not establish that miners carry HVAC filters, supplies, or tools as they ascend or descend the ladder. (Tr. 67). Further, Peabody noted the lack of evidence that the ladder is used during hazardous weather. (Tr. 70).

Discussion and Analysis

I find that the Secretary established a violation because the ladder did not provide the 3 inches of clearance that section 77.206(e) requires. I credit the testimony of Inspector Johnson that he accurately determined that the distance between the ninth rung and the pipes was between 1 and 1 1/2 inches.¹ His photographs corroborate his testimony. (Exs. G-3, G-5, G-8). I also find that the violation created a hazardous condition, even in ideal weather conditions when miners are not carrying tools or supplies up the ladder.

¹ Inspector Johnson could not remember if he measured the distance between the rung and the outer edge of the ladder's support structure that pressed against the pipes at the ninth rung or at a lower rung. I find that either measurement would accurately reflect the distance at issue. There is no dispute that he climbed the ladder to examine the conditions at the ninth rung.

I find that the violation was S&S.² The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is significant and substantial is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998). I credit Inspector Johnson's testimony concerning the condition and find that the cited condition was reasonably likely to contribute to an injury. The Secretary established that the violation created a discrete safety hazard and satisfied the first two elements of the *Mathies* test. The commission has held:

The test under the third [S&S] element 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

Musser Eng'g, Inc., 32 FMSHRC 1257, 1281 (Oct. 2010). The hazard contributed to by a violation of section 77.206(e) is the risk of falling. The location of the insulated pipe and the lack of clearance made it likely that a miner would not have a good foothold. The two insulated pipes abutted each other. It appears that miners placed the toes of their boots between the two pipes because the lack of clearance forced them to search for a better foothold. A miner is more likely to lose his balance and fall due to the poor foothold in the event of inattention, wind, or a variety of factors, which contributes to the risk of injury as a result of the 8 foot fall onto the hard ground below. While miners may maintain three points of contact much of the time, if they unexpectedly slip upon the ninth rung as a result of the poor foothold, they could fall and would likely sustain a serious injury.

I reject Peabody's argument that the backguard required by 30 CFR § 77.206(c) eliminated the severity of this violation. It is clear that the backguard would prevent a miner from falling further away from the ladder. (Tr. 67). The guard, however, would not prevent a miner from falling 8 feet to the ground or from becoming entangled in lower rungs of the ladder. A miner can easily be injured by a short fall from a ladder.

The evidence establishes that the most likely injuries would result in lost workdays or restricted duty, not a permanent disability. The gravity was serious. I also find that Peabody's negligence was low. The pipes and fixed ladder were present for many years without MSHA issuing a citation or commenting upon the situation.

² An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). 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).

Citation No. 8475874 is **MODIFIED** to reduce the negligence to low. A penalty of \$500.00 is appropriate for this violation.

B. Citation 8475971

Inspector Johnson issued Citation 8475971 on May 16, 2012, alleging a violation of section 77.205(a). (Ex. G-10; Tr. 33). The cited standard states that a “[s]afe means of access shall be provided and maintained to all working places.” 30 C.F.R. § 77.205(a). The citation alleged that a travelway crossed below an elevated conveyor belt which brought coal from the crusher area into the silo. Inspector Johnson observed that there was no guarding under the conveyor belt’s idlers. (Tr. 12, 36). Inspector Johnson testified that if the bearings for an idler roller failed, the roller could fall onto a miner using the travelway. (Tr. 36). One miner walked under the conveyor at least once per shift. (Tr. 37). Inspector Johnson determined that an injury was unlikely to occur but that if a miner were injured it would likely be permanently disabling. Further, he determined that the violation was not S&S and the operator’s negligence was low. The Secretary proposed a fine of \$100.00 for the citation.

Duane Myers testified that if an idler roller wears out it would not fail completely without obvious signs lasting for hours, such as smoke, worn belts, and noise. (Tr. 124-25). Even when they fail, Myers testified that the rollers used by Peabody at that location do not fall. *Id.*

Benjamin Ortiz, the maintenance planner for the mine, testified that he had never seen the type of idler roller used at the mine drop away from the belt in his 37 years of mining experience. (Tr. 157, 169). He told the court that miners inspect the idlers and pulleys at least once per shift and that more significant maintenance upon the system is performed quarterly. (Tr. 159). Further, he testified that the cited idlers are “the finest quality you can buy” because they utilize heavy-duty shafting, cans, and bearings. (Tr. 160). Therefore, he testified that idler failure is “not a very frequent occurrence” and that when they do fail, “it’s a very slow failure” taking days or weeks. (Tr. 162-64, 175). Peabody would replace failing idler before it would fall.

Summary of the Parties’ Arguments

The Secretary argues that the cited condition violates the safe access requirement enumerated in section 77.205(a). He argues that the idlers, which are mounted above the travelway, could fall to the floor because they were unguarded. (Tr. 12). The Secretary produced a picture from another mine, demonstrating how malfunctioning idlers present a falling hazard. (GX-20; Tr. 48). The Secretary also notes that idlers are guarded at other locations at the mine. (Tr. 47).

Peabody argues that the citation was issued upon a purely speculative theory that is unlikely to occur. (Tr. 190). Peabody notes that an idler would not drop unless both bearings suffered a catastrophic failure that was undiscovered for a long period of time. (Tr. 190). The roller would have to “heat to such a degree and for such a prolonged period of time that it would melt the medal rod that runs through the center of the roller. . . .” (Tr. 190). Even if such a failure occurred, Peabody argues that the resulting sights, sounds, smells, and vibrations would

be obvious and it would remedy the condition before an idler could fall. (Tr. 190). Citing Ortiz's testimony, Peabody asserts that the high quality idlers used at this mine can operate for decades without the type of bearing failure that could present a falling hazard. (Tr. 191-92).

Discussion and Analysis

I find that the Secretary failed to fulfill his burden to show that Respondent violated section 77.205 and therefore I vacate Citation 8475971. At least one miner walks under the conveyor belt to a working place during most shifts, but the Secretary did not establish that safe access was not provided and maintained by Peabody. I credit the testimony of Ortiz and Myers with respect to this citation. In their 72 years of combined experience, they never observed a return idler that fell at the mine. The theory proposed by the Secretary is too speculative to establish a failure to provide safe access.

I find that a reasonably prudent person would conclude that safe access was provided. The Commission has held that in interpreting a broadly worded standard "it is appropriate to evaluate the evidence in light of what a 'reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard.'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990) (citations omitted).

In *Big Sky Coal Co.*, Commission Judge Barbour noted that proof that an accident "could" occur "falls short of establishing [that] a reasonable person would have expected it. . . ." 20 FMSHRC 582, 587 (Jun. 1998) (ALJ) (emphasis in original). Similarly here, though I recognize that it is remotely possible that one of the three return idlers could fail and then fall, I hold that a reasonably prudent person would conclude that it was unlikely and that Peabody provided the safe access to the working place on the top of the silo.

The Secretary did not show that a return idler was likely to fail and fall onto the walkway. I find that the evidence establishes that such an event was virtually impossible due to the roller design and Peabody's examination and maintenance protocol. The photographs taken by the inspector demonstrate that the rollers were of substantial construction, properly installed, and in excellent condition. (Exs. G-12 – G-19). I find that Peabody provided safe access to the working places in the cited area.³ I therefore **VACATE** Citation No. 8475971.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered Peabody's history of previous violations as presented in the Assessed Violation History Report. (Ex. G-24). At all pertinent times, Peabody Caballo Mining, LLC, was a large mine operator and its parent company, Peabody Energy Corporation, was also large. The violations were abated in good faith. The penalty assessed in

³ The citation did not allege that miners could be injured by material falling from the belt because the belt transported clean coal that has been processed into "very fine coal." (Tr. 56).

this decision will not have an adverse effect upon the ability of Peabody Caballo Mining, LLC, to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

For the reasons set forth above, I **VACATE** Citation No. 8475971 and I **MODIFY** Citation No. 8475874. Peabody Caballo Mining, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$500.00 within 30 days of the date of this decision.⁴

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

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⁴ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 14, 2014

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

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2008-1265
A.C. No. 46-04168-151760

v.

WOLF RUN MINING CO.,
Respondent

Mine: Sentinel

DECISION ON REMAND APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Barbour

This case is before me upon a petition for assessment of a civil penalty filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Solicitor has filed a motion to approve settlement. A reduction in the penalty from \$142,900.00 to \$70,000.00 is proposed. The Solicitor also requests that Order No. 6605922 be modified to remove the flagrant designation.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Order No. 6605922 be **MODIFIED** to remove the flagrant designation.

It is further **ORDERED** that the operator pay a penalty of \$70,000.00 within thirty days of this order.¹

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

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¹ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION,
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April 16, 2014

RONALD E. KEIM, III	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2013-537-D
v.	:	DENV CD 2013-06
	:	
CORDERO MINING, LLC,	:	Cordero Mine
Respondent	:	Mine ID 48-00992

**ORDER GRANTING RESPONDENT’S
MOTION FOR SUMMARY DECISION**

Before: Judge McCarthy

I. Procedural Background

This case is before me upon a discrimination complaint filed by Ronald E. Keim, II, (“Keim” or “Complainant”) pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).¹ Complainant’s December 14, 2012 pro se discrimination complaint filed with the Mine Safety and Health Administration (MSHA) essentially alleges that on August 28, 2012, Complainant was suspended without pay, placed on a “Last and Final Warning” and one-year performance plan, and threatened with discharge. The complaint further alleges that Keim was improperly disciplined during the previous two years. Complainant seeks back pay for the suspension, performance pay that was lost during the one-year action plan, expungement of disciplinary records, compensatory damages for pain and suffering to self and family, and transfer from “D Crew” to “C Crew” to work with his father, Scott Keim.

On April 2, 2013, Respondent filed an Answer denying that Keim engaged in any protected activity, denying that Keim suffered any adverse action motivated by any protected activity, and alleging that Keim was disciplined for unprotected activity, specifically, his pattern of subjecting his co-workers to lewd, offensive and threatening behavior.

¹ Complainant’s brother, Kip Allen Keim, filed a separate pro so complaint of discrimination against Respondent in Docket No. WEST 2013-442-D. As discussed below, my Notices of Hearing consolidated the brothers’ discrimination cases for hearing. Respondent has filed a Motion for Summary Decision in both cases. Having reviewed Respondent’s Motions for Summary Decision and Complainants’ responses, I now sever the previously consolidated cases. I will address Respondent’s Motion for Summary Decision in Kip Keim’s case by separate Order.

By letter dated February 4, 2013, MSHA determined that the facts disclosed during the investigation did not constitute a violation of Section 105(c). By letter dated February 26, 2013, Keim appealed MSHA's determination of no discrimination to the Commission and claimed that review would establish that he had been "treated unfairly" and that post-complaint changes to crew personnel have improved morale and reduced workplace stress.

This case was assigned to the undersigned on March 28, 2013. The next day, I instructed Keim to provide a copy of his original complaint to MSHA, which set forth his allegations of discrimination or adverse treatment and any instances of protected activity in which he engaged. In response, Keim provided a letter addressed to MSHA dated December 14, 2013, and a copy of his statement provided to MSHA during the course of their investigation.

Keim's complaint alleges a novel theory of protected activity. He states that co-worker Dave Alaniz was the source of the complaints about Keim and that Alaniz is the reason that Keim is on an action plan. Complaint at 2. Keim further states that at some unspecified time in 2012, Keim and several other miners brought to management's attention that Alaniz was creating a disgusting and hostile work environment. Keim's complaint states that it was a hostile environment because Alaniz has complained to Human Resources about Keim and other miners and "threatened" to have them fired, but that Keim was the only one disciplined. *Id.* Keim alleges that Alaniz told Keim, in a statement laced with expletives, that he allows everyone to work there and he can fire any one he wants. Keim states that "this" is a "great safety issue" because the miners "deal with huge equipment and over head cranes that lift huge pieces of steel [that] are unforgiving and with having fellow workers (just out of college) worrying about their jobs is unsafe, because their minds are not on the task." *Id.* Keim also alleges that Alaniz comes to work with holes in his pants exposing his genitals, just daring co-workers to say something, and that management has acknowledged that Alaniz is a problem. *Id.*

Similarly, in his deposition, Keim testified that sometime in 2012, Keim complained to D Crew Lead, B.J. Hubble, that Alaniz was creating a hostile work environment that prevented others from safely performing their jobs. Ron Keim Depo. at 111:16-22; 115:9-16. Keim also complained to Clint Cooper, Rebuild Shop Maintenance Manager, that Alaniz was creating a hostile work environment. R. Ex. O at 2. Keim, however, has never alleged that his complaint to mine management was in any way related to the disciplinary measures imposed on him by Respondent. Instead, Keim contends that he initiated this proceeding with the hopes that a third party would intervene to stop what he perceived as preferential treatment towards Alaniz. *Id.* at 149:5-15.

On May 2, 2013, my office issued a Notice of Hearing for August 27, 2013 in Gillette, Wyoming consolidating Ron Keim and Kip Keim's discrimination cases for hearing. On August 9, 2013, the hearing location was moved to Casper, Wyoming. In the interim, several conference calls were held with the parties regarding pre-hearing issues and discovery matters. After agreement, an Amended Notice of Hearing issued on August 20, 2013 setting this matter for hearing on October 15, 2013 in Casper, Wyoming.

On August 19, 2013, during a conference call with the parties, Keim was asked to state a specific example of his protected activity under the Mine Act. Keim responded that he had been reprimanded for “cussing in the break room and playing inappropriate music when even upper management cusses in the break room and on the shop floor.” Conference Call Tr., p. 9 (Aug. 19, 2013). In addition, Keim confirmed that his complaint to MSHA completely covered the scope of his allegations in this case. *Id.*

On September 5, 2013, the undersigned ordered disclosure of certain documents to Complainant subject to Confidentiality Order in the originally consolidated matter.

On September 10, 2013, Respondent filed a Motion for Summary Decision, with attached exhibits.² Respondent argues that Keim’s claim is time-barred because no adverse action occurred within sixty days of his complaint. Respondent also argues that Keim cannot establish a prima facie case because he did not engage in any protected activity and has failed to show any adverse action motivated by such activity. Finally, Respondent argues that Keim would have been disciplined for unprotected activity alone after he engaged in disruptive and inappropriate workplace behavior.

On October 1, 2013, Complainant Keim filed a one-page response in opposition to Respondent’s motion, restating his earlier arguments and presenting new allegations of discrimination occurring in the spring of 2011. Complainant’s Letter in Response to Motion to Dismiss (Oct. 1, 2013). In that letter, Keim contends that his problems with management first arose when Respondent allegedly violated the Health Insurance Portability and Accountability Act (HIPAA) privacy rules by disclosing a medical condition of Keim’s that was discovered during a random drug screening in 2011. *Id.* Keim’s letter did not mention any exercise of rights under the Mine Act. *Id.*

Thereafter, the federal government shutdown compelled rescheduling of the October 15, 2013 hearing. On November 8, 2013, an Amended Notice of Hearing issued setting this matter for hearing on February 18, 2014 in Casper, Wyoming. During a conference call on January 24, 2014, the parties agreed to reschedule the hearing until May 8, 2014 to enable the parties to complete outstanding discovery requests and to enable Respondent to submit a Third Supplement to Motion for Summary Decision with the deposition transcript of a third party in the Kip Keim matter. On February 7, 2014, an Amended Notice of Hearing issued setting this matter for hearing on May 8, 2014 in Casper, Wyoming.

On March 10, 2014, Ron Keim wrote a letter to the undersigned and sent a copy separately to Respondent’s counsel. In that letter, Keim states that on February 21, 2014, the Cordero Human Resources office, headed by Director Amy Clemetson, accused Keim of additional harassment, including drawing faces on cardboard boxes and overhead doors in the

² Respondent’s Motion for Summary Decision is designated “R. Mot.” and the attached exhibits are designated “R. Exs. A-Q.”

shop, and threatening Alaniz with physical harm if he ever saw him off mine property. Keim denied the allegations and signed a paper to this effect, purportedly to keep his job. He alleges that there were no problems with Alaniz or Hubble, who had been transferred off D-Crew, until recently, when Alaniz was put in the cat bay on straight days, such that Alaniz's break and Keim's D-Crew break coincided. Keim asserts that "all hell has broken loose meaning that anything and everything has become offensive to (Alaniz)" since Alaniz received a paper from management about witness preparation dates and court dates in this matter. Keim expresses the belief that the Clemetson and rebuild shop management are retaliating against him because of the instant "lawsuit" against the company, although Keim further acknowledges that other employees have been punished and also required to sign a paper, purportedly to save their jobs. Keim further asserts that "[w]ith all this going on it has been very difficult for me to perform my job properly and safely at the rebuild shop." Keim concludes that he and his co-workers were singled out by Alaniz because of the past problems that they have all had with him and Keim re-emphasizes that the recent harassment investigation began right after Alaniz received a paper from supervisor Roger Gilliam setting forth witness preparation dates and court dates in this matter. Keim then writes, "on Sunday 2/23/2014 one of the DDS hands stopped me in the hall and told me that all DDS hands were basically threatened to lose their jobs by MSHA if the harassing faces don't stop." In a postscript, Keim asserts that he has been traveling from the rebuild shop to work at other Cloud Peak Energy mines, and that when he asked that his travel be reduced, his lead man, Kent Thurman, told him that Supervisor Gilliam said that Keim has to travel and would be sent home if he refused. *See* March 10, 2014 correspondence.

Keim has not filed a new or amended discrimination complaint with MSHA, which raises the new allegations in his March 10, 2014 letter. Therefore, MSHA has had no opportunity to investigate them. Accordingly, the issues raised by Keim's March 10, 2014 letter are not before me. *See Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (April 1991). *Cf.*, *SOL o/b/o Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1014-18 (June 1997); *Carmichael v. Jim Walter Res., Inc.*, 20 FMSHRC 479, 484 and n. 9 (May 1998).

For the reasons that follow, Respondent's Motion for Summary Decision is granted.

II. Stipulations

Pursuant to their respective pre-hearing reports, the parties have agreed to the following stipulations:

1. Respondent is an operator within the meaning of the Mine Act.
2. Cordero Mining LLC, Cordero Mine, Mine I.D. No. 48-00992, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1997 (the "Mine Act"), 30 U.S.C. §§ 801 *et seq.*

3. At all times relevant to this proceeding, Complainant, Ronald Keim, II (“Keim”), was a “miner” within the meaning of Sections 3(g) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(g) and 815(c).
4. The Administrative Law Judge has jurisdiction in this matter.
5. Keim began working at the Cordero Mine during November 2007 as a welder.
6. Keim received a Written Warning for inappropriate behavior on July 15, 2011 as a welder.
7. Keim received a Last and Final Discipline for inappropriate behavior on August 28, 2012.
8. On or about December 21, 2012, Keim filed a discrimination complaint with MSHA under § 105(c) of the Mine Act.

III. Factual Background

Complainant works as a welder in Cloud Peak Energy’s Rebuild Shop. In the year and a half prior to filing his complaint, Complainant has had a contentious relationship with management. Keim received his first written warning on July 15, 2011 for complaints of inappropriate language and music and a verbal altercation with a co-worker over the volume of his radio. R. Ex. F; Complaint at 1. Keim does not deny the allegations of misbehavior that lead to the warning, but feels that he was unfairly singled out for punishment by management. Ron Keim Depo. at 59:20-22. Keim alleges that other employees, including members of management, used vulgar language and regularly played music containing obscene lyrics. *Id.* at 58:20-22, 88:22, 144:5-12. In particular, Keim recalls that his co-worker, Dave Alaniz, regularly uses the “F-Word,” but alleges that management does not punish Alaniz. *Id.* at 144:22-145:5.

In April 2012, Keim received a promotion to Welder 4 and a corresponding pay raise. R. Ex. A. Keim states that Tim Bishop, rebuild shop supervisor, told him that “[w]e just need to “move on and put stuff behind us so we can . . . keep moving forward.” Ron Keim Depo. at 60:7-10.

On August 16, 2012, Keim was called into a meeting with Bishop, human resources site manager, Doug Nutting, and rebuild shop maintenance manager, Clint Cooper. Complaint at 1; Ron Keim Depo. at 66:9-67-17. Nutting informed Keim that despite his excellent welding skills, management had received new complaints about his attitude on the job. Complaint at 1; Ron Keim Depo. at 67-68. Keim alleges that Nutting yelled at him saying “[t]hat my f***ing attitude has to change and I am tired of hearing about your s***.” Keim claims that he was not presented with any specific examples of offending conduct during this meeting. *Id.*

Keim alleges that on August 23, 2012, Bishop belittled and embarrassed him in front of the crew by telling him to stay in the break room before another meeting was held to discuss complaints related to Keim's conduct toward co-workers. Complaint at 1; Ron Keim Depo. at 70:3-6. Bishop, Nutting, and human resource representative, Sheila Harshark, were present at the meeting. Complaint at 1. Nutting told Keim that management was again hearing complaints from the crew about Keim.³ Bishop allegedly jabbed his finger toward Keim and said the whole crew is complaining and tired of Keim's "s***." Complaint at 1. Keim also claims that Bishop told Keim that he gave Keim the raise because he thought "it would clean up [Keim's] act." *Id.* At the end of the meeting, Bishop and Nutting informed Keim that he was suspended without pay for the remainder of the day and that they would recommend that Keim's employment be terminated. Ron Keim Depo. at 74:11-24; R. Ex. I.

On August 28, 2012, rather than terminating Keim's employment, Respondent gave him a "Last and Final Warning Letter." R. Ex. I. The warning states that because Keim's behavior has not improved since the 2011 written warning, Keim will be placed on an action plan for one year during which his behavior will be closely monitored by his supervisor. *Id.* It further states that Keim is no longer eligible for performance pay for the third quarter of 2012, and that Keim is precluded from promotions or application for other company positions until his behavior improves. *Id.*

Although Keim does not deny the workplace misbehavior that management has used to justify the disciplinary measures, he argues that his behavior was misinterpreted and that he was singled out for behavior that other employees and management engage in without reprimand. Ron Keim Depo. at 144:6. Keim also states that mine management was dismissive of his complaints against Alaniz, particularly his complaint that Alaniz was spitting on the bus. *Id.* at 113:24. Further, Keim's MSHA complaint specifically alleges that Bishop and Nutting told him that his size intimidates others and that Keim believes that management has "stereotyped" and discriminated against him because he spends time off in the gym and eats healthy, but other guys are taller and bigger than he is. Complaint at 2. When asked why he believed that he was singled out for discipline, Keim responded that someone had a "beef" with him, but he did not know why. Ron Keim Depo. at 59:2-9.

IV. Principles of Law

Under Commission Rule 67, "a motion for summary decision shall be granted only if the entire record . . . shows: (1) [t]hat there is no genuine issue as to any material facts; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) ("[A] party must move for summary decision and it may be entered only when there is no genuine issue as to any material

³ Keim admits that about this time he told bus driver Aaron McAllister to "open the door, man, or I'll kick it open." Keim testified that he "was just picking on him, just having fun, just trying to get home." Ron Keim Depo. at 60:22-24.

fact and when the party in whose favor it is entered is entitled to it as a matter of law.”); *see also Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (holding that summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law).⁴

The Commission has held that summary judgment is an extraordinary procedure that must be entered with care because erroneous invocation denies a litigant the right to be heard. Thus, when considering a motion for summary decision, the judge must draw all “justifiable inferences” from the evidence in favor of the non-moving party. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The judge should only grant a summary decision “upon proper showings of the lack of a genuine, triable issue of material fact.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp.*, 477 U.S. at 322).

V. Analysis

A. Keim’s Alleged Failure to Timely File His Discrimination Complaint

Section 105(c)(2) states that a miner “who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within sixty days after such violation occurs, file a complaint with the Secretary alleging such discrimination.” 30 U.S.C. § 815(c)(2). Complainant was issued his first written warning in July of 2011 and was placed on a Last and Final Warning on August 28, 2012. Keim’s Complaint to MSHA, however, was not filed until December 14, 2012, 108 days after the issuance of the Last and Final Warning. Respondent argues that Keim’s claim is time-barred because his allegations of adverse employment action did not occur within sixty days prior to the filing of his complaint of discrimination. Mem. of Points & Authorities in Support of R. Motion for Summary Decision at 10.

The Commission has found that the 60-day filing period for discrimination claims is not a jurisdictional bar and that timeliness questions must be examined on a case-by-case basis. *David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff’d mem.*, 750 F.2d 1093 (D.C. Cir. 1984). The relevant legislative history of the Mine Act supports this case-by-case approach when stating:

⁴ Summary judgment is proper only if there is no reasonably contestable issues of fact that are potentially outcome determinative. *See, e.g., Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997). This standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). Under that standard, the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986) (citing *Brady v. Southern R. Co.*, 320 U.S. 476, 479-480 (1943); *Wilkinson v. McCarthy*, 336 U.S. 53, 62 (1949)).

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

It is clear from Keim's interactions with this tribunal and his pro se status, that Keim is unaware of many of his rights and responsibilities under the Mine Act. When asked why he filed his complaint in December 2012, Keim seemed unaware that the Mine Act imposed any time limit for filing a discrimination complaint. Ron Keim Depo. at 148:20-23. Rather, Keim indicated that he was motivated by alleged discrimination against his brother Kip Keim, who works at the same mine. *Id.*

Although Keim has not provided any justification for the delay in filing his complaint, I find that some leniency is warranted given his pro se status. *See Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 12-13 (Jan. 1984) (pro se miner's late filing may be excused in justifiable circumstances if filed thirty-one days late). Keim's 48-day delay in filing is relatively short. Respondent has failed to present any evidence that such delay resulted in any actual prejudice to its ability to mount a defense. Furthermore, dismissal is a drastic remedy that is disfavored when based solely on a procedural irregularity. *See, e.g., Salt Lake*, 3 FMSHRC 1714, 1717 (July 1981); *Long Branch Energy*, 34 FMSHRC 1984, 1992 (Aug. 2012). Accordingly, in the circumstances of this case, I decline to dismiss Keim's complaint on the basis of his untimely filing.

B. Keim's Alleged Failure to Establish a Prima Facie Case of Discrimination

To proceed on his discrimination complaint under the Mine Act, Keim has the burden of establishing a prima facie case of discrimination by presenting evidence "sufficient to support a conclusion that [he] engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *Sec'y of Labor on behalf of Donald E. Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 989 (Sept. 1999); *see also Tanglewood Energy, Inc.*, 19 FMSHRC 833 (May 1997); *Sec'y of Labor on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). Such a burden is "lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Jayson Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059,

1065 (May 2011). To establish a prima facie case, a complainant need only provide evidence from which the trier of fact could infer employer retaliation for protected activity. *Id.*

Keim offers only one example that arguably could be construed as protected activity. Keim told Hubble and other managers sometime in 2012 that co-worker Alaniz was creating a hostile work environment that made it difficult for Keim's crew to safely perform their jobs. *See* Ron Keim Depo. At 111:16-22; 115:9-16; Complaint at 2.

Keim's allegations of discrimination in 2011 clearly predate the complaint to Hubble and thus cannot be evidence of adverse employment action motivated by protected activity. The Last and Final Warning, however, occurred in 2012, possibly after Keim made his complaints to management. In examining the record on summary decision, I view the facts in the light most favorable to the non-moving party and thus infer that Keim's complaints predated the adverse employment actions. *See Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962)).

Even assuming, arguendo, that Keim's complaint to Hubble and other managers constituted protected activity, Keim has failed to establish a nexus between the protected activity and the adverse action taken by Respondent.⁵ The Commission has found the following to be common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983); *see also Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

Although Keim's complaints concerning Alaniz were known to mine management and may have occurred in close temporal proximity to the adverse employment action, there is no evidence of disparate treatment or animus towards Keim's complaints. While Keim has claimed disparate treatment in disciplinary actions taken in 2011 (complaints of inappropriate language and music), Keim has not presented any facts in support of disparate treatment in 2012. Further, there are no facts that establish that management was hostile to Keim's complaints concerning Alaniz, nor are there any facts that suggest that management held any animus towards Keim for bringing such complaints to the attention of management. In fact, Keim avers that other rank-

⁵ Although the Commission has never addressed the issue, it is conceivable that under the particular facts and circumstances of a given case, reporting workplace violence or abuse that implicates concerns for safe performance of work tasks could raise to the level of protected activity under section 105(c) of the Mine Act. *Cf.* Complaint at 5, *Harris v. Duane Thomas Marine Contr., LLC*, No. 2:13-cv-00076-SPC-DNF (M.D. Fla. Feb. 5, 2013) (the Secretary brought a complaint under section 11(c) of the OSH Act of 1970 alleging that internal complaints to owner and/or external complaints to OSHA concerning workplace violence and verbal abuse constitute protected activity related to the OSH Act). The only allegations of workplace violence here concerns threats made by complainant Ron Keim.

and-file miners and even members of mine management had raised issues with Alaniz's behavior. Ron Keim Depo. at 110:24, 117:13; *see also* R. Ex. P, at 5; R. Ex. Q, at 7.

Rather, it is clear from conference calls and correspondence with the parties, that Keim is unhappy with what he perceives as longstanding inequities in Respondent's disciplinary procedures and managerial practices. Keim believes that Bishop is unreasonable in his belief that Keim should not be on the same crew as his father. Ron Keim Depo. at 167:10. Keim also asserts that because of his muscular physique, management gave undue credence to coworker's complaints of threats and intimidation from Keim, which Keim allegedly uttered in jest. Further, Keim believes that management has not done enough to address Alaniz's alleged overzealous reporting of workplace banter, which Alaniz finds objectionable. It is apparent that Keim seeks the aid of the Commission to arbitrate the aforementioned workplace disputes rather than address discrimination based on activities protected under the Mine Act.

It is well established that "[t]he Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Chacon, supra*, 3 FMSHRC at 2516. Thus, regardless of the merits of Keim's issues with management, a prima facie case of discrimination under the Mine Act cannot be established without some modicum of evidence supporting the contention that Keim's protected activity, at least in part, motivated the adverse action, and that management exhibited animus toward that activity. After careful review of the documents submitted by both parties, I find no such evidence here, even when viewing the facts in the light most favorable to Complainant.⁶

⁶ While I need not pass on the validity of Respondent's affirmative defense, it is worth noting that Keim has admitted to a history of inappropriate behavior. Specifically, Keim has admitted to the use of foul language, playing loud music with highly offensive lyrics, threatening to damage company property, threatening to fight colleagues, and posting a comment on Facebook that he was going to "kick [Hubble's] ass." Ron Keim Depo. at 44:1-22, 45:1-4, 53:23-25, 54:1-25, 55:1, 55:10-25, 56:1-8, 57:8-19, 60:13-24.

VI. Order

Complainant Ron Keim, II, has failed to establish any genuine issue of material fact that the adverse discipline taken against him was motivated, at least in part, by any protected activity in which he engaged, or that management harbored any animus toward such activity. Accordingly, Respondent's Motion for Summary Decision is **GRANTED**. This case is **DISMISSED**, with prejudice.

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

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/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 16, 2014

MANUEL A. GARZA,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. CENT 2013-307-DM
	:	SC MD 13-08
v.	:	
	:	
	:	
HANSON AGGREGATES, LLC,	:	Mine ID: 41-00059
Respondent.	:	Mine: Servtex Plant

DECISION ON LIABILITY

Appearances: Mark A. Sanchez, Esq., San Antonio, Texas, on behalf of Complainant Manuel A. Garza

William K. Doran, Esq., Washington, D.C., on behalf of Respondent Hanson Aggregates, LLC.

Before: Judge James G. Gilbert

This case is before me upon a complaint of discrimination brought by Manuel A. Garza (“Garza”), a miner, against Hanson Aggregates, LLC, (“Hanson” or “the mine”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 “(Mine Act)”, 30 U.S.C. § 815(c). Complainant alleges that he was unlawfully discharged by Respondent Hanson on August 31, 2012. Garza alleges that his termination was motivated by discriminatory animus toward his protected activities, which consisted of reporting various safety issues regarding Hanson’s Servtex Plant.¹ Hanson denies the allegation of unlawful discrimination and asserts that Garza was fired for violations of safety practices that occurred several days before the date of his termination.

¹ Section 105(c)(1) provides in pertinent part:

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 ... because such miner ... has filed or made a complaint under or related to this Act[.]

A two day hearing was held commencing on December 10, 2013, in San Antonio, Texas.

I. Stipulations of Fact

1. Respondent Hanson Aggregates, LLC, operates the Servtex plant located in New Braunfels, Texas.
2. Operations at the Servtex plant are subject to the jurisdiction of the Mine Act.
3. The Administrative Law Judge has jurisdiction in this matter pursuant to section 105 of the Act.

II. Procedural Background

On November 19, 2012, Garza filed a discrimination complaint with the Mine Safety and Health Administration (“MSHA”) pursuant to section 105(c)(2) of the Act. The Complaint was investigated by MSHA, and by letter dated February 4, 2013, MSHA determined that no discrimination had occurred. On February 27, 2013, Garza filed a discrimination complaint on his own behalf with the Federal Mine Safety and Health Review Commission pursuant to section 105(c)(3) of the Mine Act.² On April 5, 2013, and again on April 10, 2013, and again on May 16, 2013, Respondent was ordered to file an *Answer* within thirty days. On May 22, 2013, Hanson filed an *Answer* denying the allegations of discrimination.³ On June 17, 2013, this matter was assigned to me. A *Notice of Hearing and Site* was issued on August 1, 2013, for a hearing scheduled for October 23-24, 2013, in San Antonio, Texas. As the result of a lapse in appropriations during the period leading to the scheduled hearing, the hearing was rescheduled in a conference call on October 17, 2013. Following the conference call, a *Notice of Rescheduled Hearing and Site* set the date for hearing as December 10-11, 2013, in San Antonio, Texas. Pre-

² Section 105(c)(3) of the Act states in pertinent part:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right ... to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.

³ There is no information in the record to explain the multiple orders extending time for an *Answer*, all of which were issued prior to my assignment to the case.

hearing reports were filed by both parties in a timely manner. Although both parties were invited to submit post-hearing briefs, only Respondent chose to do so.

III. Factual Background and Findings

A. Garza's Employment History

Garza was employed by Hanson at its Servtex plant in New Braunfels, Texas ("Servtex") beginning in March 1991. Tr. 383. During his 21 year career with Hanson, Garza served as a utility man, eventually being promoted to quarry supervisor of production in 2007. Tr. 383-84. Garza served as a supervisor for four years before he was demoted by Plant Manager Kenneth Early ("Early") on June 1, 2011. Tr. 355, 393, 443, 551; Resp. Exh. 12. Garza accepted the demotion in lieu of termination and continued to be employed with Hanson until the date of his termination. Tr. 393; Resp. Exh. 10.

B. Garza's 2011 Demotion

Garza served as a supervisor from approximately 2007 until his demotion on June 1, 2011. Tr. 443. During this time he reported to Early directly. Tr. 383. Notwithstanding the demotion, there was no documentation introduced to refute that throughout the time Garza served as supervisor he performed his duties at an acceptable level.⁴ Tr. 488. In fact, Keith Bechly ("Bechly") Hanson's Director of Human Resources for the South Region, testified that Garza had done a good job. Tr. 550. However, his employment relationship with Early was strained. There were multiple examples of difficulties Garza encountered with Early as his supervisor. One of the more significant of these involved Garza's attempt to rectify a recent blasting of rock.

Sometime in the first half of 2011, Garza was scraping the wall, which is a process by which fallen rock is removed so as to prevent the possibility of a rock slide into the base of the plant.⁵ Tr. 485-86. On this particular day, Early was hosting a meeting of other general managers at the facility. Tr. 385, 485. When Early encountered Garza scraping the wall, Early was incensed because this safety procedure interfered with production. Tr. 385. Although scraping the wall is a necessary safety procedure, Early delivered clearly his message to Garza that any such safety measures were second to the need to maintain production. *Id.*

⁴ On rebuttal, Production Manager Jacob Scherer testified to a "best practices" team that he participated in that was critical of Garza's operation of the base of the plant during the time he was supervisor. Tr. 652-54. Although he testified that those findings were presented to Early prior to Garza's demotion, no record or copy of any written report to support the testimony was offered by Hanson, either at the hearing, or as a request to supplement the record post-hearing. Tr. 654.

⁵ In fact, such an incident occurred sometime prior to Garza's termination when a rock slide came down and landed a few feet away from Garza, and Garza brought that safety infraction to the attention of Early at the time. Tr. 486. The record does not reflect when that rock slide occurred.

Within a month or two of this incident, Early sought to demote Garza from his position as supervisor. Tr. 487. Early consulted with Bechly. Tr. 492-93, 496. Bechly, for his part, could not specify or recall any basis for the demotion, other than Early's statements about Garza's lack of performance. Tr. 512, 515. There was no documentation offered to support Early's position that Garza was not performing his duties. Tr. 515. There were no records introduced into evidence of any performance appraisals for Garza during this four year period as supervisor. Also, although Garza had been in the supervisor's position for four years, Bechly did not require documentation when Early approached him with the request to demote Garza. Tr. 524. Likewise, Bechly did not make any inquiry of Early as to whether Garza had engaged in protected activity prior to this time. Tr. 513. While Bechly testified that such demotions were rare, Bechly concurred with the demotion notwithstanding the lack of any documentation to support the personnel action.⁶

Early told Garza that he could return as a leadman in the base of the plant, or face termination. Tr. 487. Garza accepted the demotion in lieu of being fired, but credibly testified that he still did not understand why he was forced to accept the demotion after four years as a supervisor. Tr. 485.

C. Garza's Relationship with Early

Garza credibly testified to a long history of verbal abuse from Early. Tr. 391-393. Although Early's reputation for verbal abuse was well known, and many in the plant were victims of his anger, Andy Gallegos ("Gallegos"), Garza's supervisor, credibly testified that Garza was singled out by Early for particularly harsh treatment. Tr. 206-07. Incidents included the use of profanity, derogatory comments related to Garza's perceived political affiliations, and other inappropriate offensive language. Tr. 207. Garza described an example of Early's ongoing abuse.

