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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

December 10, 2014

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

v.

DAWES RIGGING & CRANE RENTAL

Docket No. LAKE 2011-206-M

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and involves a single citation issued to Dawes Rigging and Crane Rental ("Dawes") by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Citation No. 6502467 alleges that Dawes' workers failed to stay clear of a suspended load as required by the mandatory safety standard in 30 C.F.R. § 56.16009.[1] The Administrative Law Judge affirmed the citation and the unwarrantable failure designation, concluding that three workers were within the suspended load's spin/arc/fall path in violation of the standard. 34 FMSHRC 2012, 2024-25, 2028-29 (Aug. 2012) (ALJ).

While we affirm the finding of a violation and the assessed penalty, we conclude that the Judge erred in finding an unwarrantable failure.[2] We find that the Judge erred in his analysis of the extent of the violation, the length of time the violation existed, and whether the operator was put on notice that greater efforts were necessary to achieve compliance with the standard. In addition, in light of these errors, the Judge failed to give proper weight to the fact that the one worker who traveled directly under the suspended load did so to prevent an imminent threat to another worker.

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[1] 30 C.F.R. § 56.16009 provides that "[p]ersons shall stay clear of suspended loads."

[2] The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

I.

Factual and Procedural Background

Dawes was contracted to provide, assemble, and operate a Manitowoc Model 21,000 mobile crane at Tilden Mine's pellet plant in Marquette County, Michigan. On May 27, 2010, Dawes was attempting to connect a 93,000 pound, 150 foot long lattice boom to the body of the Model 21,000 crane with the help of a smaller Manitowoc Model 14,000 crane. 34 FMSHRC at 2017, 2030. This process, referred to as the "boom-to-foot connection," required the smaller crane to lift the lattice boom precisely into place so that the boom and body of the larger crane line up and pins could be inserted to connect the two components. *Id.* at 2017, 2021. The assembly of the crane was overseen by Assembly/Disassembly Director William Rahmlow, a veteran in crane operation and assembly with over two decades of experience at Dawes. *Id.* at 2019.

Dawes employed seven men to complete the boom-to-foot connection. Jeffery Eick and an oiler were tasked with holding tag lines to help stabilize the elevated boom. Eick was positioned two to seven feet to the east of the boom on the end of the boom closest to the body of the Model 21,000 crane, and the oiler was on the west side of the boom on the opposite end. Rahmlow was immediately adjacent to the west side of the boom, across from Eick, giving instructions to the crew to help guide the boom into place. *Id.* at 2020-21, 2024-25; Dawes Ex. 12. Two men were located on the body of the large crane where they would make the final pin connections when the boom was in place. 34 FMSHRC at 2017; Tr. 162. Cleve Mozley was operating the Model 21,000 crane, and Randy Gilbertson was operating the Model 14,000 crane. 34 FMSHRC at 2017.

While the lattice boom was being lifted into place, a gust of wind caused the boom to swing to the east towards the cab of the large crane where Mozley was working. *Id.* at 2018. To avoid a collision, Rahmlow instructed Eick to cross under the boom to pull the boom away from the cab. *Id.* at 2025; Tr. 169, 170. Eick complied, and with Rahmlow's assistance, was able to pull the tag line and re-stabilize the boom. 34 FMSHRC at 2025.

MSHA Inspector Dominic Vilona observed Dawes' assembly of the crane from inside a van parked atop a hill 150 yards away. *Id.* at 2014, 2014 n.2. From the inspector's vantage point, it appeared that Rahmlow was working directly under the boom. Tr. 26-27. Vilona also observed another miner (Eick) on the northeast side of the boom holding a tag line. Tr. 27. Vilona then had the van driver go to the site, where he observed that the person with the tag line had moved to the northwest side of the boom. Tr. 31-32. Accordingly, Vilona issued a citation alleging a violation of section 56.16009 for the two men's failure to stay clear of a suspended load. Tr. 45; 34 FMSHRC at 2015.

In his decision below, the Judge found that Eick, Rahmlow, and Mozley had failed to stay clear of the area in which the boom could have moved, spun, or fallen in violation of the standard. 34 FMSHRC at 2024. Although Rahmlow and Mozley were never directly under the suspended boom, the Judge noted that their proximity to the boom placed them both at risk of serious injury were it to move or fall unexpectedly. *Id.* at 2024-25.

Dawes filed a petition for review, which the Commission granted. It contends that the cited standard does not apply to the assembly of a crane, and even if it does, the regulations should not be interpreted to prevent the assembly crew from working alongside the suspended boom. Dawes further argues that the Judge erred in finding an unwarrantable failure as its conduct did not rise to the level of aggravated conduct or a reckless disregard or indifference to the safety of its workers.

II.

Disposition

A. Whether Section 56.16009 Applies to Suspended Components During Equipment Assembly

The cited standard, 30 C.F.R. § 56.16009, appears in the regulations governing metal and nonmetal mines, under Subpart O entitled "Materials Storage and Handling." Dawes asserts that the crane is "machinery" rather than "material" and hence is not covered by the standard.

Regulatory language cannot be construed in a vacuum but must be read in its context and with a view to its place in the overall regulatory scheme. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). When a regulation is ambiguous, traditional tenets of regulatory interpretation permit examination of the heading of the section in which the regulation falls to assist in resolving doubt about its meaning. *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 710 (8th Cir. 2013) (citing *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)).

Although ambiguity may exist in the scope of the regulation's application, we find the term "materials" sufficiently broad to encompass the suspended boom in question. "Materials" is defined, inter alia, as the "substance or substances out of which a thing is or can be made" or the "[t]ools or apparatus for the performance of a given task." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1079 (4th ed. 2009); *see also Robert Hardin*, 19 FMSHRC 1233, 1237 (June 1997) (defining the term "smoking materials"). We are not persuaded by Dawes' contention that the suspended boom is beyond the purview of the regulation. The placement of the regulation does not exclude suspended equipment from coverage. *See Jim Walter Res., Inc*., 7 FMSHRC 493, 495-96 (Apr. 1985) (finding a regulation governing the transport of "materials" to include the transport of coal, despite the Judge's finding that a more appropriate standard existed). Additionally, Subpart O contains other regulations that address equipment such as overhead cranes (§§ 56.16014, 56.16015), forklifts (§ 56.16016), and tag lines, hitches and slings (§ 56.16007).

We decline to read a limitation into the standard where none exists. We find the standard applicable to the case at hand.

B. Whether Dawes' Conduct Violated Section 56.16009

The question of whether an operator has violated section 56.16009 is dependent on whether a person was not "clear of" the suspended load. The inspector issued Citation No. 6502467 based on the belief that both Eick and Rahmlow had failed to stay clear of the suspended load because they had gone directly under the boom. The Judge discounted the inspector's testimony concerning Rahmlow's location directly under the boom based on the contrary testimony by Dawes' witnesses and the inspector's distance from the assembly site. 34 FMSHRC at 2024-25. However, the Judge interpreted "stay clear of" to prohibit persons from working in the suspended load's possible arc or radius and the area that would be affected should the load fall. *Id.* at 2024. Accordingly, the Judge found that not only were Eick and Rahmlow in violation of the standard, but that Mozley, who was operating the Model 21,000 crane, was also not clear of the boom.

All parties agree that it is not safe to stand directly under a suspended load. *See* Tr. 86, 121, 146, 160, 173, 179, 189; Sec'y Ex. 15 at 2-20, Fig. 2-4. Further, we have held that "stay clear of" requires more than simply staying out from directly underneath a suspended load. *Anaconda Co.*, 3 FMSHRC 299, 301 (Feb. 1981). As explained below, the record in this case does not permit further elaboration on the principle in *Anaconda*.

It is undisputed that, at Rahmlow's direction, Eick crossed directly under the suspended load in order to pull the wayward boom away from the cab where Mozley was working. In doing so, Eick placed himself in danger of potentially fatal injuries were the crane's rigging to fail and the 93,000 pound boom to fall. Although in some emergency situations there may be instances where an operator is justified in violating a standard to prevent an impeding greater hazard, *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 n.2 (Dec. 1983), Eick's conduct cannot be excused by citing the threat the boom posed to Mozley. This was an emergency of Dawes' own making by virtue of the number and placement of tag lines attached to the boom. Had Dawes employed additional tag lines or made effective use of the two existing tag lines, the crane assembly crew would have been better situated to counteract the effect of the sudden gust of wind without resorting to Eick moving under the boom. Eick's travel beneath the boom clearly violated the regulation.

The case regarding the placement of Rahmlow and Mozley is not as straightforward. Much of the testimony of the Secretary's sole witness, Inspector Vilona, was not credited by the Judge because of the inspector's distance from the assembly site and his relative inexperience with the crane assembly process. 34 FMSHRC at 2014 n.2, 2025 n.14. Whether a person is clear of a suspended load must be determined by considering the particular facts surrounding the violation. The case cannot rest on a vague observation that suspended loads move in unpredictable ways. Tr. 46.

No evidence was presented that either Rahmlow or Mozley was ever beneath the boom, and it is not clear from the evidence whether they were located in positions in which they were in danger from the movement or falling of the boom. The Secretary did not produce any evidence

as to the area which would be affected if the boom fell.[3] In any event, Eick's unquestioned movement under the boom clearly violated the standard and we affirm the Judge's finding of a violation.

C. Whether the Judge Erred in Finding an Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.,* 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.,* 31 FMSHRC 1346, 1350-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These factors need to be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated or whether mitigating circumstances exist. *Id.*

Having reviewed the Judge's application of those factors, we vacate the Judge's unwarrantable failure determination. As set forth below, the factors relevant to an unwarrantable failure determination do not support a finding of an unwarrantable failure.

The extensiveness of the violative conduct has traditionally been determined by examining the extent of the affected area as it existed at the time the citation was issued. *See E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) (the purpose of the extensiveness criterion is to account for the magnitude or scope of the violation); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992) (finding five accumulations of loose coal identified during a single inspection to be extensive). In some situations, though, extensiveness depends on the

[3] Because Vilona issued the citation based on his belief that persons worked directly underneath the suspended boom, there is scant evidence in the record explaining what area posed a risk to persons, beyond that directly under the boom. The inspector evidently did not believe that Mozley was exposed to the hazards posed by the boom. Tr. 44-45. Similarly, the inspector did not appear to believe that Rahmlow's position next to, but not under, the boom placed him at risk of immediate injury. Tr. 84. When Vilona reached the crane assembly site, Rahmlow was standing very close to the boom guiding the boom-to-foot connection. Tr. 38; Sec'y Ex. 4 at 1.

number of persons affected by the violation. *See Watkins Eng'rs & Constructors,* 24 FMSHRC 669, 681 (July 2002). As discussed above, the evidence establishes that Eick engaged in violative conduct and that his presence under the boom only endangered himself. Given the relatively small scope of the hazard, the violation was not extensive.

An operator's past practices are not relevant to the consideration of the extensiveness factor in an unwarrantable determination analysis. To the extent the Judge based his unwarrantable failure finding on Dawes' past practices, he erred. However, even considering past practices, the record does not support a finding that the violative conduct was pervasive. Dawes is a contractor that operates at work sites beyond MSHA jurisdiction, which are governed by regulatory schemes with different rules regarding how close persons can work in relation to suspended loads. The record only indicates that Dawes worked at one other mine prior to its work at Tilden Mine, and there is no testimony as to the type of work performed at mines in the past. *See* Sec'y Ex. 14. In light of the fact that the record establishes a relatively discrete violation in this case, and without past examples of Dawes employees failing to stay clear of suspended loads at MSHA regulated work sites, there is no basis for finding that the violative conduct was extensive.[4]

Similarly, the record does not support the Judge's presumption that Eick was in dangerous proximity to the boom for a significant amount of time. Eick was only under the suspended boom for a matter of seconds. Tr. 54. Although his actions placed him in danger of serious injury were the rigging to fail, Eick's exposure to this danger was very brief. Accordingly, the extensiveness and duration of the violative condition weigh against a finding of an unwarrantable failure.

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. *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) ("a high number of past violations of section 75.400 serve to put an operator on notice that it has a recurring safety problem in need of correction") (citations omitted). "The purpose of evaluating the number of past violations is to determine the degree to which those violations have 'engendered in the operator a heightened awareness of a serious . . . problem.'" *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007) (quoting *Mid-Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994)).[5]

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[4] Given that substantial evidence only supports the finding that Eick violated the standard, the Judge erred insomuch as he considered Rahmlow's and Mozley's conduct in his unwarrantable failure analysis. *See* Slip op*., supra,* at 4-5.

[5] A significant difference exists between the forms of notice that inform an operator of the Secretary's interpretation of a standard and the forms of notice that inform an operator that greater efforts at compliance are needed for purposes of an unwarrantable failure analysis. An operator is on notice of the Secretary's interpretation of a regulation when it is, or reasonably should be, aware of the standard's requirements or is aware of other regulatory enforcement announcements, such as the Rules to Live By initiative. However, such notice of a regulatory

(continued...)

The Judge suggests that the operator was indirectly on notice that greater efforts were necessary where the regulation and its intent were clear. 34 FMSHRC at 2029. However, the evidence demonstrates that Dawes had a good safety record. In the 15 months prior to the issuance of the citation, Dawes had only been cited for two violations by MSHA, neither of which alleged a violation of section 56.16009 or a danger posed by a suspended load. Sec'y Ex. 14. There is nothing in the record to suggest that MSHA had previously spoken to Dawes about its crane assembly process or that Dawes was alerted in any other way that employees failing to stay clear of suspended loads represented an ongoing problem requiring corrective measures. Accordingly, we determine that substantial evidence does not support the Judge's finding of notice and conclude that this factor also weighs against a finding of unwarrantable failure.

Finally, as we have discussed, the Judge's findings regarding extensiveness, duration, and notice were erroneous. In light of this, we conclude that the mitigating circumstances present here outweigh the remaining factors the Judge relied on to find unwarrantable failure. Most importantly, we agree that Eick's explanation for why he did not stay clear of the suspended load should be considered as a mitigating factor. The evidence indicates that Eick only crossed under the boom in order to address an imminent threat to Mozley. While such a consideration does not negate the violation, it significantly militates against a finding that Dawes was indifferent to the safety of its employees.

D. Penalty Determination

Although we vacate the unwarrantable failure designation, we find the Judge's application of the civil penalty criteria in assessing a penalty of $2,500 is not an abuse of discretion. The Secretary proposed a penalty of $3,000, which the Judge reduced to $2,500. The penalty assessed by the Judge falls within the range of his discretion given the high level of danger the 93,000 pound boom posed; the fact that Rahmlow, a supervisor, instructed Eick to cross under the suspended load; and that Dawes' decision regarding the number and placement of tag lines to control the suspended load precipitated the need to go beneath the suspended load.

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[5] (...continued)

interpretation does not place an operator on notice that its mine is failing to comply with MSHA's regulations for the purposes of the unwarrantable failure analysis. In that context, it is well settled that we examine the operator's history of violations, warnings from inspectors, and other forms of specific warnings to determine if the operator has been placed on notice of a persistent unsafe condition or practice at its mine. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1262 (Aug. 1992) (past preshift examinations placed operator on notice of a problem); *Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) (past discussions with MSHA placed operator on notice of a problem); *Lion Mining Co.*, 18 FMSHRC 695, 700 (May 1996) (history of similar violations and recent roof falls placed operator on notice of a problem).

III.

Conclusion

For the reasons set forth above, we (1) affirm in result the Judge's finding that Dawes violated section 56.16009, (2) vacate the unwarrantable failure designation, and (3) affirm the $2,500 penalty assessed by the Judge.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, DC 20004-1710

December 19, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. DQ FIRE & EXPLOSION CONSULTANTS, INC.	Docket No. WEVA 2011-602

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), an Administrative Law Judge upheld a withdrawal order issued to DQ Fire & Explosion Consultants, Inc. for an alleged violation of 30 C.F.R. § 48.5(a).[1] Unpublished Order Granting the Secretary's Motion for Partial Summary Decision dated Aug. 13, 2012 ("Sum. J. Order"). DQ filed a petition for discretionary review challenging the Judge's final Decision and Order issued on August 30, 2014. However, the Commission granted review only on the question of whether the Secretary provided adequate notice of the Secretary's interpretation of the training regulations at issue.

For the reasons stated below, we reverse the Judge's decision and conclude that DQ was not provided fair notice of the requirements of the training regulations at issue, 30 C.F.R. §§ 48.2(a)(1), (a)(2), and 48.5.[2]

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[1] 30 C.F.R. § 48.5(a) provides:

> Each new miner shall receive no less than 40 hours of training as prescribed in this section before such miner is assigned to work duties. Such training shall be conducted in conditions which as closely as practicable duplicate actual underground conditions, and approximately 8 hours of training shall be given at the minesite.

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

I.

Facts and Proceedings Below

The central issue presented in this case is whether a scientific consultant, hired by the operator's attorneys to investigate the causes of an explosion, needed comprehensive new miner training or only hazard training. Comprehensive miner training requires 40 hours of training and covers topics in detail such as emergency evacuation and barricading, the use of self-rescue and respiratory devices, hazard recognition, first aid, mine gases and eight hours of underground training specific to the mine site. 30 C.F.R. § 48.5. Hazard training requires significantly less instruction on topics such as hazard recognition, self-rescue equipment, and emergency evacuation procedures. 30 C.F.R. § 48.11. Miners subject to hazard training must be accompanied at all times underground by an experienced miner. *Id.*

On April 5, 2010, a massive coal dust explosion occurred at the Upper Big Branch ("UBB") Mine resulting in the deaths of 29 miners. Performance Coal Company was the operator of UBB at the time of the explosion. The Department of Labor's Mine Safety and Health Administration ("MSHA") immediately began an extensive investigation into the causes of the explosion.

Performance Coal's attorneys hired Dr. Christopher Schemel ("Schemel") of DQ as a consultant to be part of the investigation team for UBB, and to provide information to Performance Coal about the explosion and how it occurred. During MSHA's part of the investigation, Schemel accompanied personnel from MSHA and West Virginia's Office of Miner's Health Safety and Training. From June 29 to October 6, 2010, he went underground with MSHA on 25 days during MSHA's investigation. Sum. J. Order at 6. His role was to accompany the MSHA team to observe mine conditions, gather data for his own analysis, and take notes. Schemel Dep. at 80-81, 84-85. Prior to going underground, Schemel received hazard training required by 30 C.F.R. § 48.11. Sum. J. Order at 9. Throughout the period from June to October, MSHA was aware that Schemel had only received hazard training. *Id.* at 3.

On October 7, 2010, MSHA issued an order withdrawing Schemel from the mine until he received comprehensive 40-hour training.[3] This withdrawal order corresponded with the onset of Performance Coal's part of the investigation. Schemel received the 40-hour training and then resumed his investigatory and analytical consultant duties.

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[3] Order No. 8249950 provides:

> Chris Schemel, a contract employee for the operator, has not received the required 40-hour new miner training prior to performing duties underground at the mine site. Mr. Schemel has no previous mining experience. Mr. Schemel is hereby ordered to withdraw from the mine until he has received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others.

The Secretary assessed a penalty of $112 for the training violation. DQ contested the order and penalty. Prior to a hearing, the Secretary filed a motion for partial summary judgment, contending that the record and law were uncontroverted that Schemel was a miner under 30 C.F.R. § 48.2(a)(1) who needed comprehensive training under 30 C.F.R. § 48.5. DQ, on the other hand, argued that Schemel was not a "miner" as defined by section 48.2(a)(1), but was instead a "scientific worker" as described in section 48.2(a)(2), and therefore required only hazard training.

In addressing DQ's argument that Schemel required only hazard training because his work fell under the scientific worker exception, the Judge agreed that some of Schemel's work at the UBB mine consisted of collecting data and analyzing coal dust, and could fall within the realm of scientific work. However, the Judge reasoned that Schemel was not conducting research for scientific purposes alone and "his primary purpose was assisting his employer in litigation." Sum. J. Order at 12. Accordingly, the Judge found that DQ qualified as "an independent contractor" that was providing "services" to the mine, as that term is used in the Mine Act and in the training regulations. *Id*. at 13-14. The Judge further found that the training standards demonstrate "an obvious intent on the part of the Secretary to provide 40-hour training to . . . those whose time underground is sufficient to create an exposure to hazards." *Id*. at 14. She held that Schemel "was frequently exposed to hazards underground," and as such was required to have comprehensive training pursuant to section 48.2(a)(1). *Id*.

The Judge also rejected DQ's argument that the Secretary failed to provide notice of his interpretation of the training regulations, concluding that "a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would understand that a person who is underground for frequent and extended periods of time must be adequately trained." *Id*. at 15.

II.

Disposition

A. Relevant Training Law

Mine Act section 115(a)(1) requires that "[e]ach operator. . . shall have a health and safety training program which . . . .shall provide as a minimum that new miners having no underground mining experience shall receive no less than 40 hours of training." 30 U.S.C. § 825(a)(1). Section 104(g) of the Act provides that if the Secretary finds "a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary. . . shall issue an order . . . which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal . . . mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act."[4] 30 U.S.C.§ 814(g).

[4] The legislative history of the Mine Act expressed a deep concern over the problem of poorly trained miners and attributed many mining disasters to poor training. S. Rep. No. 95-181, at 49-51 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 637-39.

The Secretary's Part 48 regulations implement Mine Act section 115 and set forth different types of training requirements. As noted above, pertinent to this case are comprehensive new miner training, which is outlined in section 48.5, and hazard training, described in section 48.11. The definitions of "miner" set forth in sections 48.2(a)(1) and (a)(2) determine which training is applicable, as set forth below. Section 48.2(a)(1) provides:

> "Miner" means, for purposes of [comprehensive training], any person working in an underground mine and who is engaged in the extraction and production process, or engaged in shaft or slope construction, or who is regularly exposed to mine hazards, or who is . . . a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works underground on a continuing, even if irregular basis. . . . This definition does not include: . . . [a]ny person covered under paragraph (a)(2) of this section.

Section 48.2(a)(2) provides:

> "Miner" means, for purposes of [hazard training], any person working in an underground mine, including any delivery, office, or scientific worker or occasional, short-term maintenance or service worker contracted by the operator, and any student engaged in academic projects involving his or her extended presence at the mine. This definition excludes persons covered under paragraph (a)(1) [above].

Thus, the definitions of "miner," as they relate to the two different training requirements, are mutually exclusive.

The preamble to Part 48 states that "only those persons most directly and regularly exposed to mining hazards need to undergo comprehensive training." 43 Fed. Reg. 47,454, 47,455 (Oct. 13, 1978). It continues: "other workers at the mine, such as scientific, office, or delivery personnel, either employed or contracted by the operator, or short term maintenance or service personnel contracted by the operator [who] are exposed to . . . hazards on a less regular basis . . . . [t]hese workers, therefore, have periodic instruction concerning the hazards they may encounter." 43 Fed. Reg. at 47,455.

In 2003, MSHA issued a Program Policy Manual on Training and Retraining of Miners (Vol. III) ("PPM"), which provided that independent contractors working at a mine are miners for Part 48 training purposes and that the type of training a miner receives is not based on the specific job title but a "determination must be made as to the kind and extent of mining hazard exposure." PPM at 34. The PPM states that "[i]ndividuals engaged in the extraction or production process, or regularly exposed to mine hazards, or contracted by the operator and regularly

exposed to mine hazards, must receive comprehensive training." *Id*. It defines "'regularly exposed' [as] either frequent exposure, that is exposure to hazards at the mine on a frequent rather than consecutive day basis (a pattern of recurring exposure), or extended exposure of more than 5 consecutive workdays, or both." *Id*. The PPM goes on to state that independent contractors "must receive comprehensive training if they . . . are regularly exposed to mine hazards." PPM at 35, 36.

B. Whether DQ Had Notice that Schemel Needed Comprehensive Training

Under Commission precedent, if the language of a regulation provides clear and unambiguous notice of its coverage and requirements, no further notice is necessary. *Bluestone Coal. Co.*, 19 FMSHRC 1025, 1029 (June 1997) (when regulatory provision is clear and unambiguous, then the regulation provides adequate notice); *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1061 (Sept. 2000) (If the regulation is unambiguous, the regulation's clear meaning is controlling and it "follows that the standard provided the operator with adequate notice of its requirements.")

Sections 48.2(a)(1) and (a)(2) do not explain or define who qualifies as a "scientific worker." Similarly, neither the preamble nor any published guidances, including the 2003 PPM, explains the term "scientific worker." Accordingly, we determine that sections 48.2(a)(1) and (a)(2) are ambiguous with respect to who qualifies as a scientific worker under these circumstances.

When a regulation is ambiguous, the courts and this Commission defer to the Secretary's reasonable interpretation of the regulation. *E.g., Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). However, this is not a case of interpretation but rather involves whether the operator received sufficient notice to satisfy due process considerations.[5]

The due process clause "prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *General Electric Co. v. EPA,* 53 F.3d 1324, 1328 (D.C. Cir. 1995)(citation omitted) ("*GE*"). DQ argues that it had insufficient notice of the Secretary's interpretation because Schemel should be classified as a "scientific worker" under section 48.2(a)(2) (requiring only hazard training) and because MSHA permitted him to go underground many times before asserting the need for comprehensive training.

When a regulation does not provide unambiguous notice of its coverage, the appropriate test for notice of an ambiguous regulation is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). "In deciding whether a party had adequate notice of regulatory requirements, a

[5] We do not address the issue of whether the Secretary's interpretation of the training regulations at issue was reasonable in that the Commission did not accept review of that question in granting DQ's petition. 30 U.S.C. § 823(d)(2)(A)(iii).

wide variety of factors are relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question." *Lodestar Energy, Inc*., 24 FMSHRC 689, 695 (July 2002).

A reasonably prudent person would not have recognized the training mandate now advanced by the Secretary in part because section 48.2(a)(2) exempts scientific workers from comprehensive 40-hour training requirements. As the Judge found, some of Schemel's work at the UBB mine consisted of collecting data and analyzing coal dust, and could fall within the realm of scientific work. Sum. J. Order at 12. As discussed above, the text of the regulations does not define who qualifies as a scientific worker. Additionally, neither the preamble nor the PPM specifies who falls under the scientific worker category. In the absence of a definition of "scientific worker" in the regulations or published guidances, it was reasonable for DQ to assume that Schemel qualified as a scientific worker.

Moreover, MSHA's actions created enormous confusion regarding the type of training Schemel needed. Schemel accompanied MSHA underground at UBB on 25 occasions prior to Performance Coal's part of the investigation.[6] On none of these occasions did MSHA indicate that he required comprehensive 40-hour training.

Indeed, MSHA itself did not assert that Schemel needed comprehensive training when he was accompanying MSHA officials. It was not until approximately September 9, 2010, after Schemel had been underground 21 times, when Jerry Vance, a training specialist with MSHA, checked with MSHA Headquarters to inquire whether Schemel needed more than hazard training. Vance Dep. at 28. Although Headquarters responded that Schemel required 40-hour training, MSHA delayed in issuing the withdrawal order until October 7, and MSHA escorted Schemel underground without comprehensive training on four more occasions.[7] Thus, the actions of MSHA itself contributed to DQ's failure to understand the training requirements. If MSHA inspectors and supervisors did not know what the training regulations required, how could DQ? *See GE*, *supra* at 1333 (when agency itself is "unable to discern clearly . . . [what] was required," the regulation did not provide adequate notice).

In *GE, supra* at 1334, the court held that when regulations and other policy statements are unclear and "where the agency itself struggles to provide a definitive reading of the regulatory requirements," the regulated party cannot be held to be "on notice" of the agency's interpretation. *See also Lloyd C. Lockrem, Inc. v. United States*, 609 F.2d 940, 944 (9th Cir.

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[6] Schemel accompanied MSHA underground at UBB on the following dates between June and October 6, 2010: June 29; July 7, 8, 13, 14, 15, 19, 20, 21, 23, 27, 28, 29; August 4, 12, 13, 18, 20, 23, 25, 30; September 9, 23; October 5 and 6. Sum. J. Order at 6.

[7] MSHA Inspector Charles Maggard, a training supervisor who was part of the UBB investigation team, stated that the delay was caused by a lack of coordination with other MSHA inspectors and the large, busy nature of the UBB investigation. Maggard Dep. at 5-10, 26-27, 36-37.

1979) (vacating order and providing that "an employer should not be held to standards, the application of which cannot be agreed upon by those charged with their enforcement."). Here, the ambiguity in the wording of the regulations, coupled with MSHA's confusing actions, resulted in a lack of notice to DQ that Schemel was required to have comprehensive training.

We emphasize that this is a narrow ruling based on a unique set of facts. We conclude that on these facts, dealing with a scientific expert and MSHA's specific enforcement actions, the operator did not have notice of the Secretary's interpretation that miners who are regularly exposed to mining hazards must receive comprehensive training regardless of job title. Accordingly, on due process grounds, we vacate the withdrawal order and the penalty at issue here.

III.

Conclusion

For the foregoing reasons, we vacate Order No. 8249950 and the accompanying penalty.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

December 19, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. DQ FIRE & EXPLOSION CONSULTANTS, INC.	Docket Nos. WEVA 2011-952-R WEVA 2011-2480

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). It involves a citation issued to DQ Fire & Explosion Consultants, Inc. for a violation of a section 103(k) [1] order issued to Performance Coal Company at its Upper Big Branch Mine – South ("UBB") after a massive explosion on April 5, 2010. The citation was issued in January 2011, alleging that DQ violated the terms of a section 103(k) order by entering a restricted area of the mine, Zone 5. The Secretary alleged that high negligence was involved and initially proposed a penalty of $112. After the hearing, the Secretary requested that the penalty be increased to $1,000. The Judge affirmed the citation, found high negligence, and assessed a penalty of $1,000. 34 FMSHRC 2318, 2333-36, 2338-40 (Aug. 2012) (ALJ). DQ filed a petition for discretionary review challenging the Judge's decision

[1] Section 103(k) provides:

> In 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, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

on several grounds. The Commission granted DQ's petition only with regard to the Judge's high negligence finding.[2] For the reasons that follow, we affirm the Judge's decision.[3]

I.

Factual and Procedural Background

On April 5, 2010, an underground coal dust explosion killed 29 miners and injured two others at Performance's UBB Mine. 34 FMSHRC at 2320; Jt. Stip. 15. In January 2011, DQ was providing consulting services to Performance at the UBB Mine. 34 FMSHRC at 2319; Jt. Stip. 2.

A representative of MSHA issued a section 103(k) order to the mine following the explosion on April 5, 2010. Gov. Ex. 3. On December 23, 2010, MSHA modified the previously issued section 103(k) order controlling access to the accident scene at the UBB Mine and limiting entry into Zone 5, which included the longwall face, a portion of the headgate for the longwall, and a portion of the tailgate for the longwall. Tr. 11-12, 38-39, 66, 100; G. Ex. 5. This is the location where authorities believed the explosion originated. Tr. 8, 85. The modified section 103(k) order stated:

> 103(k) Modification allowing Performance Coal to proceed with its' [sic] investigation following the completion of investigation activities on the longwall
>
> This Order is hereby modified to allow Performance Coal to proceed with its' [sic] investigation activities with the following stipulations:
>
> > No person shall be permitted in Zone 5 to conduct any activities other than for the purpose of conducting examinations required by the regulations.
> >
> > . . .

[2] In its petition, DQ raised the following issues: (1) whether it was an independent contractor under the Mine Act; (2) whether a violation of the section 103(k) order occurred; (3) whether MSHA abused its discretion in modifying the order for January 10, 2011, but not January 11 and 12; (4) whether MSHA abused its discretion in retaining the December 23, 2010 modification of the order; (5) whether the Judge erred in finding high negligence; and (6) whether the Judge erred in increasing the penalty.

[3] DQ also filed a motion requesting oral argument. We have determined that oral argument is not necessary, and DQ's motion is denied.

> Performance Coal Company shall continue to follow the Performance Coal Company Investigation Plan Addendum dated December 2, 2010 . . . .
>
> Any modifications to the existing investigation plan shall be submitted to MSHA's Accident Investigation Team. These modifications will be reviewed and approved by the AI Team prior to Performance Coal proceeding with any submitted modification to the existing plan.
>
> Performance Coal shall submit daily updates concerning the progress of its' [sic] investigation to MSHA's Accident Investigation Team . . . .

34 FMSHRC at 2324; G. Ex. 3. This was the order in effect in January 2011 on the dates of the alleged violation. The Judge credited MSHA Inspector James Keith McElroy's testimony that in order for the section 103(k) order to be modified, the operator must request modification by at least the night before, and that MSHA had to perform the modification, deliver the modification to the mine, and assign an authorized representative to escort the operator for the day of the modification. 34 FMSHRC at 2335; Tr. 82-83.

The negligence determination in this case hinges on the process required for the operator to seek modifications of the section 103(k) order – and specifically whether the informal modification process the operator claims it followed sufficed.

On January 10, 2011, Dr. Christopher Schemel led DQ's investigative team. Tr. 21-23. He was accompanied by Stephen Dubina, an electrical engineer with MSHA's Pittsburgh Technical Support Center, who was assigned as an observer to the Performance Coal/DQ investigative team. While underground, Schemel asked Dubina for permission to view the longwall face, which was located in Zone 5, the area where MSHA's 103(k) order prohibited access. Tr. 21-22; 34 FMSHRC at 2322-23. Dubina granted him permission. Tr. 46-48; 34 FMSHRC at 2322-23.[4]

On January 11, 2011, Dr. Pedro Reszka Cabello ("Reszka") led the DQ team from Zone 3 down Entry No. 2 to crosscut 24, which is in Zone 5. While in crosscut 24, Reszka's team examined a supply car and a monorail, took several measurements, and then proceeded to Entry No. 1. The team took nine photographs of equipment within Zone 5. While underground, Dubina had suspected that the DQ team had entered Zone 5, but did not have a map to verify that and did not say anything to Reszka. 34 FMSHRC at 2323; Tr. 30-31. Reszka testified that prior to entering the mine on January 11, he informed Chris Prater of Performance of DQ's plan to enter Headgate 21, which is partly in Zone 5, during their investigation on January 11, and he believed

[4] Dubina testified that he did not have a map with him that day, and did not know that they had entered Zone 5 until he exited the mine. Tr. 21-22, 25.

that Prater had notified MSHA by phone on the night of January 10. 34 FMSHRC at 2326; Tr. 99.

On the night of January 11, Prater sent MSHA an email explaining the investigative teams' plans for January 12, which included two teams on "HG 21/22 crossover" and one team "working in the glory hole panel." 34 FMSHRC at 2535; DQ Ex. D.

On January 12, Reszka's DQ team traveled through the North Glory Mains at Entry No. 2 into the Headgate area, and then into Zone 5 through Crosscut 24. 34 FMSHRC at 2335; Tr. 33, 35, 105. They traveled through Crosscuts 25 and 26, went to the longwall at Crosscut 26, and under Shield number 1 to check on some measurements on covers that possibly were blown off some of the equipment. Then, the team went up to Tailgate 22, to its face area, and then back to Entry No. 3. While in these areas, the team conducted measurements, examined roof bolts, timbers, and stoppings, and took 26 photographs in Zone 5. Dubina testified that he had alerted Reszka that the team had entered Zone 5, but that Reszka did not respond. 34 FMSHRC at 2323; Tr. 37. Reszka denied that Dubina made any such statement to him. 34 FMSHRC at 2327; Tr. 103. Reszka and Danny Lee Laverty, a representative of Performance whose role was to accompany DQ during its investigation, both testified that Laverty had asked Dubina's permission to enter Tailgate 22 in Zone 5 on Janunary 12, and that Dubina said "I don't see a problem with that." 34 FMSHRC at 2327-28; Tr. 111, 128-31. Dubina testified that he did not recall this conversation. 34 FMSHRC at 2334; Tr. 135-36.

Initially following the UBB mine explosion, Dubina was part of MSHA's investigation team in the electrical group tasked to identify electrical problems. Dubina was not an authorized representative of MSHA and had no authority to enforce the Mine Act on the Secretary's behalf. 34 FMSHRC at 2322; Tr. 20. Dubina admitted that he never explained to Schemel or any representative of DQ that he was not an authorized representative of MSHA. 34 FMSHRC at 2324; Tr. 48, 50, 51.

During his role as observer, Dubina maintained daily logs corroborating DQ's activities on the dates in question and reported to MSHA's Accident Investigation ("AI") Team any apparent violation he observed. 34 FMSHRC at 2323-24; Tr. 32-33, 38-39, 56; G. Ex. 6; R. Ex. E. Following the events of January 10 through 12, Dubina reported DQ's activities in Zone 5 to Inspector McElroy, an authorized representative of MSHA's AI Team, who prepared the citation at issue in this case. 34 FMSHRC at 2323, 2325.

MSHA issued a section 104(a) citation to DQ for a violation of section 103(k) of the Mine Act. 34 FMSHRC at 2321; Jt. Stip. 16. Citation No. 8249977 states:

> Evidence indicates the operator worked in violation of the 103(k) order #4642503-BB. This modification specifies "No person shall be permitted in Zone 5 to conduct any activities other than for the purpose of conducting examinations required by the regulations." The operator failed to comply with this stipulation on 01-11-2011 and 01-12-2011. Investigative activities were conducted in Zone 5 without modification of the k order. This

> condition has not be [sic] designated as "significant and substantial" because the conduct violated a prevision [sic] of the mine act rather than a mandatory safety or health standard.

Ex. G-1; Jt. Stip. 17. The negligence was designated as high and the Secretary initially proposed a penalty of $112. However, in his post-hearing brief, the Secretary requested that the penalty be increased to $1,000 "in order to have a deterrent effect so that future MSHA accident investigations of major mine disasters are not compromised by operators disregarding the important restrictions in place under a 103(k) order." S. Post-Hearing Br. at 20-21; 34 FMSHRC at 2329.

The Judge addressed the issues of whether DQ was an independent contractor under the Mine Act, the validity of the citation, the degree of negligence and the appropriate penalty. 34 FMSHRC at 2321. After finding that DQ was an independent contractor under the Mine Act, the Judge subsequently affirmed the citation and found that MSHA did not abuse its discretion in modifying the section 103(k) order solely for January 10. 34 FMSHRC at 2333-38.

The Judge found high negligence and assessed a penalty of $1,000. *Id.* at 2338-39. In considering DQ's level of negligence, the Judge considered DQ's argument that it had followed the informal procedure to seek approval for travel to Zone 5, which was explicitly prohibited by the section 103(k) order. *Id.* at 2338. Finding that there was no contention that DQ personnel were not aware they were traveling to Zone 5, the Judge rejected DQ's argument, specifically because the section 103(k) order, which set out the prohibitions and process for investigative actions by Performance and its agents, was clear on its face and because DQ "offered no evidence of why the belief in the informal modification procedures was reasonable." *Id.* DQ appealed the Judge's decision, and the Commission granted DQ's petition with regard to whether the Judge erred in finding high negligence.

II.

Disposition

Negligence is one of six criteria a Commission Judge must consider in assessing a penalty for a violation under the section 110(i) of the Mine Act. 30 U.S.C. § 820(i). The Commission has stated that a finding of high negligence "'suggests an aggravated lack of care that is more than ordinary negligence.'" *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citations omitted). The Commission noted that, in particular, "an operator's intentional violation constitutes high negligence for penalty purposes." *Id.* (citations omitted).

The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) ("*JWR*") (quoting *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983)). In determining whether an operator has met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a

reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).[5]

The Commission reviews a Judge's finding of negligence on substantial evidence grounds. *See, e.g., JWR*, 36 FMSHRC at 1976; *Mach Mining, LLC*, 36 FMSHRC 1525, 1526-27 (June 2014); *Topper Coal*, 20 FMSHRC at 350. Therefore, the issue before the Commission is whether substantial evidence supports the Judge's finding of high negligence.

In support of its argument that the Judge erred in finding high negligence, DQ contends that the Judge did not consider mitigating circumstances related to an informal process for seeking modification of the section 103(k) order. However, the Judge did explicitly address the evidence upon which DQ relies and rejected DQ's arguments. In his decision, the Judge stated:

> There is no contention that DQ personnel did not know they were traveling to Zone 5. Rather, Respondent argues that it complied with the 103(k) order by informing MSHA by email or telephone that it planned to enter Zone 5, or seeking approval from Dubina to enter Zone 5. For the reasons above, I do not find DQ's belief in this informal procedure to be a mitigating circumstance. The prohibitions and stipulations of the 103(k) order were clear on its face, and Respondent offered no evidence of why the belief in the informal modification procedures was reasonable. Accordingly, I find that DQ acted with high negligence when it violated the 103(k) order.

34 FMSHRC at 2338. Earlier in his opinion under the violation section, the Judge addressed in great detail the evidence pertaining to DQ's argument regarding an informal modification procedure and determined that DQ's argument lacked merit. *Id.* at 2334-36.

DQ continues to argue that it believed that it complied with the section 103(k) order by following informal procedures to obtain MSHA's approval to enter Zone 5. The Secretary contends that DQ had knowledge of the clear language of the order, which contained no such procedure. It is undisputed that DQ's investigative team entered Zone 5 on January 11 and 12. Although Reszka testified that he did not know that Dubina was not an authorized representative of MSHA who could provide DQ authorization on the spot, the Judge rejected the assertion that such a belief was reasonable because (1) DQ knew the terms of the section 103(k) order, which, as Inspector McElroy testified, required that a request for a modification be made no later than

[5] While the parties cite the Secretary's Part 100 regulations, they apparently do so for the limited purpose of providing the Commission guidance in considering the issue on appeal. The Commission recently rejected the Secretary's argument that the Commission must apply the standard of care set forth in 30 C.F.R. § 100.3(d) in considering an operator's negligence. *JWR*, 36 FMSHRC at 1975 n. 4 ("The Secretary's Part 100 regulations apply only to the Secretary's penalty proposals, while the Commission exercises independent authority to assess penalties pursuant to section 110(i) of the Mine Act.") (citations omitted).

the night before, approval by MSHA, and that an authorized representative of MSHA accompany the operator on the day of the modification, 34 FMSHRC at 2335; Tr. 82-83, and (2) DQ provided no evidence of approval of an informal procedure. 34 FMSHRC at 2334.

The Commission has held that actual knowledge of the violation and failure to act in compliance constitutes high negligence. *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994) (concluding that actual knowledge of violative conditions and failure to act constituted high negligence).

Here, DQ knew of the restrictions on travel to Zone 5 and knowingly violated the terms of the section 103(k) order. Despite allegations of a good faith belief that it obtained authorization to enter the restricted area, the Judge concluded such belief was unreasonable. *See Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992) (holding that intentional misconduct supports a high negligence finding). We agree.

Even were we to accept the operator's argument that informal modification procedures sufficed, the record shows that such procedures were not followed for the January 11 or 12 investigations. As a threshold matter, the Judge properly concluded that DQ "conflate[d] the procedures for complying with the December 23 order by informing MSHA of its plans for the following day with procedures for modifying the 103(k) order in order to be permitted to travel to Zone 5." 34 FMSHRC at 2334 n.5. In any event, the evidence did not reflect that DQ or Performance alerted MSHA that the investigative team intended to enter Zone 5 on January 11 and 12. The Judge did not find merit in Reszka's testimony that Prater notified MSHA via phone on January 10 of DQ's intention to enter Zone 5 on January 11 because Reszka was neither on the call nor in the room when the alleged call was made. 34 FMSHRC at 2334; Tr. 123. In addition, the Judge found that DQ failed to comply with the alleged "informal procedures" because the email sent by Chris Prater of Performance on January 11 concerning where the teams were to travel on January 12 omitted reference to Tailgate 22 in Zone 5, where the DQ team traveled on January 12. 34 FMSHRC at 2334; DQ Ex. D.

Also, the Judge appeared to credit Dubina's testimony that he did not recall that either Reszka or Laverty sought his permission to enter Zone 5 on January 12. 34 FMSHRC at 2334; Tr. 134-36. The Judge declined to credit testimony from DQ's witnesses that the company attempted to use "informal procedures" to modify the section 103(k) order. 34 FMSHRC 2334. Thus, even if Dubina had the authority to permit investigators to enter Zone 5 – which he did not – there is no finding that he authorized DQ to enter the restricted area on January 11 and 12. We conclude that substantial evidence supports the Judge's finding that both on January 11 and 12, DQ did not follow the alleged "informal procedures" by using prior email or phone contacts, or by seeking approval from Dubina, MSHA's observer. 34 FMSHRC at 2334.

Therefore, substantial evidence supports the Judge's findings that the alleged informal procedure did not suffice to modify the section 103(k) order and, in any event, DQ did not comply with any "informal procedure" for modification of the order to permit entry into Zone 5.

Finally, DQ argues that MSHA's action in retroactively amending the section 103(k) order on January 17 to allow Performance Coal to enter Zone 5 on January 10, but not January 11 and 12, was arbitrary and that this inconsistency reduces its level of negligence. It states that the modification of the order for January 10 demonstrates that Dubina had apparent authority to permit entry into Zone 5. This argument fails on several fronts.

First, MSHA's after-the-fact decision to modify the section 103(k) order cannot be used to show anything about the reasonableness of an asserted belief regarding Dubina's authority on the preceding days when DQ entered Zone 5 without following the required procedures. Thus, it is not relevant to the issue of the level of DQ's negligence.

Second, the decision by MSHA not to cite DQ for its actions on January 10 does not constitute a concession that Dubina had the authority to modify the 103(k) order. MSHA's witnesses testified that the decision to modify the order for January 10 was made "to cut [DQ] a break." Tr. 83-84, 90-91. Dubina had erred by allowing DQ to enter Zone 5 on January 10. MSHA's willingness to forego prosecution under circumstances in which an MSHA employee made a mistake does not amount to a concession that Dubina had the authority to permit DQ to enter Zone 5.

Accordingly, we conclude that substantial evidence supports the Judge's finding of high negligence.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

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December 23, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HIDDEN SPLENDOR RESOURCES, INC.	Docket Nos. WEST 2009-208 WEST 2009-209 WEST 2009-210 WEST 2009-342 WEST 2009-591 WEST 2009-916 WEST 2009-1072 WEST 2009-1162 WEST 2009-1451

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY: Nakamura, Acting Chairman, and Althen, Commissioner

In these civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), the Secretary of Labor seeks review of three civil penalties assessed by a Commission Administrative Law Judge for violations of mandatory safety standards by Hidden Splendor Resources, Incorporated. 34 FMSHRC 3310 (Dec. 2012) (ALJ). The Secretary argues that the Judge erred by relying on mitigating circumstances that were irreconcilable with other penalty-related findings, by assessing a penalty less than the statutory minimum penalty amount, and by failing to adequately explain an assessment's substantial divergence from a penalty proposed by the Department of Labor's Mine Safety and Health Administration ("MSHA").

For the reasons that follow, we conclude that the Judge did not err by relying upon the mitigating circumstances and affirm that penalty. However, we conclude that the Judge erred with respect to the other two penalty assessments at issue.

I.

Order No. 8460169

A. Factual and Procedural Background

On April 10, 2009, MSHA Inspector Richard Boyle issued Order No. 8460169 to Hidden Splendor, alleging a training violation of 30 C.F.R. § 48.5(a). The order further alleged that the violation was significant and substantial ("S&S") and had been caused by the operator's

unwarrantable failure to comply with the standard[1] and by high negligence. The inspector issued the order because he discovered that two new miners had worked underground without receiving required training. 34 FMSHRC at 3323. The inspector stated that management had told him that they thought it "would be okay" to have the untrained miners work underground if they were accompanied by experienced miners. *Id.*; Tr. 660-61. When the shift foreman discovered that the new miners had not been trained, he removed the entire crew from the mine as quickly as possible. 34 FMSHRC at 3324; Tr. 683-85, 687.

The Secretary proposed a penalty of $5,645 for the violation. The operator conceded that it had violated the training regulation but disputed the special findings and the designation of high negligence. 34 FMSHRC at 3323-24.

The Judge concluded that the violation was S&S and had been caused by unwarrantable failure and high negligence. Regarding S&S, he concluded that it was reasonably likely that the untrained miners could cause a serious injury to themselves or other miners underground. The Judge further concluded that the violation was unwarrantable because the violation was obvious and posed a high degree of danger, and Hidden Splendor's belief that it could send the untrained miners underground defied common sense and demonstrated a serious lack of reasonable care. He based his high negligence finding on evidence that mine management knew that the miners had not completed training. The Judge acknowledged, however, that the foreman immediately pulled the miners from the mine when he discovered that they had not completed their training and, "[f]or that reason," reduced the penalty to $4,000. *Id.* at 3325-26.

The Secretary argues that the Judge's decision to reduce the penalty on the basis of the foreman's withdrawal of the untrained miners cannot be reconciled with his high negligence and unwarrantable failure findings. He notes that "high negligence" is defined in 30 C.F.R. § 100.3(d)[2] as occurring when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." PDR at 17-18 (citations omitted).[3] In addition, the Secretary asserts that the foreman's action in withdrawing the miners

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[1] The S&S terminology is taken from section 104(d)(1) of the Act, 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." The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

[2] Section 100.3(d) defines negligence in part as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). Section 100.3(d) sets forth five categories of negligence ranging from "no negligence" to "reckless disregard." Each category defines the level of negligence and number of penalty points assigned for that level.

[3] The Secretary has previously taken a contrary position, asserting that a Commission Judge acted within his discretion in assessing a penalty because Part 100 is binding only on the Secretary and not on Commission Judges. *See Hubb Corp.*, 22 FMSHRC 606, 608 (May 2000).

does not diminish the culpability of Hidden Splendor's management in deciding to send the miners underground to work without training. *Id.*

B. Disposition

The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000). An abuse of discretion may be defined to include errors of law. *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991).

The Mine Act sets forth a bifurcated penalty scheme under which the "Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses [the] penalty." *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1151-52 (7th Cir. 1984). The Secretary's regulations at 30 C.F.R. Part 100 apply only to the Secretary's penalty proposals, while the Commission exercises independent "authority to assess all civil penalties provided [under the Act]" by applying the six criteria set forth in section 110(i).[4] 30 U.S.C. § 820(i); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties. . . . [W]e find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *see also W.S. Frey Co. v. Sec'y of Labor*, 57 F.3d 1068, *5 (4th Cir. 1995) (unpublished) (citing *Sellersburg*, 736 F.2d at 1152) (holding that a Judge is authorized to determine a penalty amount *de novo* based on statutory criteria).

We conclude that the Judge did not abuse his discretion in assessing a $4,000 penalty rather than the penalty of $5,645 proposed by the Secretary. As already discussed, the Judge was not bound by the Secretary's penalty proposal. In addition, the Commission's Procedural Rules specifically state that, "In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary. . . ." 29 C.F.R. § 2700.30(b). Nor was the Judge bound by the Secretary's definition of "high negligence" set forth in section 100.3(d). *See, e.g., Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug.

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[4] Section 110(i) provides in pertinent part:

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

30 U.S.C. § 820(i).

2014) ("We reject the Secretary's argument that the Commission must apply the standard of care set forth in 30 C.F.R. § 100.3(d) in considering whether [the operator] was negligent."); *Deshetty, emp. by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994).

Moreover, we see no inherent inconsistency between the Judge's findings of high negligence and unwarrantable failure and his assessment of a penalty lower than that proposed by the Secretary. Although the operator's conduct in permitting the untrained miners to go underground was intentional, the operator's conduct was offset by evidence that the foreman withdrew the miners from the mine as soon as he realized the miners were untrained rather than waiting until the end of the shift. 34 FMSHRC at 3324, 3325-26; Tr. 685. The foreman's conduct, which is imputable to the operator for civil penalty and unwarrantable failure purposes, promoted miner safety and is to be encouraged. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (stating that the conduct of an operator's agents may be imputed to the operator for civil penalty and unwarrantable failure purposes). Accordingly, we affirm the $4,000 penalty related to Order No. 8460169.

II.

Order No. 8457347

A. Factual and Procedural Background

On July 29, 2009, MSHA Inspector DeVere Smith observed accumulations of float coal dust and coal fines on and around the No. 1 surface belt tailpiece. 34 FMSHRC at 3357. The inspector considered the condition to be obvious and extensive, and noted that a supervisor had recently traveled through the area. Tr. 511-12. The inspector issued Order No. 8457347 to Hidden Splendor, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). The order alleged an S&S and unwarrantable accumulations violation of 30 C.F.R. § 77.1104, which had been caused by high negligence. Hidden Splendor stipulated that it had violated the standard. 34 FMSHRC at 3357, 3359.

Following a hearing on the matter, the Judge found that the violation was unwarrantable and had been caused by high negligence. However, the Judge concluded that the violation was not S&S. *Id.* at 3359-60. Accordingly, the Judge assessed a penalty of $500 rather than the penalty of $4,000 proposed by the Secretary. *Id.* at 3357, 3360.

On review, the Secretary argues that the Judge erred by assessing a penalty below the statutory minimum required by section 110(a)(3)(B) of the Mine Act.[5] The Secretary does not challenge the Judge's determination that the violation was not S&S.

[5] Section 110(a)(3)(B) of the Mine Act provides, "The minimum penalty for any order issued under section 104(d)(2) shall be $4,000." 30 U.S.C. § 820(a)(3)(B).

B. Disposition

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties under the Act in accordance with the six criteria listed. 30 U.S.C. § 820(i). Section 110(a)(3) of the Mine Act sets forth minimum penalty assessment provisions for citations and orders issued under section 104(d) of the Act. More specifically, section 110(a)(3)(B) sets forth a minimum penalty of $4,000 for any order issued under section 104(d)(2).

The statutory minimum provisions set forth in section 110(a)(3) are binding upon the Commission and its Judges. *Stansley Mineral Res., Inc.*, 35 FMSHRC 1177, 1180 (May 2013). The Commission has explained that sections 110(i) and 110(a)(3) "confer broad discretionary authority upon the Commission and its Judges to apply the criteria in section 110(i), but require that no penalty for a section 104(d) citation or order may be assessed at less than the statutory minimums in section 110(a)(3)." *Id.*

Here, the Judge sustained the allegations of unwarrantable failure underlying the section 104(d)(2) order. In addition, he adequately addressed each of the six factors required for consideration under section 110(i). However, the Judge erred by assessing a penalty of less than $4,000 for a section 104(d)(2) order. Finding no fault otherwise in the reasoning underlying his assessment, we vacate the penalty assessed by the Judge and impose the $4,000 minimum penalty required by the Mine Act.

III.

Citation No. 6685833

A. Factual and Procedural Background

On August 11, 2008, MSHA Inspector Russell Bloomer issued Citation No. 6685833 to Hidden Splendor, alleging that an S&S roof control violation of 30 C.F.R. § 75.202(a) was caused by high negligence. The citation alleged bad roof conditions in the mine, including areas where material had fallen and had exposed roof bolts. The inspector testified that the Horizon Mine had a history of repeated roof control violations. The Secretary proposed a penalty of $6,458 for the violation. 34 FMSHRC at 3378.

The Judge found that the operator violated the standard and that the violation was S&S and caused by high negligence. With respect to S&S, the Judge credited the inspector's testimony regarding the roof conditions and the mine's history of roof falls. Regarding negligence, the Judge found that the conditions were obvious, extensive, and had existed for "quite some time." *Id.* at 3379-80. He further stated that a roof fall had potentially fatal consequences to miners, and that the operator had made no effort to correct the conditions. After finding high negligence, the Judge stated that, "[a] penalty of $5,000 is appropriate for this violation." *Id.* at 3380.

The Secretary argues that the Judge erred by substantially deviating from MSHA's proposed penalty for the citation without any explanation. The Secretary explains that the Judge's assessment of a penalty 23% lower than the proposed penalty requires more explanation than that the assessed penalty is "appropriate."

B. Disposition

In a contested case, the amount of the penalty to be assessed by the Commission and its Judges is a *de novo* determination based on the criteria set forth in section 110(i), 30 U.S.C. § 820(i). *Sellersburg Stone*, 5 FMSHRC at 293. Penalties assessed by Commission Judges can be greater than, less than, or the same as those proposed by the Secretary. *Id*. However, when it is determined, based on further information developed in an adjudicative proceeding, that penalties should be assessed which substantially diverge from those originally proposed, Judges must sufficiently explain the bases underlying the penalties assessed. *Id.*; *Cantera Green*, 22 FMSHRC 616, 622-23 (May 2000).

Here, the Judge considered and made findings on all six section 110(i) factors and assessed a penalty that was 23% below that proposed by the Secretary. 34 FMSHRC at 3380-81. However, the Judge did not offer any explanation for the divergence, for instance, by explaining whether he gave special weight to various criteria, and thus failed to provide the basis for meaningful review of the penalty by the Commission. *See Cantera Green*, 22 FMSHRC at 622-23, 626 (vacating assessed penalties that ranged from 20% to 70% of the proposed penalties because Judge failed to explain divergence although he made findings on penalty criteria). Accordingly, we remand the penalty associated with Citation No. 6685833 to the Judge for further explanation consistent with this decision.

IV.

Conclusion

For the reasons discussed above, with respect to Order No. 8460169, we affirm the Judge's assessment of a penalty in the amount of $4,000. With respect to Order No. 8457347, we vacate the penalty of $500 assessed by the Judge and hereby assess a penalty in the amount of $4,000. Finally, we remand the penalty associated with Citation No. 6685833 to the Judge for further explanation consistent with this decision.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

Commissioner Cohen, concurring:

Commissioner Cohen joins the majority with respect to their decision regarding Order No. 8457347 and Citation No. 6685833, and concurs with their decision regarding Order No. 8460169.

Order No. 8460169

The Secretary contends that after finding high negligence and unwarrantable failure, the Judge erred in reducing MSHA's proposed penalty. According to the Secretary, the Judge relied on "a reason that should not have been considered after he found that the violation was the result of mine management's high negligence." PDR at 2. I concur with my colleagues' conclusion that the Judge did not err when he reduced the civil penalty for Order No. 8460169. Rather, the Judge's analysis reflects a thoughtful balancing of the statutory penalty criteria he is required to consider when exercising his authority to assess civil penalties. I write separately in order to more fully discuss why the Judge's Decision fully reflects the principles contained in the Mine Act.

The Secretary's argument is predicated on the definition of "high negligence" found in 30 C.F.R. § 100.3(d) (Table X): "The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." Essentially, the Secretary's argument is that: (1) the Commission and its Judges are bound by the definitions of negligence contained in section 100.3(d); (2) the Judge's finding of "high negligence" meant that he was precluded from finding any mitigating circumstances; (3) the fact relied on by the Judge in reducing the penalty -- the section foreman stopped production and pulled all the miners from the section as soon as he discovered that management had sent two untrained miners to work there -- was not a mitigating circumstance; and (4) because the Judge relied on a mitigating circumstance, his assessment was inconsistent with his finding of high negligence.

The Secretary's argument does not reflect a correct understanding of the penalty provisions of the Mine Act. As my colleagues have noted, slip op. at 3-4, the Mine Act establishes a bifurcated mechanism for the proposal and assessment of civil penalties. The Secretary initially proposes a civil penalty for a citation or order under section 105(a), and – if the operator contests the proposed penalty – the Commission holds a hearing and assesses the final penalty pursuant to section 110(i). 30 U.S.C. §§ 815(a), 820(i).[1] *Sellersburg Stone Co.,* 5 FMSHRC 287, 291 (Mar. 1983), *aff'd,* 736 F.2d 1147, 1151-52 (7th Cir. 1984).

[1] The Commission considers six statutory factors in assessing a penalty: (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 operator charged in attempting to achieve rapid compliance after notification of a violation. *See* 30 U.S.C. § 820(i).

To assist in his responsibility to propose civil penalties, the Secretary promulgated regulations at 30 C.F.R. § 100. *See* 30 C.F.R. § 100.1 ("This part provides the criteria and procedures for proposing civil penalties under sections 105 and 110 of the [Mine Act].") The Part 100 regulations assign "points" that correlate generally with the six statutory criteria. *See* 30 C.F.R. § 100.3 (Tables I-XIII). MSHA's proposed penalty is then calculated based on the number of points.

The Secretary proposed a penalty of $5,645 for the order at issue. The amount of the proposed penalty was based, in part, on the Secretary's allegation that the violation was the result of "high negligence" on the part of the operator.[2] Gov. Ex. 38.

After a hearing on the merits, the Judge concluded that the failure to train the miners in accordance with 30 C.F.R. § 48.5 was a very dangerous practice, reasonably likely to result in serious injury. The Judge found that the violation was indeed the result of a high degree of negligence because the management at Hidden Splendor knew that two miners had not finished their training, but nevertheless sent the miners underground to work. 34 FMSHRC at 3325.

The Judge then noted that when section foreman Carl Martinez discovered that the miners had not completed their training, he immediately withdrew the entire crew from the mine. *Id.* at 3324, 3325-26; Tr. 683-85, 687. In consideration of the prompt remedial actions of the section foreman, the Judge lowered the civil penalty to $4,000.

Contrary to the Secretary's assertion, there is no inherent contradiction between the Judge's finding of high negligence and his reduction of the penalty because of the section foreman's safety-conscious action.

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[2] Mine inspectors issue citations on MSHA Form 7000-3. The form includes five options for negligence: no negligence, low negligence, moderate negligence, high negligence, and reckless disregard. When issuing the citation, the inspector must check a box designating an assignment of negligence which he believes most closely resembles the culpability of the operator for the violative condition at issue. Mine inspectors are directed to consider the surrounding circumstances in accordance with the definitions of the categories of negligence that are provided in the Part 100 regulations.

The associated definitions are as follows: No negligence - the operator exercised diligence and could not have known of the violative condition or practice; Low negligence – the operator knew of or should have known of the violative condition or practice, but there are considerable mitigating circumstances; Moderate negligence – the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances; High negligence – the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances; Reckless disregard – the operator displayed conduct which exhibits the absence of the slightest degree of care. 30 C.F.R. § 100.3(d) (Table X) (emphasis added).

The greater the degree of negligence designated by the inspector, the more "penalty points" are assigned during the penalty proposal process, and the higher the penalty. *Id.*

The Commission and its Judges are not bound by the definitions in Part 100, but instead assess penalties in accordance with the six statutory criteria set forth in section 110(i) of the Act "and the information relevant thereto developed in the course of the adjudicative proceeding." *Sellersburg Stone*, 5 FMSHRC at 292*; see also Black Diamond Coal Mining Co*., 7 FMSHRC 117, 1122 (Aug. 1985) ("The separate procedures by which penalty assessments are proposed by the Secretary . . . are not material to a penalty assessment by the Commission."). Indeed, the Commission has recently specifically rejected the Secretary's argument that the Commission must apply the standard of care set forth in section 100.3(d) in considering an operator's negligence. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) ("The Secretary's Part 100 regulations apply only to the Secretary's penalty proposals, while the Commission exercises independent authority to assess penalties pursuant to section 110(i) of the Mine Act.") (citations omitted).

The Seventh Circuit has directly considered the application of the Secretary's penalty proposal regulations to the Commission and concluded that there was "no basis upon which to conclude that these MSHA regulations also govern the Commission." *Sellersburg Stone Co. v. FMSHRC*, *supra,* 736 F.2d at 1152. The Court further stated:

> It cannot be disputed that the Commission and its ALJs constitute an adjudicative body that is independent of the MSHA. Sen. Rep. No. 461, 95th Cong. 1st Sess. 38 (1977). This body is governed by its own regulations, which explicitly state that, in assessing penalties, it need not adopt the proposed penalties of the Secretary. 29 C.F.R. § 2700.29(b) (1983). Furthermore, neither the Act nor the Commission's regulations require the Commission to apply the formula for determining penalty proposals that is set forth in section 100.3 of the MSHA regulations.

Id.[3]

[3] I recognize that some courts have applied the Secretary's Part 100 regulations when considering a Judge's negligence finding and assessment of a penalty. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012) (defining "high negligence" in accordance with section 100.3(d)); *see also Allied Products Co. v. FMSHRC*, 666 F.2d 890, 895-96 (5th Cir. 1982) (applying Part 100 regulations in determining whether the Judge abused his discretion in assessing a penalty). In addition, in an unpublished decision, the D.C. Circuit stated that the penalty regulations required the Judge to adjust the negligence finding to "moderate negligence" because he found a mitigating circumstance. *Excel Mining, LLC v. Dep't of Labor*, 497 Fed.Appx. 78, 80; 2013 WL 1155362 (D.C. Cir. Mar. 15, 2013). However, these cases are distinguishable because the issue of whether the Secretary's Part 100 regulations are binding on the Commission was not directly before the courts in these proceedings. Thus, the statements regarding the applicability of Part 100 are dicta. In contrast, in *Sellersburg Stone,* the issue of whether the Judge was required to apply section 100.3 in his assessment of penalties was directly at issue.