Q. How was Mr. Early's demeanor, behavior towards you in these [safety] meetings?

A. Oh, you know, he would kind of pick on me more, but he would also, you know, he would pinpoint me as Obama Garza, you know. I didn't like it. I didn't tell him nothing because I had respect for the man. It doesn't matter how much anybody says about you, you know, as long as you have that respect, you know, everything is going to be okay. But he would call me Obama Garza in front of all the supervisors in the meeting.

Q. Where did that term come from, if you know?

A. At one time they were talking about the economy being so bad, you know, production was pretty slow at the time. I said yeah, well, you know – some gentleman, Clayton Simpson said, yeah, we're going to be all right, Obama is going to help us out. He said, you mean Obama Garza,

⁶ Bechly testified that they discussed the possibility of placing Garza on a performance plan for 120 days, but that idea was rejected by Early, ostensibly to keep Garza employed at Servtex. Tr. 550.

and everybody just, like, got quiet, didn't say nothing. And I just looked at him and what can I tell him, you know? I couldn't say nothing.

Q. Had you ever brought politics into the workplace yourself?

A. No, I don't really talk politics to nobody. That's kind of a closed-doors issues between me and myself.

Q. Well, do you have any idea where he got the term Obama Garza? Why he picked on you like that?

A. No, I don't.

Q. Is this something that occurred frequently at the meetings?

A. Yes.

Q. Would it happen at every meeting?

A. Yes, almost all -- at every meetings they had to bring some kind of politics into it.

Q. And would he single you out at these meetings?

A. Yeah, he would call me Obama Garza.

Q. Did he call you any other names?

A. Not there. On the phone, yes.

Q. What sort of names would he call you?

A. He would just -- he would just say a lot of bad words to me when something wasn't going his way.

Q. Would he drop F bombs?

A. Yes. He had plenty of those for me.

Tr. 391-92.⁷

Although much of the abuse Garza took from Early occurred during his tenure as a supervisor, the abuse continued after his demotion from the position.

D. Early's Written Warning to Garza in July 2012

On July 19, 2012, less than six weeks before his termination, Garza was given a written warning pertaining to a blown tire on the loader by his supervisor Gallegos. Tr. 221; Comp. Exh 1. Garza knew that the nightshift operator had been spinning the tires and otherwise had abused the equipment. Tr. 427-28. Gallegos credibly testified that he saw the damage to the tire first thing in the morning and agreed with Garza that the damage had been done the night before. Tr. 222, 224. Nevertheless, Early insisted that Garza be disciplined for the damage. Tr. 222. Gallegos protested to Early and explained to him that the night shift operator had damaged the tire. Tr. 222. Early told Gallegos to issue the written discipline to Garza anyway. Tr. 223. Garza objected to the written warning and placed his objection in writing on the corrective discipline form. Tr. 223; Comp. Exh. 1. For his part, Production Manager Jacob Scherer ("Scherer") also disagreed with Early's decision to take disciplinary action against Garza for the damage to the loader tire. Tr. 29. None of this prevented Early from ordering Gallegos to issue

⁷ I take notice that in this area of the State of Texas it is apparently considered insulting to be compared to the President of the United States.

the written reprimand to Garza even in the face of evidence that Garza was not responsible for the damage.

E. Garza's Protected Activity

Garza engaged in multiple activities that would generally fall within the term "protected activity." Prior to his demotion in 2011, Garza was derided by Early for taking proper safety measures such as "scraping the wall." Tr. 484. Garza made repeated requests for access to fall protection prior to his request to Scherer in July 2012. Tr. 446. Garza complained about the lack of scraping the wall to both Russell and Early. Tr. 212-13. Garza also commented to the MSHA inspector on August 29, 2012, that he did not have company issued fall protection. Tr. 464. Each of the above constitutes protected activity.

F. Urbano Garcia's Violation of Safety Protocol

In or about May 2012, Urbano Garcia ("Garcia"), a worker in the electrical department, was filling the oil in the gearbox on top of the crusher and failed to wear protective fall gear.⁸ Tr. 603-05. This behavior was observed by witness Derek Henk ("Henk"). Tr. 604. Henk scolded Garcia for his transgressions of safety policy and reported the matter to supervisor Antonio Mosquedo ("Mosquedo"). Mosquedo gave Garcia a verbal warning for this offense. Tr. 300-01. No other disciplinary action was taken against Garcia. Tr. 301. In fact, Mosquedo testified that if Garcia was caught again, he would receive a three-day suspension. *Id.* Mosquedo said at no time was termination of Garcia ever considered for this transgression of safety policy. *Id.* Both Gallegos and Garza testified that Garcia's actions on this date were consistent with how Mosquedo's crew normally filled the oil in the gearbox. Tr. 195, 403.⁹

G. Garza's Termination

On August 29, 2012, MSHA Inspector Lance Miller conducted an inspection of the Servtex Plant, accompanied by Scherer (the "inspection party"). Tr. 66, 68. During the course of that inspection at approximately 6:00 a.m., the inspection party arrived at the crusher at the base of the plant where Garza was assigned that day. Tr. 114. At the time they arrived, Garza

⁸ The gearbox on the top of the crusher leaked oil and need to be refilled two or three times per week. Tr. 399. Garza reported this oil leak to Mosquedo on multiple occasions; however Mosquedo did not consider repair of the gearbox to be a priority. Tr. 400. The decision not to repair the gearbox required Garza to refill the oil. Tr. 400. Each time the oil had to be refilled, the crusher was out of operation for production purposes. *Id.* The parties dispute whether the maintenance of the faulty gearbox was the responsibility of Mosquedo's maintenance unit, or the responsibility of the operator of the crusher. Tr. 123. For the purposes of this matter it is unnecessary to resolve that factual dispute.

⁹ In fact, Garza credibly testified that in July 2012, Early saw him on the crusher without a safety harness, and with the engine in idle (the same offenses that led to his termination), and that Early's concern was not that Garza lacked safety equipment, but that Garza's actions slowed production. Tr. 411-12.

was at the top of the crusher, placing oil in the gearbox, and was not wearing protective fall gear. Tr. 116-17, 223. In addition, an inspection of the equipment noted that the diesel engine that operates the electric motors on the crusher was in operation, though the clutch had been disengaged. Tr. 49, 124. Miller asked Garza what he was doing on the top of the crusher and Garza informed him that he was refilling oil. Tr. 123. Miller asked why he was not wearing any safety harness and Garza replied that he did not have a harness. Tr. 464.

As the result of his observations, Miller issued two citations. The first citation cited the mine under 30 C.F.R. § 56.15005 for Garza's failure to use protective gear and for the lack of guardrail protection on the top of the crusher. Resp. Exh. 6. The second cited the mine under 30 C.F.R. § 56.12016 for Garza's failure to lockout the diesel motor while performing maintenance. Resp. Exh. 7.

After the inspection, Scherer met with Early and discussed the citations and Garza's violations of safety protocol. Tr. 480. Early and Scherer then had an additional discussion with Bechly, and Bechly recommended that both Garza and his supervisor Gallegos be suspended pending an investigation into the safety violations. Tr. 85-86. Garza was informed that evening that he was suspended pending investigation. Tr. 82. In the course of that discussion, Garza repeatedly explained that he objected to having to refill the broken gearbox with oil on a regular basis, and that the gearbox was never repaired by Mosqueda's maintenance team. Tr. 85, 397, 399. Scherer testified that Garza also stated that Gallegos told him to fill the oil before the MSHA inspector arrived. Tr. 85. The "investigation" did not include any further discussion with Garza. Tr. 85. Garza was informed that evening that he was under suspension. Tr. 82.

The next day, Early and Scherer spoke with Gallegos and inquired of his knowledge of whether Garza had been instructed to hurry the process of filing the gearbox with oil before the MSHA inspector arrived. Tr. 86. Gallegos denied that Garza had been so instructed and stated only that he told Garza to finish it before the trucks arrived. Tr. 86. Gallegos also admitted that his understanding of the lockout/tagout procedure would permit Garza to do exactly what he had done on the day of the inspection. Tr. 88-89.

After the conversation with Gallegos, there was a conference call between Early, Bechly, Scherer, Richard Crowe, the area production manager, and Russell Ellis, Hanson's south Texas safety manager. Tr. 89. The purpose of the call was to discuss the results of the "investigation" and to make a decision about the future of Garza and Gallegos. Tr. 90. While the parties on the call agreed that termination of Garza was proper, ultimately, it was Early's call to terminate both Garza and Gallegos, overruling Scherer's objection as to the termination of Gallegos. Tr. 55, 90.

On August 31, 2012, Garza was told to report to the plant where he met with Scherer and Early. Tr. 94, 439. Early informed Garza that he was terminated. Tr. 439. Garza did not question Early but left the plant premises. *Id.*

IV. Discussion

I begin by reviewing the Commission's framework for analyzing a section 105(c) "mixed motive" discrimination complaint.¹⁰ This is no easy task. What at first glance appears to be an application of traditional *McDonnell Douglas* burden shifting is in fact and in application a much more complicated analysis that shifts burdens of persuasion from the employee to the employer, and, in the end, to both parties. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under traditional *McDonnell Douglas* analysis, once a plaintiff establishes a prima facie case under Title VII, the burden of proof shifts to the employer to rebut the prima facie case. *Id.* at 802-03. The employer's burden is a burden of production not persuasion. *Id.* At all times, the burden of persuasion remains with the employee. *Id.* However, under Commission precedent, upon establishment of a prima facie case by the miner, the burden shifts to the operator to rebut the prima facie case *by a preponderance of the evidence*. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). Unlike *McDonnell Douglas*, the employer now has the burden of persuasion not production.¹¹

Presumably, if the operator meets its burden and can provide sufficient evidence that it would have taken the adverse action based on a nondiscriminatory basis, there is nothing left to rebut. It is indisputable that a fact established by a preponderance of the evidence cannot be overturned by evidence that the fact was a pretext; otherwise it could not have been established in the first place. Under *McDonnell Douglas*, unlike under the Mine Act, a Judge does not find that an employer established his rebuttal by a preponderance of the evidence, but rather that it met its burden of production, leaving open the question of whether the proffered reason was pretextual, and keeping the burden of persuasion at all times with the employee. In my opinion, it is the adjustment of the traditional framework by the Commission that leads many Judges to fail to address pretext because the Commission's altered Title VII framework does not easily invite such an analysis. In order to properly address the issue of pretext, the Commission precedent must be read to require that the Judge review pretext (burden of persuasion on employee) at the same time the Judge reviews the company's affirmative defense (burden of persuasion on employer). *See, e.g., Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1374 (Dec. 2000) (concurring opinion of Commissioner Beatty) ("complainant has a burden to produce evidence designed to refute the operator's affirmative defense by showing that the

¹⁰ A "mixed motive" case exists "where it is found that both the miner's protected activity and his unprotected activity motivated the adverse action[.]" *Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1923, n.3 (Aug. 2012).

¹¹ Judges sometimes face remand for failing to conduct a proper or thorough analysis of the operator's proffered reason as pretextual. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1076-77 (May 2011); *Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820 (2012) (dissent argues that ALJ failed to adequately consider pretext). Under *McDonnell Douglas*, that pretext analysis is conducted when the employer meets its burden of production with a nondiscriminatory reason for the adverse action. Here, however, the operator's burden is not production but persuasion. Thus, the operator must prove its case by a preponderance of the evidence. There lies the challenge for pretext analysis. *See* discussion *infra* pages 9-10 and accompanying notes.

affirmative defense offered by the operator is merely pretext and not the true reason for the adverse action.”) The most efficient way one can accomplish such a task is to clarify the section 105(c) analysis.

On rebuttal, an employer must establish either that: (1) the miner was not engaged in protected activity; or, (2) that the adverse action was not motivated in any part by the protected activity. *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 825 n.20 (Apr. 1981). Such a successful determination on either prong precludes further review, including review on pretext.¹² *Id.* If however, the operator cannot rebut the prima facie case, then the operator may assert an affirmative defense, which it must prove by a preponderance of the evidence.¹³ The operator must establish both that: (1) the discharge was also motivated by the miner’s unprotected activity, and (2) it would have taken the adverse action in any event for the unprotected activities alone. *Nat’l Cement Co. of California*, 33 FMSHRC at 1064. In the assertion of this affirmative defense, it is best to break down the framework a little further.

To establish its affirmative defense, the company must first carry its burden of persuasion on the issue of whether the discharge was also motivated by the miner’s unprotected activity. If the company is unable to prove this element, it has failed to establish its affirmative defense and the employee is entitled to judgment in his or her favor. If, however, the operator meets this burden, the question now rises and falls on whether the operator can establish that it would have taken the adverse action in any event for the unprotected activities alone.

In reviewing this second prong, I find that the suggestion of some Commission precedent regarding the order of proof presents a logical inconsistency. Looking to the operator to establish by a preponderance of the evidence that it would have taken the action in any event, then looking to rebut a fact already established by preponderance makes little rational sense. If the operator sufficiently determines by a preponderance of the evidence that it would have taken the action for the unprotected activities alone, then no pretext could possibly exist. The pretext to be established is that the proffered reason hides actual discriminatory animus. If the operator proves that it would have taken the action for the unprotected activity alone, it has proved that notwithstanding evidence of discriminatory animus the outcome remains the same. The employer acknowledges the existence of the discriminatory animus, but says it was not the ultimate factor in the decision. Thus, if that particular *fact* is established by a preponderance of the evidence, how can that objective finding also be pretextual?

¹² Again, to state the obvious, successful rebuttal proves that pretext did not exist, thus analysis of pretext is unnecessary. Pretextual analysis is only relevant when considered during the employer’s affirmative defense.

¹³ When an operator fails to rebut the prima facie case, the operator now faces a “mixed motive” case because the operator is contending that notwithstanding the discriminatory motivation it failed to rebut, there was an equally compelling nondiscriminatory motive represented by the unprotected activity, and that activity alone was sufficient to justify the adverse action. *See supra* note 10.

Rather, I believe the burden on the operator in the final prong of the two part test articulated by the Commission, and the ultimate burden of persuasion on the complainant to establish pretext, are not separate or distinct burdens but directly competing burdens. You cannot both find by a preponderance of the evidence that an employer would have taken the same action without the discriminatory motive, and find by a preponderance of the evidence that the opposite is also true. A pretext by definition is a finding that the proffered reason, here the finding that the operator would have fired the miner anyway, is not true, i.e., a pretext for discrimination. *Black's Law Dictionary* (9th ed. 2009). This raises the question of how can a fact be established by a preponderance of the evidence and yet be untrue. That conundrum represents the logical inconsistency of the order of proof at this stage of a mixed motive case.

By viewing the burdens as competing burdens, the Judge can remain consistent with Commission precedent to evaluate both parties' respective cases, remain true to the burdens of persuasion on each party, but eliminate the logical inconsistency of conducting the review of each burden as though they were entirely unrelated. Accordingly, when reviewing the operator's evidence that it would have taken the action in any event, the Judge must do so with an eye toward any evidence of pretext such an assertion raises. The Judge must evaluate the operator's case not only reviewing the operator's evidence but also looking at all the evidence presented by the employee that the proffered reason for the adverse action was pretextual. It is here that the Judge must determine *either* that the operator met its burden on the second prong, *or* that the employee has proved pretext by a preponderance of the evidence. As stated, these are directly competing burdens, which means that if one is true the other must be false.

The Judge's analysis then is to place the competing burdens on either end of a scale and weigh the evidence. At this stage, the Judge considers all evidence proffered by the employee of pretext, and weighs it against all evidence produced by the company that they would have taken the adverse action in any event.¹⁴ If the evidence weighs greater in one direction than another, then the scale is tipped to the party presenting that evidence. If the employer can establish that they would have taken the action for the unprotected activity alone, then logically pretext was not established. Likewise, if the employee establishes that the proffered reason is pretextual, then logic dictates the employer has failed to meet its burden of persuasion. The one thing cannot exist alongside the other; this is an either/or proposition. In my reading, prior Commission precedent has not explained this analysis in these terms, although I find that this is the intent of the Commission's precedent, and is consistent with existing case law. Accordingly, this is the balance of competing interests that I adopt in deciding the matter before me under section 105(c).

A. Complainant's Prima Facie Case

In order to establish a prima facie case of discrimination, Garza must prove that he was engaged in a protected activity and that "the adverse action complained of was motivated in any part by that activity." *Driessen v. New Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1988). The burden of proof to establish a prima facie case is less than the burden of persuasion under section

¹⁴ An employee's prima facie case need not establish its elements by a preponderance of the evidence. Thus, it is necessary to review the employee's evidence in total, to determine whether the employee has met its burden of persuasion on pretext.

105(c)(1). *Nat'l Cement Co. of California*, 33 FMSHRC at 1065. It is enough that Garza bring forth sufficient evidence in which I can infer retaliation. To assist in this process, the Commission has identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and, (4) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Often, direct evidence of motivation is not available. Thus, to establish motivation I must draw upon reasonable inferences from the facts of record.

In this case, Garza's requests for a safety harness, his actions to encourage safety activities that were criticized by Early including scraping the wall, and his statement to the MSHA inspector that he was not provided with fall protection constitute protected activity. *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 983, 988 (Aug. 2010) (anti-discrimination provision is to be interpreted expansively to effect purpose of safety of mines). Likewise, his allegations regarding Early's conduct, including his repeated verbal assaults, Early's decision to discipline Garza for an infraction just a month prior to his termination under questionable circumstances, a demotion a year earlier under equally questionable circumstances, the disparate treatment of Garza for the same offense committed by another employee, and Early's general pattern of placing production over safety combine to establish evidence of animus. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089-90 (Oct. 2009) (evidence of animus included supervisor "'dogged' him, swore at him, and assigned him more difficult and onerous tasks as compared to other" employees).

Garza established that Early had knowledge of Garza's safety complaints, including the repeated requests for a safety harness, and the activity of "scraping the walls," both at the time Garza scraped the walls, and Garza's subsequent complaints to Russell and Early of his safety concerns because of a failure to scrape the wall. Tr. 212-14, 387. Hanson did not rebut that knowledge during its rebuttal case.¹⁵ Also, Garza established that there was hostility to the protected activity of scraping the walls. Tr. 485-87. Further, the disparate treatment of Garza as compared to Garcia is undisputed and suggests ongoing hostility. While the timing of the protected activity of scraping the walls may be in the more distant past, it likely led to Garza's demotion, and thus, was part of a pattern of continuing animus by Early against Garza. This

¹⁵ In its post-hearing brief, Hanson argues that Early's knowledge of the safety complaints cannot be imputed to the company. However, that argument is not consistent with Commission precedent. *Nat'l Cement Co. of California*, 33 FMSHRC 1059; *Metric Constructors, Inc.*, 6 FMSHRC 226 (Feb. 1984). Further, Hanson's reliance on *Metric* and *Nat'l Cement* to support this argument is entirely misplaced. Neither case supports Hanson's attempt to cleanse Early's discriminatory motivations in a single conference call, and the weight of testimony from Hanson's own witnesses place the responsibility of termination ultimately on Early.

pattern was further evidenced just weeks before Garza's termination by the unjustified disciplinary action against Garza for the blown tire on the loader.¹⁶

Although Scherer denied knowledge of the discussions between Garza and Miller on the date of the citation, given his close proximity to the site of the infraction, I find it unlikely that Scherer did not hear Garza tell the inspector he did not have a harness. Garza's statement implied that the company had failed to provide him with proper safety protection. In the termination of the citation, there was discussion that "[t]he miner was instructed on the use of fall protection [when] there is a danger of falling." Resp. Exh. 6. This discussion could only have occurred with Scherer at the time of the infraction, as the citation terminates just five minutes after it was issued.¹⁷ *Id.* Although Scherer denied any such conversation, the only person who would have had such a discussion at that time was Scherer. Thus, I find that Early was likely aware of Garza's statement to the inspector through Scherer. This statement was protected activity that occurred just twenty-four hours before Garza was terminated.

In summary, I find that Garza has demonstrated: (1) that Early was aware of his protected activity; (2) that Early exhibited hostility toward the protected activity; (3) that there exists a sufficient nexus between the protected activity and the discriminatory action based on the timelines cited herein; and, (4) that Garza was subjected to disparate treatment. Accordingly, based on the foregoing, I find that Garza established a prima facie case of discrimination in his termination from Hanson.

B. Respondent's Rebuttal of Complainant's Prima Facie Case

The mine operator may rebut the prima facie case by showing that: (1) the miner was not engaged in protected activity; or, (2) that the adverse action was not motivated in any part by the protected activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 825 n.20 (Apr. 1981). Should the company fail to rebut the prima facie case by a preponderance of the evidence, it may assert an affirmative defense that establishes: (1) the discharge was also motivated by the miner's unprotected activity, and (2) it would have taken the adverse action in any event for the unprotected activities alone. *Nat'l Cement Co. of California*, 33 FMSHRC at 1064.

¹⁶ Although Gallegos did not identify the time period in which Garza made the complaints to Early and Russell regarding the need to scrape the wall, I infer that these complaints were made after Garza was demoted and assigned to the base of the plant when such a danger would be of particular concern to Garza.

¹⁷ Scherer also denied telling the inspector that part of the termination would be the use of the Genie boom in future situations. Scherer testified that it was likely Mosquedo who so informed the inspector, but only Scherer was present with the inspector at 6:50 a.m. on the date of the infraction. Thus, it had to have been Scherer who explained to the inspector how the company intended to deal with preventing future infractions.

(1) Miner Was Not Engaged in Protected Activity

Hanson argues in its post hearing brief, that none of the issues raised by Garza can be considered protected activity. The argument is supported largely by declarative sentences that contain no reference to Commission precedent. As I have found that the actions indeed constitute protected activity in Garza's prima facie case, I found nothing in Hanson's post-hearing brief, or in the record, that sufficiently rebuts that finding by a preponderance of the evidence. Accordingly, Hanson has failed to meet its burden that no protected activity occurred.

(2) The Adverse Action Was Not Motivated in Any Part by the Protected Activity

Scherer denied any knowledge of Early's mistreatment of Garza. On direct, Scherer testified that he had little contact with Garza prior to arriving at the mine. Tr. 17-18. However, on rebuttal, Scherer clarified that testimony to state that he did have contact with Garza sometime in 2011, that he observed Garza's performance, and that he was very critical of that performance in an unnamed report that was not offered into evidence. Tr. 652-54. I found Scherer's testimony was not persuasive on that issue. Likewise, Scherer's professions of ignorance and his evasiveness on the questions of the circumstances of Early's departure were difficult to believe given the level of responsibility placed upon him when he began working at the mine in July 2012. Tr. 16-17, 565-66. Bechly's testimony of Scherer's responsibilities at the plant certainly raised the question of how Scherer could not have known of the specific circumstances of Early's departure when it was Scherer who was the "company insider" sent to observe and to document Early's operation of the mine. Tr. 565-66. In fact, Bechly testified in detail to Scherer's criticisms of Early's management of the Servtex plant that ultimately led to the decision to terminate Early. *Id.* I infer that Scherer wanted to downplay Early's termination, and the circumstances that led to that departure, because they might be viewed as assisting Garza's discrimination case. As a result, I find that Scherer's instinct to protect the company served to limit his overall credibility as a witness.

Likewise, I find it inconceivable that Bechly, as a human resource professional, never insisted upon documentation or adherence to the progressive discipline policy, either for the Garza demotion in 2011, or at the time of his termination. Bechly also showed no curiosity as to whether Garza had engaged in protected activity prior to his termination, and seemed to exhibit a surprising lack of knowledge of the provisions of the Mine Act that offer protections to miners against retaliatory action by the mine. Bechly testified that he relied on Early's and Scherer's observations alone in making his recommendations for termination. However, to ignore Garza's side of the story, and rely upon the opinion of a man who would be terminated for his poor operation of the plant only weeks later -- at least in part as the result of his mistreatment of employees -- raises the question of what level of analysis and thoughtful guidance Hanson human resources provided to its managers in this instance. Nevertheless, neither Scherer's unlikely lack of knowledge of the circumstances of Early's departure, nor Bechly's odd lack of desire to see that a reasonable investigation of the facts of the termination was conducted, were factors in my decision.

The issue here is neither the motivation of Scherer, who was not the plant manager at the time of Garza's termination, nor that of Bechly in his role as human resource director. Rather, the factual circumstances of this termination involve the retaliatory conduct of Early. If Early acted with animus in retaliation for protected activity, then Scherer's and Bechly's belief that this incident was a termination offense has little probative value. *Nat'l Cement Co. of California*, 33 FMSHRC at 1069 (lack of knowledge of protected activity or discriminatory animus by others does not remove the "taint" of retaliation.) The bad faith of Early is imputed to the company and cannot be sanitized by Scherer's or Bechly's lack of knowledge of Early's motivation.¹⁸ "An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Id.* at 1067 (citing *Metric Constructors, Inc.*, 6 FMSHRC at 230 n.4).

As discussed previously, the animus toward Garza by Early was palpable. The circumstances of the demotion that occurred about a year prior to the termination raise questions about whether the demotion itself was retaliatory, however, that question is not directly before me. It does, however, point to a long history of animus by Early against Garza. There is no question that Early disliked Garza. Early's treatment of Garza as a subordinate was abysmal. Likewise, Early's history of lax oversight of safety in favor of increased production is well established. Even company officials had to admit that Early was not a pleasant person to work with, and that his safety record left something to be desired. Tr. 55.

Also, the decision to terminate for failure to follow the lockout/tagout procedure raises questions. Garza's supervisor was under the apparently mistaken belief that lockout/tagout of the diesel motor was not necessary if the clutch was disengaged. Tr. 88-89. Both Garza and Gallegos testified credibly that this procedure was accepted practice at the plant notwithstanding company policy to the contrary. Thus, the decision to terminate Garza for offenses that were, at least during Early's regime as plant manager, somewhat common safety shortcuts, strikes me as an overreaction. Nevertheless, I do not substitute my judgment for that of company management. Only if Garza can establish that the decision to terminate was the result of his protected activity is the management decision subject to reversal here. *Driessen v. New Goldfields, Inc.*, 20 FMSHRC at 328.

Garza's undisputed testimony that Early got very angry at earlier safety concerns raised by Garza certainly provides evidence that Early's animus toward Garza was long held and continuing. The incident involving scraping the wall was clearly protected activity by Garza that was met with furious indignation by Early for its interference with production. Also, Garza testified credibly that he made multiple requests for safety equipment and until Scherer placed the order for his harness, his prior requests had been ignored. A request for safety equipment is a protected activity. *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Company*, 3 FMSHRC 2313, 2318 (Oct. 1981) (ALJ). Thus, Early's late conversion to safety watchdog, after the arrival of Scherer on the scene, strikes me as more self-serving than a rational, dispassionate review of Garza's conduct on August 29, 2012. I believe Early was more likely driven in part by

¹⁸ However, the company can still prove its case that it would have taken the adverse action in any event. This is a different analysis than the analysis under the prima facie case that the adverse action was motivated, at least in part, by the discriminatory animus. On rebuttal, the company must refute the prima facie finding of animus. In its affirmative defense, it must prove that while animus was present, it would have taken the action in any event.

a desire to keep his job, which was clearly in jeopardy after Scherer arrived at the mine. Early no doubt understood that his pressure on production at the expense of safety was not well received by the company. His mistreatment of his employees was also apparently well understood by Hanson management during this period. Tr. 206-07. Indeed, Early's eventual termination several weeks after Garza's dismissal certainly confirms that Early's operation of the mine was less than textbook.

Further, the issuance of the write-up against Garza for the blown tire incident, when it was apparent that Garza had nothing to do with the abuse of the equipment, is evidence that Early was after Garza as recently as just a few weeks before the termination. The circumstances of Garza's demotion, following complaints and concerns regarding safety issues, and Early's history of verbally abusive treatment of Garza, leads to the reasonable conclusion that Early's motivation on August 29, 2012, was at least in part in retaliation for Garza's previous protected activity. Early had Garza in his sights for at least the prior two years, and likely perceived Garza as an ongoing irritant in his efforts to maximize production. If Early had objections regarding Garza's performance as an employee, Hanson offered no evidence to support those criticisms in the way of performance appraisals, human resource documents, or other reports. The only corrective action form submitted by the company tended to prove further animus toward Garza by Early, rather than support any concern with Garza's performance on the job.

In addition, Garza also told the inspector on August 29, 2012, that the reason he was on the crusher without a safety harness was that he did not have one. That statement to the inspector was also protected activity, and would tend to discredit Early, who was already on shaky ground for his lax safety practices at the mine. Thus, to bolster his safety credentials in the presence of Hanson upper management, Early advocated for the termination of both Garza and Gallegos in an apparent effort to portray himself as a safety conscious manager. In fact, even Scherer counseled against the termination of Gallegos, placing Early in the fortuitous position of appearing to Hanson management to hold his employees to higher safety standards than might Scherer, when the record reflects that safety was never a priority for Early prior to August 29, 2012. Thus, I find that Early's discriminatory animus toward Garza was at least in part the result of Garza's protected activity described herein and Hanson has failed to meet its burden to rebut Garza's prima facie case.

C. Respondent's Affirmative Defense

If an operator is unable to rebut a prima facie case of discrimination, it may nevertheless prove an affirmative defense by showing that: (1) the discharge was also motivated by the miner's unprotected activity; and, (2) it would have taken the adverse action in any event for the unprotected activities alone. This affirmative defense, termed the *Pasula-Robinette* test, must be established by the employer by a preponderance of the evidence. *Robinette*, 3 FMSHRC 803, 817-818; *Pasula*, 2 FMSHRC 2786. Having determined that the adverse action was motivated at least in part by discriminatory animus, the company bears the burden of persuasion that the discharge was also motivated by unprotected activity.

The Commission has explained that an affirmative defense should not be examined superficially or approved automatically once proffered. *Nat'l Cement Co. of California*, 33

FMSHRC at 1072 (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982)). Rather, in reviewing an affirmative defense, the judge must determine whether it is credible and, if so, whether it would have motivated the particular operator, as claimed. *Id.*, citing *Bradley*, 4 FMSHRC at 993. Pretext may be found where the asserted justification is weak, implausible, or out of line with the operator's normal business practices such that it was seized upon to cloak discriminatory motive. *Chacon*, 3 FMSHRC at 2516; see also *Nat'l Cement Co. of California*, 33 FMSHRC at 1072, citing *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38). As discussed above, the parties share equal and competing burdens at this stage. While the company must prove its affirmative defense by a preponderance of the evidence, the miner must establish pretext in the assertion of the proffered justification by the same burden. Where two parties carry equal and competing burdens, it is up to the Judge to determine by a preponderance of the evidence which party has met its burden.

(1) Was the Adverse Action Also Motivated by Unprotected Activity

Garza's breach of safety protocols was the "trigger event" for his termination. The operator cited no other basis for the action, and the fact that Garza violated the safety protocols on the date in question is not in dispute. Thus, notwithstanding the findings of animus against Garza by Early, and the establishment of a prima facie case, I find Hanson has brought forth sufficient evidence to establish that the adverse action was also motivated by unprotected activity.¹⁹

(2) Would Respondent Take the Action for the Unprotected Activity Alone

In this analysis, I must look to the evidence proffered by the company to support its argument that it would have taken the adverse action against Garza for the unprotected activities alone. The burden rests with Hanson to prove this prong by a preponderance of the evidence. At the same time, I do not view Hanson's evidence in a vacuum. Rather, I must weigh the evidence Hanson presents against any evidence put forth by Garza that the proffered reason for his discharge, in this case violation of safety protocols, is a pretext. First I review the evidence submitted by Hanson.

(a) Testimony of Scherer

Scherer testified that he was involved in the decision to terminate Garza. Tr. 52-53. In that testimony Scherer admitted that he has observed employees working in positions similar to Garza without fall protection. Tr. 52. Scherer admitted that not all employees will be terminated for such an offense. *Id.* He indicated that when he witnessed an employee violating such a safety protocol, he would counsel the employee immediately, and then determine later whether

¹⁹ Accordingly, this is a "mixed motive" case. *Sec'y of Labor, Mine Safety & Health Admin. on Behalf of Lawrence L. Pendley*, 34 FMSHRC 1919, 1923, n.3 (Aug. 2012). See *supra* notes 10, 13.

disciplinary action was necessary. Tr. 53. Thus, the lack of fall gear alone does not appear to be a termination offense.

Scherer was particularly critical of Early's management of the facility, citing the lax safety culture that was present, and the lack of enforcement of safety rules under Early's tenure. Tr. 54-55. Included among the areas where Early was lax in safety management was following the lockout/tagout procedure. Tr. 55-56. He also testified to an employee who violated the lockout/tagout procedure. Tr. 56. That employee apparently received a three day suspension but was not terminated. Tr. 188-89. Thus, I find that failure to follow the lockout/tagout procedure is not a termination offense at Servtex.

Scherer justified the harsh treatment of Garza based upon the fact that Garza was a former supervisor. He testified that supervisors are held to a higher standard. Tr. 98, 130. Scherer explicitly denied that Garza's termination had anything to do with protected activity. Tr. 88. Nevertheless, Scherer admits that it was Early who terminated Garza. Tr. 55.²⁰

For his part Scherer could not identify any other Servtex employees, or employees of Hanson who were terminated for similar offenses. He stated that if the offense had been one or the other, the likely discipline would have been a three day suspension. Tr. 188-89. However, Scherer felt the combination of the two offenses warranted discharge. While he denied the presence of the inspector or the citations resulted in the harsher discipline, he stated that he would have disciplined Garza exactly the same way had it been his decision alone. Tr. 170

(b) Testimony of Bechly

Hanson's other evidence that it would have taken the same adverse action in any event was presented through the testimony of Bechly. In his position, Bechly could be expected to know of any number of situations in which similar behavior resulted in termination. However, his testimony did not shed much light on that effort.

Bechly testified to supervisors at other facilities who were terminated. In that discussion, he mentions two (non-supervisory) employees who were terminated "for failure to lockout/tagout after having been counseled and talked to substantially about that[.]" Tr. 521. He also testified to a "lead person, who created an unsafe situation in his work environment" who was fired. Tr. 521-22. Bechly offered no documentation to support these prior terminations, although, as human resources director one could assume that such documentation was readily

²⁰ Respondent's post-hearing brief argues that the termination was a group activity, and not one man's decision. However, the testimony cited above establishes that Early was the decision maker, and the others on the call simply agreed with the decision. While the others may not have had knowledge of the protected activity, or Early's discriminatory motive, that lack of knowledge does not excuse Hanson its liability for an unlawful termination. *Nat'l Cement Co. of California*, 33 FMSHRC at 1069 (lack of knowledge of protected activity or discriminatory animus by others does not remove the "taint" of retaliation).

available to him. As such, this hearsay evidence from Bechly is all the company produced to establish similar adverse actions at other facilities.²¹

Bechly testified that both Scherer and Early were asked if there were any other instances of others behaving in the same manner and he was told no. Tr. 524. This contradicts Scherer's own experience of both employees lacking fall gear and employees failing to follow the lockout/tagout procedures. Bechly further denied being aware of any allegations that other supervisors at Servtex may have allowed employees to engage in similar violations, but indicated that information may have had an impact on his decision in Garza's case. Tr. 522-23. "If it happened and we had not acted in the same manner, we would be asking questions why are we doing this different here." *Id.*

D. Complainant's Evidence of Pretext

In *Nat'l Cement Co. of California*, the Commission analyzed the issue of pretext in the context of other federal discrimination statutes, and concluded that a complainant may establish that an operator's explanation is not credible by demonstrating either: (1) that the proffered reason has no basis in fact; (2) that the proffered reason actually did not motivate the adverse action; or (3) that the proffered reason was insufficient to motivate the adverse action. *Nat'l Cement Co. of California*, 33 FMSHRC, at 1073, citing *Madden v. Chattanooga City Wide Service Dep't.*, 549 F.3d 666, 675 (6th Cir. 2008) (citing *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)), *overruled on other grounds*, *Geiger v. Tower Automotive*, 579 F.3d 614 (6th Cir. 2009) (emphasis in original); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993). The first type of showing consists of evidence that the proffered basis for the complainant's discharge never happened, *i.e.*, that it was factually false or did not exist. *Id.* The third type of showing generally consists of evidence that other miners were not fired even though they engaged in substantially similar conduct that allegedly motivated the discharge of complainant. Both types of rebuttal are direct attacks on the credibility of the operator's proffered motivation for firing the miner. *Id.* Unlike the first and third discussed above, the second showing "is of an entirely different ilk." *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct *could* motivate dismissal. The plaintiff's attack on the credibility of the proffered explanation is, instead, an indirect one. In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was *more* likely than that offered by the defendant. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it "more likely than not" that the employer's explanation is a pretext, or coverup. *Id.*

²¹ In addition to the lack of documentation, the company did not produce the plant managers involved in these decisions, thus, I had no ability to hear testimony from the direct participants in these matters to determine whether they were relevant to the issues raised in this case.

One of the more obvious challenges for Respondent in this case is that the decision to terminate Garza is not consistent with the suggested punishment under the progressive discipline policy for these transgressions. Under the progressive discipline policy, the most likely penalty for Garza's infractions would be a three-day suspension, or perhaps even two three day suspensions, one for each transgression. Resp. Exh. 8. Although Garza's behavior resulted in two citations to the company, given the lesser treatment for the same offense involving other miners, and the fact that Early observed Garza on the crusher without a harness on prior occasions, the punishment in this instance does not seem to fit the crime. Thus, when an individual is singled out for harsher treatment than similarly situated employees, we look to the circumstances that might lead to the decision to do so. *Nat'l Cement Co. of California*, 33 FMSHRC at 1073.