The definitions in 30 C.F.R. § 100.3(d) make sense in light of the purpose for which they were created. As described *supra* in footnote 2, the categories of low negligence, moderate negligence and high negligence are all characterized by the finding that the operator "knew or should have known of the violative condition or practice. What distinguishes the three categories are the existence and amount of "mitigating circumstances" -- if no mitigating circumstances, the negligence is "high"; if considerable" mitigating circumstances, the negligence is "low"; and if there simply "are" mitigating circumstances, the negligence is "moderate". This sets up a system which is easily applicable by MSHA inspectors at mine sites. They deal with thousands of violations where the amount of negligence has to be rated. With this system, they can do it efficiently and quickly (as they must) – if no mitigating circumstances, check "high"; if considerable mitigating circumstances, check "low"; if somewhere in between, "moderate".

In contrast, Commission Judges can evaluate all of the evidence presented to them after a full hearing and take a more nuanced approach to the degree of negligence. Thus, there is a very different process for the Judge to evaluate negligence compared with the inspector at the mine site. The criteria of 30 C.F.R. § 100.3(d) make sense for inspectors at the mine site, but are too mechanical for Commission Judges.

The Commission has not promulgated a definition of "high negligence". But the Commission has stated that high negligence "suggests an aggravated lack of care that is more than ordinary negligence" and "an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co.,* 20 FMSHRC 344, 350 (Apr. 1998). In *Deshetty, employed by Island Creek Coal Co.,* 16 FMSHRC 1046, 1053 (May 1994), despite the claim of mitigating circumstances, the Commission upheld an ALJ's conclusion of high negligence based on findings "that Deshetty had actual knowledge of the accumulations along the No. 1 belt and that he failed to remedy the conditions."

Although *Topper Coal* and *Deshetty* provide examples and useful statements about high negligence, they do not completely define its parameters. Nevertheless, it is clear that a single mitigating circumstance does not preclude the finding of high negligence. I would suggest that the application of the Secretary's definition of high negligence goes beyond the *Sellersburg Stone – Jim Walters Resources* proposition that Commission Judges are not bound by the Secretary's definition. Rather, I conclude that the 30 C.F.R. § 100.3(d) definition of high negligence is too restrictive, and should not be used by Commission Judges.

In the present case, the Judge found a high degree of negligence because management sent two new miners into the mine, knowing that they had not completed their training: "The fact that Joe Fielder thought it would be permissible to send the new miners into the mine supports the fact that management knew that these miners had not completed training." 34 FMSHRC at 3325. The violation, together with its high negligence, was complete when the two untrained miners entered the mine.

What section foreman Martinez did was in the nature of abatement – "as soon as Martinez discovered that the miners had not completed their training, he immediately pulled them out of the mine." *Id.* at 3325-26. One of the factors to be considered in setting a penalty

pursuant to section 110(i) of the Mine Act is "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). Here, in ordering the miners out of the mine, section foreman Martinez did not wait for "notification of a violation". He took action immediately. Since a Judge is statutorily required to consider the mine's promptness in abating a violation after notification by MSHA, it is certainly appropriate for the Judge to consider a section foreman's prompt action in averting a hazard before an MSHA inspector appeared on the scene.

In *Spartan Mining Co.,* 30 FMSHRC 699, 710, 722-26 (Aug. 2008), the Commission affirmed a Judge's decision to substantially increase penalties because of extreme negligence on the part of a section foreman. Conversely, it is appropriate for a Judge to reduce a penalty where a section foreman takes decisive action to enhance miners' safety even when his superiors created the hazard by flouting the law. When assessing a civil penalty a Commission Judge may consider the deterrent purposes of a civil penalty within his analysis of the statutory criteria. *Black Beauty Coal Co.,* 34 FMSHRC 1856, 1866-67 (Aug. 2012). Lowering a civil penalty, after crediting a foreman's proactive behavior in abating a violative condition before it was cited, is consistent with the deterrent purposes of a civil penalty. Stated another way, lowering a penalty based on abatement prior to the issuance of a citation encourages vigilance and works to deter the existence of violative and unsafe conditions.

I find no inconsistency in the Judge's application of the six penalty criteria. I conclude that the Judge's analysis is well reasoned and does not reflect an abuse of discretion. Rather, the Judge's analysis reflects an appropriate exercise of the discretion that was afforded to the Commission by Congress to assess civil penalties. Thus, I join my colleagues in affirming the $4,000 penalty for Order No. 8460169.

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

December 11, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket Nos. WEVA 2014-82-R, et al.[1]
BRODY MINING, LLC	

BEFORE: Nakamura, Acting Chairman; Cohen 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). On December 1, 2014, the Secretary of Labor filed with the Commission a document entitled "Petition for Discretionary Review." The Secretary seeks review of a Decision issued by an Administrative Law Judge on November 3, 2014, in which he dismissed the Pattern of Violation ("POV") Notice issued by the Secretary to Brody Mining, LLC. ("Brody") on October 24, 2013. 36 FMSHRC __, slip op. at 19, Nos. WEVA 2014-82-R, (Nov. 1, 2014) (ALJ). The Judge's decision was not a final order. Nonetheless, the Secretary has appealed the decision on the basis of the collateral order doctrine. As explained below, the collateral order doctrine does not apply to this case at this juncture. Therefore, we deny the petition for review.

Under section 104(e)(1) of the Mine Act, if an operator has a pattern of violations of mandatory health or safety standards which could significantly and substantially contribute to the cause and effect of health or safety hazards, it shall be given written notice that such a pattern

[1] The relevant docket numbers involved in this proceeding are listed in Appendix A, attached to this decision.

exists.[2] If, within 90 days following issuance of the POV Notice, an inspector cites the operator for a significant and substantial ("S&S")[3] violation, then the Department of Labor's Mine Safety and Health Administration ("MSHA") may issue a withdrawal order under section 104(e)(1) of the Act. 30 U.S.C. § 814(e)(1).

Background

On October 24, 2013, the Secretary notified Brody that a pattern of violations existed at its Brody No. 1 Mine. In response, Brody filed a contest of the POV Notice.

In an Order dated January 30, 2014, Chief Administrative Law Judge Robert Lesnick dismissed Brody's challenge to the POV Notice itself (Docket No. WEVA 2014-81-R) for lack of jurisdiction. *Brody Mining, LLC*, 36 FMSHRC 284, 287 (Jan. 2014). The Judge found, however, that he had jurisdiction to hear any contest of an order issued pursuant to section 104(e) of the Act and any properly contested citation or order relied upon by the Secretary in issuing the

[2] Section 104(e) of the Mine Act, 30 U.S.C. § 814(e), states, in relevant part:

> (1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health of safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

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

POV Notice. He further found that after the date of issuance of the POV Notice numerous section 104(e) withdrawal orders had been issued against Brody and that such orders were still being issued as of the date of his order. He consolidated those contests with the existing contests and stated that all future section 104(e) withdrawal orders would be consolidated into the proceeding, as well. *Id.* at 293.

Chief Judge Lesnick upheld the facial validity and constitutionality of the POV regulations.[4] *Id*. at 301-08. He remanded the cases for further proceedings and assigned a new Judge to the cases.

On November 3, 2014, the newly-assigned Judge entered the order with respect to which the Secretary has filed the current petition for discretionary review.[5] The Judge found the POV Notice unconstitutional as applied by the Secretary and dismissed the POV Notice. Order at 17-19. The Judge further ruled on each of the 54 alleged S&S violations the Secretary had asserted as constituting the pattern of violations. Twenty-nine of those alleged S&S violations were sustained. Because the Judge had ruled the POV Notice was unconstitutional as applied, he did not decide whether those 29 S&S violations constituted a pattern of violations. Nor did the Judge specifically rule on the validity of the section 104(e) withdrawal orders.[6]

Disposition

In this proceeding contesting the issuance of a POV Notice, the Judge disposed of all of the S&S citations and orders underlying the notice. However, he did not dispose of 357 non-S&S citations and orders. Thus, the November 3, 2014 decision is not a final decision. *See* 29 C.F.R. § 2700.69.[7] However, while recognizing the decision is not final, the Secretary asserts that the Judge's decision is an appealable order under the collateral order doctrine. PDR at 2.

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[4] That decision was reviewed and affirmed by the Commission on an interlocutory basis. *Brody Mining, LLC*, 36 FMSHRC 2027 (Aug. 2014), and is presently on appeal before the U.S. Court of Appeals for the D.C. Circuit, Docket No. 14-1171.

[5] The Judge specifically noted the consolidation of the cases challenging the citations and orders underlying the POV Notice with later cases challenging withdrawal orders based upon the POV Notice. Order at 1, n.1.

[6] Commissioner Cohen notes that the Judge's ruling on the validity of the POV Notice, without also ruling on the withdrawal orders issued pursuant to the notice, is in apparent conflict with Chief Judge Lesnick's previous finding that the Commission lacks jurisdiction to consider a POV Notice standing alone.

[7] Rule § 2700.69(a) states, in relevant part:

> Form and content of the Judge's decision. The Judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record, and an order.

The collateral order doctrine is a practical construction of the final judgment rule which has been applied in federal courts. The final judgment rule permits appeal only from "all *final* decisions" of a district court. 28 U.S.C. § 1291 (emphasis added). In *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949), the Supreme Court recognized that appeals of a small class of decisions which appear interlocutory in nature must be permitted if those decisions "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." The Court cautioned, however, that appeal gives an upper court "a power of review not one of intervention." *Id*. Thus, if a matter remains "open, unfinished or inconclusive, there may be no intrusion by appeal." *Id.*

The Supreme Court has clarified that there are three prongs that must be satisfied under the collateral order doctrine. Specifically, an order that does not conclude an action may nonetheless be immediately appealable if it: (1) conclusively determines the disputed question; (2) resolves an important issue separate from the merits of the action; and (3) is effectively unreviewable on an appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). In order to be reviewable, the order must satisfy all three requirements. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987).

The Secretary has failed to satisfy the third prong of this test.[8] The Secretary's argument is not that the Judge's decision would be unreviewable on final appeal. Rather, he argues that the decision "would be effectively unreviewable on appeal from a final order in light of the irreparable harm to the health and safety of Brody's miners as long as the ALJ's dismissal of the POV Notice remains in effect." PDR at 3. However, he overlooks the availability of interlocutory review of the Judge's decision, as set forth in the Commission's procedural rules. The issue the Judge decided and which the Secretary seeks to appeal is currently reviewable under those rules.

Pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, the Commission may review a Judge's ruling, prior to the Judge's final decision in the case, if certain conditions are met. First, pursuant to Rule 76(a)(1), either the Judge must certify that his or her interlocutory ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding, or the Judge must deny a party's motion for certification of the interlocutory ruling to the Commission and the party must file with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification. Second, under Rule 76(a)(2), a majority of the Commission members must conclude that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding.

[8] Because we conclude that the third prong of the collateral order doctrine has not been satisfied, we need not reach the remaining prongs. *Performance Coal Co*., 32 FMSHRC 1212, 1217 (Oct. 2010).

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

Given the Secretary's concerns regarding irreparable harm, we would expect a motion for interlocutory review to be promptly brought before the Commission either by certification by the Judge or petition of the Secretary.

For the reasons set forth above, the petition filed by the Secretary is denied.[9]

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

[9] We are without jurisdiction to consider the Secretary's Emergency Motion to Stay.

APPENDIX A

WEVA 2014-83-R

WEVA 2014-86-R

WEVA 2014-87-R

WEVA 2014-97-R

WEVA 2014-151-R

WEVA 2014-161-R

WEVA 2014-190-R

WEVA 2014-191-R

WEVA 2014-192-R

WEVA 2014-193-R

WEVA 2014-221-R

WEVA 2014-244-R

WEVA 2014-284-R

WEVA 2014-285-R

WEVA 2014-447-R

WEVA 2014-448-R

WEVA 2014-449-R

WEVA 2014-450-R

WEVA 2014-451-R

WEVA 2014-452-R

WEVA 2014-453-R

WEVA 2014-454-R

WEVA 2014-455-R

WEVA 2014-456-R

WEVA 2014-457-R

WEVA 2014-479-R

WEVA 2014-480-R

WEVA 2014-529-R

WEVA 2014-530-R

WEVA 2014-531-R

WEVA 2014-537-R

WEVA 2014-539-R

WEVA 2014-561-R

WEVA 2014-562-R

WEVA 2014-563-R

WEVA 2014-570-R

WEVA 2014-571-R

WEVA 2014-572-R

WEVA 2014-593-R

WEVA 2014-594-R

WEVA 2014-638-R

WEVA 2014-639-R

WEVA 2014-640-R

WEVA 2014-641-R

WEVA 2014-672-R

WEVA 2014-673-R

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WEVA 2014-675-R

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WEVA 2014-681-R

WEVA 2014-715-R

WEVA 2014-716-R

WEVA 2014-717-R

WEVA 2014-718-R

WEVA 2014-719-R

WEVA 2014-720-R

WEVA 2014-722-R

WEVA 2014-745-R

WEVA 2014-804-R

WEVA 2014-805-R

WEVA 2014-806-R

WEVA 2014-807-R

WEVA 2014-811-R

WEVA 2014-813-R

WEVA 2014-814-R

WEVA 2014-819-R

WEVA 2014-854-R

WEVA 2014-855-R

WEVA 2014-856-R

WEVA 2014-909-R

WEVA 2014-974-R

WEVA 2014-975-R

WEVA 2014-976-R

WEVA 2014-1012-R

WEVA 2014-1013-R

WEVA 2014-1035-R

WEVA 2014-1036-R

WEVA 2014-1037-R

WEVA 2014-1038-R

WEVA 2014-1135-R

WEVA 2014-1138-R

WEVA 2014-1157-R

WEVA 2014-1993-R

WEVA 2014-1994-R

WEVA 2014-1995-R

WEVA 2014-1996-R

WEVA 2014-2172-R

WEVA 2014-2173-R

WEVA 2014-2174-R

WEVA 2014-2175-R

WEVA 2014-2221-R

WEVA 2015-59-R

WEVA 2015-60-R

WEVA 2015-61-R

WEVA 2015-63-R

WEVA 2015-66-R

WEVA 2015-67-R

WEVA 2015-68-R

WEVA 2015-121-R

WEVA 2013-370

WEVA 2013-564

WEVA 2013-997

WEVA 2013-1055

WEVA 2013-1189

WEVA 2014-619

WEVA 2013-620

WEVA 2014-702

WEVA 2014-842

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

December 23, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BLUESTONE QUARRIES, INC.	Docket No. SE 2011-577-M A.C. No. 09-00996-255476

BEFORE: Nakamura, Acting Chairman; Cohen 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 September 4, 2013, the Commission received from Bluestone Quarries ("Bluestone") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On January 18, 2012, the Chief Administrative Law Judge issued an Order to Show Cause in response to Bluestone's perceived failure to answer the Secretary of Labor's June 23, 2011 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on February 21, 2012, when it appeared that the operator had not filed an answer within 30 days.

Bluestone asserts that it sent an answer to the Order to Show Cause on February 8, 2012 by certified mail. Bluestone provides a copy of the answer, along with an e-mail sent to the CLR assigned to the case at the time, confirming that the answer was mailed. Bluestone fails, however, to provide a certified mail receipt to prove delivery of the answer.

The Secretary of Labor opposes the request to reopen. The Secretary notes that the Commission has no record of ever receiving Bluestone's answer to the Judge's show cause order. The Secretary further asserts that the operator failed to follow up with the Judge to make sure that he received its reply. Finally, the Secretary emphasizes that Bluestone does not explain why it waited approximately one and a half years to submit its motion to reopen after the Default Order became effective, even though a delinquency letter was sent to Bluestone on June 14, 2012.

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.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen assessments that have become final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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 held that, in accordance with Rule 60(c) of the Federal Rules of Civil Procedure, a Rule 60(b) motion shall be made within a reasonable time, and in the case of mistake, inadvertence or excusable neglect, not more than one year after the order was entered or, in this case, became effective. *Newmont USA, Ltd.,* 31 FMSHRC 808, 809 (Jul. 2009); *JS Sand & Gravel, Inc.,* 26 FMSHRC 795, 796 (Oct. 2004); *Lakeview Rock Products,* 19 FMSHRC 26, 28 (Jan. 1997).

As noted above, Bluestone failed to provide a certified mail receipt to prove delivery of the answer. Thus, we hereby remand the proceeding to the Chief Administrative Law Judge to determine if the operator in fact replied to the Order to Show Cause. If the operator demonstrates that it replied as asserted, we will conclude that the operator was not in default under the terms of the Order to Show Cause as it timely complied with the Order. *See Vulcan Construction Materials*, 33 FMSHRC 2164 (Sept. 2011). Thus, the Default Order would be rendered a nullity, and the Chief Administrative Law Judge should conduct further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If, however, the operator fails to demonstrate that it replied to the Order to Show Cause, Bluestone's motion to reopen will be denied because it waited for over one year to submit its motion to reopen after the Default Order became effective.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

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December 23, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. C. S. & S. COAL CORPORATION	Docket No. VA 2010-51 A.C. No. 44-07025-179671

BEFORE: Nakamura, Acting Chairman; Cohen 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 September 10, 2013, the Commission received from C. S. & S. Coal Corporation ("C. S. & S.") a motion by counsel seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On March 16, 2011, the Chief Administrative Law Judge issued an Order to Show Cause in response to C. S. & S.'s failure to answer the Secretary of Labor's September 1, 2010 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on April 18, 2011, when the operator did not file an answer within 30 days.

C. S. & S. asserts that both the Petition for Assessment of Civil Penalty and the Order to Show Cause were issued and delivered to an incorrect address. The Secretary of Labor does not oppose the request. We note that the proposed assessment forms for this case were also mailed to the same incorrect address, and that the Commission issued an order allowing the case to be reopened on July 14, 2010. We also note the operator's argument that, since this case was reopened, it has been diligent in monitoring the case for receipt of the Petition. The operator asserts that it contacted the Commission's docket office to determine the status of the case on August 22, 2013, which is when it first learned that the Petition and Order to Show Cause were filed again to the same incorrect address. The motion to reopen at issue was received by the docket office 19 days later.

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 will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator'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.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 23, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. SIERRA ROCK & DIRT, INC.	Docket No. WEST 2014-42-M A.C. No. 24-02115-331596-02

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 3, 2014, the Commission received from Sierra Rock & Dirt, Inc., ("Sierra") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On February 25, 2014, the Chief Administrative Law Judge issued an Order to Show Cause in response to Sierra's perceived failure to answer the Secretary of Labor's November 22, 2013 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on March 28, 2014, when it appeared that the operator had not filed an answer within 30 days.

Sierra asserts that it had filed a timely answer to the Petition for Assessment of Civil Penalty. The Secretary does not oppose the request to reopen and notes that this case was split into two dockets, WEST 2014-41-M and WEST 2014-42-M. The Secretary confirms that the operator sent a timely answer that included all citations for both dockets, but that the answer was labeled with only one docket number, WEST 2014-41-M.

Having reviewed Sierra's request and the Secretary's response, we conclude that the operator was not in default under the terms of the Order to Show Cause as it filed a timely response to the penalty petition. *See Eagle Creek Mining, LLC,* 35 FMSHRC 781, 782 (Apr. 2013). This renders the Default Order a nullity. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 23, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2014-786 A.C. No. 46-01968-338993
CONSOLIDATION COAL COMPANY	

BEFORE: Nakamura, Acting Chairman; Cohen 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 8, 2014, the Commission received from Consolidation Coal Company ("Consolidation") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 1, 2014, and became a final order of the Commission on January 31, 2014. Consolidation asserts that the proposed assessment was not timely contested due to miscommunication resulting from a change in contest procedures, arising from a change in ownership. The Secretary does not oppose the

request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Consolidation'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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

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December 23, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CONSOLIDATION COAL COMPANY	Docket No. WEVA 2014-1044 A.C. No. 46-01968-343269

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

BY: Nakamura, Acting Chairman; Althen, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 17, 2014, the Commission received from Consolidation Coal Company ("Consolidation") 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, 2014, and became a final order of the Commission on March 21, 2014. Consolidation asserts that the proposed assessment was not timely contested due to miscommunication resulting from a change in contest procedures, arising from a change in ownership. The Secretary does not oppose the

request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Consolidation'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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

Commissioner Cohen, dissenting:

I dissent from my colleagues because I believe that the respondent has not established good cause to reopen the captioned proceeding.

The subject motion to reopen concerns a proposed assessment for civil penalties that was delivered to Blacksville No. 2 Mine more than two months after the mine was acquired by Murray Energy Company from Consolidation Coal Company. This is the second docket in which the Commission has received a motion to reopen from the respondent contending that its failure to file a contest form because of "miscommunications" resulting from the transfer in ownership of the mine constitutes good cause to reopen final orders. *See also Consolidation Coal Co*., 36 FMSHRC _, slip op. at 2, No. WEVA 2014-786.

On December 5, 2013, Murray Energy Company acquired the Blacksville No. 2 mine. Mot. at 2. On April 8, 2014, the Commission received the first motion to reopen (in Docket No. WEVA 2014-786). In its motion, the respondent alleged that the acquisition of the mine resulted in the disruption of the practices for filing notices of contest. The respondent claimed that its failure to file a notice of contest to a proposed assessment received on January 2, 2014 resulted from inadvertence or mistake within the meaning of Rule 60(b)(1). Apparently officials at the Blacksville No. 2 mine, consistent with past practices under Consolidation Coal, forwarded the contest form to the Murray Energy corporate offices. However, Murray Energy officials failed to file the form because Murray Energy's customary practice is that officials at the individual mine file the contest form.

Respondent stated that it discovered the lapse, investigated other outstanding Consolidation Coal citations, and then implemented new procedures to ensure the timely filing of notices of contest. Mot. at 3 (Docket No. WEVA 2014-786). Notably, it represented that "[t]his is the only such incident of this type arising from the re-allocation of responsibilities associated with the acquisition of Blacksville No. 2 by Murray Energy. Murray Energy and Blacksville #2 have now implemented procedures to ensure that assessments are timely contested. " *Id*. I concluded that the respondent established good cause to reopen the citations. *Consolidation Coal Co.,* 36 FMSHRC _, slip op. at 2, No. WEVA 2014-786.

On June 17, 2014, the Commission received a second motion to reopen, which is the subject of the captioned proceeding. This motion relates to a proposed assessment received on February 19, 2014. Again the respondent contends that Murray Energy's acquisition of the Blacksville No. 2 Mine resulted in a failure to timely file a contest form, and requests that the Commission reopen the resulting final orders. The motion fails to account for the respondent's past assurances that it investigated its system of processing contest forms and implemented procedures to ensure the timely submission of contests of proposed assessments. In its first motion to reopen, the respondent had acknowledged that it was notified of the delinquency by email on February 24, 2014, and received a delinquency notice from MSHA dated March 18, 2014. Mot. at 3 (Docket No. WEVA 2014-786). Since the proposed assessment in the present

case did not become final until March 21, 2014, the respondent clearly had time to act to prevent the second delinquency.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co*., 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008).

I accepted the respondent's proffers that the failure to file a contest form in Docket No. WEVA 2014-786 was the result of mistake or inadvertence, and relied on its representations that it investigated the incident, discovered that this failure was an isolated incident, and implemented new procedures.

However, it is now apparent that the respondent did not investigate with the requisite level of diligence. If it had performed due diligence it could have discovered the problem in time to file a timely contest of the proposed assessment in Docket No. WEVA 2014-1044. Certainly it could have discovered the problem and filed a prompt motion to reopen. Instead, the respondent sought reopening more than two months after it failed to discover the problem in its own internal investigation.

I find the respondent's contentions to be insufficient to establish good cause to reopen the final order.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 30, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. KENT 2013-1078 A.C. No. 15-19199-325351-E24
AUSTIN POWDER COMPANY	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

ORDER

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 25, 2013, the Commission received from Austin Powder Company ("Austin") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 27, 2013, and became a final order of the Commission on July 29, 2013. Austin asserts that its safety specialist mistakenly waited for further instructions from her supervisors and didn't forward the assessment to counsel. Austin has modified its handling procedures to avoid future errors. The Secretary does not oppose the request to reopen and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Austin'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/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

Commissioner Cohen, dissenting

I dissent from my colleagues' decision because I believe that Austin Powder has not established good cause to reopen the subject civil penalty case.

As grounds to reopen the proceeding, Austin Powder states that a safety and compliance specialist did not forward the proposed assessment to its counsel for contest because she was awaiting direction from three Austin Powder management officials on whether to do so. Mot. at 1-2. The operator produced an affidavit from the safety specialist who surmised that each of the managers "assumed" that she had forwarded the assessment to counsel, when, in fact, she was waiting for their instructions. Mot. at Ex. 1, par. 6. Austin Powder did not provide affidavits or other evidence from the three management officials who did the assuming, and so the safety specialist's affidavit, at best, is based on hearsay.

Austin Powder has an extensive history of filing motions to reopen. Its September 2013 motion was the sixth motion it has filed since 2006. *See Austin Powder Co.*, 34 FMSHRC 2346 (Sept. 2012) (covering two motions); 34 FMSHRC 1285 (June 2012); 28 FMSHRC 424 (July 2006); 28 FMSHRC 430 (July 2006). In its most recent prior motions to reopen, Austin Powder moved the Commission to reopen two dockets under circumstances remarkably similar to the present case. In both of those cases the managers failed to instruct the safety specialist to forward the proposed assessments to its counsel. In granting the motions, the Commission noted that "[t]he operator further states that in the future its safety specialist will forward to counsel all proposed penalty assessments which the safety director intends to contest." 34 FMSHRC at 2347.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). In examining the operator's asserted justifications for reopening a particular case, the Commission has also explored whether the operator has demonstrated a pattern of behaviors that are attributable to inadequate or unreliable internal processing systems in other cases. *See Oak Grove Res., LLC*, 33 FMSHRC 2378, 2379-80 (Oct. 2011). In the *Pinnacle* cases, we emphasized that "[r]elief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines." 30 FMSHRC at 1062; 30 FMSHRC at 1067.

I find Austin Powder's claim of inadvertence or mistake to be insufficient, and that the operator has not established good cause to reopen the proceeding. The failure to file the contest in this case occurred only 10 months after the Commission reopened two other defaults for Austin Powder which were similarly caused by the failure of the three management officials to give direction to the safety specialist. Austin Powder did not make good on its promise to reform its system for contesting proposed assessments, and is asking us to reopen this case based

on the same breakdown in communication that had recently occurred. I conclude that based on Austin Powder's own submissions, it has condoned an unreliable internal processing system and placed responsibility for its contest process on a lower-level employee rather than on its management officials. Austin Powder is a large operator which should have the resources to ensure that proposed assessments are timely contested. It has consistently failed to do so.

Therefore, I would deny its motion to reopen.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 30, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2013-82-M A.C. No. 21-03672-302353
80TH STREET AGGREGATES	

BEFORE: Nakamura, Acting Chairman; Cohen 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 31, 2013, the Commission received from 80th Street Aggregates ("Aggregates") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On February 6, 2013, the Chief Administrative Law Judge issued an Order to Show Cause in response to Aggregates' failure to answer the Secretary of Labor's November 26, 2012 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on March 11, 2013, when the operator did not appear to have filed an answer within 30 days.

Aggregates asserts that it filed a timely answer in response to the Order to Show Cause with the Commission on February 25, 2013, as well as with MSHA on July 13, 2013. Aggregates supplies copies of two delivery confirmation receipts to support its claims, as well as a copy of its undated letter. The Secretary does not oppose the request to reopen and notes that although Aggregates did file an answer with MSHA, it incorrectly sent the answer to MSHA's St. Louis payment processing address and not to MSHA's Duluth District Office, as required.

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, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable

neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits will be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Aggregates' request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Acordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 30, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. LAKEVIEW REDI-MIX COMPANY	Docket No. WEST 2010-314-M A.C. No. 35-03398-203430

BEFORE: Nakamura, Acting Chairman; Cohen 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 November 5, 2013, the Commission received from Lakeview Redi-Mix Company, ("Lakeview") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On March 18, 2011, the Chief Administrative Law Judge issued an Order to Show Cause in response to Lakeview's perceived failure to answer the Secretary of Labor's January 15, 2010 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on April 18, 2011, when it appeared that the operator had not filed an answer within 30 days.

Lakeview asserts that it had filed a timely answer to the Petition for Assessment of Civil Penalty. The Secretary does not oppose the request to reopen and confirms that Lakeview sent its answer on March 31, 2011.

Having reviewed Lakeview's request and the Secretary's response, we conclude that the operator was not in default under the terms of the Order to Show Cause as it filed a timely response to the penalty petition. *See Eagle Creek Mining, LLC,* 35 FMSHRC 781, 782 (Apr. 2013). This renders the Default Order a nullity. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 30, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HARRY C. CROOKER & SONS, INC.	Docket No. YORK 2012-123-M A.C. No. 17-00576-282499

BEFORE: Nakamura, Acting Chairman; Cohen 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 31, 2013, the Commission received from Harry C. Crooker & Sons, Inc., ("Crooker") a revised motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 23, 2012, the Chief Administrative Law Judge issued an Order to Show Cause in response to Crooker's failure to answer the Secretary of Labor's April 2, 2012 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 24, 2012, when it appeared that the operator had not filed an answer within 30 days.

Crooker asserts that it had sent a timely answer to the Order to Show Cause to the Department of Labor and the Commission. The Secretary does not oppose the request to reopen and confirms that Crooker sent its answer on September 12, 2012.

Having reviewed Crooker's request and the Secretary's response, we conclude that the operator was not in default under the terms of the Order to Show Cause as it timely complied with the Order. *See Vulcan Construction Materials,* 33 FMSHRC 2164 (Sept. 2011). This renders the Default Order a nullity. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Acting Chairman

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19TH STREET, SUITE 443
DENVER, CO 80202-2536
303-844-3577/FAX 303-844-5268

February 26, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2011-0878-M A.C. No. 14-01478-254923 Plant 2
v.	Docket No. CENT 2011-0712-M A.C. No. 14-01277-251773 Docket No. CENT 2011-1158-M A.C. No. 14-01277-263558 Plant 3
NELSON QUARRIES INC., Respondent	Docket No. CENT 2011-0879-M A.C. No. 14-01597-254924 Plant 4

DECISION

Appearances: Jamison P. Milford, Esq., Office of the Solicitor, US Department of Labor, Kansas City, Missouri and Robert D. Ankeney, Mine Safety and Health Administration, US Department of Labor, Denver, Colorado, for Petitioner
Paul M. Nelson, Nelson Quarries, Inc., Jasper, Missouri, for Respondent

Before: Judge Richard W. Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Nelson Quarries Inc., 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 Kansas City, Missouri.

A total of 11 section 104(a) citations were adjudicated at the hearing. One section 104(a) citation was settled immediately before the hearing. The Secretary proposed a total penalty of $1,705.00 for these matters.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Docket No. CENT 2011-878-M, Plant 2

Citation No. 6593717

On April 7, 2011, MSHA Inspector Leon Mueller issued Citation No. 6593717 under section 104(a) of the Mine Act, alleging a violation of section 56.1000. The inspector later modified Citation No. 6593717 to allege a violation of section 56.14201(b). (Ex. G-9; Tr. 22). An equipment operator could not see the entirety of the plant conveyors, but activated the conveyors without providing a visual or audible warning. *Id*. Inspector Mueller determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was Significant and Substantial ("S&S"), the operator's negligence was moderate, and that one person would be affected. Section 56.14201(b) of the Secretary's safety standards requires that "[w]hen the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started." 30 C.F.R. § 56.14201(b). The Secretary proposed a penalty of $127.00 for this citation.

For the reasons set forth below, I modify Citation No. 6593717 to non-S&S.

Discussion and Analysis

I find that Respondent violated section 56.14201(b) because Respondent failed to operate a warning system before activating the conveyor system. Section 56.14201(b) requires the installation and operation of a warning system for conveyors unless the operator can see the entire conveyor. Patrick Clift, a Nelson Quarries superintendent who oversaw Plant 2, testified that the miner who started the conveyor ensured that he could see all the miners before he started the conveyor system. (Tr. 54-55). This miner tried to activate the alarm before he started the system and, because the alarm was not working, he did not start the conveyor system until he was able to see all the miners at the plant. Being able to see every miner that was present at a mine, however, does not comply with the requirements of the safety standard. I credit the inspector's testimony, as well as Clift's, that the conveyor was running, the entirety of the conveyor system was not visible from the control shack, and the alarm did not function. (Tr. 24-25, 53-55). Respondent therefore violated section 56.14201(b).

I find that Citation No. 6593717 was not S&S;[1] it is unlikely that the cited condition would contribute to an injury. An S&S determination must be based upon the particular facts

[1] 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

(continued…)

surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). The cited conveyor had a warning system that had worked properly on the previous day, but it was not working on April 7, 2011. (Tr. 24). The system operated the day before the inspection. (Tr. 54). Clift testified that Respondent had already called a mechanic to repair the warning system at the time of the inspection and repairs were made the day of the inspection. (Tr. 54). Assuming continued normal mining operations, I find, based upon the testimony of Clift, it was unlikely that the violation would contribute to an injury before the condition was repaired. The cited conveyor, furthermore, is usually started only once each day. (Tr. 25, 55). Moreover, I credit Clift's testimony that the operator of the conveyor could not see the entire conveyor, but could see every miner. (Tr. 54-55). I find it is unlikely that the cited condition would contribute to an injury and Citation No. 6593717 is therefore not S&S.

I find that Respondent's moderate negligence caused Citation No. 6593717. Although the miner had actual knowledge of the cited condition, he took affirmative steps to make sure that no miners were close to the conveyor before he started it. Nevertheless, the repair of the warning system only required reconnecting a wire, which could have been done before operating the conveyor. (Tr. 64). The leadman discussed activating the conveyor with the miner who operated the conveyor before that miner did so. (Tr. 54-55). A penalty of $120.00 is appropriate for Citation No 6593717. I hereby **MODIFY** Citation No. 6593717 to non-S&S.

Citation No. 6593718

On April 7, 2011, Inspector Mueller issued Citation No. 6593718 under section 104(a) of the Mine Act, alleging a violation of section 56.14107(a) of the Secretary's safety standards. (Ex. G-12). The citation states that the underside of the tail pulley under the first screen, which was 30 inches above the ground and 42 inches wide, was unguarded. *Id*. Inspector Mueller determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 56.14107(a) of the Secretary's safety standards requires that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." 30 C.F.R. § 56.14107(a). The Secretary proposed a penalty of $127.00 for this citation.

For the reasons set forth below, I modify Citation No. 6593718 to be non-S&S and low negligence.

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[1] (…continued)
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).

Discussion and Analysis

I find that Respondent violated section 56.14107(a) because the underside of the cited tail pulley was not guarded to prevent contact. The Commission has held that a violation of a guarding standard requires a "reasonable possibility of contact and injury" that includes "contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984). To determine whether a reasonable possibility exists, the Commission stated that all "relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct" must be considered. *Id*. Both Inspector Mueller and Clift testified that the underside of the cited tail pulley, which was 30 inches above the ground, was unguarded. (Tr. 36, 56-57). Work duties, such as greasing, required miners to work in the area. (Tr. 66). Without a guard, nothing existed to prevent the hand, foot, or clothing of a miner from contacting the tail pulley. The tail pulley was not so low to the ground that it was impossible for a miner's appendage to contact the pulley. It was possible for a miner to contact the tail pulley.

I find that Citation No. 6593718 was not S&S because the Secretary did not fulfill his burden to show that contact with the cited pulley was reasonably likely to occur.[2] The tail pulley presented the hazard of entanglement, which could cause permanently disabling injuries. The inspector testified that miners would be in the area of the cited pulley to clean, maintain, grease, or repair the equipment. (Tr. 37). He also acknowledged that the company policy required that the conveyor be locked and tagged out for these activities. (Tr. 41). Inspector Mueller worried that a miner in the area during operation may ignore company policy and perform maintenance or clean the area, although he acknowledged that no miners would likely be in the area while the conveyor operated. (Tr. 38-39, 48). The miners operate mobile equipment during their shift except for the crusher operator. Even if a miner performed maintenance or cleaning without locking out the conveyor, the inspector did not explain how a miner would be likely to contact the pulley. The pulley was surrounded by flat ground, guarded on its other sides, and close to the ground, which made it unlikely that a miner would contact it due to tripping or falling. (Tr. 65, Ex. G-14). Miners cleaning accumulations under the pulley would not reach under using their hands or shovels because they used a skid steer to clean, not hand tools. (Tr. 65, 38). According to Clift, access to grease the conveyor was from the top of the pulley, not the unguarded bottom and was performed when the plant was locked and tagged out. (Tr. 66). The Secretary failed to show that a miner would be reasonably likely to contact the unguarded underside of the cited tail pulley.

I find Respondent's low negligence caused Citation No. 6593718. Although the drawings from MSHA's guarding guidelines do not alleviate Respondent's responsibility to properly guard its pulleys, the drawings are misleading. (Exs. R-1, 2). It is unclear at what distance from the ground the underside of a pulley must be guarded and the drawings reasonably suggest that the cited pulley was not a violation. The pulley, moreover, was not previously cited despite numerous inspections, making the guideline drawings seem more likely to suggest that

[2] The Secretary bears the burden of proving that a violation is S&S." *Peabody Coal Co.*, 17 FMSHRC 26, 28 (Jan. 1995).

the cited pulley did not require a guard because it was low to the ground. (Tr. 56-57). I find that Respondent reasonably believed that the cited pulley was too low to require a guard and therefore its negligence was low. A penalty of $100.00 is appropriate for Citation No 6593718. I hereby **MODIFY** Citation No. 6593718 as discussed above.

B. Docket No. CENT 2011-712-M, Plant 3

Citation No. 6593690

On March 2, 2011, Inspector Mueller issued Citation No. 6593690 under section 104(a) of the Mine Act, alleging a violation of section 56.14100(b) of the Secretary's safety standards. (Ex. G-16). The citation states that the emergency steering device on the Cat 769c haul truck, which operated close to other equipment at the time of the inspection, did not function when tested. *Id*. Inspector Mueller determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 56.14100(b) of the Secretary's safety standards requires that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." 30 C.F.R. § 56.14100(b). The Secretary proposed a penalty of $285.00 for this citation.

For the reasons set forth below, I vacate Citation No. 6593690.

Discussion and Analysis

I find that Respondent did not violate section 56.14100(b) because the Secretary did not fulfill his burden to show that the cited condition was not corrected in a timely manner.[3] The parties agree that the emergency steering of the cited equipment was not operational. Although Respondent operated the equipment with the cited condition, I credit the testimony of Ted Brown, the operator of the truck at the time of inspection, that he performed a preshift examination of the equipment before using it and the emergency steering was operational. (Tr. 111). Brown was a new miner and the day that the inspector cited this piece of equipment was the first day Brown ever operated it. Brown testified that because he was new to this haul truck, he thoroughly performed a preshift examination. *Id*. Although the cited condition existed during the operation of the cited equipment, I find that it did not exist during the preshift examination. Respondent, therefore, had no warning of the short lived condition and the Secretary did not show that the condition was not corrected in a timely manner. Citation No. 6593690 is hereby **VACATED**.

Citation No. 6593692

On March 2, 2011, Inspector Mueller issued Citation No. 6593692 under section 104(a) of the Mine Act, alleging a violation of section 56.14107(a) of the Secretary's safety standards.

[3] The Secretary is required to show the existence of a violation by a preponderance of the evidence. *RAG Cumberland Resources Co.*, 22 FMSHRC 1066, 1070 (Sept. 2000).

(Ex. G-23). The citation states that the underside of the tail pulley of belt #544 was 40 inches above the ground and not guarded. *Id*. Inspector Mueller determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of $127.00 for this citation.

For the reasons set forth below, I vacate Citation No. 6593692.

Discussion and Analysis

I find that Respondent did not violate section 56.14107(a). I find that the cited pulley did not operate without the presence of a guard and therefore no moving machine parts were unguarded. The inspector testified that according to the pre inspection meeting, the only guards that were missing and required repairs were on the "screen deck area." (Tr. 90). Michael Peres, the superintendent of Plant 3, testified that there were no screen decks at the plant that required guarding. (Tr. 122). Furthermore, he testified that the plant did not run with the cited guard missing; the plant was shut down because the guard was damaged by a broken belt. (Tr. 120-21). The inspector found the guard that was originally attached to the cited pulley upon the ground nearby. (Tr. 89-90). Peres had placed a work order to repair the guard and the plant would not run until the repairs were completed. (Tr. 121). The miner who referenced the guards on the screen deck most likely referred to the cited guard. I credit the testimony of Peres that the plant did not run without the cited guard in place and that the plant was shut down specifically to repair that guard. Citation No. 6593692 is hereby **VACATED**.

Citation No. 6593693

On March 2, 2011, Inspector Mueller issued Citation No. 6593693 under section 104(a) of the Mine Act, alleging a violation of section 47.44(b) of the Secretary's safety standards. (Ex. G-27). The citation states that the "operator failed to label a 2 1/2 gallon temporary, portable container with at least the common name of its contents." *Id*. Inspector Mueller determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 47.44(a) of the Secretary's safety standards mandates that portable containers do not require a label if the miner using the container "(1) [k]nows the identity of the chemical, its hazards, and any protective measures needed, and (2) [l]eaves the container empty at the end of the shift." 30 C.F.R. § 47.44(a). Section 47.44(b) provides that if the requirements of section 47.44(a) are not met, "the operator must mark the temporary, portable container with at least the common name of its contents." 30 C.F.R. § 47.44(b). The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I affirm Citation No. 6593693.

Discussion and Analysis

I find that Respondent violated section 47.44(b). Section 47.44 requires that either temporary, portable containers have labels stating the common name of the contents or that two conditions are satisfied: (1) a miner knows the contents of the container and (2) empties the container at the end of the shift. 30 C.F.R. § 47.44. I credit Inspector Mueller's testimony that the miner present during his inspection could not identify the contents of the cited container until he removed the lid and examined the contents. (Tr. 92). The miner opened the unlabeled container to identify its contents because he did not know what the container held. The cited container also did not have a label, which is a violation of section 47.44(b). (Tr. 91; Ex. G-29). I **AFFIRM** Citation No. 6593693; a penalty of $120.00 is appropriate.

C. Docket No. CENT 2011-1158-M, Plant 3

Citation No. 6593767

On June 23, 2011, Inspector Mueller issued Citation No. 6593767 under section 104(a) of the Mine Act, alleging a violation of section 56.14100(b) of the Secretary's safety standards. (Ex. G-30). The citation states that the hook of the Grove RT500D XL had a spring loaded gate closure that did not function. *Id*. The clevis and chain attached to the crane were attached to a Volvo loader. *Id*. Drive train parts and plywood under the loader showed that the operator performed work upon the loader. *Id*. Inspector Mueller determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of $127.00 for this citation.

For the reasons set forth below, I affirm Citation No. 6593767.

Discussion and Analysis

I find that the defective gate closure of the cited equipment affected safety; Respondent violated section 56.14100(b). The cited crane was attached to a chain, which was attached to the back of a loader with a hook. The spring loaded latch of the hook, which was designed to prevent a load from detaching and dropping off of the hook, was not closed. (Tr. 139; Ex. G-33). The crane was connected to the loader to lift the back of the loader off of the ground to work upon the loader. (Tr. 138-40). The latch should be closed to prevent the crane from releasing and dropping its load. (Tr. 139; Ex. G-36). If the loader detached and dropped from the crane the loader could strike a miner. Peres stated that the crane did not operate in the cited condition and the latch needed to be tapped to close. (Tr. 178-80). He also testified that the crew would return to close the latch and left it open because they were called to work upon another piece of equipment. (Tr. 176). Respondent should have closed the latch before leaving the crane unattended because the unclosed latch affected safety by creating a crushing hazard for miners because it could contribute to a load dropping from the crane. The condition cited in Citation No. 6593767 violated section 56.14100(b).

I find that Citation No. 6593767 was S&S because the cited condition was reasonably likely to lead to a serious injury. The unclosed latch created a crushing hazard. Although the crane did not hoist the loader, work had begun upon the loader. (Tr. 179). Even if Respondent's work crew planned to return to close the latch, a miner could hoist the loader assuming that that the latch was closed before the crew returned, or the crew may forget to close the latch when it returned. The crane, furthermore, was ready to operate in every way except the closing of the latch, which only required a tap with a hammer; this suggests that the crew was not called away from the crane in the middle of their work, but rather deemed their work to be finished. If the crane hoisted the loader while the latch remained open, it could cause the crane to drop the loader; because miners had already begun working below the loader and left materials behind to continue to do so, it is reasonably likely that a miner would be injured as a result of this condition.

I find that Respondent's moderate negligence caused Citation No. 6593767 because Respondent should have known of the cited condition. The cited condition also presented a serious hazard. I hereby **AFFIRM** Citation No. 6593767; a penalty of $200.00 is appropriate.

Citation No. 6593769

On June 23, 2011, Inspector Mueller issued Citation No. 6593769 under section 104(a) of the Mine Act, alleging a violation of section 56.20003(a) of the Secretary's safety standards. (Ex. G-39). The citation states that parts, oil, grease, and trash covered the floor of the back of a Ford F800 maintenance truck and a miner was in the back of the truck during the inspection. *Id*. Inspector Mueller determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 56.20003(a) of the Secretary's safety standards requires that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." 30 C.F.R. § 56.20003(a). The Secretary proposed a penalty of $127.00 for this citation.

For the reasons set forth below, I reduce the gravity of Citation No. 6593769.

Discussion and Analysis

I find that Respondent violated section 56.20003(a) by failing to keep a workplace clean and orderly. I credit Inspector Mueller's testimony that he saw a miner standing in the back of the truck and the floor of the truck was covered with parts, oil, grease, and trash. (Tr. 147; Exs. G-41, 42). The cited area was a workplace based upon the fact that Mueller witnessed a miner standing in it. (Tr. 147). Peres, furthermore, testified that miners had to get into the back of the truck in order to access and unload the parts that it carried. (Tr. 186). The cited workplace was neither clean nor orderly, which violated section 56.20003(a).

I find that Citation No. 6593769 was S&S because the cited condition was reasonably likely to lead to a serious injury. The abundance of debris in the back of the cited truck created tripping and slipping hazards that could cause injuries including sprains and broken bones. The inspector witnessed a miner working to unload the back of the truck in the cited area. According

to Peres, this was standard operating procedure. (Tr. 186). The amount of debris provided ample opportunities to trip a miner. The miner, furthermore, would be more likely to trip because he was climbing in and out of the truck while carrying equipment. Two large pieces of equipment that the miner had to unload, a compressor and a jack, were furthest from the miner's point of entry and required the miner to get through all the debris to access and unload them. (Tr. 148-49). As a result of the disorderly workplace cited in Citation No. 6593769, a miner was reasonably likely to sustain a serious injury due to tripping and falling. I reduce the gravity because the evidence establishes that the violation was more likely to contribute to an injury resulting in lost workdays or restricted duty as opposed to a permanently disabling injury.

Respondent's moderate negligence caused Citation No. 6593769 because Respondent should have known of the cited condition. The condition was obvious. I hereby **MODIFY** Citation No. 6593769; a penalty of $130.00 is appropriate.

Citation No. 6593770

On June 23, 2011, Inspector Mueller issued Citation No. 6593770 under section 104(a) of the Mine Act, alleging a violation of section 56.14107(a) of the Secretary's safety standards. (Ex. G-43). The citation states that the tail pulley of belt #543, which was 55 inches above the ground and 45 inches wide, had an insufficient guard. *Id*. Inspector Mueller determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of $285.00 for this citation.

For the reasons set forth below, I modify Citation No. 6593770 to be non-S&S.

Discussion and Analysis

I find that Respondent violated section 56.14107(a) because the cited tail pulley was not adequately guarded to protect miners from contact with the pulley. I credit the inspector's testimony that the guard nearly touched the pulley and a miner touching the guard might touch the pulley itself. (Tr. 158, 174). The guard was close enough to the pulley that it would not actually prevent miners from contacting the pulley, making it reasonably possible that a miner could contact the pulley and sustain an injury.

I find that the Secretary did not fulfill his burden to show that Citation No. 6593770 was S&S. Although it is possible for a miner to contact the pulley and sustain a serious injury, the Secretary provided little evidence to show that it was reasonably likely. By policy, the operator locked and tagged out the cited area before service. (Tr. 188). No miners worked in the cited area. (Tr. 170). Although the Secretary explained how a miner could contact a pulley, he did not provide evidence to show that miners worked in the area or were likely to contact the pulley.

I find that Respondent's moderate negligence caused Citation No. 6593770 because Respondent had reason to know of the cited condition. I credit the inspector's testimony that

preshift examinations should have identified and corrected the condition. (Tr. 156). A penalty of $230.00 is appropriate for Citation No 6593770. I hereby **MODIFY** Citation No. 6593770.

D. Docket No. CENT 2011-879-M, Plant 4

Citation Nos. 6593706 and 6593707

On March 23, 2011, Inspector Mueller issued Citation No. 6593706 under section 104(a) of the Mine Act, alleging a violation of section 56.12002 of the Secretary's safety standards. (Ex. G-50). The citation states that the switch box in the MCC trailer had three .5 inch diameter holes in the bottom that could allow dirt, moisture, insects, and rodents to enter the box and damage the wires. *Id*. Inspector Mueller determined that an injury was unlikely to occur and that such an injury could reasonably be expected to cause lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 56.12002 of the Secretary's safety standards requires that "[e]lectric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." 30 C.F.R. § 56.12002. The Secretary proposed a penalty of $100.00 for this citation.

Also on March 23, 2011, Inspector Mueller issued Citation No. 6593707 under section 104(a) of the Mine Act, alleging a violation of section 56.12008 of the Secretary's safety standards. (Ex. G-54). The citation states that a 480 volt power cable did not have proper fittings where it entered the control box in the MCC, exposing 2 inches of inner conductors. *Id*. Inspector Mueller determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to be fatal. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 56.12008 of the Secretary's safety standards requires that "[p]ower wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings." 30 C.F.R. § 56.12008. The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I affirm Citation Nos. 6593706 and 6593707.

Discussion and Analysis

I find that Respondent violated sections 56.12002 and 56.12008. For jurisdictional purposes, the Mine Act includes the language "used in or to be used in, the milling of such minerals, or the work of preparing coal or other minerals" in its definition of a mine. 30 U.S.C. § 802(h)(1). The definition of "mine" in the Mine Act, furthermore, "[shall] be given the broadest possibl[e] interpretation, and … doubts [shall] be resolved in favor of … coverage of the Act." *Shamokin Filler Company, Inc.*, 34 FMSHRC 1897, 1902 (Aug. 2012) (citing S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978)). Clift testified that the plant where the conditions in Citation Nos. 6593706 and 6593707 were cited had not operated for three to four months, was not energized, did not have a work crew, and did not have the necessary components to operate because Respondent moved a large portion of the plant to

another site. (Tr. 217-18, 225-27). The plant remained open because a wash plant, which was several hundred yards away from the cited conditions and utilized a different power source, was operated by one miner to produce a washed sand material. (Tr. 226-27). Although the crusher at Plant 4 was idled at the time of the inspection, Respondent retained a mine ID number and did not officially close the plant. (Tr. 226-27). The wash plant was involved in the work of preparing minerals. The mine was not closed and the wash plant remained active, which gives MSHA the ability to inspect and cite Plant 4, including the crusher.

Respondent did not dispute any of the factual representations made by the inspector at hearing or in the citations themselves. Furthermore, it was clear that the generator was not running and had not done so for a substantial period of time; it was unclear, however, whether the generator was locked and tagged out. I credit Inspector Mueller's testimony that the cited switch box had three .5 inch holes in the bottom of the cited electrical box in violation of section 56.12008. (Tr. 192). I also credit Inspector Mueller's testimony that the exposed energy conductors cited in Citation No. 6593707 violated section 56.12008. (Tr. 197-98). Respondent did not present sufficient evidence to overcome Inspector Mueller's undisputed testimony concerning the cited condition; showing that the generator that powered the cited equipment was locked and tagged out was vital, but Respondent did not do so. Respondent violated sections 56.12002 and 56.12008.

Respondent's moderate negligence caused Citation Nos. 6593706 and 6593707 because Respondent knew or should have known about the cited conditions. Respondent's foreman contacted MSHA to shut the plant down and MSHA denied permission. (Tr. 226-227). I **AFFIRM** Citation Nos. 6593706 and 6593707; a penalty of $125.00 is appropriate for each citation.

Citation No. 6593708

On March 23, 2011, Inspector Mueller issued Citation No. 6593708 under section 104(a) of the Mine Act, alleging a violation of section 56.13011 of the Secretary's safety standards. (Ex. G-50). The Kohler air compressor tank was equipped with a functioning automatic pressure release valve, but did not have a pressure gauge. *Id*. Inspector Mueller determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to cause lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 56.13011 of the Secretary's safety standards requires that air receiver tanks "shall be equipped with indicating pressure gauges which accurately measure the pressure within the air receiver tanks." 30 C.F.R. § 56.13011. The Secretary proposed a penalty of $100.00 for this citation.

For the reasons set forth below, I modify Citation No. 6593708 to a low negligence designation.

Discussion and Analysis

I find that Respondent violated section 56.13011. Inspector Mueller and Clift agree that the cited gauge was broken, but that a connected air tank had a gauge that monitored the pressure

of both tanks. (Tr. 213, 218-19). As the inspector testified, the hoses that connected the two tanks could be obstructed or damaged, which would cause the operational air gauge to stop monitoring the tank without a functional air gauge attached to it. All air tanks must be equipped with a pressure gauge and that gauge must be on the tank. I defer to the Secretary's interpretation of the standard to require a gauge upon each tank. Respondent violated section 56.13011.

I find that Citation No. 6593708 was the result of Respondent's low negligence. The presence of the exhaust valve on the cited tank as well as the air gauge on the connected tank mitigate Respondent's negligence. I hereby **MODIFY** Citation No. 6593708; a penalty of $100.00 is appropriate for Citation No 6593708.

II. SETTLED CITATIONS

The parties settled one of the citations in these dockets immediately before the hearing. In Docket No. CENT 2011-712-M, Respondent withdrew its contest of Citation No. 6593691 and its $100.00 penalty.

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 Reports, which were submitted by the Secretary. (Exs. G-2, 3, 4, 5). At all pertinent times, Respondent was a small 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 Nelson Quarries, Inc., to continue in business. The gravity and negligence findings are set forth above.

IV. ORDER

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

Citation No.	30 C.F.R. §	Penalty
CENT 2011-712-M, Plant 3		
6593690	56.14100(b)	Vacated
6593691	56.12018	$100.00
6593692	56.14107(a)	Vacated
6593693	47.44(b)	120.00
CENT 2011-878-M. Plant 2		
6593717	56.14201(b)	120.00
6593718	56.14107(a)	100.00

CENT 2011-879-M, Plant 4

6593706	56.12002	125.00
6593707	56.12008	125.00
6593708	56.13011	100.00

CENT 2011-1158-M, Plant 3

6593767	56.14100(b)	200.00
6593769	56.20003(a)	130.00
6593770	56.14107(a)	230.00

TOTAL PENALTY $1,350.00

Nelson Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $1,350.00 within 30 days of the date of this decision.[4]

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

Distribution:

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Paul M. Nelson, Nelson Quarries Inc., P.O. Box 334, Jasper, MO 64755 (Certified Mail)

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 31, 2014

FRED ESTRADA, Complainant v. RUNYAN CONSTRUCTION, INC., Respondent	DISCRIMINATION PROCEEDING Docket No. CENT 2013-311-DM SC-MD 2013-06 Mine ID 29-00159 Mine: Tyrone Mine

DECISION ON LIABILITY

Appearances: Ben Furth, Esq., The Furth Law Firm, Las Cruces, New Mexico for Complainant

Nathan Gonzales, Esq., Gonzales Law, Silver City, New Mexico for Respondent

Before: Judge Moran

Summary

Before the Court, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., (2012) ("Mine Act," or "Act"), is a section 105(c)(3) complaint of discrimination which was brought by Mr. Fred Estrada, acting initially *pro se*.[1] A hearing was held in this matter on November 19, 2013 in Silver City, New Mexico. Upon consideration of the entire record and the post-hearing briefs, for the reasons which follow, the Court finds: that the Complainant engaged in protected activity, when he made a safety complaint, identifying to his supervisor an improperly repaired wiring connection for a truck's auxiliary gas tank fuel pump; and that his termination from employment ensued from that event. The Court rejects, as completely pretextual, the Respondent's contention that the Complainant was fired for failing to follow an order from that same supervisor that he was to leave the keys for that same truck inside the truck cab to allow access to it for a different repair.

[1] Post-hearing, Complainant retained Attorney Furth, who filed a post-hearing brief and a reply brief on Mr. Estrada's behalf.

Findings of Fact with Discussion

Introduction

Complainant, Fred Estrada, on February 28, 2013, filed, *pro se*, his section 105(c)(3) action, following a letter dated February 1, 2013 from the Mine Safety and Health Administration informing him that its investigation did not conclude that there had been a violation of the Mine Act's discrimination provision. The letter went on to advise of the right for a miner to file an action on his own before the Federal Mine Safety and Health Review Commission. *See, e.g., Turner v. National Cement Co.,* 33 FMSHRC 1059, (May 20, 2011). The February 28th letter was filed by David Estrada, brother of the Complainant, who was assisting him due to, among several reasons, Fred Estrada's limited education. Although several "apparent violations" were brought up in the four-page typed letter, the "crux of the whole case" was the claim that "[t]he complainant was terminated because he was exercising his right and raising an issue about a safety defect on a piece of equipment. It was alleged that the Supervisor, Todd Hamilton, took offense that the same safety defect was brought to his attention again after he had apparently sent the equipment out to be repaired. He was apparently angry that the complainant raised the safety issue and proved him [*i.e.* Hamilton] wrong." February 28, 2013 letter to the Commission at page 2. At the time Fred Estrada initially filed his discrimination complaint with MSHA, the same basis for his discrimination claim was identified. The document was handwritten[2] but, typed on the first page of that document, it informs that Fred Estrada claims that he "[w]as fired for requesting safety defect on Bird Hazing truck to be repaired. (No fuse for pumpon [sic] secondary fuel tank)" Discrimination Report at page 1, parenthesis in original. The handwritten portion makes it clear that the complaint revolved around the pump on the spare gas tank for the bird hazing truck. The pump stopped working and the Complainant discovered that the fuse for the wires to the spare pump had burned out. Complainant noted this needed to be repaired. However, he later discovered that the wiring had not been repaired properly and so advised Mr. Hamilton of that deficiency. Shortly after a heated exchange between the Complainant and Mr. Hamilton over this issue, the Complainant was fired.

Hearing testimony and related Findings of Fact

David Estrada, brother of the Complainant, acted, with the Court's permission, as a non-attorney representative in this proceeding, as English is not Fred Estrada's first language and because of his limited formal schooling. In that role, David Estrada outlined in his opening statement the basis of Fred Estrada's Complaint, namely that Runyan supervisor Todd Hamilton

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[2] The handwritten complaint is acknowledged by the Complainant to be incomplete, with a page apparently missing from it. There is no evidence to suggest that the missing page was intentionally dropped. Further, despite efforts, no full copy of the complaint could be located. This was unfortunate but, as the Respondent has pointed out, the Complaint is not evidence itself. The more important point is that the Respondent has long known, through various documents, including the handwritten complaint, of the basis of Fred Estrada's discrimination complaint and, understanding that basis, it has countered that the reason for his discharge was a failure to obey an order.

took offense, when told by Fred Estrada of a safety defect on the truck he was assigned to operate and informed that the defect had not been properly corrected. Tr. 23.

The testimony began with Complainant, Fred Estrada.[3] Relating his description of the events that led up to his termination from Runyan Construction, he stated that on September 20, 2012, Ms. Viola Ogas was his relief operator at the mine. Ms. Ogas informed him that the pump for the spare gas tank on the truck had "run out." Tr. 27. The spare or "extra" gas tank in the truck was used to fill up the truck's primary tank, when the primary gas tank would run out of fuel. The extra gas tank was not used to run other machinery; it was simply an auxiliary gas tank for the truck itself. Accordingly, to state the obvious, the truck in question was equipped with two gas tanks: a main tank and a spare. Tr. 32. A pump delivered gasoline from the spare tank to the truck. Fred Estrada advised Ms. Ogas that he and Walt Mitchell, another Runyan employee, would check the spare tank issue. Tr. 27. On Fred Estrada's first day back at work, September 21st, he told Mr. Mitchell about the pump issue and together they examined the spare gas tank pump and found that the wiring from the pump to the battery had a burned-out fuse. That problem, they concluded, caused the pump to stop working. Tr. 30. As a temporary fix, the two employees cut the ends of the wires, circumventing the fuse, and then reconnected the wire ends directly to one another, enabling the pump to work again.[4] Tr. 31. This occurred on September 21, 2012. After the temporary fix was done, Mr. Estrada went about his other duties at the mine, which he described as "making [his] rounds." Tr. 33. Late on the following day, the 22nd of September, Complainant had to fill the truck's gas tank and, in preparation for that, the wires for the auxiliary tank were disconnected from one another and taped on each end. After doing those tasks, Complainant proceeded to attend to other work duties at the mine. Tr. 34-35.

Following that, late in the evening two days later, on September 24th, the Complainant called Ms. Ogas from his home. Ms. Ogas had the same job duties as the Complainant; both were employed as roving bird hazers. It was at that time that he told Ms. Ogas about the problem with the truck's auxiliary gas tank problem and the way it had been fixed it.[5] Tr. 38. He left the decision about repairing the tank up to her, but expressed his opinion that it was best if she took it to be fixed. Tr. 40. He also explained how the wires could be hooked up, in the fashion he had employed. The Complainant stated that it was up to Ms. Ogas, not him, as to whether to have the tank fixed.

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[3] For the record and for no other purpose regarding the Court's findings and determinations, it was noted that, when Fred Estrada was sworn in, and asked to raise his right hand, he could not do so because he has a prosthesis on his right arm. Consequently, he raised his left arm for being sworn.

[4] Apparently under this dual tank arrangement, the truck would need a gas refill every other day.

[5] Complainant reiterated in his testimony that he had discovered the gas tank problem on the 21st and informed Mr. Mitchell of it on that day. Mr. Mitchell looked at the problem with the Complainant on that day. As of that point in time, the Complainant did not mention the problem to any other Runyan management person, other than Mr. Mitchell. Tr. 36.

The Complainant was then off from work from September 25th through the 28th, returning to work on September 29th. During his time away from work he learned from Ms. Ogas that she had brought the truck in to fix the gas tank pump problem on the 26th. However, Ms. Ogas informed the Complainant on the 28th that, while she brought the truck in for the repair, all that was done to address the problem was to cut the wires and tape them. No fuse was installed.

Complainant then returned to work on the 29th and also worked on the 30th of September. No problems arose during either of those days. On Monday, October 1st, the Complainant found that the truck was about a half-a-quart low on oil. Tr. 42. He then proceeded to drive the truck, making his rounds, when he saw his supervisor, Mr. Hamilton, drive up to the "conex box," [6] which is a place where the mine stored equipment. Tr. 43. The Complainant approached Mr. Hamilton, requesting motor oil. According to the Complainant, Hamilton told him "in a very bad way" to "look for some [oil]." Tr. 44. Mr. Estrada then began looking for oil in the conex box but was only able to find heavy duty oil, which he considered unsuitable for use in the truck.

It was then, as the Complainant exited the conex box, that he told Hamilton, "Oh, by the way, Todd, that truck - - they took the truck in to be fixed, but it wasn't fixed right." Tr. 45. The Complainant related that Hamilton then became "really upset," raising his voice and saying "what do you mean?" The Complainant again told Hamilton that the truck wasn't fixed right. Following that exchange, according to the Complainant, Hamilton got in the back of the pickup and turned the pump on.[7] He then told Mr. Estrada, in a high voice, "See [ ] It's working." Tr. 45. At that point, the Complainant also became upset, telling Hamilton, "Yes, it's working. But they didn't fix it right." He informed Hamilton that the "repair" was nothing more than what he and Walt Mitchell had done, simply connecting the wires.