Hanson argues that because Garza's infractions were of two major safety violations, termination was appropriate under the circumstances notwithstanding the progressive discipline policy. The argument is not entirely without merit. Certainly the progressive discipline policy allows for the company to ignore its own guidelines whenever it deems it appropriate.²² In this case, the decision to deviate from the company policy raises some concerns regarding the company's motivations. A company's failure to follow its own policies can be evidence of pretext. *See Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005) (failure to follow company's own procedures may be evidence of pretext). Yet, I do not believe that this deviation from the progressive discipline policy itself was sufficient evidence of pretext. I credit Bechly's testimony on the application of the progressive discipline policy in this case. Thus, I do not rely upon Hanson's uneven application of the progressive discipline policy to establish pretext.²³

However, I do find it difficult to reconcile the disparate treatment that occurred with respect to Garcia for the same violation that led, in part, to Garza's termination. *Chacon*, 3 FMSHRC at 2512 (pretext may be established by disparate treatment).²⁴ One obvious difference between Garza's transgression and Garcia's transgression was the presence of the MSHA inspector. Another is Early's well documented longtime animus toward Garza. It strikes me as incredulous to suggest that the offense for which Hanson strongly argues is part of the reason it had little choice but to terminate Garza was worthy of little more than a verbal warning to Garcia. If nothing else, it is clear evidence that enforcement of safety violations at the plant under Early's regime was haphazard and random. If the particular safety violation of which

²² Of course, a progressive discipline policy that permits the company to ignore the progressive discipline policy is not much of a progressive discipline policy at all.

²³ I also find that given Garza's admission of the facts that establish that he failed to follow company policy regarding safety on the date of his termination, Garza clearly cannot establish that the proffered reason has no basis in fact.

²⁴ This attack on the employer's proffered reason addresses the third prong referenced in *Nat'l Cement Co. of California*.

Hanson contends is so egregious that termination must ensue, then one can assume that message must have been clearly sent to all Servtex supervisors to ensure standard and proper enforcement. Yet, in his testimony Mosquedo seemed nonchalant about the lack of safety equipment when Garcia was the violator. Thus, if strict companywide enforcement was the policy, as Scherer would have us believe, it seems to have escaped Mosquedo entirely.

More likely, the inference I draw from this evidence is that the lax enforcement of safety violations as testified to by both Gallegos and Garza was standard procedure under Early's undistinguished tenure. Scherer confirms that Early created a culture where lax enforcement of safety was the norm. Tr. 55. This evidence leads me to the conclusion that Mosquedo did not harshly discipline Garcia for this particular transgression because it was much more commonplace than the company cares to admit in this proceeding.²⁵ While the parties all acknowledge that working on the crusher without safety equipment is wrong, and violates company safety policy as well as MSHA regulations, the message Early sent to his supervisors was that such violations should not be enforced if they interfere with production. Thus, I find that on the date that Garza was on the crusher, in clear violation of safety protocol, he was following the standard level of mine safety in the Servtex plant, and complying with the unwritten policy of the Servtex plant to value production over safety.²⁶

I note that safety protocols and regulations are not present for the convenience of management to enforce as they see fit, or to use as a tool to discipline disfavored employees, or as some expedient defense to deflect attention from a pattern of poor safety compliance at a particular facility. Early created an environment of bullying employees who he perceived criticized his lax safety enforcement, and his policy of placing production over safety at the risk of his employees was well documented. His sudden conversion to zero tolerance for safety infractions on August 29, 2012, is difficult to accept as credible. The disparate treatment of Garza in this case is evidence of pretext.

As a basis to defend the disparate treatment of Garza, Hanson repeatedly noted that Garza was a former supervisor, and taught training classes, and thus should be held to a higher standard. Tr. 98, 130-31; Resp. Post-hearing Brief at 1. This argument conveniently ignores the fact that the company had demoted Garza from supervisory position a year earlier, under somewhat questionable circumstances.²⁷ Holding Garza to the higher standard of supervisor a

²⁵ In fact, Gallegos credibly testified that it was normal procedure for individuals to access the top of the crusher without fall protection. Tr. 214.

²⁶ Garza credibly testified that in July 2012, Early saw him on the crusher without a safety harness, and with the engine in idle, and that Early's concern was not that Garza lacked safety equipment, but that Garza's actions slowed production. Tr. 411-12. This incident is further evidence of Early's desire to place production over safety, and reinforces the notion that Early's safety concerns on August 29, 2012, were pretextual. *See supra* note 9.

²⁷ On rebuttal, Scherer testified as to a report not offered into evidence that was critical of Garza's performance as supervisor. I did not find the testimony helpful as it was not accompanied by any record of these alleged criticisms of Garza's performance. If these records

(...continued)

year after demoting him to a lesser position simply does not pass the smell test. Garza was not a supervisor, and thus, cannot be argued to be held to any higher standard of safety at the plant than any other employee, including Garcia. The company made the decision to treat Garza as less than a supervisor when they demoted him. It cannot be a post-hoc justification that his prior service as supervisor now warrants a higher standard. I completely reject this attempt by the company to bootstrap a higher standard on the same employee they demoted so cavalierly a year earlier.²⁸

The company also went to great lengths to prove that suitable protective gear was readily available to Garza. Tr. 134, 160, 240, 606. The gear was maintained in the offices in the upper part of the mine, while Garza operated at the base of the mine. Hanson argues that Garza simply needed to drop by any of the offices to pick up his safety gear at the beginning of the shift. I found this line of testimony to be of little value. There is no factual dispute that Garza violated company policy by standing on top of the crusher without protective fall gear. Based on this testimony, I could also infer that if the company were so concerned about the use of fall protection, they should have kept the fall protection close to the crusher for easy access, which they admit they did not. However, whether the fall gear was sitting on the ground in front of Garza, or was back in an office at the top of the mine, is of little consequence here, as the fact of the violation is not in dispute. The issue is whether the company's proffered reason for termination was a pretext.

E. Weighing Complainant's Burden versus Respondent's Burden

In the absence of Early's testimony, Hanson was unable to refute the allegations of Early's misconduct, or his very clear animus toward Garza in any meaningful way. Thus, Hanson could not rebut Garza's prima facie case establishing animus. Hanson was further unable to bring forth evidence to deny that Garza had engaged in protected activity, and thus was also unable to refute that portion of Garza's prima facie case. Thus, having failed to rebut the prima facie case, Hanson must establish its affirmative defense to relieve liability for Early's discriminatory conduct.

In doing so, Hanson must establish that it would have taken the action based solely upon the unprotected activity. I find that Bechly's testimony of other miners who were terminated for similar offenses was hearsay and did not rise to the level of reliability necessary to meet the company's burden. He offered no documents of these terminations to determine whether the

²⁷(...continued)

were the basis for Garza's demotion, I find it unusual they were not part of the record for Bechly's review, or part of the personnel file for Garza. As such, that testimony was given little weight. *See supra* note 4.

²⁸ I likewise reject the argument that Garza's service on the safety committee somehow transforms his transgression into a termination offense. Service on the safety committee in a facility that placed so little emphasis on safety cannot be perceived as anything other than a disingenuous post-hoc justification for termination.

circumstances were, in fact, similar. The absence of that documentation left Bechly's testimony, and to some extent Scherer's testimony, as the only evidence proffered by Hanson that it would have taken the adverse action in any event.²⁹

Hanson's affirmative defense was further undermined by the failure of Servtex management to take any disciplinary action against Garcia when he engaged in the same misconduct for his failure to wear protective gear while adding oil to the gearbox on the top of the crusher. As that single offense barely merited a verbal warning in Garcia's case, Hanson was left to prove either that Garza's failure to do the proper lockout/tagout procedure was a termination offense in and of itself (when its own progressive discipline policy as well as prior actions call for a three day suspension), or that the unique combination of the two safety offenses justified termination.

Garza was a first time offender, according to company records, for both offenses. Prior history at the plant establishes that being on top of the crusher without fall gear was not considered a serious offense at Servtex, notwithstanding company policy to the contrary. If it were, Mosquedo would have strongly disciplined Garcia for the offense, which occurred just a month or two before Garza's termination. In the face of that evidence, Hanson would have to prove that the lack of protective gear combined with the failure to follow the lockout/tagout procedure demands termination. Yet, given the lax safety environment at Servtex during Early's tenure, and the testimony from Garza's supervisor that even he believed Garza had followed proper protocol with respect to the lockout/tagout procedure, Hanson simply cannot meet its burden that such behavior would have resulted in termination of this employee absent the taint of Early's discriminatory animus.

Simply put, Hanson failed to demonstrate by a preponderance of the evidence that the combination of both offenses was a termination offense. Scherer's testimony inferred that if in the position of Plant Manager at the time of Garza's offense, he might have instituted a more strict record of compliance with safety standards than did Early. However, Scherer was not the plant manager at the time of the termination, thus, his testimony of what he considered a termination offense or how he would have handled a similar situation is not definitive. Hanson offered no evidence of any individual at the Servtex plant fired for similar violative behavior in the recent past. I find the evidence presented by Bechly of similar terminations was not persuasive and was not supported by any documentary evidence (though such documentary evidence was presumably available to Hanson). I further note that none of the anecdotes offered of terminations for similar behavior occurred at the Servtex plant. In the absence of supporting documentary evidence of past termination actions for similar offenses that might tend to support

²⁹ The progressive discipline policy was not helpful to Hanson in this case. It did not specify or require termination when a miner is faced with two or more allegations of safety violations. Thus, reliance on that policy to satisfy the burden was not persuasive.

Hanson's affirmative defense, I find Hanson has failed to establish its burden by a preponderance of the evidence.³⁰

A complainant may demonstrate pretext where the asserted justification is weak, implausible, or out of line with the operator's normal business practices such that it was seized upon to cloak discriminatory motive. *Nat'l Cement Co. of California*, 33 FMSHRC at 1072; *Chacon*, 3 FMSHRC at 2516. Accordingly, after carefully weighing all of the evidence presented by both parties, I find that Garza has established by a preponderance of the evidence that the proffered reason for the termination was pretextual. In applying the *National Cement* tests as guidance, I find that that the proffered reason was insufficient to motivate the adverse action. I find persuasive the evidence that Garcia was treated differently than Garza for a similar infraction, as well as the company's inability to provide sufficient documentation to prove similar adverse actions. I also find that the evidence of discriminatory animus and the culture of indifference to safety violations weigh in favor of pretext. Given lax enforcement of safety violations at the Servtex plant, I find that the termination of Garza was not in line with the operator's normal business practices. Thus, the weight of evidence in this case lies in favor of a finding that the termination was pretextual.

In the end, it is clear that with Early at the helm, the lax safety environment at Servtex permitted individuals to violate safety protocols, often without punishment. In fact, it could be inferred from the record that such violations were encouraged when necessary so as not to inhibit production. The preponderance of the evidence establishes that this lax safety environment prevailed at Servtex throughout the period in question here. Although the company did take corrective action after the fact to improve the safety environment when it terminated Early, that post-termination corrective action did nothing to alleviate the situation that existed on the day that Early terminated Garza.

On August 29, 2012, Servtex was a plant in trouble. Early had proven himself to be an incompetent manager, and ongoing lax enforcement of safety violations invited MSHA's citations on that day. For that, Hanson had no one to blame but itself. The termination of Garza purporting to be for his breach of safety protocols served as a convenient scapegoat for Early's mismanagement of the facility. It was not, however, representative of normal business operations at Servtex, nor did it remove the taint of Early's discriminatory animus. Accordingly, Hanson has failed to meet its burden on its affirmative defense and Garza is entitled to judgment in his favor.

V. Conclusion

Garza's termination was motivated, at least in part, by Early's discriminatory animus toward Garza based upon earlier, documented protected activity, and was evidenced by a well-established pattern of animosity toward Garza by Early beginning at least with the demotion in

³⁰ As the parties maintain competing burdens, this finding logically means that pretext is established. However, an analysis of Garza's evidence of pretext is required to satisfy the Commission's requirements for the record, and to demonstrate how competing burdens demand competing analysis.

2011, and concluding with his termination. Although aware of Early's shortcomings, Hanson management chose to ignore what was occurring at the plant on a daily basis, and made a decision in a vacuum to terminate Garza without the benefit of an investigation into the circumstances that led to Garza's departure from safety protocol. It did so at its peril under the Mine Act. *See Merit Contractors, Inc.*, 6 FMSHRC at 230 (precipitous discipline without proper investigation is done at the mine's own legal risk). Accordingly, I find that Garza has established a prima facie case under section 105(c), and that Hanson failed to rebut that prima facie case, either by establishing that the protected activity did not occur, or by establishing that the company would have taken the adverse action in any event for the unprotected activities alone. In so finding, I also find that Garza established pretext by a preponderance of the evidence.

ORDER

Manuel Garza's discrimination complaint under section 105(c)(3) is **GRANTED**.

It is **ORDERED** that Garza be reinstated immediately to his former position as leadman at Hanson's Servtex facility with an equal or greater rate of pay.

It is further **ORDERED** that Hanson shall pay Garza backpay, interest, and full benefits from the date of termination, and reinstate such seniority as he is entitled as though no action had been taken against him.

It is further **ORDERED** that Hanson shall also pay to Garza his reasonable attorney's fees, costs, and expenses associated with this complaint.

It is further **ORDERED** that Hanson shall **EXPUNGE** from its personnel records any reference to Garza's termination on August 31, 2012, the circumstances surrounding his termination, and this discrimination action.

It is further **ORDERED** that Hanson shall post a copy of this *Decision on Liability* and *Final Order* at all of its mining facilities, placed in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days, together with a posting by Hanson at such properties that it will not violate the Mine Act.

PENDING A FINAL ORDER

The judge retains jurisdiction of this proceeding pending the issuance of a final order granting relief. The parties are **ORDERED** to work together to determine the amount of back pay, interest, and attorney's fees to which Garza is entitled, and to jointly submit to this Court not later than thirty days from receipt of this Decision, a stipulation as to the proposed award of damages, together with specifics on the calculation of the damages. Such stipulation will not preclude Respondent's rights to seek review of this Decision. I will retain jurisdiction on this case until receipt of that joint report and issuance of a Final Order and this Decision shall not become final until issuance of my Final Order.

If the parties are unable to come to agreement within thirty days, they shall notify me in writing, and I will schedule a further proceeding limited to the issue of damages at a time in the near future.

Following issuance of the Final Order, this case will be referred to MSHA for assessment of a civil penalty. 29 C.F.R. § 2700.44(b).

/s/ James G. Gilbert
James G. Gilbert
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 16, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2013-66
Petitioner,	:	A.C. No. 11-03054-301718
	:	
	:	Docket No. LAKE 2012-506
	:	A.C. No. 11-03054-284471
	:	
	:	Docket No. LAKE 2013-251
	:	A.C. No. 11-03054-309969-01
	:	
	:	Docket No. LAKE 2013-252
v.	:	A.C. No. 11-03054-309969-02
	:	
	:	Docket No. LAKE 2013-307
	:	A.C. No. 11-03054-312677
	:	
	:	Docket No. LAKE 2012-896
	:	A.C. No. 11-03054-298858
	:	
BIG RIDGE, INC.,	:	
Respondent.	:	Mine: Willow Lake Portal

AMENDED DECISION AND ORDER

Appearances: Ryan Pardue, Office of the Solicitor, U.S. Department of Labor
1999 Broadway, Suite 800, Denver, CO 80202 for Petitioner

Lauren Polk, Office of the Solicitor, U.S. Department of Labor
1999 Broadway, Suite 800, Denver, CO 80202 for Petitioner

Arthur Wolfson, Jackson Kelly, 3 Gateway Center, Suite 1500,
401 Liberty Ave., Pittsburgh, PA 15222 for Respondent

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Big Ridge, Inc. at its Willow Lake Portal mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act” or “Act”). The cases include six separate dockets that originally included 33 contested violations with a total proposed penalty of **\$801,018.00**. The parties settled all but eight of these contested violations prior to hearing. The parties presented testimony and documentary evidence at the hearing held in Benton, Illinois beginning December 3, 2013.

II. BACKGROUND

Big Ridge, Inc. (“Big Ridge”) operates an underground bituminous coal mine, the Willow Lake Portal mine (the “mine”) in Equality, Illinois. The mine is subject to regular inspections by the Secretary’s Mine Safety and Health Administration (“MSHA”) pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Big Ridge, Inc. is the operator of the mine and that its operations affect interstate commerce and it is subject to the jurisdiction of the Mine Act. Tr. 9.

At hearing, the Secretary presented testimony by MSHA Inspectors Chad Lampley, Larry Morris, Eddie Kane, Scott Lee, and Dean Cripps. I have organized my findings by individual docket and detailed my final ruling for each citation within its respective subsection. For the eight citations contested at hearing, the Secretary has assessed a combined monetary penalty of **\$316,142.00**.

The Secretary designated the majority of these contested citations as “Significant & Substantial” (S & S) violations that also constituted an “unwarrantable failure” to comply with mandatory safety standards. Additionally, for five of these citations, the Secretary assigned specially assessed monetary penalties in excess of the standard penalty calculation. At hearing, Big Ridge contested the factual representations of the testifying MSHA inspectors, the underlying legal basis of the citations, the Secretary’s gravity and negligence designations, and the assessed monetary penalty amounts.

As such, I have prepared a Statement of Law outlining the Commission’s instructions regarding: 1) Statute and Safety Plan Interpretation; 2) Burden of Proof; 3) Significant and Substantial violations; 4) Unwarrantable Failure; and 5) Civil Penalty and Special Assessment. I have followed these guidelines for each of the eight contested violations.

The hearing for these eight citations lasted three days and produced a 670 page transcript with numerous exhibits. The parties submitted a combined total of over 200 pages of post-hearing briefs articulating their position on the evidence presented at hearing. I have reviewed all of this evidence at length. In the interest of clarity, I have not included a summary of the testimony presented, but have cited to the testimony, exhibits, and arguments I found critical to my ultimate ruling within my analysis.

III. STATEMENT OF LAW

A. Interpretation

Mandatory site specific safety plans, including ventilation plans, are enforceable as mandatory standards. *UMWA v. Dole*, 870 F. 2d 662, 671 (D.C. Cir. 1989); *Ziegler Coal Co. v. Kleppe*, 536 F. 2d 298, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995).

Because MSHA-required site specific safety and health plan provisions are enforceable as mandatory standards,

The operator is entitled to the due process protection available in the enforcement of regulations... When a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly

Energy West Mining Co., 17 FMSHRC 1317-18 (internal citations omitted).

However, the Secretary is not required to provide the operator actual notice of its interpretation of a mandatory site specific safety standard, rather,

The Commission has applied an objective standard of notice, i.e., the reasonably prudent person test. The Commission has summarized this test as ‘whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.’

Id. at 1318 (internal citations omitted).

B. Burden of Proof

The Commission has long held, “In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation.” *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (August 1992). The Commission has described the Secretary’s burden as:

The burden of showing something by a “preponderance of the evidence,” the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.

RAG Cumberland Res. Corp., 22 FMSHRC 1066, 1070 (Sept. 2000); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989).

The Secretary may establish a violation by inference in certain situations. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153. Any such inference, however, must be inherently reasonable, and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984).

If the Secretary has established facts supporting the citation, the burden shifts to the respondent to rebut the Secretary's prima facie case. *Construction Materials*, 23 FMSHRC 321, 327 (March 2001) (ALJ Feldman).

C. Significant and Substantial

A violation is Significant & Substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operation. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The Secretary does not necessarily have to "prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (holding that failure to maintain emergency equipment was S&S despite low likelihood of emergency occurring); *See also Musser Engineering, Inc. and PBS Coals* 32 FMSHRC 1257, 1280-81 (Oct 2010) (PBS).

However, the Commission has recently reiterated that "it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial." *Black Beauty Coal*, 34 FMSHRC 1733, 1740 (August 2012) (upholding Judge's S&S determination that a ¼ mile wide gap in a protective berm created a safety hazard of trucks driving over a steep embankment) (*quoting US Steel Mining Co.*, 6 FMSHRC 1834, 1836)(Aug 1984).

Additionally, for accumulation violations of 30 CFR § 75.400, the Commission has ruled the question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965, 970-71 (May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC at 970-71;

Texasgulf, 10 FMSHRC at 500-03. An ALJ has also recently determined that roof control violations of 30 CFR § 75.202(a) are S&S when the Secretary demonstrates hazardous conditions in the roof and a reasonable likelihood of injury, but non S&S when the Secretary has failed to demonstrate a reasonable likelihood of injury. *Hidden Splendor*, 34 FMSHRC 3310, 3318, 3370 (ALJ Manning) (December 2012) (holding that (75.202(a) violation was S&S when roof was taking weight and sagging in area of travel but separate 75.202(a) violation was not S&S when Secretary did not show likelihood of miners travelling in that area); *See also C.W. Mining*, 15 FMSHRC 178, 186 (ALJ Cetti) (January 1993) (holding that 75.202(a) violation was non S&S when area was 5’8” high, difficult to get under, and resistant to scaling attempts).

D. Unwarrantable Failure

Section 104(d) (1) of the Mine Act states:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health standard... and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such findings in any citation given to the operator under this Act.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “willful intent”, “indifference”, or the “serious lack of reasonable care.” *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94. (February 1991).

The Commission considers the following factors when determining the validity of 104(d)1 and 104(d)2 orders: (1) the length of time that the violation has existed and the extent of the violative condition, (2) whether the operator has been placed on notice that greater efforts were necessary for compliance, (3) the operator’s efforts in abating the violative condition, (4) whether the violation was obvious or posed a high degree of danger and (5) the operator’s knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

E. Penalty Assessment

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

(1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. 820 (I).

Although I assess monetary penalties de novo, the Secretary has submitted proposed penalty amounts for each citation contested at hearing. Following 30 CFR §100.3, the Secretary submitted regularly assessed penalty amounts based upon point values corresponding to the six statutory criteria for Citation Nos. 8445336, 8431905, and 8444863. Pursuant to 30 CFR §100.5(a), the Secretary has submitted specially assessed penalty amounts for Order Nos. 8436212, 8436107, 8445268 and Citation Nos. 8444809 and 8445037.

For all penalty assessments, the Secretary bears the burden of establishing the proposed penalty is appropriate based upon the statutory criteria of Section 110(i) of the Act. *In re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 239, 241 (ALJ Broderick) (January 1992) (Order). Similarly, for specially assessed penalties in excess of the standard penalty calculation, the Secretary has the burden of establishing the existence of aggravating factors to justify such an increase. *S&M Construction, Inc.*, 18 FMSHRC 108, 1052-53 (ALJ Koutras) (June 1996); *Freeport McMoran Morenci, Inc.*, 35 FMSHRC 172, 181 (ALJ Miller) (January 2013)

In this matter, the parties have stipulated that Big Ridge is a large operator and Willow Lake is a large mine. Tr. 10. Big Ridge has not argued or presented any evidence indicating that any of the proposed penalties would affect its ability to continue business operations. I have discussed the violation history, negligence, gravity, and abatement efforts pertaining to each alleged violation within my findings for each order/citation.

IV. ANALYSIS LAKE 2012-506

A. Order No. 8436212

MSHA Inspector Chad Lampley issued Order No. 8436212 on September 12, 2011 for an alleged violation of 30 CFR § 75.400. Tr. 12. Lampley alleged within the citation that:

Accumulations of combustible materials are present at the 2nd North conveyor belt tail. Accumulations are in the form of coal fines with dry material in contact and pressed by the moving conveyor belt. Accumulations range from 24 to 16 inches in depth for a distance of approximately 6 feet.

Sec'y Ex. 1, 1.

Lampley determined that the violation was reasonably likely to result in a lost workdays or restricted duty injury, affected 2 persons, the violation was S&S, the result of Big Ridge's high negligence, and a 104 d (2) unwarrantable failure. Sec'y Ex. 1, 1. The Secretary has proposed a specially assessed penalty of \$66,142.00. Sec'y Br., 13.

1. Findings

30 CFR § 75.400 mandates 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 working areas or on diesel-powered and electric equipment therein.

On cross examination, Inspector Lampley confirmed that 30 CFR § 75.400 only prohibits accumulations of "combustible" material in active workings, and does not prohibit accumulations of water, rock dust, or other incombustible material. Tr. 62-63. As such, I have reviewed the testimony of Inspector Lampley and Shift Manager Podoriski in order to determine whether or not the accumulated material at the 2nd North tail pulley was indeed combustible. However, the Commission has firmly held that it is *not* necessary for an inspector to test the combustibility of an accumulation in order to issue a valid 30 CFR § 75.400 citation. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1290 (December 1998). Instead, a determination of combustible content can be based on the experience of the observing inspector. *Id.*

Furthermore, the presence of rock dust, moisture, and reject material within the accumulation of what Inspector Lampley described as "coal fines" does not remove the accumulation from coverage of the standard. Tr. 27. 30 CFR § 75.400 itself specifically prohibits "coal dust deposited on rock-dusted surfaces." Additionally, other ALJs have previously upheld 30 CFR § 75.400 citations when the accumulations contained wet portions. *Eastern Associated Coal Corp.*, 7 FMSHRC 601, 603 (April 1985) (ALJ Favaur). ALJ Favaur

reasoned that when an accumulation of partially damp coal is present in an active working area, a hazard still exists as, “water on the coal would only slow down the burning process; it would not make the coal incombustible.” *Eastern*, 7 FMSHRC 603.

Inspector Lampley credibly testified that the accumulation contained “a lot” of coal fines at the center of the accumulation and that the accumulation was dried out where the pile was in contact with the moving conveyor belt. Tr. 27, 29, 37. Inspector Lampley also credibly testified that the coal was so compacted that it took at least an hour for several miners to chip away at the pile and remove the material. Tr. 48. Big Ridge has contested Lampley’s assertion that it took over an hour to clean the accumulation, stating the belt had been restarted before Lampley returned to the area to officially terminate the order. Resp. Br., 12. However, I credit Lampley’s testimony and note that Big Ridge felt it necessary to provide additional workers in order to remove the accumulation. Tr. 48. Additionally, the photos offered by the Secretary substantiate Inspector Lampley’s observations regarding the compacted nature of the accumulations, as they show vertical shelves of what appears to be coal in close contact with the conveyor belt and tail roller. Sec’y Ex. 2A, 2B.

For this reason, while I find Shift Manager’s Podoriscki’s testimony generally credible, I do not believe his description of the accumulation as a wet slurry to be an accurate description of the accumulation. Tr. 89. If the accumulation had indeed been a recently formed wet slurry, it would not have stood up in a vertical shelf or been layered with distinct layers of rock dust. Tr. 30; Sec’y Ex. 2A, 2B.

Thus, I find that the material accumulation at the 2nd North tail pulley primarily consisted of compacted coal fines, and that these coal fines were dry and combustible where they were in contact with the moving conveyor belt. Therefore, I hold that Big Ridge violated 30 CFR § 75.400 by allowing this condition to develop and persist.

2. Gravity

Additionally, I find that Inspector Lampley correctly designated the accumulation as an S & S violation. I have already held that the accumulation constituted a violation of 30 CFR § 75.400. Coal accumulations at an active conveyor belt contribute to the discrete safety hazard of an increased likelihood of an ignition, fire, and/or explosion occurring.

In this particular situation, Lampley credibly testified that contact between the coal fines and the moving conveyor belt could produce enough frictional heat to start a fire. Tr. 50-51. I do take note that an ALJ has declined to designate a violation of 30 CFR § 75.400 as S & S when the accumulation was completely saturated with water. *United States Steel Mining*, 5 FMSHRC 1873, 1874-75 (October 1983) (ALJ Broderick) (upholding 330 CFR § 75.400 violation but removing S&S designation when accumulation was so wet it was too “soupy” to shovel). However, in this case, the compacted coal fine accumulation at the back of the tail pulley was dry and in contact with the moving belt. Tr. 26. As such, I hold that there was a reasonable likelihood of the accumulation resulting in a fire that would cause serious injuries to the belt worker and examiner assigned to this area. Tr. 52.

Finally, I find that if a fire did occur, it was reasonably likely that workers would suffer serious burn and or smoke inhalation injuries. As such, the Secretary has produced sufficient evidence to sustain all four elements of the *Mathies* S&S test.

I also hold that the presence of fire suppression systems do not motivate me to downgrade the violation from S & S. As explained by Inspector Lampley, the fire suppression systems in place may have detected a fire and prevented the fire from spreading, but they would not have prevented the fire from starting in the first place and endangering miners in the immediate area. In fact, the Commission has recently held that the presence of fire suppression systems does not “mean that fires do not pose a safety risky to miners.” *Big Ridge, Inc.*, 35 FMSHRC 1525, 1529 (June 2013) (quoting *Buck Creek Coal Co. v. FMSHRC*, 52 F. 3d 133, 136) (“*Big Ridge I*”). Therefore, I uphold Order No. 8436212 as an S&S violation.

I agree with Inspector Lampley in his determination that the violation most likely endangered the two miners who normally work in that area. Both Inspector Lampley and Shift Manager Podoriski testified that Ms. Tucker was working in the adjacent area at the time of the citation. Tr. 46; 89. Lampley also credibly testified that a fire at this area would also expose the belt examiner who was required by law to be in the belt travel way while the belt was operating. Tr. 52. To hold that this violation affected more than two persons would be to assume that any fire that occurred would be reasonably likely to spread smoke and or flame to other areas of the Willow Lake mine not detailed at hearing. I decline to make this assumption as I cannot completely ignore the presence of fire suppression systems, fire resistant conveyor belts, and split air ventilation systems at the Willow Lake mine. For these reasons I hold that the violation in Order No. 8436212 affected 2 persons.

3. Negligence

I also find that the violation was the result of high negligence on the part of Big Ridge. Inspector Lampley credibly testified that an agent-operator was required to examine the area at least once per shift and yet the accumulation was so compacted it appeared that it had been there for at least three shifts. Tr. 43, 53. Lampley also explained that MSHA had previously notified Big Ridge personnel in close-out conferences about the importance of properly cleaning up accumulations along conveyor belt lines. Tr. 54, 57. While Lampley stated that Big Ridge personnel informed him they had recently held safety meetings about cleaning up coal accumulations, the compacted nature of the accumulation and multiple layers of rock dust within the coal fines indicated that this was not a recently formed accumulation. Tr. 29-30. For these reasons, I find that Big Ridge’s clean-up efforts at this location were ineffective and demonstrated a high level of negligence.

4. Unwarrantable Failure

For Order No. 8436212, I find that the Secretary has produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

The entered photos and Inspector's Lampley testimony demonstrate that the accumulation of coal fines had built up past the midpoint of the tail pulley, indicating that the accumulation was significant and had lasted for some time. Tr. 22; Sec'y Ex. 2A, 2B. Additionally, the layers of rock dust within the compacted coal fines also show that the accumulations had persisted for at least several shifts. Tr. 30, Sec'y Ex 2B.

b. Notice to the Operator

Inspector Lampley credibly testified that MSHA had recently issued similar citations for impermissible coal accumulations at the Willow Lake portal mine. Tr. 54, 55. Additionally, Lampley stated that MSHA had emphasized the importance of important cleanup measures at conveyor belts in recent closeout meetings. Tr. 54, 57.

c. Prior Abatement Efforts

Big Ridge Shift Manager Podoriski credibly testified that he assigned an hourly employee to the dedicated task of cleaning conveyor belts in this area on a regular basis and had done so on the day of the violation. Tr. 85. Inspector Lampley corroborated that a miner was cleaning a conveyor belt in an adjacent area when he issued the citation. Tr. 46. However, the presence of rock dust within the accumulated and compacted coal fines indicates that previous clean-up efforts were insufficient. Tr. 32.

d. Obviousness of the Hazard and Degree of Danger

At the time of the citation, the accumulation was 24 inches high and in contact with the conveyor belt and roller. Tr. 22; Sec'y Ex. 1. Although Shift Manager Podoriski claimed that wet sprays could cause material to build up quickly, I have repeatedly noted that the presence of rock dust within the coal fines indicates that this condition had existed for several shifts. Tr. 32, 90. Similarly, although Big Ridge contends that the accumulation was too wet to ignite and Lampley concedes the accumulation was not warm at the moment, it is reasonably likely that the material would have continued to dry out and increase frictional heat under continued belt operation. Tr. 39-40. As such, the condition posed a high degree of danger as it increased the likelihood of a coal-belt fire occurring.

e. Operator's Knowledge of the Violation

Again, the presence of rock dust within the accumulation and compacted nature of the coal fines indicates the accumulation had existed for several shifts. Tr. 22, 32. As such, Big

Ridge examiners failed to identify the hazard and completely remove the accumulation during mandatory pre and on-shift examinations.

Thus, the Secretary has produced supporting evidence for all Commission unwarrantable failure factors, and Big Ridge's evidence of prior abatement efforts only point to previous ineffective efforts. Therefore, I hold that Big Ridge conducted cleanup efforts with a "serious lack of reasonable care" and hold that the violation was properly designated a 104 d (2) unwarrantable failure.

5. Penalty Assessment

Although I assess monetary penalties de novo, the Secretary has submitted a proposed specially assessed penalty of \$66,142.00 for Order No. 843212 without any evidence to justify or support the enhanced penalty. Secy. Br., 13. The Respondent introduced, over the Secretary's objections, a Special Assessment Narrative Form that indicates the penalty for Order No. 8436212 would have been regularly assessed a penalty of \$15,971.00. Resp. Ex. B. The special assessment form indicates that the specially assessed penalty was due to an increase in the number of points assigned to the likelihood of occurrence, severity of injury, number of persons affected, negligence, and unwarrantable failure penalty designations. Resp. Ex. B.

As indicated by Inspector Lampley's testimony and the Special Assessment Narrative Form, Big Ridge has been cited for numerous violations of 30 CFR § 75.400 at the Willow Lake Mine. Tr. 55; Resp. Ex. B. The parties have stipulated that Big Ridge is a large operator. Tr. 10. Big Ridge has not claimed or presented any evidence indicating that the proposed penalties will affect its ability to continue mining operations. I have found that Big Ridge's negligence was high due to a serious lack of reasonable care in properly cleaning up accumulated material. However, I find that its attempt at clean-up efforts prior to the citation, while insufficient, indicate that the accumulations were not the result of intentional misconduct or wanton disregard of the standard. I have determined that while an injury was reasonably likely to cause permanently disabling injuries to miners in the immediate area, the number of miners likely to be affected is two. Finally, Big Ridge personnel promptly and properly removed the accumulation from the tail pulley area after Inspector Lampley issue the order.

After considering these statutory factors, consulting, for reference purposes, the 30 CFR 100.3 penalty tables and noting the high degree of danger posed by the violation, I assess a civil monetary penalty of \$30,000 for Order No. 8436212.

B. Order No. 8436107

MSHA Inspector Larry Morris issued Order No. 8436107 as a 104(d)(2) unwarrantable failure on November 28, 2011 for an alleged violation of 30 CFR § 75.202(a). Tr. 239. Morris alleged within the citation that:

An area of roof, measuring 5 feet by 8 feet 8 inches, at cross cut # 92 along the 2nd Main North travel way, is not supported or otherwise controlled to protect persons from hazards related to

falls of the roof or rib. There is one loose roof bolt in this area and it had been painted a bright orange and was visible to even the most casual observer. The travel way between cross cut 3 92 and # 93 has tensor bolted to the roof and is bagged down with the weight of loose rock. These tensor bags must be cut down and the area re-supported.

Sec'y Ex. 6, 1.

Morris determined that the likelihood of injury was unlikely, that a resulting injury would be lost workdays or restricted duty, the violation was non S&S, 4 persons were affected, and that the violation was a 104 (d) (2) unwarrantable failure to comply with a mandatory safety standard. Sec'y Ex. 6. The Secretary has proposed a regularly assessed penalty of \$14,700.00 for Order No. 8436107. Sec'y Br., 32.

1. Findings

The cited standard, 30 CFR § 75.202 (a), requires that:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

Inspector Morris credibly testified that the base plate of the cited roof support bolt was bent and loose. Tr. 249. The Secretary introduced photos that clearly showed the bent condition of the base plate. Morris explained that the damaged bolt was part of the standard support pattern in this area and necessary under the mine's mandatory roof plan. Tr. 290. Respondent has not disputed the damaged condition of the roof bolt base plate or the violation itself. As such, I hold that Big Ridge violated 30 CFR 75.202 (a) by failing to repair the damaged base plate on the pattern roof bolt.

2. Gravity

Morris testified that the bent base plate was the only damaged bolt in the adjacent area and that the roof was sound in this specific area. Tr. 249, 255. Morris maintained at trial that he determined an injury was not reasonably likely to result from this condition. Tr. 256. For these reasons, I find that the cited condition was "unlikely" to result in injury and that the violation was appropriately designated as non S&S. The damaged bolt was located in a main travel way regularly traveled by unprotected personnel carriers. Tr. 246. Therefore, I uphold Inspector Morris's determination that in the event of a roof-fall, the condition could expose four persons to "Lost Workday or Restricted Duty" injuries.

3. Negligence

Inspector Morris based his high negligence designation for Order No. 8436107 upon his belief that the rock dust on top of the plate indicated Big Ridge had failed to repair the damaged bolt for more than one shift and was in fact aware of the damage since the bolt was painted orange. Tr. 247, 251. Morris also referenced his previous warnings to Big Ridge about the lack of clearance in travel ways and the high number of previous 30 CFR 75.202 violations at Willow Lake Mine. Tr. 258.

Big Ridge contests the high negligence designation, arguing that the damaged base plate was not obvious, as a different MSHA inspector had passed through the same area only half an hour earlier without noting the damaged bolt or issuing a related citation. Tr. 277; Resp. Br., 51. Big Ridge also argues Willow Lake personnel normally flagged off a safe perimeter around a damaged bolt rather than painting the damaged bolt in order to avoid exposing workers to a roof-fall hazard. Tr. 280-81; Resp. Br., 57.