From Mr. Estrada's recounting of this exchange, which the Court found to be a credible recounting of the interaction between Mr. Estrada and Mr. Hamilton, it is fair to conclude that Mr. Hamilton was significantly irritated with the Complainant. As recounted, per the footnote below, Hamilton's irritation with Mr. Estrada was heightened when he then had difficulty unlocking the truck's gas tank. Hamilton then told Mr. Estrada that he "better check [the truck's] fire extinguisher." Estrada responded he would do that, but Hamilton told him "You do

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[6] The witness explained that the "conex box" referred to a large metal box where the mine stores supplies. Tr. 44. Mr. Hamilton later confirmed that it is a metal storage building, of approximate dimensions of 8 x 8 x 20 feet. Tr. 145-146.

[7] An indication of the credibility of Mr. Estrada's telling of this exchange is that he remembered details of it, such as his claim that Hamilton, upon jumping in the back of the truck, had trouble unlocking the lock to the pump. Tr. 45. Continuing, Mr. Estrada related that Mr. Hamilton then had trouble putting the lock back on, to the point that he was going to leave it unlocked. Mr. Estrada objected to that and told Hamilton to lock it, as he was concerned that, in its unlocked state, it would fall off the truck and that he would be blamed for loss of the lock. Tr. 46.

it now." Tr. 46. Estrada followed the order and checked the fire extinguisher immediately, finding it to be in fine order. Hamilton then told Mr. Estrada to "clean the [bed of the] truck up." Tr. 47. Again, Estrada followed the order and he started cleaning the pickup truck's bed.[8] After he finished cleaning out the bed of the truck, the Complainant left in the truck and completed the work day, October 1st, without further incident. Tr. 53.

The following day, October 2nd, Fred Estrada, upon returning to work, was told that he was needed at the contractor's parking lot. When Mr. Estrada arrived at that location, Tommy Christiansen [sic](the mechanic's correct name is Christian),[9] a mechanic who did work for Runyan, was present, along with Mr. Oscar Flores.[10] Estrada was asked to be there because mechanic Christian was going to work on the truck. Tr. 55. Christian advised that he was there to install a fuse for the gas tank arrangement on the truck. Although Mr. Estrada had some fuses, apparently none were large enough for the gas tank fuse. Estrada related in his testimony that, when mechanic Christian saw the taped wiring arrangement for the extra gas tank, he remarked to him "Oh, man, this is wrong." Although Mr. Estrada more or less knew what the problem was with the wiring arrangement, he still asked the mechanic "What do you mean?" The mechanic told him that, "Well, it's fixed wrong. It's wired wrong. Man, this is dangerous." Tr. 57. Estrada then asked him, "what could happen?" and the mechanic replied that it "can catch fire and blow the truck up." Tr. 57. This did not surprise Mr. Estrada, as he knew that the taped arrangement, with no fuse, was hazardous. The mechanic then asked Mr. Estrada who had worked on the truck earlier. While Mr. Estrada actually had an idea who had done the poor repair, he advised that he did not know who did the work, but he informed the mechanic that the truck had been taken for the repair to the mine's hilltop garage. Tr. 58. The mechanic then told Mr. Estrada that it couldn't have been mechanic "Mr. Brown," because "[Mr. Brown] knows better than that." Mr. Estrada then helpfully responded advising that Mr. Brown has "a young guy working there for him." Tr. 58. The mechanic then commented about the young guy working at that the garage, with the remark "that figures." The mechanic then left to obtain the fuse which was needed to properly repair the wiring. Later that same day the mechanic returned and fixed the wiring by installing the fuse.

Following that repair, Mr. Estrada then continued making his rounds. However, a new problem then arose with the truck, making it hard to turn the steering wheel. At the same time, he also noted a smell, which he thought could be transmission or power steering fluid. He then drove the truck to the conex box, although that was very difficult to do because of the steering problem. From there, he radioed the front gate, using his hand radio, but no one responded.

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[8] While Mr. Estrada believed another person was nearby – inside the conex box – while he was having his unpleasant exchange with Mr. Hamilton, he did not know who that person was and he did not believe that their exchange was heard by anyone else. Tr. 49.

[9] The mechanic was mistakenly referred to as "Christiansen" but his true name is "Tommy Christian." Tr. 197.

[10] Mr. Flores was the worker who took the place of former employee Walt Mitchell.

Mr. Estrada then called Sam Hill, an employee of Freeport McMoRan,[11] and upon reaching him on the radio, asked him to come down to his location. When Mr. Hill arrived, Mr. Estrada asked him to drive him to the contractor's parking lot, so that he could get a spare truck. Tr. 61. As Hill and Estrada were driving out of the mine, on their way to the contractor's parking lot, they met Mr. Hamilton, who was then driving in to the mine. Mr. Estrada informed Hamilton about the truck steering issue and, in response to Hamilton's question about its location, advised that the truck was "out of the way," meaning that the truck was out of the roadway. Tr. 62. Mr. Hamilton told him which truck to use, although Mr. Estrada already knew that he was to use the spare truck. Mr. Estrada then drove the spare truck to the location of the broken one, and removed his items from the broken truck. He then continued with his job duties. However, he then received another call on his radio from the front gate. The radio transmission was very poor; Mr. Estrada stated that he could barely hear the communication and he could not transmit back to them. Subsequently, as Mr. Estrada was driving back inside the property, using the spare truck, Sam Hill radioed him and advised that "Todd [Hamilton] want[ed] to talk with [him]." Tr. 65. Mr. Estrada informed Mr. Hill of his location and advised that he would be at the front gate in about 15 to 20 minutes. Tr. 66.

When Mr. Estrada arrived at the front gate building, he inquired if Mr. Hamilton was there. Danny Placencia and Ed McNally, who worked security there, advised that Hamilton had left a few minutes earlier. Estrada was advised by security that they wanted the keys to the broken truck and they suggested that he leave the keys with them. In that way, when the mechanic arrived to fix the truck, the security personnel would be able to provide him the keys. Estrada did as instructed, handing over the keys to security. Tr. 67. Mr. Estrada then left and picked up Oscar Flores. While in a vehicle with Mr. Flores, the office secretary, Kim, called Flores' cell phone, inquiring about Mr. Estrada's whereabouts and informing Flores that Mr. Hamilton wanted to speak with Mr. Estrada. Mr. Estrada then called Mr. Hamilton, who asserted that he had already instructed Estrada to leave the keys in the broken truck. He then told Estrada to go retrieve the keys from the front gate and put them in the broken truck. Tr. 69.

Mr. Estrada responded to Mr. Hamilton that he would do as instructed. Hamilton then added "Okay. And then go home." Mr. Estrada was surprised about the last instruction and responded, "Go home? [ ] What do you mean? It's still early." Tr. 70. Hamilton responded, "No. Go home for disobeying an order." Tr. 70. Mr. Estrada then replied, "Fine." That was not the end of the conversation however, as Hamilton then added an instruction for Estrada to "[l]ook in the truck and see if [Estrada] can find the [model] year of the truck."[12] Tr. 70. To clear up the Court's understanding of this exchange, it inquired if Mr. Estrada understood that he had been fired at that point in time. Mr. Estrada responded that, after being told to take the keys to the truck and then "go home," that he was not expressly told that he had been fired. Tr. 72.

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[11] Freeport McMoRan, it should be explained, was initially a named Respondent in this matter. On September 27, 2013, the Court issued its Order on Freeport-McMoRan Tyrone's motion for summary decision, granting the motion and dismissing them as a party to this proceeding. Runyan is an independent contractor working at Freeport-McMoRan's mine site.

[12] Later, Mr. Estrada informed that neither he, nor Oscar, could find the year of the truck, although they looked in the truck's glove box and along its doors. Tr. 74-75.

Upon further inquiry by the Court, Mr. Estrada was asked if had misgivings about leaving the keys in the truck. He affirmed that he did not think it was wise to do so because the truck has an automatic lock feature and he was concerned that the door could lock with the keys inside it. Tr. 72. Nevertheless, Mr. Estrada did as instructed and left the keys in the truck. This meant he had to return to the front gate, pick up the keys, and then drive back to the disabled truck to leave the keys there. At that point Mr. Estrada still had not been told, expressly, that he was fired. His firing was only inferred by Hamilton telling him to "[t]ake the keys back and go home." Tr. 73. At that point, Mr. Estrada related that he was pretty upset and that he forgot to call and tell Hamilton that he couldn't find the year of the truck. He then drove back to the front gate, parking the spare truck in the parking lot and leaving its keys at the front gate. Tr. 75. October 2nd was his last day of work.[13] Tr. 80.

Mr. Estrada stated that he did not fully grasp that he had been terminated until October 5th. October 3rd, a Wednesday, was Estrada's regular day off. He related that he had some phone calls from the office but that he didn't call back. The next day, October 4th, he went by the office, advising the secretary, Kim, that the office had called him twice. She advised, "Yes, Fred. Todd told me to tell you that your services were no longer needed." Mr. Estrada then asked if he could have his paycheck early, as he had been terminated, but the secretary told him he would have to wait until Friday, the usual day for checks to be issued to employees. Thereafter, Fred Estrada did return on that Friday to pick up his check and inquired then if his "termination paper" was ready. The secretary advised that it was not, informing "No. Whenever it's ready, [she would] call [him] so that [he could] come and sign it." Tr. 77.

However, he never received a call about his termination paper from that date, nor thereafter, until the 19th of October. It was only then, on the 19th, when he returned to the office to pick up his paycheck for days he had worked in his last pay period, that he was issued his termination paper. Tr. 78. When he looked at it, he noticed that it was only dated and had no reason for termination listed on it, nor was it signed by Mr. Hamilton or by "Brian."[14] Tr. 78. He told the secretary that he was in a hurry and asked if he could sign it later that day. She agreed and also made a copy of the termination paper at that time, providing it to Mr. Estrada.[15]

In further testimony concerning the termination paper, Mr. Estrada spoke to the fact that he had *two* pieces of paper regarding this. He identified one of them as *the one* that the Respondent's secretary gave him on October 19th and this was marked by the Complainant as

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[13] Mr. Estrada repeated that his last day of working for the Respondent was October 2nd. Subsequent references to pay pertain to work done up to that date. Tr. 84, 87.

[14] Though not expressly identified in the transcript, "Brian" is presumed to refer to "Mr. Runyan." Tr. 83.

[15] The Court advised that it wanted a copy of that termination paper and that it would be made as an exhibit. Tr. 78. It was received as exhibit C-1.

Exhibit C-1. Tr. 83. Referring to that document, Mr. Estrada repeated that he noted that no reason for his termination was listed on the paper and that it was not signed by Mr. Hamilton, nor by Mr. Runyan. Tr. 83. The paper was dated October 2, 2012. Tr. 84.

The second copy of the termination paper was then discussed. Regarding this one, Mr. Estrada stated that he had not seen that version until he received it, subsequently, from Runyan and that this occurred at a time long after his termination. Tr. 85, 87. The Court instructed Mr. Estrada to mark this second version of the termination paper as "C-2." Mr. Estrada then spoke to the difference between C-1 and C-2. For C-2, he noted that the secretary had signed her name to it.[16] However, like C-1, C-2 did not list a reason for the Complainant's termination. Tr. 86. Mr. Estrada reiterated that, at the time he was fired, he was only given C-1. The Court finds that Mr. Estrada was in fact only given C-1 on October 19th.

The Court then asked Mr. Estrada to express in his own words why he was terminated. His first response, indicative of his misunderstanding of the question, was that he didn't "think there was enough reason for being terminated." Tr. 88. When the question was repeated, he stated, "Because of not leaving the keys in the truck. That's why. . . . I disobeyed his order." Tr. 88. It is true that he repeated this answer when asked if he was let go for any other reason. Tr. 89. However, with the Court closely scrutinizing Mr. Estrada during his responses, it was clear that he was simply providing *the Respondent's* given reason for his termination.

At that point, Mr. Estrada's brother, David, asked if he could explain the question to the Complainant, Fred Estrada. Respondent's Counsel objected to that request and the Court continued with its questions. The Complainant continued to respond by stating that he was fired because he disobeyed an order. Tr. 89. That order was that he leave the keys in the truck. When the Court then asked if the gas tank issue was any part of the reason why he was fired, Fred Estrada stated, "No, sir."

Naturally, Respondent's Counsel was elated with these responses, but the Court strongly believes that this glee was unwarranted for several reasons. First, as noted earlier, it was clear to the Court that Fred Estrada was expressing the reason for his firing *as put forward by the Respondent* and not as an expression of his own estimation of the genuine reason. Second, the bulk of Mr. Estrada's testimony pertained to the spare gas tank wiring issue and the conflict and anger this produced with the very man who fired him, Mr. Hamilton. The issue with the key and the claimed failure of Mr. Estrada to place the keys in the disabled truck was ancillary and, as explained within, utterly does not add up as a genuine ground for Runyan to have dismissed Fred Estrada. Third, even assuming for the sake of argument that Mr. Fred Estrada was not confused[17] and *he* believed that the failure to leave the keys in the truck was the reason for his

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[16] Mr. Estrada explained that, by the time the secretary signed the other termination paper, she was then the office manager. Tr. 86.

[17] It should be emphasized that the Court found that Fred Estrada was simply confused when trying to answer the reason for filing his discrimination complaint and the Court noted that

(continued...)

firing, the Court finds, based on the entirety of the record testimony, that the issue about the keys for the disabled pickup truck was simply a pretextual reason, put forward so that the Respondent could retaliate for Mr. Estrada's safety complaint about the gas tank wiring issue. A Complainant's misperception of the reason for his firing during testimony does not defeat his claim, especially when his original complaint and the wealth of his testimony points to a safety-related ground for his dismissal.

Mr. Fred Estrada's somewhat profound confusion on this subject was also exhibited when the Court asked him about the fuse and the improper way of connecting the two wires, as he had previously testified about. To that, Mr. Estrada quite naively expressed that he thought Mr. Hamilton "*would have told* [him] *about it, the reason for being fired*." Tr. 91(emphasis added).

Based on the entirety of David Estrada's testimony, and equally upon the Court's very strong conclusions about the lack of credibility of Mr. Hamilton when he testified, as discussed later, the Court concludes that Mr. Hamilton had no legitimate basis to fire Fred Estrada and that *the last thing* he would disclose to Fred Estrada would be the real reason for that termination.[18]

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[17] (...continued)

Mr. Estrada's own written complaint is a more accurate statement of the basis for his Complaint. The face of that document, as the Court noted, shows that the complaint was related to the gas tank wiring and fuse issue. Tr. 100-101. Mr. Estrada has an eighth grade education. Tr. 101. Counsel for Runyan objected to the Court's determination that Fred Estrada was confused. Counsel also noted that the Complaint is only a pleading, not testimony. Further it objected to the document's admission under the "rule of completeness," as it is not the entire document that was admitted. As to the "rule of completeness" argument, the Court notes that this is a matter for the trial judge's discretion and that admission of the complaint did not create a misleading impression about the nature of Mr. Estrada's claim against Runyan. Further, this is not a situation where a party is attempting to hide part of a document. Rather, the missing portion was simply lost. *See, e.g., Miller v. Holzman,* 563 F. Supp.2d 5 (D.D.C 2008), *U.S. v. Hassan,* 742 F.3d 104, (4th Cir. 2014). Next, Counsel objected to the document as a foundational issue. However, that argument was simply an offshoot of the objection that it was incomplete. Tr. 103-104. The objections were overruled. In terms of confusion, Fred Estrada did ultimately state that he was confused about the questions regarding his dismissal, stating "I really didn't know what [the Court] was really meaning." Tr. 105. The Court finds that to have been the case; Mr. Estrada did not process, that is, did not apprehend, the question that was being asked. Finally, Fred Estrada later added that his discrimination complaint was filed because he reported the truck and that caused Mr. Hamilton to become upset. Tr. 106. That later remark was entirely consistent with his claim of discrimination as originally brought and with his initial testimony on the subject. It is abundantly clear that the aberration in his stated basis for his firing only arose in the context of his confusion on the witness stand.

[18] Runyan's Counsel attempted to show that Mr. Estrada's initial answers regarding the reason he believed he was fired were more reliable than his later responses, by asking, for example, if he was then under the influence of drugs or alcohol when he gave those answers, moments earlier, during the hearing. Tr. 108-109. However, Mr. Estrada did add that [Mr.

(continued...)

Although Fred Estrada expressed a belief that Runyan would have fired him right at the time he voiced his complaint about the gas tank, if his dismissal were based on the gas tank wires and fuse issue, the Court views this as a jejune belief, especially considering his own testimony about the gas tank issue and, of comparable significance, Mr. Hamilton's quite unreliable testimony on the subject.

Also relevant to the issue of the Complainant's allegations of the reason for his dismissal, per the Court's instructions, the Complainant marked C-3 as an exhibit and it was subsequently admitted.[19] Tr. 95. Fred Estrada identified that document as reflecting his handwriting and as a copy of the complaint that he wrote and sent to MSHA.[20] Tr. 97.

Continuing with its cross-examination, Mr. Estrada upon being shown Exhibits R-1 through R-12, by the Respondent, identified them as the checklists for the pickup truck, each of which he filled out. Tr. 113. R-1, the first presented to Mr. Estrada, is dated September 22, 2012, and he agreed that there is no mention in the checklist of any electrical problem, nor any

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[18] (...continued)
Hamilton] was upset with him for reporting the truck not being fixed right. Tr. 109. He then stated that Hamilton was upset for reporting the truck as being unsafe. Tr. 110. The person he reported that to was none other than Mr. Hamilton.

[19] Exhibits C-1 and C-3 were admitted. C-2 was admitted without objection from Runyan because it reflects Respondent's view of the termination letter that it claims to have issued to Mr. Estrada. Tr. 111. It should be clear from the foregoing that the Court finds that only C-1 was issued to Fred Estrada at or near the time of his firing and that it was woefully deficient with no signature upon it and no reason for the discharge on it either. Further, as discussed *infra*, the Court finds that, contrary to Mr. Hamilton's claim, Fred Estrada was not given R-14 when C-1 was issued.

[20] The last page of that document ends incompletely, stating: "So then when I." Tr. 99. The Court acknowledged that the document was incomplete but, in the exercise of its discretion, determined that the document could be admitted. In this regard the Court noted that, despite its incompleteness, it was still useful in terms of identifying the basis for Fred Estrada's complaint. Tr. 100. Counsel for Runyan stated his objections to the Court's determination by noting that there was no *testimony* that suggested Mr. Estrada was confused and noting that the Court three times asked Mr. Estrada to listen closely to its question for him. Runyan's Counsel also noted that the Complaint is a pleading, not testimony. If that pleading is to be viewed as more than that, Respondent objects that it fails the rule of completeness, by depriving Runyan of the entirety of that document. As a third objection, Runyan's Counsel objected to the document's admittance as a "foundational issue." By this, Counsel explained, he repeated that his objection was again that it was an incomplete document. This whole maelstrom, it must be remembered, grew out of Fred Estrada's misapprehension either out of the questions themselves or his unschooled understanding of the basis for his dismissal. While much dust was raised over what Respondent hoped was a windfall, once it settled, it was clear that the Complainant's basis remained as he originally contended; he was dismissed because of his safety complaint regarding the unsafe wiring for the auxiliary tank and Mr. Hamilton's ire towards Fred Estrada over that.

mention of fuel tank or wiring issues. Tr. 113. Only oil leaks were noted. After reviewing each of them, and concurring that he made no notation of any fuel tank or related electrical issues on any of the checklists, Mr. Estrada explained that he only listed major things. For example, he would not list dents. Tr. 117. Although he conceded that the fuel pump electrical issue was major, he did not mark it on the checklist because "it really wasn't hooked up." Tr. 118. He added that he didn't mark it on the list because "[t]he wires weren't hooked up. That's why I didn't." Mr. Estrada agreed that he chose not to list the truck wire issue on the checklist. Tr. 119.

Upon questioning by the Court on this issue, Mr. Estrada again confirmed that he never did record on the checklist that there was a problem with the gas tank wiring. Asked to explain further, Mr. Estrada stated: "Like I said, because we worked on that. And when I used the pump, I would just connect it. That's the reason that I didn't write it up." Tr. 123. Although he confirmed that it was a problem, he explained his reasoning behind the decision not to record it, advising "Like I said, because I would take it apart every time. The twice [sic] that I filled the truck up with gas, I would move those wires." Tr. 123.

The Court finds Mr. Estrada's explanation for failing to record the fuel pump wire issue as credible, but more importantly, it finds that Respondent's introduction of the issue to be a distraction. If meant to show that there was no fuel pump wiring issue, Mr. Estrada's testimony and other testimony establishes otherwise and the Court's findings with regard to the testimony of Mr. Hamilton and Mr. Christian on this subject is that neither witness was credible on that subject. Several other points need to be made concerning this. First, Mr. Estrada *did* take action on the issue and advised Ms. Ogas about the problem. Second, a repair did occur, not long after the problem was identified. Third, the test for protected activity does not depend upon a miner *ultimately being correct* about a safety concern; only a reasonable, good faith believe need be entertained. *See*, *Secretary on behalf of Hannah, Payne & Mezo v. Consolidation Coal Co.*, 18 FMSHRC 2085, 2090 (December 1996); *Secretary on behalf of Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133-38 (February 1982); *Robinette*, 3 FMSHRC at 807-12; *Pasula,* 2 FMSHRC at 2789-96. Here, there was *more than* a reasonable, good faith, belief on the part of Mr. Estrada that a safety concern existed.

Mr. Estrada also stated that he received his paycheck on October 5, 2012, which was payday at the mine. Tr. 121. He agreed that he requested his paycheck on the day he learned he had been terminated, which was the day before payday.[21] With the completion of Fred Estrada's

[21] It was the contention of Respondent's Attorney Gonzales that the issue of the day he received his paycheck spoke to the Complainant's credibility. The Court inquired whether the testimony about the day Mr. Estrada received his paycheck was tangential to the proceeding. Tr. 122. The Court then instructed Respondent's attorney to move on to something else, adding its view that it would not "focus on that. If [the Court] were to decide[] this case based on that business, that would be a total distraction." Tr. 122.

testimony, the Court inquired of David Estrada as to the witnesses and subjects he would be covering next.[22]

Upon Mr. Estrada concluding his evidence, Runyan's Counsel then moved for a directed verdict. The Court heard Counsel's arguments[23] and, upon consideration of them, decided to hold its ruling in abeyance, pending testimony from Respondent's witness, Todd Hamilton. Tr. 138-139. Therefore, at that point in the proceeding, the Court ruled that there was a sufficient basis for it to conclude that, minimal as it was, the Complainant had put forth a prima facie case and that a safety issue had been presented along with a close-in-time termination. Tr. 139.

Todd Hamilton then testified. The direct exam began without any preliminaries about Mr. Hamilton's duties or length of service at Runyan. Instead, for the first question posed, he was asked to state the basis for the termination of Fred Estrada. He responded: "The basis is that he was asked numerous times on October 2nd to *please* return the keys to the pickup [truck] so we could have it repaired. At no time during that day till after 4 o'clock when I left the property were the keys taken to the pickup or left in the pickup. I talked to him numerous times during the day and asked him to *please*[24] take the keys to the truck so we could get it repaired." Tr. 140 (emphasis added).

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[22] David Estrada then responded that such testimony would pertain to defective radios and toilet facility issues. He also wanted to introduce testimony that Mr. Hamilton continued to allow the truck to be used, despite the wiring problem. Tr. 126-127. The Court advised David Estrada that it did not consider that testimony to be material to the issues in this proceeding. Tr. 127. The Court then made a ruling on this proposed additional testimony advising that it would only permit testimony about the incidents alleged by Fred Estrada that were contained in his complaint to MSHA. Tr. 129. Those issues, it noted, pertained to the auxiliary pump, and whether that pump was correctly wired, and a second issue, described by the Court as a "quasi-safety complaint about leaving keys in a vehicle and that [practice] being against company policy." As to the latter, the Court expressed that it "didn't know about the safety implications of that." Tr. 130. The Court explained that any additional witnesses offered by the Complainant would need to testify about matters which support the basis for Mr. Estrada's complaint. Tr. 131.

[23] Runyan's Counsel contended that Mr. Estrada was "terminated for not obeying a direct order of leaving the keys in the vehicle. . . . It [*i.e.* his firing] had nothing to do with any of the alleged electrical incidents which took place . . . [further Counsel contended that Mr. Estrada's] failure to do so [*i.e.* notify the employer of any major problems so they can correct them] specifically negates his ability to further support his claim here." Tr. 137-138. The problem with Runyan's Counsel's re-telling is that Mr. Estrada, according to his testimony, did specifically have exchanges with Mr. Hamilton about the wiring issue. Therefore, Mr. Hamilton hardly needed a recorded checklist of the problem, as he was already quite aware of the issue.

[24] Even this claim, that Mr. Hamilton continually asked Mr. Estrada to *please* return the keys, lacked authenticity. By his retelling, Hamilton was one step away from begging Mr. Estrada to put the keys in the pickup truck.

Mr. Hamilton stated that he first spoke with Mr. Estrada during the morning about the truck and the steering issue, adding that Sam [Hill] was with Mr. Estrada in a truck. He continued that "we stopped outside the gate and [Mr. Estrada] told me about the problem with the pickup." Tr. 141. This occurred on October 2nd. Hamilton then asked Mr. Estrada about his location and was advised that he was at the conex box. Tr. 141-142. Next, he told Mr. Estrada that he would call Tommy, their mechanic, to fix the truck. The mechanic told him that he needed to know the truck's model year but when Mr. Hamilton went to the truck, he found it was locked and he couldn't find the keys. Tr. 142. Following that, he stated that "we" tried to contact Mr. Estrada, using the mine radio, and by cell phone and by the front gate and also through Runyan's secretary, Kim, who was tasked to try and contact the other bird hazer, O.T. Flores, all to convey the message to Fred Estrada to take the keys to the truck. Tr. 142. Mr. Hamilton added that around 1:30 that day, Sam Hill called him on the phone and advised that he then had Fred Estrada on the radio. Learning of that, Mr. Hamilton stated that he turned his radio to Channel 12, and asked Fred Estrada to take the keys to the pickup truck. Estrada responded, according to Mr. Hamilton, that he would "be there in 15 minutes." Tr. 142. Learning that, Mr. Hamilton parked his truck near the broken pickup and operated "the blade" for about an hour, but when he came back the truck was still locked. Tr. 142-143. His story continued that "*we* then called the front gate *numerous* times besides once to try to get ahold of Fred. Kim tries numerous times throughout the day. So when I was leaving the mine after 4 o'clock, the keys were at the front gate." Tr. 143 (emphasis added).

Mr. Hamilton denied that the keys had always been at the front gate, instead maintaining that "Fred had the keys all day long." Tr. 143. According to Mr. Hamilton, "[t]hey said that Fred dropped off the keys at the front gate just a little while ago." This occurred around 4 p.m. Tr. 143. According to Mr. Hamilton, he specifically requested that Mr. Estrada go unlock the truck and leave the keys with it speaking "to him three times personally" about the matter. Tr. 144.

At that point, the Court announced that it would have some questions about this testimony and, as Runyan's attorney announced he would be changing topics, the Court began its questioning. Regarding the broken truck,[25] the Court first inquired about the distance between the disabled truck and the front gate, where the keys were eventually located and was told by Hamilton that it was "half a mile to three quarters of a mile." The Court notes that, even driving 30 mph, this means a time of less than two minutes was involved. Next, the Court asked about the range of Mr. Estrada's bird scaring duties in relation to the front gate and was advised that it was "around a 5 mile radius." Tr. 145.

The Court then frankly advised Mr. Hamilton that, upon listening to his version of the events, it seemed "like a rather small reason to decide to fire someone because they didn't get the keys over to the disabled truck." Tr. 146. Hamilton responded that "Judge, after speaking to him on three different occasions, he blatantly disregarded to take the keys to the truck so we could get the truck repaired." Tr. 146.

[25] Hamilton stated that the truck was disabled due to a power steering issue. Tr. 144.

The Court replied that it took that answer as reflecting Hamilton's belief that such a failure provided "a sufficient basis to fire someone." Tr. 146. Given that posture, the Court inquired whether Runyan had a policy of issuing warnings or whether in the alternative it would go "from zero-to-ten" so to speak and fire someone, with no intermediate steps. The Court explained further what it meant, asking Mr. Hamilton to assume that the Court was employed by Runyan and to further assume that it had certain job responsibilities and that it failed to do one of those responsibilities. The Court then asked, "Is your company policy that that's it, I'm fired? There's no warning issued. There's no paper? There's nothing preliminary? You go right from mistake or failure . . . [a] failure to obey [your] order, to you're fired? Is that the way it works [with Runyan]? Tr. 147. Mr. Hamilton's response was unequivocal and short, advising "Yes, sir." Tr. 147.

The Court then inquired of Mr. Hamilton as to the number of employees working at the mine site. Two people had the bird-scaring responsibilities, but the Court then learned that Runyan's work at the mine encompassed much more than that. In total, Hamilton estimated that Runyan had about 40 employees at the mine. He then agreed with the Court's characterization that 40 is "quite a large number of employees." Tr. 148. Given that, the Court then asked if Runyan had a written policy as to how it deals with discipline. Mr. Hamilton responded, asking if the question was whether Runyan had a written policy. He then added that Runyan has "safety policies." Tr. 148.

This prompted the Court to ask whether Hamilton had understood the question and he affirmed that he did understand it. Honing in on the issue, the Court then asked if "the company [has] a policy that they adhere to such as - - a process [they use]. Tr. 148. Hamilton then affirmed that Runyan does "have a warning document, yes sir." Asked whether it ever issued a warning to Fred Estrada, he responded, "No, sir." Tr. 148.

The Court then inquired whether, during that approximate time period, that is, during 2012, Runyan ever fired an employee without issuing a warning. Hamilton's response was "No, sir." Tr. 149. That answer led the Court to inquire what made the Estrada case so special, that Hamilton decided not to issue a warning, but instead to fire him for not getting the keys over to the truck. The Court added, "Why didn't you use a lesser tool than just deciding to fire him?"

Mr. Hamilton's response was that because Mr. Estrada "blatantly disregarded *anything* that I asked him to do that day." Tr. 149 (italics added). This response perplexed the Court, prompting it to ask for a clarification, as Hamilton had only cited the issue with the keys for the pickup truck. Asked if he only requested Mr. Estrada to do that one thing that day, namely to take the keys to the truck, Mr. Hamilton affirmed that in fact that *was the only thing* he asked him to do that day. Thus, upon questioning, Hamilton admitted that his reference to Mr. Estrada's *failure to do anything he asked him to do that day*, in fact boiled down to failing to do *one* thing.

The Court then asked again if Hamilton could point to any other employee that he had fired unceremoniously, with no warning first issued. To this, Hamilton replied "I never had to. I haven't fired anyone." Tr. 149. In candor, the Court, speaking to Mr. Hamilton's credibility, advised that him that it had "some problems with what [he] was telling [the Court]. Tr. 150.

Counsel for Runyan then resumed his direct examination of Mr. Hamilton. Tr. 150. Picking up from Hamilton's response that he hadn't fired anyone before, he inquired if he had ever before had anyone blatantly disregard his orders for eight hours, to which he responded, "No sir." Asked how many times the mechanic had gone "out there to go fix that vehicle, Hamilton responded, "At least once, twice." Tr. 150. He affirmed that his asking Estrada more than once to take the keys to the truck weighed in his decision to fire him, stating that it is important for every employee "to be accountable for their actions." Tr. 151. Hamilton also advised that he had worked at this mine for 20 years and during that time had always had people working under him. He agreed that for the business to run properly employees cannot do whatever they want. He also denied that he had ever had any "cross words" with Mr. Estrada.

The Court then inquired about the mechanic who repaired the truck, asking if he is a Runyan employee. Hamilton described him as "a part-time employee." Tr. 153. The Court asked if it would be correct to assume that the mechanic would have been at the mine that day, regardless of the truck repair issue. However, Mr. Hamilton stated that he did not know if the mechanic was on the mine property earlier that day. Hamilton did state that *he* called him to look at the truck and that he had called him "for that truck for the steering pump." Tr. 153.

Mr. Hamilton was then presented with an invoice to Runyan for the truck repair from Hilltop Service, dated September 26, 2012. That bill *was* the bill "for electric wire and labor."[26] Tr. 155; R-13. Hamilton then agreed that safety at the mine is a concern of his and that repair of a broken vehicle is a concern related to such safety. Tr. 157. In this instance, Mr. Hamilton stated that his concern was "[b]ecause the policy of fluid being displaced on the ground in the mines, [and it is Runyan's] policy to repair any defects as soon as possible." Tr. 158. Following a series of extremely leading questions, Mr. Hamilton agreed that the extra time involved in repairing the fluid leak was, *as Counsel expressed it for him*, "something that raised the level of noncompliance, simply this employee not responding to you, to a different level in your mind?" "Yes, it did," Mr. Hamilton responded cooperatively to the leading question. Tr. 160.

Respondent's Counsel having completed his examination, the Court made further inquires, handing Exhibit C-2, a termination notice for Mr. Estrada, to Mr. Hamilton. The Court inquired if that was the termination notice Mr. Hamilton was relying upon as the notice which was submitted to Mr. Estrada. Hamilton advised that it was, adding "[a]nd also the letter that I

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[26] It is worth noting that after *Mr. Hamilton* stated that R-13 was the September 26 invoice for the repair of the electric wire and labor, his attorney then asked if it was the bill "to repair the [steering] pump issue." Tr. 155. Hamilton, contradicting his immediately preceding testimony, agreed with his Counsel that the exhibit represented the bill to repair the pump issue. "Yes, it is." *Id.* He then confirmed that this repair to the pump was done on the 26th. *Id.* The document itself, R-13, shows that it had nothing to do with the power steering pump issue. Hamilton had just stated that he called the mechanic "for that truck for the power steering pump." Tr. 153. As noted *infra*, Mr. Hamilton and Mr. Christian did not even have their stories, and "stories" is the correct term, lined up. As set forth in dictionaries, a "story" is a fictional narrative. In this case, different versions of the "story" came from Hamilton and Christian.

had wrote [sic] per the notes that was with it also." Tr. 161. This was represented to be the back page of Exhibit C-2 and it was separately marked as R-14.[27] Hamilton then stated that he wrote this regarding the termination of Fred Estrada and that he created it on the 3rd [of October], which was the next day. He stated that it was presented to Fred Estrada when he was terminated and that it set forth the reasons for that termination. Tr. 163. The Court finds that it is extremely unlikely that Mr. Hamilton presented the letter, R-14, to Mr. Estrada. The typewritten letter is not at all of the nature that an employee would be presented upon being terminated. Rather, on its face, it is merely a defensive attempt to set forth a justification for Mr. Hamilton's action to fire Fred Estrada.

Regarding other discipline he had taken against employees, Hamilton then stated that he "had suspended employ***ees*** about four years ago." Tr. 164 (emphasis added). He then, when questioned, stated that it was *one employee* and that this occurred about four years ago. Tr. 164. The reason, he stated was: "I believe it was damaging a pickup." The Court noted that "[s]ince these events you told me are rare, in fact you can only think of one instance in [the past] [f]ive years . . ." , it wanted to learn what occurred. Tr. 164-165. Hamilton informed: "I believe the pickup ran into reflectors and damaged the whole side of the pickup." Tr. 165.

The Court then inquired, "how does the suspension process work? Just get a letter that you're suspended, or does he first get to discuss this with people in management first?" Hamilton responded, "Uh-huh," and the Court advised that "'Uh-huh' is not an answer." The Court then asked whether the employee gets a chance to present his reasons why he should not be suspended, to which Hamilton responded, "No. He was suspended for three days." Tr. 165.

Inquiring further about Runyan's practice, as told by Mr. Hamilton, the Court asked if there was any appeal from such a decision. In this regard it asked, if an employee[28] is told that he is going to be suspended, is he told, for example, "you're going to be suspended. We're going to talk about this, and then we're going to make a final determination" or does Runyan "just sort of decide and [the employee] only learns of it with no right to express his point of view?" Tr. 165. "No," Hamilton responded to the Court, "We talked about that suspension." Tr. 166. However, Hamilton maintained that the employee was first suspended with the talk *following* that action. Tr. 166. The Court then wondered, given that the hanging was followed by the trial, what there was to talk about. Mr. Hamilton's response was "Well, I don't know, sir, what you're - - talk about? I'm not - - " Tr. 166. The Court then reminded him that he had just stated that he talked with the employee about the suspension. Hamilton responded that his talk consisted of telling the employee that "he's going to be suspended for three days." Tr. 166. His answers, in the Court's estimation, were all very confusing and for good reason: they did not add up nor did they make sense.

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[27] Counsel for Respondent represented that R-14 was part of Ex. C-2, stating that it was the back page for the notes portion from Mr. Hamilton. Tr. 162.

[28] For illustrative purposes of its question, the Court named a hypothetical "Jim" as the employee facing discipline.

The Court then turned to Mr. Hamilton's version of his interactions with Fred Estrada and in particular with issues about the pickup truck. Mr. Hamilton affirmed that he recalled that interaction. On the issue of checking the fire extinguisher on the same truck involved with this dispute, Mr. Hamilton stated that, although he had such a discussion, it did not occur on October 2nd. Tr. 166. He did note that the fire extinguisher was not checked off and he told Estrada to do that right away. Next, the Court asked if, having heard Mr. Estrada testify about the issue of cleaning up the truck, Hamilton agreed that he heard Mr. Estrada's testimony at the hearing about that, but when asked if the two had such a conversation, as Mr. Estrada had asserted, Hamilton asserted, "I don't believe so, no, sir." Tr. 167. Unsure what that response meant, the Court inquired further, asking if that meant he was uncertain, Mr. Hamilton then stated, "No such conversation occurred." Further, when the Court inquired of Hamilton if he had any conversation with Fred Estrada about the auxiliary gas tank and wiring issue, he stated, "No. I deny that." Tr. 167-168. In fact, when the Court asked if Hamilton *had ever* had "any discussion with Fred Estrada about this wiring issue for the auxiliary tank," he stated, "No discussions. . . . never." Given these conflicting accounts, Mr. Hamilton agreed with the Court's characterization that either Mr. Estrada or Mr. Hamilton "is not telling the truth or isn't remembering." Tr. 168. It is the Court's conclusion that it was Mr. Hamilton that was clearly not telling the truth. Even the Respondent's own exhibit, R-13, shows that the electric wire issue on the truck was repaired on September 26, 2012, a date consistent with Mr. Estrada's testimony about the problem and the dates.

David Estrada then had an opportunity to ask questions of Mr. Hamilton. This began with the subject of Mr. Hamilton's statement that he had spoken with David Estrada three times on October 2nd. The first time, he stated, was about 8:30 that morning. He maintained that Fred Estrada told him the truck was broken down and that he, Hamilton, then told him "to leave the keys there so that the mechanic could fix the truck." When challenged that the truck did not even break down until that afternoon, around 2:30, Mr. Hamilton denied that was the case. Tr. 169-170. Pressed further about his assertion that he spoke with Fred Estrada three times that day, Mr. Hamilton stated that each of those conversations involved "[t]he same pickup, the same keys." Tr. 170. Hamilton was asked how he reached Fred Estrada on the three occasions. Hamilton responded that the first time was "face to face passing each other in the pickup." The second occasion was around 1 o'clock and was "on the radio . . . on the phone . . ." And the third occasion was around "4:30, 5 o'clock." Tr. 171.

Hamilton contended that he did not fire Estrada at the time of the 5 o'clock conversation, although he admitted that he told Estrada then to "go home." He added, "It was late in the afternoon. I thought it was time to go home. It was close to 5 o'clock." Tr. 171. When challenged about this assertion, and asked if Fred Estrada "still had a couple of more hours to go [on the shift]," Hamilton responded, "That's what I said." Tr. 171. The Court sought clarification. Hamilton agreed that he was referring to October 2nd at a time near but not quite at the end of the work day when he told Fred Estrada to go home, adding "I said 'Once you've got the keys there, you can just go home." Tr. 172. He maintained that at that time he had not yet decided to fire Mr. Estrada and that he "didn't make up [his] mind till when [he, Hamilton] got home that night." Tr. 172. The Court finds this to be another incredible recounting from Mr. Hamilton.

David Estrada then resumed his questioning, further challenging Mr. Hamilton's assertion that he spoke with Fred Estrada three times on October 2nd. In this regard David Estrada noted that Mr. Hamilton's statement that he tried to reach Fred Estrada on the phone and received no response and on the radio, also with no response, and that he had the front gate call Estrada numerous times. Hamilton spoke to one aspect of this, stating that he did not assert that Kim got no response but rather that she "made contact with [Fred Estrada] and with O.T. also." Tr. 173. However, Hamilton did not know the time when Kim received a response from Mr. Estrada. He then expressed uncertainty whether Kim actually talked only to Sam Hill but not Mr. Estrada. Tr. 174. Hamilton still maintained that *he* talked to Mr. Estrada three times that day. Tr. 174.[29]

On the subject of whether Runyan issues warnings to employees, David Estrada asked Mr. Hamilton if Fred Estrada was issued a warning on September 5, 2008, in connection with an allegation that he was sleeping on the job and also presented a warning notice.[30]

On redirect, Counsel for Runyan asked Hamilton to explain his earlier answer that the mechanic was a part-time employee. Hamilton stated that the mechanic was an independent contractor, not a part-time employee of Runyan. That mechanic, Tommy Christian, is the owner/operator of Maverick Mechanical. Runyan's Counsel then turned to Mr. Hamilton's statement, addressing "some of [Mr. Hamilton's] timing with regard to [his] statement." Tr. 185. On this second go-round, Mr. Hamilton stated that on the 2nd of October he saw Mr. Estrada at

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[29] The Court then stopped the questioning on that point, commenting that it had been pursued as far as it could go. It went on to note that it would need to compare Mr. Hamilton's written statement, which he stated was prepared the day after the termination notice was issued to Mr. Estrada, with his testimony at the hearing, to determine if conflicts existed. The Court made no suggestion about its
conclusion on this point and noted that it was possible that it could determine there was no conflict. Tr. 175.

[30] Runyan's attorney objected to the warning notice document on multiple grounds, asserting that it was: too old, occurring in 2008; that it was issued by one other than Mr. Hamilton, and; generally, that it was not relevant or material. David Estrada's purpose in introducing the document was to refute the claim that Runyan does not issue warnings to employees. Tr. 178-180. Runyan had known of the document, as Mr. Estrada produced it as part of his response to Runyan's discovery request of him. The Exhibit was marked for identification as C-4 but it was never admitted to the record. Mr. Hamilton stated that he did not recognize the document, asserting that he had not seen it until the hearing. Tr. 181. Upon further questioning by the Court, Hamilton did state that, although he had not seen this document before, he had seen a warning notice issued by Runyan about two months before this hearing, adding that it was on a different looking form. The Court finds that the issue of whether Fred Estrada had ever received a warning notice for an event unassociated with this dispute and whether Runyan issued warning notices as a general practice is not necessary to resolve, as there is ample testimony in the record from the Complainant, Mr. Hamilton and Mr. Christian, to decide this discrimination matter.

7:30 that morning at the conex box. At that time Hamilton stated that he did not know about the pickup truck's failure and that he learned of it when he "passed Sam Hill and [Mr. Estrada] when they were leaving the front gate." Tr. 185. This occurred at 9:30 or 10:00 a.m. He stated that at that time he then told Mr. Estrada to leave the truck unlocked. Hamilton then agreed with his attorney statement that he came back to the truck later and found it locked. Tr. 186. Upon finding the truck locked, again with Hamilton providing one word affirmative responses to the questions posed by his attorney, Hamilton agreed that he then tried unsuccessfully to reach Estrada on the radio, then having the front gate guards trying, again without success, and then by having Kim try to reach Estrada and the other bird hazer. Tr. 187.

Mr. Hamilton then revisited his second attempt to reach Mr. Estrada that day, advising this occurred when Sam Hill was on the phone with him (*i.e.* with Mr. Hamilton) and also on the radio. According to Hamilton, Sam Hill called him on his cell phone and advised that he was in contact with Fred Estrada via Hill's radio. Hamilton then turned his radio on, tuned to Channel 12, and spoke directly with Fred Estrada. Tr. 187. He maintained that all three were on the radio at that time speaking with one another: Hamilton, Estrada and Hill. Tr. 188. At that time, Hamilton stated that he asked Fred Estrada to "please take the keys to the pickup. And that's when [Fred Estrada] stated he would be there in 15 minutes." Tr. 188. However, Hamilton stated that Estrada did not show up with keys. *Id.* Again, resuming his diminished testimonial role as one affirming the statements of his attorney, Hamilton answered 'yes' the mechanic showed up after that. He stated that mechanic Christian called him, advising that the truck was locked. At that point, Hamilton stated that "we started making our phone calls again to the front gate, Kim and myself." Tr. 188-189. Hamilton stated that he did not get a hold of Estrada until after 4:30 and discovered that the keys were at the front gate "when [he] went to go check out." Tr. 189. Runyan's attorney continued, stating, "Mr. Estrada left without notifying you that he had left, and you were on your way out. What happen[ed] at the front gate?" Hamilton stated that was when he "was informed that the keys were at the front gate, that [Mr. Estrada] had just dropped the keys off a little after 4:00." Continuing with what was, practically speaking, the attorney's testimony and Mr. Hamilton's mere agreement with it, Hamilton advised that the mechanic left and returned the next day to make the truck repair. As Counsel for Runyan stated, "And you had to pay this mechanic to go out there twice; right?" Hamilton responded, "Yes, sir." Tr. 189.

Mr. Hamilton also denied: that he had "words" with Mr. Estrada; that he was short and raised his voice with him; that he had any personal animosity; and that he had any ill will towards him. Tr. 190. In sum, Hamilton expressed that "[e]mployees need to abide by instructions they are given so that the company can keep working." In his view, Mr. Estrada's alleged failure to abide by those instructions, again in his attorney's words, were "so serious that termination was warranted [.]"

Upon re-cross-examination, Hamilton was asked if he considered it to be a safe practice to simply leave the keys in the truck, and he responded that in his view it was. Tr. 193. However, Hamilton also stated that he *was aware* of the issue of that truck on occasion being locked with keys in it. Tr. 193. He then amended his response, stating that he *was not aware* of that, advising that he thought the Court's question was whether the truck would be locked with the keys *left* outside it. Asked what his instructions were to Mr. Estrada about the truck's keys,

Hamilton stated that he told him to "[j]ust to take the keys to the truck and unlock the truck and leave the keys there *in* the truck." Tr. 193 (emphasis added). When asked again if he meant "*in*" the truck, Hamilton reaffirmed that was what he meant. Tr. 194.

David Estrada then asked Mr. Hamilton if it was true that "your policy was to leave the keys at the front gate, check in and out every time you come in?" As Mr. Hamilton began with a non-responsive response, the Court interjected that this was a very basic question and to answer if that was the company's policy. He then responded "Yes. The keys - - In the parking lot. When the pickup is in the parking lot, being that it has the bird-hazing equipment in it, they do take the keys after the shift and take them to the front gate in the parking lot." Tr. 194. Hamilton denied that he had a second set of keys for the truck, a 2008 model and that there was not a second set of keys for it. Tr. 196.

Following Mr. Hamilton's appearance on the witness stand, the mechanic, Mr. Tommy Christian was then called to testify. He stated that his business is Maverick Mechanical and that he is self-employed. As a subcontractor for Runyan, when he goes to the mine, he writes a receipt and then is paid for his work. Tr. 198. He affirmed that he had occasion to work on a disabled vehicle at the Tyrone mine on October 2nd and that he had received notification that it was broken in the morning of that day, around 10 a.m. However, he stated that he couldn't get to the mine until "a little bit after 4:00" that afternoon. He stated that he was unable to work on the truck that day because it was locked and there were no keys. Tr. 200. Because of this problem, he called Mr. Hamilton and waited for the keys, stating that he waited "[p]robably at least an hour an a half that night. And then the next morning I came and got the keys," he believed, from Mr. Hamilton, though he couldn't be sure of that. Tr. 200-201. He then drove the pickup directly to the Ford dealer, after first adding power steering fluid to it. Tr. 201. Following that, he gave Runyan an invoice for his work, which was thereafter admitted. R-15. It reflects two charges, one of which was for October 2nd, for $133.

The Court then asked Mr. Christian about the year of the vehicle, which he believed to be either a 2004 or 2005 model year. He stated that, once he gained access to open the vehicle the following day, he had no trouble finding the vehicle's identification information. In effect, he stated this information didn't matter, because he simply drove the vehicle to the Ford dealer. However, he stated that the Ford dealer never advised him that the ID information was missing from the pickup. Tr. 205.

Mr. David Estrada then asked Mr. Christian about his repair of the truck fuse problem, inquiring about the day that occurred. Christian could only respond that the fuse problem was not repaired on the same day, *i.e.* that repair was not done on October 2nd. Tr. 206. He admitted that he did suggest that they "put a fuse in if we wanted to get the fuel tank to work later on." Tr. 206. He also stated he "saw the wires taped together with tape and folded back and not connecting to a battery at the time." Tr. 207. He also remembered that repair. Agreeing that he is a "certified" mechanic, and responding to whether it would have been improper to make the fuel tank work by connecting the wires as they were and that one should have a fuse in place, he stated: "You could have - - there's several ways to do it. You can have a fuse. You can have a butt connector. You can have a nut connector on there." Tr. 207.

It was obvious to the Court that Mr. Christian did not want to testify in a manner that detracted from his customer's case. When the Court inquired whether one would not want "just to tie the two wires together and wrap it with electrical tape," he answered, "I've seen people do that, but it's not my practice." Tr. 208. The Court had to press further, following up with "[b]ecause it has potential risks, does it not?" Christian finally relented, answering, "Yes, it does." Tr. 208.

David Estrada then continued, asking Mr. Christian if he asked Fred Estrada who had repaired the truck pump wire issue in the first place. Christian responded, "I could have. I don't remember at the time." Tr. 208. Pressed further by Mr. David Estrada, Christian avoided a direct answer and the Court took note of that, stating, "No. no. [David Estrada's] question was do you remember having a conversation with Fred Estrada about the problems of having [the pump wiring] be that way? Do you remember that conversation with Fred Estrada?" Tr. 208. Christian answered, "I had a conversation with Fred [Estrada] about how we could rewire it to make the pump work." Tr. 208. When asked if he made any statement to the effect about it not being a good way to just tape the wires together, Christian denied it, instead offering that he "said this is the way I would do it, Your Honor. I would put a fuse in there, and then we would connect the battery if we wanted the fuel tank to work, the auxiliary fuel tank to work." Tr. 209. This testimony reinforced the Court's earlier conclusion that Mr. Christian was doing everything he could to present his repair in a light most favorable to Runyan, but at the end of the day it was clear that his testimony was evasive until the point that he had to admit that the wiring was in fact improperly done.

When David Estrada continued on this issue, Christian stated that he never repaired the fuse, but rather repaired a fuse "for the buggy whip light." Tr. 209. The Court then again inquired about this repair. While Christian conceded that he noticed the auxiliary gas tank connection problem, as he told Fred Estrada that the taping of the wires would not be the way he would address the problem, he repeated that he never fixed that issue. "I never made the correction on the vehicle because it was to the auxiliary fuel pump, and I didn't know whether they wanted me to repair it and use that pump. . . ." Tr. 210.

Christian did repeat that he waited around for an hour and a half to gain access to the pickup for the power steering issue. He also stated that he checked in with security and that he always has to do that. However, he stated security did not have the car keys. Stating that Mr. Hamilton had testified that he left the property at 4 o'clock on October 2, David Estrada asked Christian if he met him at the gate. Christian stated that he did not meet Hamilton, that he only "met" him by phone. He had called Hamilton to inform him that he did not have the pickup's keys and that this occurred around 4 o'clock or 4:30. On redirect, Respondent's attorney asked if he ever told Fred Estrada that the wiring could cause the vehicle to blow up, and whether it could cause it to catch on fire. The mechanic responded 'no' to those questions. Tr. 213. The Court would note that this question, rather than helping Respondent's claims, reconfirms that Mr. Christian was fully aware of the truck gas tank issue, despite his late claim that his September 26 repair invoice was for a buggy whip wire. The invoice itself only informs that it was for an "Elec Wire" and that Viola Ogas' signature was on the invoice. Ex. R-13.

Fred Estrada then retook the stand. On redirect he stated that he left the pickup's keys at the front gate as he drove in. This was a little after 4:00 p.m. He informed that, upon arriving, Danny Plancencia was the security person there and Fred asked him if Mr. Hamilton was on the property. Placencia checked with the other guard and then advised Fred that Hamilton had left the property. Placencia then told Fred that they wanted the pickup keys and suggested that he leave the keys there at the front gate. Further, Placencia told Fred, in that way, if the mechanic arrived, they would give him the keys. Fred Estrada agreed with that suggestion, and left the keys with security. Tr. 215. Placencia then took the keys and took them inside the security front office.

Fred Estrada also took issue with mechanic's claim that he (*i.e.* Mr. Christian) did not tell him about the safety concern with the fuse, stating, "No, that's not true. And it was the same day. He was saying that it's not - - that it wasn't the same day, and it was. He told me - - well, it must have been - - to work on the fuse, it must have been about 12:30 or so, maybe 12:15, 12:30. They called me to go to the contractors' parking lot; so I did. When I got there, Mr. Christiansen [sic] was there. And I just asked him. I said, 'Well, do you want to talk to me?' And he said, 'Yes.' He said, 'I came to fix the fuse on the truck.' So I said, 'Fine.' So he opened the hood to the truck, and that's when he [Christian] said , 'Oh, man. Who worked on this truck?' " Tr. 216.

Mechanic Christian inquired further about this and Mr. Estrada told him there was a young guy working at the Hilltop Garage on the truck. Upon hearing that, the mechanic responded, "Well that answers my question." Mr. Estrada continued to relate his interaction with the mechanic and that the mechanic checked out the wires, advising that "he didn't have no fuse." The mechanic then looked in his toolbox, finding that he didn't have a fuse of the appropriate size to install. He then informed Mr. Estrada that he would need to run into town to get the needed fuse. Tr. 217. Later, the mechanic returned with the fuse and fixed the problem, whereupon Mr. Estrada left. Tr. 218.

That same afternoon, the other problem with the truck's steering fluid arose. When that happened Mr. Estrada managed to drive it to the conex box and called about the problem, finally reaching Sam Hill, who drove to the conex box to pick up Mr. Estrada. Hill drove Estrada to the contractor's parking lot and it was then that he met Hamilton who, along with another rider, was driving into the mine. Estrada then informed Hamilton what had happened with the truck. In response, Hamilton asked if the truck was out of the road and Estrada advised that it was off the road and at the conex box. Hamilton then told Estrada to get a different truck, identified as "Runyan 4." Mr. Hill drove him to the contractor's lot, where Estrada retrieved Runyan 4 and he then resumed making his rounds. Tr. 218-219. The Court specifically finds that the truck steering issue arose during the afternoon that day, *not*, as Hamilton asserted, that morning.

Following that, around 2:30 to 3:00, he received a call from the front gate. However, he could barely receive the call and he could not transmit a response. He continued his work and then, around 3:30, he received another call, advising him that Hamilton wanted to speak with him. Estrada advised that he would be at the front gate in about 15 minutes but, upon arriving he did not speak with Hamilton, as he had left by that time. He then resumed his work, helping Mr. Flores check an area at the mine. Kim then called Mr. Flores, who advised that Mr. Estrada was with him. He passed his phone to Mr. Estrada and Kim spoke with him, informing that Mr. Hamilton wanted to speak with him. Tr. 219-220. Hamilton then spoke with Estrada, telling

him that he was to pick up the keys for the disabled truck, take them to that truck, leave them in the truck, look for the year of the truck and then go home. Tr. 220. Estrada then went to the truck with Mr. Flores. Although uncomfortable about leaving the keys in the truck, because of the automatic locks issue, he did as instructed by Hamilton, leaving the keys in the truck. He then returned to the front gate, signed out around 5 p.m., and then went home. Tr. 220-221.

The Parties' Briefs[31]

Complainant's Contentions

As noted, Fred Estrada proceeded *pro se* at the hearing but subsequently secured legal counsel, which Counsel filed both a post-hearing brief and a reply brief on Complainant's behalf. Complainant's Counsel contends that Mr. Estrada engaged in protected activity when he reported the safety issue with the truck's spare fuel tank pump wiring and that his subsequent termination constituted an adverse employment action. C's Br. at 15-16. It then contends that the nexus between the protected activity and the termination was established, noting that the Complainant was fired one day after the protected activity. To that, Complainant's Counsel maintains that the element of knowledge of the protected activity was also established when Fred Estrada informed Mr. Hamilton, Runyan's project manager and safety director, that the pump wire had not been fixed correctly. The element of animus was also demonstrated through Mr. Estrada's testimony, relating Hamilton's angry reaction upon being informed that the pump wire had not been repaired properly. R's Br. at 19. Beyond the establishment of those elements, Complainant's Counsel points to the presence of disparate treatment on two grounds. First, it contends that Mr. Estrada was following Runyan's policy by leaving the truck's keys at the front gate. Second, the Complainant was treated differently both in terms of the procedure employed and the punishment imposed. Regarding the procedure, it notes Mr. Estrada received no prior warning and was simply fired, while Hamilton conceded that another employee had only been suspended, not fired, upon an infraction. Second, the sanction imposed against Mr. Estrada, firing, was greater, even though the other employee's action was more serious, having damaged the whole side of a truck. C's Br. at 20.

Addressing the subject of whether Runyan rebutted Estrada's prima facie case, Counsel for the Complainant notes that the Respondent contends that Mr. Estrada did not list the pump wiring issue on the small truck operator's checklist and asserts that Mr. Estrada never had the conversation with Mr. Hamilton about the matter, noting that the latter denied its occurrence. C's Br. at 21. To these contentions, Complainant simply notes that Mr. Estrada verbally informed Runyan of the issue and that there is no requirement that such complaints need to be in

[31] Runyan's Counsel filed a post-hearing brief, but did not file a response brief. The Court read and considered all contentions made by counsel in the post-hearing briefs. Any absence of discussion to a particular contention does not mean that it was not considered but only that it did not require particular comment.

writing.[32] Complainant's Counsel recognizes that the Court stated that credibility determinations would need to be made. In support of its contention that Mr. Hamilton lacked credibility, it notes that while Mr. Hamilton testified that he did not make the determination to fire Fred Estrada until he got home on the evening of October 2, Respondent's Exhibit C-2, is both dated and signed October 2nd. That means, Complainant observes, that either the document was backdated or Mr. Hamilton was not truthful as to the date that the termination decision was made. C's Br. at 23. The Court agrees with this assessment but would add that independent of that determination, it did not find Mr. Hamilton to be a credible witness on a variety of subjects, including the time when he made the decision to fire Fred Estrada. Observing his demeanor on the witness stand, along with Hamilton's claim that he merely told Mr. Estrada to go home early that day, apart from any decision to end his employment, that Court finds that claim is not credible.[33]

Complainant's Brief concludes with the assertion that Runyan's stated reason for terminating Fred Estrada was pretextual. In this regard, it contends that Mr. Estrada did in fact leave the keys with the truck on the one occasion when he was requested to do that and that the basis to support that claim is simply that Fred Estrada's relation of the events on that issue is the more credible than Hamilton's version. C's Br. at 30-31. In further support of its claim that the stated reason for dismissal was pretextual, it notes that the Complainant had no prior work deficiencies identified by Runyan and that no warning was first provided, though it had a warning document for discipline matters. In addition, while Mr. Hamilton claimed that Fred Estrada disregarded anything he was asked to do that day, in fact Hamilton latter admitted that leaving the keys with the truck was the *only* failure allegedly committed by him. Last, in this regard, it notes that another employee was not fired, despite committing a more serious offense. C's Br. at 31-33.

The Complainant also filed a Reply Brief.[34] To begin, Complainant's Reply asks that the Court adopt various statements made by Runyan in its post-hearing brief which were presented as proposed findings of fact and to employ them as judicial admissions. C's Reply at 2-3.

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[32] Complainant's Counsel also makes the related, but important, observation that, to be valid, a miner need only have a reasonable belief of a safety concern; it need not be objectively demonstrated that, in fact, the safety concern was verified as present in fact. C's Br. at 22, citing *Bradley v. Belva Coal Co.,* 4 FMSHRC 982, 992 (June 4,1982) citing *Robinette,* 3 FMSHRC at 812.

[33] Although the Court provides its own analysis of the credibility of the witnesses, regarding Mr. Hamilton's testimony at this moment, the Court subscribes to the analysis of that witness' credibility as set forth in Complainant's Brief at pages 23, at paragraphs 120 through 129. The Complainant also spoke to the testimony of mechanic Christian and the subject of his credibility. As part of its proposed findings of fact, it notes that the mechanic admitted that such a wiring arrangement had associated risks and it observes that there is an invoice for electric wire labor. The Court will speak to the subject of mechanic Christian's credibility *infra.*

[34] As noted, Respondent elected not to file a Reply Brief.

However, as the Court independently finds each of the statements highlighted by Complainant's Counsel to be fact, apart from whether they are construed as admissions, the request need not be ruled upon.[35]

Complainant also addresses Runyan's motion for a directed verdict, a motion which, Complainant notes, relies upon Fred Estrada's statements at the hearing that he was fired for failing to drop the keys off at the disabled truck. To this, Complainant repeats the claim made earlier in its brief that Runyan had already made repeated admissions in its proposed findings that Mr. Estrada engaged in protected activity. C's Reply at 7, citing pages 1-3 of its reply. It then notes that Mr. Estrada's testimony also included repeated statements that he was fired for informing Mr. Hamilton that the truck's spare fuel pump had not been correctly repaired and as a consequence was unsafe. It maintains that to the extent Mr. Estrada seemingly contradicted himself about the reason for his firing, it is clear that he was voicing the reason Runyan was claiming. As already noted, the Court has found that Mr. Estrada was not expressing his own view for his firing, but rather the claim advanced by Runyan. As also noted, even if Mr. Estrada were to believe that he was fired over the truck keys, his misapprehension of the reason would not be determinative of the Court's supported finding to the contrary and its determination of the real reason for Runyan's action.

Runyan's Contentions

Runyan begins the argument section of its post-hearing brief by renewing its motion for a directed verdict. It emphasizes that *Mr. Estrada* testified that it was his understanding that he was terminated "for not complying with a direct order from his superior Tod [sic] Hamilton." R's Br. at 8.[36] As noted earlier, Respondent's Counsel attempted to seal the door on Fred Estrada's testimony about *Fred Estrada's understanding* of the reasons for his firing, by asking if, during that hearing testimony, he was then under the influence of drugs or alcohol. Having Mr. Estrada's testimony that he was not then in such an altered state, Counsel believed that testimony terminated the Complainant's case. However, as the Court pointed out at the hearing and reiterates here, the recounting and sole focus upon the Complainant's testimony is seriously misguided. A *complainant's understanding* of the actual reason for his termination neither makes nor breaks the complaint of discrimination. Rather, the facts, as determined by the Court,

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[35] The statements Complainant would employ against Runyan and the source in Respondent's post-hearing brief are: a. "During this conversation Mr. Estrada stated to Mr. Hamilton, that when the truck was taken in it was not fixed right." Proposed Findings, pg. 2, ¶4; b. "When Mr. Estrada walked out of the Conex box he stated to Mr. Hamilton, 'Oh, by the way, Todd, that truck—they took the truck in to be fixed, but it wasn't fixed right.'" *See id*. at pg. 4, ¶12; c. "Mr. Estrada repeated that [ ] [the wiring] wasn't fixed right." *See id*. at pg. 4, ¶12; d. "Mr. Estrada explained [to Mr. Hamilton] that yes it was working, but they did not fix it right… ." *See id*. at pg. 4, ¶12; and e. "Mr. Estrada picked up the keys at the front desk and left them in the truck." *See id.* at pg. 6, ¶18. C's Reply at 3.

[36] Respondent's Brief was not paginated. Page number references were added by the Court.

lead to the determination whether a given complainant engaged in protected activity and whether the adverse action was motivated in any part by that activity.

In addition, while Complainant Fred Estrada did utter those words about the reason for his dismissal, that recounting only partially relates his view of the reason for his termination. At the hearing itself, Fred Estrada subsequently made efforts to restate his understanding of the reason for his termination, but long before that, in filing his original discrimination complaint, he clearly recounted in his handwritten report of discrimination that the matter was all about the pump on the spare gas tank and the associated wiring issue and how upset Mr. Hamilton became with him when he had the temerity to speak up and inform Hamilton that, while the pump was working, it had not been fixed correctly. Even in that handwritten discrimination report, Fred Estrada began with the remark that "I was send Home for disobey a order," but he then continued with a recounting of the spare gas tank pump wiring issue. The Respondent has long understood that the pump wiring was the real basis for Mr. Estrada's complaint and its lame attempt at the hearing to play "gotcha" based upon the complainant's answers would reflect a superficial and isolated reading of his complaint. Again, *it is for the Court to decide*, upon hearing *all* of the testimony, whether there was protected activity and whether adverse action flowed from it.