Big Ridge further contends that the Secretary's photo show that neither the roof nor the top of the bent plate is painted. Resp. Br., 57. Big Ridge concludes that this demonstrates the bolt was painted before the damage occurred. *Id.* Big Ridge also contends that as the damaged bolt was a replacement bolt installed after the roof was originally rock dusted, it is reasonable to conclude that some rock dust would have adhered to the topside of the plate before it was bent loose from the roof. Resp. Br., 56.

After considering both parties arguments and the entered exhibits, I hold that the Secretary did not produce sufficient evidence to establish that Big Ridge acted with high negligence. Big Ridge personnel credibly testified that miners normally flag off a safe perimeter rather than painting damaged bolts. Tr. 280-81. In the Secretary's photos, a clear outline appears on the roofline indicating where the baseplate was positioned before it was struck and rotated loose from its original position. Sec'y Ex. 8, 1-2. As such, I hold that the base plate was painted before the bolt was struck loose. Although neither party offered an alternate explanation for why the roof bolt was painted, I find that given the high volume of traffic in this passageway, Big Ridge may have painted the bolt bright orange to warn equipment operators and prevent equipment from striking the bolt. For all of these reasons, I hold that the Secretary failed to show that the roof bolt had been damaged for a long enough period of time to justify a high negligence designation

Additionally, I find that the presence of bagged down tensor netting was neither a violative condition nor an indication of Big Ridge's negligence. The Secretary did not contend that the use of tensor violated Willow Lake's roof plan or point to any official guidance that provided guidelines for appropriate vs. non-appropriate use. Although an inspector may rely upon his experience in issuing citations, Inspector Morris did not claim that the tensor was frayed or damaged in any way. The photos entered into evidence do not demonstrate any excessive loading or damaged conditions. Sec'y Ex. 7, 19-21. For these reasons I have not factored the presence of the rock-filled tensor netting into my negligence findings.

I also find Inspector Morris's reference to previous meetings on equipment/roof clearance, and Willow Lake's history of 75.202(a) citations an insufficient basis to merit a finding of high negligence for this Order. I have already ruled that the Secretary did not establish that the roof bolt had been damaged for an extended period of time. As such, previous meetings regarding the importance of roof clearance and a history of roof control violations did indeed put Big Ridge on notice that more effort was needed in general to achieve roof control compliance. However, the Secretary has only demonstrated that Inspector Morris found one partially damaged bolt in the course of his inspection on Nov 28, 2011. Therefore, I find that Big Ridge acted with moderate negligence in failing to immediately identify and repair the single damaged bolt.

4. Unwarrantable Failure

For many of the same reasons discussed above in my negligence findings, I find that the Secretary has not produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

The Secretary did not establish that the roof bolt had been damaged for a significant time period, and the violative condition was not extensive as only one bolt was partially damaged. Sec'y Ex. 6.

b. Notice to the Operator

MSHA had put Big Ridge on notice that greater efforts toward roof-control compliance were necessary through previous close-out meetings and other 30 CFR 75.202 citations. Tr. 258.

c. Prior Abatement Efforts

The parties did not specifically discuss prior abatement activities, but Inspector Morris testified that the Willow Lake mine had suffered numerous roof falls in the recent past. However, Inspector Morris and Supervisor Cummins also testified that Big Ridge began using longer roof bolts in response to roof falls, that the bolt in question was itself a replacement bolt for a different damaged bolt, and that a nearby hazardous kettle bottom had been supported and then eventually removed from the roof. Tr. 244, 252-53.

d. Obviousness of the Hazard and Degree of Danger

While the roof-bolt was painted bright orange, that paint was not necessarily indicative of damage and it is undisputed that an MSHA inspector passed through the area shortly before without noting the damage. Tr. 277. As such, the damage was not inherently obvious and Inspector Morris confirmed that the roof in the area was structurally sound and it was unlikely for an injury to result from this specific violation. Tr. 249, 256.

e. Operator's Knowledge of the Violation

The Secretary did not present convincing evidence that Big Ridge was aware of the damage to this specific bolt. The Secretary has argued that the bright orange paint indicates that Big Ridge marked the bolt as damaged yet failed to install a replacement bolt. However, I have found that the absence of paint on the roof underneath the base plate and top of the bent plate indicates that the bolt was painted before it was struck loose. As such, I find that Big Ridge did not have any actual knowledge of the damaged roof bolt.

Therefore, I find that the Secretary has only offered supporting evidence for the second and peripherally third factors considered by the Commission in an unwarrantable failure analysis. Additionally, the testimony indicates that Big Ridge had undertaken some abatement work in improving their roof control measures, mitigating the Secretary's contention that the Willow Lake Mine had pervasive roof control problems.

The Secretary has only offered evidence supporting two of the five unwarrantable failure factors. The underlying violation itself in Order No. 8436107 concerned a single partially damaged bolt that was not likely to cause an injury. While it is not necessary for the Secretary to provide supporting evidence for all of the unwarrantable failure factors, the *Consolidation Coal* unwarrantable failure test is a balancing test and I hold that the evidence, when considered as a whole, fails to establish that Big Ridge acted with a serious lack of reasonable care, willful intent or reckless disregard. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. As such, I find that the Secretary has not established that Order No. 8436107 was an unwarrantable failure to comply with a mandatory safety standard due to more than ordinary negligence. For this reason, Order No. 8436107 shall be modified from a 104(d) (2) Order to a 104 (a) Citation.

5. Penalty Assessment

The Secretary has proposed a specially assessed penalty of \$14,700 for Order No. 8436107. Sec'y Br., 2. The Special Assessment Narrative Form indicates that Order No. 8436107 would have received a regularly assessed penalty of \$4,000.00. Resp. Ex. K. As discussed above, I have already held that the negligence designation for this citation shall be reduced from high to moderate and that the unwarrantable failure designation shall be removed. The Secretary has not specifically addressed his justification for the specially assessed penalty amount, but has pointed out that Big Ridge was cited 136 times in the previous two years for alleged violation of 30 CFR § 75.202(a), that the Willow Lake mine had experienced numerous roof falls in the recent past, and that Inspector Morris had specifically addressed the need to improve equipment clearance in travel ways. After considering all statutory penalty criteria and the specific background for this violation, I assess a civil monetary penalty of \$1,500.00 for the modified Citation No. 8436107.

V. ANALYSIS DOCKET LAKE 2012-66

A. Citation No. 8444809

MSHA Inspector Scott Lee issued Citation No. 8444809 on June 12, 2012 for an alleged violation of 30 CFR 75.202(a). Tr. 373. Lee alleged within the citation that:

The roof where persons work or travel was not adequately supported to protect from hazards related to falls of the roof. Two roof bolts in patterns were damaged and were not tight against the roof. One of the roof bolt plates was completely missing and the other bolt was curled up towards the roof. The area of exposure was approximately 4 to 5 feet in width and approximately 10 feet in length.

This condition was observed in the # 6 entry (SS 84+25) on the inby corner of the intersection immediately adjacent to the dumping location on the feeder (#5 entry) in unit # 4, (MMU 014).

Sec'y Ex. 11, 1.

Lee determined that that the violation was reasonably likely to result in a lost workdays or restricted duty injury and affected 1 person. Lee also determined that the violation was S&S and the result of Big Ridge's high negligence. Sec'y Ex. 11, 1. The Secretary has proposed a specially assessed penalty of \$47,700.00. Sec'y Br., 42.

1. Findings

The cited standard, 30 CFR § 75.202(a) requires that,

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

Inspector Lee testified that without the bearing plate tight to the roof, the grouted roof bolts were not serving their intended purpose. Tr. 388. Big Ridge Safety Manager Schiff stated that in his opinion, the bearing plates were not necessary for structural support, but agreed that the

Willow Lake Roof Plan required bearing plates to be tight to the roof.¹ Tr. 414. Both Lee and Schiff testified that, in addition to the missing and loose bearing plates, the bolts were bent over. Tr. 386, 407. As such, it is clear that the two pattern bolts were not in place as designed and required by the mine's mandatory roof control plan. Therefore, I hold that the Secretary has established that Big Ridge violated 30 CFR § 75.202(a) and the mine's mandatory roof control plan by not repairing bent pattern roof control bolts and baseplates.

2. Gravity

Inspector Lee designated Citation No. 8444809 as an S&S violation. Sec'y Ex. 11. I have already held that the Secretary has established the violation of a mandatory standard thus meeting the first element of the *Mathies* test. However, I find that Big Ridge has sufficiently rebutted the Secretary's allegation that the bent plates created a discrete safety hazard by presenting credible testimony corroborated by Inspector Lee that the roof was in fact sound in this area.

Specifically, the affected area was described by Inspector Lee as creating a 20 square foot area of exposure. Tr. 390. The surrounding roof was properly bolted and the bent bolts were up against the rib. Sec'y Ex. 42. Additionally, the bent bolts were fully grouted and the immediate area was still solid according to Safety Manager Schiff. Tr. 410. Although Inspector Lee testified to a history of roof falls at the Willow Lake mine, Lee confirmed that the roof in this area was not cracked at the time of the inspection and did not give any other indication of instability. Tr. 389, 394. Even after considering continued normal mine operations given the surrounding roof bolting, the fully grouted installation, the stability of the immediate roof area, and the location of the damaged bolts up against the rib; I find that in these specific circumstances the Secretary has not demonstrated that a hazard was created by the bent base plate and bolts.

Additionally, even if I were to have found a discrete safety hazard was created by the bent roof bolts, I also find that due to the particular location and the relatively small size of the affected roof area, it was highly unlikely for an exposed miner to be in that area in the unlikely event of a roof fall. Big Ridge Safety Manager Schiff credibly testified that a No Walk Zone prohibited miners from entering Entry #6 from the nearby dinner hole and feeder belt. Tr. 407-08. Big Ridge Section Foreman Reeves also testified that mining activities were located in a separate area and only haul cars with protective canopies traveled entry #6 during the June 12, 2012 production shifts. Tr. 423. Inspector Lee's diagram in his inspection notes indicates that

¹ Although Manager Schiff agreed that the Willow Lake roof control plan required bearing plates to be tight to the roof, the Willow Lake Roof Control Plan submitted by the Secretary does not appear to actually state this requirement. Additionally, in their Post Hearing brief, the Secretary relied upon Schiff's statement during cross-examination rather than pointing to a particular clause of the roof-control plan to assert that the Willow Lake Roof Control plan required bearing plates to be tight to the roof. Sec'y Br., 43. As Respondent has not contested this ambiguity, and Inspector Lee credibly testified that the loose bearing plate and bent bolt were violations of 30 CFR § 75.202(a), I have accepted the Secretary's representation for the purpose of determining that a violation occurred.

the damaged bolts were up against the rib. Sec’y Ex. 42. Similarly, Safety Manager Schiff stated that a miner would have to almost “crawl” against the rib in order to pass underneath the damaged bolts. Tr. 416. As any roof fall that occurred in the affected area would likely involve relatively small amounts of material, I find that ram car operators were protected from injury by the canopy of their cars. As pedestrian traffic was prohibited in this area, I find that the Secretary has not established there was a reasonable likelihood of an injury occurring. For these reasons, I rule that the likelihood of injury for Citation No. 8444809 shall be **MODIFIED** to unlikely. Additionally, as the Secretary has failed to satisfy the second and third elements of the *Mathies* test, I also hold that Citation No. 8444809 shall be modified to non- S&S.

For reasons discussed above regarding the location of the damaged bolts, I also hold that any resulting accident would likely involve lost workdays or restricted duty injuries and affect one person.

3. Negligence

I find that the violation was the result of moderate negligence on the part of Big Ridge. Inspector Lee stated that the bolts had been dusted over and had likely been damaged somewhere between 5 to 12 shifts prior to his inspection depending on whether a ram car or miner had struck the bolts. Tr. 391, 398. However, the Secretary did not present any definitive evidence of when the bolts had actually been damaged. Furthermore, rock dust made it difficult to detect the damage, as Inspector Lee himself noted that “if you wasn’t looking real close at it, you would miss it because it had been dusted through.” Tr. 392-93. Indeed, Lee himself passed by the bolts without noting the damage on his way towards the face, and MSHA Inspector Eddie Kane also passed by the area without noticing the damaged bolts earlier that same shift. Tr. 407, 409. As such, although the damaged bolts were in an area that required mandatory inspections, it is reasonably likely that the damage occurred within the past several shifts and was obscured by rock dusting operations. Therefore, the location of the damage at a corner up against the rib, the layer of rock dust, and the likelihood of recent damage all decreased the likelihood of Big Ridge identifying the damaged bolts and stand as mitigating circumstances. As such, I rule that the negligence designation for Citation No. 8444809 shall be **MODIFIED** from high to moderate.

4. Penalty Assessment

The Secretary has proposed a specially assessed penalty of \$47,700.00. Other than listing the factors considered in the negligence designation for this penalty, the Secretary has not presented any specific evidence supporting the justification for the specially assessed penalty. Upon review of the Special Assessment Narrative Form and 30 CFR § 100.3, it appears that the original penalty designations would have resulted in a regularly assessed penalty of \$15,971.00. Resp. Ex. S. However, I have already held that Citation No. 8444809 shall be modified from reasonably likely, S&S and high negligence to unlikely, non-S&S and moderate negligence. After considering these modifications and the six 30 CFR § 100.3 penalty criteria, including Big Ridge’s history of previous roof control violations, I assess a civil monetary penalty of \$3,000.00.

B. Citation No. 8445037

MSHA Inspector Eddie Kane issued Citation No. 8445037 on June 19, 2012 for an alleged violation of 30 CFR § 75.202(a) as a 104(a) citation. Tr. 300-01. The Citation alleges in part that:

There is an area of unsupported roof on unit # 5, entry # 6 in the last open crosscut, at survey station 8+40. The unsupported area measured 9.75 feet by 6 feet with an unsupported coal brow in the affected area that measured 4.5 feet wide by 22 inches thick by 26 inches tall.

Sec'y Ex. 13, 1.

Inspector Kane determined that the condition was reasonably likely to result in injury, a resulting injury was likely to be fatal, the violation was S&S and that the violation was the result of Big Ridge's moderate negligence. Sec'y Ex. 13. The Secretary has proposed a specially assessed penalty of \$47,700.00. Sec'y Br., 38.

1. Findings

Inspector Kane issued Citation No. 8445037, because he determined that the overhanging coal brow was a violation of 30 CFR § 75.202(a) which mandates in part that:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof...

The testimony from both parties clearly indicates that an overhanging coal brow approximately 4 feet wide, 9 feet long, and 26 inches thick was left during the mining cycle and not bolted sometime prior to June 19, 2012. Both the Secretary and Big Ridge have generally agreed that the overhang varied between 55 and 66 inches in height above the mine floor. Tr. 307-08; Tr. 340. The photos entered into evidence by Big Ridge corroborate Compliance Supervisor Cummins's statements that the majority of the unsupported overhang was only 55 inches above the mine floor. Tr. 340; Resp. Ex. AA 4, 5.

Although Big Ridge has not contested the violation itself, they have argued that it would have been difficult for a miner to get under the overhang. Resp. Br., 67. As such, it is necessary to determine whether this unsupported area meets the standards definition of an area "where persons work or travel." 30 CFR 75.202(a). Both parties testified that the coal brow was located at the last open crosscut in Unit 5, Entry # 6, which was an active face of the Willow Lake Portal Mine. On cross-examination, Compliance Supervisor Cummins confirmed that while miners generally walked down the centerline of the entry, it would have been possible, if not likely, for the coal brow to fall and trip out into the entry. Tr. 333, 337-38. As such, I hold that the Big

Ridge violated 30 CFR 75.202(a) by failing to control or support the coal brow in an active entryway where miners worked and traveled.

2. Gravity

Inspector Kane designated Citation No. 8445037 as an S&S violation. However, I find that the Secretary has failed to establish the second and third elements of the *Mathies* S&S analysis and hold that Citation No. 8445037 is non-S&S.

I have already determined that Big Ridge violated 30 CFR § 75.202(a) and, thus, the Secretary has shown the violation of a mandatory safety standard. However, while the coal brow was not bolted, I have found that in this specific case, Big Ridge has sufficiently rebutted the Secretary's determination that the coal brow contributed to a discrete safety hazard of a possible roof fall.

The Secretary argues that Inspector Kane's notes and testimony regarding a crack and oozing water supports his determination that the brow was certain to fall. Sec'y. Br. 39-40. Both Big Ridge witnesses testified they did not observe any cracks and oozing water at the time of the citation. Tr. 330, 353. The photos entered by Big Ridge are not entirely clear, but they do not indicate any obvious gaps, water, or sluffage. Tr. 330-31; Resp. Ex. AA 4, 5. While I find that Inspector Kane must have seen something that caused him to note a crack and oozing water, it is clear that the coal brow was in fact stable at the time of the citation. Kane, Cummins, and Kanady all testified that when the continuous miner was brought in to remove the coal brow, it was necessary to turn the mining heads on to cut the overhang down. Tr. 319, 332-33, 354. Compliance Supervisor Cummins testified in detail that the operator first tried the normal method of tramming the continuous mining machine into the coal brow with the cutting heads off but the brow would not fall under pressure from the 20 ton machine. Tr. 332-33. Additionally, Kane himself testified that the surrounding roof area was generally sound and properly bolted up to the coal brow. Tr. 312, 323. Given this specific evidence regarding the stability of the coal brow and surrounding roof, I find that the Secretary has not shown the coal brow created a discrete safety hazard even when considering, as I must, normal continued mine operations.

Furthermore, the Secretary has not shown that even if the coal brow did fall, it was reasonably likely for miners to be struck by the coal brow and injured. Inspector Kane measured the overhang as standing between 55 and 66 inches above the mine floor. Tr. 307-08. Compliance Supervisor Cummins testimony that the majority of the overhang was only 55 inches above the mine floor is supported by the photos entered into evidence by Big Ridge. Tr. 340; Resp. Ex. AA 4, 5. Relying on Cummins's statement that hard hats add 3 inches of clearance height to miners, I find that only a miner shorter than 5'-3" could walk under the highest part of the coal without stooping or crawling. Tr. 344-45. In fact, a miner would have to be 4'-9" or shorter to walk under the majority of the overhang closer to the rib. Furthermore, Big Ridge Supervisor Cummins credibly testified that miners were trained to walk down the centerline of entryways to increase visibility. Tr. 333-34. Given the height of the overhang, the absence of any evidence demonstrating a need for miners to pass under the relatively small

overhang, and the fact that miners typically walked down the center of the travelway, I find that it was not reasonably likely for a miner or ram car to travel underneath the underhang.

The Secretary stated during cross-examination that it is not possible to predict how material in a roof collapse will fall and that miners further out into the entry would have been endangered by the coal brow against the rib. Tr. 337. While I do not disagree with the Secretary's argument as a general proposition, the third element of the *Mathies* test requires the Secretary to show a reasonable likelihood that the hazard contributed to will result in an injury. Although, as I have ruled above, the Secretary has established a theoretical possibility of the overhang falling and striking workers further out into the entry, the Secretary has not provided sufficient evidence to raise the likelihood of a roof fall in this area actually striking a miner to the level of reasonably likely.

Additionally, the next workers to enter this location would have likely been continuous miner operators making their next cut into the Entry # 6 face. Section Foreman Kanady credibly testified that once in the area, the continuous miner operator would have identified and brought the overhang down as part of the normal mining cycle. Tr. 352. Inspector Kane testified that he thought Big Ridge personnel may continue to overlook the overhang. Tr. 320. However, I find Foreman Kanady's testimony credible, particularly given that the coal brow obviously contained coal, providing additional motivation to Big Ridge personnel to quickly bring the overhang down and add to their production totals.

After considering evidence regarding worker travel in this area, I hold that the Secretary has failed to show that the overhang was reasonably likely to result in an injury. As such the Secretary has failed to satisfy the second and third elements of the *Mathies* test and I rule that Citation No. 8445037 shall be **MODIFIED** to non S&S.² For these same reasons, I rule that the likelihood of injury for Citation No. 8445037 shall be **MODIFIED** to unlikely.

Inspector Kane designated Citation No. 8445037 as reasonably likely to result in a fatal injury. Kane based this determination partly upon a recent fatality at a nearby mine that involved a roof fall similar in size to the size of the coal brow. Tr. 314. While roof falls may certainly be fatal, Big Ridge Compliance Supervisor Cummins credibly testified that miners traveled down the center of the entry way and ram cars could not fit under the underhang. Tr. 333-34. As such, I find that if the coal brow were to fall, it would only be reasonably likely to result in an indirect glancing blow to a miner. For this reason, I rule that the type of injury for Citation No. 8445037 shall be **MODIFIED** to permanently disabling. Additionally, as I have found that ram cars were

² In modifying Order Nos. 8445037 and 8444809 from S&S to Non S&S, I am not requiring the Secretary to demonstrate roof instability in order to sustain an S&S determination. However, in both these instances, the Respondent has produced credible and sufficient evidence corroborated by the Secretary's witnesses to show that the roof was in fact stable at these areas. Tr. 319, 332-33, 354, 389, 410. As such, I have determined that in these specific instances, although Big Ridge violated the specific mandates of the Willow Lake roof control plan, these violations did not in fact create or contribute to a discrete safety hazard as required by the second element of the *Mathies* test.

not able to pass under the coal brow, I uphold the Inspector Kane's determination that the violation affected one person.

3. Negligence

Inspector Kane determined that this violation was the result of Big Ridge's moderate negligence. Kane based this designation partially on previous meetings with Big Ridge regarding the need to control and or support coal brows. Tr. 314-15. Kane also noted in his inspection notes and testified that Section Foreman Kanady told him he had set sights in this entry twenty minutes before Inspector Kane arrived, but that the rock dust and perspective from the entry prevented him from noticing the overhang. Tr. 312, 317.

At hearing, Section Foreman Kanady disputed Kane's assertion that he had set sights in this area, and testified that he had not set sights in any area that morning and had not yet traveled the # 6 Entry. Tr. 350-51. Big Ridge further argues that the negligence designation should be reduced to low or none based upon Kanady's testimony and lack of management knowledge. Resp. Br., 70-71.

The Secretary argues that as the area had been previously scooped, dusted and examined at the beginning of the shift, Big Ridge management had ample opportunity to identify the overhang in the two and a half hours after the area was cut and a negligence designation of moderate or high is warranted. Sec'y Br. 41-42.

The Mine Act defines high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and, low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

In this situation, Big Ridge had been cited for this standard 119 times in the previous two years and at an unspecified time, Inspector Kane had conducted close-out meetings focusing on the hazards of coal brows. Tr. 315. However, the coal brow had only been created two and a half hours before Inspector Kane traveled Entry # 6 and rock dust made the coal brow difficult to see as miners approached the face. Therefore, I find that mitigating circumstances made it difficult for Big Ridge to promptly identify the hazard. Thus, I find that the violation was the result of Big Ridge's moderate negligence.

4. Penalty

The Secretary has proposed a specially assessed penalty of \$47,700.00 for Citation No. 8445037 as originally written. The Special Assessment Narrative form indicates that Citation No. 8445037 would have received a regularly assessed penalty of \$15,971.00. Resp. Ex. CC. I have already ruled that the Citation No. 8445037 shall be modified from reasonably likely to unlikely, from fatal to permanently disabling, and from S&S to non-S&S.

Other than noting Big Ridge's history of 30 CFR § 75.202 violations and Inspector Kane's previous focus on controlling coal brows when supporting their negligence designation, the Secretary has not provided any specific support for the specially assessed penalty. I have found that Citation No. 8445037 was unlikely to result in injury and non-S&S. I have determined that the violation was the result of Big Ridge's moderate negligence. Inspector Kane testified that Big Ridge immediately abated the condition by bringing the overhang down with the continuous miner. Tr. 318-19. After considering the six statutory penalty criteria and reviewing the standard penalty tables provided in 30 CFR § 100.3, I assess Big Ridge a civil monetary penalty of \$2,000.00 for Citation No. 8445037.

C. Citation No. 8445268

MSHA Inspector Lampley issued Citation No. 8445268 on August 23, 2012 for an alleged violation of 30 CFR § 75.512. Tr. 101. Lampley alleged within the Citation that:

The company 301 welder, in service and energized at the unit # 1 battery barn has not been frequently examined, tested, and properly maintained. Multiple hazards were found on the 480 V.A.C. power cable for the welder, reference citation # 8445267, in which three damaged areas were found... Upon inspection of the weekly electrical examination book, records indicate the company #01 welder has not been examined since 08/06/2012. The operator engaged in aggravated conduct in that management is directly responsible for completion of required weekly electrical examinations...

Sec'y Ex. 15, 1-2.

Lampley determined that the violation was reasonably likely to cause an injury, the resulting injury would be fatal, the violation was S&S, affected one person, and was the result of Big Ridge's high negligence. Sec'y Ex. 15, 1. Lampley also determined that the violation was a 104(d) (1) unwarrantable failure to comply with a mandatory safety standard. Sec'y Ex. 15, 1. The Secretary has proposed a regularly assessed penalty of \$25,810.00. Sec'y Br., 20.

1. Findings

30 CFR § 75.512 and subsection 30 CFR § 75.512-2 require mine operators to inspect equipment "at least weekly." 30 CFR § 75.512; 30 CFR § 75.512-2. Inspector Lampley credibly testified and introduced inspection logs that showed Big Ridge failed to inspect the welding machine located at the No. 1 battery barn for a period of 17 days. Tr. 118; Sec'y Ex. 16 A-C. Big Ridge management acknowledged that the required weekly inspection for the welder was indeed missed. Tr. 139. As such, I hold that Big Ridge violated 30 CFR § 75.512 by failing to inspect the welding machine on a weekly basis.

2. Gravity

As an initial matter, I take note that Inspector Lampley issued Citation No. 8445267 for the damaged electrical cable itself on the same day as Citation No. 8445268. Sec'y Ex. 15, 1. Big Ridge has accepted and paid the civil monetary penalty for Citation No. 8445267.³ As such, I have focused on Big Ridge's knowledge of, and negligence in failing to inspect the welder while taking note of the actual hazards that developed during the missed inspection time period as evidence of the violation's gravity.

I uphold Inspector Lampley's designation of Citation No. 8445268 as an S&S violation. The first element of the *Mathies* test requires a violation of a mandatory safety standard, and I have already found that the failure to inspect the welding machine for a period of 17 days was a violation of 30 CFR § 75.512. The second *Mathies* element is a contribution to a discrete safety hazard. By failing to inspect the welding machine and its power cable, Big Ridge allowed damaged electrical components to go unrepaired, exposing miners to possible electrocution, fire, and ignition hazards.

The third *Mathies* element requires a showing that a significant injury is reasonably likely to occur under normal mining operations. The Secretary contends that an electrocution injury was reasonably likely to occur through one of several different possibilities. Sec'y Br., 22-23. According to the Secretary, a miner may have unknowingly contacted one of the damaged areas of the cable without realizing the copper conductors were exposed, or have been electrocuted if they contacted the metal a-frame hoist or welding trailer with the damaged area in contact with the metal frame. Sec'y Br. 23.

Big Ridge argues that the violation was not reasonably likely to lead to a significant injury as Mr. Pinkston, the normal examiner, would have inspected the welding machine on his return and identified the damaged areas. Resp. Br., 30. Big Ridge also argues that the damaged areas were not reasonably likely to cause a significant injury because miners did not normally contact the power cable directly while it was energized. Resp. Br., 30-31.

After considering both parties testimony, I find that the missed electrical inspection did make it reasonably likely that a significant injury would occur. Inspector Lampley credibly testified that the No. 6 gauge cable was thin for a 480 VAC power supply and easily susceptible to damage. Tr. 123. Indeed, after 17 days this cable was damaged in three different places, exposing copper conductors in two locations. Tr. 105, 107. Although Big Ridge contends that Mr. Pinkston would have eventually inspected the cable and identified these hazards, it is unclear how soon Mr. Pinkston would have inspected the welding machine due to the confusion regarding inspection responsibilities.

Additionally, although Maintenance Foreman Melvin credibly testified that miners did not normally handle the energized power supply cable, Big Ridge did not state that they had a policy in place to prevent such contact with the energized cable or the metal frame of the welding

³ MSHA website <http://www.msha.gov/drs/ASP/MineAction.asp> Mine ID 1103054 08/23/2012 Citation Status.

machine/A-frame hoist during welding operations. Tr. 163. I also take note that another Commission ALJ has previously upheld an alleged violation of 30 CFR 75.512 at the Willow Lake Portal mine as S&S despite the presence of safety protocols when the judge found the protocols did not prevent the possibility of an electrocution. *Big Ridge Inc.*, 33 FMSHRC 2238, 2248-49 (Sept. 2011) (ALJ Melick). In this situation, hazards could and actually did develop in the time period of the missed inspection. Tr. 104-05. Therefore, given that the time period for the next welder inspection was uncertain and miners routinely worked around, and with, the three damaged areas on the 480 VAC power cable, an electrocution was reasonably likely to occur. Tr. 124, 170-71.

The fourth *Mathies* element requires a reasonable likelihood that a resulting injury will be reasonably serious. Both Inspector Lampley and Supervisor Mullins testified that a miner who contacts an exposed 480 VAC conductor could suffer a fatal shock. Tr. 121, 150. While the ground fault protection system for the welder may have mitigated the potentially fatal hazard of uncorrected damaged electrical components, it is clear that failing to inspect and repair the damaged power cable exposed miners to a reasonable likelihood of suffering a reasonably serious injury.

As the evidence produced at hearing supports all four elements of the *Mathies* formula, I hold that the Secretary has established that Citation No. 88445268 was an S&S Violation.

As stated above in my analysis of the third *Mathies* element, I find that the missed inspection was reasonably likely to cause a significant injury as the missed inspection allowed damage to a high voltage power supply cable and welding machine to go unrepaired. I also find that due to the high voltage capacity of the 480 VAC damaged power cable, a resulting injury was likely to be fatal. I additionally find that the missed examination exposed the one worker observed by Inspector Lampley in the battery barn to the violative condition. Tr. 124.

3. Negligence

Big Ridge personnel failed to inspect the welder at the unit #1 battery barn when inspection duties were transferred from the normal examiner, Mr. Pinkston, to a qualified replacement examiner, Mr. Schutt. Tr. 158. Mr. Schutt was not aware that the welder was located nearby the battery barn because the battery barn inspection log did not contain an entry for the welder. Tr. 159. As such, Mr. Schutt did not inspect the welder and management officials that reviewed the inspection logs did not notice the missed inspection because the welder did not have a formal entry in either the battery barn log or the outby equipment log. Tr. 167, 173. The Secretary has alleged that these circumstances show Citation No. 8445268 was the result of high negligence on the part of Big Ridge. On the contrary, Big Ridge has argued that these facts should motivate this court to reduce the negligence designation to either moderate or low. The Mine Act defines high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and, low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

The two examiners responsible for inspecting the welder, Mr. Pinkston and Mr. Schutt, both appeared to have carried out their individual inspection duties in good faith. Tr. 157-58. However, I find it concerning that Big Ridge management did not have a more accurate method of ensuring inspection of mobile equipment other than relying on individual examiners to manually write in mobile equipment whenever it was within their inspection area. Tr. 172. I also note that Inspector Lampley testified that he and other inspectors had issued similar citations for failure to inspect equipment within the last couple of years. Tr. 130.

As testified to by Big Ridge witnesses, the size of the Willow Lake Portal mine and the sheer number of different pieces of equipment made it difficult for shift and area level foreman to track and inspect each piece of equipment. Tr. 171-72. Given Big Ridge's status as a large sophisticated operator, Big Ridge should have known that the very nature of mobile equipment and the size of the Willow Lake Portal mine required a more fail-safe inspection tracking method other than penciled-in inspections on various different inspection logs. However, I do acknowledge that Mr. Pinkston's temporary absence contributed to the missed inspection. I also credit Big Ridge's inspection supervision efforts, as management reviewed the inspection log on a daily basis to ensure all listed hazardous conditions were promptly corrected. Tr. 162.

As such, while I find that Big Ridge should have identified the missed inspection; I also hold that Mr. Pinkston's absence and Big Ridge's efforts to ensure prompt corrective action for completed inspections stand as mitigating circumstances. Therefore, the negligence designation for Order No 8445268 is **MODIFIED** from high to moderate.

4. Unwarrantable Failure

I hold that the Secretary has not produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

Order No. 8445268 involved a failure to inspect the welding machine at the No. 1 battery barn for a period of 17 days. Tr. 118. Due to the construction of the governing statute Big Ridge was 4 days overdue in inspecting the welding machine. Resp. Br., 33. Big Ridge Safety Manager Grounds credibly testified that Mr. Schutt had properly inspected all other pieces of equipment at the battery barn during Mr. Pinkston's absence. Tr. 142. Although Inspector Lampley testified that other citations for failure to inspect equipment had previously been issued at the Willow Lake mine, it does not appear that there were any other failures to inspect equipment in this area in the immediate timeframe.

b. Notice to the Operator

As I have just noted, Inspector Lampley credibly testified that he had previously cited Big Ridge for failure to inspect equipment and emphasized the importance of properly conducting inspections with maintenance foremen in closeout meetings. Tr. 130.

c. Prior Abatement Efforts

Although Big Ridge had not developed a formal program to ensure inspection compliance in the event of an examiner's absence, Big Ridge did appoint a qualified miner to conduct Mr. Pinkston's inspections during his absence. Tr. 152. Additionally, Big Ridge also instituted a voluntary back-check system designed to ensure listed hazards were promptly corrected. Tr. 162.

d. Obviousness of the Hazard and Degree of Danger

As the welder inspections had previously been penciled-in to the outby equipment log rather than formally entered the battery barn inspection book, the missed inspection was not obvious to Mr. Schutt or Big Ridge management who reviewed the logs. Tr. 160. However, as I have previously noted, the multiple entry logs and policy of allowing pencil inspections should have alerted upper management that an inspection could be missed without an examiner realizing his oversight. I have already held that the missed inspection exposed miners to a high degree of danger as it permitted a damaged high voltage power cable to go unrepaired for multiple shifts.

e. Operator's Knowledge of the Violation

Big Ridge did not have actual knowledge of the missed inspection as Mr. Schutt relied upon the battery barn inspection log as the complete list of equipment in that area. Tr. 160. Additionally, Big Ridge management that reviewed inspection logs would not have known to look for a missed welder inspection as the welder had previously only been penciled-in to the outby inspection log. Tr. 161. For these reasons, I strongly urge Big Ridge to consider a more failsafe comprehensive inspection log. However, it does not appear that Big Ridge was aware of, or had been notified by MSHA of the need to improve its inspection logs at the procedural level.

As I have found that the missed examination was not extensive, did not exist for a significant period of time relative to the inspection cycle, was not obvious to mine examiners or immediate management, and that Big Ridge had undertaken genuine effort to improve inspection follow-up, I hold that the violation was not due to a reckless disregard or serious lack of reasonable care in conducting inspections. For these reasons, Order No. 8445268 shall be **MODIFIED** from a 104(d)(2) order to 104(a) citation.

5. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$25,810.00 for Citation No. 8445268. As I have held above, Citation No. 8445268 shall be modified from a high negligence 104 d(2) unwarrantable failure Order to a moderate negligence 104(a) Citation. Big Ridge abated the violation by completing the required electrical examination for the welder. Sec'y Ex. 1, 3. After accounting for these modifications, considering the six statutory penalty criteria, including the hazard of an uninspected high voltage cable, and reviewing the 30 CFR § 100.3 penalty tables, I assess a civil monetary penalty of \$15,000.00.

VI. ANALYSIS DOCKET LAKE 2012-251:

A. Order No. 8444863

MSHA Inspector Scott Lee issued Order No. 8444863 as a 104(d)(1) Order on August 20, 2012 at 9:45 a.m. for an alleged violation of 30 CFR § 75.370 (a)(1). Tr. 429. The Order alleges that:

C Crew (Midnight A Shift) was not mining coal according to the mines approved ventilation plan in unit # 2 (MMU 002). The Plan requires that a spray block of 5 have 5 sprays available with at least 3 of those sprays working. The bottom left block on the left side of the cutting head had 1 of its 5 sprays plugged, (with a steel plug). Also a block of 3 sprays must have 3 sprays available with 2 of those working at a minimum. The block of 3 sprays just behind the cutting head on the left side of the machine had one of its sprays plugged with wood, leaving only 2 available, none of those sprays were working properly at start of "A" shift, (days). There was a blown water line to these sprays that had to be repaired at start of shift. The mine plan also requires a block of 3 sprays be centered in the throat of the conveyor. This miner had 2 blocks of 3 sprays on either side of the conveyor in this location, only 1 side was working and not adequately covering the width of the conveyed coal... A spray count was done at 1300, (6 hours into the shift) the repairmen at that time had only been able to repair 32 of the 35 sprays required to operate with a minimum spray count. The crew foreman on unit 2 (MMU 002) engaged in aggravated conduct constituting more than ordinary negligence in that he allowed this condition to exist while mining.

Sec'y Ex. 17, 1-2.

Inspector Lee determined that this violation was reasonably likely to result in an injury, that the resulting injury would be expected to be permanently disabling, the violation was S&S, two persons were affected, the violation was the result of Big Ridge's high negligence, and that the violation constituted an unwarrantable failure to comply with a mandatory safety standard. The Secretary has proposed a specially assessed civil monetary penalty of \$52,500.00.

30 CFR § 370 (a) (1) requires that:

The operator shall develop and follow a ventilation plan approved by the District Manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.

Inspector Lee issued this Order after he attempted to obtain a routine dust pump sample for the #242 miner and was unable to do so because the day shift was unable to get the machine up to compliance after six hours of repair work. Tr. 433-35. In particular, Lee alleged Big Ridge had violated 30 CFR § 370(a)(1) and the mine's ventilation plan due to 1) the presence of spray plugs, 2) an unapproved throat spray configuration, and 3) his determination that the Midnight crew must have operated with an insufficient total number of sprays. Tr. 439, 441, 450.