In an apparent alternative to its directed verdict motion, the Respondent then contends that Mr. Estrada failed to establish a prima facie case. For this portion of its Brief, Respondent acknowledges that the Complainant alleges "he was really fired for reporting a minute wiring issue for his work truck."[37] R's Br. at 9. In this regard Respondent asserts "[w]hat is important to point out is this is complaint [sic] he chose not to make for 11 days and continue [sic] to use the truck." *Id.* It adds that the mechanic, Mr. Christian, testified "that the vehicle was not in any unsafe condition because of wiring." *Id.* That claim is at odds with Mr. Christian's testimony. In fact, Mr. Christian, near the end of his testimony, claimed that he never fixed the pump wiring and that his repair invoice, he asserted, was for a "buggy whip light." Therefore, even if the Court were to accept the mechanic's testimony as credible,[38] Respondent can hardly point to the mechanic's testimony to support that the pump wiring arrangement was safe. According to some, but not all of mechanic Christian's testimony, he knew not of the pump wiring issue, despite having an invoice for "Elec. Wire Labor" at the same time as the pump wiring issue had been raised by Fred Estrada, which invoice was signed by Viola Ogas, the person to whom Fred Estrada advised about the pump wiring issue.

In a similar fashion, Respondent mischaracterizes Mr. Estrada's testimony when asserting that his "testimony is important to point out here as it is clear he understood it not to be a safety issue that was important enough for him to stop using the vehicle." R's Br. at 10. Viewed in its entirety, as recounted *supra*, Mr. Estrada's testimony contradicts that characterization.

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[37] The characterization that the wiring issue was "minute" is not based on any testimony at the hearing to support it as such.

[38] As explained *infra* the Court found that neither Mr. Hamilton nor mechanic Christian were credible witnesses.

Respondent concludes that Fred Estrada failed to make a prima facie case of discrimination. R's Br. at 12. To support this contention, Runyan focuses on its claim that Fred Estrada was fired for failing to obey the direct order from Hamilton. It is noted here that nowhere in its brief does Respondent formally make any alternative claim that, even if it were found that Runyan discriminated against Mr. Estrada, it affirmatively defends its action through showing that it was also motivated by his unprotected activity and would have taken that adverse action for such unprotected activity alone. *Sec. obo Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-818. Thus, Respondent, through its legal counsel, did not expressly so affirmatively defend. It would seem that, since Runyan was represented by legal counsel, its failure to expressly assert any affirmative defense, waived such a claim. However, because it could be inferred that Runyan's claim that it dismissed Mr. Estrada because he disobeyed a direct order *(i.e.* the alleged failure to leave the keys in the truck) was tantamount to an affirmative defense, the Court, as explained below, rejects any claim that Runyan had a legitimate, non-discriminatory, basis to dismiss the Complainant.

The basic elements of discrimination actions

As the Commission recently reiterated in *Mark Gray v. North Fork Coal Corporation*, 2013 WL 4648492, (August 22, 2013) a "complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), rev'd on other grounds 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying Pasula-Robinette test)."

Analysis, Further Findings of Fact and Conclusions of law

Upon the close of the testimony at the hearing, the Court noted that "this case is going to turn on credibility determinations primarily. It also advised that, upon hearing the testimony, it had made "certain more-than-preliminary conclusions about the credibility of various witnesses." Tr. 223. As should be clear from the foregoing, the Court found that neither Mr. Hamilton nor mechanic Christian were credible witnesses. Their testimony followed an oath in which they swore to tell the truth. That did not occur. In contrast, Mr. Fred Estrada was quite credible.

Because the foregoing lengthy recounting of the hearing testimony and the findings of fact, as set forth above, already makes it clear that Mr. Fred Estrada established his discrimination complaint, only a summary analysis is necessary now. As just noted, of the three witnesses at the hearing, only one, Fred Estrada, provided credible testimony. When Mr. Estrada returned to work on September 29th, he learned that Ms. Ogas had attempted to have the pump wire fixed on September 26th but that it had not been properly repaired. On October 1st the triggering event occurred when Mr. Hamilton, obviously irritated about the pump wire repair issue, attempted to show Mr. Estrada that it had been fixed. Though the pump worked, Mr. Estrada showed up Mr. Hamilton by explaining that the "repair," if it could even be called such, had been inadequate. Mr. Estrada's testimony about the exchange between him and Hamilton is found to be credible. Hamilton was clearly angry over Mr. Estrada's accurate assessment that the pump wire had not been properly repaired. Mr. Hamilton's claim that he never had an exchange with Mr. Estrada about the pump wire is not believable, nor is his claim that he never had angry words with the Complainant. The following day, despite mechanic Christian's protestation to the contrary, the pump wire was correctly fixed by him with the installation of a new fuse in the wire's line. Thus, Mr. Estrada clearly engaged in protected activity and his firing, shortly thereafter, was motivated by that activity.

A few words should be added about the claim that Mr. Estrada was fired for failing to leave the truck keys in the disabled truck. First, the whole claim about this does not add up. If believed, and he is not, Mr. Hamilton's Herculean efforts, repeatedly contacting Mr. Estrada to "please" put the keys in the disabled pickup were disproportionate to the problem. One would think, by this accounting, that this was the most important task of the day. Thus, by Hamilton's telling, the urgency of the task was akin to responding to a four-alarm fire. This was hardly the case, as the backup truck was available and used by Mr. Estrada the same day. And, of course, the front gate, where Mr. Estrada initially left the pickup's keys was all of two (2) miles away from the conex box. Even hypothetically viewing the truck key issue in the very darkest construction possible against Mr. Estrada, at most, there was a simple communication mix-up as to where Mr. Estrada was to leave the keys, and his initial depositing of them at the front gate was both entirely reasonable and consistent with Runyan's usual practices. That Mr. Estrada could be fired for such a minuscule communication error, for which the blame could be spread among many, is not at all believable.

ORDER

The parties are directed to confer in order to determine if there can be agreement as to the terms of relief for Mr. Fred Estrada. Section 105(c)(3) of the Act provides, in pertinent part: Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner … for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation." Some issues related to the relief were raised by Complainant's Counsel in its post-hearing brief.[39] Typically, reinstatement to Mr. Estrada's former position, if sought, back pay with an appropriate interest rate, medical expenses, if any, benefits, such as pension contributions, if any, and lost overtime, are among the remedial matters that may be present. In addition, the remedies typically also include: expungement from Fred Estrada's personnel file of all references to the unlawful disciplinary action taken against him, including any such references to the events and circumstances associated with his wrongful termination from any other records maintained by the company; and a posting of this decision at all of its mining properties where Runyan operates, placed in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days, together with a posting by Runyan at such properties that it will not violate the Mine Act.

[39] Complainant's post-hearing brief also addressed the subjects typically included for the relief aspects of established discrimination claims. In this regard it lists the following: "1. Expunge from Mr. Estrada's personnel file any negative references relating to this matter. 2. Reimburse Mr. Estrada for all reasonable and related economic losses or expenses incurred in the institution and litigation of this case. This amount shall include damages in an amount equal to full backpay, all employment benefits, attorneys' fees and costs, all medical and hospital expenses and any and all other damages suffered and incurred by Complainant as a result of his discriminatory discharge. Furthermore, interest shall be added to backpay and other expenses, from the date of discharge until the date of payment, at the adjusted prime rate announced semi-annually by the Internal Revenue Service. 3. Post this decision at all of its mining properties in conspicuous, unobstructed, places where notices to employees are customarily posted, for a period of 60 days. 4. Restore Mr. Estrada to his former position as a bird hazer or to a similar position, at the same rate of pay, same shift assignment, and with the same or equivalent duties." It also addressed the procedural aspects related to determining if an agreement can be reached on these issues, adding that if "an agreement cannot be reached, the parties are . . . to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record . . . [and] [f]or those areas involving monetary damages on which the Parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case, the Parties should so state." C's Br. at 33-34. The Court views this as a reasonable outline for the parties to use in their discussions.

The Court retains jurisdiction in this matter until the specific remedies to which Mr. Estrada is entitled are resolved and finalized. Following the issuance of the final order, this case will be referred to MSHA for assessment of a civil penalty.[40] Accordingly, this decision will not become final, and therefore not appealable, until an order granting specific relief and awarding monetary damages has been entered. Counsel are directed to discuss the issues of the appropriate relief and to report the results of their discussions in writing to the Court within 20 calendar days of the date of this order.

So Ordered.

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

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[40] Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act. Consequently, the Secretary shall be provided with a copy of this decision so that she may file a petition for assessment of civil penalty with this Commission.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 15, 2014

CACTUS CANYON QUARRIES, INC., Applicant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	EQUAL ACCESS TO JUSTICE PROCEEDING Docket No. EAJA 2014-1-M Formerly CENT 2013-639-M A.C. No. 41-00009-327753 Mine: Fairland Plant and Quarries

DECISION AND ORDER

Appearances: Andy Carson, Esq., Marble Falls, TX, for the Applicant

Amy S. Hairston, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, TX, for the Respondent

Before: Judge Rae

This case is before me upon an application for an award of legal fees and expenses filed under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and the implementing regulations published in 29 C.F.R. Part 2704. Cactus Canyon Quarries, Inc. filed the application against the U.S. Department of Labor's Mine Safety and Health Administration (MSHA). Cactus Canyon seeks to recover $11,250 in costs expended in defending itself against the violations alleged in Docket No. CENT 2013-639-M, which was dismissed by unpublished Order dated June 16, 2014.

For the reasons that follow, I find that Cactus Canyon is not entitled to an EAJA award.

BACKGROUND

On May 20, 2013, former MSHA Inspector Michael Sonney conducted an inspection of Cactus Canyon's mine and issued seven citations under section 104(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(a). One citation alleged unsafe storage of compressed gas cylinders in contravention of 30 C.F.R. § 56.4601. Another alleged failure to maintain a material safety data sheet (MSDS) for two hazardous chemicals in contravention of 30 C.F.R. § 47.51. The other five citations alleged failure to properly guard moving machine parts in contravention of 30 C.F.R. § 56.14107(b). Cactus Canyon's president and attorney, Andy Carson, asserts that the supervisor for MSHA's San Antonio field office, Jerry Anguiano, visited the mine the day after the inspection – as was his custom – to review the

inspection and assist with corrective action and termination of the citations. Applicant's Reply Br., Ex. 1, Decl. of Andy Carson, Aug. 12, 2014.

On August 15, 2013, the Secretary of Labor petitioned the Federal Mine Safety and Health Review Commission for assessment of a total penalty of $700 for the seven citations at issue in the docket, Docket No. CENT 2013-639-M. The petition was filed by one of MSHA's Conference and Litigation Representatives (CLRs) who works out of Dallas. Mary Kathryn Cobb, the attorney who supervises all MSHA litigation at the Dallas Solicitor's Office, attests that she also reviewed the citations at the outset of the litigation and determined they were supported by the law and the evidence in the file. Sec'y's Answer, Ex. B, Decl. of Mary Kathryn Cobb, Aug. 1, 2014. Cactus Canyon timely filed a notice of contest.

By letter transmitted August 19, 2013, Cactus Canyon requested that the matter be designated for simplified proceedings pursuant to the Commission's rules of procedure at 30 C.F.R. § 2700 Subpart J. On August 27, 2013, Solicitor Dolores Wolfe transmitted a notice of appearance on behalf of the Secretary. The next day, she filed an unopposed motion seeking additional time to respond to the request for simplified proceedings and pursue settlement, noting that her office had just received the file from MSHA and that a phone call with Andy Carson had revealed a need for additional time to evaluate the file. Wolfe attests that during several phone conversations with Carson in late August and early September, "it became clear that Mr. Carson's goal was not to settle this matter, but rather to get the Secretary to stipulate to his own interpretations of MSHA regulations, in what appeared to be an attempt to limit MSHA's ability to cite violations at his mine in the future." Sec'y's Answer, Ex. C, Decl. of Dolores G. Wolfe, July 31, 2014. On September 26, 2013, attorney Wolfe filed a document styled "Secretary's Opposition to Simplified Proceedings" that stated:

> This case involves complex and contested issues of fact and law on seven citations. If this case proceeds to hearing, it will take more than 1 day to present evidence.
>
> The parties are in dispute over a number of contested facts including whether the mine was in operation on the day of the inspection, whether five of the guarding citations involve moving parts that are less than seven feet away from walking or working surfaces, and whether the mine had an MSDS for each hazardous chemical that they use. The Secretary would like to conduct written discovery … The Secretary respectfully requests that the request for Simplified Proceeding be denied, and written discovery be allowed.

Contrary to Wolfe's explanation, Carson asserts that Wolfe opposed simplified proceedings because she was aware that discovery would be necessary since Inspector Sonney was no longer available for the hearing. Decl. of Andy Carson. Carson attests that MSHA and its counsel knew Inspector Sonney was unavailable before litigation commenced, and introduced an MSHA organizational chart purporting to show Sonney was "gone by August 1, 2013." *Id.*; Applicant's Reply Br., Ex. 3, organizational chart (undated). Regardless of the reasons for the Secretary's opposition, no action was taken on the request for simplified proceedings, as the case was still pending before the Office of Administrative Law Judges in unassigned status.

On April 1, 2014, the case was assigned to me. Cactus Canyon subsequently renewed its request for simplified proceedings by email correspondence[1] with my office, noting there was "no current necessity for Discovery."[2] Solicitor Virginia Fritchey, who had filed a notice of substitution as counsel for the Secretary in December 2013, notified my office on May 7, 2014 that the Secretary had withdrawn any objections to the request for simplified proceedings. Accordingly, I granted the request for simplified proceedings by order dated May 8, 2014.

Meanwhile, on April 16, 2014, Fritchey had called Carson and sent him an email requesting a settlement position. Sec'y's Answer, Ex. D, Decl. of Virginia E. Fritchey, Aug. 6, 2014. However, she asserts that the next day, she learned that Inspector Sonney no longer worked for the agency and no other MSHA representatives had been present at the inspection or witnessed the violations. *Id.* On April 18, 2014, MSHA supervising attorney Cobb discussed the case with the MSHA District Director. Decl. of Mary Kathryn Cobb. After they discussed "the unavailability of the MSHA inspector who conducted the inspection … or any other MSHA representatives to testify on behalf of the agency," the District Director advised Cobb's office to pursue an amicable resolution with Cactus Canyon. *Id.*

Fritchey asserts that she contacted Carson again on May 7, 2014 and attempted to engage in settlement discussions. Decl. of Virginia E. Fritchey. On May 15, 2014, Fritchey sent an email to my office stating that the Secretary had made multiple efforts to contact Cactus Canyon, but had not received a settlement offer or confirmation that the operator was interested in settlement. Carson responded by email on May 21, 2014. Carson contended that he had communicated with the CLR, attorney Wolfe, and attorney Fritchey, none of whom seemed to have any of their predecessor's notes. Although he had "made the same specific settlement offer on at least 3 occasions," he contended that the Secretary had not taken a clear position on the matter. Fritchey asserts that Carson's email made clear he would not agree to any settlement unless it included stipulations incorporating his own interpretations of MSHA regulations 30 C.F.R. § 47.51 and § 56.14107(b) (pertaining to MSDSs and guarding violations), which were "unacceptable to MSHA." Decl. of Virginia E. Fritchey. Fritchey spoke to the MSHA District Director and recommended vacating all the citations due to Sonney's unavailability for hearing and her belief that further settlement negotiations would be unproductive. *Id.*

On June 2, 2014, Fritchey filed a motion stating that the Secretary had vacated the citations and unilaterally requesting dismissal of the case. In response, on June 5, 2014, Carson filed a Motion for Judgment requesting that I enter specific findings, dismiss five of the citations, modify the sixth, and leave the seventh as issued.[3] In subsequent correspondence with this

[1] To avoid ex parte communications, all email correspondence to and from my office was copied to the representatives for both parties.

[2] The email, which was transmitted on April 16, 2014, further explained, "Respondent is very familiar with Simplified Proceedings because the Secretary requested Simplified Proceedings in Respondent's last 2 contested cases. . . . [I]t seemed appropriate here because Respondent needs no discovery and the Secretary never seems to need Discovery."

[3] Specifically, Carson requested an order entering the following finding: "Respondent has in place an effective and observed policy, practice, and procedure to not allow access to any area (continued…)

office, Carson indicated that Cactus Canyon opposed dismissal because the company had been asked to waive its EAJA rights; because the Secretary's motion to dismiss suggested that dismissal would not affect the Secretary's interpretation of the mandatory safety standards or their applicability to the operator; and because of related concerns that the dismissal would be without prejudice to the Secretary, permitting the Secretary to reassert the same position in the future. Solicitor Fritchey responded that the dismissal would be a final decision and offered to delete the objectionable language regarding the interpretation of the safety standards if Cactus Canyon would join in the motion to dismiss. However, Carson declined to accept these terms. In an email transmitted June 13, 2014, he argued that the Secretary's motion to dismiss amounted to a settlement motion and stated:

> If this is a settlement, then the Court is required to review the settlement under §110(k) of the Mine Act. There is no settlement offered, except that the Secretary may join in Respondent's Motion for Judgment and the Court could review the Motion. . . . Respondent objects to the Secretary's Motion and Order of Dismissal current before the Court. The words "WITH PREJUDICE TO THE SECRETARY" must be added after the word "DISMISSED" if the Court is inclined to sign the Order of Dismissal. . . . If the Dismissal is granted and Respondent's Motion for Judgement and with attached Judgement [sic] are not entered, then Respondent will be filing an Equal Access to Justice Act filing in this same Court for the extensive legal time spent communicating, researching, and responding to the numerous representatives of the Secretary. This claim is not settled or waived. Agreeing to the Dismissal would appear to give the Secretary the substantial justification that it loses with a Dismissal.
>
> Perhaps we need a hearing with the Court on these conflicting motions and objections. Perhaps the Secretary should embrace the Respondent's Motion for Judgment, which will serve the health and safety of the miners and avoid the slam dunk attorney's fees claim.

On June 16, 2014, I denied Cactus Canyon's Motion for Judgment and dismissed the proceedings, recognizing the Secretary's unfettered discretion to vacate citations. *See RBK Constr., Inc.*, 15 FMSHRC 2099 (1993).

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[3] (…continued)
required to be guarded under § 56.14107(a) [the guarding standard under which five of the citations were issued] during operations. Respondent always de-energises [sic] the systems before access to any area required to be guarded." On the basis of this proposed finding, Carson requested that I reduce the gravity and negligence of one of the guarding citations. He requested dismissal of the other four guarding citations on grounds that each pertained to machine parts that would be inaccessible to miners because they were more than seven feet off the ground. Carson further requested dismissal of the citation that alleged Cactus Canyon did not have material safety data sheets (MSDSs) on hand for two chemicals. Carson premised this request on his position that the mandatory safety standards do not require brand-specific MSDSs. Carson did not request any modifications of the citation that alleged unsafe storage of gas cylinders.

Cactus Canyon subsequently filed an EAJA application on July 2, 2014 requesting $11,250 for legal fees expended in defending itself against the $700 penalty assessment and preparing the EAJA application. The Secretary timely filed an Answer[4] and Cactus Canyon timely filed a Reply, which requested an additional $2,500 for preparing the reply brief. Because the matter was fully briefed at this juncture, I denied the Secretary's subsequent motion for leave to file a Sur-Reply and declined to consider the additional written arguments submitted by both of the parties.

DISCUSSION

Congress passed the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, to ensure that certain eligible individuals and small organizations would not be deterred from seeking review of or defending against unjustified governmental action because of the expense involved in securing vindication of their rights. *Rushton Mining Co.*, 11 FMSHRC 759, 766 (May 1989). The EAJA, as implemented by the Commission in 29 C.F.R. Part 2704, permits an award of attorney fees and other expenses to an eligible party that prevails in an adversary adjudication against MSHA "unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust." 29 C.F.R. § 2704.100. Thus, one of the threshold eligibility requirements for an EAJA award is that the applicant must have been a prevailing party in the underlying litigation.[5]

The Secretary contends Cactus Canyon is not a prevailing party within the meaning of the EAJA because the underlying citations were vacated without a decision or agreement on the merits. Sec'y's Answer at 4-7. "Prevailing party" is a legal term of art referring to a "party in

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[4] Cactus Canyon argues the Secretary's Answer was filed late. Applicant's Reply Br. at 1. However, the Answer was timely filed pursuant to 29 C.F.R. § 2700.8(b), which extended the due date by five days because the EAJA application was served by "a method of delivery resulting in other than same-day service" (namely, by mail).

Cactus Canyon also objects to the Secretary's filing of an amended Answer the next day. Applicant's Reply Br. at 1. However, the sole amendment to the Answer was that Fritchey's attached declaration was changed to reflect that Inspector Sonney had not been *fired* from MSHA, but was *no longer working* for MSHA. The Secretary stated that this distinction is not relevant to the issue of Cactus Canyon's entitlement to an EAJA award. I agree. I find that the Secretary's amendment of the Answer was permissible because it did not affect the relevant substance of the Answer and carried no risk of prejudice to Cactus Canyon. I further reject as meritless Cactus Canyon's characterization of the Secretary's request to substitute the amended Answer as a "request to Destroy Evidence." Applicant's Reply Br. at 2. I also note that Cactus Canyon itself submitted an amended EAJA application (Carson's signature had been omitted from the original) in the very same filing in which it objected to the Secretary's attempt to amend the Answer, which was somewhat hypocritical on Cactus Canyon's part.

[5] A non-prevailing party can recover fees under § 2704.105(b) when the "demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision." This provision is inapplicable here, as Cactus Canyon has not alleged an excessive demand and no decision was issued.

whose favor a judgment is rendered." *Buckhannon Board & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 603 (2001) (citing Black's Law Dictionary).

The Federal Mine Safety and Health Review Commission has not directly addressed what defines a prevailing party or whether a party prevails within the meaning of the EAJA when the underlying case was dismissed without a decision on the merits. The Commission was presented with such a case in *Black Diamond Constr., Inc.*, 21 FMSHRC 1188 (Nov. 1999). In that case, the Secretary had initially imposed a small penalty for two violations, but settlement negotiations were unsuccessful, so the parties engaged in discovery and pre-trial preparation. The day before the hearing, the Secretary vacated the violations due to a dispute within MSHA over the legal basis for the violations. 21 FMSHRC at 1192. In the ensuing EAJA proceeding, the Commission did not expressly discuss why Black Diamond constituted a prevailing party. The Commission merely described the lack of justification for the Secretary's position and awarded fees on grounds that MSHA's pre-litigation conduct, including its failure to recognize the internal agency dispute earlier in the proceedings, did not justify forcing Black Diamond to shoulder the considerable costs of trial preparation. *Id.* at 1197-8. Thus, the *Black Diamond* decision suggested that an operator can achieve prevailing party status when the Secretary voluntarily vacates a citation after the operator has incurred considerable pre-litigation costs. *See also McLaughlin v. Sec'y of Labor*, 18 FMSHRC 2073 (Nov. 1996) (ALJ) (finding without discussion that EAJA applicant was prevailing party when Secretary had dismissed section 110(c) case against him after a hearing had been held).

Two years later, the Supreme Court issued a landmark ruling on the definition of "prevailing party." *Buckhannon*, 532 U.S. 598 (2001). Before *Buckhannon*, courts had routinely awarded attorney fees under the "catalyst theory," which confers prevailing party status when a plaintiff's lawsuit spurs the defendant to voluntarily change its conduct. *Id.* at 601-2. In *Buckhannon*, the Court rejected the catalyst theory and held that the types of case dispositions that give rise to prevailing party status are (1) an enforceable judgment on the merits, or (2) a court-ordered consent decree evincing judicial imprimatur of a material alteration in the parties' legal relationship. *Id.* at 603-4; *see also Aronov v. Chertoff*, 562 F.3d 84, 90-1 (1st Cir. 2009) (en banc) (explaining that a consent decree that meets the *Buckhannon* standard must be court-ordered and must provide for judicial oversight and enforcement). Although *Buckhannon* was litigated under the fee-shifting provision of the Civil Rights Act, the rule it enunciated has been applied to EAJA cases by all of the federal circuits that have considered the matter. *Jeroski d/b/a USA Cleaning Serv. & Bldg. Maint. v. FMSHRC*, 697 F.3d 651, 653 (7th Cir. 2012), *aff'g* 33 FMSHRC 2264 (Sept. 2011) (ALJ). See, for example, *Castaneda-Castillo v. Holder*, 723 F.3d 48, 57 (1st Cir. 2013); *Iqbal v. Holder*, 693 F.3d 1189, 1193-4 (10th Cir. 2012); *Green Aviation Mgmt. Co. v. FAA*, 676 F.3d 200, 202-3 (D.C. Cir. 2012); *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12, 16 (D.C. Cir. 2010); *United States v. Milner*, 583 F.3d 1174, 1196-7 (9th Cir. 2009); *Aronov*, 562 F.3d at 89; *Ma v. Chertoff*, 547 F.3d 342 (2d Cir. 2008) (per curiam); *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226, 1230 (10th Cir. 2008); *Li v. Keisler*, 505 F.3d 913 (9th Cir. 2007); *Morillo-Cedron v. Dist. Dir. for U.S. Citizenship & Immigration Servs.*, 452 F.3d 1254, 1257-8 (11th Cir. 2006); *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006); *Marshall v. Comm'r of Soc. Sec.*, 444 F.3d 837, 840 (6th Cir. 2006); *Vacchio v. Ashcroft*, 404 F.3d 663, 673 (2d Cir. 2005); *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 492 n.1 (D.C. Cir.

2003); *Brickwood Contractors v. United States*, 288 F.3d 1371, 1379 (Fed. Cir. 2002); and *Perez-Arellano v. Smith*, 279 F.3d 791, 795 (9th Cir. 2002).[6]

Thus, the prevailing rule in the federal courts is that the government's voluntary dismissal of a claim against a party does not confer prevailing party status under the EAJA. Cactus Canyon argues that it is a prevailing party despite *Buckhannon* and its progeny because, unlike in the majority of these cases, it achieved financial instead of equitable relief through the dismissal of the penalty proceedings. However, I find that this distinction is not relevant. Monetary and equitable relief are both forms of relief that can materially alter the parties' relationship, and thus both have the potential to satisfy *Buckhannon*'s prevailing party test.

As noted above, the Commission has not expressly addressed the definition of a prevailing party or adopted *Buckhannon*, but five administrative law judge decisions from FMSHRC have discussed the meaning of "prevailing party" in the wake of *Buckhannon* in various contexts. *North County Sand & Gravel, Inc.*, 36 FMSHRC 1214 (May 2014) (ALJ) (applicant was prevailing party after decision on merits); *Signature Mining Servs., LLC*, 35 FMSHRC 3540 (Dec. 2013) (ALJ) (applicant was prevailing party when judge reviewed and approved terms of settlement, which included Secretary's agreement to vacate one violation); *Left Fork Mining Co.*, 34 FMSHRC 2311 (Aug. 2012) (ALJ) (applicant was prevailing party when judge decided to vacate 104(b) order after holding hearing); *Sand Products, LLC*, 34 FMSHRC 1224 (May 2012) (ALJ) (applicant was not prevailing party when Secretary vacated citations); *USA Cleaning Serv. & Bldg. Maint.*, 33 FMSHRC 2264 (Sept. 2011) (ALJ) (applicant was not prevailing party when Secretary vacated contested order one week after it was contested), *aff'd sub nom. Jeroski d/b/a USA Cleaning Serv. & Bldg. Maint. v. FMSHRC*, 697 F.3d 651 (7th Cir. 2012). Three are relevant here.

In *Sand Products*, a mine operator sought an EAJA award after entering into a court-approved settlement agreement in which some citations were modified, some were paid as

[6] *But see Kholyavskiy v. Schlecht*, 479 F. Supp. 2d 897 (E.D. Wis. 2007). In that case, the District Judge acknowledged other circuits' application of *Buckhannon* in the EAJA context, but concluded on his own analysis that *Buckhannon* should not be applied. In his view, the EAJA stands alone among the federal fee-shifting statutes in that its purpose is not solely to encourage vindication of parties' rights, but is also to discourage government overreach. 479 F. Supp. 2d at 906-7. Characterizing the EAJA as an "anti-bullying" statute, he stated that barring EAJA awards where the government has voluntarily dismissed a case could permit the government to initiate and vigorously litigate unjustified actions for mischievous purposes and then avoid paying the other side's attorney fees by nonsuiting before a decision is reached on the merits. *Id.* at 906-7. However, this opinion was effectively overruled by the Seventh Circuit's decision in *Jeroski*. Moreover, there is no evidence that the concerns cited in *Kholyavskiy* have come into play in this case. This case involved minor safety violations that are routinely cited by MSHA, and the citations on their face provide substantial justification for the Secretary's actions in initiating the litigation. There is no indication of government overreach or mischievous purposes such as harassment, nor is it at all apparent that MSHA litigated the claim vigorously such as would have burdened the operator with the high cost of defending himself, as MSHA did not conduct discovery or prepare for a hearing and in fact appears to have let the case sit for about six months without taking any action on it.

assessed, and some were dismissed because the Secretary had vacated them. The judge found that the operator was not a prevailing party as to the vacated citations because there was no judicial relief on the merits for these citations. 34 FMSHRC at 1227. The judge explained that because he had no authority to review the Secretary's decision to vacate a citation, his dismissal of the citations in question was a procedural rather than substantive function. *Id.*

In *USA Cleaning*, a mine operator sought an EAJA award when the Secretary had vacated the contested order ten days after it was issued, before litigation had commenced. The judge first noted that the Commission's decision in *Black Diamond* suggested a judgment on the merits was not a necessary prerequisite to an EAJA award, but stated he was wary of concluding the Commission intended to confer prevailing party status when the Secretary promptly vacated the underlying violations. 33 FMSHRC at 2266. The judge went on to find that, regardless of *Black Diamond*, the Supreme Court's subsequent *Buckhannon* decision and its adoption by the D.C. Circuit supported a finding that the mine operator was not a prevailing party because a dismissal confers no judicial relief and does not change the relationship between the parties. *Id.* at 2266-7 (citing *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12 (D.C. Cir 2010)). Thus, the judge agreed with the finding in *Sand Products* that dismissing a case does not confer any relief on the merits when the EAJA applicant has already achieved relief through an unreviewable act of prosecutorial discretion. The judge's decision was upheld by the Seventh Circuit.

In *Signature Mining Servs.*, a mine operator sought an EAJA award after entering into a settlement agreement in which the Secretary agreed to vacate one order in exchange for the operator's withdrawing its contest of another. 35 FMSHRC at 3542. The judge considered these settlement terms when he considered and approved the operator's motion to withdraw. *Id.* After discussing the legal background of the prevailing party issue in detail, he concluded, "the 'critical fact' becomes the level of discretion a judge exercises in permitting parties to carry out the finalized terms of a settlement. . . . Therefore, an EAJA plaintiff achieves the functional equivalent of a consent decree in Commission proceedings where a judge substantively reviews settlement terms . . . and conditions the issuance of a dispositive order on the parties' decision to be bound by the terms." *Id.* at 3545-6.

All of these cases support a finding that Cactus Canyon Quarries was not a prevailing party within the meaning of the EAJA. My dismissal of the citations in the underlying proceedings did not indicate judicial consideration, oversight, and approval, and was not an exercise of judicial discretion that provided court-ordered relief on the merits of the case. Rather, the dismissal was a judicial recognition that the issues at hand had been mooted by the Secretary's grant of relief in exercising his prosecutorial discretion to vacate the citations. Although *Black Diamond* would suggest a different result, the instant case can be distinguished. In *Black Diamond*, the citations were vacated the day before the hearing after considerable discovery and trial preparation had taken place, and MSHA essentially recognized it had dropped the case at the last minute because its legal theory was not solid. 21 FMSHRC at 1192. In this case, by contrast, the citations were vacated before the costly and time-consuming processes of discovery and trial preparation had begun, and for reasons unrelated to the merits of the case, namely, MSHA's inability to find witnesses.

After considering all the points discussed above, I find that Cactus Canyon Quarries was not a prevailing party in the underlying proceedings and is not entitled to an EAJA award.

ORDER

It is ORDERED that Cactus Canyon Quarries' application for an award of legal fees under the Equal Access to Justice Act is DENIED.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 15, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2011-1037 A.C. No. 15-19069-253078
v.	
REX COAL COMPANY, INC., Respondent	Mine: Rex Strip #1

DECISION AND ORDER

Appearances: Joseph B. Luckett, Esq., U.S Department of Labor, Office of the Solicitor, Nashville, TN for the Secretary

John M. Williams, Esq., Rajkovich, Williams, Kilpatrick &True, PLLC, Lexington, KY for Respondent

Before: Judge Andrews

STATEMENT OF THE CASE

This case is before the undersigned Administrative Law Judge on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Respondent, Rex Coal Company, Inc. ("Respondent" or "Rex") 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 London, KY on April 10, 2014.

PROCEDURAL HISTORY

On November 23, 2010, a miner, Rhett Mosley, was involved in a fatal accident at Respondent's Rex Strip #1 mine. MSHA inspector David A. Faulkner was immediately dispatched to the mine. Faulkner, along with other MSHA personnel, conducted an investigation into the causes of the accident. On February 25, 2011, following that investigation, Faulkner issued three 104(a) citations and assessed a total penalty of $157,500.00. Respondent contested these citations and filed an Answer to the assessed penalties on July 28, 2011. The undersigned was assigned to the case on December 6, 2012. On April 10, 2014 a hearing was held on these matters. On May 22, 2014 the parties submitted Post-Hearing Briefs.

STIPULATIONS

The parties have entered into several stipulations, admitted as Parties' Joint Exhibit 1.[1] Those stipulations include the following:

1. Rex Coal Company, Inc. is subject to the Federal Mine Safety and Health Act of 1977.

2. Rex Coal Company, Inc. has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.

3. Rex Coal Company, Inc. is subject to the jurisdiction of The Federal Mine Safety and Health Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.

4. Rex Coal Company, Inc. operated the Rex Strip #1 Mine, I.D. No. 15-19069, in 2011.

5. The Rex Strip #1 Mine produced approximately 84,000 tons of coal in 2010.

6. Citation Nos. 8365953, 8365954, and 8365955 were properly issued by an authorized representative of the Secretary and are admissible.

7. A reasonable penalty will not affect Rex Coal Company, Inc.'s ability to remain in business.

(JX-1) (*see also* Transcript at 8).[2]

SUMMARY OF TESTIMONY

At approximately 12:00 a.m. on November 23, 2010, Rhett Mosley, was killed in an accident at Rex Strip No. 1 Mine. (Tr. 24-25,174). Mosley's shift ran from 6:00 p.m. to 5:00 a.m., but Mosely arrived at 5:00 p.m. on Monday November 22, 2010, to service equipment. (Tr. 24). Mosley worked as the second shift lube truck operator and, in that capacity, he would supply diesel fuel and lubricants to equipment as needed and in between shifts. (Tr. 24-25, 42, 175-176). This was to ensure there was proper maintenance throughout the production cycle. (Tr. 25).

The lube truck was a 1988 Mack Model DM-690-SX tandem axle truck with a rigid chassis and a large service bed. (Tr. 26, 101). The truck weighed approximately 55,000 pounds. (Tr. 101-102). In the back, enclosed in a van body, were tanks of lubricants, antifreeze, and grease. (Tr. 26, 40). Between the bed and the cab was a 1,000-1,100 gallon rectangular steel tank for hauling diesel fuel. (Tr. 26, 40). The truck had three axles, including a steering axle

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

[2] Hereinafter the transcript will be cited as "Tr." followed by the page number.

under the engine and two drive axles (a center and a rear axle) driven by the engine. (Tr. 101, 113). The truck was equipped with a service brake on each of the six wheels (two on each axle). (Tr. 26, 108). There were also four parking brakes on the ends of each rear axle. (Tr. 108). It also included an engine brake. (Tr. 27). The truck was used on both of the mine's shifts. (Tr. 47).

The incident at issue here occurred at the bottom of a roadway descending from the high splint coal seam elevation to the low splint coal seam elevation.[3] (Tr. 25, 181). The roadway from the high splint to the low splint was approximately 524 feet long, 21 feet wide, and at a 22% grade. (Tr. 29-30, 103, GX-2, 3, and 4). The roadway was dry. (Tr. 35). The grades were measured in segments, with the top of the hill having a 25% grade for 180 feet. (Tr. 102-103). There was also a 54-inch berm along the right side of the roadway which was the appropriate size. (Tr. 30, 34-35). There was a highwall or spoil area on the left side of the roadway. (Tr. 30, 34-35). At the beginning of the shift, Mosley had fueled equipment by going up and down this hill. (Tr. 76, 179, 186, 211-213).

Mosley was parked at the top of this roadway eating his lunch. (Tr. 26, 34, 77, 183). At the base of the roadway (the low splint area), the dozer operator James Muncy had created a service road so that Mosley could bypass the backfill left by the production crew and enter the production pit to service equipment.[4] (Tr. 27-28, 31-32, 34, 37-38, 181, 205-208, GX-7). Reaching this service road in the backfill required a left turn off of the roadway.[5] (Tr. 37-38). Muncy informed Mosley that the service road was open for his use. (Tr. 26, 31). Mosley turned his truck around, stopping on a slight incline, and started to move down the hill. (Tr. 183-184). Muncy saw Mosley travel down the hill at an unusually high speed. (Tr. 208-209). Mosely had a radio but did not say anything either before or during his descent. (Tr. 208-209, 211). As Mosely's truck descended toward the service road it lost control, encountered the berm, was "deferred" by the berm back into the roadway, and overturned on its left side. (Tr. 27, 31, 68-69, 76, 209). As the truck went down the hill it was rocking back and forth, even from the start. (Tr. 68, 209). The truck's front tires may have come off the ground. (Tr. 68, 209). Muncy watched as Mosley wrecked, including seeing the truck in the air. (Tr. 208-210). Mosely either jumped or was thrown from the vehicle and was pinned beneath the service bed area of the truck. (Tr. 27, 31-32).

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[3] The mine worked multiple coal seams. (Tr. 25). The uppermost coal seam was the high splint coal seam and the lowermost coal seam was the lower splint coal seam. (Tr. 25).

[4] James Wilson Muncy appeared at hearing and testified for Respondent. (Tr. 203). At the time of the hearing Muncy worked as a diesel mechanic for Curtis Equipment. (Tr. 203-204). During his career he worked for Big Branch Energy, Southern Coal, Sequoia, and Loving. (Tr. 204). He had worked on rock trucks, dozers, and coal loaders. (Tr. 204-205). Muncy believed he started work at the mine about four months before the accident. (Tr. 205).

[5] Muncy was moving material from the low splint pit to the roadway to eliminate the grade. (Tr. 27, 213). He had driven the dozer on the hill earlier, but had not left any rough patches because he backed down the hill. (Tr. 213-214).

James Chasteen was working in his excavator when the accident occurred.[6] (Tr. 180). He heard someone say "just a second, Slater. Someone needs to get down here now," twice. (Tr. 180). Chasteen knew something was wrong and ordered the dozer to go down the hill. (Tr. 180). He went over the hill where Mosley had traveled and saw the truck on its side. (Tr. 180). He did not actually see Mosley drive down the hill. (Tr. 188).

After the accident, Muncy called the MET, who was already on his way over. (Tr. 210). Muncy then went to check on the situation. (Tr. 210). Muncy and the MET walked over to the truck, eventually the MET found Mosley under the truck. (Tr. 210).

Inspector David A. Faulkner investigated this accident.[7] (Tr. 22). After being informed of the accident, Faulkner traveled to the mine site and gathered information for a preliminary report. (Tr. 22-23). To that end, he conducted informal interviews with second shift employees and observed the accident scene. (Tr. 23). He also scheduled for tech support, including Mechanical Engineer Terry Marshall to evaluate the truck, and arranged formal interviews.[8] (Tr. 23, 98). Marshall traveled the day of the accident and started his investigation the next day. (Tr. 98).

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[6] James R. Chasteen appeared at hearing and testified for Respondent. (Tr. 173). At the time of hearing, Chasteen had been working in the mining industry for seven years and was working as a truck driver for JW Resources. (Tr. 173-174). He had worked as a dozer operator, benchman, and on an excavator. (Tr. 173). At the time of the accident, he worked for Respondent. (Tr. 174). Chasteen met Mosley in August 2010, when Chasteen was hired as night shift foreman. (Tr. 174-175). As foreman, Chasteen would pre-shift the mine to make sure it was safe for the men at the start of the shift. (Tr. 175). He would also ensure all safety precautions were followed. (Tr. 175). He supervised three rock truck drivers and one lube truck driver. (Tr. 187).

[7] Inspector Faulkner appeared at the hearing and testified for the Secretary. (Tr. 19). At the time of hearing Faulkner worked as a surface CMI for MSHA and had held that position since March 5, 2006. (Tr. 19). Faulker received inspector and accident investigation training at the National Mine Safety and Health Academy. (Tr. 20). He had conducted two or three fatal investigations at the time of the accident (six or seven at the time of the hearing). (Tr. 66). Faulkner had worked in the surface mining industry for 17 years, including time as the owner/operator of contract augering companies, a foreman, a superintendent, production manager, dozer operator, auger operator, loader operator, and truck driver. (Tr. 20-22). In management positions he handled operations, hiring, and placement. (Tr. 21). In 1986-1987 Faulkner was certified as a Kentucky Surface Mine Foreman, a Tennessee Mine Foreman, and a Kentucky Mine Energy Technician (now lapsed). He also had a commercial driver's license since 1990. (Tr. 21-22).

[8] Terry Marshall was present at the hearing and testified on behalf of the Secretary. (Tr. 93, GX-17). At the time of the hearing, Marshall was a mechanical engineer for the Mechanical Engineering Safety Division of MSHA in the technical support and approval center. (Tr. 93-95). In that capacity he provided technical assistance for enforcement, obtained technical information, and evaluated that information. (Tr. 95). That included accident investigation, for which he was trained by MSHA. (Tr. 94-95). He had investigated 80 to 90 accidents, around 40 of which

(continued…)

When Inspector Faulkner and Marshall initially observed the truck, it was at the accident scene. (Tr. 23-24, 98-99). The truck was damaged on the left side cab door, in the service bed, and at the front axle. (Tr. 39). At some point the excavator was used to overturn the truck so Mosley could be removed. (Tr. 33-34, 38-41, GX-3, 4, 7, 8 & 9). On the 24th or 25th it was moved to a maintenance facility for further evaluation. (Tr. 24, 99). That evaluation lasted four or five days and took approximately two man-days to complete. (Tr. 24, 100, 160). Both Faulkner and Marshall examined the truck. (Tr. 23, 98). They spent a few days looking at the mechanical condition of the truck, including the engine brake system, the service brake system, the parking brake system, the seat and seatbelt assembly installation, and the tank volumes. (Tr. 99-100). Marshall worked with Faulkner to get maintenance information on the truck. (Tr. 100). Sometimes, Respondent's employees were present. (Tr. 100). Based on Marshall's findings, Faulkner concluded the investigation and completed a detailed report. (Tr. 23-24).

Three citations were issued based on the accident investigation. (Tr. 41). Citation No. 8365953 was a 104(a) citation issued under 30 C.F.R. §77.1607(b), which deals with mobile loading and haulage equipment, like the lubricant truck (GX-10). (Tr. 41-42). The cited section required mobile equipment operators to have full control of moving equipment. (Tr. 42). According to Faulkner, "full control" means being able to maintain and stop or direct a piece of equipment to the location as desired. (Tr. 67). The cited standard was meant to prevent operators from losing control of equipment and experiencing accidents. (Tr. 42). Inspector Faulkner cited this standard because Mosley was unable to maintain control of the truck, the truck overturned, and Mosley was involved in a fatal accident. (Tr. 42, 66-67).

To determine the level of control, information was gathered about the weight of the truck, the length of the road, the grade of the road, and the speed the truck would travel in various gears. (Tr. 67-68). Marshall found that the maximum engine RPM for the truck would be 2200 RPM. (Tr. 104). In addition, he determined the maximum speed for each gear setting on the truck. (Tr. 104-105). The first low gear would have a maximum speed of 3 miles per hour and the first high gear would have a maximum speed of 5 miles per hour.[9] (Tr. 69, 105, 238). The engine brake would help to maintain these speeds.[10] (Tr. 105). It was possible that, if the truck

[8] (…continued)
involved trucks. (Tr. 95-96). Marshall primarily worked with mobile surface and underground (equipment. (Tr. 95). Marshall received a Bachelor's degree at Ohio State University in 1996 and began working for MSHA in that year. (Tr. 94). He had worked in both the Mechanical Engineering Safety Division and Applied Engineering offices for MSHA. (Tr. 94). Since the 90's Marshall had been a member of the Society of Automotive engineers, a professional society that develops standards in the automotive, off-highway, and airline industries. (Tr. 96). In that society he is a member of a few committees within the construction, agriculture, and off-highway portion including a committee on braking standards for off-highway equipment. (Tr. 96-97).

[9] This particular truck had a Maxidine transmission and two shifters. (Tr. 238). One shifter went from one to five while the other was either low or high. (Tr. 238).

[10] An engine (or Jake) brake is an auxiliary brake separate from the service brake system that is used to control the speed of the truck. (Tr. 103-104). It prevents exhaust from escaping, creating compression in the engine and thereby slowing the truck. (Tr. 27). It essentially changes the function of the engine so that it absorbs power instead of providing power. (Tr. 103-104).

was moving 3 to 5 miles per hour in low gear, the truck could have traversed the hill in a controlled manner and made the left turn. (Tr. 71-72). However, Faulkner and Marshall did not know the exact speed of the truck. (Tr. 67, 80, 161). The field dozer operator, James Muncy saw the truck coming down the hill at a greater than normal speed. (Tr. 27-28, 67-68, 80, 105-106). Marshall considered several subjective factors (including braking capacity and when brakes were applied) and estimated that the truck was moving five miles per hour. (Tr. 161-162). High speed would be inconsistent with travel in low gear or the use of the engine brake. (Tr. 69, 105-106).

Based on the speed and the inability to stop, Faulkner and Marshall believed the truck was in neutral rather than in gear. (Tr. 69-71, 80, 105-106). The gear shift was found in neutral. (Tr. 70-71, 106). The truck could have been in neutral because of driver error or it could have slipped out of gear under load because it was not fully engaged. (Tr. 107). Faulkner did not see any indication that Mosley intended to put the truck in neutral and believed that the truck could have slipped out of gear at impact. (Tr. 70-71). However, Marshall believed the truck was in neutral before impact. (Tr. 106-107). If the engine slipped out of gear it would be difficult to get it back in because, in order to do so, the speed of the engine and the speed of the transmission components must be equal. (Tr. 107-108, 164). When a truck is in neutral, the engine brake will be ineffective to control the speed. (Tr. 107). The engine brake would also stall the engine if it popped out of gear. (Tr. 107). A stalled engine would make it more difficult to match the RPMs of the engine and transmission to return the truck to gear. (Tr. 108).

The cited standard requires equipment to be operated at speeds prudent and consistent with conditions of roadway grades, clearance, visibility, and traffic. (Tr. 70). Normally, the truck would be in gear. (Tr. 76). Faulkner conceded that it would not be prudent or consistent with conditions to place this truck in neutral. (Tr. 70). Faulkner would not have descended the hill in neutral because, based on the braking capacity of the truck, it could be dangerous. (Tr. 71). However, he believed that given all of the truck equipment, including the transmission, gears, and the engine brake, the truck should have been controlled, regardless of speed. (Tr. 75-76).

Foreman Michael Boggs also testified that neither he, nor anyone else at the mine, would go down the hill in neutral because it would be dangerous.[11] (Tr. 198-199). The other lube truck

[11] Michael Boggs appeared at the hearing and testified for Respondent. (Tr. 189). At the time of the hearing, Boggs had been in the surface mining industry for 30 years and worked for Kentucky Fuels as a grader. (Tr. 189-190). He had worked in every aspect of the surface mining industry including running equipment, acting as foreman, and working as an MET. (Tr. 189). He also had a commercial driver's license. (Tr. 200). Boggs received his surface foreman papers in 1999 and worked as a foreman for 10 years. (Tr. 190). At the time of the accident, Boggs worked as dayshift foreman for Regional Contracting at the subject mine. (Tr. 190-191). He started there in 2009 as the night shift foreman. (Tr. 191). As foreman, he would run the daily operations of the mine, set up job sites, coordinate with Chasteen, and confer with Terry Loving regarding maintenance, coal haulage, drilling, and blasting. (Tr. 191). Boggs was not working on the evening shift when Mosley was killed, but he knew Mosley when they both worked nights. (Tr. 192). Boggs had no notes from the day of the accident. (Tr. 200).

driver, Matthew Blanton, testified that he never drove down the hill in neutral because it would be easy to lose control of the truck.[12] (Tr. 240). Instead, he would travel down the hill in low first gear. (Tr. 238, 241-242). In low gear it was unnecessary to use the service brakes down the hill. (Tr. 238-239, 242). He would travel 3-5 miles per hour without application of the brakes. (Tr. 242). Blanton did not believe the engine brake would have been necessary in first low gear, but it was available if needed. (Tr. 239, 242-243). He might have used the service brakes to make the turn at the bottom of the hill, but was unsure because five miles an hour is not very fast. (Tr. 243).

The gravity was marked as having occurred and resulting in a fatal injury. (Tr. 43). This citation was marked as S&S for the same reasons. (Tr. 44).

The negligence was marked moderate because Respondent knew or should have known the truck would be required to travel up and down steep grades during operation. (Tr. 43). The truck was used in adverse conditions while carrying heavy loads. (Tr. 43). Also, Respondent was required to ensure all vehicles were maintained in a safe operating condition. (Tr. 43).

This citation was terminated when Respondent implemented an action plan and trained employees on safe and proper operation of all loading and hauling equipment on inclined roadways. (Tr. 44). This training occurred prior to the mine returning to operation. (Tr. 44).

Citation No. 8365954 was a 104(a) citation issued under 30 C.F.R. §77.1605(b), which required mobile equipment to be equipped with adequate brakes (GX-11). (Tr. 45-46). The standard was designed to allow an equipment operator to stop a piece of mobile equipment when needed. (Tr. 46). MSHA does not officially define "adequate." (Tr. 46). Inspector Faulkner believed that "adequate" meant the operator should be able to stop or control the vehicle with the brakes at any time and in any circumstance encountered during the mining process. (Tr. 46, 73-74). However, he believed the ability to stop had to be considered in light of all other factors, including speed, weight, and grade. (Tr. 73-74). Inspector Faulkner cited to this standard because the technical support evaluation conducted by Marshall found four of the five service brakes and three of the four parking brakes were ineffective or compromised. (Tr. 46-47, 79).

With respect to that technical support evaluation, Marshall found that that the wheels on the truck contained S-cam drum brakes. (Tr. 108-109, GX-20). This type of brake was applied with a foot pedal attached to the brake chamber. (Tr. 109, GX-20). The brake chamber was the actuator that applied and released the brake. (Tr. 110). In this truck, the steering axle brake was air applied and released solely by the pedal. (Tr. 110). The parking brakes on the rear axles could be air applied and released by pedal or spring-applied and air released. (Tr. 110). As air pressure was applied to the brake chamber, pushrods were extended from the brake chamber into the slack adjustor. (Tr. 109). The slack adjustor was connected to the end of the brake cam and

[12] Matthew Blanton appeared at hearing and testified for Respondent. (Tr. 230). At the time of the hearing he worked as a day-shift serviceman for Jean Coal Company, where he had worked for four years. (Tr. 231-232). This was his first job in the coal industry, after previously working as an ironworker. (Tr. 231). As a serviceman, he ran the lube truck, greased equipment, fueled, changed oil, changed filters, and kept everything running. (Tr. 231).

as the adjustor was applied, the linear motion of the pushrods was transmitted into rotational motion in the brake S-cam. (Tr. 109). As the S-cam was rotated during the brake application, it pushed on the rollers which in turn pushed onto the shoe. (Tr. 109-110). The shoe then contacted the drum, causing braking. (Tr. 110).

Marshall checked the size of the brake chambers to ensure that they conformed to the equipment manufacturer specification and to identify the readjustment limits for the brake chambers. (Tr. 114). The steering axle contained Type-24 size brake chambers, while the rear axles had Type-30 size brake chambers. (Tr. 113-114). There is a direct correlation between the size of the chamber and how much output force the pushrod applies to the slack adjustor. (Tr. 114). A pushrod is a metal rod that moves in and out of the brake chamber when the brake is applied. (Tr. 82-83). The pushrod stroke is the amount that the pushrod extends out of the brake chamber when the brakes are applied. (Tr. 82, 115). Pushrods need to be adjusted periodically. (Tr. 166). Brakes can go out of adjustment for multiple reasons including general wear, wear on the brake lining, and defective slack adjustors. (Tr. 166-167). The readjustment limit is the maximum allowable pushrod stroke before maintenance is required. (Tr. 115). To determine whether the readjustment limit has been reached, the pushrod stroke must be measured. (Tr. 117-118). This can be done by selecting a point on the pushrod or slack adjustor and then measuring it against a reference point. (Tr. 117). First a measurement between the pushrod or slack adjustor and the reference point is made with the brake released. (Tr. 117). Then the brake is applied and another measurement is taken from the same locations. (Tr. 117). The difference between the measurements is the pushrod stroke. (Tr. 117).

According to the Mack air brake manual, Type-24 brakes need to be readjusted when a pushrod stroke of one and three-quarter inches is measured. (Tr. 115). For a Type-30 brake chamber, the amount is 2 inches. (Tr. 115). For practical purposes, Marshall explained that on a Type-30 brake chamber, as the output forces the slack adjustor out from 0 to 2 inches, there is a relatively consistent output of force. (Tr. 115-116). Once the adjustor goes beyond 2 inches the output force exerted by the pushrod onto the slack adjustor starts to diminish. (Tr. 116). Eventually, the brake will reach full stroke limit, where the brake chamber can physically go no further and no force is applied. (Tr. 83, 116-117). The measurement between the re-adjustment limit and the point at which the brake completely bottoms out is known as the reserve stroke. (Tr. 130). For the Type-30 brake, the full stroke limit is 2.5 inches. (Tr. 116). So between 2 and 2.5 inches, the force exerted by the brake chamber on the slack adjustor starts to decrease quickly, but still has some braking capacity. (Tr. 116-117, 168). However, depending on the amount of reserve stroke, this limited capacity can disappear in high demand situations. (Tr. 168).

Marshall's report summarized the significant findings with respect to each of the brake ends or wheels.[13] (Tr. 123). On the left side steering axle, the pushrod stroke measurement was one and seven-eighths inch. (Tr. 119-120). Marshall did not believe the accident could cause the brakes to come out of adjustment. (Tr. 167). The contact surfaces of this brake drum were

[13] In preparing that report, Marshall was tasked with examining the mechanical condition of the truck and was not directed specifically to determine if the brakes were adequate. (Tr. 154). He was not asked to determine the status of the brakes under normal mining conditions. (Tr. 154). Normally, this truck would be driven in gear when going down the hill. (Tr. 155).

rusted and pitted. (Tr. 124-125, GX-22). This indicated that the brake shoe was not contacting the drum when the brake was applied but instead that a gap existed that allowed dirt to accumulate on the shoe and for the drum to rust. (Tr. 124-127, 139-140, GX-23). Therefore, this brake was not producing any braking force. (Tr. 127). A properly applied brake would be silvery and shiny from the shoe contacting the drum. (Tr. 126). This condition could have existed for a month or two. (Tr. 126). In addition, the S-cam rollers were unseated and lying loose in the brake assembly. (Tr. 124). While the roller condition could have occurred during the accident, Marshall still believed that the shoe was not contacting the drum, as shown by the rust. (Tr. 139-140).

On the right side steering axle, the pushrod stroke measurement was two and three-quarter inches. (Tr. 119). The readjustment limit was one and three-quarter inches. (Tr. 119). That meant that this particular brake was at full stroke measurement and was no longer applying any effective force to the slack adjustor. (Tr. 119, 127). This wheel end was ineffective. (Tr. 119). In addition, there was a slight grease-like contamination in the brake line. (Tr. 127-128, GX-25). Portions of the contact surface of the brake shoe, as well as the brake assembly, appeared wet. (Tr. 128). Friction between the shoe and the drum was the essential braking action provided by the assembly and this grease-like material would reduce the coefficient of friction between those components. (Tr. 128-129, 160). The grease-like material would not necessarily result in reports of slipping when braking. (Tr. 159). No testing was done on the grease-like material to determine the degree to which it affected braking. (Tr. 158, 160). Marshall believed this brake was severely compromised. (Tr. 129).

The left side center drive axle was out of adjustment with limited reserve stroke and had a grease-like contamination on portions of the brake-lining. (Tr. 129-130). The pushrod stroke measurement was for this wheel was two and a quarter inch. (Tr. 120). The readjustment limit here was 2 inches, so this brake was out of adjustment, close to full stroke limit, and in need of maintenance. (Tr. 120, 130). The degree to which this brake was compromised meant that under different operating conditions it would have different braking capacities. (Tr. 130). In low demand, static situations (80-90 PSI), there would be some braking but in high demand, dynamic situations (perhaps 120 PSI) the reserve stroke would be used up and the chamber would essentially be at full stroke limit.[14] (Tr. 130-131). The situation here placed a heavy burden on the brake, eliminated the stroke reserve, and lost braking force. (Tr. 132, 168-169). The main concern with this wheel was that the reserve stroke would disappear in high demand situations. (Tr. 133). However, this would not be a brake failure, because it was related to maintenance. (Tr. 170). In addition to the adjustment, the wheel had a grease-like contamination. (Tr. 132-133). This condition compromised the brake by reducing the coefficient of friction, though the degree to which this occurred was uncertain. (Tr. 133). However, the contamination was only on portions of the brake. (Tr. 133).

On the right side center drive axle, the pushrod stroke could not be measured because of the damage done to the brake chamber during the accident or recovery. (Tr. 120, 133). Therefore, the adjustment was deemed sufficient and effective. (Tr. 133-134).

[14] Static conditions would be sitting or moving slowly on level ground, like Respondent's pre-shift, while a dynamic situation would be moving on a 25% grade in neutral. (Tr. 131-132, 169).

On the left side rear drive axle, the pushrod stroke measurement was two and three-eighths inches. (Tr. 120). This brake chamber was out of adjustment and had no effective reserve stroke. (Tr. 121-122, 134). In a dynamic or even static condition, this brake chamber was not producing effective braking force. (Tr. 134, 137). This brake also had a significant amount grease-like contamination on the brake lining. (Tr. 134, GX-26). Some of the grease had been transmitted to the contact surface of the brake shoe, but not fully across the shoe's width. (Tr. 134-135, GX-27). Marshall believed this material was actually grease, while other fluids on the wheel were probably axle lubricant spilled during over lubrication of the bushings. (Tr. 135). The brake shoe was worn down to the hardware and showed general wear. (Tr. 136). The grease was not as serious an issue as brakes bottomed out in a static position. (Tr. 134-135).

On the right side rear drive axle, the pushrod stroke measurement was over two inches. (Tr. 120). However, because of the damage to the brake chamber, it was difficult to measure the stroke. (Tr. 121). Marshall was unable to air-release the brake and instead had to use a mechanical release to measure the 2 inches. (Tr. 121). However, the mechanical release under reports the pushrod stroke as compared to an air release. (Tr. 121). Despite this, Marshall felt that this brake could not provide effective force to the slack adjustor and had no reserve stroke. (Tr. 121-122, 137, 168-169). This would be true even in static conditions. (Tr. 137).

The truck also had parking brakes on each of the wheel positions on the two rear drive axles. (Tr. 137-138). The parking brakes used the same assemblies as the service brakes, they were simply applied differently; the service brakes were applied to all six wheels with a pedal and the parking brakes were applied to the four rear wheels with a manual push-pull control valve or with automatic pressure gauges.[15] (Tr. 137-138, 167-168). Therefore, the problems found in the service brakes also apply to the parking brakes. (Tr. 138).

In addition to these findings, Marshall inspected other aspects of the brakes but found they did not play a significant role in the accident. (Tr. 122-123, 157-158). Specifically, Marshall inspected the brake lining thickness on each wheel to determine their condition. (Tr. 122). Three of the six had lining segments below accepted limits and an additional segment was at the minimum level. (Tr. 122). Marshall also measured the internal brake drum diameters. (Tr. 122-123). This showed that two of the six brakes were worn below the recommended limit. (Tr. 123). In high demand brake situations, this condition would allow heat to be absorbed into the brake drum at a quicker rate than normal, causing the drum to expand. (Tr. 123). This essentially increases the pushrod stroke requirement. (Tr. 123).

The engine brake was adequate. (Tr. 72, 104, 157, 165). Faulkner testified that if it had been engaged it might have slowed the truck. (Tr. 72).

In general, Marshall believed the brakes on the truck were in poor condition and would have been inadequate when the truck was in neutral on a 25% grade. (Tr. 139, 146, 148). At 5 miles per hour under heavy load, the total braking capacity could have been as low as 20%. (Tr. 143, 146). Most of that braking would come from the right center or rear drive axles. (Tr. 146).

[15] The automatic application occurred if the brakes fell to 40 PSI. (Tr. 138-139). The pressure came from the primary and secondary air systems on the truck. (Tr. 139). The actual pull valve would move when the brakes automatically applied. (Tr. 139).

Despite this, Faulkner and Marshall agreed there was no catastrophic failure of the brakes; instead this was a maintenance issue. (Tr. 78, 169-170). The brakes would not have to be at 100% capacity to be adequate, but the necessary capacity would depend on the conditions. (Tr. 155-156). If Marshall gave every benefit of the doubt (including ignoring lining contamination) the highest capacity would be 50% of service braking. (Tr. 147). He felt at least 50% capacity would be needed to compensate for the 25% grade, even without considering the 500-foot distance. (Tr. 147, 156, 163). Without 50% capacity Mosley had no opportunity to control the truck. (Tr. 164-165). Marhsall testified that to control the truck here, the brakes would need around 75% capacity to allow the driver time to react. (Tr. 163-164). He also believed that brakes with no significant maintenance issues would have stopped a truck going 15 to 20 miles an hour in neutral on a 25% grade. (Tr. 148). The size of the truck and the fact that it was in neutral was more relevant here than the speed. (Tr. 161-162). However, it is possible for a truck to move so fast that even 100% brake capacity could not control it. (Tr. 162).

Marshall opined that when the truck drove up the hill during the shift with the engine brake controlling the speed and the service brakes providing additional deceleration, the braking capacity was adequate. (Tr. 165). However, this was a low demand situation. (Tr. 165). A low demand situation can become a high demand situation if the brakes were applied long enough. (Tr. 166). According to Marshall, if the truck were in first gear and traveling at around five miles per hour under control of the engine brake, 20% capacity would have been adequate to decelerate the truck and control it on the grade. (Tr. 143, 156-157, 161-162). However, deceleration and control are different and control would depend on how the brakes were applied. (Tr. 156-157). By second high gear, the engine brake would not have controlled the truck. (Tr. 143-144).

Marshall believed that Mosley attempted to apply the service brake during the accident. (Tr. 14, 151). First, use of the brakes would have been a natural reaction for any driver. (Tr. 144). Second, the brake pressure when first inspected after the accident was 75 PSI in both tanks, and there was no damage to the truck that would cause air loss. (Tr. 144-145, GX-28). This was shown in both the primary and secondary air systems. (Tr. 145). Therefore, the air was depleted by the driver applying and releasing the service brake during the accident. (Tr. 144). Marshall tested the air systems after the accident, and they were able to maintain 100 PSI for a considerable time. (Tr. 145-146). If the brakes had not been applied, they would have been over 100 PSI, maybe up to 110 or 120. (Tr. 146). He did not believe the reduction in air pressure occurred during the accident, because of the nature of the accident damage. (Tr. 146).

Marshall also believed that Mosley manually applied the parking brake. (Tr. 151-152). This was because under normal conditions, the parking brake is spring-applied, air released. (Tr. 152). Therefore, during operation, when the brake is released, air pressure is released into the brake chambers. (Tr. 152). The damage done during the accident in one of those brake chambers would have allowed this pressure into the open air if released. (Tr. 152). If the brake was released when the accident occurred, the air would have been released down to 45 PSI and then shut off when the brake automatically applied preventing further release. (Tr. 152-153). Instead it was at 75 PSI, indicating that the parking brake was applied before automatic application. (Tr. 152-153).

Marshall did not know when Mosley applied the brakes. (Tr. 164). Instead of applying the brake, he may have attempted to first put the truck back in gear. (Tr. 164). It was possible he was already free-rolling when attempting to use the brakes. (Tr. 164).

Respondent's witnesses testified that the brakes were adequate. (Tr. 181, 185-187, 194-196, 199-200, 222-224). Terry Loving testified that the Burnette Combs Contracting Company adjusted the brakes on the lube truck on October 25, 2010.[16] (Tr. 47, 223, RX-F). Combs was a mechanic who owned a repair company and he would come to the mine as repairs were needed. (Tr. 224). Loving did not know how or why Combs had adjusted the brakes. (Tr. 224).

In addition, Loving, Chasteen, Blanton and Boggs testified that Mosley did not complain about any problems with the brakes on the truck at that time or any other time. (Tr. 181, 194, 222, 240). Chasteen testified that he had also driven the truck up and down the hill without any issues stopping. (Tr. 185). He had never driven the truck down the hill in neutral. (Tr. 185-186). He would drive the truck at 15-25 miles an hour on flat surfaces and 5-10 miles per hour on a grade, depending on the grade. (Tr. 187). At no time while Chasteen was working for Respondent did anyone complain about the brakes on the truck. (Tr. 185). Loving testified that his son Andrew drove the truck for several months and did not complain about the brakes. (Tr. 222-223). Blanton had driven the truck earlier in the day and performed the pre-operational examination but found no problems or slippage with the brakes at that, or at any, time. (Tr. 194, 236, 238-240). In fact, Blanton had traveled the hill more than 10 times, including once (or perhaps twice) on the day of the accident. (Tr. 235-237). Blanton did not recall problems with the brakes in making the turn onto the service road. (Tr. 237-238). The turn could be made without difficulty even if the brakes were not used. (Tr. 239). Boggs had driven the truck four or five times, as recently as two weeks before the accident, without complaint. (Tr. 194, 200). Bogg's son had worked on the lube truck for a year and a half without any complaints regarding the brakes. (Tr. 194-196, 199).

The gravity was marked as having occurred and resulting in a fatal injury. (Tr. 48). This citation was marked as S&S for the same reasons. (Tr. 48).

The negligence was marked moderate because the operator knew or should have known that the truck would be used in adverse conditions, hauling heavy loads on steep grades where high demand would be placed on the service brakes. (Tr. 46-47). The fact that the brakes were adjusted on October 25 did not affect this evaluation because, based on Faulkner's experience, including driving this type of truck, brakes will be used at different times and in different

[16] Terry Glenn Loving appeared at hearing and testified for Respondent. (Tr. 215). At the time of the hearing, Loving was the superintendent of underground mines for Harlan Cumberland Coal Company, a single mine. (Tr. 215-216). Loving had worked in the mining industry since 1967, starting at the age of 13 on the surface helping his father. (Tr. 216). He worked for several different coal, logging, and trucking companies over the years. (Tr. 216-217). At those locations he worked as a foreman, president, and owner at various companies. (Tr. 216-217). He then worked for Respondent as superintendent of underground mines (before switching to Harlan Cumberland) (Tr. 217-218). Harland Cumberland and Respondent are sister companies owned by Joe Bennett. (Tr. 218). Loving had worked for Bennett since 1984. (Tr. 219).

situations. (Tr. 47-48, 86-87). Brakes may have to be adjusted as often as once a day, depending on the durability, the conditions, and the amount of travel. (Tr. 48). Other than the left side steering axle, Marshall could not say how long the conditions existed. (Tr. 140).

The citation was terminated when Respondent implemented a new written procedure to provide for regular mobile equipment examination, maintenance, and repairs to the braking system of each machine. (Tr. 49). This termination occurred on 2/25/2011 at 8:25 a.m. (Tr. 49).

Citation No. 8365955 was a 104(a) citation issued under 30 C.F.R. §77.1606(a) (GX-12). (Tr. 49). This standard requires that a competent person make an examination of mobile loading and haulage equipment prior to that equipment being placed into service. (Tr. 49). Any safety defects observed must be recorded and reported to management. (Tr. 49). Faulkner believed that a competent person was someone with experience and expertise in operating a piece of equipment. (Tr. 49). The standard was designed to ensure that any safety defects on the loading and mobile haulage equipment were corrected before use. (Tr. 50). Faulkner did not conduct pre-operational examinations as an inspector, though he observed them. (Tr. 82). Further, when he was a truck driver, he did not conduct pre-operational examinations. (Tr. 82). Marshall was also familiar, though he never conducted one himself. (Tr. 141). Marshall was vaguely familiar with the regulations regarding pre-operational checks, but he typically defers to enforcement for interpretation. (Tr. 141).

Faulkner issued Citation No. 8365955 because the pre-shift examination of the lube truck was inadequate. (Tr. 52-53). Respondent provided checklists to the equipment operator to use in examining mobile equipment. (Tr. 50, 53) (GX-13). The checklist included walk-around items, engine compartments, fluid levels, tires, fire extinguishers, operator's compartments, glass, loose objects, seatbelts, brakes, horns, back up alarms, and similar items. (Tr. 50, 193). The operator was not required to keep this checklist by MSHA. (Tr. 50-51). However, Faulkner would expect the examiner to check whatever was included on the list for an adequate pre-operational check. (Tr. 86). Blanton testified that this process takes five to ten minutes. (Tr. 232-233, 243). Once the equipment operator conducted the examination the checklist was kept in the truck and, at the end of the shift, he placed the form in the foreman's mailbox. (Tr. 50, 87, 182, 195, 234). The foreman reviewed these forms at home and then filed them in the mine office the next day. (Tr. 53, 182, 195). Blanton testified that he would also update the record. (Tr. 233). There was no mechanic on the second shift and if a defect was found, the equipment operator would fix it himself. (Tr. 92, 182-183, 195). If it could not be fixed, it would be parked and a note would be left on it so it could be fixed the next day. (Tr. 92, 182-183, 195-196). There were three mechanics on the day shift to correct problems. (Tr. 196). Faulkner believed this method was inadequate because the foreman was not aware of the pre-shift examination reports until after the shift was over. (Tr. 54). However, Chasteen and Blanton testified that the foreman would be notified immediately if something needed to be repaired. (Tr. 182, 233).

In addition to the improper and untimely method of reporting, four specific conditions were listed on the citation for not being included in the pre-operational reports. (Tr. 54). The first was that five of the six brake chamber pushrods were out of adjustment. (Tr. 54-56). The second item listed was that three of the four parking brakes were out of adjustment. (Tr. 55). Respondent's checklist included a notation for brakes. (Tr. 55).

According to Faulkner, Respondent, and most operators, conducted the pre-operational check of the brakes by driving the truck onto a slight grade and checking to see if the brakes were adequate. (Tr. 57, 77-78, 81, 84). Boggs had both conducted and seen Mosley conduct an examination of the lube truck. (Tr. 193-194). To check the brakes, Mosley (and Boggs) would look at the gauges for air pressure and then apply the brakes to see if they actually worked. (Tr. 193). Blanton also conducted examinations and he testified he checked the brakes by putting it in gear, easing out the clutch, and seeing if the brakes held. (Tr. 232-233). Andrew Loving, not Boggs, had tasked trained Mosley and Blanton on pre-operation checks of the lube truck. (Tr. 193-194, 201, 232). Boggs' signature was only included on the documents attesting to the task training because a foreman needed to fill out the form. (Tr. 201-202, GX-30). Chasteen was familiar with pre-operational examinations but was not familiar with how brakes were checked. (Tr. 184-185). He had never observed his drivers conduct an examination. (Tr. 187).

These methods would not have found the cited conditions with the brakes. (Tr. 55). Marshall described these as a low demand situation. (Tr. 131). However, Marshall believed that the conditions he observed with the brakes could have been found prior to the accident. (Tr. 141). The pushrod strokes could have been found if Respondent used two people to check brakes or one person with a device to apply the brake. (Tr. 55-56, 142-143, 201). To do this, one person would watch the pushrod strokes outside of the truck while another person in the cable applied the brakes to 80-90 PSI. (Tr. 56, 142). A measurement would be made before the application and then again afterward, showing the pushrod travel. (Tr. 56-57, 142). No disassembly of the truck would be needed. (Tr. 56-57, 152). This was how MSHA checks the brakes. (Tr. 56). Boggs knew how to measure the pushrod stroke. (Tr. 200-201). He was not required to know how to do so under DOT regulations, but had measured the stroke during DOT inspections. (Tr. 201). To detect the grease-like material, the wheel or the drum could have been removed for inspection. (Tr. 141). In fact, Marshall only saw this material after someone removed the wheels from the truck. (Tr. 168).

Faulkner was not aware of any operators who used the pushrod stroke measurement in a pre-shift and would not write a citation for failure to do so. (Tr. 83-86). Faulkner did not do his pre-operational checks in this way. (Tr. 84). As long as the brakes were checked according to the form, the exam would be sufficient. (Tr. 86). Instead, the basis of the citation was that the brakes were compromised and nothing was recorded. (Tr. 85).

The third item listed was that the seatbelt was improperly installed. (Tr. 57, 148-149). Specifically it was mounted on the floor in two places. (Tr. 57-58, 148-149, GX-14, 15, & 16). Because of the air ride seats, the seatbelts should have been attached to the seat on one side. (Tr. 59, 149). This would allow force transmitted in an accident to be absorbed into the floor and for the seatbelt to move with the seat. (Tr. 149-150). The incorrect installation would have been very uncomfortable for an operator because, in conjunction with the air ride seat, it would have presented a choking effect or a cinch on the lap each time the truck met rough terrain. (Tr. 60, 149-150). Further, the belt would have to restrain the mass of the seat, in addition to the operator's weight. (Tr. 150). Marshall believed that in this particular incident, the improper installation could have caused a premature failure of the seatbelt. (Tr. 149-151). Faulkner believed proper installation could have lessened the severity of the injury. (Tr. 89, 150-151).

Boggs testified that the mine had a policy requiring a seatbelt to be worn if one was installed. (Tr. 201). There was no indication of how long the seatbelt was in this condition. (Tr. 60).

Inspector Faulkner conceded that MSHA regulations only require seatbelts when there was a danger of overturning and rollover and that this truck would not require a seatbelt. (Tr. 60-61, 88-89). This truck would not be cited for failure to install a seatbelt. (Tr. 89). However, Faulkner believed an inoperative seatbelt would still be a safety defect. (Tr. 60-61). It was included in the citation because Respondent's pre-operational checklist had a notation for seatbelts, indicating Respondent believed that a seatbelt would affect safety. (Tr. 60-61).

The fourth item listed was a crack in the windshield that existed prior to the accident. (Tr. 61). Inspector Faulkner learned the windshield was cracked in a collision with another piece of equipment on a previous shift, possibly on November 19, through interviews with employees, but he did not see it. (Tr. 61-62, 89). Chasteen testified that it had occurred a few days prior to the accident. (Tr. 187). The crack in the windshield, especially at night with glare from lights, could affect visibility. (Tr. 63). However, Inspector Faulkner was not sure of the severity of the crack or whether it would affect visibility. (Tr. 63, 90). He did not know if the crack contributed to the accident. (Tr. 90). A crack is not necessarily an uncommon thing, however Boggs must have thought the crack was severe enough to constitute a hazard because he recorded it on his on-shift examination on November 20, 2010. (Tr. 62-64, 90). That was the reason it was included in the citation. (Tr. 62-64). Chasteen would have instructed his drivers to record a cracked windshield in their pre-operational examinations. (Tr. 187-188).

These four conditions were not recorded in the pre-operational record. (Tr. 53). This failure to include the conditions led to the accident because violations were allowed to exist during operation without correction. (Tr. 64). The Secretary submitted several pre-operational examination checklists running over 41 pages from 9/16/2010 to 11/22/2010. (Tr. 51, GX-13). All of the documents were signed by Blanton (the last one on 11/22/2010) and Mosley (the last one on 11/19/2010). (Tr. 51-52). The information included on these forms was kept in a log by Respondent. (Tr. 196-198, RX-D). These pre-operational forms indicated that in the weeks before the accident, the windshield was in good condition, that the seatbelt was adequate, and that the brakes were adequate. (Tr. 53, 55, 63, 77-78). Only one entry, a flat tire, was included in the log book for the lube truck from 10/13/2010 to 11/19/2010. (Tr. 197-198). Respondent did not provide a checklist for the second shift on 11/22/2010. (Tr. 52). In fact, MSHA officials were not sure if a pre-operational examination was conducted on the subject shift, though it was possible that the documents were lost or damaged in the accident. (Tr. 52-54, 80). It was also possible, given that defects only needed to be recorded if observed, that Mosley had conducted a pre-operational examination and simply found no defect. (Tr. 87-88). Regardless, the foreman found conditions during on-shift examinations even on days when the pre-operational sheets indicated that nothing was wrong with the truck or were when such forms were not available. (Tr. 53, 88). Specifically, Foreman Michael Boggs included the cracked windshield on his 11/20/2010 on-shift. (Tr. 62). Blanton also testified that occasionally equipment would need to be serviced during a shift, but that those things were simply fixed and not recorded in the record. (Tr. 234-235).

MSHA did not tell operators how to do a pre-operational examination, though guidance was available. (Tr. 80-81, 91). MSHA resources include guidelines, information on how to conduct an examination, and information from other operators. (Tr. 91). Faulkner was not sure if there was information about brakes. (Tr. 91-92). Blanton testified that no one from MSHA was ever present when he conducted a pre-shift examination of brakes. (Tr. 235). However, he had seen MSHA inspectors do so in the same manner that he did: by placing the truck on a small incline (if possible), putting it in gear, and then easing out the clutch to see if it held. (Tr. 235-236). He did see an MSHA inspector conduct a pushrod stroke, though only once in four years. (Tr. 243). No one from MSHA ever told Blanton to conduct a pushrod stroke. (Tr. 236, 243-244).

The gravity was marked as having occurred and resulting in a fatal injury. (Tr. 64). This citation was marked as S&S for the same reasons. (Tr. 65).

This citation was marked as moderate negligence because the operator knew or should have known that the cited conditions existed and were not being reported or corrected. (Tr. 64).

This condition was terminated when management established a written procedure to assure that adequate pre-operational checks were conducted on mobile equipment and to ensure that any safety defects identified were corrected prior to operation. (Tr. 65). Termination occurred on 2/25/2011 at 8:30 a.m. (Tr. 65). Faulkner was not involved in the abatement meetings; those were conducted by the CMIs documented on the 5023 forms, Argus Brock and Brad Sears. (Tr. 86, 227, 241). Loving and Blanton attended the retraining and Loving reviewed the action plan. (Tr. 225-227, 241, RX-G) The plan was created by Ronnie Brock, a consultant for the Respondent's owner, Joe Bennett, and Hobie Hayes, the surface superintendent for Respondent. (Tr. 227-229, 243-244). Hayes conducted the training. (Tr. 227, 229). According to Loving and Blanton, there was no mention of measuring the pushrod strokes on the truck in the training. (Tr. 227, 241).

At the time of the accident, Terry Loving was the superintendent for Respondent's underground mines. (Tr. 220, 228). He was also the owner of two contracting firms, Jean Coal Company and Regional Contracting. (Tr. 219, 221-222, 228). Jean did surface mining for the companies controlled by Bennett, Blue Diamond Coal Company, and Arch Mineral. (Tr. 219). Respondent paid Jean by the ton. (Tr. 221). Regional Contracting was an employee leasing business and all of Jean's employees were on the Regional payroll. (Tr. 222). While the instant mine was a surface mine, Loving was familiar with it. (Tr. 219-220). In fact, Jean Coal was a contract miner at the mine and Loving visited the location every day.[17] (Tr. 219-220). At the time of the hearing, this was Jean's only surface job. (Tr. 221). MSHA was aware that Respondent's employees were paid through a different company. (Tr. 43). However, Inspector Faulkner testified that Mosley was Respondent's employee. (Tr. 24). He was not sure if Jean or Regional would meet the qualifications to be identified by MSHA as a contractor. (Tr. 43).

[17] Loving testified at length as to his daily routine. (Tr. 220-221). He would travel to Respondent's underground mine in the morning and conduct pre-shifts and maintenance. (Tr. 220). At 4:00 he would go to the surface job for two or three hours and travel with the foreman. (Tr. 220-221). He usually arrived at shift change so he could talk to the dayshift foreman and employees to see how operations were going. (Tr. 221).

Loving conceded that at the time of the accident, Jean did not have its own contractor ID. (Tr. 228). However, at the hearing it had a mine ID number. (Tr. 228). Regional, which Loving testified employed Mosley, had a contractor ID at the time of the accident. (Tr. 229-230).

FINDINGS AND CONCLUSIONS

I. CONTENTIONS OF THE PARTIES REGARDING CITATION NO. 8365953

With respect to Citation No. 8365953, the Secretary asserts that Respondent violated 30 C.F.R. §77.1607(b), that this violation resulted in a fatal injury to one miner, that the violation was S&S, and that it resulted from moderate negligence. (GX-10)(*Secretary's Post-Hearing Brief* at 16-18). The Secretary also asserts that a penalty of $52,500.00 is appropriate. (*Secretary's Post-Hearing Brief* at 28-30)

Respondent concedes that it violated the cited standard. (*Respondent's Post-Hearing Brief* at 6). However, it avers that its actions would be better characterized as showing "low" or "no" negligence. (*Id*. at 6-7). Further, Respondent believes a reduction in the proposed penalty is appropriate. (*Id*. at 17-18).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CITATION NO. 8365953

The findings of fact in this, and all other sections of this decision, 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. Respondent Violated 30 C.F.R. §77.1607(b).

On February 25, 2011, Inspector Faulkner issued a 104(a) Citation, No. 8365953, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> As the result of a fatal accident investigation at the Rex Coal Company, Inc.'s Rex Strip #1, it has been determined that the operator of the 1988 Maroon Mack tandem lube truck, Model DM-690-SX, VIN #1M2B198C2JW002173, failed to maintain control as the lube truck was descending the mine haul road, connecting the Highsplint and Lowsplint coal seam work areas. The Section of mine haul road measured to have an overall grade of 22 percent. Mobile equipment

> operators shall have full control of the equipment while it is in motion. The overturned truck resulted in fatal injuries to the operator.

(GX-10).

The cited standard, 30 C.F.R. §77.1607(b) ("Loading and haulage equipment; operation"), provides the following:

> (b) Mobile equipment operators shall have full control of the equipment while it is in motion.

30 C.F.R. §77.1607(b).

"In order to establish a violation of section 77.1607(b), the Secretary must only demonstrate, by a preponderance of the evidence, that the operator failed to maintain full control of a piece of equipment while it was in motion." *Clintwood Elkhorn Mining Co. Inc.*, 35 FMSHRC 365, *4 (Feb. 2013). The Secretary is not required to prove any causal or contributing factor for that loss of control; the fact that a piece of equipment was not in control is sufficient to meet the standard. *Id*. Further, in *Dynamic Energy, Inc.*, the Commission affirmed Judge Bulluck's determination that a plain meaning for the term "full control" exists within the scope of this standard. 32 FMSHRC 1168,1172 (Sept. 2010). Specifically, the Commission noted:

> Section 77.1607(b) requires a mobile operator to have "full control [of the equipment] while it is in motion." "Full" is defined as "being at or of the greatest or highest degree" and the "greatest or highest potential." *Webster's Third New International Dictionary* 919 (1993). "Control" is defined as having "the power … to guide or manage." *Id.* at 496… Based on the terms of the standard, the judge's construction of requiring the highest degree of control to guide or manage a vehicle appears well supported by the plain language. Hence, we conclude that the judge's determination that full control means having "complete power to guide or manage" accords with the plain meaning of the standard.

Id. Therefore, the question at issue is whether the equipment operator, Mosley, failed to maintain complete power to guide or manage the truck while it was in motion, regardless of the cause of that failure.

At hearing, Secretary's counsel presented credible evidence to show that Mosley failed to maintain complete control over the lube truck. Inspector Faulkner testified that Mosley's truck traveled down the roadway at greater than normal speeds (while in neutral), encountered a berm, rocked back and forth, and then overturned. (Tr. 27-28, 31-32, 67-69, 80). Further, Marshall testified that Mosley attempted to control the truck with the brakes but was unable to do so. (Tr. 14, 144-146, 155). Even Respondent's witnesses testified that Mosley did not appear to be capable of guiding or managing the truck as it descended the hill. (Tr. 208-210). All relevant witnesses agree that, as a result of this lack of control, the lube truck overturned. (Tr. 27, 31, 68-69, 76, 209). No evidence was presented that could be used to show that the truck was under control.

In its brief, Respondent conceded that, based on the evidence provided at hearing, the violation was validly issued. (*Respondent's Post-Hearing Brief* at 6). In light of this fact, and the evidence presented, I find that Respondent violated 30 C.F.R. §77.1607(b).

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

Inspector Faulkner marked the gravity of the cited danger in Citation No. 8365953 as having resulted in a "Fatal" Injury to one person. (GX-10).

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

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

30 C.F.R. §100.3(e).

The event against which the instant standard, 30 C.F.R. §77.1607(b) is directed is injury resulting from loss of control of mobile loading and haulage equipment. (Tr. 42). As discussed *supra*, the evidence shows that Mosley was unable to control the lube truck as it descended the hill and, as a result, the truck overturned. (Tr. 42, 66-67). In short, the danger the cited standard was designed to prevent was realized. Further, this incident, unfortunately, actually resulted in the gravest possible outcome: the death of a miner, Rhett Mosley. (Tr. 24-25, 179). Therefore, I find that the cited violation resulted in fatal injuries to one miner. I will now turn to the S&S designation in this matter.

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

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

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

With respect to the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. §77.1607(b).

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. As discussed *supra*, the cited condition contributed to the danger of an accident involving mobile loading and haulage equipment. Mosley's inability to control his equipment resulted in the truck overturning. (Tr. 42, 66-67). That incident was undoubtedly a safety hazard.

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 was not only reasonably likely to contribute to an injury, but in fact resulted in one.

Under *Mathies,* the fourth and final element that the Secretary must establish is that there was a "reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC 1573, 1574 (July 1984). As discussed *supra*, the injury at issue here was extraordinarily grave as Rhett Mosley was killed. Therefore, the fourth prong of *Mathies* is met.

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

3. Respondent's Conduct Displayed "Moderate" Negligence.

In the citation at issue, Inspector Faulkner found that the operator's conduct was moderately negligent in character. (GX-10).

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 reserved for situations where there are "considerable" mitigating circumstances.

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

With respect to the instant violation, the evidence shows that Respondent's foreman should have known that the truck could not be controlled. As will be discussed at length regarding Citation Nos. 8365954 and 8365953 *infra*, Marshall testified that the brakes on the truck involved in this accident were totally inadequate for use at the mine. (Tr. 46-47, 79, 139, 146, 148). Respondent's agents, including witnesses Chasteen and Boggs, were tasked with coordinating maintenance of mobile equipment. (Tr. 50, 87, 175, 182, 195, 234). It was the responsibility of Respondent's foremen to ensure that unsafe equipment was repaired or removed from service. (Tr. 182, 233). In this case, inadequate brakes on the lube truck were not repaired and, when Mosley foreseeably used that truck on a steep incline, the brakes failed, resulting in a loss of control. (Tr. 54-56). Therefore, Respondent's negligence led to the cited accident.

Respondent's negligence is somewhat mitigated by the fact that the inadequate brakes were not marked on the pre-operational examination forms. (Tr. 53-54). Mosley (and the other truck driver, Blanton) were tasked with actually performing these pre-operational examinations. (Tr. 50, 53, 86). These men were not agents of Respondent. Because the inadequate brakes were not included on any of the submitted pre-operational forms, Respondent's foreman may have, inaccurately, believed that the brakes were sufficient. While they should have known the brakes were inadequate, their failure to ensure that proper brake maintenance had been performed was mitigated. Therefore, I find that a finding of "moderate" negligence was appropriate.

Respondent argued that it was not negligent or that there was considerable mitigating circumstances necessitating a finding of "low" negligence. (*Respondent's Post-Hearing Brief* at 6-7). However, Respondent's arguments are not compelling.

First, Respondent argues that Mosley was solely responsible for the accident. (*Respondent's Post-Hearing Brief* at 7). It asserts that Mosley's actions in failing to place the truck in gear directly led to his death. (*Id*.). It also notes that because Mosley was solely responsible, it could not have been aware of the conditions surrounding the accident; all relevant actions occurred within the truck in the seconds before the accident. (*Id*.). Therefore, it argues, Mosley's actions were not known or imputable to Respondent. (*Id*.). Respondent further avers that none of its actions before the accident in any way contributed to the accident and that there was nothing it could have done to prevent the accident. (*Id*.). In short, Respondent asserts that

any negligence in this matter occurred solely as a result of Mosley's actions and that that negligence can, in no way, attach to the company.

Respondent is correct that Mosley's actions in placing the truck in neutral likely contributed to the danger here and that, as a non-supervisor, his actions were not imputable to Respondent. However, that is largely irrelevant. This accident was not primarily caused by Mosley's actions. As the Secretary's expert witness on brakes testified, even if the transmission was in neutral, the brakes should have been capable of maintaining control of the truck. (Tr. 148, 163-164). While Mosley's descent may have been safer (perhaps entirely without incident) if the truck were in gear, Mosley should have been able to maintain control of the truck solely with the brakes. It was Respondent's responsibility to ensure that Mosley was mechanically capable of controlling the truck and its failure to meet that responsibility was negligent.

Respondent also argued that Mosley was not Respondent's employee, that it did not provide supervision to Mosley, and that none of Respondent's employees were present at the time of the accident. (*Respondent's Post-Hearing Brief* at 7-8). It even argued that there was "no proof" Respondent owned the truck. (*Id*. at 7). It is well-established under Commission case law that that Secretary may hold an operator liable for all violations which occur at its mine, whether committed by its employees or contractors. *See Mingo Logan Coal Company*, 19 FMSHRC 246, 249 (February 1997), aff'd 133 F.3d 916 (4th Cir. 1998) (table)(citations omitted); *Secretary v. Twentymile Coal Company*, 456 F. 3d 151 (D.C. Cir. 2006); *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310 (4th Cir. 2008). The Secretary may cite an operator, a contractor, or both for violations committed by the contractor. *Mingo Logan Coal Co.*, *supra* (*citing Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989)). "An operator challenging the Secretary's enforcement discretion bears a heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on a misunderstanding of the law." *Vandalia Resources, Inc.*, 25 FMSHRC 390, 396 (Jul. 2003)(ALJ Melick) citing *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (January 1998).

In the instant matter, Respondent was responsible for the safety and health of the miners working at Rex Strip #1. Even if none of the miners working at the mine were Respondent's employees, Respondent was still required to ensure a safe working environment. As the Fourth Circuit noted, "[p]recluding owner-operator liability for independent contractor violations would encourage owners to use contracts as a means of insulating themselves from safety regulations." *Speed Mining, Inc.*, 528 F.3d at 315. That is essentially what Respondent is attempting to do here: hire only contractors and then claim that it could not "know" about safety issues at its mines because it had no employees. This appears to be a transparent attempt to circumvent the Mine Act.

Also, Respondent's assertion that it did not have any employees, equipment, or control over the mine it ostensibly owned does not match the evidence. The level of separation between the three companies involved (Respondent, Jean, and Regional) was more ambiguous than Respondent implies. Specifically, the owner of Regional and Jean, Terry Loving, was also the superintendent of Rex Strip #1 mine and an employee of Respondent. (Tr. 219-222, 228). Loving supervised the work of the foreman and was responsible (as both the owner of two companies and an employee of another) for ensuring the safe working conditions. Loving, as an

agent of Respondent, should have taken actions to ensure that all equipment was safe and the foremen were properly supervising maintenance.[18] As a result, the nature of the contractor relationships in this matter is irrelevant and in no way mitigates Respondent's negligence.

4. Penalty

In this matter, the Secretary proposed a penalty of $52,500.00 for Citation No. 8365953. The Commission has affirmed that ALJs are not bound the Secretary's proposals. *Sec. v. Performance Coal Co.*, (Docket No. WEVA 2008-1825 (8/2/2013) (*see also* 30 U.S.C. §820(i) and 29 C.F.R. §2700.30(b)). The Commission also held that, although there is no presumption of validity given to the Secretary's proposed assessments, substantial deviation from the Secretary's proposed assessments must be adequately explained using §110(i) criteria. (*Id*. at p. 2). (*see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000)). However, having affirmed the Secretary's determinations in all respects, no deviation is necessary. In fact, the proposed penalty is appropriate under the Act.

Respondent argued that the penalty should be lessened in accordance with the mitigating circumstances it raised in regards to negligence. (*Respondent's Post-Hearing Brief* at 17). Having found that no change in the negligence designation was necessary, I decline to modify the penalty. Further, Respondent noted that it had little history of violations or extensive fines either at this mine or any other mines. (*Id*. at 18). In fact, it noted that it had a total, at all of its operations, 277 cited violations for a total proposed penalty of $98,047.00. (*Id*.). While I considered Respondent's violation history in approving this penalty, it was not my chief concern. In this matter, the large penalty is justified primarily by the intense gravity of the accident. Rhett Mosley was killed while at work. Respondent was negligent and responsible. A substantial penalty is justified both to reflect that gravity and to provide an incentive to Respondent to care more deeply for the miners it employs.

Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $52,500.00 with respect to this violation.

III. CONTENTIONS OF THE PARTIES REGARDING CITATION NO. 8365954

With respect to Citation No. 8365954, the Secretary asserts that Respondent violated 30 C.F.R. §77.1605(b), that this violation resulted in a fatal injury to one miner, that the violation was S&S, and that it resulted from moderate negligence. (GX-11)(*Secretary's Post-Hearing Brief* at 16-18). The Secretary also asserts that a penalty of $52,500.00 is appropriate. (*Secretary's Post-Hearing Brief* at 28-30)

[18] Beyond the legal ramifications of the principal-contractor relationship described here, from a practical standpoint the distinction was meaningless. Terry Loving was both an agent of Respondent and a contractor of Respondent. When Loving gave an order to an employee at Rex Strip #1 mine, was he doing so as Owner of Regional? Owner of Jean? Or Employee of Respondent? How is a miner (or a judge) supposed to make such a fine distinction? I find that making such a distinction is both impossible and unnecessary.

Respondent asserts that it did not violate the cited standard. (*Respondent's Post-Hearing Brief* at 8-11). It further avers that if a violation existed it was not S&S and that its actions would be better characterized as showing "low" or "no" negligence. (*Id*. at 11-15) Further, Respondent believes a reduction in the proposed penalty is appropriate. (*Id*. at 17-18).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CITATION NO. 8365954

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 C.F.R. §77.1605(b).

On February 25, 2011, Inspector Faulkner issued a 104(a) Citation, No. 8365954, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> As a result of a fatal accident investigation at Rex Coal Company, Inc.'s, Rex Strip #1, it has been determined that the brakes were inadequate on the 1988 Maroon Mack tandem lube truck, Model DM-690-SX, VIN #1M2B198C2JW002173. The brake evaluations indicated that five of the six service brakes, along with three of the four parking brakes were ineffective or compromised. Five of the six service brake chamber pushrod strokes for the truck exceeded the maximum allowable pushrod stroke readjustment limit. This condition contributed to the occurrence of this fatal accident.

(GX-11).

The cited standard, 30 C.F.R. §77.1605(b) ("Loading and haulage equipment; installations"), provides the following:

> Mobile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.

30 C.F.R. §77.1605(b).

The Commission has held that to prove a violation of this standard, the Secretary is not required to determine the precise cause of braking inadequacy or to provide an elaborate mechanical explanation for it. *Wilmot Mining Company*, 9 FMSHRC 684, 688 (Apr. 1987). If the Secretary is able to establish a "demonstrated inadequacy," under "normal operating capacity" then the burden is met. *Id*. In *Wilmot*, the Commission upheld a violation under 30 C.F.R. §77.1605(b) when a piece of equipment that should have braked within five to ten feet under normal operating capacity instead stopped at 36 feet or more. *Id*. This was upheld even though the technical cause of the excessive braking distance was uncertain. *Id*.

Without citing to *Wilmot*, Judge Feldman articulated a standard that is helpful for determining if there was a demonstrated inadequacy in brakes, stating the issue was whether, "a truck's service brake system is capable of stopping and holding the vehicle with its typical load

on the maximum grade it typically travels." *Nally & Hamilton Enterprises, Inc.*, 31 FMSHRC 689, 695 (June 2009)(ALJ Feldman).

In the instant matter, Inspector Faulkner credibly testified that the truck weighed about 55,000 pounds when loaded. (Tr. 101-102). Further, he testified that the truck was loaded with lube, diesel, and other industrial products at the time of the accident. (Tr. 26, 40). The evidence showed that Mosley drove the truck down a 22% incline (25% at the top). (Tr. 29-30, 102-103). Further, Respondent's witnesses testified that they regularly traveled on this same roadway. (Tr. 185, 222-223, 235-237, 240, 243). Marshall credibly testified that while descending the incline, Mosley applied the brakes. (Tr. 151). Significantly, he noted that the brakes should have been able to control the truck under the conditions present at that time. (Tr. 148, 163-164). However, the brakes were unable to control the truck and a fatal accident occurred. (Tr. 42, 66-67). Taken together, this evidence shows that the brakes here were demonstrably inadequate. The service brakes were unable to stop the truck under its typical load on a grade that it typically traveled. As a result, I find that Respondent violated 30 C.F.R. §77.1605(b).

The Secretary presented copious, credible evidence to establish the reasons why and to quantify the degree to which the cited brakes were inadequate. Specifically, Marshall testified that he physically examined the brakes and determined their level of wear and the pushrod stroke adjustment. (Tr. 114). Based on his analysis, he determined that the brakes were out of adjustment and also contaminated with a grease-like substance. (Tr. 119-133, 139-140, 158-160). He determined that the braking capacity was likely 20% and no more than 50%. (Tr. 143, 146-147). He further opined that the brakes needed to be at least at 75% capacity for the conditions present. (Tr. 163-164). While this evidence is instructive, it is not strictly necessary for my determination of whether Respondent violated the instant standard. The brakes were demonstrated to be inadequate, the exact cause and technical degree of this inadequacy, as the Commission noted in *Wilmot*, is not needed. This evidence is relevant primarily because it shows the mechanical condition of the brakes conforms to the practical inadequacy observed.

Respondent argued that the truck was not being operated under normal mining conditions. (*Respondent's Post-Hearing Brief* at 8). It cited *Nally &Hamilton*, for the proposition that the adequacy of the trucks brakes must be determined under normal mining conditions. (*Id*. at 8-9). Specifically, Respondent noted that this truck was not in gear and that, under normal mining conditions, it would be. (*Id*. at 9). It noted that even Faulkner and Marshall conceded that if the truck was in gear, the brakes would have been adequate to stop the truck. (*Id*. at 9-10). It argues that the brakes were sufficient for their intended purpose and that it should not be held responsible for any unintended use. (*Id*. at 10). In short, Respondent argues that "normal mining conditions" are those at which all other safety precautions are being followed.

Respondent's argument fails for several reasons. First, Respondent seriously misapprehends the meaning of "normal mining conditions" in the context of the cited standard. Respondent seems to believe that "normal mining conditions" means that the braking capacity should be considered while presuming otherwise flawless conditions at the mine. Essentially, Respondent asks that instead of considering the facts presented, I consider an imaginary mine wherein everything is "normal" except for the brakes. "Normal", in Respondent's conception does not consider other problems, issues, or mistakes that are likely to, or even foreseeably

could, occur at an operating mine. I decline the invitation to engage in complex, fanciful hypotheticals. Instead, I look to the standard, relevant case law, and the facts.

As the Commission stated in *Wilmot* (and Judge Feldman echoed in *Nally & Hamilton*), the relevant factors to consider in determining whether brakes are adequate are their efficacy under typical load and on typical grades. Therefore, in the context of the cited standard, these are the determining characteristics of "normal mining conditions." In the instant case, a truck was under normal load on an incline it normally traveled. The driver attempted to engage the brakes, but they were not adequate to stop the truck. (Tr. 14, 151-152). As a result, under relevant normal mining conditions, the brakes were inadequate.

Second, Respondent places far too much reliance on the fact that the truck was not in gear. It is true that all of the witnesses who spoke on the issue testified that they would not take the truck down the incline in neutral. (Tr. 70, 76, 198-199, 240). However, mines are dynamic, industrial working environments with many hazards that, while not expected, are foreseeable. Here, it was foreseeable that a driver would descend the incline out of gear or that the truck would accidentally slip out of gear. In such a foreseeable situation, the driver would need to rely on the brakes. As was shown here, the driver was unable control the truck with only the brakes and therefore, they were inadequate.

More importantly, the standard and relevant case law do not state anything about other mechanical features of the truck. The question is whether the *brakes* can hold or stop the truck under normal load and on a normal grade, not if the brakes *and transmission* acting together can do so. As Marshall testified, adequate service brakes alone would have been able to stop the truck even if the truck was not in gear. (Tr. 148, 163-164). Here there was essentially a test of whether the brakes alone could stop the lube truck under normal load and on normal grade and the brakes failed. Unfortunately, it was not a test.

At its most basic, the issue presented here is that the facts have clearly established that two factors went into this accident. First, the truck was in neutral. Second, the truck had inadequate brakes. Either one of these factors was insufficient, on its own, to cause the accident. Respondent's argument seems to be that because one of those factors (the neutral truck) was not its responsibility that it can now evade responsibility for the other factor, over which it had control. However, there is no reason, legal or otherwise, to allow that result. Respondent must meet its responsibilities even if others, arguably, have not. This citation is valid.

2. <u>The Violation Resulted in a Fatal Injury to One Miner And Was Significant And Substantial In Nature</u>

Inspector Faulkner marked the gravity of the cited danger in Citation No. 8365954 as having resulted in a "Fatal" Injury to one person. (GX-11). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §77.1605(b) is directed is an accident or injury resulting from inadequate brakes on mobile equipment. (Tr. 46). As discussed *supra*, the Secretary's witnesses credibly testified that the brakes installed on the lube truck were

inadequate. (Tr. 139, 146, 148). In particular, the brakes were unable to stop the truck as it descended a 22% grade under normal load. (Tr. 139, 146-148, 156, 163-165). Further, the brakes were technically insufficient with respect to maintenance and pushrod adjustment. (Tr. 119-133, 139-140, 158-160). As a result of these inadequate brakes a fatal injury occurred to one miner, Rhett Mosley. (Tr. 48). Therefore, the evidence supports and I affirm the Secretary's findings with respect to gravity.

With respect to S&S, the first element - the underlying violation of a mandatory safety standard - it has already been established that Respondent violated 30 C.F.R. §77.1605(b).

With respect to the second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. As discussed *supra*, the cited condition contributed to the danger of an accident involving mobile equipment. The brakes were unable to stop or control the truck as it descended the hill. (Tr. 139, 146-148, 156, 163-165). This inability to control the truck undoubtedly contributed to a discrete safety hazard, in this matter an accident involving mobile equipment.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. In this matter, the hazard contributed to was realized and an injury occurred as a result. Therefore, the third prong of *Mathies* is met.

The fourth element -that the injury be of a reasonably serious nature - was also met. Unfortunately, the actual injury sustained was a fatal injury to Rhett Mosley. (Tr. 48). As a result, the fourth prong of *Mathies* is met.

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

Respondent argued that the cited condition should not be assessed as S&S because there was no "substantial evidence," to support such a finding. (*Respondent's Post-Hearing Brief* at 13 *citing Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)(citations omitted)). To wit, Respondent asserts that the determination of S&S must be considered in light of "continued normal mining operations," and that, in this situation, there were "abnormal" mining conditions. (*Id*. at 14 *citing United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1130 (Aug. 1985)). The abnormal condition cited by Respondent was the driver losing control of the truck by operating in neutral. (*Id*.). It noted that Marshall stated the truck should have been driven in gear. (*Id*.) It further opined that Marshall conceded that if the truck were in gear that the brakes would have controlled the vehicle. (*Id*. at 14-15). Therefore, it argues that the condition of the brakes did not in any way contribute to this accident and that Mosley's actions alone caused his death. (*Id*. at 15).

Respondent's understanding of "continued normal mining operations" is deeply flawed. When a judge is tasked with determining whether a citation is S&S in terms of "continued normal mining operations" the question is whether, in the future, a hazard will exist if conditions continue in the same manner. For example, in the case cited by Respondent, the Commission considered a citation for violation of a ventilation plan. *United States Steel Mining Co., Inc.*, 7

FMSHRC at 1126. There, the Commission determined the citation was S&S because the violation of the ventilation plan was reasonably likely to result in a methane explosion. *Id*. at 1129-1130. It made this finding despite the fact that at the time of the violation, the methane levels at the mine were well-below the explosive range. *Id*. at 1130. This was because under "continued normal mining operations" a rapid build-up of methane could reasonably be expected. *Id*. Further, under continued normal mining operations, a continuous miner would be reasonably expected to cause an ignition. *Id*.

Therefore, when considering "continued normal mining operations" the judge determines what could be reasonably expected in the future, without assuming any intervening, unscheduled abatement. Sometimes, as in the *U.S. Steel* case described above, this analysis results in the judge finding that while a hazard does not currently exist, one is reasonably expected in the future. Sometimes, the analysis results in a finding that a current violation could not contribute to a hazard or would resolve itself before a hazard could occur in the future.

However, the analysis of "continued normal mining operations" never requires a judge to ignore presently existing hazards because those hazards are not "normal." In this case, there were inadequate brakes, as described *supra*. This condition contributed to the hazard at issue here and that hazard was realized. I do not need to imagine a hypothetical truck that was in gear because the Respondent believes that such a hypothetical truck would be more normal. When, as here, a hazard is realized and an accident occurs there is no need to look into the future to determine what would be reasonably expected. The facts speak for themselves.[19]

Finally, the issue of the truck being in gear is a distraction in this matter. Under the *Mathies* formulation the issue is whether a violation *contributes* to a safety hazard. In this matter the truck had inadequate brakes. (Tr. 139, 146, 148). It was also being driven in neutral. (Tr. 69-71, 80, 105-106). Both of these conditions contributed to the hazard here. The hazardous contribution of one condition does not negate the hazardous contributions of any other conditions.

3. Respondent's Conduct Displayed "Moderate" Negligence

In the citation at issue, Inspector Faulkner found that the operator's conduct was moderately negligent in character. (GX-11). The evidence supports this designation.

With respect to knowledge, the factual situation presented here is substantially similar to that in Citation No. 8365954. Specifically, a supervisor within in the definition provided in 30 U.S.C. 802(e) and *Martin Marietta Aggregates*, *supra*, should have known that the brakes were

[19]Anything more than cursory consideration of Respondent's argument exposes its inherent absurdity. Respondent argues that this situation was not "normal" because the truck was not in gear. But why stop there? "Normally" brakes are well maintained and adequate for use. Therefore, under Respondent's conception of normal, this citation could not be S&S because the lube truck would normally have reliable brakes. Why consider the actual truck when we have a perfectly adequate imaginary one? In fact, under Respondent's formulation, any hazard would be an "abnormal" mining condition that could not give rise to an S&S designation. Such an analysis cannot be seriously considered.

inadequate. As will be discussed *infra*, Respondent, through its foremen, was required under relevant standards as well as company policy, to ensure the adequacy of the brakes by supervising pre-operational examinations. Marshall testified that the condition of the brakes was readily ascertainable through examination of the pushrod stroke. (Tr. 55-56, 142-143, 201). Further, as has already been shown, the truck would not have been capable of stopping on a typical grade while under a typical load. Therefore, the condition would have been discovered on an *adequate* practical examination.[20] However, none of Respondent's employees ever determined the condition. (Tr. 53-54). The foremen's conduct in failing to ensure adequate brakes is imputed to Respondent. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. The evidence showed that the brakes had been adjusted on October 25, 2010. (Tr. 47, 223, RX-F). While this was nearly a month before the accident, it does show that Respondent took some effort to ensure the brakes were adequate. Further, the brakes were sufficient when the truck was in gear and had functioned adequately while in gear earlier on the day of the accident. (Tr. 76, 179, 186, 211-213). This might have allowed Respondent to erroneously, but not completely unreasonably, believe the brakes were adequate. Having found that there were some mitigating circumstances, I affirm the Secretary's designation of "moderate" negligence.

Respondent argued that it was entirely without negligence or, at most, there were substantial mitigating circumstances. (*Respondent's Post-Hearing Brief* at 15-16). In addition to the October 25 brake adjustment and the fact that the brakes functioned earlier in the day, Respondent raised several other issues. (*Id*.). In particular, Respondent noted that the brakes were adequate under "normal mining conditions." (*Id*. at 16). This argument is rejected for the same reasons it was rejected regarding S&S, *supra*. The accident at issue here occurred under "normal mining conditions," and there is no reason to consider a theoretical scenario where the circumstances are more favorable to Respondent.

Respondent also argued that the method suggested by the Secretary for determining the adequacy of the brakes, the pushrod stroke measurement, was not an accepted practice. (*Respondent's Post-Hearing Brief* at 16). It noted that even Faulkner conceded that he had never seen anyone conduct this type of examination. (*Id*.). This issue will be discussed at length *infra*, regarding Citation No. 8365955. At this time it is sufficient to note that the technical way in which Respondent determined the adequacy of brakes is irrelevant. The brakes here were in fact inadequate. Any competent examination conducted by Respondent should have determined that this was the case. The fact that Respondent did not conduct a pushrod stroke measurement is not the negligent action; it is that it failed to adequately ensure safe brakes in *some* way, pushrod measurement or otherwise.

Finally, Respondent once again noted that none of the miners working at the mine were its employees. (*Respondent's Post-Hearing Brief* at 16). For the reasons discussed with respect to Citation No. 8365953, this argument is rejected.

[20] This issue will be discussed at length in the discussion of Citation No. 8365955

4. Penalty

In this matter, the Secretary proposed a penalty of $52,500.00 for Citation No. 8365954. Having affirmed the Secretary's determinations in all respects, no deviation is necessary. In fact, the proposed penalty is appropriate under the Act. Once again, Respondent argued that the penalty should be lessened in light of the modifications it suggested as well as its citation history. (*Respondent's Post-Hearing Brief* at 17-18). However, given the fact that no modifications were made and the extreme gravity of this violation, a substantial penalty is justified. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $52,500.00 with respect to this violation.

V. CONTENTIONS OF THE PARTIES REGARDING CITATION NO. 8365955

With respect to Citation No. 8365955, the Secretary asserts that Respondent violated 30 C.F.R. §77.1606(a), that this violation resulted in a fatal injury to one miner, that the violation was S&S, and that it resulted from moderate negligence. (GX-12)(*Secretary's Post-Hearing Brief* at 22-28). The Secretary also asserts that a penalty of $52,500.00 is appropriate. (*Secretary's Post-Hearing Brief* at 28-30)

Respondent asserts that it did not violate the cited standard. (*Respondent's Post-Hearing Brief* at 11-13). It further avers that if a violation existed it was not S&S and that its actions would be better characterized as showing "low" or "no" negligence. (*Id*. at 11-15) Further, Respondent believes a reduction in the proposed penalty is appropriate. (*Id*. at 17-18).

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CITATION NO. 8365955

1. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That 30 C.F.R. §77.1606(a) Was Violated.

On February 25, 2011, Inspector Faulkner issued a 104(a) Citation, No. 8365955, to Respondent. Section 8 of that Order, Condition or Practice, reads as follows:

> The results of a fatal accident investigation at the Rex Coal Company, Inc.'s, Rex Strip #1 revealed that an inadequate pre-operational examination was conducted for the 1988 Maroon Mack tandem lube truck, Model DM-690-SX, VIN #1M2B198C2JW002173, on Monday 11-22-2010, prior to the accident. During the investigation and interviews the following safety defects were revealed to exist on the truck, without recording or correcting the conditions: (1) Five of the six service brakes chamber pushrod strokes for the truck exceeded the maximum allowable pushrod stroke readjustment limit. (2) Three of the four parking brakes were ineffective or compromised. (3) The operator seat belt was improperly installed. (4) Both sections of the front windshield were cracked prior to the accident. An adequate pre-operational examination would have revealed these defects affecting safety.

(GX-12).

The cited standard, 30 C.F.R. §77.1606(a) ("Loading and haulage equipment; inspection and maintenance"), provides the following:

> Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.

30 C.F.R. §77.1606(a).

Evidence that equipment defects existed at the time of a pre-operational examination but were not corrected or recorded is sufficient to establish a violation of this standard. *See e.g. Speed Mining, Inc.*, 2007 WL 2746692, *14 (Aug. 27, 2007)(ALJ Weisberger); and *Alsea Quarries*, 33 FMSHRC 1840, 1853-1854 (Aug. 2011)(ALJ Barbour) (the citation in this matter was issued under 30 CFR § 56.14100(d), which is substantially similar to 30 C.F.R. §77.1606(a) for the relevant issues here).

In the instant matter, inspector Faulkner credibly testified that several equipment defects existed on the lube truck before the shift on which the accident occurred and that these defects were not recorded. Specifically, he noted that five of the six service brakes on the truck were inadequate. (Tr. 54-56). Because they used the same brake assembly as the service brakes, three of the four parking brakes were also inadequate. (Tr. 55). Faulkner knew that at least one of the brakes, the one on the front left steering axle, had been defective for a month or two. (Tr. 126). Faulkner also noted that the operator seat belt was improperly installed. (Tr. 57, 148-149). The belt was attached to the floor of the truck in two places. (Tr. 57-58, 148-149, GX-14, 15, & 16). This created a choking or squeezing hazard and also put an excessive burden on the seatbelt, as it had to hold the entire weight of the seat in an accident. (Tr. 60, 149-150). Finally, Faulkner learned from interviews that both sections of the front windshield were cracked and had been cracked for several shifts. (Tr. 61-62, 89, 187). Respondent's pre-operational examination form included areas for the examiner to check the brakes, the seatbelt, and the windshield. (Tr. 55, 60-61, 187-188). However, none of the conditions discovered by Faulkner were recorded in any of the pre-operational forms. (Tr. 53-54). As a result, I find that Respondent violated 30 C.F.R. §77.1606(a).

In its brief, Respondent asserted several arguments to support its claim that this citation was invalid. (*Respondent's Post-Hearing Brief* at 11-13). However, those arguments are not supported by the evidence.

First, Respondent noted that it had no reason to suspect that the brakes were inadequate. (*Respondent's Post-Hearing Brief* at 12). Respondent pointed to Blanton's testimony regarding the way in which pre-operational examinations of the brakes were conducted. (*Id*.). It explained that the method used by the Secretary, the pushrod stroke measurement, was not the accepted method to examine brakes. (*Id*.). In fact, Faulkner conceded that normal mining operations did not require such an examination, that he did not expect operators to use the pushrod stroke

measurement, and that he would not issue a citation for failure to do so. (*Id*. at 12-13). Similarly Respondent noted that there was no way to determine whether there was "grease-like" material on a brake without removing the wheel. (*Id*. at 12). It asserts that the Secretary would not require a wheel to be removed during a pre-operational examination. (*Id*.). Finally, in this matter the Secretary did no tests to determine the degree to which the grease-like material affected the brakes. (*Id*.).

Respondent misunderstands the purpose of the evidence regarding pushrod stroke adjustments and grease-like material presented in this proceeding. The Secretary presented extensive evidence regarding the pushrod stroke measurements (and the grease-like material) to quantify the degree to which the brakes were inadequate. To that end, Marshall testified that these brakes were likely at 20% capacity and at no more than 50% capacity. (Tr. 143, 146-147). This evidence is helpful in a legal proceeding under the Mine Act, where the Secretary bears the burden of proof. However, Respondent was not required to know with technical precision the mathematical degree to which the brakes on the lube truck were inadequate. It only needed to know that the brakes were, in fact, inadequate. Respondent could have determined that the brakes were defective with a pushrod stroke measurement, but, as noted by Inspector Faulkner, it was not required to do so. (Tr. 83-86). Respondent had discretion to determine a method of pre-operational examination that worked for the mine. (Tr. 80-81, 91). Whatever method selected, however, the pre-operational examination needed to be sufficient to find safety defects.

Here, as discussed *supra*, brakes on mobile equipment needed to be sufficient to stop or hold the truck under typical load on the highest grade the truck typically traveled. The method of pre-operational examination needed to be designed to ensure the brakes could meet those requirements. A pushrod stroke measurement might have been sufficient to achieve that goal, but certainly other methods were available as well. In short, the practical adequacy, not the technical method used to gauge that adequacy, is the primary issue in this matter.

Respondent's method, as described by Blanton, was logically and demonstrably insufficient for the task. Blanton explained that to check the brakes he would put the truck in gear, ease out on the clutch, and check to see if the brakes were holding. (Tr. 232-233). Logically, this method would be ineffective to determine whether the brakes could hold or stop the truck under typical load on a typical maximum grade. As Marshall credibly explained, high demand situations can place additional burdens on brakes. (Tr. 130-131, 133). Brakes that may be adequate in low demand situations may be inadequate for more strenuous activity. (Tr. 130-131, 133). Checking whether the brakes were sufficient to hold a stationary truck on a flat surface would not be helpful in determining whether brakes would stop a moving truck on a 22% grade. Even if no accident had occurred, it would not be reasonable to believe the test described by Blanton was sufficient to conduct an adequate pre-operational examination.

Unfortunately, the insufficiency of Respondent's pre-operational examination method was clearly, and tragically, demonstrated on November 23, 2010. That day, the brakes were adequate in low demand situations, as the pre-operational examination indicated they would be. However, the brakes failed when faced with a high demand situation, traveling a 22% grade while in neutral. As a result, a fatal accident occurred. Respondent's pre-operational examination procedure failed to test the brakes sufficiently to prevent this misfortune.

Respondent should have used some other, effective method, whether a pushrod stroke measurement or some other test, to determine the adequacy of its brakes. Because it did not, this citation is valid.

In addition to the brakes, Respondent also argued that a seatbelt was not required in this truck and that the improperly installed seatbelt did not violate any standard. (*Respondent's Post-Hearing Brief* at 12). The cited standard, 30 C.F.R. §77.1606(a), does not require the operator to list and record violations, instead it requires the operator to list "equipment defects." In this case, Respondent was not required by law to install a seatbelt. (Tr. 89). However, it was required under its own policy to have a seatbelt in the truck and that truck driver was required to wear it. (Tr. 201). That seatbelt was defective and presented a choking or squeezing hazard to the driver. (Tr. 57-58, 148-149). As a result, it should have been included on the pre-operational form. In fact, Respondent's form actually included a place where defects to the seatbelt could be listed. (Tr. 60-61). Clearly, before the instant litigation, Respondent believed that that seatbelts were properly considered during a pre-operational examination.

Finally, Respondent argued that the inspector learned of the cracks in the windshield from interviews. (*Respondent's Post-Hearing Brief* at 12). Inspector Faulkner did not see the cracks himself and could not say if they affected the driver's vision. (*Id*. 12-13). I find that Inspector Faulkner credibly testified that the windshield was cracked and that this was an equipment defect as countenanced by the standard. (Tr. 61, 63, 187-188). I find no reason to doubt the Inspector's testimony or question the credibility of the miners he interviewed. Clearly Boggs believed the condition was hazardous, because he included it in his on-shift report. (Tr. 62-64, 90). Further, the reason Inspector Faulkner was unable to inspect the windshield was because Respondent's negligent action in failing to ensure adequate brakes resulted in further damage to the glass. Respondent cannot benefit from its own bad actions.

None of Respondent's arguments affect my determination that this citation was validly issued under 30 C.F.R. §77.1606(a). A preponderance of the evidence supports the issuance.

2. <u>The Violation Resulted in a Fatal Injury to One Miner And Was Significant And Substantial In Nature</u>

Inspector Faulkner marked the gravity of the cited danger in Citation No. 8365955 as having resulted in a "Fatal" Injury to one person. (GX-12). These determinations are supported by a preponderance of the evidence.

The event against which the instant standard, 30 C.F.R. §77.1606(a) is directed is the use of defective equipment leading to an accident. (Tr. 50). Here, the Secretary presented credible evidence that the lube truck had several defects, including inadequate brakes, an improperly installed seatbelt, and a cracked windshield. (Tr. 54-57, 61). However, none of these conditions were recorded and the truck was actually placed into service. (Tr. 53-54). The hazard was realized and the defective equipment was involved in an accident that resulted in fatal injuries to one miner, Rhett Mosley. (Tr. 64-65). Therefore, the evidence supports the Secretary's determinations.

With respect to S&S, the first element, the underlying violation of a mandatory safety standard, it has already been established that Respondent violated 30 C.F.R. §77.1606(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 – was also met. The cited condition, failure to remove defective equipment from service, contributed to a discrete safety hazard. The truck and its brakes were not maintained or removed from service when defects were present and, as a result, the brakes were unable to stop or even control the truck as it descended the hill. (Tr. 46-47, 79, 139, 146, 148). This inability to control the truck undoubtedly contributed to a discrete safety hazard, in this matter an accident involving mobile equipment.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. In this matter, the hazard contributed to was realized and an injury occurred as a result. Therefore, the third prong of *Mathies* is met.

The fourth element -that the injury be of a reasonably serious nature - was also met. Unfortunately, the actual injury sustained was a fatal injury to Rhett Mosley. (Tr. 63-64). As a result, the fourth prong of *Mathies* is met.

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

Respondent argues that this citation should not be S&S because the violation cited the examination performed on November 21, the day before the examination, and Blanton testified that there were no problems with the brakes that day. (*Respondent's Post-Hearing Brief* at 16). As noted *supra*, Marshall noted that at least one of the brakes had been defective for a month or two. (Tr. 126). Marshall was unable to determine the length of time the other brakes were defective, but they were also defective to some degree. Further, the windshield had been damaged for several shifts. (Tr. 61-62, 89, 187). Finally, there was no evidence or reason to believe the seatbelt had recently been installed. Therefore, some conditions (at least one brake, the windshield, and the seatbelt) should have been noted on November 21, 2010.[21]

Respondent also argued "[u]nless the Secretary can establish a brake problem which the pre-op examination would have detected, the exam cannot be considered S&S." (*Respondent's Post-Hearing Brief* at 15). Respondent, unsurprisingly, cited no authority for this bizarre

[21] Even if I were to discount the November 21 pre-operational examination, Respondent would still be liable for the November 22 exam. The Secretary cited the November 21 examination because the November 22 examination for Mosley's shift was either not conducted or, because Respondent's method of having pre-shift examination records submitted after the shift, was destroyed in the accident. (Tr. 52-54, 80). Respondent's actions in setting up this delayed reporting system and also in allowing the truck to be operated in ill-repair resulted in the loss of the record. If I had been asked to draw an adverse inference against Respondent because of this lost record (either that the record never existed or that it was inadequate) I would have done so.

assertion. The gravity and dangers of mining are not determined by the method of Respondent's pre-operational examination, the pre-operational examination should be conducted in light of the gravity and dangers of mining. A pre-shift examination should be conducted in such a way as to consider, and limit, the real dangers faced by miners. An operator cannot conduct its examinations in a way that ignores dangers and then claim that, as a result of wilful ignorance, that the dangers are somehow lessened.[22] This argument in no way changes S&S determination.

Finally, Respondent argued "[e]ven an exam performed exactly as Mr. Faulkner would have expected would not have detected any brake problems." (*Respondent's Post-Hearing Brief* at 15). Faulkner's expectations, even if they were as Respondent described, would be immaterial. The issue was whether a defect existed and whether it was recorded. Here, the brakes, seatbelt, and windshield were defective, and nothing was done about the conditions. Further, Marshall believed that the conditions he observed with the brakes could have been found prior to the accident. (Tr. 141).

3. Respondent's Conduct Displayed "Moderate" Negligence.

In the citation at issue, Inspector Faulkner found that the operator's conduct was moderately negligent in character. (GX-12). The substantial evidence supports this designation.

With respect to knowledge, the factual situation presented here is substantially similar to that in Citation Nos. 8365953 and 8365954. Specifically, a supervisor within in the definition provided in 30 U.S.C. 802(e) and *Martin Marietta Aggregates*, *supra*, should have known that the brakes were inadequate. Respondent, through its foremen, was required under relevant standards as well as company policy, to ensure the adequate pre-operational examinations. Specifically, the foremen were required to collect the pre-operational examination records, review them, and ensure that all proper repairs were conducted. (Tr. 53, 92, 182-183, 195-196, 233). The foremen were also required to remove equipment from service when it could not be repaired. (Tr. 92, 182-183, 195-196). Equipment operators testified that they would bring any problems with the equipment to the attention of the foremen. (Tr. 182, 133). Despite this responsibility, none of the foremen determined that the pre-shift examinations conducted here were inadequate. This was true even though one of those foremen, Boggs, saw the cracked windshield during an on-shift examination and could see on the pre-shift examination form that the condition was not recorded. (Tr. 62-64, 90). The foremen's conduct in failing to ensure adequate pre-shift examinations is imputed to Respondent. *Whayne Supply Co.*, *supra*; *Rochester & Pittsburgh Coal Co.*, *supra*; and *Southern Ohio Coal Co.*, *supra*.

Even higher levels of management beyond the foremen were directly culpable for the negligence shown here. Specifically, Respondent had appointed Chasteen as foreman. While Chasteen appeared to be an honest and reliable individual at trial, it should be noted that he testified that while he was generally familiar with pre-operational examinations, he did not know

[22] Respondent was quick to note at other places in its brief that an operator has discretion to determine the method of its pre-operational examination. Suppose, for example, an operator decided that its examiners should smell, and only smell, the brakes to determine they if they were adequate. Would Respondent argue that a subsequent accident caused by inadequate brakes could not be S&S because the examiner could not smell the defect?

how Respondent's equipment operators tested the brakes. (Tr. 184-185). Despite this fact, Chasteen supervised three rock truck drivers and one lube truck driver. (Tr. 187). How could Chasteen ensure the miners working at his direction were performing adequate pre-shift examinations if he had no idea what an adequate pre-shift would entail? To a certain extent, the negligence of the foremen was incidental to the earlier negligence shown by higher levels of management in making policy and conducting training.

Having found the requisite knowledge, the next issue is whether there were any mitigating circumstances. The evidence showed that Respondent regularly conducted pre-operational examinations. While these examinations were inadequate for testing the brakes in high demand situations, Respondent did determine that the brakes would work in low demand situations. Having found that there were some mitigating circumstances, I affirm the Secretary's designation of "moderate" negligence.

Respondent argued that it was entirely without negligence or, at most, there were substantial mitigating circumstances. (*Respondent's Post-Hearing Brief* at 15-17). Once again, Respondent noted that none of the miners working at the mine were its employees. (*Id*.). For the reasons discussed with respect to Citation Nos. 8365953 and 8365954, this argument is rejected.

Respondent also argued that a prudent operator would not have conducted a pushrod stroke examination and that Respondent had no reason to know the brakes required maintenance. (*Respondent's Post-Hearing Brief* at 16-17). Respondent was not negligent for failure to conduct a push-rod stroke measurement. It was negligent for failure to determine that the brakes were defective. The brakes were at best at 50% capacity. (Tr. 147). Therefore, Respondent had reason to know they were defective; it simply needed to develop an examination method that would determine the deficiency. This is not a mitigating factor.

4. Penalty

In this matter, the Secretary proposed a penalty of $52,500.00 for Citation No. 8365955. Having affirmed the Secretary's determinations in all respects, no deviation is necessary. In fact, the proposed penalty is appropriate under the Act. Once again, Respondent argued that the penalty should be lessened in light of the modifications it suggested as well as its citation history. (*Respondent's Post-Hearing Brief* at 17-18). However, given the fact that no modifications were made and the extreme gravity of this violation, a substantial penalty is justified. Therefore, Respondent is hereby **ORDERED** to pay a civil penalty in the amount of $52,500.00 with respect to this violation.

ORDER

It is hereby **ORDERED** that Citation Nos. 8365953, 8365954, and 8365955 are **AFFIRMED**.

Respondent is **ORDERED** to pay civil penalties in the total amount of $157,500.00 within 30 days of the date of this decision.[23]

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

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/tjb

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 4, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. EXCEL MINING, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2011-1618 A.C. No. 15-18839-265121 Mine: Van Lear Mine

DECISION

Appearances: Anthony M. Berry, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;

Tyler H. Fields, Esq., Excel Mining, LLC, Lexington, Kentucky, for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). In dispute are two section 104(a) citations issued to Excel Mining, LLC ("Excel" or "Respondent"). To prevail, the Secretary must prove his charges "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom.*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Both of the alleged violations in this docket charge Excel with a violation of its ventilation plan under 30 C.F.R. § 75.370(a)(1).[1] The MSHA inspectors designated each violation as significant and substantial ("S&S")[2] and characterized Excel's level of negligence as moderate. The Secretary proposed specially-assessed penalties under his 30 C.F.R. § 100.5 regulations based on Respondent's history of violations at this mine. Specifically, the Secretary proposed penalties of $13,600.00 and $11,500.00, respectively, for Citation Nos. 8258130 and 8252975.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. KENT 2011-1618 to me, and I held a hearing in Pikeville, Kentucky.[3] The Secretary presented testimony from Inspectors Jamie Hamilton and Billy Stiltner. Excel presented testimony from Mine Engineer David Arrington. The parties each filed closing briefs and reply briefs.