1. Spray Availability

According to Inspector Lee, the Willow Lake ventilation plan required spray banks to have all sprays available, if not actually operational. Tr. 438-39. For this reason, Lee considered the presence of steel and wood plugs at several of the spray nozzles to be an unacceptable violation of the mine's ventilation plan. Tr. 439. On cross examination, Lee confirmed that the plan stated that 3 out of 5 sprays in a bank of 5 and 2 out of 3 sprays in a bank of 3 must be "operational", and did not actually state that all sprays must be "available." Tr. 465. However, Lee maintained that the diagram in the ventilation plan depicted a certain number of sprays at each bank. *Id.* Lee stated that this diagram indicated that while the plan allowed a certain number of sprays to malfunction, it was necessary to have all sprays "available." *Id.*

Big Ridge argues that Inspector Lee's interpretation of the ventilation plan is incorrect and unworkable, as neither the diagram nor the text of the ventilation plan make any explicit reference to a minimum number of "available" sprays. On cross-examination, Big Ridge pointed out that there is no functional difference between a spray clogged with sediment and a spray that is mechanically plugged. Resp. Br., 88; Tr. 465. Additionally, Big Ridge contends that the plugged sprayer is in fact available, as an operator can replace the plug with a new spray in several minutes with simple hand tools if needed. Tr. 469, 519.

I find that the presence of plugs on the continuous miner was not in itself a violation of the 30 CFR § 370 (a) (1) or the mine's ventilation plan. The Willow Lake Ventilation Plan neither prohibits the use of plugs nor mandates that all sprays be "available" at all times. Sec'y Ex. 19. The plan does require a certain number of sprays at various locations on the continuous miner, but allows the miner to operate as long as a certain fraction of the sprays in that bank are "operational". Sec'y Ex. 18, 27.

Inspector Lee's determination that the diagram's depiction of five sprays prohibits the use of spray plugs is illogical. According to Lee, a bank of five sprays with one sediment clogged spray is acceptable but a bank of five sprays with one mechanically plugged spray is unacceptable. Tr. 466-67. This interpretation of the plan would not improve dust control at the continuous miner or at the Willow Lake Portal mine. Indeed, as alluded to by Inspector Lee, the use of a plug at a damaged spray head may allow a mining crew to maintain proper water pressure across the entire machine. Tr. 458. Additionally, although Lee referenced previous meetings regarding the need to maintain sprays, Lee did not indicate he had previously instructed Big Ridge not to use spray plugs. Other than relying on Lee's interpretation of the ventilation plan, the Secretary has not pointed to any program policy manual or other agency publication that warns against the use of spray plugs.

As the ventilation plan did not prohibit the use of plugs, the Secretary did not introduce evidence demonstrating that MSHA had prohibited the use of spray plugs at the Willow Lake Portal mine, and the Secretary's interpretation is not one a reasonably prudent miner would have anticipated, I hold that the presence of plugs was not in itself a violation of the mine's ventilation plan or 30 CFR § 370 (a) (1).

2. Throat Spray Configuration

Inspector Lee testified that the unit #2 miner had two separate banks of three sprays offset to either side of the conveyor belt at the throat, rather than the one bank of three sprays centered on the conveyor belt depicted in the mine's ventilation plan. Tr. 441. Lee confirmed that positioning dual spray banks to the side of the conveyor belt was not a hazard in and of itself, but he maintained that the failure to obtain MSHA approval constituted a violation. Tr. 441, 444-45.

Big Ridge Safety Compliance Manager Todd Grounds testified that nearly every continuous mining machine at the Willow Lake mine had the dual offset throat spray configuration. Tr. 485. Grounds stated that the continuous miners were configured this way by the factory and that MSHA Inspectors, including Inspector Lee, had never previously issued a citation regarding the offset spray configuration for the 242 machine or any other continuous miner. Tr. 485-86.

I find that the offset dual spray block configuration was not in itself a violation of the mine's ventilation plan or 30 CFR § 370 (a) (1). As pointed out by Big Ridge and confirmed by Inspector Lee, the dual spray block provided additional sprays and adequate coverage of the conveyor belt when the sprays were working. Resp. Br., 91; Tr. 441. As such, "a reasonably prudent person familiar with the mining industry and the protective purposes of the standard" could have determined that while the diagram required a *minimum* of three sprays centered on the throat, it was acceptable to position a total of six sprays to the sides of the conveyor belt in order to ensure proper coverage and avoid damage. *Energy West Mining Co.*, 17 FMSHRC 1318. Indeed, Inspector Lee himself explained at length that:

Typically they'll move the (throat spray) to the side like that, because if they put them dead center, if they're not just right, a rock or something will come through there and knock them out. So they move them on either side which is fine, because, you're just trying to knock dust down there in that conveyor.

Tr. 442.

The Willow Lake ventilation plan did explicitly require that "Any changes or deviations in the plan require approval by the district manager before implementation." Tr. 443. However, it is also clear that this offset dual spray bank set-up was installed in the majority of the continuous miners at the Willow Lake Portal mine and had been observed by MSHA inspectors on numerous previous occasions without incident. Tr. 485-86. Indeed, as emphasized by Inspector Lee, he himself had inspected and collected dust samples from continuous mining machines over a dozen times in the 2012 fall quarter. Tr. 457, 459, 467. As MSHA performed

regular and extensive dust control checks on the continuous mining machines at the Willow Lake Portal Mine, and had never previously raised any concerns regarding this common and obvious condition, it was reasonable for Big Ridge to assume that the dual spray block configuration complied with the mine's ventilation plan and 30 CFR § 370 (a) (1). *Good Construction*, 23 FMSHRC 995, 1005 (Sept. 2011).

As such, I hold that the dual spray block configuration at the throat was not a violation because it met the minimum requirements of the ventilation plan and MSHA had never provided Big Ridge any advance notice that this common configuration was impermissible.

3. Midnight Shift Operation

Inspector Lee alleges within Order No. 8444863 that the midnight shift operated the #242 continuous miner in violation of the mine's ventilation plan and 30 CFR § 370 (a)(1). Tr. 450. Lee based this conclusion on the presence of a blown water line at the beginning of the day shift and the day shift's inability to achieve the required 80% level of functioning sprays in six hours of repair time.

Lee testified that he had persistent difficulties obtaining dust samples from continuous mining machines at the Willow Lake Portal mine. Tr. 434. Lee had only been able to gather 3 valid samples out of 13 attempts during the 2012 fall quarter. Tr. 434. Lee stated that he was often not able to collect a sample at all because Big Ridge personnel were unable to meet the requirements of their dust plan, including sufficient spray nozzles. Tr. 435, 459. Lee stated that that he was confident Big Ridge only performed the lengthy dust parameter repairs during MSHA inspections, and simply ran out-of-compliance when MSHA was not present. Tr. 460.

I find that the Secretary has not produced sufficient evidence to support Lee's determination that the August 19-20 midnight shift operated with insufficient sprays or water pressure. Lee was not present during the midnight shift and did not question any midnight shift employees regarding August 19-20 shift operations. Tr. 463. Lee assumed that the presence of the broken water line at the beginning of the morning shift indicated that the midnight shift had produced coal without the water line or sufficient water pressure. Tr. 450. However, midnight Section Foreman Davis credibly testified that the water line blew at the end of the shift and that the crew reported the damage to the maintenance department for repair. Tr. 507-08. Indeed, Lee confirmed that the day shift was already repairing the damaged line at the start of the day shift when he first arrived at the # 242 miner. Tr. 450; Sec'y Ex. 17. As such, it appears that Big Ridge considered the blown water line a necessary repair item and was working in earnest on the line before Inspector Lee began to inspect the machine.

Additionally, Lee's conclusion that the midnight shift must have run without an adequate number of sprays is not supported by sufficient evidence. Lee based this conclusion on the day shift's inability to obtain 35 working sprays after 6 hours of repair time. However, Section Foreman Davis credibly testified that he personally checked the #242 miner at the beginning of the August 19-20 shift and observed 36 working sprays. Tr. 514. Davis also stated that the miner operator checked the sprays between each cut and that the operator could quickly repair malfunction sprays if necessary. Tr. 506.

At hearing, Lee stated that the day shift could not get spray nozzles to stay in certain spray heads because the threads were worn. Tr. 439. However, on cross-examination Lee stated he was not entirely certain that spray heads on the #242 had blown out under pressure. Tr. 469. While I generally found Lee a credible witness, Lee did not note worn spray threads or blown out spray nozzles in the text of the citation or within his inspection notes. Additionally, Compliance Supervisor Grounds testified that repair difficulties were due to the spray nozzles clogging quickly with in-line debris. Tr. 497. Indeed, Inspector Lee himself testified that debris within the water line was a common cause of clogged sprays and could be caused by the installation of a new water line. Tr. 474-75. In this situation, both parties agreed that a main feeder bull line and the continuous miner's water line had blown and been repaired in the previous 12 hours. Tr. 453, 510.

After reviewing all available evidence, I find that the day shift's difficulty in obtaining a sufficient number of sprays was most likely due to recent damage to the water lines that fed the sprays. While I acknowledge Inspector Lee's concerns regarding his inability to gather valid dust samples in the past, neither Lee nor the Secretary presented sufficient evidence to support an inference that Big Ridge personnel were ignoring or postponing necessary dust parameter repairs. Therefore, I credit the testimony of Davis who observed the #242 continuous miner in operation during the August 19-20 midnight shift over the inferences of Inspector Lee who was not present. For these reasons, I hold that the Secretary has not produced sufficient evidence to establish that the midnight shift violated the mine's ventilation plan or 30 CFR § 370 (a) (1).

As I have found that neither the spray plugs nor the dual bank spray configuration violated the mine's ventilation plan in themselves, and that the Secretary has failed to demonstrate that the midnight shift operated the #242 miner with an insufficient amount of sprays or water pressure, Order No. 8444863 is **VACATED**.

VII. ANALYSIS DOCKET LAKE 2012-307

A. Order No. 8445336

MSHA Inspector Lampley issued Order No. 8445336 for an alleged violation of 30 CFR § 75.403 on October 29, 2012 as a 104 (d) (2) unwarrantable failure to comply with a mandatory safety standard. Tr. 174. Lampley alleged within the Order, in part, that:

As the result of lab analysis, 10 out of 24 (41.67%) samples collected in rock dust Survey #1 contain less than the required 80 percent incombustible content. Rock dust survey # 1 was collected on October 23, 2012 in the second right panel off the 5th North Sub-main, Unit # 2 (MMU-002 & 012). The affected areas of the mine floor are black with pulverized coal mixed into the clay.

Sec'y Ex. 21, 1.

Lampley determined that the violation was unlikely to result in an injury, that any resulting injury would be fatal, the violation was non-S&S, 4 persons were affected, the violation was the result of Big Ridge's high negligence, and that the violation constituted a 104(d) (2) unwarrantable failure to comply with a mandatory safety standard. Sec'y Ex. 21, 1. The Secretary has proposed a regularly assessed penalty of \$7,774.00. Sec'y Br., 26.

1. Findings

At the time of Order No. 8445336, 30 CFR § 75.403 required 90% of samples taken in a rock dust survey to have an incombustible content higher than 80%. Inspector Lampley credibly testified and provided documentation demonstrating that only 14 of the 24 samples he collected at the Old 2nd Right Area met the 80% incombustible content requirement. Tr. 185. Thus, only 58% of the samples taken by Lampley on the October 29 survey met the standard and the survey did not meet the requirements of 30 CFR § 75.403.

Although Big Ridge pointed out that Lampley did not collect samples from the roof at any of the sample locations, they did not contradict Lampley's assertion that his sampling methods were acceptable under MSHA regulations and the Mine Act. Tr. 216. Big Ridge has also stated that the average incombustible content of all 24 samples was 80.8% when considered as a collective whole. Tr. 229. However, Safety Director Barras confirmed that the standard required operators to maintain an 80% incombustible level at each sample location throughout all required areas. Tr. 236. As such, I hold that the Secretary has established that Big Ridge violated 30 CFR § 75.403 by failing to maintain the mandatory level of rock dust throughout the sampled Old 2nd Right Area.

2. Gravity

Inspector Lampley found that Citation No 8445336 was unlikely to result in injury due to the lack of ongoing mining activities at this area. However, he credibly testified that the scheduled removal of remaining equipment would require powered machinery that could produce an ignition source. Tr. 203-04. Lampley also stated that that the insufficiently rock dusted area extended for several hundred feet and contained enough combustible material to sustain a coal dust explosion. Tr. 206. Lampley explained that a coal dust explosion of that size would generate a massive amount of heat and gases that could cause a fatal accident. Tr. 205.

Big Ridge argues, in essence, that there was no likelihood of ignition or injury because Big Ridge had stopped active mining in that area. Resp. Br., 45. Big Ridge states that Lampley did not provide a specific mechanism for ignition other than referencing the presence of electrical equipment. *Id.* However, I find that Lampley provided adequate support for his unlikely and fatal gravity designations by detailing the high combustible content of the samples gathered near the face, referencing the removal plans for electrical mining equipment including the continuous mining machine, and explaining the severe effects of a resulting explosion. I also find that Lampley credibly testified removal efforts would typically involve a crew of four miners, justifying his designation of four persons affected.

3. Negligence

The Mine Act defines high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances. Within the citation itself, Inspector Lampley noted that several of the failing areas were black in color and easily visible, and that MSHA had notified Big Ridge on Sept 26, 2012 that greater efforts were required to comply with rock dust standards. Sec'y Ex. 21. Lampley testified to all these conditions at hearing and added that MSHA personnel had informed Big Ridge prior to this survey that they had not yet surveyed the Old North panel and that it would be necessary to do a good job rock dusting that area. Tr. 209.

Big Ridge argues that the Secretary has failed to establish a nexus between the September 26 close out meeting, previous failed surveys, and Order No. 8445336. Resp. Br., 46-47. Big Ridge contends that the violative condition resulted from the unusual nature of the halted mining activities at the fault location. Resp. Br., 38-39. Big Ridge also contends that the increase in rock dust applied per ton of coal produced over the previous years demonstrates that Big Ridge was making serious efforts towards compliance with the standard. Tr. 233-34; Resp. Ex. EEE. Big Ridge argues that it would be improper to rely on Lampley's characterization of the failed areas as very dark in color as an indication of Big Ridge's negligence, as Lampley himself did not issue a citation until he received official lab results. Resp. Br., 43-44.

I find that Big Ridge was aware or should have been aware of the violation, and the conditions listed by Big Ridge are not mitigating circumstances in terms of Big Ridge's negligence. Mining operations had stopped four days before Lampley conducted the survey, and yet 10 of the 26 samples taken failed to meet the standard, and the area closest to the abandoned working face was dark in color and obviously in need of additional rock dust. Tr. 182-83, 186, 200-01. Lampley credibly explained that he waited on the official lab results, not because he was uncertain about whether individual samples would fail, but because he was following standard protocol and allowing for the possibility that several individual samples could fail and the overall survey still pass if 90% of the samples were compliant. Tr. 218.

Although Big Ridge contends that previous meetings and citations regarding rock dust levels did not notify management regarding this specific condition, I find that MSHA provided ample notice of the specific need to adequately rock dust the old North area. Inspector Lampley credibly testified that in addition to the Sept 26 meeting following a failed dust survey, MSHA had also specifically informed Big Ridge that this panel was due for dust sampling and that greater efforts would be needed to achieve compliance as several recent surveys in adjacent areas had failed. Tr. 208-09. Big Ridge criticizes Lampley's testimony regarding these meetings as lacking specificity. However, I found Lampley's testimony regarding meetings in the months prior to this citation entirely credible and sincere.

Additionally, I find that the significant increase in rock dust application in terms of pounds applied/coal tonnage mined from 2009-2012 at the Willow Lake mine is not a mitigating factor for this Order. Tr. 233-34; Resp. Ex. EEE. While this metric may serve as a useful tool for Big Ridge management in monitoring mine-wide rock dusting efforts over the course of a year, it tells me very little about Big Ridge's effort to improve rock dust levels following the Sept 26, 2012 meeting in which Big Ridge was notified that a mining area at the Willow Lake mine had

failed to meet the standards of 30 CFR § 75.403. Similarly, I do not find the presence of a geologic fault at this area as a mitigating circumstance that excuses the lack of mandatory levels of rock-dust in a required area. Although the fault may have forced Big Ridge to change their standard pattern of equipment removal/belt advancement, Big Ridge Safety Manager Barras confirmed that at the time of the Order, four days and 12 shifts had already passed since mining activities had been halted at the fault. Tr. 237. As such, Big Ridge had adequate time to meet the requirements of 30 CFR § 75.403 through some combination of dusting equipment, yet failed to do so.

For all these reasons, I hold that Order No. 8445336 was the result of high negligence on the part of Big Ridge, as they should have been aware of the violation and there were no legitimate mitigating circumstances.

4. Unwarrantable Failure

For Order No. 8444536, I find that the Secretary has produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

The Secretary established that the Big Ridge had stopped actively mining at the Old North face four days before Lampley conducted the survey, and the band of failed samples extended for several hundred feet. Tr. 182-83, 206. These conditions demonstrate that the condition had existed for a significant period of time and that the violation was extensive. Big Ridge's attempt to cite the overall 80% incombustible content of the entire survey as evidence the condition was not extensive is misleading. This contention ignores the requirements of the standard itself and fails to acknowledge that six of the ten failed samples were significantly below the required 80% standard and located in an unbroken survey band that extended for several hundred feet. Sec'y Ex. 21, Tr. 206.

b. Notice to the Operator

MSHA had put Big Ridge on notice that greater efforts towards rock dusting were necessary through the Sept 26, 2012 close out meeting, advance warnings of the need to survey the old North area, and the issuance of 44 other 30 CFR § 75.403 violations in the previous two years at the Willow Lake mine. Tr. 208-09; Sec'y Ex. 21, 2. Big Ridge's argument that Inspector Lampley failed to provide specific evidence of this notice is unavailing, as I found Lampley's testimony regarding the early warning for the Old North rock dust survey entirely credible. Tr. 208-09. As Big Ridge Safety Manager Barras himself acknowledged that management was tired of getting rock dust failure citations, it is clear that Big Ridge was aware that rock dusting was considered a critical safety requirement by MSHA and that they needed to do a better job of rock dusting. Tr. 234.

c. Prior Abatement Efforts

Big Ridge presented credible evidence that they had increased rock-dusting efforts at the Willow Lake Mine from 2009 to 2012. Tr. 232-33; Resp. Ex. EEE. However, they did not present any evidence concerning heightened efforts after the Sept 26, 2012 closeout meeting or claim they were applying additional rock dust at the Old North face at the time of Lampley's inspection. Thus, Big Ridge did not present convincing evidence of specific prior abatement efforts related to the specific violative condition identified in Order No. 8445336

d. Obviousness of the Hazard and Degree of Danger

Inspector Lampley credibly testified that near the abandoned face, the sample areas were dark, indicating to him that those samples would not meet the 80% incombustible requirements of the standard. Tr. 200. Indeed, at the farthest inby survey band, six samples were collected and none of those samples contained more than 65% incombustible material, with one sample containing only 49.5% incombustible material. Sec'y Ex. 21. As such, I find that the test results corroborate Lampley's testimony that the condition was visually obvious. In an apparent attempt to dispute the obviousness of the violation, Safety Director Barras stated at hearing that the test results indicated that rock dust was present at every sample location. Tr. 238. However, after reviewing the test results, it is clear that the test results only report total incombustible content and do not detail specific amounts of applied rock dust. As the Respondent pointed out in regards to Order No. 8436212, not all mined material is combustible and the average baseline incombustible content of mined material at the Willow Lake mine is 50%. Tr. 93. Thus, noting Big Ridge's earlier statement that Willow Lake material on average has a 50% incombustible content, I find that incombustible content results in the 50% to 65% range indicate that very little rock dust had been applied at that sample location. As such, the test results corroborate Mr. Lampley's observations that at the farthest inby band, rock dust was very thinly applied and visually deficient.

I have already held that due to halted mining activities, there was only a small probability of an ignition occurring at the old North area. However, if planned equipment removal activities were to cause an ignition, the presence of uncontrolled combustible material throughout a several hundred foot area could sustain a fatal coal dust explosion. As such, while the likelihood of an injury event occurring was low, the risk of such an ignition was not totally eliminated and the insufficiently rock dusted areas still presented a high degree of danger.

e. Operator's Knowledge of the Violation

The Secretary has not established that Big Ridge management had actual knowledge that the old North area was not adequately rock dusted. However, as I have ruled above, the fact that the area closest to the abandoned face was dark and significantly lacking in sufficient rock dust indicates that Big Ridge should have identified the violation.

As such, the Secretary has presented strong evidence for four of the unwarrantable failure factors while Big Ridge has only produced evidence of a general effort to improve rock dusting efforts without providing evidence of specific efforts at the location in question or time period

immediately before the survey. Therefore, for all the reasons stated above, I find that Order No. 8445336 was the result of Big Ridge's unwarrantable failure to comply with a mandatory safety standard and uphold the Secretary's 104(d) (2) designation.

5. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$7,774.00. In considering the six statutory penalty criteria, I find that Big Ridge violated 30 CFR § 75.403 44 times in the two years prior to this citation and the proposed penalty is appropriate to Big Ridge's status as a large operator. I have ruled that Big Ridge was highly negligent and that the violation involved a low likelihood of injury yet still presented a high degree of danger. The Secretary acknowledged that Big Ridge did abate the condition through repeated redusting efforts. Tr. 197; Sec'y Ex. 21, 3.

After considering all these criteria, I uphold the Secretary's proposed penalty and assess Big Ridge a civil monetary penalty of \$7,774.00 for Order No. 8445336.

B. Order No. 8431905

MSHA Inspector Dean Cripps issued Order No. 8431905 on November 29, 2012 for an alleged violation of 30 CFR § 75.220 (a)(1), finding that Big Ridge had violated its roof control plan by allowing miners to operate in the "red zone". Sec'y Ex. 34, 1. The Order alleges in part that:

...Interviews were conducted with several employees as part of an accident investigation. Several of the employees stated that they have recently observed continuous miner operators in the Red Zone while operating the machine. They have also stated they have recently observed operators tramping the continuous mining machine while standing on the cable and leaning against the machine....

Sec'y Ex. 34, 1-2.

Cripps determined that an injury was highly likely, a resulting injury would be fatal, the violation was S&S, 1 person was affected, the violation was the result of Big Ridge's high negligence, and constituted a 104(d) (2) unwarrantable failure to comply with a mandatory safety standard. Sec'y Ex. 34. The Secretary has proposed a regularly assessed penalty of \$53,858.00. Sec'y Petition: Exhibit A.

30 CFR § 75.220(a) (1) states:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The relevant portion of Respondent's roof control plan cited in the order states in part:

While repositioning the continuous mining machine within the working place, all persons involved shall be positioned in a safe location away from any part of the continuous mining machine. During place changing, all persons involved with the move shall be positioned in a safe location away from the continuous mining machine while the machine is being trammed.

Tr. 572, Sec'y Ex. 34.

Inspector Cripps issued Order No. 8431905 while completing an EO3 hazard complaint investigation in response to a November 17, 2012 miner hazard complaint. The complaint alleged that employees at the mine were operating continuous miners in the red zone while standing on the power cable and leaning against the machine, an action Cripps refers to as "cable surfing". Tr. 533, 546. The hazard complaint investigation occurred in conjunction with a separate accident investigation initiated on the same day. Tr. 537. On November 19, 2012, MSHA investigators Cripps and Steve Miller interviewed Willow Lake Section 1 third shift crew members about miner operators allegedly working in the red zone. Tr. 538. Several of the interviewed miners confirmed that they had observed miner operators working in the red zone and standing on the continuous miner power cable while tramping, leading Cripps to believe the alleged hazard complaint was valid. Tr. 549, 557-58. As such, Cripps issued Order No. 8431905 based on the miners' descriptions of violative actions separate from the events of the November 17 accident. Tr. 538-539. Specifically, six of the eight miners interviewed confirmed observing miner operators performing work in the red zone. Tr. 540, Sec'y Ex. 45.

Inspector Cripps designated the risk of injury in the order as highly likely and fatal, stating that many fatalities had resulted from employees being "pinched" while operating the miner in the red zone. Tr. 567-568. He designated the negligence level as high and an unwarrantable failure because everyone he interviewed had knowledge about and had been trained with regard to the red zone. Tr. 568. Cripps concluded that management must have seen or been aware of miners working in the red zone due to the number of miners working in a variety of positions indicating they had witnessed red zone violations. One such miner, Josh McClendon indicated it was a common practice for miners to operate in the red zone and that he had observed this practice as recently as the last full shift he worked. Tr. 568-569. As such, Cripps determined that the widespread knowledge of this common practice among hourly employees indicated that the practice must have been extensive enough for the shift foreman and management to have observed the practice as well. Tr. 569. Cripps also testified that as there were no records of anyone being disciplined for working in the red zone despite the miners' statements regarding how common red zone work was, it appeared that Big Ridge was not enforcing their red zone policy. Tr. 571. Cripps noted one person would be affected, the person who was working in the red zone. *Id.*

1. Findings

Big Ridge argues that Order No. 8431905 fails to meet the particularity requirements of Section 104(a), which should be incorporated into the elements of a 104(d) (2) order. Resp Br. 111-113; *Emerald Mines Co.* 863 F.2d 51, 52 (D.C. Cir. 1998). Big Ridge specifically questions a lack of specificity regarding which miners were observed in the red zone, when the instances

occurred, the circumstances surrounding the violations, and whether any managers were present when the alleged instances occurred. Resp. Br. 114. Accordingly, Big Ridge urges me to vacate the Order entirely. Resp. Br., 109. While I agree the particularity requirement in 104(a) generally applies to a 104(d) enforcement action, and that MSHA needed to provide more details to sustain the Secretary's high negligence and unwarrantable failure designations, the Order and evidence gathered during the E03 investigation produced sufficiently specific facts to sustain the underlying violation.

Big Ridge notes that the Commission has held that an order must allege particular facts so that the operator has an opportunity to both abate the violation and defend itself by challenging the legitimacy of the allegations. Resp. Br., 115-117; *Erie Mining Co.*, 2 FMSHRC 2717, 3721 (Sept. 1980)(ALJ Lasher)(vacating citation when the Order recited language of the standard without specifying whether cable was energized, whether tongs were used, or whether other protective measures were employed). In the present case, the Willow Lake mine was closed permanently following the November 17 accident thus, abatement efforts are not at issue in this matter. Resp. Br., 115 n. 96. Furthermore, in *Erie Mining*, the standard, 30 CFR § 55.12-14, allowed for alternate means of compliance that were not addressed by the citation issued, leading the judge to conclude that the operator did not understand what it was being charged with. *Erie Mining Co.*, 2 FMSHRC 2722. Indeed, the judge in *Erie* warned the regulation at issue in that case must not be confused with other regulations which are more simplistic. *Id.* at 2721. I find the regulation at issue in this case, the specific red zone prohibition required by 30 CFR § 75.220(a) (1), lacks the alternate means of compliance dilemma that was presented to the ALJ in *Erie*. In this case, the Willow Lake roof control plan clearly prohibits miners from operating in the red zone whenever the continuous miner is energized and not cutting coal. More specifically, anytime the continuous miner is "tramming", or moving from one cut to another, and a miner enters the area between the miner and the rib or actually contacts the machine, that miner is automatically violating the red zone prohibition. Tr. 598.

Additionally, the Order itself specifically charges that miners were "tramming the continuous mining machine while standing on the cable and leaning against the machine." Sec'y Ex. 34. As such, the Secretary must point to evidence that sustains this allegation and Big Ridge may defeat the allegation by rebutting the Secretary's evidence that miners have recently "surfing" the continuous miner power cable or otherwise violated the red zone prohibition. Big Ridge management and their legal representative were present at the November 19, 2012 interviews with the Willow Lake Section 1 third shift crew members and thus, were aware of their identities. Big Ridge had over a year before the hearing to further interview or depose those crew members in order to prepare a defense rebutting the miners' statements regarding red zone violations. Tr. 664-65. Indeed, Big Ridge did call one of the original interviewees, Shift Leader Duty, to explain the exact meaning of his statements to MSHA during the hazard complaint investigation. Tr. 643. Thus, I find that the Order described minimally sufficiently specific factual allegations that allowed, and did in fact prompt, Big Ridge to prepare a defense to the Secretary's allegations.

Alternatively, Big Ridge argues that the Secretary has failed to meet his burden of establishing a violation by a preponderance of evidence because the cited violation is based entirely on unsubstantiated hearsay interviews conducted by Cripps and Miller. Resp. Br. 117. Respondent correctly acknowledges that hearsay evidence is admissible in a FMSHRC hearing

and cites Judge Feldman's *Metz* decision for the proposition that it is most apt to be credited when it is corroborated. See, e.g., *Metz v. Carmeuse Lime, Inc.*, 32 FMSHRC 1710, 1713 (Nov. 2010), aff'd 532 Fed. Appx. 309 (3rd Cir. 2013) (unpublished). While I acknowledge this holding, I must note that hearsay testimony "may be treated as substantial evidence, even without corroboration, if, to a reasonable mind, the circumstances are such as to lend it credence." *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984) (finding hearsay evidence is admissible in Commission proceedings so long as it is material and relevant)(quoting *Hayes v. Department of the Navy*, 727 F. 2d 1535, 1538 (Fed. Cir. 1984)).

In this light, Big Ridge specifically questions whether some of the interviewed miners understood that when a continuous miner is cutting coal the red zone prohibition does not apply. Resp. Br. 118. Big Ridge bases this claim on Car Drivers Hawkin's and Van's statements that red zone violations could occur any time the continuous miner was "tramming back or any time it's energized" and "any time the miner is running if it's up against the rib or a car." Tr. 544, 547. Big Ridge claims that these statements may indicate that the miners believed a red zone violation could occur while the miner was cutting coal. Resp. Br., 118. However, I find that as Big Ridge had provided extensive red zone and pinch point training to the entire underground crew, these statements demonstrate that the miners fully understood it was not permissible to enter the red zone while the continuous miner was neither cutting coal or actively tramming, but was energized with the pumps on. Tr. 598-99, 654, 659. Additionally, Van specifically stated that he himself had trammed the continuous miner but had never cut coal. Sec'y Ex. 45: Van 1:08:00- 1:09:00.⁴ As such, Van obviously understood the difference between tramming and cutting. While I recognize some variances in the way each interviewed miner explained their understanding of the red zone, none of them inaccurately described a situation where they characterized an operator as violating the red zone regulations while the continuous miner was cutting coal.

Additionally, Roof Bolter McClendon and Car Driver Van explicitly stated they had observed operators standing on the power cable and leaning back against the continuous miner while tramming.⁵ Tr. 557-58, Sec'y Ex 45, Van 1:07:00-1:10:00. McClendon specifically stated that he had observed this type of red zone violation as recently as the last full shift he worked

⁴ The CD audiotope submitted by the Secretary does not contain an index or accurate time search function. I have cited to the relevant segment of the audio recording to the best of my ability.

⁵ A third miner, Car Driver Hall similarly confirmed he observed operators in the red zone leaning against or sitting on the continuous miner while moving it and with their feet on the cable to keep their feet and the cable from under the cats. He is not relied upon in my finding because he also testified somewhat inconsistently that he had not observed miners in the red zone while they were tramming the continuous miner from place to place. TR 552. A fourth miner, Shift Leader Duty corroborated the observations of the other three miners when interviewed by Miller and Cripps but he is not relied upon in findings regarding the underlying violation because it is unclear whether he understood he was being asked about his observations while working at the Willow Lake mine. In fact, he testified at hearing he believed he was being asked about whether he had ever seen this practice in his mining career, not specifically at the Willow Lake mine. TR 560-561, 643.

and described it as a “common practice” Tr. 557-58. Van stated he had observed operators tramming the continuous miner while standing on the cable as recently as two weeks before the November 19 interview. Sec’y Ex 45, Van 1:07:00-1:10:00. These observations clearly and unequivocally describe recent tramming operations at the Willow Lake Portal mine while the continuous miner was not cutting coal, and by definition depicted violations of the red zone prohibition. Tr. 545-46. As such, I do not agree with Big Ridge Safety Manager Barras’ belief that all the interviewed miners were referring to red zone violations outside of the Willow Lake mine or to instances in the distant past. Tr. 664-65.

In addition to questioning the accuracy of the miners’ interpretation of the red zone, Big Ridge has argued that the miners’ out of court statements are not corroborated by independent evidence. Resp. Br. 117-119. I acknowledge that the Secretary has not produced physical evidence or first-hand testimony from an MSHA inspector that corroborate the red zone violations described by the interviewed miners. However, while preferable, such evidence is not absolutely necessary in order to prove a violation. *Mid-Continent Resources, Inc.*, 6 FMSHRC 1135. I would also note in fairness that Big Ridge urged me, in order No. 8444863, to rely on a Big Ridge Section Foreman’s hearsay testimony that a separate miner operator, who did not testify at hearing, had told him he checked the spray heads of a continuous miner in support of their argument that the order should be vacated. Resp. Br. 89; Tr. 507. Here, the Secretary presented audio recordings of the miners’ November 19, 2012 interview responses. Tr. 544-566. I find the recordings absolutely relevant and material to the question of whether there was a violation of Big Ridge’s roof control plan. All of the interviewed miners sounded entirely direct, genuine and sincere in their responses. However, even after accounting for some apparent and unexplained inconsistencies in some of the miner’s statements about general red zone violations I still find the responses by McClendon, Van and Duty, specifically related to cable surfing while at the Willow Lake Portal mine, consistent and compelling enough to support an affirmative finding for the underlying violation. This is underscored by the fact that these interviews were conducted in response to a hazard complaint and a fatal accident investigation, a fact each miner was painfully aware of and which dispels Big Ridge’s argument that somehow they thought they were being asked about red zone violations occurring at any time in their careers prior to working for Big Ridge.

Accordingly, I find that the Secretary of Labor demonstrated by a preponderance of the evidence that miners at the Willow Lake Portal mine had recently entered the prohibited red zone area around a continuous miner while it was energized and not cutting coal. As such, I hold that Big Ridge violated 30 CFR § 75.220 (a)(1) and the mine’s mandatory roof control plan.

2. Gravity

Inspector Cripps stated that operating in the red zone is an S&S violation because it is highly likely that a continuous miner operator would suffer severe or fatal injuries due to the risk of being pinned between the machinery and a coal rib. Tr. 567-568. Applying the four *Mathies* S & S criteria, I have already found a violation of 30 CFR §75.220(a) (1). Additionally, operating the continuous miner while in the red zone creates a discrete safety hazard by increasing the likelihood of caught-between, struck by, and pinch injuries. In this situation, the Secretary presented credible statements of Big Ridge miners describing operators standing on the continuous miner power cable and leaning back against the machine while the machine was tramming at the Willow Lake Portal mine during recent shift work. Tr. 558. As such, the

preponderance of evidence indicates that there was a high likelihood that the hazard would result in a serious injury, as operators who surfed the cable could be caught underneath the tracks of the continuous miner, or pinched between moving machine parts and the coal rib. Big Ridge has previously emphasized that the 20 ton continuous mining machines at the Willow Lake Portal mine can crush and shatter rock and coal formations through their weight alone. Tr. 332. As such, I agree with Inspector Cripps that a miner caught underneath the miner or between the miner and the rib would most likely suffer severe or fatal injuries in the event of an accident. Tr. 567. Therefore, I find that the Secretary has produced satisfactory evidence to meet all 4 *Mathies* elements necessary to establish that the violation at issue is S & S. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

I note that Big Ridge has challenged the S & S and highly likely chance of injury designations of Order No. 8431905 due to a lack of specificity cited in the order. Resp. Br. 119-120. However, as I held above, the Secretary has credibly established through the statements of Willow Lake employees that operators at the Willow Lake Portal mine stood on the continuous miner power cable and leaned back against the machine while tramping the machine backwards in the shifts prior to November 17, 2012. Due to the weight of the machine, the close confines of the mine entryways, and the multiple trip/pinch point hazards presented by the power cable and articulated joints of the continuous miner, I cannot conceive of a situation in which these actions would not be highly likely to lead to a serious injury or death. As such, I uphold Order No. 8431905 as S&S and highly likely to result in an injury.

3. Negligence

Inspector Cripps determined that Order No. 8431905 was the result of Big Ridge's high negligence. Sec'y Ex. 34, 1. He made this determination based upon the number of miners in different positions that observed miners operating in the red zone and McClendon's statement that surfing the cable was a "common practice" at the Willow Lake mine. Tr. 558. Cripps surmised that if numerous hourly employees had observed red zone violations, management officials must have been aware of these actions as well. Tr. 569. Furthermore, the fact that Big Ridge had not previously disciplined or terminated any miner for working in the red zone led him to believe Big Ridge was not enforcing its red zone policy. Tr. 570-71.

Big Ridge disputes these inferences and denies any knowledge of red zone violations. Resp. Br., 121. Of the eight miners interviewed, one would clearly be considered management, Section Foreman Benjie Reeves. Reeves stated he has never observed or caught any miners at Willow Lake operating in the red zone or "cable surfing". Tr. 562. Although not relied upon as a management employee by MSHA for negligence designations, Shift Leader Duty's interview with Miller and Cripps is more difficult to assess.

Rank and file hourly employees are considered agents when they perform inspections, "that one might expect an employer more normally to delegate to management personnel," *Pocahontas Fuel Co.*, 8 IBMA 136, 48 (1977). As such, I find that Duty was a member of management for the two years he was a shift leader as his duties included directing production on one side of a split air unit and examining pre-shift inspection records. Sec'y Ex. 45: Duty 3:35:00-3:39:00. During the November 19 interview, Duty stated he had both observed people operating the continuous miner in the red zone and leaning against the machine with their feet out and pushing the cable away as they tramped the machine. Tr. 560-561. At hearing

however, Duty denied ever seeing these practices while working either as a shift leader or previously as a mechanic at the Willow Lake mine, but testified that he had seen it in his previous mining experience at other mines. Tr. 639-640. Big Ridge argues that Duty was in a bad emotional state during the November 19 interview because he had just lost a friend, co-worker Chad Meyers, who was the subject of the concurrent MSHA accident investigation. Big Ridge reiterated Duty's claim that he interpreted the interview questions about observing work in the red zone to mean whether he had ever observed these practices at any time during his seventeen year mining career. Resp. Br., 123, Tr. 643.