II. ISSUES

The parties have stipulated to the Commission's jurisdiction in this case. (Ex. J–1 at 1–2.) The Secretary argues that the allegations underlying both citations are valid and that his proposed penalties are appropriate.[4] (Sec'y Br. at 6, 9–10, 14, 16–19.) Although Excel admits

[1] Section 75.370(a)(1) provides:

> 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. The ventilation plan shall consist of two parts, the plan content as prescribed in [section] 75.371 and the ventilation map with information as prescribed in [section] 75.372. Only that portion of the map which contains information required under [section] 75.371 will be subject to approval by the district manager.

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

[3] In this decision, the hearing transcript, the Secretary's exhibits, and Excel's exhibits are abbreviated as "Tr.," "Ex. G–#," and "Ex. R–#," respectively. The parties also admitted a list of stipulations in a joint exhibit, which is abbreviated as "Ex. J–1."

[4] Although MSHA Inspector Hamilton characterized Excel's negligence as "moderate" for Citation No. 8258130 (Ex. G–1), the Secretary in his posthearing brief asks that I modify the level of negligence to "high." (Sec'y Br. at 10, 19.) The Federal Rules of Civil Procedure allow the amendment of pleadings to conform to the evidence if an issue is tried by the parties' express or implied consent. *See* Fed. R. Civ. P. 15(b)(2). Given the facts of this case and my conclusions of law, *see* discussion *infra* Part V.A.2, I need not reach this issue.

that the cited conditions constituted violations, Respondent disputes the Secretary's allegations regarding gravity and negligence. (Resp't Br. at 6–7; Resp't Reply at 7.) Specifically, Respondent argues that the Secretary has failed to demonstrate either violation was S&S and claims its negligence in each case was low. (Resp't Br. at 6–7.) Further, Excel suggests that I modify Citation No. 8252975 to reduce the number of miners affected from five to two. (*Id.* at 7.) Finally, Excel contends that the penalties should be lowered in this case. (*Id.*)

Accordingly, the following issues are before me: (1) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations, including whether each is S&S and whether Citation No. 8252975 affected five miners; (2) whether the record supports the Secretary's assertions regarding Excel's negligence in committing the alleged violations; and (3) whether the Secretary's proposed penalties are appropriate.

For the reasons set forth below, Citation Nos. 8258130 and 8252975 are **AFFIRMED** as to the Secretary's gravity determinations and **MODIFIED** to reduce the levels of negligence from "moderate" to "low."

III. FINDINGS OF FACT

A. Basic Mining Phases at Van Lear Mine

The Van Lear Mine is an underground coal mine located in Martin County, Kentucky. (Ex. G–4 at 1.) Room-and-pillar mines like the Van Lear Mine produce coal in two phases. (*See* Tr. 21:13–15, 32:21–23, 50:14–51:4, 55:20–57:13.) In the first phase—known as advance mining—an operator uses a continuous mining machine to bore deeper into different sections of the mine. (*See* Tr. 55:20–57:13, 153:12–15, 165:3–10.) The continuous mining machine cuts through the coal seam in long corridor-like entries and perpendicular crosscuts. (*See* Ex. G–3; Ex. G–3A; Ex. G–8; Ex. G–8A; Ex. R–1; Tr. 153:25–154:4.) However, the resulting square or rectangular "pillars" of coal within the seam are *not* simultaneously mined; instead, those pillars remain in place to provide support for the overlying rock and dirt as the operator advances deeper into the mine. (Tr. 165:3–10.) Thus, when viewed from above, working sections at Van Lear Mine—also known as panels—in the advance mining phase resemble checkerboards, with entries and crosscuts surrounding pillars of coal. (Ex. G–3; Ex. G–3A; Ex. G–8; Ex. G–8A; Ex. R–1.)

When the mine operator reaches the end of a coal panel, the process enters the second phase, which is known as retreat mining. (Tr. 151:19–152:5, 165:11–15; Ex. G–3; Ex. G–3A; Ex. G–8; Ex. G–8A; Ex. R–1.) In this phase, the operator removes portions of certain coal pillars on the panel sequentially as it "retreats" towards the entrance to the panel. (Tr. 50:14–51:4, 112:14–113:3, 151:19–152:5, 165:11–18.) As the operator retreats, the mine roof may collapse because the weight of the rocks and dirt above is no longer being supported—creating a refuse area called "gob." (Tr. 146:19–24, 148:1–10.) Because methane and other dangerous gases collect in the gob, mine operators must continue to ventilate it even though no additional mining activity will occur in these areas. (Tr. 48:9–49:14, 50:14–51:7, 55:20–56:10, 57:5–7, 113:12–114:5, 146:25–147:10.) Proper ventilation of gob areas includes the retention of a series of pillars—also known as bleeder blocks—around the outside of the gob, which provides a pathway

to ventilate fresh air into and through the gob, thus forcing those dangerous gases out of the mine. (*See* Tr. 48:9–49:14, 56:4–10, 57:5–7, 113:23–114:5, 121:16–20, 178:8–20; Ex. G–4 at 31.) This air pressure on the gob also helps ensure that those gases do not seep back into the active mining section.[5] (Tr. 113:12–114:5, 114:24–115:8, 121:7–20, 126:4–13, 132:17–21, 133:17–134:16.) Accordingly, panels at the Van Lear Mine in the retreat mining phase continue to resemble checkerboards around their borders, but they contain large gob areas in the center of the ring created by the bleeder blocks. (Ex. G–3; Ex. G–3A; Ex. G–8; Ex. G–8A; Ex. R–1.)

B. Ventilation Controls at the Van Lear Mine

Methane gas and respirable dust are two dangerous by-products of the coal mining process. (*See* Tr. 22:2–20, 38:24–39:10.) In certain concentrations, methane is an explosive gas. (Tr. 60:10–14.) The Van Lear Mine is a gassy mine, which liberates more than 500,000 cubic feet of methane within a twenty-four hour period. (Tr. 22:2–20.) Based on the volume of methane the Van Lear Mine liberates, MSHA placed the mine on a ten-day spot exam schedule requiring MSHA inspectors to take bottle samples every ten days to test for methane accumulations. (Tr. 22:7–12, 131:18–21, 164:6–14.) In addition, exposure to silica in respirable dust form contributes to serious lung diseases. (Tr. 39:24–40:22, 45:21–46:11, 67:14–68:10.)

In accordance with 30 C.F.R. § 75.370(a)(1), Excel also submitted a ventilation plan to MSHA on April 27, 2010, and MSHA approved the plan on May 10, 2010 ("May 10 Plan"). (Ex. G–4; Ex. G–4A.) To control methane and dust produced in the mining process, the plan required Excel to provide fresh air with a velocity of at least 4,800 cubic feet per minute (c.f.m.) at any face where coal is being mined. (Ex. G–4 at 9, 11, 31; Ex. G–4A at 9, 11, 31; Tr. 36:4–14, 36:23–37:4, 125:5–15.) In addition, the May 10 Plan required Respondent to provide at least 13,000 c.f.m. of air on the intake side of the pillar line. (Ex. G–4 at 9, 11, 31; Ex. G–4A at 9, 11, 31; Tr. 108:18–109:22.) During retreat mining, Excel was required to ensure at least 7,000 c.f.m. reached the deepest part of the panel, after the air passed through the gob and the bleeder blocks. (Ex. G–8; Ex. G–8A; Ex. R–1; Tr. 127:13–128:13, 174:4–7, 174:23–175:3.)

C. Inspections – January 24, 2011

Inspectors Hamilton and Stiltner visited the Van Lear Mine to conduct a complete inspection of the mine on January 24, 2011. (Tr. 22:21–23:8, 90:20–21, 91:23–24, 92:21–93:3; Ex. G–2 at 1; Ex. G–7 at 1.) At the time, Excel had begun the retreat mining phase and was removing pillars from the Van Lear Mine's Panel 6 using two separate continuous mining machines.[6] (*See* Tr. 100:2–13, 102:5–105:9.) On January 24, day shift miners began cutting coal in Panel 6 at approximately 7:30 a.m. (Tr. 32:11–13.)

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[5] Once a week, Excel was required to monitor the amount of air that reached the back end of the panel beyond the gob and the bleeder blocks. (Tr. 128:14–21.)

[6] These machines and their respective crews were known as the 007 MMU and 008 MMU. (Tr. 31:16–18, 100:8–9, 101:23–24.) "MMU" stands for mechanized mining unit. (*See* Tr. 31:18.) Each unit includes a continuous mining machine operator, two shuttle car drives, and two miners setting timbers for roof control purposes. (Tr. 112:2–7.)

The roof of Panel 6 was made of sandstone, which contains quartz.[7] (Tr. 32:24–33:4; Ex. G–5.) In addition, the continuous miner frequently created sparks when its carbide tip bits struck the mine roof. (Tr. 116:17–20.) These sparks provided potential ignition sources. (Tr. 116:17–20.)

Panel 6 included six entries. When looking towards the working face, the No. 1 Entry was located on the far left and the No. 6 Entry was located on the far right. (Ex. G–3A; Ex. G–8A; Tr. 27:8–31:16, 37:6–8, 100:8–103:23.) Because Excel employed two separate continuous miners on the Panel, Respondent provided separate air courses of fresh air for each mining unit. (*See* Tr. 102:5–12, 104:11–15, 120:12–121:20.) Thus, the intake air traveled up the No. 3 Entry, then split into separate air courses when it reached the last open crosscut. (Tr. 101:17–24, 102:10–12; Ex. G–3A; Ex. G–8A.)

Hamilton and Stiltner arrived at the mine at approximately 8:00 a.m., met with Excel personnel at the surface, and examined preshift and on-shift reports. (Ex. G–2 at 1; Ex. G–7 at 1, Tr. 25:8–11, 54:12–21, 94:24–95:2, 129:6–12.) Along with Excel's Curtis Webb and Mike Hurley, the inspectors then traveled to Panel 6 and completed an imminent danger run of the retreat mining section. (Ex. G–2 at 1–4; Ex. G–7 at 1–3; Tr. 25:15–24, 93:12–20, 130:9–12.) At this point, Hamilton inspected the right side of the panel while Stiltner inspected the left. (Ex. G–3A; Ex. G–8A; Tr. 100:12–103:23, 104:11–23, 109:17–25.)

1. Hamilton's Inspection and Citation No. 8258130

As Inspector Hamilton approached the No. 6 entry, he noticed the 008 MMU cutting into the pillar bounded by the entry and the last open crosscut. (Tr. 27:25–31:18, 32:14–20.) The machine operator had just begun his cut a few minutes earlier, cutting the bottom of the pillar near the floor. (Tr. 39:11–15, 57:14–59:7, 82:2–12.) As the mining machine operator made his cut, Hamilton also observed a cloud of dust surrounding the operator. (Tr. 38:16–23, 41:5–10, 67:9–13, 73:23–74:2; Ex. G–2 at 6.) Although Hamilton did not collect bottle samples of this dust, he witnessed the machine operator standing in the dust and inhaling without any respirator or dust mask. (Tr. 40:19–41:2, 41:11–15, 62:11–18, 74:3–5.) He also learned that neither the section foreman nor the machine operator had taken an air reading prior to beginning the cut. (Tr. 46:19–47:8, 50:2–7, 53:12–23; Ex. G–2 at 8.) Hamilton did not detect any methane present in the working section. (Tr. 60:18–21, 78:15–18, 82:24–83:1.)

At that point, Hamilton measured the air flow at the continuous mining machine using an anemometer. (Tr. 37:10–19.) He recorded an air velocity of 3,456 c.f.m., which was below the 4,800 c.f.m. required under the May 10 Plan. (Tr. 37:20–25, 49:15–23; *see* Ex. G–4 at 9, 11, 31; Ex. G–4A at 9, 11, 31.)

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[7] The Secretary's regulations lower the concentration of respirable dust that may be found in the mine's atmosphere when the respirable dust contains more than five percent quartz. *See* 30 C.F.R. §§ 70.100–.101. Although Excel was not subject to this heightened quartz standard at the time of the inspection (Tr. 42:6–43:5; Ex. G–5), it is uncontroverted that Respondent's mine roof contained quartz.

Based on his inspection, Hamilton issued Citation No. 8258130 at 10:30 a.m., providing:

> The compan[y's] Ventilation plan is not being followed for the 008 MMU. While cutting in the [No.] 6 [E]ntry[,] 3456 cfm was measured going over [the] miner when checked with calibrated anemometer while cutting in [the] 1st sump of pillar block. The compan[y's] plan requires 4800 cfm as stated on page 31 of the ventilation plan. The miner had visible float dust suspended in the air around [the] miner and miner man. The continuous miner was cutting in sandstone roof. This condition exposes miners to the dangers associated with lung disease. This mine also on a 10 day spot liberating 500,000 cubic ft of methane in a 24 hour period. This condition exposes miners to the dangers associated with an ignition. Standard 75.370(a)(1) was cited 50 times in two years at [this mine] (50 to the operator, 0 to a contractor).

(Ex. G–1 at 1–2.) Hamilton marked the citation as S&S and indicated the condition affected one person. (*Id.* at 1.) Hamilton also characterized Excel's negligence as moderate. (*Id.*) To abate the violative condition, Respondent spent approximately 10 minutes tightening ventilation curtains on Panel 6. (*Id.*; Tr. 47:9–18, 51:18–53:7; Ex. G–2 at 7.) At the hearing, Hamilton admitted that he had no basis for determining the length of time this cited condition existed. (Tr. 63:24–64:14, 74:13–19.)

2. Stiltner's Inspection and Citation No. 8252975

When Inspector Stiltner began to inspect the left side of the working section, he noted that the 007 MMU was completing its pillar removal work in the No. 3 Entry and moving into the No. 2 Entry. (Tr. 105:11–16, 112:14–113:3, 114:11–23, 147:11–23; Ex. G–7 at 4–5.) At the time, two miners were setting timbers in the No. 2 Entry and three miners had moved into the No. 3 Entry. (Tr. 112:14–113:3; Ex. G–7 at 4.) Stiltner took an air reading while positioned in the last open crosscut between the No. 2 and No. 3 entries. (Tr. 122:16–21; Ex. G–8A.) He recorded an air velocity of 10,703 c.f.m., which is below the 13,000 c.f.m. required under the May 10 Plan. (Tr. 111:11–18, 120:25–121:2; Ex. G–7 at 5, 9.) Stiltner did not detect any methane on the section. (Tr. 115:9–14, 130:9–131:14; Ex. G–7 at 4, 9.)

In light of his observations, Stiltner issued Citation No. 8252975 at 11:15 a.m., providing:

> The approved ventilation plan is not being followed on the 007-0 [sic] MMU. When measured with a calibrated anemometer only 10,703 cfm of air is present at the intake side of the pillar line. Page 9 of the approved plan, dated [May 10, 2010], states that a minimum of 13,000 cfm of air will be maintained at the intake side of the pillar line. This mine is on a 103(i) 10 day spot with a history of liberating in excess of 500,000 cubic feet of methane in a 24 hour period. This inadequate ventilation exposes the miners who work on this section, three shifts per day five to six days per

> week, to the hazards associated with the buildup of methane. [Section] 75.370(a)(1) was cited 50 times in two years at [the Van Lear Mine] (50 to the operator, 0 to a contractor).

(Ex. G–6.) Stiltner designated the citation as S&S and indicated that five miners were likely to be affected. (*Id.*) He also characterized Respondent's negligence as "moderate" in this case. (*Id.*) Stiltner suggested that the foreman might have been able to feel the difference between 13,000 c.f.m. and 10,703 c.f.m. (Tr. 119:9–16, 143:7–144:14.) However, Stiltner did not know how long this condition existed. (Tr. 117:21–118:3.) Excel again tightened ventilation curtains and the citation was abated thirty minutes after being issued. (Tr. 118:2–4, 119:17–120:6, 134:17–137:21, 144:22–146:18; Ex. G–6.)

IV. PRINCIPLES OF LAW

A. Significant and Substantial

A violation is S&S "if, based on 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). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that "an inspector's judgment is an important element" in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present *a measure* of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Nat'l Gypsum*, 3 FMSHRC at 827). Moreover, the Commission clarified "the correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury." *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742 n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Negligence

Although the Secretary's part 100 regulations are not binding on the Commission, the Secretary's definitions of negligence in those provisions are illustrative. According to the Secretary, negligence is "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). These standards indicate that high negligence is found where "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* at Table X. Moreover, the standards prescribe moderate negligence where "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Finally, low negligence is found where "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.*

C. Penalties

Although the Secretary proposes penalties, the Commission assesses penalties for violations of the Mine Act *de novo*. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria, including: the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i). The criteria are not required to be given equal weight. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1979 (Aug. 2014).

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

A. Citation No. 8258130

As explained above, Inspector Hamilton issued Citation No. 8258130 as the result of conditions he identified during his January 24, 2011, inspection of the Van Lear Mine. *See* discussion *supra* Part III.C.1. Although Excel admitted that the cited conditions were a violation of 30 C.F.R. § 75.370(a)(1), Respondent contends that the Secretary has not satisfied his burden of proving his allegations regarding gravity and negligence. *See* discussion *supra* Part II.

1. Gravity and S&S

The Secretary contends that he has satisfied all four elements of the *Mathies*' test for S&S.[8] (Sec'y Br. at 8–9.) Respondent does not dispute the fact of violation or seriousness of the

[8] Although Inspector Hamilton included methane ignition as a hazard in the "Condition or Practice" narrative of Citation No. 8258130 (Ex. G–1), his testimony made only passing reference to methane ignition. (Tr. 22:13–20, 82:17–83:1.) Instead, he focused on dust exposure as the hazard with which he was most concerned. (*See* Tr. 40:14–16, 78:23–79:2.) Similarly, the (continued…)

injury that is likely to result from prolonged exposure to respirable dust. (Resp't Br. at 8.) Accordingly, Excel admits that *Mathies*' first and fourth elements have been satisfied. (*Id.*) However, Respondent claims that the Secretary has not met his burden of proving that the violation contributed to a discrete safety hazard. (*Id.* at 9–11.) In the alternative, Excel also argues that the Secretary has not demonstrated that the discrete safety hazard is reasonably likely to result in an injury. (*Id.* at 11–15.) Given the evidence before me, I determine that the Secretary has satisfied his burden of proof on both the second and third *Mathies*' elements.

First, the record in this case demonstrates that Excel's violation of its ventilation plan contributed to a discrete safety hazard. Inspector Hamilton specifically identified dust exposure as the hazard to which Excel's violation would contribute. (Tr. 40:14–16, 78:23–79:2) When Hamilton arrived on Panel 6, he observed the operator of the continuous mining machine surrounded by visible dust. Further, the machine operator was not wearing a respirator or dust mask, which meant that he was breathing in the dust surrounding him. Although Hamilton did not take bottle samples of the dust he observed, he credibly testified that the sandstone roof would provide a source of quartz, which is a source of hazardous respirable dust.[9] As the operator cut into the top of the coal pillar, Excel's violative and insufficient air flow would allow dust to continue to collect around the miner. Indeed, Hamilton credibly testified that the low air velocity increased the amount of dust flowing over the machine operator. (Tr. 77:14–19.)

Hamilton is also an experienced inspector and miner. (Tr. 16:17–18:15.) As mine foreman and section boss, Hamilton had been responsible for ventilation and the safety of miners underground. (Tr. 17:7–18:1.) Thus, his opinion is entitled to significant weight. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ's S&S determination). Accordingly, I determine that Excel's violation of its ventilation plan contributed to the hazard of respirable dust inhalation.

Second, the record before me also demonstrates that this dust hazard was reasonably likely to result in an injury. Hamilton credibly testified that brief exposure to respirable dust

[8] (…continued)
Secretary in his posthearing brief claims this violation "contributes to the discrete safety hazard of allowing the accumulation of respirable dust and harmful gases, such as methane" but focuses solely on dust exposure in discussing the reasonable likelihood of reasonably serious injury. (Sec'y Br. at 8–9.) Accordingly, my analysis will focus on the dust exposure hazard.

[9] In Excel's posthearing brief, the operator notes that the dust Inspector Hamilton observed "came from cutting in the mine floor, not the mine roof where quartz can be found." (Resp't Br. at 11.) Thus, Respondent claims that "the continuous miner was not cutting an area that generally exposes quartz, and any testimony that they would eventually cut into quartz is purely speculative." (*Id.*) Nevertheless, it is uncontroverted that the sandstone roof at the Van Lear Mine contained quartz, and Hamilton credibly testified that Respondent would eventually cut into the roof as it continued to mine the pillars in Panel 6. Indeed, Excel did not dispute that it intended to mine the top portion of the coal pillar that abutted the sandstone roof. Thus, Excel would have cut into the mine's sandstone roof in the course of continued mining operations.

contributes to black lung disease and silicosis. He also indicated that the low air velocity and presence of dust surrounding the machine operator made this hazard reasonably likely to result in injury. In contrast, Excel argues that "[t]he nature of the retreat mining process makes it impossible to sustain this exposure to the degree that it is reasonably likely illness will occur."[10] (Resp't Br. at 12.) Yet in the context of respirable dust hazards, the Commission has not cast the reasonable likelihood of injury analysis in durational terms. *Consolidation Coal Co.*, 8 FMSHRC 890, 894–99 (June 1986) [hereinafter "Consol I"], *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987); *see also Oxbow Mining LLC*, 35 FMSHRC 932, 947 & n.3 (Apr. 2013) (ALJ) (citing Air Quality Standards for Abrasive Blasting and Drill Dust Control, 59 Fed. Reg. 8318, 8319 (Feb. 18, 1994) (indicating in preamble that inhalation of relatively small amounts of freshly fractured silica particles may contribute to the development of acute silicosis)); *Pine Ridge Coal Co.*, 34 FMSHRC 291,304 (Jan. 2012) (ALJ) (discussing "the nebulous, progressive nature of black lung disease . . . ."). In fact, in the context of dust sampling standard violations, the Commission has adopted a presumption that respirable dust hazards are reasonably likely to result in injury, regardless of the duration of exposure. *Consol I*, 8 FMSHRC at 894–99; *Consolidation Coal Co.*, 17 FMSHRC 250, 254 (Mar. 1995) [hereinafter "Consol II"] ("To the extent the judge suggested that short periods of exposure to respirable dust are exempt from the presumption . . . we agree . . . that he erred.").

Although the Commission has not extended a comparable presumption in the context of respirable dust hazards arising out of ventilation plan violations, the direct and indirect evidence before me demonstrates that the respirable dust hazard was reasonably likely to result in injury in this case. The machine operator was engulfed in a cloud of dust, yet he did not wear a respirator or mask. The sandstone roof contained quartz. Brief exposure to dust containing quartz and silica contributes to silicosis. In the course of continued mining operations, these conditions were reasonably likely to continue. Accordingly, I determine that *Mathies*' fourth element has been satisfied.

Based on the forgoing, Excel's admissions and the record before me have satisfied each of the four elements of *Mathies*. Thus, I conclude that Citation No. 8258130 was appropriately designated as S&S.

[10] Excel also claims that the ventilation controls would have been removed after Respondent completed retreat mining in Panel 6. (Resp't Br. at 14.) Thus, Respondent argues, "[t]here is no reason to assume that, upon completing advance mining in a new panel, similarly faulty controls would be established in the next retreat mining process." (*Id.*; *see also* Resp't Reply Br. at 6–7 (suggesting "[a]n analysis of continued normal mining operations should not unequivocally assume the condition would exist in perpetuity.") However, the Commission has declined to assume or infer that the violative condition would be abated in continued mining operations. *See, e.g.*, *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014); *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1140–41 (May 2014); *Gatliff Coal Co., Inc.*, 14 FMSHRC 1982, 1986 (Dec. 1992); *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

2. Negligence

Here, Respondent has admitted that it violated the May 10 Plan because it did not provide the required air velocity at the continuous miner, and I have concluded that Citation No. 8258130 was properly designated as S&S. Moreover, the Mine Act is a strict liability statute. Regardless of whether a miscommunication occurred, Excel had a duty to comply with its ventilation plan under section 75.370(a)(1). Thus, Respondent reasonably should have known of the violative condition. That condition also presented a danger to Excel's miners. Accordingly, I determine that Respondent's failure to fulfill its duties, thus exposing its miners to dust inhalation dangers, constitutes negligent conduct. Nevertheless, the Secretary has the burden of proving Respondent's *level* of negligence. *See* 30 C.F.R. § 100(d) at Table X (indicating that an operator's level of negligence turns not only its reason to know of the violative condition, but also any mitigating factors).

In this unusual case, I am presented with arguments for three different levels of negligence: low (Excel); moderate (Inspector Hamilton); and high (the Secretary). Here, Inspector Hamilton initially marked this citation as resulting from Excel's moderate negligence. However, the Secretary has asked that I increase the level of negligence from moderate to high. *See* discussion *supra* note 4. In support of his allegations, the Secretary claims the section foreman should have taken an air reading before allowing the mining machine operator to begin his pillar cut and notes that the foreman admitted he had not done so. (Sec'y Br. at 9–10.) Thus, the Secretary suggests the foreman's "awareness of his own inaction and willingness to subject the miner to the, at the time, unknown danger of deficient ventilation demonstrated an absence of mitigating circumstances." (*Id.* at 9–10.) In other words, the Secretary appears to imply indifference on the part of the section foreman. *Cf. San Juan Coal Co.*, 29 FMSHRC 125, 136 (Mar. 2007) (suggesting that high negligence often correlates with unwarrantable failure); *see also Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (noting that unwarrantable failure includes indifference, serious lack or reasonable care, reckless disregard, and intentional misconduct.)

Conversely, Excel contends its conduct in this case constituted a low level of negligence. Excel disputes that it had reason to know the air velocity at the continuous mining machine was insufficient. (Resp't Br. at 15.) Instead, Excel claims this failure resulted from a "miscommunication between the section foreman and the miner operator." (Resp't Reply Br. at 2.) Further, Respondent notes that Inspector Hamilton provided no indication regarding the duration of the violative condition. (Resp't Br. at 15–16.) Excel therefore characterizes the foreman's failure to take an air reading prior to the beginning of the pillar cut as inadvertent. (Resp't Br. at 15; Resp't Reply Br. at 2–3.)

Based on the record before me, three factors convince me that Excel's conduct is consistent with a low level of negligence. First, the Secretary's evidence falls well short of demonstrating the indifference the Secretary suggests in his posthearing brief. Inspector Hamilton testified that the machine operator told him that he did not take an air reading because he believed the mine foreman had taken one. In addition, Hamilton indicated that when he himself worked as a section foreman, he had been trained to take readings prior to every cut of coal to ensure that he had sufficient air velocity. Thus, the Secretary infers indifference from the

section foreman's failure to take an air reading before the cut began. Although such a policy might be *one* effective method to ensure compliance with a ventilation plan, Hamilton admitted that section 75.370(a) did not require the section foreman to take an air reading at the beginning of every cut. (Tr. 54:22–55:19.) Moreover, Inspector Hamilton admitted that he did not know Excel's practices and policies. (Tr. 80:21–81:11.) Without those details, the Secretary falls short of his suggested inference. Perhaps the machine operator—rather than the section foreman—ordinarily measures the air velocity, but failed to do so in this case because he misunderstood his foreman. Perhaps the section foreman expected the machine operator to take an air reading. Hamilton is an experienced miner, but here he simply did not provide a basis to infer indifference on the part of the section foreman.

Second, Excel's history of 30 C.F.R. § 75.370(a)(1) violations in the previous two years (Tr. 46:15–18, 73:12–15) does not support an inference that the section foreman was indifferent. Inspector Hamilton could not provide any details regarding any of those prior citations or explain any similarities to Citation No. 8258130. (Tr. 71:2–73:11.) The Secretary need not provide voluminous details regarding these previous ventilation plan violations, but merely highlighting past violations of this far-reaching standard does not suggest to me a lack of concern for the machine operator's safety in this case. I also note that Citation No. 8252975, which is the other citation involved in this docket, occurred the same day on the same section. That violation of the ventilation plan also required Excel to tighten its ventilation curtains. *See* discussion *supra* Part III.C.2. Although I understand the Secretary's concern that two separate violations of the May 10 Plan occurred on Panel 6 at the roughly the same time, neither inspector linked the violations in their testimony. Without more, it is unclear why this temporal link alone should demonstrate the section foreman's disinterest in the safety to Excel's miners. Under the circumstances, I cannot determine that the section foreman's action or inaction constituted indifference to the endangerment of the machine operator. Thus, the Secretary has not shown that Excel's level of negligence was high.

Third, the Secretary's inability to demonstrate either the duration or extent of the ventilation problems on Panel 6 significantly mitigates Excel's reason to know of this violation. *Cf.* 30 C.F.R. § 100.3(d) at Table X (suggesting "low" negligence is appropriate where the mitigating circumstances are "considerable.") Indeed, Hamilton found no indication in Excel's preshift reports that Panel 6 had previously experienced any ventilation problems. (Tr. 54:12–21.) Further, he could not identify which ventilation curtains were adjusted to abate the violation. (Tr. 52:6–8, 64:20–65:17, 74:6–12.) However, Hamilton indicated that in underground coal mining it is common for ventilation to leak air and to require adjustment. (Tr. 52:18–53:7.) Despite the significant hazard this condition presented, I recognize that mining conditions change rapidly. At times, such dynamism may allow methane to accumulate quickly. *See* discussion *infra* Part V.B.1. In this context, however, the potentially brief duration significantly mitigates Respondent's reason to know of the violative condition. Further, the adjustment of the ventilation curtains appears to be a somewhat common event in underground coal mining, and Excel restored the required ventilation within ten minutes. Accordingly, these minor adjustments also mitigate Excel's reason to know of the violation.

Notwithstanding the danger the cited condition presented, in light of the seemingly brief duration and minor extent, I conclude that Excel's conduct constituted a low level of negligence, and Citation No. 8252975 is **MODIFIED** to change the cited level of negligence to low.

B. Citation No. 8252975

While Inspector Hamilton conducted his inspection of Panel 6 that led to his issuance of Citation No. 8258130, his colleague Inspector Stiltner simultaneously inspected the left side of Panel 6. *See* discussion *supra* Part III.C.2. Stiltner likewise identified a violation of 30 C.F.R. § 75.370(a)(1) and issued Citation No. 8252975. Excel again admitted that the cited conditions constituted a violation of its ventilation plan, but Respondent again contends that that Secretary has not satisfied his burden of proving his gravity and negligence allegations. *See* discussion *supra* Part II.

1. Gravity

a. S&S

The Secretary claims in his posthearing brief that potential sources of methane and ignition sources on Panel 6 demonstrate that Citation No. 8252975 was S&S. (Sec'y Br. at 14–16.) Specifically, the Secretary notes that methane could accumulate quickly on Panel 6 because the Van Lear Mine was a gassy mine. (*Id.* at 15–16.) The Secretary also suggests that methane may collect in the gob areas and leak back onto the panel if Excel did not provide adequate ventilation. (*Id.*) Finally, the Secretary claims that the continuous miner and shuttle cars provided ignition sources. (*Id.* at 16.)

Although Respondent concedes that the first, second,[11] and fourth elements of the *Mathies* test have been satisfied, Excel argues that the Secretary has not satisfied his burden of proving that the methane explosion hazard was reasonably likely to cause injuries. (Resp't Br.

[11] Respondent also claims the record is "devoid of any indication as to why [the low air volume] was likely to cause injury." (Resp't Br. at 20.) Respondent's argument seems to conflate the second and third elements of *Mathies*. The question before me under *Mathies*' third element is whether a methane accumulation hazard—rather than the insufficient air—is reasonably likely to result in reasonably serious injuries. *See* discussion *supra* Part IV.A. Nevertheless, I note that ventilation plans set forth *minimum* requirements and that Excel provided only 82% of the minimum required air on the section. (*See* Resp't Br. at 20–21 & n.6.)

I recognize that it *might* be possible to imagine a scenario where the air volume falls short by such an incremental margin as to have a de minimis impact on the S&S analysis. Yet, a nearly twenty percent shortfall of the *minimum* requirement is no such minor misstep. The plan's minimum air volume was intended to sweep methane and harmful gases away from the working section and through the gob. It also helped ensure methane and gases did not seep back onto the section. Notwithstanding the concessions in Excel's posthearing brief—and to the extent that Respondent's argument might be construed as an argument regarding *Mathies*' second element—I therefore determine that the violation of the ventilation plan contributed to a discrete safety hazard.

at 16–22.) First, Excel notes that no methane was present at the time of the inspection and disputes whether a roof fall would force methane out of the gob and into the working area. (*Id.* at 18–19.) Second, Excel argues that the Van Lear Mine liberated less methane during the retreat mining of Panel 6 than it did during advance mining. (*Id.* at 21–22.) Respondent therefore surmises that the confluence of factors do not demonstrate that a methane ignition hazard was reasonably likely to result in injury. (*Id.* at 22.)

Looking at the evidence before me, it is uncontroverted that sparks from the continuous mining process would provide an ignition source. Thus, this case turns on whether methane gas would be present in the course of continued mining operations. As the Secretary notes, the Van Lear Mine is a gassy mine that liberated more than 500,000 cubic feet of methane every twenty-hour hours. Indeed, the high levels of methane liberation at Van Lear prompted MSHA to perform spot inspections at the mine every ten days.

Furthermore, MSHA required the mine to provide ventilation pressure through the gob area and out of the bleeder system to prevent accumulation of methane in the gob. Regardless of what air pressure must be maintained at the *back* side of the gob and bleeder blocks, Excel fell well short of the 13,000 c.f.m. required on the working section. Insufficient air pressure through the gob would allow methane to accumulate in the course of continued mining operations. If a roof fall occurred in the gob area, some of that methane might be forced back on to the working section. As Stiltner explained, the minimum requirements of a ventilation plan are critical: "If [10,000 c.f.m. were enough air], they would probably have 10,000 in their plan. So there was a reason it was 13,000. It was either the mine being on the [ten-day] spot or a history of methane. . . . So evidently, 10[,000] wasn't enough." (Tr. 117:16–20.)

In addition, I accord little weight to Mine Engineer Arrington's testimony that the pillars removed in retreat mining liberate smaller amounts of methane because some of the pillars' methane has escaped as the advance mining process bored deeper into the mine. (Tr. 176:17–177:8, 178:21–179:10.) Although Stiltner agreed that methane would continue to escape from the coal pillars as the operator advanced (Tr. 153:25–154:22), neither Arrington nor Stiltner quantified, either in terms of cubic feet or percentages, the amount of methane that would dissipate from the coal pillars between the advance mining and retreat mining phases. Without that critical detail, I have no basis to infer that the Van Lear mine's retreat mining panels were no longer "gassy." Moreover, Arrington did not address Stiltner's testimony that a roof fall in the gob area could force methane back onto the working section, providing fuel for an ignition.

Here, the Secretary has demonstrated that ignition and methane sources would be present in the course of continued mining operations. In light of the record and confluence of factors before me, I determine that a methane ignition hazard was reasonably likely to cause injuries in the course of continued mining operations, which satisfies *Mathies*' third element. Given Excel's concession of the remaining elements of the *Mathies* test, I therefore conclude that Citation No. 8272975 was properly designated as S&S.

b. Number of Miners Affected

The Secretary claims that the deficiency in airflow affected the safety of all five miners on the 007 MMU because the intake air was used to ventilate the whole section and miners work

in close proximity during retreat mining. (Sec'y Br. at 17.) In contrast, Excel contends that the violative condition did not affect five miners and asks that I reduce the number of miners from five to two.[12] (Resp't Br. at 23.) Looking at the evidence before me, I note that two of the members of the 007 MMU were located in the No. 3 Entry as the miner prepared to cut in the No. 2 Entry. However, Stiltner specifically testified that miners work in close proximity during the retreat mining phase. (Tr. 112:8–13.) In light of the record, I determine that these miners would have returned in close proximity to the continuous mining machine in the course of continued mining operations. Accordingly, I conclude that Citation No. 8252975 would affect five miners.

2. Negligence

The Secretary's argument in this case reiterates his negligence theory for Citation No. 8258130: Excel was negligent because the section foreman or miner was responsible for taking air readings during his preshift examination, but failed to do so. (*See* Sec'y Br. at 17.) Yet, *unlike* Citation No. 8258130, the Secretary characterizes Respondent's negligence in this case as "moderate" rather than "high."

Given the similarities between the cases, it is unclear why the Secretary's theory leads to different results for the two violations before me. As with Citation No. 8258130, I have concluded that Citation No. 8252975 was appropriately designated as S&S in the context of continued mining operations. Like his colleague, Inspector Stiltner was unable to describe similarities between Citation No. 8252975 and any of those violations. (Tr. 139:25–141:2, 120:22–121:6, 134:17–21, 135:8–12, 146:2–146:8.) Stiltner also admitted that that he did not know how long the violative condition existed and could not describe the details of the curtain adjustments Excel made on Panel 6. (Tr. 141:7–142:2.) Finally, those curtain adjustments were completed in just a half-an-hour, which suggests they were not extensive.

In light of the record before me and similarities between the cases, I again conclude that Excel's level of negligence was low. Excel has a duty to maintain the required air velocity, and Respondent was negligent in failing to ensure it had the required air coursing through this section before mining. Nevertheless, the Secretary has provided no evidence describing that these conditions existed for a significant amount of time or extended across a large portion of Panel 6. He also presented no evidence regarding Respondent's air measurement policies or linking the present violation to any of the fifty previous ventilation plan violations at the Van Lear Mine. Finally, Respondent was able to restore the required air flow in just thirty minutes. Accordingly, the apparent short duration and limited extent of the ventilation failure on Panel 6 significantly

[12] Respondent also claims in its posthearing brief that the two shuttle car operators would have never been in close proximity to the continuous miner at the same time because they took turns loading coal at the miner and dumping it at the belt feeder. (Resp't Br. at 23.) Yet Excel provides no support in the record for that claim. I note that two company representatives—Curtis Webb and Mike Hurley—travelled with Inspectors Stiltner and Hamilton on January 24. Perhaps Webb and Hurley would have provided evidence to support this position, but neither appeared at the hearing. Instead, Excel only presented testimony from Mine Engineer Arrington, who was not on Panel 6 that day and provided no evidence regarding the number of miners that would be affected.

mitigates Respondent's negligence in this case. 30 C.F.R. § 100.3(d) at Table X (suggesting "low" negligence is appropriate where the mitigating circumstances are "considerable.")

Based on the above, I determine that Excel's conduct constituted "low" negligence, and Citation No. 8252975 is **MODIFIED** to change the cited level of negligence to low.

C. Penalty Assessment

Turning to the six penalty factors specified in section 110(i) of the Mine Act, I note that Excel has stipulated that the proposed penalty would not affect its ability to remain in business. (Ex. J–1 at 2.) Moreover, nothing in the record suggests the proposed penalties are inappropriate for the size of the mine, and I also note that Respondent promptly abated each citation in good faith. Although I have affirmed the Secretary's gravity determinations, I have modified each citation to reduce Excel's level of negligence to "low." Finally, the Secretary's Assessed Violation History Report lists 37 final citations or orders within the previous fifteen months at the Van Lear Mine that involved 30 C.F.R. § 75.370(a)(1). Of those final citations and orders, only six were designated as S&S.

I recognize that the Secretary has proposed special assessments of $13,600.00 and $11,500.00, respectively, for Citation Nos. 8258130 and 8252975. However, the Secretary's proposed penalties are not binding upon me. I also recognize that both violations exposed Excel's miners to serious dangers. Had the Secretary demonstrated the substandard air velocity existed for a significant amount of time or required major efforts to restore the required air flow, had resulted from poor internal policies at Excel, or had been a recurring problem at the Van Lear Mine, I might have been inclined to affirm his negligence determinations and, therefore, his proposed penalties. However, I note that the Secretary presented no evidence demonstrating the duration or extent of the conditions in question. Likewise, he provided no evidence suggesting Respondent's policies led to the low air velocity or that low air velocity at the miner or in the intake entry was an on-going problem at the mine. As I noted, conditions often change rapidly in an underground mine. Given this rapidly changing environment, even a fastidious operator may sometimes fail to provide the air velocities required under their plans. The Mine Act is a strict liability statute, and this dynamic environment does not excuse those failures. However, I have determined Respondent's negligence to have been low. I therefore determine that a penalty of $4,000.00 for each violation is appropriate based on the six section 110(i) factors.

VI. ORDER

In light of the foregoing, I hereby **ORDER** that Citation Nos. 8258130 and 8252975 are **AFFIRMED** as S&S and **MODIFIED** to reduce the level of negligence from "moderate" to "low." Excel Mining, LLC is **ORDERED** to **PAY** a civil penalty of $8,000.00 within 40 days of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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/pjv

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 5, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. PORTABLE, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-526-M A.C. No. 24-02016-314135 Mine: Wash Plant

DECISION

Appearances: Ronald Gottlieb, Esq., Office of the Solicitor, U.S. Department Labor, Denver, Colorado for Petitioner

Donna Pryor, Esq., Breyana Penn, Esq., Jackson Lewis P.C., Denver, Colorado for Respondent

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary's petition alleges that an MSHA Inspector, who was at Portable's Mine for the purpose of conducting an inspection, was refused entry for a period of time in that the start of MSHA's inspection was delayed by approximately one-half hour. The delay stemmed from the operator's claim that a safety escort was needed to accompany the Inspector. As a consequence of the delay, MSHA contends that Portable unreasonably delayed the inspection, in violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a). As an alternative theory of liability, the Secretary asserts that Portable violated section 103(a)'s prohibition against giving mine personnel advance notice of an inspection. A hearing was held in Bozeman, Montana and both parties submitted post-hearing briefs. For the reasons which follow, the Court, finding that neither theory of liability was established by a preponderance of the evidence, vacates the citation and dismisses the matter.

Findings of Fact and Conclusions of Law

Portable, Inc., a subsidiary of Kenyon Noble Ready Mix, is a small, six employee, sand and gravel operation. Tr. 20, 164. It extracts aggregate from the ground and transfers that material with a loader to a crusher, which then sizes the material, according to the product needed. Tr 165. After being sized, the product is placed onto a conveyor belt where it is sent to the wash plant. From there, as a final step, a loader places the product in its designated pile. *Id.* Portable's products are sold to the public and to Kenyon Noble Ready Mix, for concrete. Tr. 20, 165.

On August 16, 2012, MSHA's Dennis Bellfi[1] arrived at Portable to perform a general inspection. Tr. 19. At that time Bellfi's usual job was as an MSHA conference and litigation representative ("CLR") out of Denver, Colorado, but he was asked by the Montana area MSHA office to temporarily help that office with its required inspections. Tr. 19. Five of Portable's six employees were working at the mine on the day of the inspection. Tr. 164.

According to his testimony, Inspector Bellfi stated that when he arrived at Portable on that date, he proceeded past a small entry gate. He then flagged down a loader operator, who was working at the wash plant, and inquired about where he could find the person in charge. Tr. 20-21. As Bellfi was speaking with the loader operator, laborer Kevin Bright joined them and the Inspector again asked where to find the person in charge. Tr. 21. Mr. Bright told the Inspector that Scott Miller, the general manager, was not on site. Bellfi stated that Bright then proceeded to the front office and returned 5 to 7 minutes later, explaining to him that the Inspector needed to sign in at the front office and that someone would then accompany him on the inspection. Tr. 22. Bellfi, while maintaining that he did not need to sign in, agreed to go to the front office to obtain an escort. Tr. 22.

Bellfi testified that, once at the office, he spoke with Eric Edwards, an employee of Kenyon Noble Ready Mix, who asked him to sign in as a visitor. Tr. 23, 141. Inspector Bellfi refused since, as a matter of practice, he did not consider himself to be a visitor. Tr. 23, 58-59, 68. Mr. Edwards then told him that, for safety reasons, it was company policy to escort any visitor. Tr. 24. Edwards did not provide the Inspector with any estimate of how long it would take to locate an escort. Tr. 24. Inspector Bellfi told Edwards that he knew how to be safe in the mine and that he was ready to begin his inspection. Tr. 24-25. However, the Inspector did not, at that time, tell Edwards that he had the right to inspect the mine without an escort, nor did he advise that a citation could be issued for denying him access to the mine. Tr. 54, 55. Bellfi stated that Edwards then explained to him that Jennifer Rather,[2] the Safety Director, was doing payroll at the corporate office and would get to the mine when she was able. Tr. 25.

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[1] Inspector Bellfi has been an MSHA conference and litigation representative for over 2 years. Prior to that, he was an MSHA mine inspector for about 5 years, performing close to 300 inspections. Tr. 17.

[2] Ms. Rather is employed by several companies, including Portable, Kenyon Ready Mix and other companies, all in the capacity as a human resources and safety director. She has been employed by these companies for 15 years. Tr. 162.

Bellfi stated that he then told Edwards that the longer it took to obtain an escort, the more inclined he was to issue a citation for impeding the inspection. Tr. 25-26. However, Bellfi then told Edwards that he would "go ahead and wait downstairs for [Edwards] to get an escort." Tr. 26. He then related that 5 to 10 minutes later, Edwards informed him that they were having trouble locating someone to escort him and that they were going to shut down the crusher[3] so that the crusher operator, Tom Hamilton, could accompany him. Tr. 26-27. Bellfi stated that he repeated that the longer he had to wait, the more inclined he was to issue a citation for impeding the inspection. Tr. 27. Approximately 20 minutes later, Edwards came back and it was then that he informed Edwards that he had waited "longer than necessary" and that he was going to issue a section 103(a) citation for impeding his inspection. Tr. 27. Edwards' response was that Ms. Rather advised that the Inspector could start his inspection by himself. Tr. 27, 43-44, 103.

Based on those events, Citation No. 8587084 was issued on August 16, 2012 by Inspector Bellfi, pursuant to section 104(a) of the Mine Act. The citation alleges a violation of section 103(a) of the Act, which requires the Secretary to make frequent inspections and investigations of mines. In doing so, the Secretary is not required to provide advance notice and has the right of entry to, upon, or through any mine. The violation was described in the citation as follows:

> On 08/16/2012[,] the dispatcher and Tom Hamilton, Crusher Operator and person in charge at the mine[,] refused to allow Dennis Bellfi, an authorized representative of the Secretary, entry into the Portable Inc. Wash Plant Mine for the purpose of conducting an inspection of the mine pursuant to Section 103(a) of the Act. Tom Hamilton[,] via the dispatcher[,] stated that the Federal Inspector could not enter the mine without being escorted by a company official. No company official was provided and thus delayed the inspection. After waiting 30 minutes[,] this inspector was advised by Jennifer Rather, Safety Director[,] via the dispatcher that the inspection could commence without [an] escort. This condition has not been designated as "significant and substantial" because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard.

Ex. S-2.

Bellfi determined that there was no likelihood the violation would result in illness or injury, that such injury or illness could reasonably be expected to result in no lost workdays, that no persons were affected, but that the negligence level was deemed to be high. The Secretary proposed a specially assessed penalty of $1,000.00.

Inspector Bellfi informed that, prior to becoming a CLR, when he used to conduct MSHA mine inspections on a full-time basis, he would generally wait about 5 minutes for an escort. Tr. 19, 53. If an escort was not present within that period of time, Bellfi would begin the inspection and tell mine personnel that the escort could meet up with him. Tr. 19, 54. The Inspector advised

[3] Shutting down the crusher concerned Bellfi because he preferred to view the mine while it was operational. Tr. 50-51. However, Bellfi did not express this concern to Edwards or any other Portable employee. *Id.*

that he was trained to allow time for an operator to get a mine representative to accompany him during an inspection, as long as doing so did not unduly delay the inspection. Tr. 39. It was Bellfi's view that Portable was in violation of section 103(a) of the Act because it refused to allow him to inspect the mine by telling him that he needed an escort to enter mine property, then failing to provide one for 30 minutes, before then allowing him to begin his inspection without an escort. Tr. 39-41. He considered these actions to be an indirect denial of the inspection. Tr. 81; Ex. R-17. Bellfi believed that other employees, besides Hamilton and Rather, could have escorted him, though he did "suppose" that an operator could designate the escort. Tr. 41, 57. On cross-examination Inspector Bellfi admitted that he never explained to Eric Edwards, or to anyone at Portable, that there are inspection requirements under 103(a). Tr. 55.

Bellfi started his inspection once Edwards told him he could start alone and he was joined by Mr. Hamilton, the crusher operator, approximately 10 to 20 minutes later. Tr. 28, 31. It was the Inspector's testimony that during his inspection he noticed "that there were guards that had had different types of [ ] bolts in the guarding." Tr. 29. There were four or five clean, shiny, new washers and bolts next to rusted bolts and washers on different areas on different screens or guards. Tr. 30. He was unsure how long they had been there, but when pressed, he added that it could have been "[a] couple of days to a week." Tr. 30. Bellfi also observed one berm on the crusher feed ramp that had, what he assumed was new dirt, piled on the edge of it. Tr. 32. He estimated the area of the fresh dirt to be about 10 to 15 feet across and that it had been placed there within the hour based on the fact that it looked wet.[4] Tr. 34. However, Inspector Bellfi did not include the berm or bolt and washer observations in his notes on the day of the inspection, assertedly because he did not think it was an issue at the time. Tr. 77. It was not until after the inspection that Bellfi determined that such safety corrections could have been made during the time that he was waiting for an escort. It was such afterthoughts that prompted MSHA's alternative theory of liability, that Portable gave advance notice of the inspection.

As noted, the Inspector raised two grounds, new bolts and fresh berm dirt, in support of the claim of advance notice.[5] The Inspector acknowledged that he arrived for his inspection of the mine in the afternoon. Tr. 80-81. He claimed that the dirt moved on to the berm could have occurred after his arrival. He admitted that it is not normal practice to change bolts or washers on a crusher while it is running. Further, he did not ask anyone during his inspection when the bolts and washers were last changed, nor did he ask for any maintenance records as a source for indicating when maintenance was last done on the crusher. Similarly, he failed to ask anyone during his inspection when the berms had been created. Tr. 86-87.

The Court noted that these matters were simply suspicions on the Inspector's part, and that the Inspector was unable to state definitively when those actions, regarding the berms and the bolts, were taken. In fact, when that question was then expressly posed to the Inspector, he conceded that he could not prove that either of the actions were taken during the interval in which he was delayed. Tr. 90-93. Bellfi then acknowledged that the basis for his advance notice

[4] Bellfi made the assumption that the dirt should have been dry and crusted on the top because it was hot on the day of the inspection. Tr. 32.

[5] As the Inspector issued his impeding notice before seeing the berm dirt and new bolts, these contentions have relevance only to the claim of advance notice.

allegation was that Eric Edwards or Jenifer Rather had contacted Tom Hamilton. However, based upon all the evidence of record, the Court does not agree that such an inference is fair. The contact with Mr. Hamilton was simply for the purpose of finding an escort at Portable's very small operation. Tr. 51.

Curt Petty was the MSHA Field Supervisor[6] of the Helena, Montana office at the time that the citation was issued and in that capacity he considered himself Bellfi's boss for the time Bellfi was temporarily assigned to the Helena office. Tr. 119, 125. Inspectors working under Supervisor Petty were instructed to call him *before* issuing a citation for impeding. Tr. 125, 133. Inspector Bellfi admitted that he did not do that but he insisted that inspectors are only supposed to contact their supervisors if they are denied entry *after* issuing a citation. Tr. 84, 85; Ex. R-22 at 39-40. Supervisor Petty testified that once the inspector explains to mine personnel that they have the right to inspect the mine immediately, there is no timeline for issuing such an impedance citation. The Court, wanting additional precision about this, asked if that meant that once an inspector informs that there is a right to inspect, there is to be no delay and the inspector should be permitted to begin his inspection immediately. Mr. Petty agreed with that description. Tr. 120-21.

When asked to describe his experiences with waiting for mine representative escorts, Supervisor Petty testified that he had conducted and been present for hundreds of inspections, and for some of those he waited 30 minutes or longer for an escort and that he did not issue a citation for impeding an inspection in any of those instances. Tr. 124, 132. He also stated that he had inspected Portable twice in the past and had waited about 15 to 20 minutes for Ms. Rather to meet him at the mine the first time. No citation was issued for impeding an inspection then either.

Mr. Edwards, who Inspector Bellfi acknowledged was not an employee of Portable and that he was untrained in MSHA standards, testified that he never asserted to Inspector Bellfi that the property could not be inspected. Tr. 143-44, 147. Edwards stated that he called Mr. Hamilton, who was operating the crusher at the time, to ask him to escort the Inspector and called Ms. Rather to let her know that he was attempting to have Hamilton escort Bellfi. Tr. 147. Edwards followed up with Hamilton 10 minutes later and Hamilton informed him that Richard Van Dyke, the other crusher operator, was not on-site and therefore he had to shut the crusher down. Tr. 148. Mr. Edwards maintained that, when he told the Inspector that Hamilton was shutting the crusher down and would then escort him, Bellfi then wrote the citation. Tr. 148-49. According to Edwards, Bellfi did not discuss his authority under section 103(a), prior to issuing the citation. Tr. 149.

In the 15 years that Ms. Rather has worked for Portable she could not remember any MSHA inspector that did not check in at the front office before conducting the inspection. Tr. 170-177. She explained that Portable's policy is to have a representative accompany anyone traveling on the mine site, including MSHA inspectors. Tr. 172-73. According to Ms. Rather, the designated representatives allowed to escort MSHA inspectors are the managers, which consist

[6] Petty has been with MSHA for 16 years, 12 of which were as a field supervisor and 4 of which were as a metal/non-metal inspector. Tr. 121, 123.

of herself, Scott Miller, and Tom Hamilton, because they are the most knowledgeable and experienced employees. Tr. 173, 176.

Over those 15 years, Ms. Rather has joined the MSHA inspector on every inspection except one, when she was away on travel. Tr. 176. She primarily works at Kenyon Noble's corporate office in Bozeman, Montana which is approximately an 8 to 10 minute drive to Portable. Tr. 172. The practice employed when the MSHA inspector arrives at the mine site is for an employee from the front office to call and so inform her of the inspector's presence. Tr. 177. Ms. Rather asserted that, historically, inspectors have waited anywhere from 10 to 30 minutes for her to then arrive to accompany them. Tr. 178.

On the date of this incident, August 16, Ms. Rather was doing payroll for Kenyon Noble's 280 employees and therefore was not available to accompany the inspector that day, as the company pays its employees on the 16th of each month. Tr. 178. Because Miller was out, Hamilton was the only other authorized representative of the mine that could escort the inspector. As mentioned, Mr. Van Dyke, who had the day off, was contacted by Hamilton to see if he could cover for him while the inspection took place. Tr. 180, 183. When Rather was later told that Van Dyke was out of town, she telephoned Hamilton and told him to shut down the crusher. Tr. 183. Hamilton confirmed that he called Van Dyke to cover for him but, because he was too far away, Hamilton had to shut the crusher down, a process that takes approximately 25 minutes. Tr. 211, 217.

Ms. Rather further testified that she was never told by Mr. Edwards that Inspector Bellfi was threatening to issue a citation for impeding an inspection. Tr. 184. She also assured the Court that new procedures have been put in place to prevent a recurrence of the type of delay that occurred on August 16. Tr. 200-01. The Court considers this to be tangential, yet important, as Portable has assured that there will not be a repeat of this misunderstanding.

Discussion

The Secretary states that section 103(a) is violated if a mine operator unreasonably delays the start of an inspection by denying the inspector access to the mine. As a principle, the Court agrees with that contention, but the issue here is whether, in the context of the findings of fact, there was an unreasonable delay in this instance. As mentioned, as an alternative theory of liability, the Secretary contends that Portable violated section 103(a)'s prohibition against giving mine personnel advance notice of an inspection.

The unreasonable delay contention will be discussed first. The Secretary notes that Section 103(a) of the Act prohibits an operator from interfering with an inspection, and that such interference includes that which is caused by unreasonable delay or where an operator's actions have the effect of frustrating the Secretary's legitimate objectives. *Topper Coal Co.*, 17 FMSHRC 945, 948 (June 1995) (ALJ); *Calvin Black Enters.*, 7 FMSHRC 1151, 1156-57 (1985); *Spiro Mining, LLC*, 33 FMSHRC 3255, 3257 (Dec. 2011) (ALJ). Here, the Secretary acknowledges that the 30 minute delay was an *indirect denial* of the right to inspect. Inspector Belfi himself so characterized the delay as an indirect denial. Tr. 81, 84. Nevertheless, the Secretary contends that the delay was unreasonable in this instance because Portable's safety

policy did not apply to MSHA inspectors, because Portable placed its interest in allowing Ms. Rather and Mr. Hamilton to continue their work duties over MSHA's interest in conducting an inspection,[7] and because the delay frustrated MSHA's legitimate objective to observe the mine when it is operating. Sec'y Br. at 7 - 9. As applied to the particular facts here, the Court finds that none of these contentions are meritorious.

The Secretary[8] asserts that Portable's argument that the delay was prompted by its inability to find an escort to accompany the inspector ignores that, in circumstances when an operator's preferred representative is busy, it is the operator's responsibility to find a substitute. It adds that, if no substitute is available, the operator must permit the inspector to conduct the inspection unaccompanied. Sec'y Br. at 15-16, citing *F.R. Carroll Inc.*, 26 FMSHRC 97, 102 (2004). Last, the Secretary maintains that any of three other employees who were on site on the day of the inspection could have escorted Bellfi and therefore not delayed the start of his inspection.

The Secretary's arguments for upholding the citation are significantly based on the assumption that Portable refused to allow Bellfi to start his inspection and that he was legally entitled to commence the inspection without undue delay. Sec'y Br. at 10. The latter contention is not disputed. Both sides agree that an inspector is entitled to inspect without undue delay. However, as to the former contention, the Court has previously stated that it finds that there was no indirect denial of entry. It is further noted that the Inspector never attempted to explain his authority, nor did he simply start his inspection. On these facts it is clear that the Inspector chose to wait much longer than his normal amount of time for an escort. As he stated, he would usually start the inspection after five (5) minutes, proceeding unaccompanied, if necessary.

There was no testimony or documentary evidence presented by either side that Bellfi was told that he was *not permitted* to inspect the mine at any point during the 30 minute waiting period despite the description in the citation suggesting otherwise.[9] On the contrary, Edwards

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[7] For the sake of completeness only, it is noted that the Secretary observes that Bellfi was not bound by Portable's safety policy. That is true and this decision does not suggest otherwise. Beyond that, it is noted that Mr. Edwards was a marginal figure in this matter. He was an employee of Kenyon Noble, not Portable, and had not been trained in MSHA regulations. On this record, it appears that Edwards simply miscommunicated Portable's company policy to Bellfi.

[8] Both parties addressed Portable's right to have a representative present during the inspection under section 103(f). Resp. Br. at 12; Sec'y Br. at 14. The court does not find this argument relevant to determining whether section 103(a) was violated in this case because Portable sought to have a representative present and Bellfi allowed Portable the opportunity to have a representative present by waiting for 30 minutes before issuing a 103(a) citation and beginning his inspection.

[9] This is distinguishable from the facts in *F.R. Carroll* where the inspector repeatedly asked the operator to allow him to proceed with the inspection, and told mine personnel that a 5 hour delay could not be granted. *F.R. Carroll*, 26 FMSHRC at 102.

had returned to Bellfi to tell him the crusher was being shut down and he could begin the inspection unaccompanied when Bellfi decided to issue the citation. Further, Bellfi never told Edwards he had a right to inspect the mine,[10] nor did he attempt to start his inspection despite testifying that he would normally only wait 5 minutes for an escort before beginning. These actions also diminish the Inspector's claim that Portable's actions constituted an indirect denial. In the Program Policy Manual (PPM), a source of MSHA's interpretation and guidelines on enforcement of the Act, indirect denials are "those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to prevent inspection of the mine by interference, delays, or harassment. There must be a clear indication of intent and proof of indirectly denying entry." Ex. R-27 at 2. Based on the above actions taken by Portable, the court finds that the record does not evidence such "clear indication of intent and proof of indirectly denying entry," and accordingly it is found that the Respondent did not exhibit the intent to indirectly deny access or otherwise delay the inspection.[11]

In addition, testimony from Supervisor Petty and Ms. Rather regarding past practices were particularly enlightening. Petty had performed or accompanied hundreds of inspections in the past, sometimes waiting 30 or more minutes for an escort before beginning the inspection. No citations for impeding were issued as a result of those prior wait times. Petty also explained that MSHA protocol was for inspectors to tell mine personnel that they had a right to inspect the mine immediately and that, after so informing, there was no timeline for issuing the citation for impeding. There is no indication that Bellfi did this. Ms. Rather had been present for all inspections at Portable, except for one, prior to August 16, 2012, and she never had an issue with an inspector waiting up to 30 minutes for her to arrive and be an escort. While a lack of past enforcement by MSHA cannot be the sole reason for vacating this citation, the Secretary's previous interactions with Portable set the stage for its expectations, and was indicative of the amount of time it considered to be a reasonable period to wait.

Thus, it is fair to state that Portable's past experience with MSHA inspections led it to believe that it was acting in a manner consistent with those experiences, and therefore that it was not thwarting any inspection. What was remarkably different here is that Portable was dealing with a new inspector, one who was temporarily assisting the Helena, Montana office with its

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[10] Bellfi did testify at hearing that he told Edwards the longer he had to wait, the more inclined he would be to issue a citation for impeding. Respondent pointed out that the Inspector did not mention this in his depositions, nor does this claim appear in his notes. Tr. 101-02; Ex. R-22. When questioned, Bellfi stated that he remembered this while reviewing the case prior to hearing. *Id.* These observations undercut the Inspector's assertion.

[11] With regard to the above facts and the Secretary's position about the delay frustrating his legitimate objective to view the mine while in operation, it appears to the Court that he is trying to argue both sides. On one hand he states that Hamilton should have been instructed to shut down the crusher immediately so that Bellfi could begin his inspection. Sec'y Br. at 16. In depositions on February 2, 2014, Bellfi stated that it would not have mattered whether the crusher was operating if he was able begin his inspection promptly. Ex. R-22 at 21-22. On the other hand, the Secretary states he has a legitimate interest in seeing the mine in operation – an attempt made by Hamilton when he called Van Dyke to take over for him so that he could escort Bellfi. It seems that the Secretary would not have been satisfied with either scenario.

inspection responsibilities, and who lacked the institutional knowledge of the interactions between that local MSHA office and Portable's operation. It is fair to state that no claim of indirect denial, nor the advance notice claim, would have arisen but for the temporary inspector's lack of appreciation of the protocol that MSHA had been observing with Portable.

As noted, in the alternative, the Secretary has argued that Portable violated section 103(a)'s prohibition against giving mine personnel advance notice of an inspection. Sec'y Br. at 8. He states that because Edwards and Rather told Hamilton that MSHA had arrived to conduct an inspection 30 minutes before Bellfi was permitted to start the inspection, Portable violated section 103(a). *Id.* This contention has largely been discussed. However a few additional remarks follow.

Bellfi testified that the depositions of Rather, Edwards and Hamilton revealed that Rather made phone calls to Hamilton, telling him that Bellfi was at the mine to conduct an inspection and needed an escort. Tr. 51, 93. Edwards also told Hamilton that Bellfi was at the mine to conduct an inspection and needed an escort. Tr. 73-74, 93. Bellfi asserted that these actions constituted advance notice. However, he did not believe that talking to Bright or the loader operator was the equivalent of advance notice because he was ready to conduct his inspection at that moment. Tr. 71. Bellfi maintained that Edwards and Rather should not have told Hamilton to escort him specifically for an inspection and that it should not have been disclosed that he was there for an "inspection." Tr. 95. Bellfi did not give this instruction or recommendation to Bright, the loader operator, Edwards, or Rather. Tr. 71-72, 96. It should also be remembered that this is a very small, six employee, operation.