Close examination of the questions asked of Duty during the interview lends partial support to Big Ridge's argument. Duty was asked "Have you *ever* observed anybody else operating the continuous miner while in the red zone?" And "Have you *ever* noticed anyone moving a continuous miner - - I used to call it the old way - - with kind of leaning against the machine with their feet out and pushing the cable away as he trammed the machine around it? Have you *ever* seen that happen?" Tr. 561. (Emphasis added). He answered affirmatively to both questions. However, his response to a follow-up question - "How recently have you seen that happen?" adds confusion - "It's been probably a pretty good while because I've been on the idle crew mostly here lately." Tr. 560-561.

I find Duty's reference to his current assignment on the idle crew indicates that his answer described actions he had observed at some point during his work experience at the Willow Lake mine contrary to his testimony at trial. However, as stated by Duty himself during the interview, it had "been a good while" since he had observed red zone violations. As such, it appears doubtful that Duty was aware of the violations Roof Bolter McClendon referred to as a "common practice" that McClendon had observed as recently as the last full shift. Tr. 558.

The preponderance of the evidence compels me to hold that "surfing the cable" was a common enough occurrence that Big Ridge management should have been able to identify violations of the red zone and initiated disciplinary action. However, as Big Ridge had instituted a zero tolerance policy regarding red zone violations, it is entirely plausible that operators would only engage in the "cable surfing" practice when they knew management was not present or in a position to see them. When Inspector Miller asked Roof Bolter McClendon if he believed operators were violating the red zone due to a lack of safety training or the operator's desire to take a short cut, McClendon answered "I believe the operator think it's easier for them; they have more control of the cable." Tr. 559. McClendon went on to state that he had participated in plenty of safety talks regarding the prohibition of red zone work. Tr. 559. When Inspector Miller asked Duty a similar question regarding what might cause operators to enter the red zone, Duty replied, "I think they need to move their cable, and that's the only reason I can think of." Tr. 561. Section Foreman Reeves stated he'd received red zone training in annual refresher trainings and that he'd never caught anybody operating in the red zone. Tr. 562-63. These responses indicate that the practice of surfing the cable appeared to be initiated by individual operators in direct contradiction of Big Ridge's safety policy when management personnel were not present or in a position to readily observe them.

While Inspector Cripps and Miller did ask questions about safety training, the interview excerpts presented by the Secretary do not indicate that they asked any hourly miners if management was aware of red zone violations, if management was present during any of the violations observed by hourly miners or if they reported their observations to management.

Section Foreman Reeves indicated he had never operated or observed anyone else operate in the red zone. Tr. 562-63. Even discounting Duty's claim at hearing that he only observed red zone violations at other mines, Duty stated at the November 19 interview that he had been on a different work assignment and it had been a "good while" since he had observed anyone operate in the red zone. Tr. 561, 640. I find the Secretary has not demonstrated by a preponderance of evidence that management was aware of the recent red zone violations upon which the underlying violation is based.

Big Ridge Operations Superintendent Haantz, Mine Manager Genisio and Regional Safety Manager Barras testified regarding Big Ridge's zero-tolerance red zone policy. Haantz, Genisio and Barras described Big Ridge's daily safety meetings, annual safety refresher training, an off-site "Safety, A Way of Life, Days" training, and posters warning against work in the red zone placed on bulletin boards and in the facility restrooms. Tr. 614-15, 631-32, 562, 653-60, Resp. Ex. PPP; RRR (1), (3); QQQ (1); OOO; MMM; NNN. Big Ridge also maintains a 1-800 "Tell Peabody" anonymous hotline whereby employees can call into the company's legal group for any issue they have. Tr. 650. These witnesses also confirmed that Big Ridge instructs all employees if they are caught working in the red zone, they will be subject to immediate termination with no progressive discipline. Tr. 619, 630, 649-650. Both Haantz and Barras confirmed that miners had been fired from other Peabody mines in the region for violating the red zone policy as well as other life-saving rules. Tr. 618-619, 650. Finally, Big Ridge management personnel Haantz, Barras, Genisio, and Reeves all deny having any prior knowledge of any allegations of miners working in the red zone at the Willow Lake mine. Tr. 616, 632, 660, 562-63.

Big Ridge had instituted a comprehensive safety plan prohibiting red zone work and encouraging anonymous safety complaints to be filed by Peabody employees. Therefore, although it appears that red zone violations occurred often enough that management should have been aware of the issue; the hourly operators who violated the red zone did so on their own accord in direct violation of the company's safety policy without the actual knowledge of management. Thus, I hold that the company's efforts to prohibit, identify, and discipline red zone violations are legitimate mitigating circumstances. As such, I hold that the negligence designation for Order No. 8431905 shall be **MODIFIED** from high to moderate.

4. Unwarrantable Failure

For Order No. 8431905, I find that the Secretary has not produced sufficient evidence to satisfy the five factor test considered by the Commission in evaluating unwarrantable failure designations. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

a. Extent and Duration of the Violation

After reviewing the transcript and the submitted compact disk recording of the eight interviewed miners, it is clear that some continuous miner operators at the Willow Lake Portal mine violated the red zone on an intermittent basis, "when they felt like they needed to be there." Tr. 549. However, it also appears some operators followed the mine's safety rules and consistently stayed out of the red zone. Sec'y Ex. 45: Van 1:07:00- 1:10:00. Unfortunately, the length of time the violation existed cannot be determined because as Big Ridge argues there is

very little evidence provided regarding the details of observed red zone violations. All we really know is that several miners answered affirmatively when asked if they had ever observed miner operators either working in the red zone or using their feet while tramming to push the power cable out of the way of the miner cats, a term Cripps refers to as “cable surfing.” This evidence is woefully inadequate to meet the burden of demonstrating duration. Likewise the extent of the violation is difficult to assess. Out of all the miners interviewed only one, Roof Bolter McClendon opined that it was common practice to see a miner operator using their feet while tramming to push the cable out of the way of the miner cats. This is minimally sufficient to at least suggest that the violation was relatively extensive.

b. Notice to the Operator

The Secretary did not produce any evidence suggesting that MSHA had previously cited or warned Big Ridge about red zone violations at the Willow Lake Portal mine. Big Ridge Safety Manager Barras credibly testified that he had never been informed of any red zone violations at the Willow Lake Mine during ten years as a safety officer. Tr. 660-61. Section Foreman Reeves stated during the Nov 19 interview he had never observed anyone working in the red zone. Tr. 562-63. I find on balance, Shift Leader Duty’s statements indicate that while he had previously observed red zone violations most likely at the Willow Lake mine there is no indicia of specifically when he made such observations, who was involved, the circumstances he observed and most importantly his reaction to what he observed. As such, the Secretary has not produced any evidence to demonstrate that MSHA had notified Big Ridge of a need to increase red zone enforcement/monitoring, and woefully insufficient evidence that Big Ridge management was aware of ongoing red zone violations in the weeks and months prior to the November 17 hazard complaint.

c. Prior Abatement Efforts

Big Ridge incorporated red zone violations into a group of Life Safety Rules that were posted throughout mine facilities. Big Ridge conducted numerous pre-shift safety talks on red zones and hosted a full day refresher course that emphasized the hazards of working in red zone and pinch point areas. Tr. 559; 651-52. Big Ridge created an anonymous safety complaint hotline to encourage miners to report safety hazards. Tr. 650. Big Ridge also appears to have consistently and promptly terminated any employee observed by management working in the red zone at other nearby Peabody mines whenever a complaint was filed. Tr. 618-19. However, Barras stated management had not observed or received any reports regarding red zone violations at the Willow Lake mine. Tr. 660-61. Therefore, I find that Big Ridge instituted a substantial preventative safety program designed to prevent red zone violations from occurring.

d. Obviousness of the Hazard and Degree of Danger

As red zone violations involved the minute to minute work movements of miner operators, red zone violations could only be identified by closely monitoring the operation of the continuous miner operator or unfortunately, if an accident occurred. Although hourly employees described seeing red zone violations, no evidence was proffered to show that the hourly employees ever reported them to management. Tr. 660-61. As such, while the hazard of a red

zone violation was obvious at the times it actually occurred, such a violation appears to have lasted for a brief period of time and was not detectable as soon as the operator removed himself from the danger zone. Additionally, the Secretary has not specifically contended that Big Ridge management failed to adequately supervise continuous miner operations in their work. In fact both Shift Leader Duty and Reeves informed MSHA inspectors that they watched continuous miner operators make cuts as part of their regular supervisory duties. Sec’y Ex. 45: Duty 3:44:00-3:46:00, Reeves 4:03:00-4:05:00.

As I have held above, red zone violations posed a high degree of danger to continuous miner operators, as the operator could become entrapped or crushed by the continuous miner.

e. Operator’s Knowledge of the Violation

The Secretary has presented no evidence of management’s knowledge of red zone violations in the months leading up to the November 17 hazard complaint. The Secretary merely relies on an inference made by Inspector Cripps that given the observations of the interviewed miners management must have been aware of red zone violations at Willow Lake. Said inference is countered by the credible straightforward testimony, on this point, by Big Ridge management officials. Safety Manager Barras stated that while he had received reports of other life safety violations at Willow Lake, he had never been informed of a red zone violation at Willow Lake in his ten years as a safety officer. Tr. 660-61. Mine Manager Genisio testified that he had never observed or received a report of a red zone violation during two years as the third shift mine manager at Willow Lake leading up to November 2012. Tr. 632-33. Section Foreman Reeves stated during the November 19 interview that he had never operated or observed anyone else in the red zone of a continuous miner. Tr. 562-63. Shift Leader Duty did state in the November 19 interview that he had observed red zone violations but that he had not seen any for a “pretty good while” since he had been assigned to an idle shift. Tr. 561. As such, I cannot conclude, with so little information about Duty’s prior observations, that he was aware of the recent red zone violations observed by McClendon and Van referenced in the order at issue.

The Secretary has argued that since McClendon described red zone violations as a “common practice”, it is simply not credible that Big Ridge management was not aware of ongoing red zone violations. However, when reviewing the statements made by the miners during the November 19 interview, it appears that the miners’ exposure to red zone violations varied greatly as some workers had seen red zone violations as recently as the “last full shift” while some had not seen any violations for “months” or a “long while” Tr. 558, 553, 566. As the third shift ran two separate continuous mining operations and different continuous miner operators ran the miners from shift to shift, it appears that this variance may be attributed to the tendencies of individual continuous miner operators. Sec’y Ex. 45: Hawkins 23:00-25:00; Sec’y Ex. 45: Van 1:07:00- 1:10:00. As noted in the discussion regarding prior abatement efforts, Big Ridge management testified without dispute that it had terminated employees for violating its red zone violations at other mines in the region. Tr. 618-19. Thus, I find it reasonable to believe that a few continuous miner operators at the Willow Lake mine simply, and regrettably, disobeyed company policy when they knew management was not present and that no one reported such violations to anyone in management. Tr. 618-19.

After reviewing all five unwarrantable failure factors, I have determined that the Secretary has not presented sufficient evidence to demonstrate Big Ridge was aware of ongoing red zone violations, and that Big Ridge credibly demonstrated it had instituted comprehensive life-safety training and policies designed to prevent such violations. Although the Secretary does not necessarily have to prevail on all unwarrantable failure factors, I find that when the factors are considered as a whole, the Secretary has not demonstrated that Big Ridge acted with a serious lack of reasonable care, intentional misconduct or reckless disregard of the standard. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004. As such, Order No. 8431905 shall be **MODIFIED** from a 104(d) (2) Order to a 104(a) Citation.

5. Penalty Assessment

The Secretary has proposed a regularly assessed penalty of \$53,858.00 for Order No. 8431905. Resp. Br., 127. I have already held the negligence level shall be modified from high to moderate and that the 104(d)(2) unwarrantable failure designation shall be modified to a 104(a) citation

Order No. 8431905 indicates that standard 75.220(a) (1) was cited 46 times in two years at the mine. Sec'y Ex. 34. However, the Secretary did not present any evidence showing whether any of these citations were for red zone violations. The parties have stipulated that Big Ridge, Inc. is a large operator. Tr. 10. I have found Big Ridge to be moderately negligent. There is no indication that the assessed penalty would have any impact on Big Ridge's ability to continue in business. I have determined that the gravity of the violation is properly assessed as highly likely and S &S. Finally, Big Ridge acted in good faith to achieve rapid compliance after being notified of the violation when it closed the mine. Tr. 572. After considering all of the above factors, the 30 CFR § 100 penalty tables, and noting the extraordinary danger involved in red zone violations, I find it appropriate to assess a penalty of \$35,000 for Citation No. 8431905.

VIII. JUDGMENT SUMMARY

For the eight citations and orders contested at hearing, I hereby **ORDER** that the following penalty modifications and monetary penalty adjustments shall be made:

Citation No.	Originally Proposed Assessment	Judgment Amount	Modification
LAKE 2012-506 (Judgment Only)			
8436212	\$66,100.00	\$30,000.00	Reduce Number of Miners Affected from “4” to “2”
8436107	\$14,700.00	\$1,500.00	Modify 104 (d)(2) Order to 104(a) Citation ⁶
LAKE 2012-66 (Judgment Only)			
8444809	\$47,700.00	\$3,000.00	Reduce Likelihood of Injury from “Reasonably Likely” to “Unlikely” Remove Significant and Substantial Designation Reduce Negligence from “High” to “Moderate”
8445037	\$47,700.00	\$2,000.00	Reduce Likelihood of Injury from “Reasonably Likely” to “Unlikely” Remove Significant and Substantial Designation Reduce Severity of Injury from “Fatal” to Permanently Disabling
8445268	\$25,810.00	\$15,000.00	Modify 104(d)(1) Order to a 104(a) Citation Reduce Negligence from “High” to “Moderate”
LAKE 2012-251 (Judgment Only)			
8444863	\$52,500.00	\$0.00	Vacate
LAKE 2013-307 (Judgment Only)			
8445336	\$7,774.00	\$7,774.00	Upheld as Written and Assessed
8431905	\$53,858.00	\$35,000.00	Modify 104(d)(2) Order to 104(a) Citation Reduce Negligence from “High” to “Moderate”
Judgment Total	\$316,142.00	\$94,274.00	

IX. SETTLEMENT

The Secretary has filed a motion to approve settlement of 25 of the violations involved in this matter. I acknowledge and accept the explanation for the agreed upon settlement contained in the parties’ settlement motion and amendments. The originally assessed amount for these 25

⁶ Modification reflects reduction from “Special Assessment Narrative Form Chart; Resp. Ex. B”

citations was **\$484,876.00** and the proposed partial docket settlement is for **\$296,571.00**. The parties have moved to approve the proposed settlement as follows.

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
LAKE 2013-251 (Settlement Only)			
8445322	\$32,800.00	\$32,800.00	
8407445	\$70,000.00	\$35,000.00	Modify Number of Persons Affected from "9" Persons to "4" Persons
8407466	\$70,000.00	\$35,000.00	Modify Number of Persons Affected from "9" Persons to "4" Persons
LAKE 2013-252			
8407448	\$2,901.00	\$2,000.00	Reduce Monetary Penalty
8407451	\$2,678.00	\$2,678.00	Reduce Monetary Penalty
8407464	\$3,405.00	\$3,405.00	
8407902	\$3,689.00	\$3,689.00	
8444868	\$19,793.00	\$15,000.00	Reduce Monetary Penalty
8445325	\$3,996.00	\$3,200.00	Reduce Monetary Penalty
8445328	\$2,473.00	\$2,200.00	
8445332	\$1,795.00	\$1,795.00	
8445339	\$11,306.00	\$8,500.00	Modify Severity of Likely Injury from "Fatal" to "Permanently Disabling"
LAKE 2012-506 (Settlement Only)			
8428748	\$27,900.00	\$20,000.00	Modify Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
8434918	\$21,900.00	\$14,000.00	Modify "104(d)(2) Order" to "104(a) Citation"
8435824	\$14,700.00	\$10,000.00	Modify Likelihood of Injury from "Reasonably Likely" to "Unlikely" Remove "Significant and Substantial" Designation
8435826	\$35,500.00	\$20,000.00	Reduce Monetary Penalty
8428781	\$13,600.00	\$8,899.00	Modify "104(d)(2) Order" to "104(a) Citation"
8435650			Modify Likelihood of Injury from "Reasonably Likely" to "Unlikely"
	\$6,600.00	\$5,000.00	Remove "Significant and Substantial" Designation
LAKE 2013-307 (Settlement Only)			
8445327	\$14,700.00	\$14,700.00	

8445331	\$70,000.00	\$35,000.00	Reduce Monetary Penalty
LAKE 2012-896			
8445020	\$13,600.00	\$8,000.00	Reduce Monetary Penalty
8424296	\$9,882.00	\$2,000.00	Modify "104(d)(2) Order" to "104(a) Citation"
8424297	\$4,440.00	\$1,000.00	Modify "104(d)(2) Order" to "104(a) Citation"
8428355	\$13,609.00	\$6,396.00	Reduce Monetary Penalty
8428356	\$13,609.00	\$6,309.00	Reduce Monetary Penalty
Total	\$484,876.00	\$296,571.00	

X. ORDER

I have considered the submitted settlement documents and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110 (i) of the Act. The motion to approve settlement is **GRANTED** and the citations contained in this agreement are **MODIFIED** as set forth above for a partial settlement total of \$296,571.00.

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess the eight penalties contested at hearing above for a total judgment penalty of \$94,274.00. Big Ridge, Inc. is hereby **ORDERED** to pay the Secretary of Labor the total sum of **\$390,845.00** within 30 days of this order.⁷

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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

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April 28, 2014

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of CHARLES RIORDAN,	:	Docket No. VA 2014-199-D
Complainant,	:	NORT-CD 2014-03
	:	
v.	:	
	:	
KNOX CREEK COAL CORP.,	:	Mine: Tiller No. 1
Respondent	:	Mine ID: 44-06804

ORDER DENYING MOTION FOR APPROVAL OF ECONOMIC REINSTATEMENT

Before: Judge Moran

Before the Court is Respondent’s Motion for Approval of Economic Reinstatement. On April 7, 2014,¹ the Court issued a decision in which it ordered the temporary reinstatement of Complainant Charles Riordan, on whose behalf this proceeding was brought by the Secretary of Labor² pursuant to Section 105(c) of the Mine Safety and Health Act of 1977. Thereafter, Knox Creek Coal sought to have Mr. Riordan economically reinstated, but the parties reached an impasse on the issue of whether Knox Creek may offset the earned income the Complainant may receive from outside employment against the payment it owes the Complainant during this period of temporary reinstatement. Knox Creek now seeks an order for economic reinstatement in which the Court would impose a provision that would allow for this offset of income. Per the Commission’s clear ruling in *MSHA v. North Fork Coal Corp.*, 33 FMSHRC 589 (Mar. 2011), Commission judges, absent rare and unusual circumstances, leave the terms of such potential agreements to the parties and do not become involved in the particulars of economic reinstatement agreements. Accordingly, as explained more fully below, Respondent’s Motion is DENIED.

Respondent has moved for the Court to enter an order that would impose economic terms upon the Complainant’s temporary reinstatement that are opposed by the Complainant. Both the Secretary and private counsel for the Complainant object to the provision in Knox

¹ The Court entered an Amended Decision and a Second Amended Decision on April 8 and 10, 2014, respectively, but neither made a substantive change to the original Decision.

² Separate from the Secretary’s representation, Attorneys Tony Opegard and Wes Addington also represent Mr. Riordan in this proceeding.

Creek's proposed order that would enable the mine to deduct any income that the Complainant may earn from outside employment from the amount it owes the Complainant during this period of temporary reinstatement. Given this disagreement between the parties, the Respondent argues that an ALJ is empowered to order economic reinstatement as a part of the Act's broad authority in discrimination proceedings. Reply at 4 (quoting *MSHA o/b/o Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (Feb. 1982)).³ Both the Secretary and Complainant's counsel object to the Court's involvement in this matter, and they cite to *MSHA v. North Fork Coal Corp.*, 33 FMSHRC 589 (Mar. 2011) as guidance for the limits placed upon Commission judges in the temporary reinstatement phase of discrimination proceedings.

The Court finds the Commission's decision in *North Fork Coal* to control in this matter. Similar to Knox Creek, the *North Fork* Respondent sought to have Complainant's earnings, while employed elsewhere during his economic reinstatement, to offset the amounts he was owed by Respondent. In rejecting the Respondent's position, the Commission differentiated between the legal principles that apply to monetary awards when a miner prevails in a discrimination proceeding on the merits versus those that govern in the temporary reinstatement context:

With regard to the former, the Commission has noted that the provision for back pay and other remedies in section 105(c) awarded once it has been established that a miner was discriminated against, is modeled after the remedial provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(c). *Sec'y on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 n.4 (Jan. 1982). Under that statute, concepts of offset and the duty to mitigate damages are routinely applied to back pay awards, and the Commission has incorporated those concepts in computing back pay awards under section 105(c). *See, e.g., Sec'y on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142-44 (Feb. 1982). We have recognized that back pay is designed to make the miner as nearly whole as possible for the losses he or she has suffered between the time the miner was discriminated against and the time his or her claim of discrimination was upheld. *Id.* at 143. If the miner does not prevail, the miner is due no award.

In contrast... the purpose of temporary reinstatement is to put the miner back to work as soon as possible so that he or she can resume earning a living while the discrimination case is heard. The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits. The issue of back pay usually does not arise since the miner is not compensated for the earlier period of time between termination and the judge's order temporarily reinstating him or her. *Conversely, if the operator chooses to pay the miner while foregoing the miner's labor, there is no right for the operator to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim.* 33 FMSHRC at 592-93 (emphasis added).

³ In its Motion, Respondent cites to *Secretary o/b/o Thurman Wayne Pruitt v. Grand Eagle Mining*, 33 FMSHRC 1638 (July 2011) (ALJ Melick) to illustrate this principle. This case, however, provides no such holding, as the ALJ granted the Secretary's application for temporary reinstatement, but did not speak to the issue of economic reinstatement or to the Commission's broad authority in discrimination proceedings under the Mine Act.

In light of this distinction, the Commission rejected the notion that the considerations which shape back pay award amounts, also apply, as a matter of law, to the economic reinstatement order before it. *Id.* at 593. The Commission elaborated that “[u]nlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements.” *Id.*

The *North Fork* decision applied these legal principles as it examined three separate periods of time that transpired over the course of the discrimination proceeding. The first involved the period from when the ALJ entered the order of economic reinstatement, which was the product of a negotiated agreement between the parties, to when the ALJ dissolved the TR order. For this time frame, the Commission ordered that the Respondent pay the miner according to the terms of the economic reinstatement agreement. *Id.* at 595. The second time period does not apply here.⁴ For the third time period, addressing the date the Commission reversed the judge’s decision and forward, it held that “the judge’s earlier supplemental order incorporating the parties’ agreement should be applied, with no offset.” *Id.* Compliance with the terms of the original order, with no offset, would continue until the parties negotiated a new agreement that the judge would then enter as either a superseding new order or as a modification to the original order. *Id.* at 596.

Knox Creek’s Reply brief attempts to apply the Commission’s ruling during this second, “interim” period, when no economic reinstatement order was in effect, and then during the third period, when the ALJ could enter a modified order, to justify its position that an ALJ has broad discretion to modify the terms of an economic reinstatement agreement or offset amounts paid by other employers despite a miner’s opposition. Reply at 4-5. Only during this interim (second) period when the economic reinstatement order was temporarily dissolved did the Commission order the Complainant to offset his payments from Respondent against his earnings from outside employment. This offset, however, was unique to the circumstances in *North Fork*, where no order existed for a brief period following the dissolution of a previously entered order, and is not applicable here, where the parties have yet to reach an agreement at all. Furthermore, in the third time period, the Commission ordered that the original economic reinstatement agreement from the first period controlled until the parties negotiated a new agreement, which the Court could then enter as either a modified order or a new order. The ALJ was therefore not free to modify the order at the behest of one party; rather, the parties would need to arrive at a new agreement before the Court could take any subsequent action. Contrary to Knox Creek’s arguments, the scenario before the Court here is most closely akin to the first time period in *North Fork*, where an economic reinstatement order had been entered that incorporated the terms of the parties’ negotiated economic reinstatement agreement. As noted above, during this first period the Commission declined to intervene in making any monetary modifications and asserted that the parties’ agreed-upon order controlled.

Respondent’s assertion regarding the Court’s broad discretion to enter or modify an order of economic reinstatement presupposes the existence of an underlying agreement between the

⁴ That time period involved the “interim period” between when ALJ ordered the dissolution of the TR order and when the Commission reversed the judge’s order dissolving temporary reinstatement. For that limited period of time, in applying principles of fairness, the Commission declined to impose the terms of the economic reinstatement upon the Respondent, and ordered that the Complainant offset his pay from Respondent with his outside earnings. 33 FMSHRC at 595.

parties, which here is not the case. The Commission's rulings for the second and third time periods in *North Fork* were premised upon the existence of a negotiated agreement that was entered in the first time period. The parties here have not yet reached even this preliminary level of agreement. The Commission has spoken plainly that Commission judges *do not decide the terms of economic reinstatement agreements*. The lack of an agreement does not trigger this Court's intervention. Until the parties reach an agreement on the terms of any economic reinstatement, the Court's involvement is foreclosed.

The Court would also echo the Commission's observation in *North Fork*, where it noted that "we are cognizant of the fact that it was North Fork's decision to offer economic reinstatement in lieu of actual reinstatement that gave rise to the retroactive pay relief that North Fork now seeks to challenge." *Id.* at 593. Here the Court would note that Knox Creek does retain the option to actually reinstate Mr. Riordan at the mine. After all, it is Knox Creek that seeks to forego Mr. Riordan's labor, a fact that undercuts its objection to Riordan working elsewhere during this interval. This offer to pay could coincide with his working at the mine, which would alleviate concerns that Mr. Riordan is receiving an income from an outside employer.

In sum, the Court's broad discretion in discrimination proceedings does not encompass the authority to enter an order of temporary economic reinstatement for Mr. Riordan absent an agreement between the parties as to its terms. The make-whole principles that govern in discrimination merits rulings do not also apply in the context of temporary reinstatement, for the purpose of temporary reinstatement is to put a miner back to work. Accordingly, Respondent's Motion is therefore DENIED.

SO ORDERED.

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

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April 29, 2014

MARTIN COUNTY COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. KENT 2012-615-R
	:	Citation No. 8265796; 02/01/2012
v.	:	
	:	Docket No. KENT 2012-616-R
SECRETARY OF LABOR	:	Order No. 8265798; 02/01/2012
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2012-617-R
Respondent	:	Order No. 8265804; 02/01/2012
	:	
	:	Docket No. KENT 2012-618-R
	:	Order No. 8265805; 02/01/2012
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2012-1321
Petitioner	:	A.C. No. 15-19193-292715
	:	
v.	:	Docket No. KENT 2012-1403
	:	A.C. No. 15-19193-294671
MARTIN COUNTY COAL	:	
CORPORATION,	:	
Respondent	:	Mine: Voyager No. 7

DECISION

Appearances: Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Jeffrey K. Phillips, Esq., Steptoe & Johnson PLLC, Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Feldman

These consolidated contest and civil penalty proceedings are before me based upon petitions for assessment of civil penalty filed by the Secretary of Labor (“the Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), against The Respondent, Martin County Coal Corporation (“MCC”). These matters concern the nature

and extent of cited violative roof and rib conditions observed by the issuing inspectors on February 1, 2012, which the record reflects had not materially changed during the weeks preceding the inspection. A hearing was held on October 30 and October 31, 2013, in Prestonburg, Kentucky. The parties' briefs have been considered in the disposition of these matters.

Specifically, these proceedings concern four contested citations and orders ("citations") issued on February 1, 2012, alleging violations of mandatory safety standards contained in Part 75 of the Secretary's regulations governing underground coal mines. 30 C.F.R. §§ 75 *et seq.* The Secretary alleges the subject violations are attributable to unwarrantable failures.¹ Docket No. KENT 2012-1321 includes 104(d)(1) Citation No. 8265796, for which the Secretary proposes a civil penalty of \$14,000.00, and 104(d)(1) Order Nos. 8265798 and 8265804, for which the Secretary proposes civil penalties of \$16,400.00 each. These citations allege adverse roof and rib conditions in Voyager No. 7 Mine's No. 4 Entry along the No. 1, 2 and 3 belt lines, respectively, in violation of section 75.202(a). Section 75.202(a) provides:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

30 C.F.R. § 75.202(a).

104(d)(1) Order No. 8265805 in Docket No. KENT 2012-1403 alleges that, by failing to record and correct the cited adverse roof and rib conditions, the Respondent failed to conduct adequate on-shift examinations in violation of section 75.362(b). The Secretary proposes a civil penalty of \$3,224.00 for Order No. 8265805. Section 75.362(b) provides, in pertinent part:

During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway where a belt conveyor is operated.

30 C.F.R. § 75.362(b).

Thus, the Secretary seeks to impose \$50,024.00 for the four alleged unwarrantable citations at issue. In addition, the captioned civil penalty matters each contain one additional citation, for which the parties have reached an agreement. With regard to 104(a) Citation No. 8251922 in Docket No. KENT 2012-1321, the settlement terms include reducing the degree of negligence attributable to the Respondent, from moderate to low, and reducing the civil penalty from \$1,500.00 to \$850.00. With regard to Order No. 8265806 in Docket No. KENT 2012-1403, the settlement terms include modifying the 104(d) order to a 104(a) citation to reflect that the violative condition was not the result of an unwarrantable failure, and reducing the civil

¹ As a general matter, an unwarrantable failure occurs when a violation is attributable to aggravated conduct rather than ordinary negligence. *Emery Mining*, 9 FMSHRC 1997, 2001 (Dec. 1987).

penalty from \$9,122.00 to \$4,000.00. The parties' partial settlement agreement, which was approved on the record, imposes a civil penalty of \$4,850.00 for the two citations addressed therein. (Tr. 8-10).

I. Statement of the Case

As discussed below, I will defer to the opinion of the issuing mine inspectors that the cited roof and rib conditions constituted violations of section 75.202(a). Given the hazardous nature of adverse roof and rib conditions, the violations were properly designated as significant and substantial ("S&S").² However, the unwarrantable failure designations for the three subject violations cannot be affirmed for several reasons. As an initial matter, the cited rib and roof conditions lack specificity with respect to the nature and extent of the alleged violations. As discussed below, the citations contain general allegations of cracks ranging from one to twelve inches from the edge of ribs, without specifying whether the majority of the cracks were closer to one inch or to twelve inches from the edge. Thus, the obviousness and extent of the danger posed by the cited rib conditions cannot be determined.

The Secretary relies on duration and obviousness to prove an unwarrantable failure, asserting that the alleged hazardous rib conditions existed and went unattended for at least one month. However, the alleged violative conditions cited on February 1, 2012, by issuing inspectors who were not familiar with the conditions in the Voyager No. 7 Mine, were not supported by the opinion of the regular quarterly MSHA Inspector who had observed the rib conditions in the same areas of the No. 4 Entry between January 17 and January 23, 2012.

The record also precludes a finding of aggravated conduct because MCC was prejudiced by virtue of the fact that it was not given an opportunity to accompany the inspectors. This is particularly important because the lack of MCC's participation prevented it from having the inspectors identify, in MCC's presence, the nature, extent and location of each alleged hazardous rib condition, facts that are not adequately set forth in the general language of the citations. (Gov. Ex. A, B, C); *See, SPC Investments, LLC*, 31 FMSHRC 821, 827-28 (Aug. 2009).

Finally, the inadequate on-shift citation shall be vacated, given the inadequate description of the hazardous conditions that are alleged to have been overlooked by MCC's on-shift examiners. Moreover, as discussed below, a determination of inadequate on-shift examinations would require a finding that several regular EO-1 MSHA inspections of the same areas that occurred shortly before February 1, 2012, were also inadequate, as they did not disclose any adverse roof or rib conditions.

II. Findings of Fact

The Voyager No. 7 Mine is an underground coal mine located in Martin County, Kentucky. The mine was acquired from Massey Energy Company by Alpha Natural Resources in June 2011. (Tr. 407). Though now idle, On February 1, 2012, when the relevant citations

² Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

were issued, the mine had one working section. (Tr. 489, 491). The cited roof and rib conditions along the No. 1, 2 and 3 belts were located in the No. 4 Entry. The three conveyor belts totaled approximately 1½ miles in length. (Tr. 117, 126). The belts were approximately eight feet from the ribs on the walkway side, and two feet from the ribs on the off-walkway (maintenance) side. (Tr. 67-68). The ribs separating the entries and crosscuts along the belts were approximately fifty to sixty feet in length, and six feet high. (Tr. 94, 202). At the time of the February 1, 2012, inspection, there were two production shifts at the Voyager No. 7 Mine. The day shift was from 6:00 a.m. to 3:00 p.m., and the evening shift was from 3:00 p.m. to 12:00 a.m. (Tr. 56-57, 23).

Regular quarterly inspections of MCC's Voyager No. 7 underground mine, designated by MSHA as EO-1 inspections, were conducted by MSHA Inspectors assigned to the Martin County field office. Since 2010, MSHA Martin County Inspector Robert Wise had been assigned to conduct the inspections at the Voyager No. 7 Mine. (Tr. 405-06). Wise testified that it is common for MSHA Inspectors to be on-site on a regular basis for the entire three month quarter in relatively large mines such as Voyager No. 7. (Tr. 472). Wise normally conducted his inspections during the day shift, at which time he provided an opportunity for MCC representatives to accompany him. (Gov. Ex. G).

During January 2012, the month prior to the issuance of the subject citations, Wise was on-site conducting inspections on twelve separate days. (Tr. 414). As part of his routine EO-1 inspection duties, Wise inspected the roof and rib conditions along the No. 1, 2 and 3 belts. Wise testified that his quarterly inspection was on schedule, and that he had not requested any assistance in completing his inspection assignment. (Tr. 414, 434). Consequently, he neither expected nor requested a supplemental EO-1 inspection by inspectors assigned to an MSHA office other than Martin County.

Wise inspected the No. 3 Belt line and its roof and rib conditions on January 17, 2012, at which time he was accompanied by Kenny Hunt, MCC's superintendent of Voyager No. 7. (Tr. 418, 425). Wise inspected the rib and roof conditions along the No. 2 belt line on January 18, 2012, at which time he was accompanied by Foreman Timothy Stratton. (Tr. 424-25). Wise examined the roof and rib conditions along the No. 1 Belt line on January 23, 2012, once again accompanied by Kenny Hunt. (Tr. 429). In each case, Wise failed to observe any violative roof or rib conditions along any of the belts.³ (Tr. 421-22, 425-27, 430). Wise testified that opinions concerning whether the nature and extent of a cracked rib creates a hazard that requires remedial action are frequently subjective. (Tr. 441-42).

Wise also routinely reviewed the belt examination books as part of his inspection duties. (Tr. 432). Wise testified that he did not find the on-shift examinations inadequate, as he did not find any evidence of unreported hazardous roof or rib conditions. (Tr. 433). In this regard, the on-shift record book reflected that some actions had been taken to correct adverse roof or rib conditions in the weeks preceding the February 1, 2012, inspection. (Tr. 59-61, 241-44; Gov. Ex. M at 1, 3, 6).

³ Wise's testimony that he did not observe any hazardous roof or rib conditions is significant, as the relevant testimony and notes of the issuing inspectors reflect that the cited roof and rib conditions existed for at least a month. (Tr. 167-173; Gov. Ex. E at 4, 5, 7).

On January 31, 2012, MSHA received an anonymous complaint alleging inadequate ventilation at the Voyager No. 7 Mine. (Tr. 52). Section 103(g)(1) of the Act authorizes MSHA to investigate safety related complaints received from miners. 30 U.S.C. § 813(g)(1). The complaint was referred to MSHA's Pikeville, Kentucky office for investigation, designated by MSHA as an EO-3 investigation. (Tr. 65, 179). Normally an EO-3 related inspection requires two or three inspectors. (Tr. 180, 183). However, on February 1, 2012, six inspectors and a special investigator were dispatched from the Pikeville Office to the Voyager No. 7 Mine. (Tr. 180, 183).

Special Investigator Venita Branham's assignment was to take control of the surface phones when she arrived at the mine to prevent any underground communication which would have provided advance notice of the inspection. (Tr. 356-58, 364). Although Wise testified that he did not require any assistance in fulfilling his EO-1 responsibilities, at some point between departing their office and arriving at the mine site, the Pikeville personnel decided to divide into two groups, thus morphing their initial EO-3 inspection into an additional EO-1 inspection. (Tr. 64-66, 414). Inspectors Robert McIntosh, Billy Buchanan and Silas Adkins were to investigate the EO-3 ventilation complaint, while Inspectors Lester Keith Preece, Benjamin Adams, and James Reynolds⁴ were to conduct a supplemental regular quarterly EO-1 inspection of the belts and surrounding areas.⁵ (Tr. 51, 64, 318-19).

The inspection party arrived at the Voyager No. 7 Mine at approximately 7:30 p.m., at which time Branham took control of the Mine Office phone. (Tr. 51, 353-354). Branham informed Shannon Rowe in the Mine Office of the arrival of MSHA Inspectors, and ordered Rowe not to call underground. (Tr. 357-58). Inspectors McIntosh, Buchanan, Adkins, Preece, Adams and Reynolds proceeded underground. McIntosh, Buchanan and Adkins investigated the ventilation complaint and determined that it lacked merit. (Tr. 178).

Once underground, Preece and Adams proceeded to perform a regular EO-1 inspection by traversing the No. 4 Entry along the No. 1, 2 and 3 belts. (Tr. 66, 272). Preece noted that inspectors rarely perform regular EO-1 inspections without being accompanied by a representative of the mine operator, estimating that only one to three percent of inspections are unaccompanied. (Tr. 185-86). Preece testified that, before entering the mine, MCC was prevented from arranging for any company representatives to accompany either the EO-1 or the EO-3 inspection parties while underground. (Tr. 186). Upon arriving at the No. 1 Belt, Preece further testified that he met Brandon McKinney, foreman of the rehab crew. (Tr. 258-59). Although Preece remembered talking to McKinney underground, he could not recall what was said. (Tr. 259). However, Preece testified that he did not explicitly inquire as to whether an

⁴ Although Reynolds participated in the EO-1 inspection, he did not testify in this matter, or issue any of the citations that are the subjects of these proceedings. It is unclear from the record whether Reynolds walked the No. 1, 2 and 3 belts with Preece and Adams, or whether he proceeded to inspect nearby areas independently.

⁵ Preece conceded that, to his knowledge, this was the first time an inspection conducted in response to a complaint and a regular quarterly inspection occurred simultaneously. (Tr. 181).

MCC representative wanted to accompany him during his EO-1 inspection of the belts. (Tr. 186-88). Preece speculated that McKinney would have declined to participate in the inspections, as McKinney was the only foreman supervising miners underground. (Tr. 259).

Similarly, with regard to whether an MCC representative was provided with an opportunity to participate in the inspection, Adams testified:

Q: Did you at any time ask anyone from the Voyager Mine if they wished to accompany you?

A: I did not. No.

Q: Did you hear anyone offer any individual from the Voyager Mine the opportunity to travel with you?

A: I didn't hear anyone. No.

Q: To travel with Keith Preece?

A: No.

Q: To travel with James Reynolds?

A: No.

(Tr. 321-22).

Preece and Adams proceeded to traverse along the No. 1, 2 and 3 belts, paying particular attention to the surrounding roof and rib conditions. Preece and Adams testified that they observed a total of approximately fifty cracks, approximately 1-1½ inches wide, in the ribs surrounding the No. 1, 2 and 3 belts. The inspectors testified that the approximately one inch wide cracks were anywhere from one to twelve inches from the pillar's edge, extending from the roof down to either the floor or center of the pillar. (Tr. 72-74, 101, 107-08, 273, 279-80, 290-91). Specifically, Preece testified that they observed approximately 26 cracks along the No. 1 Belt, 16 along the No. 2 Belt, and 7 along the No. 3 belt. (Tr. 115). They opined that the cracks they observed created the risk that slices of the pillars ranging from one to twelve inches were at risk of separating and falling. (Tr. 77, 273). Significantly, neither the testimony nor the citations, as quoted below, adequately quantify how many of the cited rib cracks posed a significant hazard, i.e., differentiating those that were approximately one inch from the edge of the rib from those that were approximately twelve inches from the edge.

In addition to his observation of rib cracks along the No. 1 belt, Preece also observed two loose roof bolts, and a wide entry where roof bolts were 54-72 inches (rather than the required 48 inches) from the rib. (Tr. 96, 78). However, Preece testified that the wide area may have been cut wide, rather than a widening as a result of a rib fall, as there was no roof material observed on the mine floor. (Tr. 78, 234). Along Belt No. 3, Preece and Adams observed fallen

material in a crosscut, and noted that the bolt above was approximately 74 inches from the rib. This indicated that a crack in the rib had separated (a “rib roll”) allowing 26 inches of material to break off and fall. (Tr. 106-07, 282-83).

The specifics of the citations are as follows.

Citation No. 8265796 (Belt No. 1), issued by Inspector Preece, alleges:

The roof, face, and ribs of areas where miners work or travel is not being supported or otherwise controlled to prevent falls of the roof and ribs along the co. No. 1 belt conveyor on the off walk way side. *The ribs are broken and are hanging loose from 1 inch up to 12 inches in the following locations. Between crosscuts 4-5, 12-13, 15-16, 18-19, 20-24, 26-27, 38-42, 46-51, 53-58, 60-63.* Between crosscut 15-16 the entry is 23 feet 8 inches in width. Between crosscut 17-19 there [are] 2 permanent roof supports (roof bolts) that are hanging from the mine roof from 4 inches up to 8 inches. On-shift examinations are conducted each shift on a daily basis to recognize and correct hazardous conditions by a certified foreman. These hazardous conditions are obvious to the most casual observer. These hazards have not been recognized or recorded and no additional support has been installed in the cited areas. This is an unwarrantable failure to comply with a mandatory standard.

Standard 75.202(a) was cited 19 times in two years at mine 1519193 (19 to the operator, 0 to a contractor).

(Gov. Ex. A) (emphasis added).

Order No. 8265798 (Belt No. 2), issued by Inspector Preece, alleges:

The roof, face, and ribs of areas where miners work or travel is not being supported or otherwise controlled to prevent falls of the roof and r[i]bs along the co. No. 2 belt conveyor on the off walk way side. *The ribs are broke[n] and hanging loose from 1 inch up to 12 inches in the following locations. Between crosscut 3-4 (offside), 4-5 (walkway side), and crosscut 6-20 (offside).* On-shift examinations are conducted each shift on a daily basis to recognize and correct hazardous conditions by a certified foreman. These hazardous conditions are obvious to the most casual observer. These hazards have not been recognized or recorded and no additional supports ha[ve] been installed in these areas. This is an unwarrantable failure to comply with a mandatory standard.

Standard 75.202(a) was cited 20 times in two years at mine 1519193 (20 to the operator, 0 to a contractor).

(Gov. Ex. B) (emphasis added).

Order No. 8265804 (Belt No. 3), issued by Inspector Adams, alleges:

The roof, face and ribs of areas where miners work or travel are not being supported or otherwise controlled to prevent falls of the roof and ribs along the company No. 3 belt conveyor. The crosscut between No. 3 take-up and the track entry has the outby [] rib rolled out leaving wide bolts measuring from 52 [inches] to 74 [inches] from the rib through this area, exposing the loose and broken ribs. *Loose hanging ribs were observed from [the] No. 1 to the No. 4 crosscut on the offside of the belt. Crosscuts No. 6 through No. 7 have loose hanging ribs on both sides. Between crosscuts No. 11 and No. 12 loose hanging ribs were observed on the offside. Between No. 16 and No. 17 loose ribs were observed on the walkway side.* Onshift examinations are conducted each shift on a daily basis to recognize and correct hazardous conditions by a certified foreman. These hazardous conditions are obvious to the most casual observer. These hazards have not been recognized or recorded and no additional support ha[s] been installed in the cited areas. This is an unwarrantable failure to comply with a mandatory standard.

Standard 75.202(a) was cited 21 times in two years at mine 1519193 (21 to the operator, 0 to a contractor).

(Gov. Ex. C) (emphasis added).

Preece and Adams testified these conditions were reasonably likely to result in injuries caused by falling rock, noting that separated ribs are subject to vibrations from the belt line, contact with mine equipment, and gravitational forces. (Tr. 118-121, 295, 299-300). They testified that miners frequently work along the belts to perform maintenance and conduct belt inspections. (Tr. 117, 278). They also concluded that any injury would have been serious, based on a mine industry history of fatal roof fall and rib roll accidents. (Tr. 118, 296). Consequently, the three cited violative conditions were designated as S&S. Preece testified that, with respect to Belt No. 1, even if no loose ribs had been found, the wide entry and loose roof bolts would have been enough for an S&S designation. (Tr. 96-99). Preece and Adams also attributed their citations to unwarrantable failures. They concluded the negligence attributable to MCC was sufficient to support unwarrantable failures, primarily due to the approximately fifty cracked and loose ribs that they observed. (Tr. 130-31, 297).

At trial, consistent with his deposition testimony and his notes, Preece testified that the alleged hazardous conditions along the No. 1, 2 and 3 Belts existed for at least one month.

(Tr. 167-173). Apparently aware that Wise had not observed these hazards during his EO-1 inspections, Preece modified his opinion by testifying that the cited conditions only existed for multiple shifts. (Tr. 131). It is not credible that the majority of the approximately fifty cited rib conditions in the No. 4 Entry were only several shifts in duration. In any event, regardless of their exact duration, Preece concluded the failure of belt examiners to note these multiple conditions constituted inadequate on-shift examinations. Consequently, Preece issued Order No. 8265805 alleging a violation of section 75.362(b). (Tr. 131-32, 142-43). Preece designated the violation as S&S and attributable to an unwarrantable failure. Order No. 8265805 states:

An adequate onshift examinations is [sic] not being conducted on the company No. 1, 2, 3 and 4 conveyor belts as stated in citations and order numbers, 8269893, 8269894, 8269895, 8265794, 8265795, 8265796, 8265797, 8265798, 8265804, 8265799, 8265800, 8265801, and 8265803. Hazardous conditions existed along these conveyor belts for more than one shift and the examiners failed to recognize, record and correct these obvious hazardous conditions. The preshift/onshift examiners are the front line of defense in hazard recognition and correcting these conditions. The examiner had previously traveled these cited areas with none of the hazards recorded in the exam books. In failing to conduct an adequate onshift exam, miners are put at risk to work or travel in these areas. This is an unwarrantable failure to comply with a mandatory standard. The operator engaged in more than ordinary negligence in failing to identify these hazards.

All examiners shall receive additional training on hazard recognition on regulations 75.362 and 75.363 as for the termination of this 104(d)(1) order.

(Gov. Ex. D).⁶

⁶ Order No. 8265805 refers to citations that were issued by Inspector Reynolds, in mine areas other than along Belt Nos. 1, 2 and 3. Reynolds did not testify in these proceedings. At trial, MCC's objection to the admission of these citations into evidence was sustained for lack of foundation. Moreover, MCC did not have an opportunity to depose Reynolds, as he was not identified as a witness of the Secretary during pre-trial submissions. (Tr. 133-36). In any event, Preece testified that the cited cracked rib conditions along the No. 1, 2 and 3 Belts were the primary basis for alleging the on-shift examinations were inadequate. (Tr. 137-40, 148).

Wise could not adequately explain how the Pikeville inspectors observed so many hazardous rib conditions given that he failed to observe any significant roof or rib hazards during his inspections of the No. 4 Entry only two weeks before.⁷ In this regard, on cross-examination, Wise testified:

Q: Okay. And you've seen the – You've seen the enforcement actions that [Preece and Adams] wrote?

A: Yes.

Q: It was pretty drastic, wasn't it?

A: Yes.

Q: You never saw the conditions that were claimed to exist in these violations written by the Pikeville MSHA people, did you?

A: I didn't see anything when I went through there.

Q: You were very surprised and shocked when you heard about these enforcement actions that were lodged against Voyager, weren't you?

A: Yes.

Q: Now, just backtracking from February 1, 20—

COURT: Let me ask you, Mr. Wise. Why were you surprised and shocked at the citations?

A: Because I had traveled those belts and I hadn't seen the same conditions that they did.

(Tr. 435-36).

Both Preece and Wise noted that inspectors can reasonably disagree on whether roof or rib conditions caused by sloughage, a common occurrence in underground mines, pose hazards that require corrective action. (Tr. 147, 448). Having failed to note during his inspections the conditions cited by Preece and Adams, Wise conceded that he did not believe the cited conditions were obvious. (Tr. 443-44).

⁷ For example, Wise tried to explain the disparity between his observations and those of Preece and Adams by stating that he had inspected the roof and ribs while walking on the opposite side of the belts than that traversed by the Pikeville inspectors. (Tr. 436, 445-47). However, on cross-examination, Wise admitted that he walked on the same side as Preece along Belt No. 1 (the longest of the three with the greatest number of cited conditions). (Tr. 436, 445-47).

In order to view the cited areas in preparation for abatement, Hunt, Stratton and Safety Representative Joey Hammonds walked the belts on February 2, 2012, the morning after the citations were issued. (Tr. 519-20, 566, 585). Although they testified that they observed some cracked ribs, they maintained there were significantly fewer than fifty, and that the cracks they observed posed little, if any, hazard. (Tr. 542-44, 571-72, 589-91). In this regard, MCC's witnesses testified that it was very difficult to scale down the loose material, indicating that it would not have fallen on its own. (Tr. 521-23, 541, 569, 589-590).

Wise testified that when he arrived at the mine on the morning of February 3, 2012, a number of the cited conditions were still being abated. (Tr. 396-400). Wise explained that every cited condition must be addressed in order to be considered abated, and that his oversight of the abatement did not necessarily reflect his opinion regarding the conditions alleged in the citations. (Tr. 456-58). Consequently, the fact that Wise abated the citations is of little evidentiary significance with respect to obviousness and the degree of negligence attributable to MCC.

III. Further Findings and Conclusions

1. Evidentiary Framework

The Secretary has the burden of proving each element of a citation by a preponderance of the evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). In articulating the preponderance of the evidence standard, the Commission has stated: “[t]he burden of showing something by a ‘preponderance of the evidence,’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *Rag Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

As an initial matter, Preece's testimony and notes reflect that the alleged hazardous conditions along the No. 1, 2 and 3 Belts existed for at least one month. (Tr. 167-173; Gov. Ex. E at 4, 5, 7). Thus, the evidence reflects that the rib and roof conditions observed by Preece and Adams on February 1, 2012, were substantially similar to those observed by Wise during his regular EO-1 inspections on January 17, January 18, and January 23, 2012. Resolution of whether the Secretary has satisfied his burden of proof with respect to the fact of the violation, S&S, and unwarrantable failure requires reconciling the observations of Preece and Adams with Wise's regular EO-1 inspections of the same areas of the mine, as well as the testimony of MCC personnel who participated in the abatement. While Wise's failure to confirm the observations of Preece and Adams does not estop the Secretary from demonstrating the fact of a violation, the Commission has noted that prior inconsistent MSHA actions may be a mitigating factor in determining negligence. *Mach Mining, LLC*, 34 FMSHRC 1769, 1774 (Aug. 2012) (citing *King Knob Coal Co.*, 3 FMSHRC 1417, 1422 (June 1981)).

2. Rib and Roof Condition Citations

As the majority of the cited conditions in Citation No. 8265796 and Order Nos. 8265798 8265804 involve similar roof and rib conditions, these citations will be addressed collectively.⁸

a. *Fact of the Violation*

As previously noted, the majority of the cited conditions observed by Inspectors Preece and Adams involve alleged compromised ribs. The inspectors testified that, as a general matter, they observed a total of approximately fifty loose ribs that were the result of cracks measuring approximately one inch wide, extending either from the floor or center of the six foot pillar to the roof, that were anywhere from 1-12 inches from the edge of the pillar. (Tr. 107-08, 115, 290-91). Consequently, the Inspectors opined that slabs of rib, from one to twelve inches thick, were at risk of separating from the pillar and falling. (Tr. 77, 273). Preece also observed two loose roof bolts and a wide entry along Belt No. 1. (Tr. 96, 78). In addition, the inspectors testified that they observed a rib roll with fallen material resulting in a wide entry in a crosscut along Belt No. 3. (Tr. 106-07, 282-83).

In their citations, both Preece and Adams characterized the cited roof and rib hazards as “hazardous conditions [that] are obvious to the most casual observer.” (Gov. Exs. A, B, C). The rub is that the record reflects that the cited conditions apparently may not have been obvious to a casual observer. In this regard, the Secretary’s witness, Inspector Wise, conceded that he “hadn’t seen the same conditions that [Preece and Adams] did” when Wise travelled the three belt entries in the period preceding the February 1, 2012, inspection. (Tr. 436).

Consistent with Wise’s testimony, Hunt, Stratton and Hammonds, who observed the subject roof and rib conditions on the morning of February 2, 2012, testified that there were significantly fewer than fifty discernible cracks, and that the cracks they observed were a result of sloughage that was not hazardous. (Tr. 542-44, 571-72, 589-91). They summarized their participation in the abatement by testifying that much of the cited loose material would not have fallen on its own because it was difficult to scale. (Tr. 521-23, 541, 569, 589-590).

The cited mandatory standard in section 75.202(a) requires roof and rib areas where persons work or travel to be adequately supported or controlled to protect persons from hazards related to falling material. Significant testimony fairly detracts from the weight of evidence supporting the Secretary’s assertion of obvious and extensive rib hazards. However, it is reasonable to conclude that at least some of the rib cracks required scaling or supplemental support to ensure that the surrounding area was adequately controlled as required by section 75.202(a). In this regard, the Commission has held that the opinion of an MSHA inspector that a condition is hazardous is entitled to great weight. *See, Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (Dec. 1998); *see also, Buck Creek Coal, Inc.*, 52 F.3d 133, 135-36 (7th Cir. 1995). Consequently, the evidence when viewed in its entirety is sufficient to support the fact of the violations of section 75.202(a), even if the number of hazardous conditions that required remedial action was significantly less than that alleged.

⁸ The parties also jointly addressed all three citations in their briefs. Sec’y Br. at 8; Resp. Br. at 29.

b. *Significant and Substantial*

As a general proposition, a violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is [S&S] 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4; *see also Austin Power Inc., v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). With respect to the third element of *Mathies*, an S&S finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc.* 6 FMSHRC 1866, 1868 (Aug. 1984). Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986). In the final analysis, the essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. *Bellefonte*, 20 FMSHRC at 1254-55.

With respect to the *Mathies* criteria, it is obvious that the first, second and fourth criteria are satisfied, in that a violation of a mandatory standard has occurred that creates a discrete safety hazard to mine personnel in the belt entries, and that such mine personnel are reasonably likely to sustain serious injuries by their exposure to the hazard created. The remaining third *Mathies* criterion requires an evaluation of the likelihood of a roof fall injury-causing accident.

I credit Preece and Adams' testimony that both belt examiners and maintenance personnel regularly travel and work along conveyor belts. (Tr. 116-17, 278). Consequently, they are routinely exposed to hazardous roof and rib conditions that are not adequately controlled. Compromised roof and rib conditions are, by nature, hazardous and unpredictable. Adequate rib and roof control is fundamental to creating and maintaining a safe mining environment. Having credited Preece and Adams' observations that at least some cracks required remedial action, it is reasonably likely, in the context of continued mining operations, that MCC belt examiners and belt maintenance personnel who continue to be exposed to

unattended hazardous roof and rib conditions will be struck by falling material that will cause serious or fatal injury. Consequently, the citations concerning adverse roof and rib conditions are properly designated as S&S. The violations are serious in gravity in view of their potential for serious injury.

c. *Unwarrantable Failure*

The elements of unwarrantable conduct are well settled. The Commission has determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 135-36 (approving the Commission's unwarrantable failure test).

The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12, 17 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations may be 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.⁹ *Peabody*, 14 FMSHRC at 1263-64.

MSHA inspectors must be encouraged to issue citations when they believe miners may be exposed to violative hazardous conditions. Consequently, I have deferred to the broad discretion of Preece and Adams with respect to the fact of the violations. However, the question of unwarrantable failure is an entirely different matter. A prime example of an unwarrantable failure is an obvious and/or extensive violation that poses a high degree of danger that has existed for a considerable period of time. None of these elements can be discerned from the general language of Preece and Adams' citations. In this regard, with respect to obviousness, extensiveness and the hazard posed, the citations do not reflect what proportion of the cited rib cracks were only one inch from the edge of the rib, or precisely on which ribs such cracks were located. Fundamental fairness, if not due process, requires more.

Moreover, the boilerplate language in the citations that the cited conditions were “obvious to the most casual observer” does not make it so. Facts matter. In other words, it is the evidentiary facts that render a condition obvious. The general descriptions in the subject citations do not satisfy the Secretary's burden of demonstrating that the conditions were obvious

⁹ While not dispositive, it is noteworthy that the history of violations in these matters includes prior violations committed by Massey Energy Company, a previous unrelated corporate operator of the Voyager No. 7 Mine.

to the casual observer, particularly in this instance, where they were not obvious to Inspector Wise. Significantly, at trial Wise, who was familiar with the general conditions in the mine, indicated that he was shocked at the number of conditions cited by Preece and Adams, and he conceded that the enforcement actions in the citations appeared to be drastic. (Tr. 435-36). The inconsistent findings of Wise may be considered as a mitigating factor in determining negligence. *Mach Mining, LLC*, 34 FMSHRC at 1774.

Wise directed abatement of the citations by requiring scaling and supplemental support. (Tr. 396-400). However, he testified that the scaling and additional support was a required response to abate the citations, and that it did not reflect his view as to whether violations had occurred. (Tr. 456-58).

With respect to the importance of a mine operator's participation in inspections, the statutory scheme of the Mine Act recognizes that mine operators must play an active role in creating and maintaining a safe mining environment. 30 U.S.C. § 801(e). To achieve this goal, section 103(f) of the Mine Act requires, in relevant part, that "[s]ubject to regulations issued by the Secretary, a representative of the operator . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection. . . ." 30 U.S.C. § 813(f). This statutory language places an affirmative duty on an MSHA inspector to provide a mine operator with the opportunity to accompany him during an inspection.

The fundamental importance of mine operators accompanying inspectors is evidenced by Preece's testimony that mine operators accompany inspectors approximately 97 percent of the time. (Tr. 185-86). Moreover, it is standard operating procedure for inspectors to provide the opportunity for accompaniment, as reflected in Inspector Wise's notes that require documenting, at the beginning of each day's inspection, whether or not the mine operator declined to accompany the inspector. (Gov. Ex. G at 1, 10, 17, 21, 27, 33, 38, 42, 48, 50, 53, 58, 63, 70). Satisfaction of this affirmative obligation to provide mine operators with an opportunity to participate cannot be accomplished by simply shifting to the mine operator the responsibility to seek permission to "tag along" during an MSHA inspection. While I am cognizant that MSHA is not required to provide advance notice of inspections, the statutory provisions of section 103(f) must be adhered to once the presence of an inspector is known because he has arrived underground.

The Commission addressed the issue of a mine inspector's failure to provide an opportunity for a mine operator's accompaniment in *SCP Investments, LLC*, 31 FMSHRC 821 (August 2009). Although the Commission concluded that the failure to provide an opportunity as provided in section 103(f) is not jurisdictional, the Commission stated that "under section 103(f) and our case law, the right of the operator to accompany the inspector during an inspection is an important right" which may not be curtailed without legal remedy. *Id.* at 825, 834. The Commission further noted that evidence may be excluded when walk-around rights are violated, if the mine operator can demonstrate prejudice. *Id.* at 835 (citations omitted).

The prejudice to MCC in this case is self-evident. As noted by Commissioners Young and Cohen, the failure to include operators during an inspection precludes the resolution of factual disputes that otherwise could be resolved on-site. *Id.* at 828. The mine operator's participation is particularly crucial in this case, where the inspectors could have directed MCC's attention with respect to the precise extent and location of each crack, and the hazards that the inspectors believed required remedial action. Thus, the prejudice caused by MSHA's failure to provide MCC with an opportunity to participate in the inspection provides an additional basis for deleting the unwarrantable failures.

In summary, while the nature and extent of the conditions observed by Preece and Adams, which were not confirmed by Wise, may have been attributable to an unwarrantable failure, the evidence, when viewed in its entirety, is insufficient to reach such a conclusion. Significantly, the Secretary does not contend that Wise's inspections were perfunctory in nature. Rather, the evidence reflects that the cited conditions are attributable to no more than a moderate degree of negligence. Accordingly, the unwarrantable designations in Citation No. 8265796 and Order Nos. 8265798 and 8265804 shall be deleted. As a result, 104(1) Citation No. 8265796 and 104(d)(1) Order Nos. 8265798 and 8265804 shall be modified to 104(a) citations.

d. *Civil Penalties*

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "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 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)).

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the exercise of its de novo authority to assess civil penalties does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

While the Voyager No. 7 Mine apparently is idle (Tr. 489), MCC does not contend that the proposed penalties in this matter are disproportionate to its size. The cited rib and roof conditions were serious in gravity, but are attributable to no more than a moderate degree of negligence. The record reflects the cited violations were abated in good faith and in a timely manner. It is true that the history of violations during the previous two years, as noted in the citations, would ordinarily be an aggravating factor, despite the change in mine ownership. However, in this case, the violation history is less significant as the Secretary has failed to demonstrate the violations were obvious, given the conflicting testimony by the Secretary’s witnesses.

In view of the reduction in negligence, and the paucity of evidence with regard to the specific nature, extent and location of the cited conditions, a civil penalty of \$4,000.00 shall be assessed for each of these 104(a) citations.

3. On-Shift Examination Citation

As a threshold matter, in resolving whether a violation of a regulation requiring an examination has occurred, the proper inquiry is whether the subject examination was adequately performed. *See, e.g., RAG Cumberland Resources LP*, 26 FMSHRC 639, 647 (Aug. 2004) (holding that although mandatory standards may not explicitly require adequate or effective measures by mine operators, such a requirement is implicit in the standard’s underlying purpose), *aff’d* 171 Fed. Appx. 852 (D.C. Cir. 2005). Thus, 104(d)(1) Order No. 8265805 alleges, in essence, a series of inadequate on-shift examinations in violation of the mandatory standard in section 75.362(b).

In resolving the adequacy of the on-shift examinations, it is helpful to apply the Commission’s reasonably prudent person test. The Commission has previously articulated the test to determine whether there was a reasonable basis for believing that roof and ribs needed additional support. The Commission stated:

[T]he adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, *familiar with the mining industry and the protective purposes of the standard*, would have provided in order to meet the protection intended by the standard.

Canon Coal Co., 9 FMSHRC 667, 668, (Apr. 1987) (emphasis added). *See also, Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

Obviously, Inspector Wise, who (unlike the issuing inspectors) was familiar with the conditions in the No. 7 Mine, satisfies the Commission's criteria of a reasonably prudent person who understands the protective purposes of the roof control provisions in section 75.202(a). Yet, Inspector Wise did not find any unreported conditions requiring remedial roof or rib control during his relevant inspections of the ribs along the No. 1, 2 and 3 Belts.

Moreover, there is no evidence that the on-shift examinations were conducted in a perfunctory manner. Significantly, the on-shift examination book entries proffered into evidence by the Secretary reflect that there were rib conditions requiring remedial action which had been noted by the on-shift examiner during the week preceding the February 1, 2012, inspection. Specifically, MCC examiner Derrick Wright noted on January 23, 2012, that timbers were added at breaks 61 and 58 along Belt No. 1; he noted on January 25, 2012, that roof bolt plates were secured at break 6 along Belt No. 3; and he noted on January 30, 2012, that timbers were added at breaks 3 and 4 along Belt No. 3. (Gov. Ex. M at 1, 3, 6). Although Inspector Wise and the on-shift examiners may have missed a relatively small proportion of the one inch cracks cited by Preece and Adams, the dispositive question is whether the on-shift examinations were adequate based on a reasonably prudent examiner test.

Finally, although 104(d)(1) Order No. 8265805 references violative conditions in addition to the subject rib conditions in this matter, the Secretary failed to present any evidence of these conditions as the basis for demonstrating the on-shift examinations were inadequate. In fact, Preece admitted that the "fifty locations" where Preece and Adams cited rib cracks were the primary basis for issuing Order No. 8265805. (Tr. 148). Thus, on balance, Order No. 8265805 must be vacated as the Secretary has failed to satisfy his burden of demonstrating that the examinations were inadequate.

As a final note, this Commission protects miners from adverse actions taken by mine operators in response to a miner's protected activities. Protected activity includes testimony in Mine Act proceedings. Federal whistleblower statutes hold the government to the same standard. *See* 5 U.S.C. § 2302(f)(2) (2013). This litigation has caused MSHA inspectors to provide conflicting testimony with regard to their inspection findings. Consequently, Inspector Wise was required to testify under difficult circumstances. While I recognize retaliation may be extremely unlikely, it would be naïve to believe it never occurs. The Secretary should ensure that Wise does not experience any reprisals as a result of his participation in these proceedings.

ORDER

Consistent with this Decision, **IT IS ORDERED** that 104(d)(1) Citation No. 8265796 and 104(d)(1) Order Nos. 8265798 and 8265804 in Docket No. KENT 2012-1321 **ARE MODIFIED** to 104(a) citations to reflect that the cited conditions were not the result of an unwarrantable failure. **IT IS FURTHER ORDERED** that the degree of negligence attributable to Martin County Coal Corporation for each of cited violations in these citations is reduced from high to moderate. Accordingly, **IT IS ORDERED** that a civil penalty of \$4,000.00 each shall be assessed for Citation Nos. 8265796, 8265798 and 8265804, constituting a total civil penalty of \$12,000.00.

IT IS FURTHER ORDERED that 104(d)(1) Order No. 8265805 in Docket No. KENT 2012-1403 **IS VACATED**.

IT IS FURTHER ORDERED, consistent with the parties' partial settlement agreement, that Martin County Coal Corporation shall pay a total civil penalty of \$4,850.00, consisting of \$850.00 for 104(a) Citation No. 8251922 in Docket No. KENT 2012-1321, and \$4,000.00 for 104(a) Citation No. 8265806 in Docket No. KENT 2012-1403.

Accordingly, **IT IS ORDERED** that Martin County Coal Corporation pay, within 40 days of the date of this decision, a total civil penalty of \$16,850.00 in satisfaction of the citations in the captioned dockets, consisting of a civil penalty of \$12,850.00 for Docket No. KENT 2012-1321, and \$4,000.00 for Docket No. KENT 2012-1403.

Upon receipt of timely payment, the captioned contest and civil penalty proceedings **ARE DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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/tmw

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 3, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2013-510
Petitioner	:	A.C. No. 15-02132-311939
	:	
v.	:	
	:	
WEBSTER COUNTY COAL, LLC,	:	Dotiki Mine
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Rae

This docket is before me on petition for assessment of a civil penalty filed by the Secretary pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) (the "Mine Act").

Webster County Coal, LLC, ("Respondent" or "WCC") was cited by Mine Safety and Health ("MSHA") inspector Sparks on November 13, 2012 for several alleged violations, three of which Respondent seeks to have summarily dismissed as a matter of law. The three subject citations allege a violation of mandatory standard 30 C.F.R. §75.1714-7(a) which provides, "[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."

The citations were issued by Sparks when he observed miners working alone in three different areas of the mine with their multi-gas detectors switched off. The citations note that the operator was cited with this standard several times in the preceding two years. It is the Secretary's position that the operator knew or should have known that the miners were engaging in this pattern of behavior of turning off the gas detectors and should have done more to ensure they were being used properly. Respondent asserts that the operator need only "provide" or furnish the miners with the detectors within the plain meaning of the standard. For the reasons set forth below, I concur with the Secretary's interpretation of the standard and further find additional facts relating to the operator's conduct are necessary to determine whether the violations have occurred. I therefore DENY the Respondent's motion for summary decision.

Summary Decision Standards:

Commission Rule 67 sets forth the guidelines for granting summary decision (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.

29 C.F.R. §2700.67(b).

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 at 9 (quoting Unites States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

There is a paucity of case authority discussing the meaning of the term "provide" as it relates to the cited standard. In an effort to give meaning to the term, Respondent asserts that the Commission has relied upon the plain meaning of a term when not defined by statute or regulation. (Citations omitted.) The plain meaning of "provided", then, can be determined by Merriam-Webster's Dictionary which defines it as "to supply what is needed, to supply for use, to take measures beforehand." WCC asserts that because it gave each miner the detector that functioned properly when tested, it has complied with the regulation. An analogy is made by WCC to the language in mandatory standard 30 C.F.R. §77.1710(g) which states an employee "shall be required to wear" safety belts and harnesses when there is a danger of falling. It cites several cases for the proposition that the Commission has interpreted the language in that standard to mean an operator need do nothing more than have fall protection available for the miners' use. The Respondent has misread these cases. In Southwestern Illinois Coal Corp., the operator had given all miners its safety program booklet, provided a seminar in the use of fall protection and had a disciplinary program in effect for violations of mandatory rules and regulations. The Commission held that it had still violated the standard when a miner was found working at elevation without fall protection. This was because the operator failed to show specific and diligent on-site enforcement action. The Commission stated "when an operator requires its employees to wear belts when needed, and enforces that requirement, it has discharged its obligation under the regulation." Southwestern Illinois Coal Corp, 5 FMSRHC 1675. (Emphasis added.) None of the remaining cases cited by Respondent holds otherwise.

At heart in determining the proper meaning of terms such as "shall be required to wear" or in this instance "shall be provided" is the overall protective purpose of the Mine Act and the specific standard at issue. See The American Coal Co., 29 FMSHRC 941 (Dec. 2007) (An

escapeway that was not easily accessed from other working areas of the mine was not "provided" within the meaning of the standard.). If the operator were required to do nothing more than hand each miner a multi-gas detector on his first day of employment at the mine, this standard would be a hollow one. The standard is designed to protect miners against being overcome by dangerous gases while working alone and unable to call for help. Miners do not always do what is most prudent when left to their own devices. It is, therefore, the operator's responsibility under the Act and its mandatory standards to provide them with adequate protection from safety and health hazards. It discharges this duty by employing specific and diligent on-site supervision and enforcement action. Whether this obligation was properly undertaken by WCC cannot be determined at this juncture, making summary decision unavailable here. It is a question of fact reserved for a hearing on the merits.¹

The Respondent's motion for summary decision is DENIED.

/s/ Priscilla M. Rae

Priscilla M. Rae
Administrative Law Judge

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¹ A hearing on this matter has been previously scheduled to commence on April 16, 2014 in Henderson, KY.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
1331 Pennsylvania Ave., N.W., Suite 520N
Washington, D.C. 20004

April 4, 2014

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. WEST 2013-1097-DM
of JOSE VILLA	:	WE MD 13-16
Complainant,	:	
	:	
v.	:	
	:	
MOLYCORP MINERALS, LLC,	:	Mine ID 04-02542
Respondent	:	Mt. Pass Mine and Mill

ORDER DENYING RESPONDENT’S MOTION TO COMPEL

This discrimination proceeding is before me under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On August 29, 2013, the Federal Mine Safety and Health Review Commission (“Commission”) received a complaint of discrimination filed by the Secretary of Labor (“Secretary”) on behalf of the complaining miner, Jose Villa. The Commission received an answer from Molycorp Minerals, LLC (“Respondent” or “Molycorp”), on September 27, 2013. Thereafter, Chief Administrative Law Judge Robert J. Lesnick assigned this case to me on November 7, 2013. This case is currently set for hearing on June 18–20, 2014, in or near San Bernardino, California.

On January 21, 2014, Molycorp filed a Motion to Compel, and the Secretary filed his Opposition to Respondent’s Motion to Compel on January 31, 2014. In a March 6, 2014, conference call with my Law Clerk, Paul Veneziano, the parties confirmed that they had not yet resolved the issues underlying the pending motion. On March 10, 2014, counsel for Molycorp sent an e-mail attaching a chart entitled “Additional Information from Secretary Concerning Document Production.” On March 14, 2014, I permitted the Secretary to file a surreply to Molycorp’s March 10, 2014, e-mail. The Secretary filed his surreply on March 21, 2014.

I. FACTUAL BACKGROUND AND ISSUES TO BE DECIDED

On October 1, 2013, Molycorp requested the production of documents, requested admissions, and submitted interrogatories. (Mot. at Ex. 1.) The Secretary provided responses to Molycorp’s discovery requests on November 15, 2013, along with privilege log consisting of a table of withheld documents and a table of redacted documents. (Mot. at Ex. 2, Ex. 3.) On November 26, 2013, the Secretary provided additional redacted documents. (Mot. at 2.)

Based on the Secretary's discovery responses and privilege log, Molycorp identified nine documents it believes should have been produced in their entirety, excluding the informants' names. (Mot. at 2, 4; Opp. at 5.) The Secretary has provided redacted copies of eight documents and withheld the ninth. (Opp. at 5.) Those documents include:

Redacted Documents:

1. May 8, 2013 – Memorandum of Interview (Informant) conducted by MSHA
2. May 18, 2013 – Memorandum of Interview (Informant) conducted by MSHA
3. May 22, 2013 – Memorandum of Interview (Informant) conducted by MSHA
4. April 12, 2013 – Unsigned Statement from Informant
5. May 5, 2013 – Unsigned Statement from Informant
6. May 6, 2013 – Signed Statement from Villa
7. April 22, 2013 – Signed Statement from Villa
8. May 22, 2013 – Memorandum of Interview (Villa) conducted by MSHA

Withheld Document:

9. May 28, 2013 – Memorandum to File

Respondent's motion contends that the Secretary has not properly asserted privileges that justify his redactions and withholding of documents. (Mot. at 12–16, 18–19.) Molycorp also suggests that if the informant's privilege applies, the Secretary should produce the redacted and withheld materials because Respondent's need for the information outweighs the Secretary's need to maintain the privilege to protect the public interest. (Mot. at 6, 16–18.) Respondent asks that I order the Secretary "to produce the disputed documents in a complete and unredacted form with the exception of individual names of informants." (Mot. at 4.)

The Secretary asserts the work product privilege as a basis for redacting or withholding the first five above-listed documents, a portion of the eighth document, and the entire ninth document. (Opp. at 17–19.) The Secretary also claims that the informant's privilege applies to all of the redacted documents. (*Id.* at 7.) Finally, the Secretary argues that Molycorp has not shown that its need for the redacted documents outweighs the Secretary's interest in maintaining the privilege.¹ (*Id.* at 14–15.)

The following issues are before me: (1) whether the work product privilege applies to the seven documents for which the Secretary asserts the privilege; (2) whether the informant's privilege applies to the redacted documents; (3) whether the redacted material would tend to reveal the informants' identity; and (4) whether Molycorp's need for the redacted information outweighs the Secretary's interest in maintaining the privilege.

¹ The Secretary also argues that Respondent has not made the showing of substantial need and undue hardship necessary to overcome the work product privilege. (Opp. at 19–20.) Yet, Molycorp claims only that the Secretary has not properly asserted the work product privilege. (Mot. at 18–19.) Thus, I need not determine whether Respondent demonstrated a substantial need and undue hardship.