Section 103(a) of the Act states that "no advance notice of an inspection shall be provided to any person." It is acknowledged that this is important to the health and safety of miners because it helps to ensure that operators do not conceal or address hazardous conditions before the inspector observes them. However, the court finds the Secretary's argument lacks merit in this case. The Secretary did not believe that Rather was given advance notice when she was contacted by Edwards. Even if Rather was not doing payroll and could leave for the mine promptly, she still would have taken at least 8 to 10 minutes to get to the mine. Bellfi's argument appears to hinge on the use of the word "inspection," but both Rather and Edwards were told that Bellfi was there for an inspection. Bright and the loader operator were informed by Bellfi himself when he arrived that he was there to conduct an inspection. While Bellfi was ready to conduct his inspection at that moment, he did not start performing the inspection until 30 minutes later, yet Bellfi did not consider this to be advance notice. The court fails to see how informing Hamilton was distinguishable from informing Rather or Edwards. Most of Portable's employees were aware that an inspection was imminent by the time Hamilton was contacted. Again, Portable never told Bellfi that he could not begin his inspection and Bellfi never attempted to do so.

In addition, Hamilton was clearly contacted about Bellfi's presence so that he could be an escort. In this respect, the situation at bar is distinguishable from other advance notice cases. See *Topper Coal Co.*, 20 FMSHRC 344 (Apr. 1998) (Commission upheld citation for a 103(a) violation where an operator warned miners that MSHA inspectors were entering the mine and to "watch out and be careful" despite being instructed by the inspectors not to tell anyone about

their presence.); *Cougar Coal Co.*, 17 FMSHRC 628 (Apr. 1995) (ALJ upheld citation for a 103(a) violation where surface personnel alerted underground miners of the inspectors' presence despite being told not to do so.)

Based on the above, the court finds that notifying Hamilton of Bellfi's presence is clearly distinguishable from other cases where a violation of section 103(a) was found for providing advance notice. As a result, the court finds that Rather's and Edwards' communications to Hamilton did not constitute advance notice in violation of section 103(a).

As noted, the Secretary further alleges that Portable corrected hazardous conditions, or had the opportunity to do so, while Bellfi was waiting for an escort. Sec'y Br. at 11. However, for this alternative liability theory of advance warning, the record simply does not support the conclusion that such activity occurred. This conclusion is consistent with the facts associated with the unreasonable delay claim and, beyond that, the indicia that the visiting inspector pointed to support this afterthought theory of liability, that is the fresh bolts and berms, were not established under the preponderance of evidence burden as having occurred during the 30 minute window of time that forms the foundation for either theory.

Inspector Bellfi arrived in the *afternoon* of August 16, but stated in his memo to the district manager, supporting the citation, that the dirt on the berm had been moved the *morning* of August 16. Tr. 79-80; Ex. R-17. In addition, Bellfi did not ask anyone at the mine when the bolts and washers were last changed, and conceded that it was not normal practice to change them while the crusher was running, as it was on the day of the inspection. Tr. 86-87. He also did not request maintenance records to see when these tasks were performed because he did not think it was relevant, and no other evidence supporting this surmise was introduced at hearing. Tr. 87. Thus, Bellfi was not certain that the berm, washers, and bolts were fixed while he was waiting for an escort. Tr. 92-93.

As a result, the court finds that the Secretary did not meet its burden in proving by a preponderance of the evidence that Portable took corrective actions while Bellfi was waiting for an escort in violation of section 103(a).

Upon review of the entire record and the Court's assessment of the credible testimony, it concludes that there was miscommunication and some confusion on Portable's part in reacting to Inspector Bellfi when he appeared at the mine to conduct his inspection, but there was no intent to delay the inspection. Nor, *under the particular circumstances of this case*, was the 30 minute delay unreasonable, given the unfamiliarity of those at the mine with how to deal with a mine inspection and the lack of precision on the Inspector's part in communicating the immediacy associated with his right to inspect. The Mine's reaction was also tempered by the history of its significant experience when MSHA inspectors had arrived in the past.

Based on the above determinations and facts, the Court finds that Portable did not unreasonably delay Bellfi's inspection or indirectly deny access to its mine on August 16, and therefore, did not violate section 103(a). It is further determined that Portable did not engage in any advance notice violation. It is important to recognize, however, the Secretary's valid concern that "excusing" a 30 minute delay "would severely impair MSHA's ability to protect miners." Sec'y Br. at 19. Under a different set of facts, intentionally and unreasonably delaying an MSHA inspector for 30 minutes, or possibly, in some circumstances, a delay of less time, could indeed weaken MSHA's ability to protect miners. Accordingly, the Court's decision here is not meant to be broadly interpreted but instead is limited to the specific circumstances of this is case.

Wherefore, Citation No. 8587084 is **VACATED** and this case is hereby **DISMISSED**.

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

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It is hereby certified that the foregoing was served via email and certified mail on December 5, 2014:

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December 8, 2014

SIGNATURE MINING SERVICES, LLC, Petitioner	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	Docket No. EAJ 2012-0002
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Coalburg No. 1

AMENDED DECISION AND ORDER

Appearances: David Hardy, Esq., & Christopher Pence, Esq., Hardy Pence, PLLC, Charleston, West Virginia for Petitioner

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

Before: Judge McCarthy

The Decision and Order issued December 5, 2014, is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. § 2700.69(c) (2014), to correct clerical errors and read as set forth below.

I. Statement of the Case

This case is before me upon an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504 (2014). Signature Mining Services, LLC, filed its Application against the Secretary of Labor's Mine Safety and Health Administration based upon a negotiated settlement that the parties reached in the underlying contest proceeding. Currently pending in this case are Cross Motions for Summary Judgment filed on March 11, 2014, and a Motion to Supplement the Record filed on May 28, 2014. The undersigned finds no genuine issues of material fact that preclude summary disposition of this matter. For the reasons set forth herein, the Secretary's Motion for Summary Judgment is granted, and Signature's Motion for Summary Judgment is denied.

II. Factual and Procedural Background

A. The Underlying Contest Proceeding

On August 25, 2011, adverse roof and rib conditions developed at the Coalburg No. 1 Mine at the 003 MMU-2 East Panel, a retreat mining section. Order No. 8139507; Signature App. at 1-2. Initially, these conditions affected several entries on the right side of the section along and inby the last open crosscut. Order No. 8139507. After MSHA inspectors observed pillars taking weight on the 2 East Panel, MSHA issued imminent danger Order No. 8139507 pursuant to Section 107(a) of the Act. Order No. 8139507; Sec'y Answer at 3. This order covered the #6 and #8 entries along and inby the last open crosscut. Order No. 8139507.

Signature and the Secretary both allege that the conditions began to spread from the mouth of the 2 East Panel to the Mains. Signature App. at 3; Sec'y Answer at 3. In response, Signature began withdrawing miners and equipment from, and dangering off, the affected area. Signature also set Heintzman jacks along the roadway at break 15 along the Mains, outby the area affected by the adverse roof conditions. Richmond Dep. 30:9-31:10; Canterbury Dep. 11:21-12:13; Mackowiak Dep. 60:11-14, 65:2-5, 66:14-15; 75:11-19.

On August 27, 2011, at 1:30 a.m., the Coalburg No. 1 foreman reported that the pillars at the mouth of the 2 East Panel were taking weight. Richmond Dep. 18:21-19:8. Randel Richmond, Signature's president, was informed that the ground failure had migrated into the Mains. Richmond Dep. 19:6-21:8. Before 10 a.m., Richmond spoke with Terry Price, MSHA's field office supervisor, and John Kinder, a representative of the West Virginia Miner's Health, Safety, and Training (WVMHST), to apprise them about the adverse ground conditions. Richmond Dep. 30:20-32:2. Richmond told Price that Signature had stopped production and withdrawn all its miners from the affected areas. Richmond Dep. 30:22-31:3. Richmond also provided Price with assurances that Signature had taken steps to monitor and correct the conditions. Richmond Dep. 31:5-10, 36:14-22.

Approximately fifteen minutes later, Joe Mackowiak, MSHA assistant district manager, called Frank Canterbury, a mine foreman at Signature, to inquire further about the adverse conditions. Mackowiak Dep. 57:8-12. Canterbury informed Mackowiak that the ground failure had migrated into the Mains and that men were underground setting jacks to prevent further migration of the adverse ground conditions. Mackowiak Dep. 73:22-74:20, 97:3-13. Canterbury also told Mackowiak that the ventilation controls of an abandoned mine 75 feet below the Coalburg No. 1 had been crushed and the water sumps had gone dry. Order No. 8126005; Mackowiak Dep. 81:16-82:19. The subsidence led Mackowiak to conclude that the pillar failures and ground conditions created regional instability. Mackowiak Dep. 92:14-94:8.

Pursuant to Section 107(a) of the Act, Mackowiak orally issued imminent danger Order No. 8126005 by phone. Mackowiak Dep. 87:12-14. Mackowiak emphasized that the situation was so dangerous that everyone ought to be withdrawn, without exception. Mackowiak Dep. 99:16-19, 103:2-5. Mackowiak then instructed Price to dispatch inspectors to Coalburg No. 1 and reduce the Order to writing. Mackowiak Dep. 87:21-88:11. Mackowiak also faxed Price instructions to issue the imminent danger order with "[n]o exceptions," which meant that

no one was allowed to be in the mine site. Mackowiak Dep. 102:8-15; Price Dep. 54:10-20, dated November 8, 2011.

When Price and James Jackson, another MSHA inspector, arrived at Coalburg No. 1, they reduced the Order to writing. Price Dep. 56:19-57:4. At that time, 14 miners were underground. Price Dep. 60:22-61:6. Although none of these miners were involved in running coal, Price and Jackson did not conduct any investigation about why these miners were underground. Price Dep. 60:7-15. Price and Jackson did not travel underground to examine the adverse conditions. Price Dep. 64:14-65:5. Price instructed Signature that the entire mine site was closed and no one was permitted underground without MSHA's approval. Price Dep. 62:14-18, 63:4-64:8; *see* Richmond Dep. 36:15-20, 38:16-39:1.

On August 29, 2011, MSHA inspectors, Signature personnel, and consultants from Alpha Engineering traveled underground to observe the adverse conditions and determine whether the ground failure had stopped. Richmond Dep. 40:23-41:13. The inspection party determined that the 2 East Panel and approximately ten crosscuts inby break 15 were the areas primarily affected by the roof and rib conditions. *See* Appl. For Fees and Other Expenses at 3, dated January 6, 2012. Mackowiak heard pillars breaking and continued to express concern that the ground failure posed a regional threat given the conditions of the underlying mine. Mackowiak Dep. 141:22-144:17. As a result, the imminent danger Order remained in effect for the entire mine site. Order No. 8126005; *see* Mackowiak Dep. 140:7-21. Thereafter, Signature filed a Notice of Contest to Order Nos. 8139507 and 8126005. *See* Notice of Contest to Orders Nos. 8139705 & 8126005.

On August 30, 2011, MSHA issued withdrawal Order No. 7257539 pursuant to Section 103(k) of the Act. Order No. 7257539. In this control Order, MSHA alleged that a "coal and floor rock outburst accident" had occurred and all mining activities inby had been disrupted. *Id*. The 103(k) Order covered the entire mine because of hazards presented by crushed ventilation controls and instability of mine pillars. *Id*. MSHA was unsure about the extent of damage and the need to conduct an accident investigation. Sec'y Answer at 4. On August 31, 2011, Signature filed a Notice of Contest to Order No. 7257539.

Six days before the scheduled hearing on the contest proceedings, the parties entered into settlement negotiations. On December 2, 2011, the Secretary of Labor, MSHA, and Signature filed a Joint Motion to Continue based on the terms of a proffered settlement agreement. Jt. Mot. to Continue at 3-4. With respect to the Section 107(a) imminent danger Orders, Signature agreed to withdraw its Notice of Contest to Order No. 8139507 in exchange for MSHA's promise to vacate Order No. 8126005. *See* Jt. Mot. to Continue, at 3. Negotiations on section 103(k) Order No. 7257539 were ongoing at the time the Joint Motion was filed. Thereafter, MSHA agreed to narrow the area of the mine affected by that control Order and to approve Signature's ventilation plan. Jt. Mot. to Continue, Ex. 2. On December 5, 2011, the undersigned granted the parties' Joint Motion to Continue. Order Granting Continuance.

On December 16, 2011, the undersigned granted Signature's motion to partially withdraw its Notice of Contest to Order No. 8139507. My Order noted that the Secretary had agreed to vacate Order No. 8126005 and directed that Order No. 8126005 be addressed in either a subsequent settlement motion or hearing. On January 4, 2012, I granted the Secretary's motion to

dismiss and vacate Order No. 8126005. On January 20, 2012, Signature filed a motion to dismiss its Notice of Contest to Order No. 7257539. By Order dated January 26, 2012, the undersigned granted Signature's motion.

B. The EAJA Proceeding

On January 9, 2012, Signature filed its Application for Fees and Other Expenses under EAJA. On August 30, 2013, the undersigned issued a Decision and Order finding that (1) the judicially-sanctioned negotiations that concluded the underlying contest proceeding were sufficient to grant Signature prevailing party status under the EAJA and (2) Order No. 8126005 was overbroad and the Secretary's decision to enforce it was without merit and could not be substantially justified.[1] The Decision and Order directed that further proceedings address (1) whether Signature's balance sheet met EAJA's financial eligibility requirements, (2) whether Patriot Coal Company controlled the underlying contest proceedings (thereby precluding Signature from recovering fees under the EAJA), and (3) the amount of attorneys' fees, if any, to which Signature was entitled after prevailing on Order No. 8126005.

The parties engaged in additional discovery after issuance of my August 30, 2013, Decision and Order clarifying the issues to be addressed at hearing. In response to a discovery request from the Secretary, Signature's counsel produced a redacted copy of the Contract Mining Agreement, which detailed the nature of the contractual relationship between Signature and Jarrell's Branch. Resp't Ex. 24, Signature's Response to the Secretary's Requests for Production of Documents. The redactions of putative confidential business information included paragraphs 17, 18, and 20, which provided, in relevant part, that Jarrell's Branch would reimburse Signature for certain penalty assessments issued by MSHA that did not arise from intentional misconduct or gross negligence, and for attorneys' fees and costs incurred in contesting penalty assessments before the Commission. Resp't Ex. 24, Signature's Response to the Secretary's Requests for Production of Documents; Resp't Ex. 21.

The Secretary subsequently discovered an un-redacted copy of the contract on the Patriot bankruptcy information website. The contract had been filed with the bankruptcy court on

[1] During a conference call with the parties on November 21, 2013, Signature informed the undersigned that a clarification of my August 30, 2013, Decision and Order was warranted and Signature conceded that its application for fees was limited to Section 103(k) Order No. 7257539 and Section 107(a) Order No. 8126005. The Secretary then filed a Motion for Modification on November 25, 2013. An Amended Decision and Order was issued on December 6, 2013, which stated that Signature was only eligible to be awarded fees and costs related to Section 107(a) Order No. 8126005. While the Secretary may have lacked substantial justification for enforcing 107(a) Order No. 8139507, Signature did not apply for fees related to that order within thirty days of the Commission's final disposition of the underlying proceeding, Docket No. WEVA 2011-2299, and thus is ineligible to be awarded fees incurred in its defense of that Order. 29 C.F.R. § 2704.206 (2013).

July 31, 2013, in support of Signature's claim against Jarrell's Branch.[2] The Secretary had previously been unaware that Jarrell's Branch had fully reimbursed Signature for the fees incurred in the underlying contest proceeding and partially reimbursed Signature for the fees incurred in the EAJA litigation. When the Secretary notified Signature's counsel that he had found an un-redacted copy of the Contract Mining Agreement, counsel admitted that Signature had been reimbursed for attorneys' fees and costs. Secretary's Mot. Summ. J. 10, n.6.

On December 12, 2013, the parties filed a Joint Motion for Decision on Stipulated Record. They stipulated to Signature's net worth and to the amount of attorneys' fees incurred by Signature in its defense of Order Number 8126005 and the litigation of its EAJA application.

On March 11, 2014, after additional discovery, the parties filed Cross Motions for Summary Judgment stipulating to the facts, the record, and the amount of fees Signature incurred in the contest proceeding and its EAJA application. The Cross Motions for Summary Judgment present arguments on the primary issue of whether the terms of the Contract Mining Agreement between Patriot Coal's subsidiary Jarrell's Branch and Signature preclude Signature's recovery of fees under the EAJA.

C. Summary of Stipulated Facts on Cross Motions for Summary Judgment

Signature Mining Services is a West Virginia limited liability corporation formed in 2008. Resp't Ex. 22. Since its formation, Signature has employed less than 500 people and its net worth has never exceeded $7,000,000. *See* Signature's Application under EAJA.

Jarrell's Branch Coal Company is a subsidiary of Patriot Coal Corporation. On August 29, 2011, Patriot Coal was worth more than $7,000,000. Patriot Coal filed for Chapter 11 bankruptcy on July 9, 2012.[3]

Order No. 8126005 was issued on August 27, 2011. Resp't Ex. 4. On August 29, 2011, Signature's counsel filed a Notice of Contest for Order Nos. 8126005. Resp't Ex. 7. The litigation of Order No. 8126005 continued through January 4, 2012, when the undersigned issued an Order to Dismiss Docket No. WEVA 2011-2300. Resp't Ex. 19.

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[2] *See* Amended Proof of Claim No. 1394, at Part 9, *In re Patriot Coal Corp., et al.*, No. 12-51502-659 (Bankr. E.D. Mo. July 31, 2013), *available at* *https://cert.gardencitygroup.com/pcx/readPdf/3839_020101.pdf?secondTime=yes&fileType=rmi&.value=101*.

[3] The parties have stipulated to Jarrell's Branch's status as a Patriot Coal subsidiary and to Patriot's net worth as of August 29, 2011. The undersigned takes judicial notice that Patriot Coal's Joint Plan of Reorganization was confirmed by the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division on December 18, 2013 and went into effect that same day. *In re Patriot Coal Corp., et al.*, No. 12-51502-659 (Bankr. E.D. Mo. Dec. 18, 2013), *available at* http://patriotcaseinformation.com/pdflib/Dkt_No._5169A.pdf. Additional information on Patriot Coal's bankruptcy proceedings is available at patriotcaseinformation.com.

On June 1, 2011, Signature entered into a Contract Mining Agreement with Jarrell's Branch Coal Company governing mining operations at the Coalburg #1 mine. Resp't Ex. 21. The Agreement was negotiated over a period of several weeks, and the amount of Signature's compensation pursuant to its terms was directly related to Jarrell's Branch's obligation to reimburse Signature for costs incurred in operating the Coalburg No. 1 Mine, including amounts for legal fees incurred in defending certain citations and orders issued by MSHA.[4] Signature's Mot. Summ. J. 8, Stipulated Fact No. 11. Had Jarrell's Branch not agreed to reimburse Signature for costs incurred in operating the mine, Signature's compensation under the contract's terms would have been higher. Signature's Mot. Summ. J. 8, Stipulated Fact No. 12. The reserves at Coalburg No.1 Mine exceeded the term of the Contract Mining Agreement. Had Jarrell's Branch and Signature negotiated an extension or renewal of the contract upon its expiration, the historical costs incurred in the mine's operation would have been an important consideration in negotiating Signature's future compensation. Signature's Mot. Summ. J. 8, Stipulated Fact No. 13.

Under the Contract Mining Agreement, Signature was responsible for managing the daily operations at the mine, including compliance with the Federal Mine Safety and Health Act and its regulations. Resp't Ex. 21, ¶ 8. The agreement obligated Jarrell's Branch to reimburse Signature for its legal fees incurred as a result of matters pending before the Commission, excluding matters arising under section 104 of the Mine Act. Resp't Ex. 21, ¶ 18. The agreement also obligated Jarrell's Branch to pay Signature for reasonable attorneys' fees after the cancellation, expiration, or termination of the agreement if the citation was issued prior to the effective termination date. *Id*.[5] The maximum hourly rate that Signature can recover in this

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[4] Paragraph 17 of the Contract Mining Agreement states:

> For all assessments, penalties, or fines imposed by federal, state, or local agency for any local, state, or federal law or regulation, except those issued for safety and environmental violations as set for in Articles 18 and 26 of this Agreement, which arise out of the contractors or its Labor Contractor's operation at the Mine, Owner shall reimburse Contractor for the payment of such assessments, penalties, or fines; provided that Owner shall not reimburse Contractor for assessments, penalties or fines arising from Contractor's or its Labor Contractor's intentional misconduct or gross negligence.

Resp't Ex. 21. Paragraph 18, in relevant part, provides that "Owner agrees to pay Contractor for the cost of penalty assessments received by Contractor on citations issued by MSHA . . . for Contractor's or it's Labor Contractor's alleged violation of federal or state mandatory health and safety standards," except for violations arising under sections 104(d), 104(b)(2), and 104(c) of the Mine Act. S*ee* 30 U.S.C §§ 804(d), 804(b)(2), 820(c) (2013). In addition, "Owner shall pay Contractor for the reasonable attorneys' fees and costs incurred by Contractor in contesting penalty assessments and/or citations. Owner considers reasonable attorneys' fees to be those that are based on an hourly rate not in excess of $275 per hour." *Id*.

[5] Paragraph 18 of the Contract Mining Agreement states that "Owner shall continue to reimburse Contractor for the cost of penalty assessments and reasonable attorneys' fees incurred

(continued…)

matter is $275, the contractual reimbursement rate from Jarrell's Branch. *Id.*; *see also* Secretary's Mot. Summ. J. 10, n.6.

Signature decided when to initiate, settle, and terminate actions before the Federal Mine Safety and Health Review Commission. No person at Patriot Coal or Jarrell's Branch had authority to make these decisions. Signature's Mot. Summ. J. 7, Stipulated Fact No. 9. The contest proceedings regarding Order 8126005 were initiated and resolved at the sole discretion of Signature. Signature's Mot. Summ. J. 7, Stipulated Fact No. 10.

At the time the EAJA action was filed on January 9, 2012, Signature had not been reimbursed for time spent in December 2011 defending against Order 8126005. By March 9, 2012, Jarrell's Branch had reimbursed Signature for $39,789.59 in fees and expenses incurred in connection with the defense of Order No. 8126005. Signature's Mot. Summ. J. 9, Stipulated Fact No. 18; Secretary's Mot. Summ. J. 3, Stipulated Fact No. 11. Signature incurred $16,734.07 in expenses from expert services provided by Alpha Engineering Services, Inc. in connection with the defense of Order 8126005. Jarrell's Branch reimbursed Signature for all amounts Signature paid to Alpha Engineering. Signature's Mot. Summ. J. 9, Stipulated Fact No. 21; Resp't Ex. 21, ¶ 17; Resp't Ex. 23. Signature has not been and will not be reimbursed for $40,214.78 in legal fees and expenses incurred in the prosecution of the EAJA action. *See* Signature's Mot. Supplement R. Ex. 4.[6]

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[5] (...continued)

by Contractor after the cancellation, expiration, or termination of this agreement if the citation was issued prior to the effective termination date." Resp't Ex. 21.

[6] The undersigned takes administrative notice of Signature's bankruptcy claims against Patriot. In its Amended Proof of Claim No. 1394, Signature included the following Explanation of Proof of Claim:

> At the time of the bankruptcy filing, Patriot assured Signature Mining that it would continue to pay the fines and defense costs associated with MSHA violations as they arose post-bankruptcy. Signature originally filed two proofs of claim representing expenses that arose prior to the time of the bankruptcy filing. Signature was operating under the assumption that Patriot would reimburse Signature for costs and fees that were continuing to accrue post-bankruptcy. Subsequently, Patriot informed Signature that Patriot does not intend to pay the fines and defense costs as they arise.

Amended Proof of Claim No. 1394, at Part 2, *In re Patriot Coal Corp., et al.*, No. 12-51502-659 (Bankr. E.D. Mo. July 31, 2013), *available at* https://cert.gardencitygroup.com/pcx/readPdf/3839_0201.pdf?secondTime=yes&fileType=rmi&.value=1. On January 16, 2014, Signature and Patriot entered into a Settlement and Release Agreement that resolved Signature's claims in the amount of $164,687 (Exhibit B) and released Patriot from any further liability. *See* Settlement and Release Agreement, *In re Patriot Coal Corp., et al.*, No. 12-51502-659 (Bankr. E.D. Mo. January 16, 2014), *available at* https://cert.gardencitygroup.com/pcx/fs/viewreconPdf?fileName=Signature%20Mining.

Signature has been fully reimbursed for legal fees and expenses set forth in the invoices dated September 22, October 18, November 16, and December 15, 2011; and January 18, February 21, and March 21, 2012. Those invoices include all underlying contest proceeding fees and some EAJA fees. Signature was partially reimbursed for the invoice dated April 18, 2012 relating to EAJA fees. Signature has not and will not be reimbursed for the invoices relating to EAJA fees dated May 24, June 22, August 21, October 1 and 22, and November 13, 2012; October 1, November 3, and December 5, 2013; and January 2, February 3, and April 1, 2014. Secretary's Mot. Summ. J. 5, Stipulated Fact No. 21; Signature's Mot. Summ. J. 9, Stipulated Fact No. 19; Signature's Mot. Supplement R. Ex. 4.

The parties stipulated in their cross-motions for summary judgment that Signature could supplement the record to reflect additional fees incurred in the preparation of the motion for summary judgment. On May 28, 2014, Signature's counsel filed a Motion to Supplement the Record with invoices detailing those fees. Should the undersigned find that Signature is entitled to all legal fees and expenses incurred in the defense of Order No. 8126005 and the subsequent EAJA application, the total amount is $80,004.37, as of May 28, 2014. Should the undersigned find that Signature is entitled only to those fees for which it has not been reimbursed, the total is $40,214.78, as of May 28, 2014.

III. Principles of Law

A. Standard of Review for Cross-Motions for Summary Judgment

Under Commission Rule 67(b), a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows (1) that there is no genuine issue of 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) (2014). The burden is on the moving party to establish its right to summary decision. *Wimsatt v. Green Coal Company, Inc.*, 16 FMSHRC 487 (Feb. 1994) (ALJ). In other words, the party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, all reasonable inferences from the underlying facts must be construed in the light most favorable to the non-moving party. *See e.g.*, *Reeves v. Sanderson Plumbing Pods., Inc*., 530 U.S. 133, 135 (2000). In the case of cross-motions for summary judgment, the Commission has recognized the well-established principle that "the court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with a Rule 56 [of the Federal Rules of Civil Procedure] standard." *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 10 (Jan. 2007); *see also* Charles Allen Wright et al., 10A Federal Practice & Procedure § 2720 (3d ed. 1998); *Scottsdale Ins. Co. v. Cutz, L.L.C.*, 543 F. Supp. 2d 1310 (S.D. Fla. 2007).[7]

[7] Although the Commission's Procedural Rules do not directly address cross-motions for summary judgment, Rule 1(b) provides that "on any procedural questions not regulated by the [Mine] Act, these Procedural Rules, or the Administrative Procedure Act, the Commission and

(continued…)

Summary judgment, however, is an extraordinary procedure and must be entered with care, especially in the case of cross-motions. There are three reasons why courts must carefully evaluate cross-motions for summary judgment separately and individually.

First, the question of whether genuine issues of material fact still exist is a question of law reserved exclusively to the judge, regardless of the parties' opinions. Wright et al., *supra*, § 2720. The parties' filing of cross-motions for summary judgment do not "conclusively establish[] the universe of facts that [are] . . . material," and the judge must make the determination that no material fact issues remain unresolved. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 10 (Jan. 2007).[8] The Third Circuit has explained that

> [c]ross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. If any such issue exists it must be disposed of by plenary trial and not on summary judgment.

Raines v. Cascade Indus., 402 F.2d 241, 245 (3d Cir. 1968).

Second, a party's claim that there are no genuine issues of material fact for the purposes of summary judgment does not prevent that same party from making the claim that there *are* genuine issues of material fact that preclude judgment from being entered against it. In other words, "the contention of one party that there are no issues of material fact preventing entry of judgment in its favor does not bar that party from asserting that there are issues of fact sufficient to prevent the entry of judgment as a matter of law against it." *Schwabenbauer v. Bd. of Educ.,* 667 F.2d 305, 313 (2d Cir. 1981); *see also Zook v. Brown*, 748 F.2d 1161 (7th Cir. 1984); *Nafco Oil & Gas, Inc. v. Appleman*, 380 F.2d 323 (10th Cir. 1967); *Cram v. Sun Ins. Office*, 375 F.2d 670 (4th Cir. 1967).

Finally, "the mere fact that a [party] has failed to meet his burden of proof on his motion for summary judgment does not entitle the [other party] to judgment on its motion." *Rothenberg v. Chemical Bank New York Trust Co.*, 400 F. Supp. 1299, 1302 (S.D.N.Y. 1975). Rule 56 places the burden on the *moving party* to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; when both parties file competing motions for

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[7] (…continued)
its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure." 29 C.F.R. § 2700.1(b) (2014). Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, and the jurisprudence regarding standards of review for cross-motions for summary judgments is well-developed. *See e.g.*, Wright et al., *supra*, §§ 2720, 2725 (3d ed. 1998).

[8] Summary judgment may be particularly appropriate, however, where the parties have stipulated to the facts. *See e.g.*, *Trevino v. Yamaha Motor Corp.*, 882 F.2d 182 (5th Cir. 1989); *Estate of Reddert v. United States*, 925 F. Supp. 261 (D.C.N.J 1996).

summary judgment, each party must separately and individually satisfy that burden. *See Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d. 1132, 1136 (9th Cir. 2001).

Summary judgment, therefore, may only be entered when there is no genuine issue of material fact, and when the party in whose favor it is entered is entitled to summary decision as a matter of law. *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *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).

B. The Equal Access to Justice Act

1. EAJA Generally and Commission EAJA Rules

The EAJA provides for the award of attorneys' fees and other expenses to a prevailing party against the United States or an agency thereof, unless the position of the government was substantially justified or that special circumstances make an award unjust. 5 U.S.C. § 504(a)(1) (2014). The Supreme Court has recognized that eligibility for EAJA fees requires (1) that the claimant be a "prevailing party," (2) that the Government's position was not "substantially justified," (3) that no special circumstances make an award unjust, and (4) that the fee application must be submitted to the court within 30 days and be supported by an itemized statement. *Commissioner, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 158 (1990).

Pursuant to the directive of 5 U.S.C. § 504(c)(1), the Commission has promulgated its own rules and procedures for EAJA applications. In order to be eligible for EAJA fees, a corporate entity such a Signature -- as opposed to an individual or the sole owner of a corporation -- cannot have a net worth in excess of $7 million nor employ more than 500 employees. 29 C.F.R. § 2704.104 (2014). *See*, *e.g.*, *Bill Simola*, 34 FMSHRC 539, 550–51 (Mar. 2012) (treating LLCs as corporations under the Mine Act). Commission EAJA Implementation Rule 100 defines when eligible parties can recover:

> An eligible party may receive an award when it prevails over the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust.

29 C.F.R § 2704.100 (2014); *see also* 5 U.S.C. § 504(a)(4) (2014).

Under Commission rules,

> [a] prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Secretary was substantially justified. The position of the Secretary includes, in addition to the position taken by the

> Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of proof that an award should not be made to a prevailing applicant because the Secretary's position was substantially justified is on the Secretary, who may avoid an award by showing that his position was reasonable in law and fact. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the underlying proceeding or if special circumstances make the award unjust.

29 C.F.R. § 2704.105 (2014). Contest proceedings, such as the one underlying Signature's application, are expressly included in the types of Commission proceedings in which eligible parties may apply for EAJA fees. *See* 29 C.F.R. §2704.103 (2014).

Although the Commission's EAJA Implementation rules normally cap fees at a rate of $125 an hour,[9] the Commission may exercise its discretion to award fees at a higher rate to account for increases in cost of living or the limited availability of attorneys qualified to handle Commission proceedings. 29 C.F.R. § 2704.107 (2014). Eligible parties may apply for "reasonable expenses," and awards may also include attorneys' fees and expert witness fees regardless of whether "the services were made available without charge or at a reduced rate to the applicant." 29 C.F.R. § 2704.106(a) (2014). The court may also award costs for engineering studies and reports "to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study . . . was necessary for the preparation of the applicant's case in the underlying proceeding." 29 C.F.R. § 2704.106 (2014). The amount of the EAJA award is thus left largely to the discretion of the administrative adjudicator.

When determining the reasonableness of fees to award, the following five factors must be considered:

> 1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;
>
> 2) the prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;
>
> 3) the time actually spent in the representation of the applicant;
>
> 4) the time reasonably spent in light of the difficult or complexity of the issues in the underlying proceedings; and
>
> 5) such other factors as may bear on the value of the services provided.

29 C.F.R. § 2704.106(c) (2014). The EAJA also vests the adjudicator with the discretion to reduce or deny awards "to the extent that the party during the course of the proceedings engaged

[9] *See* 29 C.F.R. § 2704.106(a) (2014); *see also* 28 U.S.C. § 2412(d)(2)(A).

in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy." 5 U.S.C. § 504(a)(3) (2014); *see also* 28 U.S.C. § 2412(a)(1)(C) (2014).

2. EAJA's Purposes and Legislative History

The EAJA was enacted shortly after a period of rapid regulatory growth to address Congress' concerns that small businesses lacked the resources to litigate against the federal government. H.R. Rep. 96-1418, at 9–10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988–89. From a policy perspective, Congress was concerned that the greater resources and expertise of the federal government might coerce small businesses into regulatory compliance simply because they lacked the resources to contest citations, thereby creating precedent on the basis of uncontested orders rather than after the "thoughtful consideration and presentation of opposing views." H.R. Rep. 96-1418, at 10. Therefore, the primary purpose of the EAJA is to eliminate the financial disincentive to challenge unreasonable governmental actions for eligible parties. H.R. Rep. No. 99-120, at 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132; *Jean*, 496 U.S. at 163 *citing Sullivan v. Hudson,* 490 U.S. 877, 883 (1989)).

The EAJA's legislative history shows that Congress specifically intended the statute to serve dual functions:

> 1) [to] diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and
>
> 2) [to] insure the applicability of the common law and statutory exceptions to the "American rule" respecting the award of attorneys' fees in actions by or against the United States.[10]

The Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2321 (1980) (codified as amended at 5 U.S.C. § 504; 28 U.S.C. § 2412 (2014)). Thus, the EAJA reduces the resource disparity between the federal government and small business litigants, and creates an incentive for agencies to police their enforcement and litigation activities by imposing the risk of a fee award against them. *See generally United States v. 329.73 Acres of Land in Grenada & Yalobusha Counties*, 704 F.2d 800, 801–03 (5th Cir. 1983) (discussing congressional intent of the EAJA). Accordingly, the "[g]overnment's interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and curbing excessive regulation and the unreasonable exercise of government authority." *Jean*, 496 U.S. at 163 (1990) (citing H.R. Rep. No. 1418, at 12; S. Rep. No. 96-253, at 7 (1979)).

[10] The American Rule generally provides that each party pays its own attorneys' fees, but allows an award of fees against a party who has acted under common law in bad faith or to preserve a common fund, or when a statute, such as EAJA, provides that fees may be awarded. *See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (discussing application of the American rule doctrine in federal courts).

IV. Positions of the Parties

Signature and the Secretary have stipulated that Signature, at the time the underlying contest proceeding was initiated, was worth less than $7 million and had less than 500 employees, and is therefore eligible to recover fees and expenses under the EAJA. The undersigned's August 30, 2013 Decision and Order, together with the Amended Decision and Order issued December 6, 2013, found that Signature was a prevailing party for the purposes of the EAJA in the contest proceedings related to Order No. 8126005, and that the Secretary's defense of that order was not substantially justified. If the undersigned finds that Signature has incurred fees within the meaning of the statute, Signature is therefore eligible for a fee award. Further, the parties have stipulated that should the undersigned find that Signature is entitled to all legal fees and expenses incurred in the defense of Order No. 8126005 and its subsequent EAJA application, the total amount is $80,004.37. In the alternative, should the undersigned find that Signature is entitled only to those fees and expenses for which it has not been reimbursed (the fees and expenses related to the EAJA application incurred after the partial reimbursement in April 2012), Signature is entitled to $40,214.78.

Given the purposes of EAJA, the issue of whether Signature is entitled to EAJA fees in this matter turns on whether Signature incurred fees under the EAJA given the terms of the contract mining agreement between Signature and Jarrell's Branch, a subsidiary of Patriot Coal. The contract between Jarrell's Branch and Signature obligated Jarrell's Branch to reimburse Signature for legal fees and costs incurred in defending certain citations and orders before the Commission. Resp't Ex. 21, ¶ 18; *see supra* note 3. Signature argues that its contract mining agreement with Jarrell's Branch does not preclude collection of EAJA fees, despite reimbursement from Jarrell's Branch for all attorneys' fees, costs, and expenses, including those incurred by Alpha Engineering, associated with the underlying contest proceeding, and for part of the fees arising from pursuit of its EAJA application. The Secretary argues that the contract mining agreement precludes Signature from incurring fees for the purposes of EAJA.

Signature advances three legal arguments in support of a summary award of EAJA fees. First, Signature emphasizes that it was responsible for managing the daily operations at the mine and had sole discretion to initiate, settle, or terminate actions before the Commission. Therefore, Signature argues that it is the real party-in-interest instead of a stand-in litigant applying for EAJA fees on behalf of Patriot Coal, an ineligible party. Second, Signature argues that nothing in the EAJA suggests a purpose to prevent contractual reimbursement arrangements like that extant between Signature and Jarrell's Branch. Therefore, Signature argues for a fee award regardless of whether it was responsible for paying the fees or whether the fees already have been paid. Third, Signature argues that failure to award fees would circumvent EAJA's purpose of deterring unreasonable government action.

The Secretary advances three arguments in support of a summary denial of EAJA fees. First, the Secretary argues that the potential litigation costs had no deterrent effect on Signature's decision to defend against Order No. 8126005 because Signature knew in advance that reasonable attorneys' fees and costs incurred before the Commission would be reimbursed by Jarrell's Branch. Moreover, Signature has not actually "incurred" any fees because most of its attorneys' fees and all of its expert costs have already been reimbursed by Jarrell's Branch.

Second, because the contest costs and fees have already been paid, any fee award would constitute a windfall for Signature, contrary to the EAJA's intent. Third, the Secretary argues that any EAJA award would impermissibly impose a fine on MSHA and force taxpayers to finance Signature's EAJA litigation.

V. Analysis and Discussion

A. Circuit Court Disagreement on the Meaning of "Incur" under EAJA

The EAJA statute specifically provides in pertinent part that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). Neither the text of the EAJA nor its legislative history provides a definition of "incur." *Sec. & Exch. Comm'n v. Comserv Corp.*, 908 F.2d 1407, 1413 (8th Cir. 1990). This issue is one of first impression for the Commission.[11] Accordingly, the undersigned has canvassed federal circuit Courts of Appeals decisions for guidance, including the Fourth Circuit, which *may* have appellate jurisdiction over the Commission's final decision because Signature is located in Raleigh County in Beckley, West Virginia.[12]

The federal Circuit Courts of Appeals are divided on the issue, particularly when the EAJA award includes fees that are incurred by the party's liability insurer, or fees that are paid or advanced by a third party (here Jarrell's Branch) with a legal obligation to indemnify or reimburse the prevailing party (here Signature). *See United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378 (7th Cir. 2010) (dicta finding that award of attorneys' fees under the EAJA can include fees incurred by the prevailing party's liability insurer, because the party had contracted with the insurance company to pay premiums in exchange for the insurance company assumption of defense costs), *accord Ed A. Wilson, Inc. v. Gen. Servs. Admin.,* 126 F.3d 1406 (Fed. Cir. 1997) (contractor Wilson incurred attorney fees and expenses even though

[11] *Jeroski v. FMSHRC*, 697 F.3d 651 (7th Cir. 2012), comes close, but that case turned on the "prevailing party" issue. *Id*. at 655. The Seventh Circuit affirmed the final order of the Commission judge dismissing the contest proceeding, without prejudice, because the MSHA-targeted janitorial contractor, whose attorney fees were paid by a cement plant, was not a prevailing party under EAJA, but suggested in dicta that contractor had not incurred fees where it would not have been deterred from contesting MSHA action where the cement company financed the litigation and the contractor would receive a windfall from an EAJA award. *Id*. at 655-56.

[12] *See* 30 U.S.C. § 816(a) (2013) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit."). The D.C. Circuit has not addressed the particular issue of whether prevailing parties indemnified by third parties "incur" fees under the EAJA.

Wilson's insurer Bituminous was responsible for paying monthly billings to law firm where Wilson received interest-free loan from Bituminous to pay a denied repair claim against government contracting officer and assigned any potential recovery against government to Bituminous); *Securities & Exch. Comm'n v. Zahareas*, 374 F.3d 624 (8th Cir. 2004) (broker incurred legal fees under EAJA, even though broker's former company had initially agreed to pay fees, where company went bankrupt, leaving broker obligated to pay fees); *see also Morrison v. Comm'r of Internal Revenue*, 565 F.3d 658 (9th Cir. 2009) (taxpayer may incur attorney fees under 26 U.S.C. § 7430(a) even if those fees are paid initially by a third party where there is either a contingent or non-contingent obligation to repay the fees); *Phillips v. Gen. Servs. Ass'n,* 924 F.2d 1577 (Fed. Cir. 1991) (EAJA attorney fees incurred by government employee challenging discipline where contingency fee arrangement required that fee award be paid over to legal representative). *Compare United States v. Paisley*, 957 F.2d 1161 (4th Cir. 1992) (EAJA fees denied where employer paid attorneys' fees on behalf of its former employees pursuant to statutory obligation to indemnify them) *with Securities & Exch. Comm'n v. Comserv Corp.*, 908 F.2d 1407 (8th Cir. 1990) (corporate officer not eligible for EAJA award where company's insurance policy reimbursed company for its indemnification of officer and officer had no legal obligation to pay fees); *United States v. 122 Acres of Land*, 856 F.2d 56 (8th Cir. 1988) (because property owner had no obligation under contingent fee agreement to pay his attorney anything, he had not incurred attorneys' fees within meaning of Uniform Relocation Assistance and Real Property Acquisition Policies Act, another fee-shifting statute); *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 675 F.3d 1036 (7th Cir. 2012) (commercial truck drivers not entitled to award of attorney fees under EAJA where drivers' association was the only party responsible for payment under fee arrangement and therefore the burden of fees would not have deterred litigation challenging government's action); *Jeroski v. FMSHRC*, 697 F.3d 651 (7th Cir. 2012)) (proprietorship performing janitorial services for cement plant who financed litigation of withdrawal order against MSHA was not prevailing party, and suggesting in dicta that janitorial contractor had not incurred fees where it would not have been deterred from contesting MSHA action where cement company financed the litigation and contractor would receive windfall from EAJA award).[13]

Having carefully reviewed the foregoing circuit precedent in apparent conflict, the undersigned resolves the issue of whether Signature has "incurred" fees under its Contract Mining Agreement with Jarrell's Branch within the meaning of EAJA by focusing on whether

[13] The circuits have generally recognized an exception to the requirement that a legal liability for attorneys' fees must be incurred for an EAJA award where the prevailing party is represented by counsel appearing *pro bono* or by a legal services organization. *Cornella v. Schweiker*, 728 F.2d 978, 987 (8th Cir. 1984). For example in *Cornella*, the Eight Circuit relied in part on legislative history suggesting that awards to pro bono organizations were contemplated by Congress. *Id*. (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15, *reprinted in* 1980 U.S.C.C.A.N. 4994). The court held that where a pro bono attorney "forgives" a fee to a client unable to afford legal expenses, that client is eligible for an EAJA award on the basis of that fee arrangement. Other circuits have reached a similar result. *See, e.g., American Ass'n of Retired Persons v. E.E.O.C.,* 873 F.2d 402, 406 (D.C. Cir. 1989)*; Watford v. Heckler,* 765 F.2d 1562, 1567 n. 6 (11th Cir. 1985). Similarly, an EAJA award has been found appropriate where the prevailing party is an attorney appearing pro se. *Jones v. Lujan*, 883 F.2d 1031 (D.C. Cir. 1989).

the award of fees and costs to Signature would give effect to EAJA's specific purpose and Congress' intent to eliminate the financial disincentive to challenge unreasonable government actions. *See Jean*, 496 U.S. at 164 (citing *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989)); *Owner-Operator Indep. Drivers* Ass'n, 675 F.3d at 1040 (citing *Krecioch v. United States*, 316 F.3d 684, 686 (7th Cir. 2003)); *Sullivan v. Hudson*, 490 U.S. 877, 883–84 (1989)); *see also Comserv,* 908 F.2d at 1414–15 ("EAJA awards should be available where the burden of attorneys' fees would have deterred the litigation challenging the government's actions, but not where no such deterrence exists."); *Paisley*, 957 F.2d at 1164 (recognizing that whether an award serves EAJA's purpose in avoiding deterrence is the "critical concern underlying the EAJA precondition that a fee claimant shall have "incurred" the expense"). The undersigned agrees with that practical approach because it is consistent with the purpose of the statute and its legislative history.

> Congress prefaced the EAJA with this statement of its findings and purposes:
>
> (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.
>
> (b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.
>
> (c) It is the purpose of this title-
> (1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and
> (2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

Congressional Findings and Purposes, note following 5 U.S.C. § 504. Furthermore, the Committee Reports of both the House and Senate reflect the concerns of providing access for eligible individuals, partnerships, corporations, and labor or other organizations, for whom cost may be a deterrent to vindicating their rights, and improving government policies by helping to assure that administrative decisions reflect informed deliberation. H.R. Rep. No. 96-1418, at 10 (1980); S. Rep. No. 96-253, at 7 (1979).

In this case, I conclude that the primary purpose of EAJA to eliminate the financial disincentive to challenge unreasonable government action would not be served by awarding fees and expenses to Signature. Denial of Signature's attorney fees and expenses would not remove any financial disincentive for Signature to challenge MSHA's overbroad imminent danger Order because Signature was contractually promised and received full reimbursement for contesting

MSHA's action. In this regard, I find the Fourth Circuit's reasoning and holding in *Paisley*, relied on by the Secretary, to be persuasive here.

> To hold that a prevailing party with an unconditional legal right to indemnification of its attorney fees by a manifestly solvent third party might nevertheless qualify for an EAJA award because indemnification had not yet occurred is unacceptable for several reasons. . . . [S]uch a holding would not in fact serve a principal purpose of the EAJA: to avoid the deterring effect which liability for attorney fees might have on parties' willingness and ability to litigate meritorious civil claims or defenses against the Government. The EAJA provides for fee-shifting precisely to avoid this result. Consequently, in any situation in which the eligibility of a particular prevailing party for an EAJA award is in issue, it is appropriate to inquire whether that party would, as a practical matter, have been deterred from litigating had it been known that a fee-shifting award was not available upon a successful conclusion. If that question is asked here, it is obvious that appellees, all but one of whom were funded by an advance which by contract they need not refund if they prevailed in litigation, would not have been deterred had the EAJA not then existed. This is the critical concern underlying the EAJA precondition that a fee claimant shall have "incurred" the expense.
>
> Accordingly, we hold that, to effectuate the purposes of the EAJA, a claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the EAJA, hence is not eligible for an award of fees under that Act.

957 F.2d at 1164 (internal citations omitted).[14]

The prevailing parties in *Paisley* were denied fees because they were indemnified per statute by a third party with no obligation of repayment. Signature attempts to blunt *Paisley* by reliance on the Federal Circuit's decision in *Wilson,* where the Federal Circuit found that denying EAJA fees to a prevailing small business that had been indemnified by its liability insurer "would thwart the Act's purpose of deterring unreasonable governmental action." *Wilson,* 126 F.3d at 1410. Signature relies heavily on *Wilson* to support its argument that it incurred fees for EAJA purposes.

[14] The issue in *Paisley* was whether the prevailing parties, former Boeing employees, had "incurred" fees for the purposes of the EAJA when a Delaware state statute required Boeing to indemnify them if they successfully defended against the underlying government suit. Since Boeing paid the former employees an advance to cover the fees, the prevailing parties argued that the indemnification had actually been a "mere" possibility, because Boeing could have, in theory, demanded repayment from the employees in the event that they lost the suit. The Fourth Circuit, however, rejected that argument as inconsistent with the purpose of EAJA and found the prevailing parties to be ineligible for fees. 957 F.2d at 1164.

The *Wilson* court emphasized that it had previously awarded EAJA fees to prevailing parties who had no obligation to pay any fees to their attorneys, such as those represented pro bono or by union counsel.[15] The Federal Circuit was unable to discern any material distinction between those cases and Wilson's case since in each instance the litigant paid a third party in advance for the benefit of legal representation as a component of union dues or insurance premiums, and incurred no additional obligation of payment to counsel. *Id*. at 1409–10. The *Wilson* court reasoned that denying the EAJA application "would neither remove the financial disincentives of litigating against the government nor deter the government's unreasonable denial of minor claims filed by its small business contracting partners." *Id*. at 1410. Rather, the court reasoned as follows:

> Denying a small business, which in its keen acumen has obtained insurance to insulate itself from liability for accidents during contract performance, and thus from potential insolvency, an award of fees for the attorney services that it procured as part of its policy would thwart the Act's purpose of deterring unreasonable governmental action. In fact, it would act as an incentive to deny meritorious claims, thereby requiring the small business to litigate. If the small business has insurance, the government could deny the contractor's claim and litigate any appeal of the denial without any pecuniary risk. Even if the contractor were to win the appeal, there would be no award of attorney fees. The government could act unreasonably not only in its initial denial of the small business' claim but also during the litigation of the appeal, confident in the knowledge that it will be exposed to no attorney fee award.

Id. Whereas the Fourth Circuit in *Paisley* focused on the EAJA's primary purpose of eliminating financial disincentives for eligible parties who would defend against unjustified government action, the Federal Circuit in *Wilson* emphasized Congressional intent to deter unreasonable action by encouraging agencies to police their enforcement and litigation activities.

B. This Case is Factually More Analogous To, and Legally More Consonant With, *Paisley* than *Wilson*; Accordingly, Signature Did Not Incur Fees Within the Meaning of the EAJA

1. Pre-Bankruptcy Fees

This case is more factually akin to and legally consonant with *Paisley* than *Wilson* before Patriot filed for bankruptcy. In *Paisley*, the employer indemnified its former employees pursuant to a legal obligation imposed by state statute. Similarly, in this case, Jarrell's Branch reimbursed Signature for legal fees pursuant to contractual obligation. Both Signature and the prevailing parties in *Paisley* had a legally enforceable right to full indemnification or reimbursement of attorney fees from a solvent third party and therefore would not be deterred by liability for

[15] *See Devine v. Nat'l Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1986); *Goodrich v. Dept. of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984) (construing 5 U.S.C. § 7701(g)(1)); *see also Nat'l Treasury Employees Union v. Dept. of Treasury*, 656 F.2d 848 (D.C. Cir. 1981) (construing 5 U.S.C. § 552a(g)(3)(B) (1976)).

attorney fees and expenses from challenging the government's action had the EAJA not then existed. This is the critical concern underlying the EAJA precondition that the fee applicant "incurred" the expense. *Paisley*, 957 F.2d at 1164.

The prevailing parties in *Paisley* were former employees who never incurred or paid insurance premiums. Similarly, Signature never incurred attorney's fees and expenses in the underlying MSHA contest proceeding since Jarrell's Branch reimbursed Signature.

By contrast, the prevailing party in *Wilson* actually paid for its own indemnification in the form of monthly insurance premiums. *Wilson* specifically involved a fixed-price contract between Wilson and the General Services Administration for the remodeling of a federal building. During the remodel, a sprinkler line broke and caused damage to the building's interior. Wilson denied responsibility, but complied with the GSA officer's instruction to repair the damage. The GSA denied Wilson's subsequent claim to cover the additional cost of the repair. Wilson then submitted a claim to its third-party liability insurer, and received an "interest-free loan" that partially covered the cost of the repairs. The loan was "repayable only in the event and to the extent of any net recovery [Wilson] may make from any [party] causing or liable for the loss or damage to the property." *Wilson*, 126 F.3d at 1407. In exchange, Wilson assigned to its insurance carrier any claim against the government, any potential recovery, and the authority to appeal GSA's denial of its claim to the GSA Board of Contract Appeals. Although the appeal was filed in Wilson's name, the insurance carrier had exclusive direction and control of the appeal and covered all the expenses related to the proceeding. *Id*.

The *Wilson* court equated the monthly premiums with prepaying attorneys' fees in advance, and reasoned that Wilson had effectively "incurred" fees under the EAJA. *Id*. at 1411, n.4. In other words, "the insurance premiums are the fee that the insured pays for the insurance company's defense of his case. . . . [T]he cost of defense, to the extent borne by the insurance company, is a cost that the insured has paid for, just as he would have paid a lawyer for his defense had he had no insurance." *Thouvenot,* 596 F.3d at 383 (discussing the reasoning in *Wilson*). In that context, denying Wilson EAJA fees would almost certainly increase insurance premiums, thereby "reintroduc[ing] the cost of litigation as a factor in the small business' decision whether to contest governmental action it deems unreasonable." *Wilson*, 126 F.3d at 1411. As a consequence, "the small business would have to decide whether it is worth the increased premiums, which it will incur regardless of whether it prevails, to challenge the government." *Id.*

Thus, courts have found that an award of attorney fees under the EAJA could properly include fees incurred by the prevailing party's liability insurer because liability insurance is essentially a contingent loan. The insured pays premiums in exchange for the promise that the insurance company will bear the cost of the insured's defense (subject to a deductible) if the insured is sued on a claim that the policy covers, and to minimize the premiums, the insured agrees to repay that cost to the extent it is covered by an award of attorney fees under EAJA. *Thouvenot,* 596 F.2d at 383.

Signature contends that the relationship between Jarrell's Branch and Signature is analogous to that between the insurance carrier and the insured in *Wilson*. Signature argues that

its compensation and other benefits under the Contract Mining Agreement were directly related to Jarrell's Branch's obligation to reimburse Signature for operating costs. Signature's Mot. Summ. J. 13; Stipulated Fact No. 11. Moreover, Signature argues that it assumed the risk that Jarrell's Branch would not be able to reimburse the fees and costs it owed to Signature. Signature further argues that this reduced compensation and the assumed risk for failure to reimburse constitute forms of consideration paid in exchange for Jarrell's Branch's agreement to pay the mine's operating costs. Signature's Mot. Summ. J. 13–14.[16] This consideration, Signature contends, is analogous to the insurance premiums paid in *Wilson* and does not bar Signature from recovering fees under the EAJA. Signature's Mot. Summ. J. 14.

Signature's arguments are not persuasive. Lower compensation and assumption of risk are not explicitly mentioned as forms of consideration in the Contract Mining Agreement. *See* Resp't Ex. 21, at 1; Signature's Mot. Summ. J. 8, Stipulated Facts Nos. 11-12. Likewise, Signature's argument that the historical costs of operating the mine would be an important factor in negotiating Signature's future compensation should there have been an extension or renewal of the Agreement is not certain and is not explicitly mentioned in the Agreement. *See* Signature's Mot. Summ. J. 8, Stipulated Fact No. 13. The Federal Circuit in *Wilson* specifically noted that denying Wilson fees would almost certainly increase Wilson's monthly insurance premiums and thereby reintroduce the cost of litigation as a factor in Wilson's decision to contest the government action. *Wilson,* 126 F.3d at 1411. By contrast, Signature's argument that the costs of defending against Order No. 8126005 would "necessarily result in a reduction of [its] compensation" in the event that Signature renegotiates the contract with Jarrell's Branch is speculative, at best. The undersigned is unconvinced that such speculative reduction in future compensation is akin to the more certain increase in insurance premiums that concerned the Federal Circuit in *Wilson*. Signature's Mot. Summ. J. 17.

On the other hand, the Contract Mining Agreement does explicitly reference safety bonus payments payable to Signature. Signature was entitled to a $2,000 per month safety bonus if Signature and its contractors had zero lost time accidents during a calendar month. In addition, Signature was eligible for an additional monthly $2,000 safety bonus if its MSHA violations per inspection day were between 1.0 and 1.4 each calendar month. If Signature's MSHA violations

[16] The Contract Mining Agreement states that the parties are contracting "for and in consideration of undertakings and agreements set forth, and other good and valuable consideration not fully set forth herein, the sufficiency of which is acknowledged." Resp't Ex. 21, at 1. Under the Agreement, Signature was generally responsible for mining and transporting the coal to the preparation facility, maintaining a comprehensive general liability insurance policy, and obtaining the required state and federal operator identification numbers. Resp't Ex. 21, at ¶ 1, ¶ 16, ¶ 18. In exchange, Jarrell's Branch retained title to the coal mined by Signature, covered all operating costs of the mine (including certain penalty assessments and attorneys' fees and costs incurred in Commission proceedings), and granted Signature the use of the equipment and premises to mine the coal. Resp't Ex. 21, at ¶ 4, ¶ 7, ¶ 18, ¶ 3. Based on these contractual provisions, Signature argues that it "clearly paid consideration in the form of reduced compensation and the risk of bankruptcy in exchange for Jarrell's Branch's agreement to pay the costs of operating the mine." Signature's Mot. Summ. J. 14.

per inspection day were less than 1.0, the safety bonus increased to $3,000. Resp't Ex. 21, ¶ 20(c). In my view, these bonuses appear to negate Signature's argument that it agreed to lower compensation in exchange for Jarrell's Branch's obligation to cover its operating costs. Furthermore, the risk that Jarrell's Branch might fail to fulfill the terms of its contract due to bankruptcy is inherent in any contract, and such an assumption of insolvency risk is not a particular form of consideration under the Contract Mining Agreement with Jarrell's Branch. In short, Signature's arguments regarding contractual exchanges of consideration are speculative, illusory and much less persuasive than the bargained-for insurance exchange in *Wilson*.

More importantly, even were the undersigned persuaded that Signature's lower compensation and assumption of risk were particular forms of consideration, Signature's reliance on *Wilson's* insurance contract analogy for an award of EAJA fees is still misplaced. The relationship between Signature and Jarrell's Branch is not analogous to the relationship between Wilson and its insurance carrier. The *Wilson* court specifically recognized that "the insurance premiums are the fee that the insured pays for the insurance company's defense of his case. . . . [T]he cost of defense, to the extent borne by the insurance company, is a cost that the insured has paid for, just as he would have paid a lawyer for his defense had he had no insurance." *Thouvenot*, 596 F.3d at 383 (discussing the insurance premiums at issue in *Wilson*). The petitioner in *Wilson* received a reimbursement designated as an interest-free loan from its third-party insurance carrier to cover the costs of its initial claim against the government. In consideration of that loan, Wilson assigned its right to pursue an EAJA action and any subsequent award to its insurer. *Wilson,* 126 F.3d at 1407. Signature's Mot. Summ. J. 9, Stipulated Fact No. 13. Unlike *Wilson*, there is no right of subrogation here under which Signature assigned its right to pursue an EAJA action to Jarrell's Branch, thereby allowing Jarrell's Branch to pursue third party MSHA for attorney's fees and costs that Jarrell's Branch has already paid Signature. Also unlike *Wilson*, Signature retained the responsibility for controlling the underlying contest litigation at all times. Otherwise, Jarrell's Branch would be found to be an EAJA-ineligible stand-in litigant. Accordingly, I find *Wilson* inapposite.

Rather, the Fourth Circuit's rationale in *Paisley* is more persuasive on these facts. *Paisley* precludes an award of fees to parties with a legally enforceable right to full indemnification from solvent third parties because such awards do not advance the primary purpose of the EAJA to diminish the deterrent effect of defending against governmental action. *Paisley*, 957 F.2d at 1164. Because Signature no longer has any outstanding attorneys' fees associated with the underlying contest proceeding, any such fees awarded would not further the EAJA's purpose of diminishing the deterrent effect of defending against governmental action. Since Signature was fully reimbursed by Jarrell's Branch for fees incurred in challenging the contest proceeding, Signature was not deterred from defending against MSHA's prosecution of the overbroad imminent danger order. Rather, awarding fees for the contest proceeding for which Signature already has been reimbursed by Jarrell's Branch would constitute a windfall for Signature. *See Jeroski*, 697 F.3d at 656. Accordingly, on the instant record, the undersigned concludes that an award of EAJA fees is contrary to the primary purpose of the EAJA to eliminate the financial disincentive to challenge unreasonable governmental actions for eligible parties. H.R. Rep. No. 99-120, at 4; *Jean*, 496 U.S. at 163 (*citing Sullivan,* 490 U.S. at 883).

The undersigned also concludes that the secondary or dual purpose of the EAJA is not materially advanced by an award of fees here. That purpose is to ensure the applicability of the common law and statutory exceptions to the "American rule," which generally provides that each party pays its own attorneys' fees, but allows an award of fees against a party who has acted under common law in bad faith or to preserve a common fund, or when a statute, such as EAJA, provides that fees may be awarded. *See supra* text accompanying note 10; *see also* H.R. Rep. 99-120, at 5. Although EAJA provides fees when, as here, the government's position is not substantially justified, I conclude that any EAJA statutory exception to the American rule is subservient to the primary purpose of EAJA, which as explained above, has not been advanced here where Signature has not "incurred" fees under the EAJA statute because it has not been deterred from challenging MSHA given reimbursement from Jarrell's Branch. Accordingly, I find any statutory exception to the American rule inapplicable here. Nor has the common fund exception under common law been advanced here because Signature's contest proceeding did not have the effect of preserving or recovering a common fund for the benefit or equitable trust of others. Finally, the common law bad-faith exception to the American rule is inapposite. Although the federal government (MSHA) may be subject to punitive awards for bad faith, *see e.g., Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219 (D.C. Cir. 1991), such bad faith is a narrow basis for recovery and may be "imposed only in exceptional cases and for dominating reasons of justice." *Havrum v. United States*, 204 F.3d 815, 819 (8th Cir. 2000) (citing *Brown v. Sullivan*, 916 F.2d 492, 495 (9th Cir. 1990)). The EAJA's "not substantially justified" standard is less stringent than the bad faith required for punitive damages. Here, the Secretary's insistence on an overbroad imminent danger order during pre-litigation through settlement does not rise to the level of "vexatious, wanton, or oppressive" conduct necessary for a finding of bad faith. *Zahareas*, 374 F.3d at 630 (citing *Brown*, 916 F.2d at 495).

Finally, the undersigned is not persuaded that awarding EAJA fees would deter unreasonable government action. In the circumstances of this case, I find more compelling the Secretary's argument that allowing Signature to recover fees for which it has already been reimbursed by Jarrell's Branch would be an impermissible windfall for Signature for pursuing an overly broad imminent danger order to voluntary settlement prior to any litigation. *Jeroski*, 697 F.3d at 656. The stated Congressional intent behind the EAJA is ameliorative, not punitive. EAJA was enacted to remove the financial disincentives that small businesses face when litigating against the government and to concurrently "impose the risk of a fee award that must be paid by the agency as an incentive to police their enforcement and litigation activities so that only well-founded cases would be litigated." *See 329.73 Acres of Land in Grenada & Yalobusha Counties*, 704 F.2d at 802. Those purposes are not advanced here.

Accordingly, I find that Signature is not eligible to recover EAJA fees related to the underlying contest proceeding and is therefore not entitled to the full $80,004.37 requested in its EAJA application. The Fourth Circuit standard in *Paisley*, which I find most instructive here, does not permit an award of fees to Signature because Signature received full reimbursement for the contest proceeding from Jarrell's Branch and any additional award would not advance the primary purpose of the EAJA to diminish the deterrent effect of defending against MSHA's action. *See Paisley*, 957 F.2d at 1164. When initiating its underlying contest proceeding, Signature knew that Jarrell's Branch had a contractual obligation to reimburse Signature for any costs it might incur, except for intentional misconduct or gross negligence attributable to

Signature or its agents. *See* Resp't Ex. 21, ¶ 18. Therefore, since no intentional misconduct or gross negligence has been alleged by MSHA, Signature suffered no deterrent effect from the costs of litigation, which might have dissuaded Signature from defending against the breadth of imminent danger Order No. 8126005 to voluntary settlement short of actual litigation.

2. Post-Bankruptcy Fees

The Fourth Circuit's holding in *Paisley* referred explicitly to a legally-enforceable right to indemnification from *solvent* third-parties. *Paisley,* 957 F.2d at 1164. It is arguable that *Paisley* does not apply after the third-party indemnifier becomes insolvent. Accordingly, after Patriot's July 2012 bankruptcy filing, the Eighth Circuit's decision in *Securities & Exchange Commission v. Zahareas*, 374 F.3d 624 (8th Cir. 2004), is instructive because it addresses the issue of reimbursement of EAJA fees post-bankruptcy.