II. PRINCIPLES OF LAW

A. Work Product Privilege

Although the Commission's Procedural Rules do not specifically enumerate a work product privilege, the Federal Rules of Civil Procedure guide Commission Judges "as far as practicable" on procedural questions "not regulated by the [Mine] Act, [the Commission's] Procedural Rules, or the Administrative Procedure Act." 29 C.F.R. § 2700.1(b). Federal Rule 26(b)(3) allows parties to withhold otherwise discoverable materials under the work product privilege if they are (1) documents or tangible things; (2) prepared in anticipation of litigation or for trial; and (3) by or for another party or for that party's representative. Fed. R. Civ. P. 26(b)(3); *see also ASARCO, Inc.*, 12 FMSHRC 2548, 2558 (Dec. 1990) ("*ASARCO I*").

Courts apply a "but-for" test to determine whether a substantially similar document would have been created if not for the prospect of particular litigation. *See ASARCO I*, 12 FMSRC at 2558 ("If . . . [a] document can fairly be said to have been prepared *because of* the prospect of litigation, then the document is covered by the privilege. . . . In addition, *particular* litigation must be contemplated at the time the document is prepared.") (emphasis added); *see also U.S. v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011); *U.S. v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010). The Commission and its Judges have determined that documents prepared as a result of a MSHA investigation are prepared in anticipation of litigation. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997) (indicating that a special investigator's memoranda were prepared in anticipation of litigation); *ASARCO I*, 12 FMSHRC at 2558 (concluding that a special investigator's notes were prepared in anticipation of litigation because "[a] major function of an MSHA special investigation is to determine whether litigation should be commenced . . ."); *see also Baylor Mining, Inc.*, 26 FMSHRC 739, 742 (Aug. 2004) (ALJ) (finding investigator's documents, signed and unsigned miner witness statements, and memoranda of interviews to have been prepared in anticipation of litigation); *Sec'y of Labor on behalf of Jenkins v. Durbin Coal*, 22 FMSHRC 1135, 1137–39 (Sept. 2000) (ALJ) (determining that witness statements, memoranda, notes, and reports had been prepared in anticipation of litigation when collected as part of a section 105(c) investigation of a discrimination complaint).

B. Informant's Privilege

Under the informant's privilege, the Secretary may "withhold from disclosure the identity of persons furnishing information of violations of law to [MSHA]." *Bright Coal Co.*, 6 FMSHRC 2520, 2522 (Nov. 1984); *see also* 29 C.F.R. § 2700.61 (prohibiting Commission Judges from disclosing or ordering disclosure of an informant's name to an operator "except in extraordinary circumstances.") Informants are people who have "furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law, including a possible violation of the Mine Act." *Id.* at 2525. The informant's privilege protects from disclosure material that "tend[s] to reveal an informant's identity." *ASARCO, Inc.*, 14 FMSHRC 1323, 1330 (Aug. 1992) ("*ASARCO II*"). The Secretary must demonstrate why disclosure would tend to reveal the miner's identity, but his burden "is not necessarily high" and may be satisfied by an affidavit "setting forth how or why disclosure . . . would tend to reveal the identity of an informant." *Id.* at 1329–30.

A requesting party may overcome the informant's privilege if, in the totality of the circumstances, the information is "essential to fair determination." *Bright Coal*, 6 FMSHRC at 2526. To do so, the requesting party must demonstrate that its need for the information outweighs the Secretary's need to maintain the privilege to protect the public interest. *Id.*

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Work Product Privilege

The Secretary asserts the work product privilege as to seven different documents, including: three memoranda of interviews with miner informants dated May 8, May 18, and May 22, 2013; two unsigned statements from informants dated April 12 and May 5, 2013; the withheld May 28, 2013, memorandum prepared by MSHA; and a portion of the memorandum of interview with Villa that the Secretary claims contains only the "investigations, impressions, strategy, and methods for obtaining information." (Opp. at 17–19.) Respondent contends that the Secretary has not properly asserted the work product privilege. (Mot. at 19.) However, Molycorp states only that "the information provided is inadequate to properly assert [the work product privilege] and "[l]ittle to none of the required information has been provided."² (*Id.*) Looking at the redacted documents (Opp. at Ex. 1), I determine that each redacted item is a document that was prepared by or for the Secretary's representative. Likewise, the Secretary's privilege log and motion make clear that the withheld memorandum is a document MSHA prepared on May 28, 2013. Accordingly, the only question remaining is whether the redacted and withheld documents were prepared in anticipation of litigation.

Six of the documents—the May 8, May 18, and May 22 memoranda of interviews with informants, portions of the May 22 memorandum of interview with Villa, the May 5 unsigned statement, and the withheld May 28 memorandum—were created after Villa filed his formal 105(c) complaint with MSHA on April 29, 2013. MSHA routinely undertakes section 105(c) investigations to determine whether the Secretary should bring a discrimination case on behalf of the complaining miner. Thus, "but for" Villa's complaint and MSHA's section 105(c) investigation, none of these documents would have been created. Accordingly, I conclude that these six items were prepared in anticipation of litigation and constitute the Secretary's work product.

However, the April 12, 2013, unsigned statement significantly predates Villa's complaint. The Secretary has not adequately explained how the author prepared this statement in anticipation of litigation except to say "the underlying issues surrounding Villa's discrimination complaint were already coming to a head." (Opp. at 18–19.) None of the cases the Secretary cites involve materials prepared *before* a discrimination complaint has been filed. Although an

² Molycorp points to *Greyeagle Coal Co.*, 35 FMSHRC 3321, 3325, 3330 (Oct. 2013) (ALJ), for the proposition that boilerplate objections are insufficient to properly assert a privilege. (Mot. at 18.) I do not find this case analogous. In *Greyeagle Coal*, the objecting party provided no privilege log to go along with its written assertion of privilege. 35 FMSHRC at 3330. Here, the Secretary has identified the nine documents he has either withheld or redacted. (See Mot. at Ex. 2, Ex. 3.)

investigation may have already begun, I cannot conclude that this statement was prepared in anticipation of litigation based on the information the Secretary has provided.

B. Informant's Privilege

1. Whether the Informant's Privilege Applies

In this case, the Secretary has asserted the informant's privilege as to the eight redacted documents he provided. (Opp. at 6–7.) Given my conclusion that the work product privilege applies to five of the redacted documents, *see* discussion *supra* Part III.A, I need not revisit them to decide if the informant's privilege applies. I must only determine whether the informant's privilege applies to the April 6, 2013, unsigned statement and Villa's signed statements dated April 22 and May 6, 2013.

Molycorp contends that the Secretary has not provided sufficient information to show the informant's privilege applies to these documents.³ (Mot. at 14–15.) In response, the Secretary represents that the informants in this case “furnished information” in connection with “a possible violation of the Mine Act.” (Opp. at 7 (quoting *Bright Coal*, 6 FMSHRC at 2525).) He also avers that the miners in this case “spoke to the Secretary in confidence, currently work for Respondent, [and] seek to remain confidential” and states that “one has expressed particular concern about becoming the target of Respondent's retribution.”⁴ (Opp. at 3).

Looking at the unredacted portions of these three documents, each includes details regarding the incidents in question and miners present. These facts support a finding that unnamed witnesses possessed information to share with MSHA. Moreover, the Secretary's counsel has affirmed in his Opposition that the redacted portions involve details from (or regarding) miners that provided materials to MSHA during the section 105(c) investigation. In view of counsel's responsibilities under Commission Procedural Rule 6 and Federal Rule of

³ Pointing to *U.S. Department of Justice v. Landano*, 508 U.S. 165 (1993), Respondent contends that the Secretary must demonstrate the informant in question provided information with “some expectation of confidentiality.” (Mot. at 8.) Yet, it is unclear why Molycorp believes *Landano* is applicable. *Landano* examined Exemption 7(D) of the Freedom of Information Act (FOIA). 508 U.S. at 171. Although the informant's privilege and Exemption 7(D) each allow the government to withhold information derived from confidential sources, it is not clear that they are coterminous in scope. The FOIA is a broadly applicable statute meant to facilitate *public* access to government records rather than an evidentiary privilege between parties in litigation. Moreover, Respondent overreads *Landano*. Based on the volume and variety of the FBI's information sources, the Court refused to infer that *all* FBI investigative sources were confidential but noted that an implied assurance of confidentiality *could* be inferred from the character of the crime being investigated. *Id.* at 175–76, 179–80. Here, the potential for retaliation makes an inference of confidentiality appropriate.

⁴ The Secretary also indicates his willingness to “submit an affidavit *in camera* review” if I require “additional information regarding the application of the informant's privilege to the materials. (Opp. at 3 n.1.)

Civil Procedure 11, I also determine that an affidavit will not be necessary in this case because a sworn statement of the same will add nothing to my analysis. *See* 29 C.F.R § 2700.6(b) (a person’s signature on a document certifies, to the best of the person’s knowledge, information, and belief, that the document is well grounded in fact); Fed. R. Civ. P. 11(b)(3) (an attorney signing a pleading is certifying, to the best of the attorney’s knowledge, information, and belief, that factual contentions have evidentiary support).

Based on the foregoing analysis, I conclude that the informant’s privilege applies to each of these three redacted documents.

2. Whether the Redacted Information Would Tend to Reveal the Identity of the Informants

Having determined that the informant’s privilege applies to these three documents, I must also decide whether the redacted information would tend to reveal the informant’s identity.

First, Villa’s statement from April 22, 2013, indicates that he and another miner expressed safety concerns. (Opp. at Ex. 1.) The Secretary represents that the only information that has been redacted are the “names and phone numbers of the miner witnesses.” (*Id.* at 9.) Looking at the redacted version of the statement, it appears contact information was redacted from the list of people with knowledge of the incident. (*Id.* at Ex. 1.) Undoubtedly, contact information would reveal the informant’s identity. Thus, I determine that the Secretary has properly redacted such information.

Second, the only information redacted from Villa’s May 6, 2013, statement are his answers when asked whether he knew of any other miners who had been disciplined for making safety complaints, the reason for those safety complaints, and the date of the complaints. (*Id.* at Ex. 1.) Such details would reasonably allow Molycorp to identify the names of possible informants. I therefore determine that the Secretary has properly redacted that information.

Third, the Secretary has redacted only small portions of the April 12, 2013, unsigned statement, which relays an account of the “buggy” transportation argument involving Villa. (*Id.* at Ex. 1.) The Secretary avers that only the informant’s name, phone number, and three sentences of context have been removed. (*Id.* at 9.) According to the Secretary, those sentences reference where the informant was sitting on the small bus. (*Id.*) Molycorp claims the Secretary’s reliance on the “universe of persons with” being “small” is insufficient to support the privilege. (Mot. at 15 (citing *ASARCO II*, 14 FMSHRC at 1329).)

However, in *ASARCO II* the Commission held only that the Judge had not committed a “clear abuse of discretion” in ordering disclosure where the Secretary had relied on the “limited universe of employees” but presented no “facts to the judge to establish her claim.” 14 FMSHRC at 1329–30 (citations omitted). Here, looking at the redacted statement itself, the informant provides some context about his identity in his references to “up front,” “our crew,” “our foreman,” and “our union.” (*Id.* at Ex. 1.) Based on this review, I determine that any further context would allow Molycorp to use the redacted information to deduce the identity of the informant involved. Thus, I conclude that the Secretary’s redactions here are proper.

3. Whether Respondent Has Demonstrated a Need for the Redacted Documents That Outweighs the Secretary's Interest in Maintaining the Privilege

Molycorp argues its defenses rest “on fact-specific determinations concerning both the alleged discriminatory conduct and the related events pertaining to Respondent’s affirmative defenses.” (Mot. at 17.) Respondent claims that contemporaneous witness observations “are vital to assessing the accuracy and validity of the claims on both sides of the case,” and contends that the proximity in time to the incidents suggests that the redacted information is unavailable from any other source. (*Id.* at 17–18.) Finally, Molycorp suggests that passage of time will have degraded the memories of the informant witnesses. (*Id.* at 18.)

For his part, the Secretary argues that Molycorp has not met its burden of demonstrating the documents to be essential to a fair determination of the matter. (Opp. at 14.) Specifically, the Secretary states that Respondent has access to substantially the same information. (*Id.* at 15.) The Secretary also notes that Molycorp’s discovery responses suggest “it has spoken to multiple employees about the same incidents, and may or may not have spoken to the informants already.” (*Id.* at 15.) In addition, I note the Secretary’s representation that “the need for protection as informants is critical, as the miner informants still work for Respondent.” (*Id.* at 8.)

Molycorp has not met its burden in this case for two reasons. First, Respondent’s argument that the redacted information may be “vital” to its case is counterbalanced by the high stakes involved for these particular informants. *See Bright Coal*, 6 FMSHRC at 2524 (“The presence of an employment relationship . . . with the greater opportunity for retaliation that it provides, is a relevant factor to be considered in conducting the balancing test . . . for determining whether the privilege must yield in a particular case.”) The precarious position of informants is a weighty concern, and the informant’s privilege provides a critical protection against possible retaliation.

Second, Molycorp has not demonstrated that the passage of time limits its access to the redacted information. Respondent notably makes no mention of its own investigation—evidence which might have shown informational discrepancies with the redacted documents. Nevertheless, a full year has not yet passed since the incident in question. Molycorp has failed to show that witness recollections will have been so degraded that it will not have access to the same information. *Cf. ASARCO II*, 14 FMSHRC at 1323, 1331 (relying on operator’s ability to conduct depositions more than four years after an accident as a rationale for concluding the operator had access to the same information).

Based on the factors before me in this case, I determine that Molycorp has not demonstrated the redacted information is essential to a fair determination of the claims. Thus, I conclude that Respondent has not overcome the informant’s privilege.

IV. ORDER DENYING MOTION

In view of the above, the Secretary has properly asserted the work product or informant's privilege as to each of the nine documents at issue, and Respondent has not met its burden of overcoming those privileges. Accordingly, it is hereby **ORDERED** that Molycorp's Motion to Compel is **DENIED**.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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April 7, 2014

RICHARD M. ROBINSON and ROBERT DALE HABERLOCK, Complainants, v.	:	DISCRIMINATION PROCEEDING Docket No. KENT 2013-693-DM MSHA Case No. SE MD 12-19
VULCAN CONSTRUCTION MATERIALS, LP, Respondent	:	Mine: Grand Rivers Quarry Mine ID: 15-00087
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) O/B/O RICHARD M. ROBINSON, Complainant, v.	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. KENT 2013-742-DM MSHA Case No. SE MD 13-19
VULCAN CONSTRUCTION MATERIALS, LP, Respondent,	:	Mine: Grand Rivers Quarry Mine ID: 15-00087
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) O/B/O ROBERT DALE HABERLOCK, Complainant, v.	:	DISCRIMINATION PROCEEDING Docket No. KENT 2013-836-DM MSHA Case No. SE MD 13-10
VULCAN CONSTRUCTION MATERIALS, LP, Respondent,	:	Mine: Grand Rivers Quarry Mine ID: 15-00087

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) O/B/O
RICHARD M. ROBINSON,
Complainant,

v.

VULCAN CONSTRUCTION
MATERIALS, LP,
Respondent,

DISCRIMINATION PROCEEDING

Docket No. KENT 2013-917-DM
MSHA Case No. SE MD 13-09

Mine: Grand Rivers Quarry
Mine ID: 15-00087

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) O/B/O
RICHARD M. ROBINSON and ROBERT
DALE HABERLOCK,
Complainant,

v.

VULCAN CONSTRUCTION
MATERIALS, LP,
Respondent,

DISCRIMINATION PROCEEDING

Docket No. KENT 2013-977-DM
MSHA Case Nos. SE MD 13-18
SE MD 13-19

Mine: Grand Rivers Quarry
Mine ID: 15-00087

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) O/B/O
RICHARD M. ROBINSON,
Complainant,

v.

VULCAN CONSTRUCTION
MATERIALS, LP,
Respondent,

DISCRIMINATION PROCEEDING

Docket No. KENT 2013-987-DM
MSHA Case No. SE MD 12-17

Mine: Grand Rivers Quarry
Mine ID: 15-00087

ORDER DENYING VULCAN'S MOTION TO DISMISS

This matter is before me on Respondent's September 16, 2013 Motion to Dismiss the Discrimination Proceeding docketed as KENT 2013-977-DM. This case involves two miners, Richard M. Robinson and Robert Dale Haberlock, and six dockets, and a fairly unique set of procedural facts. The dockets are as follows:

1. KENT 2013-693-DM (§105(c)(3) Discrimination Proceeding)

- a. Deals with SE-MD-12-19.
- b. Includes both Robinson & Haberlock regarding Respondent's alleged attempts to get them removed as Miners' Representatives. The Secretary is not a party to this case.
- c. Originally dropped by Robinson & Haberlock based on conversation with Inspector Smith. After obtaining counsel, Robinson & Haberlock attempted to re-open the case, but the Secretary refused to do so.
- d. Respondent filed a Motion to Dismiss stating that the issue was dead when the Secretary refused to re-open. The motion was denied without prejudice and the case was stayed pending receipt of the related dockets.

2. KENT 2013-742-DM (Temporary Reinstatement Proceeding)

- a. Deals with SE-MD-13-09 (same as KENT 2013-917-DM).
- b. Includes only Richard Robinson and filed on his behalf by MSHA. Proceedings relate to his lay-off following an MSHA inspection.
- c. The parties came to an agreement regarding economic re-instatement without going to hearing.
- d. The undersigned retains jurisdiction pending resolution of discrimination proceedings.

3. KENT 2013-836-DM (§105(c)(2) Discrimination Proceeding)

- a. Deals with SE-MD-13-10.
- b. Includes only Dale Haberlock and filed on his behalf by MSHA. Proceedings relate to his lay-off after he allegedly reported safety hazards.
- c. No related temporary-reinstatement case.

4. KENT 2013-917-DM (§105(c)(2) Discrimination Proceeding)

- a. Deals with SE-MD-13-09 (same as KENT 2013-742-DM).
- b. Includes only Richard Robinson and filed on his behalf by MSHA. Proceedings relate to his lay-off following an MSHA inspection and several alleged safety Complaints.
- c. Discrimination case directly related to earlier (and settled) temporary reinstatement.

5. **KENT 2013-977-DM** (§105(c)(2) Discrimination Proceeding)
 - a. Deals with SE-MD-13-18 and SE-MD-13-19.
 - b. Includes both Robinson and Haberlock and filed on their behalf by MSHA. Proceedings deal with largely the same facts as KENT 2013-693-DM. Specifically, Respondents alleged attempts to remove Robinson and Haberlock as Miners' Representatives.
 - c. Currently a pending Motion to Dismiss filed by Respondent claiming that the filing was untimely and failed to allege a claim upon which relief could be granted.

6. **KENT 2013-987-DM** (§105(c)(2) Discrimination Proceeding)
 - a. Deals with SE-MD-13-17.
 - b. Includes only Robinson and filed on his behalf by MSHA. Concerns Respondent's alleged failure to contact Robinson so that he could accompany MSHA inspectors on safety inspections.

I. Procedural and Factual Background:

The relevant procedural and factual history of these dockets is as follows:

- **August 13, 2012** (on or about) - Richard Robinson and Dale Haberlock alleged that they were lawfully designated as "Representatives of Miners" at the Reed Quarry under the Mine Act (30 C.F.R. Part 40).
 - Robinson alleged that in his capacity as Miners' Representative he reported hazardous conditions including running the plant without water to control dust, fly rock from belts, housekeeping, inoperative lights at the ready line, a truck overweight by 900 pounds, and worn out deck plates.

- **August 13-September 20, 2012** (dates unclear) - Robinson & Haberlock alleged that Respondent was opposed to their designation as Miners' Representatives and began a course of conduct that interfered with their statutory right. These actions allegedly included:
 - Raising the idea with employees at the mine of removing Robinson and Haberlock as Miners' Representatives.
 - Expressing hostility to having Robinson & Haberlock act as Miners' Representatives and informing Vulcan employees ways in which they could have them removed.
 - Encouraging and/or allowing two hourly employees at the mine to circulate a petition seeking the removal of Robinson & Haberlock. Respondent allowed these workers to talk about and solicit signatures for the petition during "tailgate meetings" held by the company during work hours.

- Denying Robinson & Haberlock permission to circulate a counter-petition to stay on as Miners' Representatives.
- **September 20, 2012:** KENT 2013-693-DM –Robinson & Haberlock filed the Department of Labor's Discrimination Complaint form with MSHA for SE-MD-12-19 based on the Respondent's alleged conduct concerning their positions as Miners' Representatives.
- **October 9, 2012:** KENT 2013-693-DM (date unclear) –Robinson had a conversation with the MSHA investigator in this case in which the investigator allegedly indicated that Robinson did not suffer an "adverse action."
- **October 9, 2012:** KENT 2013-693—Robinson & Haberlock each executed a Discontinuation of Discrimination Complaint for Case No. SE-MD-12-19.
- **October 17, 2012:** KENT 2013-693-DM – Robinson & Haberlock received a letter from MSHA approving the Discontinuation and indicating that their discrimination Complaint in SE-MD-12-19 was closed as "satisfied." In that letter, MSHA acknowledged receipt of Robinson's letter waiving his discrimination Complaint.
- **November 2012:** KENT 2013-742 – MSHA received a Complaint about the mine and began an investigation. After they left, Maintenance Manager Scott Driver allegedly stated that whoever called MSHA was not a team player and Vulcan should get rid of them. Driver allegedly claimed that shutting down production for MSHA cost \$23,000.00.
- **December 20, 2012:** KENT 2013-836-DM – Haberlock was laid off. He was allegedly not given the opportunity to train in a new or previously performed job as other miners with less seniority were given. Haberlock's counsel cited the following actions as reasons for "intimidation and harassment":
 - Reporting hazardous berm, chocks covered in oil, dislodged pump line, and service truck overweight.
 - Traveling with MSHA inspectors.
- **December 22, 2012:** KENT 2013-742-DM – Robinson was laid off. When he was laid off, Respondent recalled 3 employees with less seniority.
- **January 2, 2013:** KENT 2013-987-DM – MSHA and Robinson created a procedure whereby Robinson would be informed about MSHA inspections so that he could follow the inspector as a Miners' Representative. This process was used on January 5, 8, and 9, 2013.
- **January 8, 2013:** KENT 2013-836-DM and KENT 2013-917-DM – Robinson & Haberlock filed Complaints with MSHA (SE-MD-13-09 & SE-MD-13-10) alleging that their inclusion in a 51-employee layoff was retaliation against them because they were Miners' Representatives.
 - KENT 2013-742-DM (related to KENT 2013-917-DM) – Robinson filed his discrimination claim alleging he was laid-off on December 20, 2012. The decision to lay-off Robinson allegedly occurred after a member of management stated that those who called MSHA were not team players

and should no longer work at the mine. Robinson also alleged the decision was related to his position as Miners' Representative.

- **January 9, 2013:** KENT 2013-987-DM – At a close-out conference with mine management present, Robinson stated that he would not hesitate to call MSHA with any safety concerns. After he made that statement, the operator allegedly failed to notify Robinson of MSHA presence at the mine on March 14, March 27, April 2, and April 3, 2013.
- **February 15, 2013:** Robinson received a letter regarding his claim of discriminatory lay-off from MSHA, which stated that the Secretary determined no discrimination occurred and that he had 30 days to file a discrimination Complaint on his own.
- **February 22, 2013:** Haberlock received a letter regarding his claim of discriminatory lay-off from MSHA, which stated that the Secretary determined no discrimination occurred and that he had 30 days to file a discrimination Complaint on his own.
- **February 25, February 26, or March 6, 2013:** Robinson was discharged. Other employees with less seniority were recalled during the same time period. Robinson alleged that the discharge dealt with his protected activity.
- **March 14, March 27, April 2, and April 3, 2013:** KENT 2013-987-DM – Respondent allegedly failed to inform Robinson about MSHA's presence at the mine, which effectively denied him an opportunity to accompany the inspectors during their inspection.
- **March 25, 2013:** KENT 2013-693-DM – Robinson requested, through counsel, that SE-MD-12-19 be reopened by MSHA for a new investigation. Robinson argued that the investigator who told him to drop his claim was mistaken.
- **March 27, 2013:** KENT 2013-693-DM – Carolyn T. James, Assistant Director, Technical Compliance and Investigation Office, sent an e-mail to Robinson's counsel requesting more information on the alleged wrongdoing by the Inspector in SE-MD-12-19. Robinson's attorney responded the same day with the requested information.
- **April 6, 2013:** The Secretary filed an Application for Temporary Reinstatement on behalf of Robinson with respect to SE-MD-13-09 and docketed as KENT 2013-724-DM
- **April 17, 2013:** Robinson filed a Complaint, Case No. SE-MD-13-17, alleging interference with the exercise of his rights as a Miners' Representative.
- **April 23, 2013:** KENT 2013-693-DM – Carolyn T. James sent a letter to Robinson's counsel explaining that no evidence of wrongdoing on the part of the Inspector in SE-MD-12-19 was present. However, she stated that the evidence from this case will be included in other Complaints by Robinson & Haberlock.
- **April 24, 2013:** KENT 2013-693-DM - Robinson & Haberlock filed a Complaint of Discrimination through counsel for SE-MD-12-19.
 - The Complaint alleged that Vulcan engaged in discrimination in attempting to have Robinson & Haberlock removed from their positions as

- “Representative of Miners” at the quarry, including encouraging and/or allowing the circulation of a petition to remove them from that position.
 - Documentation showed that this Complaint was also filed with Carolyn James.
- **May 9, 2013:** KENT 2013-742-DM – Robinson filed an application for Temporary Reinstatement under the Act.
- **May 14, 2013-May 20, 2013:** KENT 2013-742-DM –Respondent filed an opposition to Robinson’s Application for Temporary Reinstatement.
 - Respondent alleged that the application was not proper as it was first rejected by the Secretary and then re-opened. It also argued that the claim was frivolous.
- **May 23, 2013:** KENT 2013-693-DM – Respondent filed a Motion to Dismiss with respect to SE-MD-12-19.
 - Respondent argued that Robinson & Haberlock conflated a denial of a request to re-open an investigation with a determination by the Secretary that discrimination did not occur. It argued that as no determination had been made by the Secretary, the Section 105(c)(3) Complaint was premature.
- **May 29, 2013:** KENT 2013-742-DM – The parties filed an Agreement regarding the economic reinstatement of Robinson for SE-MD-13-09.
- **June 5, 2013:** KENT 2013-742-DM – Judge Andrews issued an Order Approving Economic Reinstatement Agreement for SE-MD-13-09.
- **June 10, 2013:** KENT 2013-836-DM – The Secretary filed a Discrimination Complaint against Respondent in SE-MD-13-10 regarding Haberlock.
 - The Complaint alleges that Respondent discriminatorily laid off Haberlock for performing his duties as a Miners’ Representative.
- **June 14, 2013:** KENT 2013-693-DM – Robinson & Haberlock filed an Opposition to the Motion to Dismiss with respect to SE-MD-12-19.
 - Robinson & Haberlock argued that MSHA’s denial of their request to re-open this matter constituted an action triggering their rights under 105(C)(3).
- **June 19, 2013:** KENT 2013-693-DM – Respondent filed a Reply to Robinson & Haberlock’s Opposition to the Motion to Dismiss.
- **June 22, 2013:** KENT 2013-693-DM – An Order Denying Motion to Dismiss without prejudice pending the assignment of all related cases was issued.
- **July 3, 2013:** KENT 2013-836-DM – Respondent filed an Answer to the Secretary’s Discrimination Complaint in KENT 2013-836-DM.
 - Respondent denied all of the substantive claims by Robinson & Haberlock.

- **July 10, 2013:** KENT 2013-917-DM – Robinson filed a Discrimination Complaint under SE-MD-13-09 (meaning it was associated with KENT 2013-742-DM).
 - Robinson again alleged that, in his capacity as Miners’ Representative, he reported hazardous conditions including running the plant without water to control dust, fly rock from belts, housekeeping, inoperative lights on a loader, an overweight truck, worn out deck plates, broken guards on equipment, a broken handrail on a belt, and holes on the crusher deck.
- **July 31, 2013:** KENT 2013-917-DM – Respondent filed an Answer to Respondent’s Complaint in SE-MD-13-09.
 - Respondent denied all of the substantive claims by Robinson & Haberlock.
- **August 6, 2013:** KENT 2013-977-DM – The Secretary filed a Discrimination Complaint marked SE-MD-13-18 and SE-MD-13-19. The alleged discrimination included the following:
 - Raising the idea with employees at the mine that they remove Robinson & Haberlock as Miners’ Representatives.
 - Expressing hostility at having Robinson & Haberlock as Miners’ Representatives.
 - Informing employees of ways in which they may get Robinson & Haberlock removed as Miners’ Representatives.
 - Encouraging and/or allowing two hourly employees at the quarry to circulate a petition seeking the removal of Robinson & Haberlock as the Miners’ Representatives during work hours.
 - Allowing miners to talk about the petition and solicit signatures for the petition during company safety meeting during work hours.
 - Denying Robinson & Haberlock’s request to circulate a counter-petition in support of keeping them as Miners’ Representatives.
 - Attempting to intimidate Robinson by asking him to agree with the operator’s position in any potential disputes between the operator and MSHA.
- **August 12, 2013:** KENT 2013-693-DM – Respondent filed an Answer to the Complaint in SE-MD-12-19.
 - Respondent denied all of the substantive claims by Robinson & Haberlock.
- **August 12, 2013:** KENT 2013-987-DM – The Secretary filed a Discrimination Complaint on behalf of Robinson in SE-MD-12-17.
 - The Complaint alleged that Respondent failed to notify Robinson of MSHA inspections and effectively interfered with his ability to act in the capacity of Miners’ Representative.

- **September 3, 2013:** KENT 2013-693-DM – Secretary filed a motion to Amend Complaint to reflect the civil penalty amount.
- **September 6, 2013:** KENT 2013-917-DM - Secretary filed a motion to Amend Complaint to reflect the civil penalty amount.
- **September 6, 2013:** KENT 2013-977-DM – Respondent filed a motion to Dismiss with respect to SE MD-13-18 and SE-MD-13-19.
 - Respondent claimed that the Secretary’s Complaint was untimely and failed to state a claim upon which relief could be granted.
- **September 9, 2013:** KENT 2013-987-DM – Respondent filed an answer to the Complaint in SE-MD-12-17.
 - Respondent denied all of the substantive claims by Robinson & Haberlock.
- **November 18, 2013:** KENT 2013-977-DM – Secretary filed a Response to Respondent’s Motion to Dismiss.
- **November 20, 2013:** KENT 2013-977-DM – Robinson & Haberlock filed Response to Respondent’s Motion to Dismiss.
- **November 25, 2013:** KENT 2013-977-DM – Secretary filed Amended Response to Respondent’s Motion to Dismiss.

II. Contentions of the Parties:

The Respondent argues that Robinson and Haberlock’s Discrimination Complaints should be dismissed as untimely. *Resp. Mot. To Dismiss*, 3-6. The Respondent asserts that the Complainants’ April 2013 filings for events that occurred between August-September 2012 exceeded the 60-day statutory time limit. *Id.* at 5. While conceding that the statutory timeframes are not jurisdictional, the Respondent argues that the Complainants delays were unexcused, and should be dismissed. *Id.* at 3-6. The Respondent further argues that cases SE-MD-13-18 and SE-MD-13-19 should be dismissed on the grounds that allowing §105(c)(2) and §105(c)(3) cases that are based on the same sets of facts to proceed would cause “prejudice, confusion, and a waste of judicial resources.” *Id.* at 7.

The Secretary responded that the Complainants were misled, and therefore their delay was justifiable. *Sec. Resp. to Resp. ’s Mot. to Dismiss*, 6. Furthermore, the Secretary argues that Respondent suffered no actual prejudice as a result of the delay. *Id.* at 7.

Additionally, the Complainants, through counsel, responded to the Motion to Dismiss by arguing that Vulcan was not prejudiced by the late filing because the Complainants filed the original Discrimination Complaint soon after the alleged conduct occurred. *Resp. of Robinson & Haberlock in Opp. To Vulcan’s Mot. to Dismiss*, 5-6. It was only after they were misinformed by MSHA that they withdrew and refiled. *Id.* The Complainants argue that the Motion to Dismiss should be denied and the various §105(c)(2) and §105(c)(3) actions should be consolidated. *Id.* at 8-9.

III. Analysis:

The Mine Act allows any miner who believes that he or she has been discharged, interfered with, or otherwise discriminated against due to his or her protected activity to file a discrimination complaint with the Secretary within 60 days of the alleged violation. 30 U.S.C. §815(c)(2). In the instant matter, the Respondent allegedly interfered with Robinson and Haberlock's rights as miners' representatives in August and September 2012. Robinson and Haberlock proceeded to file *pro se* discrimination complaints with the Secretary on September 20, 2012, well within the 60-day period stated in the Act. However, based on the request and recommendation of the MSHA special investigator assigned to the case, Robinson and Haberlock signed a Department of Labor withdrawal form on October 9, 2012.

Respondent engaged in a series of additional alleged discriminatory against Robinson and Haberlock, leading to additional filings of discrimination complaints, which are detailed *supra*. On March 25, 2013, the Complainants through counsel requested that the Secretary reopen their original discrimination complaints because the withdrawal was based on misinformation from the special investigator. MSHA refused to reopen the discrimination complaint, so the Complainants filed the instant case, based on the same facts as their September 20, 2012 discrimination complaint.

All parties in this case have noted that the Commission has consistently held that the 60-day period for filing a discrimination complaint is not a jurisdictional requirement. *See e.g. Sec'y of Labor ex rel. Nantz v. Nally & Hamilton Enterprises*, 16 FMSHRC 2208, 2215 (Nov. 1994). Indeed, even the legislative history stated this point explicitly.¹ The Commission has excused a miner's late filing on the basis of "justifiable circumstances." *Gary D. Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386 (Dec. 1999). In determining if such circumstances exist, a judge is required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation." *Id.* (citations omitted). Justifiable circumstances include, "a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act." *David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), citing legislative history, S.Rep. No. 181, 95th Cong., 1st Sess. 36 (1977),

¹ Referring to discrimination cases, the Senate Committee stated:

It should be emphasized, however, that these time frames are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations.

S. Rep. No. 181, 95th Cong., 1st Sess. 24 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 3401, 2436 (1978).

reprinted in Senate Sub-committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978).

In the instant case, Robinson and Haberlock filed their discrimination complaints in a timely fashion, and only withdrew after they were misinformed by the MSHA special investigator. The later refiling, which led to the instant §105(c)(2) proceeding is largely based on the same set of facts as the original filing. These self-same circumstances were considered by the drafters of the Mine Act as circumstances warranting a late filing.

Furthermore, there is no evidence of prejudice to the Respondent as a result of the late filing, a matter that is a “primary consideration” for the Commission in such cases. *Morgan*, 21 FMSHRC at 1387. In its Motion to Dismiss, the Respondent offers no evidence of actual prejudice. Indeed, Vulcan concedes that it had notice of the miners’ complaints after the initial filings, meaning that it was not surprised by the facts alleged in this similar later filing.

Based on the foregoing facts, the Respondent’s Motion to Dismiss is hereby **DENIED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 2, 2014

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

ORDER GRANTING SECRETARY'S MOTION TO EXCLUDE EVIDENCE OUTSIDE
THE SCOPE OF TEMPORARY REINSTATEMENT HEARING

Before: Judge Rae

This case is before me upon an application for temporary reinstatement under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Respondent has requested a hearing on the application for temporary reinstatement and a hearing date of April 29, 2014 has been set. On April 22, 2014, the Secretary filed a motion in limine to exclude Respondent's evidence extending beyond the scope of the temporary reinstatement hearing.

Pursuant to section 105(c)(2), if the Secretary finds that a complaint of discrimination was not frivolously brought, the Commission shall, upon an expedited basis on application, order the immediate reinstatement of the miner pending a final order on the complaint. 30 U.S.C. § 815(c)(2). The scope of a temporary reinstatement hearing is limited to a determination by the judge as to whether a miner's discrimination complaint was frivolously brought; it is not the judge's duty to resolve conflict in testimony. *Sec y o/b/o Ward v. Argus Energy WV, LLC*, 34 FMSHRC 1875, 1877 (Aug. 2012); *Secyo/b/o Billings v. Proppant Specialists*, 33 FMSHRC 2383, 2384 (Oct. 2011); *Sec y o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). In determining whether the discrimination complaint was frivolously brought, the judge should evaluate evidence of the Secretary's prima facie case to determine whether it appears to have merit and that a non-frivolous issue exists. *CAM Mining, LLC*, 31 FMSHRC at 1089, 1091; *Argus Energy WV, LLC*, 34 FMSHRC

at 1877; 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 Commission has found that a judge errs by assigning a greater burden of proof than required when weighing the operator's affirmative defense and rebuttal evidence against the Secretary's evidence of a prima facie case in a temporary reinstatement proceeding. *CAM Mining, LLC*, 31 FMSHRC at 1091. It has also stated that the temporary reinstatement hearing determines "whether the evidence mustered by the miners established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Sec'y of Labor v. Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999); *Argus Energy WV, LLC*, 34 FMSHRC at 1878.

The Secretary argues that in its request for hearing, Respondent offers evidence to justify Burkhart's termination and an affirmative defense and that such evidence for the purpose of creating testimonial conflict or establishing a rebuttal or affirmative defense should be excluded.

Based on the case law discussed above, evidence that tends to show a rebuttal or affirmative defense and evidence that requires a determination of credibility of a witness will not be admitted for the purpose of the hearing on temporary reinstatement.

It is hereby **ORDERED** that the Secretary's motion to exclude evidence beyond the scope of the temporary reinstatement hearing is **GRANTED**.

/s/ Priscilla M. Rae

Priscilla M. Rae
Administrative Law Judge

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