Zahareas involved a prevailing party whose employer agreed to pay his attorneys' fees in the underlying litigation. Prior to doing so, however, the corporation filed for bankruptcy. The Eighth Circuit found that since the obligation to pay the attorneys' fees passed to the prevailing party upon the corporation's dissolution, the prevailing party had incurred the attorneys' fees for the purposes of the EAJA. *Zahareas*, 374 F.3d at 631. Signature argues that like the respondent in *Zahareas*, it has incurred fees in spite of Jarrell's Branch's contractual obligation to reimburse it for fees. Signature's Mot. Summ. J. 17.

I disagree. A key factor in *Zahareas* was that the employer's bankruptcy prevented fulfillment of its obligation to pay respondent's attorney fees, and respondent then became responsible for payment. *Zahareas*, 374 F.3d at 631. That is clearly not the case here. Prior to Patriot's bankruptcy, Jarrell's Branch reimbursed Signature for all the fees and expenses incurred in the contest proceeding regarding Order No. 8126005 and part of the fees incurred in the EAJA application. *See supra*, note 6. Thus, Patriot's bankruptcy had no effect on Jarrell's Branch's fulfillment of its contractual obligation to reimburse Signature for fees related to the underlying contest proceeding and the pre-bankruptcy EAJA fees.[17] Regarding the outstanding $40,214.78 related to Signature's EAJA action after Patriot's July 9, 2012 bankruptcy, Signature and Patriot entered into a Settlement and Release Agreement that resolved Signature's allowed claims in the amount of $164,687 (Exhibit B) and released Patriot from any further liability.[18]

Furthermore, the undersigned finds that Signature is not entitled to reimbursement for post-bankruptcy fees concerning pursuit of the EAJA litigation because Signature was not

[17] Signature filed its EAJA application on January 9, 2012, and Patriot filed for bankruptcy on July 19, 2012. As previously noted, Jarrell's Branch reimbursed Signature for all contest proceeding fees and costs and part of its EAJA litigation costs, prior to Patriot's bankruptcy filing.

[18] See Settlement and Release Agreement, In re Patriot Coal Corp., et al., No. 12-51502-659 (Bankr. E.D. Mo. January 16, 2014), available at https://cert.gardencitygroup.com/pcx/fs/viewreconPdf?fileName=Signature%20Mining.

entitled to reimbursement for EAJA fees for the underlying contest proceeding. That is, but for the contest proceeding for which EAJA fees have been denied, additional fees for pursuing the EAJA litigation would not have been incurred. In short, a party cannot obtain EAJA fees for pursuing an EAJA application when it is not entitled to EAJA fees for the underlying action on the merits.

A. Alternatively, Special Circumstances Warrant Denial of EAJA Fees After Patriot's Bankruptcy

Alternatively, the undersigned finds that even if un-reimbursed fees for pursuing the EAJA litigation were incurred by Signature within the meaning of the statute, special circumstances make an EAJA award unjust. As noted, EAJA provides for the award of attorneys' fees and other expenses to a prevailing party against the United States or an agency thereof, unless the position of the government was substantially justified or *that special circumstances make an award unjust*. 5 U.S.C. § 504(a)(1) (emphasis added); *see also* 29 C.F.R § 2704.100. The undersigned finds in the alternative that special circumstances make an award of any un-reimbursed EAJA fees incurred by Signature after Patriot's bankruptcy unjust.

During the additional discovery conducted after my August 30, 2014 Decision and Order, Signature's counsel produced a redacted copy of the Contract Mining Agreement between Signature and Jarrell's Branch. The redacted portions included Jarrell's Branch's obligation to reimburse Signature for certain fees and costs incurred in Commission proceedings. The Secretary subsequently found an un-redacted copy of the Agreement on the Patriot Coal bankruptcy website, which had been filed on July 31, 2013, in support of Signature's bankruptcy claims against Jarrell's Branch.[19] Prior to finding the un-redacted copy, the Secretary had been unaware of Jarrell's Branch's reimbursement obligation. After the Secretary notified Signature's counsel of his discovery, Signature's counsel admitted that Signature had been partially reimbursed for attorneys' fees and costs. Secretary's Mot. Summ. J. 10, n.6.

Signature argues that counsel proceeded in good faith by redacting confidential business information from the contract. Signature further argues that Paragraph 34 of the Contract Mining Agreement requires prior consent of the parties or a court order to disclose confidential material, and that Signature would have been subject to a breach of contract claim had it produced the un-redacted content without a court order compelling production.[20] Signature also argues that the

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[19] *See* Amended Proof of Claim No. 1394, *supra* notes 2 and 6. Filings in bankruptcy proceedings are public records open for examination. *See* 11 U.S.C. § 107(a) (2013). The Contract Mining Agreement became a public record on July 31, 2013 when Signature filed it in support of its bankruptcy claim. *See* Amended Proof of Claim No. 1394, *supra* note 2.

[20] Paragraph 34 states that

> Owner and Contractor agree with each other that both shall treat . . . information relating to the other party or Owner's and Contractor's business operations as confidential and shall not divulge, transmit, or otherwise disclose any such information received without first obtaining prior written

(continued…)

headings of the redacted paragraphs 17, 18, and 20 were left intact to allow the Secretary to evaluate the nature of the redacted material and file a motion to compel if he so chose. Signature's Resp. to Secretary's Mot. Summ. J. 4.

I find Signature's arguments unconvincing. As noted, the un-redacted Contract Mining Agreement became a public record on July 31, 2013 when Signature filed it in support of its bankruptcy claim. *Cf.*, *Foster-Miller, Inc.*, *v. Babcock & Wilcox Canada*, 210 F.3d 1, 10 (1st Cir. 2000) (jury instructions providing that "[i]nformation ... readily known or knowable to the interest of the public cannot ... be made confidential simply by slapping it with a restrictive label"). In these circumstances, I find Signature's confidentiality arguments disingenuous and waived by public revelation.

Further, even assuming no waiver of Signature's confidentiality claim by public disclosure, the undersigned is not persuaded that the headings of the redacted paragraphs were sufficient to allow the Secretary a fair opportunity to evaluate the nature or potential relevancy of the redacted materials. For example, un-redacted paragraph 16 is titled "Indemnification," redacted paragraph 17 is titled "Fines or Penalties," redacted paragraph 18 is titled "MSHA and WVOMHST Identification Numbers Number: MSHA and WVOMHST Assessments," and redacted paragraph 20 is titled "Compensation." Despite un-redacted paragraph 16's title of "Indemnification," it is redacted paragraph 17 that requires Jarrell's Branch to reimburse Signature for the penalties and assessments at issue, and it is redacted paragraph 18 that requires Jarrell's Branch to reimburse Signature for reasonable attorneys' fees and costs incurred in the contest proceeding. Since no reimbursement obligations regarding MSHA penalties and attorneys' fees were referenced in the paragraph headed "Indemnification," the Secretary's review of un-redacted paragraph 16 and the titles of redacted paragraphs 17 and 18 could reasonably have led the Secretary to believe that no such obligations existed. Redacted paragraph 20, titled "Compensation," contained the terms under which Signature was entitled to bonus payments from Jarrell's Branch for Signature's safe operation of the mine. Resp't Ex. 21, ¶ 20. In these circumstances, I conclude that the Secretary had justifiable grounds for failing to file a motion to compel discovery under Commission Procedural Rule 59.[21]

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[20] (...continued)

consent of the other party unless such information is required by any governmental agency or court of law pursuant to due process of law.

Resp't Ex. 21.

[21] Commission Procedural Rule 59 governs discovery disputes:

> Upon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery *may* file a motion with the Judge requesting an order compelling discovery. If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of

(continued…)

In short, the redactions of paragraphs 17, 18, and 20 contained contractual obligations between Signature and Jarrell's Branch that were central to the Secretary's case against Signature's application for EAJA fees. Signature should have realized that these contractual obligations were responsive to the Secretary's discovery request and relevant to the remaining issues as defined in my August 30, 2013, Decision and Order, as amended on December 6, 2013. Rather than redacting allegedly confidential but relevant facts for fear of breaching the terms of the Agreement, the more appropriate course for Signature would have been to work with the Secretary toward a mutually agreeable accommodation that would protect the confidentiality of the purportedly sensitive information, after disclosure. *See* Fed. R. Civ. Proc. 26(c)(1)(G); *cf*., *Pennsylvania Power Co*., 301 NLRB 1104, 1105-06 (citing *Minnesota Mining & Mfg., Co*., 261 NLRB 27 (1982), *enfd.* 711 F.2d 348 (D.C. Cir. 1983)). If Signature's counsel and the Secretary had been unable to reach such an accommodation, Signature could have filed a motion for a protective order, a motion for *in camera* review, or a motion to file the allegedly confidential information under seal.[22] Rather, Signature chose to hide the ball.

In these circumstances, the undersigned finds in the alternative that Signature's failure to disclose the nature of its contractual reimbursement agreement with Jarrell's Branch during discovery constitutes special circumstances that make an EAJA award for *unreimbursed* fees and costs after Patriot's bankruptcy unjust. *See* 5 U.S.C. § 504(a)(1).

VI. Conclusion and Order

Having reviewed the record, cross motions, and supporting briefs, the undersigned finds this matter appropriate for summary decision. The undersigned finds as a matter of law that there are no material facts that preclude summary judgment from being entered against Signature. Having evaluated the arguments presented by each party and having applied the relevant law, the undersigned finds that the Secretary has met his burden of proof and is entitled to summary disposition denying any award of EAJA fees.

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[21] (...continued)

> the party seeking discovery. For good cause shown the Judge may excuse an objecting party from complying with the request.

29 C.F.R. §2700.59 (2013) (emphasis added).

[22] Signature's counsel inadvertently disclosed Signature's balance sheet, which contains confidential business information, as Exhibit 5 attached to Signature's Application for Fees and Costs under the EAJA. The balance sheet thus became part of the public record in this proceeding. Signature's counsel moved to seal Exhibit 5, and the undersigned granted that motion. Signature's counsel is therefore well aware of this tribunal's ability and willingness to protect from public disclosure alleged confidential, albeit relevant documents. *See* Signature's Mot. Seal.

WHEREFORE,

Pursuant to the stipulations agreed to by Signature and the Secretary in their Cross Motions for Summary Judgment, Signature's Motion to Supplement the Record is **GRANTED**.

For the reasons set forth above, Signature's Motion for Summary Judgment is **DENIED**. The Secretary's Motion for Summary Judgment is **GRANTED**, and it is **ORDERED** that each party bear their own costs.

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

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/ccc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 22, 2014

MAGRUDER LIMESTONE CO., INC., Applicant	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	Docket No. EAJ 2013-01
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Portable Plant #1 Mine ID: 23-00077

DECISION AND ORDER

Appearances: R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak, & Stewart, St. Louis, Missouri, for Applicant

Courtney Przybylski, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Respondent

Before: Judge McCarthy

I. Statement of the Case

Litigation is a crapshoot. The parties relinquish control, and when the dust settles, reasonable minds can differ about the legal import of the facts established, and the cogency of the legal arguments advanced. Thorough investigation, preparation of witnesses, and legal research is often an effective antidote, but not here. Both sides dug in during settlement efforts and were caught off guard by independent analysis and research by the judge, or his clerk for that matter.

This case is before me upon an Application for Award of Fees and Expenses filed by Magruder Limestone against the Secretary of Labor's Mine Safety and Health Administration under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504 (2014). The final decision in the underlying proceeding approved partial settlement of several citations, and after hearing, ordered that Citation No. 6575266 be modified from a section 104(d)(1) unwarrantable failure with high negligence to a section 104(a) citation with moderate negligence, that the specially assessed penalty of $52,500 be reduced to $16,509, and that section 104(d)(1) unwarrantable failure Order No. 6575267 be vacated based on circuit court precedent. *See Magruder Limestone Co., Inc*., 35 FMSHRC 1385 (May 2013)(ALJ).

Applicant argues that it prevailed in significant and discrete portions of the underlying consolidated civil penalty proceeding. It did. Applicant further argues that the Secretary's position was not substantially justified. I disagree. For the reasons set forth below, despite reclassification of the 104(d)(1) Citation with lower negligence and a substantially reduced penalty, and vacatur of the 104(d)(1) Order, I find that an EAJA award is not appropriate here because the Secretary's position was substantially justified with regard to Citation No. 6575266 and Order No. 6575267, and special circumstances make an award of fees unjust with regard to the vacatur of Order No. 6575267.

II. The Procedural Distraction – Alleged Improper Service

On June 20, 2013, Magruder mailed its Application to the Commission, with certificate of service indicating same date email transmission to the Secretary's trial counsel. On June 20, 2013, Applicant also emailed the undersigned and the Secretary's trial counsel and advised of the EAJA filing. The Commission docketed the matter on June 27, 2013, but under Commission Rules 301 and 7, service was effective with the Commission on the date of mailing, i.e., June 20, 2013, and service was not effective on the Secretary until email receipt. 29 U.S.C. §2700.7(c)(2).

The Secretary filed his Objection to the Application on August 13, 2013. He argued that the Application was improperly served on June 20, 2013 via email because the Secretary's former trial counsel left the office on April 12, 2013, and his email account was deactivated shortly thereafter. In support, the Secretary proffers an August 7, 2013 email from the system administrator indicating that at least as of that date, an email sent to the Secretary's former trial counsel did not reach its recipient, and that the email account no longer exists. Sec'y Obj. 2, n.1 and Ex. A. Alternatively, the Secretary argues that it had no notice of the existence of the Application until the Commission docket office notified it on August 5, 2013 of the existence of an EAJA filing on June 27, 2013. Accordingly, the Secretary argues that its Objection filed on August 13, 2013 should be treated as a timely answer.

Applicant replies that the Secretary provided no notification that his former trial counsel had left the Department of Labor. Nor was any withdrawal or substitution of counsel ever filed. In fact, the undersigned's May 21, 2013 Decision and Order listed the Secretary's former counsel as attorney of record, since the Commission also never received any contrary notice from the Secretary. Applicant alleges that it did not become aware that the Secretary's trial counsel had left the agency until August 13, 2013, when it received a copy of the Secretary's Opposition. Applicant has no objection to the timing of the Secretary's Opposition, which I treat as its Answer.

Given my disposition on the merits,[1] I need not decide whether Signature's EAJA application was timely served because the Secretary's email account had not been deactivated on

[1] The determination of the merits of the EAJA application "will be made on the basis of the record made during the proceeding for which fees and expenses are sought," except where either party requests or the judge orders further proceedings. See Commission Rule § 2704.306. Neither party requested additional proceedings nor sought to supplement the administrative record.

June 20, 2013, such that service was effective upon receipt. Assuming arguendo that Signature's EAJA Application was timely served on the Secretary, I find that an EAJA award is unwarranted because the Secretary's litigation position was substantially justified with regard to Citation No. 6575266 and Order No. 6575267, and special circumstances make an award of fees unjust with regard to the vacatur of Order No. 6575267.

III. Substantial Justification

A. General Principles

EAJA entitles a prevailing party to receive fees and other expenses incurred in an adversary adjudication, unless the position of the agency was substantially justified. 5 U.S.C. § 504(a)(1). The government agency bears the burden of demonstrating that its position in an adversary adjudication was substantially justified so as to preclude an award of attorney's fees and expenses to the prevailing party. *Loumiet v. Office of Comptroller of Currency*, 650 F.3d 796, 799 (D.C. Cir. 2011). The agency must prove that both its pre-litigation and litigation positions were substantially justified. *Iowa Exp. Distribution, Inc., v. NLRB*, 739 F.2d 1305, 1309-10 (8th Cir. 1984). "Substantially justified" does not mean justified to a high degree, but rather justified in substance or in the main - - that is, justified to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). A position may be justified even though incorrect, and it may be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact. *Id*. To establish substantial justification, an agency must show a reasonable basis in truth for the facts alleged, a reasonable basis in law for the theory advanced, and a reasonable connection between the facts alleged and the legal theory propounded. See *Iowa Exp. Distribution,* 739 F.2d at 1308 (quoting *United States v. 2,116 Boxes of Boned Beef*, 726 f.2d 1481, 1487 (10th Cir. 1984).

The "position of the agency" is to be measured against the underlying proceeding as a whole, not by reference to "separate parts of the litigation, such as discovery requests, fees, or appeals." *Kuhns v. Board of Governors of Federal Reserve System*, 930 F.2d 39 (D.C. Cir. 1991) (quoting *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 159 (1990). That is, whether or not the position of the agency was substantially justified is determined on the basis of the administrative record as a whole in the adversary adjudication for which fees and other expenses are sought. *Alphin v. National Transp. Safety Bd*., 839 F.2d 817, 822 (D.C.Cir. 1988); see also 5 U.S.C. § 504(a)(1). Partial awards, however, are contemplated within the EAJA's statutory scheme. Therefore, if some, but not all, of the agency's allegations are substantially justified, an eligible prevailing party should be compensated for challenging those allegations that are not substantially justified. In determining whether a partial award of attorney's fees is appropriate, the EAJA demands that each allegation made by the agency be evaluated at each step of the proceedings when new or additional evidence indicates that an allegation lacks substance or is erroneous. *Id.*

B. Citation No. 6575266

In the underlying civil penalty proceeding, undisputed facts established that a rock jam occurred during an MSHA inspection and that a stipulated rank-and-file plant operator, Harold

Nichelson, was observed by MSHA inspector, Lawrence Sherrill, standing on an inclined conveyor belt, 10 feet off the ground, using a six-foot breaker bar to clear the jam. Nichelson did not utilize fall protection (Citation No. 6575266) or follow lock out/tag out protocol (Order No. 6575267). These alleged violations occurred shortly after the inspector observed plant manager, Tim Stewart, speak to Nichelson about the rock jam near a loud generator. 35 FMSHRC at 1385.

Citation No. 6575266 alleged that Applicant Magruder unwarrantably failed to comply with the fall protection standard at 30 C.F.R. § 56.15005. 30 C.F.R. § 56.15005 is a mandatory standard which provides that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling . . . ." The citation ascribed high negligence to Magruder for a violative practice that was "highly likely" to result in an injury that could reasonably be expected to be fatal. The parties stipulated that the actions alleged constituted a violation of the standard and that the citation was correctly characterized as significant and substantial (S&S). The Secretary proposed a specially assessed penalty of $52,500. As noted, after hearing, I modified the 104(d)(1) unwarrantable failure citation with high negligence to a section 104(a) citation with moderate negligence, and assessed a penalty of $16,509.

Having again carefully reviewed the matter, I find that the Secretary's litigation position with respect to Citation No. 6575266 had a reasonable basis in fact and law and was substantially justified to a degree that could satisfy a reasonable person. *Pierce,* 487 U.S. at 565. The Secretary reasonably argued that Stewart's actions in the face of a hazardous condition did not meet the heightened standard of care for supervisors, and the fall hazard scenario presented a sudden, high degree of danger, which was not necessarily suitable for a traditional, factor-dependent unwarrantable failure analysis under Commission precedent such as *Lopke Quarries*, Inc., 23 FMSHRC 705, 711 (July 2001). P. Br. at 13-14, citing *Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997). That is, where hazardous conditions involve "a high degree of danger," a supervisor is held to a "heightened standard of care." *Lafarge Construction Materials*, 20 FMSHRC 1140, 1145-48 (Oct. 1988). The Secretary argued that supervisor Stewart's failure to meet that heightened standard of care supported an unwarrantable failure determination. P. Br. at 13-14.

The Secretary specifically argued that an unwarrantable designation was justified because Stewart acted with a "serious lack of reasonable care" when he shouted hurried and confusing instructions to plant operator Nichelson in front of a loud diesel generator, where such instructions were easily misunderstood and conveyed a sense of urgency to take immediate action without regard for safety protocol. In fact, the Secretary relied on alleged inconsistencies within Stewart's own testimony establishing that Stewart instructed Nichelson to act (either shut down the conveyor belt or lock out the power source), and not act (wait for him before doing anything). The Secretary argued that Stewart's confusing and unclear instructions were easily misunderstood when delivered in front of the 95 decibels of noise being emitted by the diesel generator. Additionally, the Secretary emphasized that Nichelson was standing around with other miners waiting for Stewart to return from a discussion with a vendor, when Nichelson told Stewart that the feeder was jammed. Then, only after instruction from Stewart, did Nichelson attempt to clear the jam. P. Br. at 14-15.

Nichelson testified that he ignored the safety requirements because he desired to resume production as soon as possible. 35 FMSHRC at 1392, citing Tr. 357. Stewart admitted that before promotion to management, he had ignored the fall protection and lock out/tag out requirements when in a hurry. 35 FMSHRC at 1390, citing Tr. 296-98, 306. The Secretary argued that Nichelson took cues from a hurried Stewart, assumed production was more important than safety, and risked fatal injury in a hasty attempt to comply with Stewart's instructions. P. Br. at 15.

The Secretary also emphasized that Stewart had opportunities to take precautionary measures and had no reason to rely on any assumption that Nichelson would wait to handle the rock jam. Stewart handled approximately 10 rock jams when employed as a rank and file miner, and first did so when his supervisor was too busy. P. Br. at 15-16. Also, Stewart knew that Nichelson had handled at least two rock jams prior to July 14, 2010, one of which Stewart witnessed. P. Br. at 16, see also Tr. 273. Since Stewart conceded that he thought Nichelson was going to lock out power to the conveyor, the Secretary argues that Stewart should have assumed that Nichelson was going to handle the rock jam. The Secretary pointed out that Stewart knew from personal experience that miners failed to use fall protection and lock out power sources when in a hurry. Therefore, the Secretary argued that if Stewart did not want Nichelson to handle the rock jam, Stewart should have recognized that Nichelson was taking steps to do so and clarified his instructions. P. Br. at 16.

The Secretary also argued that an unwarrantable failure determination was warranted under a traditional, factor-dependent, unwarrantable failure analysis, which considers aggravated conduct based on extensiveness, duration, notice that greater compliance efforts are necessary, abatement efforts, obviousness, high degree of danger, and knowledge. P. Br. at 17-19. In this regard, the Secretary reasonably argued that the alleged violations posed a high degree of danger and that Stewart should have known that a miner may overlook both lock out/tag out and fall protection protocol when in a hurry. P. Br. at 18. Although conceding short duration with high danger, the Secretary argued that the condition was extensive because work was being performed on the elevated belt and that MSHA's Rules to Live By were adequate to put Magruder on notice that greater efforts were necessary to achieve compliance. P. Br. at 17.

In this regard, inspector Sherrill observed Nichelson standing on the elevated conveyor belt for 20-30 seconds, without using fall protection or locking and tagging out the conveyor. Tr. 120-21. Sherrill testified that this was an extensive and extremely hazardous condition because two standards were simultaneously violated and Nichelson was performing work at elevated heights without fall protection. Tr. 123-24, 135-36.

Regarding obviousness or high degree of danger, Sherrill testified that if Nichelson had continued working on the elevated conveyor belt, without any fall protection, it was highly likely that he would have fallen and suffered fatal injuries. Tr. 103-04. In addition, because Nichelson was standing on the belt, any inadvertent belt movement likely would have caused him to fall and suffer fatal injuries or broken bones, or be impaled by the breaker bar. Tr. 102-04, 135-36.

Regarding notice that greater compliance efforts were necessary, the Secretary relied on Sherrill's testimony that MSHA provided all operators with its Rules to Live By prior to the July

14, 2010 inspection. Tr. 117-18. Also, Stewart acknowledged that Superintendent Twellman advised Stewart about MSHA's Rules to Live By, confirming that Respondent knew that MSHA was focusing compliance initiatives on certain standards, including fall protection and lock out/tag out standards. Additionally, the Secretary relied on Sherrill's testimony that he discussed the importance of using fall protection during the pre-inspection conference with Stewart. Tr. 69-70, 141-44. See P. Br. at 18.

Regarding Respondent's knowledge of the existence of the violation(s), the Secretary relied on Stewart's allegedly conflicting testimony about what he expected Nichelson to do, wait for him or lock out. Tr. 261, 321. Stewart acknowledged that his instructions were unclear. Tr. 286. The Secretary emphasized that after issuing the instructions, Stewart testified that he thought Nichelson was going to lock out the belt, and that the lock out is performed by the individual who is going to clear the rock jam. Thus, the Secretary argued that Stewart should have assumed that the Nichelson would clear the rock jam himself. Further, Stewart should have known from personal experience that it was possible for a hurried miner to climb up to the rock jam and overlook the need to lock and tag out and use fall protection. See P. Br. at 19.

Finally, the Secretary argued that the high negligence designation was warranted per regulation because Stewart knew or should have known of the alleged violations, and there were no mitigating circumstances, as Sherrill testified. P. Br. at 19; Tr. 107-115. More specifically, the Secretary argued that Stewart's response to a highly hazardous condition, the rock jam, constituted high negligence because Stewart should have given effective instructions to Nichelson regarding how to clear the rock jam, and should have ensured that Nichelson used fall protection and followed lock out/tag out procedures, particularly since a former plant operator, who was present that day, could have inadvertently started the conveyor belt while Nichelson was standing up there without tying off. *Id*. at 20-22; Tr. 324. The Secretary relied on Sherrill's testimony that he did not consider Stewart's alleged instruction to Nichelson to "shut it down and wait" to mitigate the ineffectiveness of the communication. *Id*. The Secretary argued that Stewart's unmitigated negligence resulted in a miner working on an elevated conveyor belt without the use of fall protection, while power was not locked out. P. Br. at 20-21. In sum, the Secretary concluded that while the incident was brief in duration, it was extraordinarily dangerous and constituted an inexcusable and unwarrantable breach of mine safety procedures involving two mandatory safety standards as a result of a serious lack of reasonable care on the part of management. Accordingly, the Secretary argued that the undersigned should have enforced both Citation No. 6575266 and Order No. 6575267 as written, and assessed the proposed penalties. P. Br. at 24

Although I rejected these arguments after hearing all the evidence, and weighing the credibility of witnesses, the language summarizing my conclusions regarding the unwarrantable failure factors indicates that the issue was close and the Secretary's position was substantially justified.

> . . . Citation No. 6575266 was of a very serious nature and placed Nichelson in a high degree of danger. I strongly concur with the parties' stipulation that the fall protection violation was properly designated significant and substantial. Nichelson's failure to don fall protection as described in Citation No. 6575266 was highly

> likely to result in an injury and there is sufficient evidence to show that such an injury was reasonably likely to be fatal.
>
> Despite the high risk of danger, however, the other unwarrantable factors are either neutral or weigh against an unwarrantable failure finding. The Secretary's own witness testified that Stewart did not have knowledge of the violation and there was no evidence that Stewart should have expected Nichelson to violate safety protocols. Respondent was not placed on notice that greater efforts were needed to achieve compliance with the standard, and the violation was not obvious to Stewart given the location of the belt and the short duration of the hazard. Although the scope of the hazardous practice was limited in terms of area and the number of miners affected, Stewart's testimony of past violations suggests that the violative practice may have been more extensive and signaled a possible culture of disregard for safety standards when miners were in a hurry. This is troubling and I take this into account in assessing a penalty for the violation. Nevertheless, I find that the totality of the factors weigh against a finding of unwarrantable failure for Citation No. 6575266.

35 FMSHRC at 1410-11.

Having reexamined the record as a whole in light of the Secretary's proof and arguments on briefs, I find that the Secretary had a reasonable basis in fact and law for pursuing its litigation theories in the civil penalty proceedings below and was substantially justified to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. at 565. As outlined above, the Secretary established a reasonable basis in truth for the facts alleged, a reasonable basis in law for the theories advanced, and a reasonable connection between the facts alleged and the legal theories advanced. As the Fourth Circuit has recognized, "although the impulse to equate ultimate judicial rejection of the Government's merits position--at whatever level--with its lack of substantial justification is understandable, the courts perforce have rejected it as inappropriate, for to do so, '"would virtually eliminate the 'substantially justified' standard from the statute."' *United States v. Paisley*, 957 F.2d 1161, 1167 (4th Cir. 1992) (quoting *Broad Avenue Laundry & Tailoring v. United States*, 693 F.2d 1387, 1391-92 (Fed. Cir. 1982). It would be "a war with life's realities to reason that the position of every loser in a lawsuit upon final conclusion was unjustified." *Id*. (quoting *Evans v. Sullivan*, 928 F.2d 109, 110 (4th Cir. 1991).

The Secretary's litigation position and proof could have satisfied a reasonable person. I emphasize that this case could have come out differently depending on certain credibility resolutions or other legal determinations made after trial. *See e.g., Ray, employed by Leo Journagan Constr. Co.*, 20 FMSHRC 1014, 1026-27 (Sept. 1998) (citing *Europlast Ltd. v. NLRB*, 33 F.3d 16, 17-18 (7th Cir. 1994) ("noting that NLRB had no way of foreseeing that the judge would make credibility resolutions in favor of Respondent's witnesses and against NLRB's witnesses.")). I could have credited Nichelson over Stewart's varying versions of what was said and found that Stewart told Nichelson to shut it down, but did not tell Nichelson to wait for him. Nichelson was the plant operator, Stewart was busy with MSHA trying to avoid

additional citations, and Stewart had previously witnessed Nichelson clear one rock jam and was aware that Nichelson had cleared at least two rock jams prior to the instant incident on July 14, 2010. Moreover, Stewart saw Nichelson walk off in the direction of one who would perform lock out and tag out. Based on this record evidence, and my close examination of the demeanor of Respondent's witnesses and their responses to tightly scripted and often leading questions from Respondent's counsel, I came close to concluding that Respondent's litigation strategy was to make Nichelson the fall guy, who appeared to have violated instructions, in an effort to shield Stewart and Respondent from responsibility for Nichelson's unlawful actions after direction from Stewart.

Furthermore, irrespective of exactly what Stewart told Nichelson, I found that Stewart's decision to provide instructions near the diesel generator was not without consequence and was (at least) moderately negligent. 35 FMSHRC at 1404. Stewart conveyed instructions with a lack of care, which departed from what an ordinary and prudent operator, familiar with the mining industry and in dealing with MSHA, would have done in the same or similar circumstances. There is no doubt that his instructions were conveyed in an extremely noisy environment, where they were capable of falling on deaf ears or being misunderstood. Further, Stewart's instructions were conveyed hastily, and outside the earshot of MSHA inspectors, who could have helped Respondent properly resolve the rock jam. These facts, particularly in light of Stewart's admitted failures as a rank-and-file miner to comply with both the fall protection and lock out/tag out standards when busy or in a hurry, reasonably could have led to a conclusion that Stewart signaled Nichelson to resolve the rock jam consistent with this unlawful practice before it attracted additional attention from MSHA. In fact, after speaking with Stewart, Nichelson did just that, but got caught by MSHA in the violative conduct. That could have been aggravated conduct with high negligence by Respondent.

In short, the Secretary proved up facts and advanced legal theory that reasonably supported the view that the Secretary's litigation position with regard to Citation 6575266 was substantially justified. Although ultimately not persuasive, the Secretary's position turned largely on credibility and a weighing of various evidence, and it was based on more than supposition or conjecture. His legal conclusions flowed from a rational process of reasoning and logical deduction. The unwarrantable failure and high negligence issues were close, and could have come out another way.[2]

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[2] Furthermore, although not specifically argued by the Secretary in light of the stipulation that Nichelson was a rank-and-file miner, it is arguable that such stipulation could have been set aside as contrary to law. In this regard, it was arguable that Nichelson was acting as Respondent's agent, whose negligence was imputable to Respondent for penalty and unwarrantable failure purposes. Section 3(e) of the Mine Act defines "agent" as "*any person charged with responsibility for the operation of all or a part of a coal or other mine* or the supervision of the miners in a coal or other mine." Although Nichelson was not a supervisory or managerial employee, he was charged with responsibility for the operation of all or a part of the mine. He was the plant operator controlling the operation of the mine by starting and stopping the plant from the control booth.

(continued…)

B. Order No. 6575267

Section 104(d)(1) Order No. 6575267 alleges that Respondent unwarrantably failed to comply with the lock out/tag out standard at 30 C.F.R. § 56.12016. 30 C.F.R. § 56.12016 is a mandatory standard which provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventative devices shall be removed only by the persons who installed them or by authorized personnel.

The citation ascribed high negligence to Respondent for an alleged violative condition that was "highly likely" to result in an injury that could reasonably be expected to be fatal. The Secretary proposed a penalty of $17,301.

The substantial justification analysis for this Order is more problematic because I set aside the parties stipulation of an S&S violation and vacated Order No. 6575267 based on well-established circuit court precedent that neither party discussed or relied upon. I found that although the Secretary has long argued that 30 C.F.R. § 56.12016 covers hazards associated with mechanical movement as opposed to electric shock, this interpretation is contrary to the clear meaning of the standard when examined in the context of the regulatory scheme. 33 FMSHRC at 1440, citing *Phelps Dodge Corp*., 681 F.2d 1189, 1192 (9th Cir. 1982); *Northshore Mining Co.*, 709 F.3d 706 (8th Cir. 2013).

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[2] (…continued)

In taking steps to clear the rock jam and start the plant operating again, it is arguable that Nichelson was acting within the scope of his employment as Respondent's operator agent with a level of responsibility normally delegated to management personnel. It is undisputed that a supervisor or plant manager usually cleared the rock jams, although a rank-and-file miner occasionally did so. Stewart admitted as much. Here, the record establishes that Nichelson was engaged in work that entailed "responsibility for the operation of all or a part of a . . . mine." Moreover, he was standing around near the rock jam talking to other miners before Stewart arrived. Thus, it could have been argued that Respondent held Nichelson out as its agent with apparent authority to act on behalf of management to clear the rock jam.

Thus, in the unique circumstances of this case, based on the facts the Secretary presented, it was arguable that Nichelson acted as agent of Respondent when he performed a typical managerial function and cleared a rock jam necessary for restarting production, without using fall protection. Had this been persuasively established, the undersigned could have set aside the parties stipulation that Nichelson was a rank-and-file miner whose conduct was not attributable to Respondent and found that Nichelson's gross negligence was imputable to Magruder Limestone for penalty and unwarrantable failure purposes.

But the undersigned's reliance on such circuit court precedent does not compel the conclusion that the Secretary's legal interpretation was not substantially justified, particularly when Commission law on the subject is unsettled and could be read to support the Secretary's longstanding interpretation that the lock out requirements in 30 C.F.R. § 56.12016 were intended to protect miners performing mechanical work even where there was no danger of electric shock. Although I ultimately was persuaded that 30 C.F.R. § 56.12016 was not applicable based on the reasoning of the Ninth Circuit in *Phelps Dodge* and the Eighth Circuit in *Northshore Mining* -- a case that was not even decided at the Commission level when the underlying civil penalty matter was tried in June 2012 --, this authority was not binding on the Secretary, who was free to litigate a contrary position before the Commission to create a split in the circuits, particularly where other extant authority supports the Secretary's long-standing position. *See, e.g*., *Ray, employed by Leo Journagan Constr. Co.*, 20 FMSHRC 1014, 1023 (Sept. 1998)("[a]lthough section 56.12016, standing alone, could be viewed as containing a plain and unambiguous lockout requirement, section 56.14105 and the case law interpreting that standard creates uncertainty regarding the scope of that lockout requirement."); *Empire Iron Mining Co*., 29 FMSHRC 999, 1003 n.8 (2007) (dictum agreeing with dissent in *Phelps Dodge* [681 F.2d at 1193 (Boochever, dissenting)] that the language of § 56.12016 "is clear and unambiguous" and reiterating statement of ALJ in underlying decision [29 FMSHRC at 328] that "the standard means exactly what it says – to wit, that '[e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment.'"); *Northshore Mining Co.,* 34 FMSHRC 663, 674 (Mar. 2012) (ALJ)(finding a violation of § 56.12016 despite *Phelps Dodge* and holding that "while 30 C.F.R. § 56.12016 and 30 C.F.R. § 56.14105 have many overlapping characteristics, they do not in any way preclude one another."); *Blue Mountain Prod. Co.,* 32 FMSHRC 1464, 1478-79 (Oct. 2010) (ALJ) (finding violation of § 56.12016 where miners were repairing conveyor that was not locked out/tagged out); *QMAX Co.,* 28 FMSHRC 848, 854 (Sept. 2006) (ALJ) (finding "clear" violation of § 56.12016 where miners working on conveyor belt that was de-energized but not locked out/tagged out were exposed to entanglement hazards).

In my view, this split of authority gave the Secretary a reasonable basis in law to support a violation of § 56.12016 in the instant litigation before the Commission, notwithstanding contrary circuit precedent. As I noted in *Pattison Sand Company, LLC*, 34 FMSHRC 2938, 2943, n. 3 (Nov. 2012) (ALJ), the Commission has not addressed the issue of non-acquiescence to circuit court decisions despite the fact that there is considerable authority that an administrative agency charged with the duty of formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of the U.S. Courts of Appeals that conflict with those of the agency. *See, e.g., S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1278-1279 (5th Cir. 1981); *see generally* Samuel Estreicher, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 681 (1989). Clearly, the language of the Mine Act gives the Commission jurisdiction over "substantial question[s] of law, policy or discretion." 30 U.S.C. § 823(d)(2)(A)(ii)(IV). The Supreme Court has recognized the *unique* role of the Commission as the arbiter of questions of interpretation of the Mine Act. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994) (affirming the Commission's role in formulating a uniform and comprehensive interpretation of the Mine Act).

Accordingly, in this unsettled area, the Secretary was entitled to advance its longstanding interpretation of § 56.12016 in an effort to convince the Commission to utilize its unique

adjudicatory expertise and either bow to or disagree with the Ninth and now Eighth Circuits. As the Eighth Circuit recognized in an analogous EAJA context:

> The substantial justification standard, however, should not be used to deter the government from bringing cases of first impression or offering novel arguments. The special circumstances exception "is a 'safety valve' designed to 'insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.' " *Russell v. Nat'l Mediation Bd.,* 775 F.2d 12884, 1290(5th Cir. 1985)(quoting H.R. Rep. No. 96-1418 at 11 (1980)).

S.E.C. v. Zahareas, 374 F.3d 624, 627 (8th Cir. 2004). Similarly, if the case turns on an unsettled or close question of law, as here, the government's position will normally be substantially justified, notwithstanding the fact that its legal position is ultimately rejected, unless it clearly offends established precedent. *Washington v. Heckler*, 756 F.2d 959, 961-62 (3d Cir. (1985). As noted, Commission precedent on this issue has not been clearly established.

It is troubling that the Secretary declined to appeal to the Commission my underlying decision adopting the views of the two circuits in this unsettled area. Had he done so, he may have prevailed. Perhaps the Secretary chose to wait for a better case, or for better facts, or for a judge's decision, like those in *Northshore Mining, Blue Mountain Prod.,* or *QMAX Co.,* where the judges found a § 56.12016 violation where no electric shock hazard was present. Certainly, given this difficult and unsettled area of law, the Secretary presented facts supporting a longstanding lock-and-tag-out theory of violation that, although rejected, was substantially justified because reasonable persons, including numerous Secretaries and several other Commission judges, have thought that it has a reasonable basis in fact and law when mechanical work is done on electrically powered equipment.

Finally, since the Secretary essentially relied on the same facts and legal arguments to justify the high negligence and unwarrantable failure designations in Order No. 6575267 that he relied on to justify those factually and legally parallel allegations in Citation No. 6575266, I find that the Secretary has established that his litigation position with respect to the failure to lock and tag out was also substantially justified for essentially the same reasons as those set forth above concerning the fall protection violation. Accordingly, I conclude that the Secretary was substantially justified both in fact and in law in proceeding with the underlying litigation as a whole.

C. Special Circumstances Make an EAJA Award Unjust with Regard to Order No. 6575267

Magruder's rather audacious play for attorney fees is troubling given its stipulation that it engaged in a significant and substantial violation of 30 C.F.R. § 56.12016. Despite the fact that Magruder and its attorneys never uncovered the circuit court case law relied on by the

undersigned to vacate Order No. 6575267, it now asks the Commission to award it attorneys' fees and costs because the Secretary should have uncovered this precedent and backed off the stipulation. Although Magruder correctly points out that the Secretary has the burden of proving that its litigation position was substantially justified, I have found that he met that burden with regard to the litigation as a whole, including the unwarrantable failure and high negligence designations.

I further find that special circumstances make an EAJA award unjust with regard to the vacatur of Order No. 6575267 because Magruder stipulated to an S&S violation, and it would contravene principles of equity, fairness and justice to recompense Magruder for time and expense that the administrative tribunal, sua sponte, determined to be erroneous. In explaining the "special circumstances" exception, the House Report accompanying the EAJA stated:

> Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

H.R.Rep. No. 1418, 96th Cong., 2d Sess. at 11, *reprinted in* 1980 U.S.C.C.A.N 4953, 4990. "The EAJA thus explicitly directs a court to apply traditional equitable principles in ruling upon an application for counsel fees by a prevailing party." *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir. 1983).

I agree with the Secretary that Magruder justly cannot claim that it deserves to be paid for time spent being wrong by stipulating to facts and law supporting the lock out tag out violation and concomitant S&S designation during the course of this litigation. Not one billable hour nor one word in Magruder's post-hearing brief appears to be spent on supporting any argument or research that *Phelps Dodge Corp*., 681 F.2d 1189, 1192 (9th Cir. 1982) or progeny justified vacating Order No. 6575267.[3]

I further agree with the Secretary that Magruder's ongoing stipulation to the fact of the S&S violation in Order No. 6575267 had the practical effect of foreclosing the Secretary's argument in the alternative that the facts in question supported a violation of 30 C.F.R. § 56.14105. This was understandable since stipulations are designed to narrow issues and areas of disagreement and simplify proceedings. Balancing the equities under the special circumstances exception, Magruder's work on a stipulated violation cannot equitably be deemed to have been expended in pursuit of the fortuitous vacatur achieved here. *Cf*., *United States v. 27.09 Acres of Land in Town of Harrison*, 43 F.3d 769, 775 (2d Cir. 1994)(eligible, prevailing party was denied attorneys' fees under the special circumstances exception because it did not substantially

[3] As noted, *Northshore Mining Co.*, 709 F.3d 706 (8th Cir. 2013) came down in March 2013, two months before my underlying decision, and a year after the judge in that case adopted the Secretary's interpretation of 30 C.F.R. § 56.12016 that was advanced here.

contribute to the successful phase of the litigation by ineligible parties, and fees were not expended on discrete efforts that achieved an appreciable advantage).

IV. Order

Having evaluated the record as a whole and the arguments presented by each party, and having applied the relevant law, it is **ORDERED** that EAJA fees be **DENIED**. The Secretary has established that an EAJA award is not appropriate because his position was substantially justified with regard to Citation No. 6575266 and Order No. 6575267, and that special circumstances make an award of fees unjust with regard to the vacatur of Order No. 6575267.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 22, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2011-295 A.C. No. 11-03189-241092
v.	
M-CLASS MINING LLC, Respondent	Mine: MC #1 Mine

DECISION

Appearances: Bryan R. Kaufman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;

Christopher D. Pence, Esq., Hardy Pence PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of a Civil Penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). In dispute are two section 104(a)(1) citations issued by the Mine Safety and Health Administration ("MSHA") to M-Class Mining LLC ("M-Class" or "Respondent") as the owner and operator of the MC #1 Mine. To prevail, the Secretary must prove the cited violations "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom.*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotation marks omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

The two alleged violations in this case were issued at M-Class Mining's MC #1 Mine. The first alleged violation involves Citation No. 8424233, which charges M-Class with a violation of 30 C.F.R. § 75.380(d)(4)[1] for failing to maintain the mine's alternate escapeway at the required width. The second involves Citation No. 8424774, which charges Respondent with a violation of 30 C.F.R. § 77.1109(d)[2] for failing to provide a fire extinguisher at the top of the clean coal stacker tower. The Secretary characterizes M-Class's negligence as high for Citation No. 8424233 and as moderate for Citation No. 8424774. The Secretary proposes a penalty of $425.00 for the first violation and $100.00 for the second, for a total penalty of $525.00.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. LAKE 2011-295 to me, and I held a hearing in Evansville, Indiana.[3] The Secretary presented testimony from MSHA inspectors Marty Gayer and J. Scott Lee. M-Class Mining presented testimony from Safety Manager Tim Kirkpatrick, former M-Class Vice President of Operations Barrett Fox, and current M-Class President Anthony Webb. The parties each filed post-hearing briefs and reply briefs.

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[1] Section 75.380(d) provides, in relevant part—

> Each escapeway shall be –
>
> . . . .
>
> (4) Maintained at least 6 feet wide except –
>
> . . . .
>
> (iv) Where mobile equipment near working sections, and other equipment essential to the ongoing operation of longwall sections, is necessary during normal mining operations, such as material cars containing rock dust or roof control supplies, or is to be used for the evacuation of miners off the section in the event of an emergency. In any instance, escapeways shall be of sufficient width to enable miners, including disabled persons, to escape quickly in an emergency. When there is a need to determine whether sufficient width is provided, MSHA may require a stretcher test where 4 persons carry a miner through the area in question on a stretcher.

[2] Section 77.1109 provides, in relevant part, as follows:

> Preparation plants, dryer plants, tipples, drawoff tunnels, shops, and other surface installations shall be equipped with the following firefighting equipment.
>
> . . . .
>
> (d) Fire extinguishers shall be provided at permanent electrical installations commensurate with the potential fire hazard at such installation in accordance with the recommendations of the National Fire Protection Association.

[3] In this decision, the hearing transcript, the Secretary's exhibits, and M-Class Mining's exhibits are abbreviated as "Tr.," "Ex. GX–#," and "Ex. MC–#," respectively.

II. ISSUES

For Citation No. 8424233, the Secretary asserts that Respondent failed to fulfill the duty imposed by 30 C.F.R. § 75.380(d)(4) by placing equipment in the mine's alternate escapeway that impermissibly reduced the width of the passage, preventing miners from exiting quickly through the escapeway during an emergency. (Sec'y Br. at 8–11.) The Secretary claims that M-Class's actions constituted high negligence because the operator knew MSHA considered the conditions to be a violation. (*Id.* at 14.) In contrast, M-Class argues that an exception in the regulation requires only that miners be able to move through the narrowed escapeway carrying a stretcher, and that its miners satisfactorily completed this stretcher test. (Resp't Br. at 1–2.) M-Class does not claim that any other regulatory exceptions apply. (*Id.*) Alternatively, Respondent claims its actions did not constitute high negligence because it did not know the conditions constituted a violation under the regulations. (*Id.* at 16–17.)

For Citation No. 8424774, the Secretary contends M-Class failed its duty under 30 C.F.R. § 77.1109(d) to provide a fire extinguisher for all permanent electrical installations. (Sec'y Br. at 16–17.) The Secretary asserts that electrical fixtures at the top of M-Class's clean coal stacker belt required a fire extinguisher. (*Id.* at 17.) Respondent contends no permanent electrical installations were located at the top of the clean coal stacker, and therefore a fire extinguisher was not required at the location. (Resp't Br. at 18.)

Accordingly, the following issues are before me: (1) whether the Secretary has carried his burden of proof that Respondent violated the Secretary's mandatory health or safety standards regarding the requisite width of mine escapeways; (2) whether the Secretary has carried his burden of proof that Respondent violated the Secretary's mandatory health or safety standards regarding the presence of fire extinguishers at above-ground mine locations; (3) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations; (4) whether the record supports the Secretary's assertions regarding M-Class Mining's negligence in committing the alleged violations; and (5) whether the Secretary's proposed penalties are appropriate.

For the reasons that follow, Citation No. 8424233 is **AFFIRMED** as written and Citation No. 8424774 is **VACATED**.

III. BACKGROUND

The MC #1 Mine is a coal mine in Franklin County, Illinois, that opened in 2008. (Tr. 194:15–20.) By October 2010, M-Class had begun development of the headgate and tailgate that eventually would provide access and ventilation for the mine's first longwall panel. (Tr. 74:8–16.) The mine's headgate, which is integral to creating the longwall operation, had three entries, with large pillars of coal approximately 100 feet wide separating each entry. (Tr. 78:7–9, Tr. 95:2–3; Ex. MC–1, Ex. MC–1A). Every 100 feet, crosscuts through the coal pillars connected the entries, creating a latticework grid pattern if viewed from above. (Tr. 95:7–10; Ex. MC–1.)

M-Class installed permanent concrete stoppings in the crosscuts to control the flow of air through the mine. (Tr. 79:21–23, 179:12–22.) Fresh air flowed into the headgate through the No. 3 Entry to ventilate the area being developed by a continuous miner. (Tr. 78:19–79:6.) The No. 3 Entry, as the intake, also served as the primary escapeway from the headgate. (Tr. 78:19–25, 190:13–191:12.) After sweeping across the face where active mining was taking place, the now-contaminated air flowed down the No. 1 Entry, or the return, and out of the mine. (Tr. 79:24–25.) A lesser volume of air also flowed away from the active mining face and down the No. 2 Entry, which is located between the No. 1 and No. 3 entries. (Tr. 79:7–16.) The No. 2 Entry served as the mine's alternate escapeway, i.e., the back-up route of escape in case the primary escapeway is blocked. (Tr. 79:7–12.)

In accordance with MSHA regulations, M-Class placed its coal conveyor belt in the No. 2 Entry. (Tr. 79:7–9.) The coal conveyor belt transports coal mined during the headgate's development to the surface, where the coal is processed before being placed into storage. (Tr. 27:5–12, 143:14–17.) After this processing, a long belt takes the clean coal to the top of a 100-foot-tall clean coal stacker tower, from which the mine loads the coal into storage silos to await shipment to market. (Tr. 157:8–12, 158:2–3.)

In the No. 2 Entry, M-Class had hung the coal conveyor belt from the ceiling so the bottom of the belt's frame was two or three feet above the mine floor. (Tr. 38:23–39:15, 90:20–21.) Near the active mining face, M-Class also kept several other large pieces of equipment in the No. 2 Entry, including a power transformer, cable tub, and water booster pump. (Tr. 28:11–23.) The power transformer supplied electricity to mining equipment used at the face. (Tr. 28:20–23.) The water pump provided water to the continuous miner to suppress the coal dust produced from the mining process. (Tr. 28:22–23.) The cable tub held slack in the cable that connected the transformer with power sources closer to the surface. (Tr. 29:4–7.)

M-Class developed the headgate of the MC #1 Mine at a rate of nearly 500 feet per day. (Tr. 221:7–14.) As a result, M-Class had to advance its coal belt and the mining equipment by several crosscuts every 24 to 48 hours. (Tr. 86:2–5, 221:10–14.) To simplify the moving process, the company chose to leave the transformer, cable tub, and booster pump in the No. 2 Entry rather than placing them in the crosscuts. (Tr. 209:13–210:6.) By leaving the equipment in the entry, M-Class could advance the section by hooking the three pieces of equipment to a scoop, towing them straight forward like a train. (Tr. 207:15–17.) M-Class also believed that moving the equipment straight forward rather than in and out of the crosscuts enhanced safety in the mine. (Tr. 221:12–222:9.)

IV. CITATION NO. 8424233—THE NARROWED ESCAPEWAY

A. Findings of Fact—Citation No. 8424233

On October 22, 2010, MSHA Inspector Marty Gayer visited M-Class Mining's MC #1 Mine as part of a regular quarterly inspection of the mine. (Tr. 22:6–14.) Inspector Gayer has extensive training and experience as a mining safety inspector, working for more than ten years as an MSHA inspector, training specialist, and conference litigation representative. (Tr. 16:20–17:4.) Gayer also has specialized training in mine emergency situations and worked as a member

of MSHA's national mine rescue team. (Tr. 17:8–9, 17:25–18:18.) Prior to joining MSHA, Gayer worked for almost 25 years in various other positions in the coal mining industry. (Tr. 20:7–13.)

On the day of this inspection, Inspector Gayer went to the headgate, which M-Class had advanced approximately 1,500 feet to the thirteenth crosscut. (Tr. 22:18–22.) Between the twelfth and thirteenth crosscuts in the No. 2 Entry, Gayer found the alternate escapeway substantially blocked by the coal conveyor belt on one side and on the other side by mining equipment, including the power transformer, cable tub, and water pump. (Tr. 23:2–5, 28:11–23.) The lifeline running down the mine roof of the alternate escapeway passed between the coal belt and these three pieces of equipment. (Tr. 42:3–6.) Inspector Gayer measured the distance between the power transformer and the frame of the coal belt and found a width of only 34 inches. (Tr. 35:20–36:13; Ex. GX–2 at 3.) The passageway narrowed even further to 17.5 inches between the belt and the cable tub, and just 15 inches between the belt and the booster pump. (Tr. 37:1–13.) Altogether, the equipment narrowed the alternate escapeway for a length of approximately 50 feet. (Tr. 57:13–15.)

Informed that the alternate escapeway was impermissibly narrow, the operator requested permission to attempt a stretcher test through the narrowed area. (Tr. 58:7–8.) To perform the stretcher test, four miners placed another miner on an emergency stretcher and attempted to carry him through the narrowed escapeway. (Tr. 57:21–25.) The miners were able to pass through the pinched area, but Gayer noted that they got through the area "with difficulty" and had to juggle and maneuver the occupied stretcher to pass the constricted section. (Tr. 58:15–21, 115:3–7.) Rather than carrying the stretcher with one miner at each corner, as designed, the miners had to line up single file and reach across the stretcher to avoid dumping out the supported miner. (Tr. 199:9–12, 204:13–25.) To pass the power transformer, which stood approximately five feet tall, the miners had to lift the occupied stretcher above their heads and sidestep through the narrow area. (Tr. 58:10–12.) The miners rested the stretcher's weight on the water pump to pass that piece of equipment. (Tr. 204:6–12.) Specifically, Inspector Gayer saw the miners scooting or sliding the stretcher along the mining equipment. (Tr. 58:7–21.) While passing through the pinched area, the miners at times held on to the frame of the coal conveyor belt. (Tr. 210:19–211:22.)

Based on his observations, Inspector Gayer issued Citation No. 8424233, alleging a violation of 30 C.F.R § 75.380(d)(4):

> The Alternate Escapeway in #2 Conveyor Belt Entry for Headgate #1 is not being maintained at least 6 feet wide. The presence of the Section Transformer #PC 2, the 12,470 high voltage cable tub, ISE Booster Water Pump #WP 1, and the conveyor belt reduces the width from 15 to 34 inches between the listed equipment and the conveyor belt on the North side and from 16 to 35 inches between the rib and the listed equipment on the South side for a distance of approximately 50 feet. The route of travel at this location does not pass [through] a door or other permanent ventilation controls, nor is there any necessary supplemental roof support in the affected

> area, located between 12 and 13 crosscuts. The reduced width is due solely to the presence of the equipment listed.

(Ex. GX–1 at 1.) Gayer designated the violation as unlikely to cause injury and characterized M-Class Mining's negligence as "high." (*Id.*) Inspector Gayer terminated the citation five days later on October 27 after M-Class raised the coal conveyer belt so its bottom was at least five feet above the mine floor. (*Id.* at 2.)

B. Analysis and Conclusions of Law—Citation No. 8424233

Respondent relies on two theories to escape liability: (1) the area in question fits under the exception provided in section 75.380(d)(4)(iv), and, alternatively, (2) M-Class did not have sufficient notice that the conditions constituted a violation. (Resp't Br. at 6–16.)

1. Violation of Section 75.380(d)(4)

Section 75.380(d)(4) requires that a coal mine's escapeways be at least six feet, or 72 inches, wide unless an area falls under one of a limited number of exceptions. To prove a violation, therefore, the Secretary must show (1) the escapeway was less than six feet wide, and (2) the cited area does not fall under any of four enumerated exceptions.

The exception provided by section 75.380(d)(4)(iv) allows for mobile equipment or longwall mining equipment to narrow the escapeway to less than six feet. 30 C.F.R. § 75.380(d)(4)(iv). Yet the area must still be of sufficient width "to allow miners, including injured persons, to escape quickly in an emergency." *Id.* To determine whether an area is of sufficient width, MSHA may require a stretcher test, whereby four miners carry a person through the area in question on a stretcher. *Id.*; 61 Fed. Reg. 9764, 9811–9812 (Mar. 11, 1996).

Here, Respondent argues that the cited area fell under the exception provided by section 75.380(d)(4)(iv).[4] (Resp't Br. at 7–11.) M-Class further asserts that its miners satisfactorily completed a stretcher test, proving that the escapeway was of sufficient width in accordance with the regulation. (Resp't Br. at 11–13.)[5]

[4] M-Class does not dispute the Secretary's contention that the exceptions provided in section 75.380(d)(4)(i), (ii), and (iii) do not apply. *See* 30 C.F.R. § 75.380(d)(4)(i), (ii), (iii) (describing exceptions to the width requirement for escapeways).

[5] In support of its argument, Respondent points to *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 933 (June 1991) (ALJ). (Resp't Br. at 12–13.) In that case, an Administrative Law Judge vacated the Secretary's citation under a prior version of the regulation because the Secretary failed to meet its burden of proof to show a stretcher could not be navigated through an area approximately 36 inches wide. Nevertheless, *Rochester & Pittsburgh* is both legally and factually distinct from the case at hand. First, *Rochester & Pittsburgh* dealt with an earlier version of the regulations addressing the need to maintain escape facilities to ensure passage. Furthermore, *Rochester & Pittsburgh* involved a three-foot-wide opening, more than double the width of the escapeway in question here. I am not bound by *Rochester & Pittsburgh*, and, given the factual and legal differences, I see no reason to follow it. 29 C.F.R. § 2700.69(d).

Contrary to Respondent's assertion, the evidence before me does not establish that the alternate escapeway was wide enough that miners, including injured miners, could escape quickly during an emergency. Respondent's stretcher test failed outright under a strict reading of section 75.380(d)(4)(iv), which requires four persons to *carry* a miner through the area in question on a stretcher. As Inspector Gayer and M-Class Vice President Fox testified, the miners rested the stretcher on top of the water pump and slid it across the equipment instead of carrying it. I see little to differentiate dragging the stretcher across the equipment at hand and simply placing the stretcher on the ground and dragging it through the cited area. Neither scenario satisfies the text of the regulation.

Moreover, the evidence does not show that M-Class's stretcher test satisfied the protective intent of the regulation. Inspector Gayer credibly testified that the miners had difficulty maneuvering through the chokepoint created by the belt and the mining equipment. Instead of carrying the stretcher as designed, the miners had to line up single file, lift the disabled miner over their heads, and then shuffle the stretcher across the water pump in order to pass through the narrow area. The miners were in regular contact with the frame of the coal conveyor belt, which, when in operation, presents an additional hazard to the miners. Notwithstanding Vice President Fox's broad assertions that the miners "carried the guy right down through there" (Tr. 196:5–7), Respondent did not present evidence countering Inspector Gayer's testimony. Given Inspector Gayer's detailed testimony and contemporaneous notes, I credit his testimony over the vague statements by Fox.

Furthermore, it is important to note that the miners performing the stretcher test encountered these difficulties in ideal conditions. The Commission has consistently held that the test with respect to the use of an escape route "is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners' ability to expeditiously escape a dangerous underground environment in an emergency." *Am. Coal Co.*, 29 FMSHRC 941, 950 (Dec. 2007) (citing *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 560 (citing 61 Fed. Reg. at 9810)). The limited visibility and hazardous conditions caused by an emergency would be expected to enhance the difficulties the miners encountered while attempting the stretcher test. (Tr. 42:10–19.)

Respondent's unwavering focus on the miners' ability to squeeze through the constricted escapeway is misplaced. The Mine Act must be construed broadly to achieve the goal of health and safety, and exceptions to remedial legislation must be construed narrowly. *Local Union 7107, UMWA v. Clinchfield Coal Co.*, 124 F.3d 639, 640–41 (4th Cir. 1997), *cert denied*, 523 U.S. 1006 (1998); *Sec'y of Labor v. Cannelton Indus. Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989). The purpose of the escapeway-width requirement is to ensure that all persons, including injured miners, can quickly get out of harm's way amid a potentially catastrophic emergency. *See* 61 Fed. Reg. at 9811–9812. A successful stretcher test is a "demonstration that there is no delay in escape." *Id.* M-Class's stretcher test demonstrated just the opposite—that miners scrambling to escape a life-threatening emergency would be forced to wait as their colleagues twisted and contorted and juggled a full stretcher through a 15-inch gap. Miners should not be forced to choose between their own safety and the rescue of injured comrades.

Based on the evidence before me, I determine that Respondent's stretcher test did not show that the MC #1 Mine's alternate escapeway was of sufficient width to enable miners, including disabled persons, to escape quickly in an emergency. Accordingly, the exception provided in Section 75.380(d)(4)(iv) does not apply to the cited area.[6]

2. M-Class Mining's Knowledge

In its defense, Respondent claims it cannot be penalized for the blocked escapeway because it had no knowledge that MSHA considered the discovered conditions to be a violation. (Resp't Br. at 13–16.) When determining whether an operator had fair notice of the requirements of a regulation, the Commission asks "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In applying this standard, the Commission has taken into account a wide variety of factors, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694–95 (July 2002).

First, M-Class asserts the regulation is unclear because both the text and MSHA have not provided a minimum acceptable width under section 75.380(d)(4)(iv). (Resp't Br. at 15.) Here, however, the regulatory history repeatedly emphasizes the need for miners to be able to escape the mine without delay. 61 Fed. Reg. at 9811–9812. The facts in this instance establish that M-Class did not meet that standard. The escapeway narrowed to 17.5 inches at the cable tub and to a mere 15 inches between the operational coal belt and the water booster pump. Navigating such a small gap would require careful maneuvering for even an unencumbered miner, let alone a team of equipped miners carrying a wounded colleague during an emergency.

Second, Respondent argues that MSHA's failure to cite the blocked escapeway in prior inspections should forestall the violation in this instance. (Resp't Br. at 16.) In support of its argument, Respondent points to a number of decisions from Commission Administrative Law Judges vacating citations where MSHA for years prior had either failed to identify violations or openly declined to cite the conditions. (*Id.*) Those facts are not present in this case. At the time of the inspection, M-Class's first headgate was only 1,500 feet deep. M-Class developed the headgate at a rate of nearly 500 feet per day, so the specific conditions in this citation could not have existed for more than several days prior to MSHA's October 22 inspection.

Considering these factors, I determine that a reasonably prudent miner would have recognized the alternate escapeway with equipment stored in it was too narrow to allow a stretcher team to escape quickly. While MSHA's regulations envisage instances where an alternate escapeway can be less than six feet wide, reducing the passage to a mere 15 inches is

[6] Because M-Class's escapeway did not meet the regulation's width requirement, I need not reach the question of whether the power transformer, cable tub, and water pump qualified under the section as mobile equipment or equipment necessary for the development of a longwall.

such a drastic reduction that any reasonable miner would notice the narrowing and realize it is insufficient. M-Class's tortured reading of the regulation is akin to shoving a square peg into a round hole. That exercise, like M-Class's argument, ultimately fails.

Consequently, I conclude that the Secretary has satisfied both elements for a violation of section 75.380(d)(4), as the cited area of the escapeway was not at least six feet wide, and no statutory exceptions to the width requirement were applicable. I also conclude that M-Class reasonably should have known that its actions constituted a violation of the regulation.

3. Gravity

M-Class Mining does not dispute the Secretary's gravity determination for Citation No. 8424233. Because the primary escapeway remained clear, I determine that the Secretary properly concluded that the violation was unlikely to cause injury and that the injuries most likely to result from an incident involving the violative conditions would be lost workdays or restricted duty. Finally, I agree that the Secretary properly determined that the violative conditions affected thirteen persons, the number of miners working in that section of the mine.

4. Negligence

M-Class Mining disputes the Secretary's determination that the operator displayed high negligence in allowing the violative condition to exist, as the mine did not know MSHA considered the blocked escapeway to be a violation. (Resp't Br. at 16–18.) As discussed above, however, Respondent should have known that the escapeway was too narrow to allow injured miners to escape quickly. Furthermore, I note that M-Class abated the violation by simply raising the coal conveyor belt approximately three feet higher than it had been initially installed. Although M-Class presented testimony to the difficulty of placing its equipment in crosscuts rather than the escapeway, Respondent provided no explanation for its failure to adopt the simple precaution of raising the conveyor belt. Absent such evidence, it is unclear to me why M-Class failed to pursue such a seemingly straight-forward precaution to meet the high standards of miner safety required by the Mine Act. I conclude that the Secretary has demonstrated M-Class Mining's level of negligence to be high. *See* 30 C.F.R. § 100.3(d) at Table X (suggesting "high negligence" where the "operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.")

C. Penalty

The Secretary proposes a $425.00 civil penalty for this violation. Under section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In the seven months prior to the MSHA inspectors' visit, M-Class Mining received sixteen citations or orders for violations of mandatory safety and health standards. M-Class is a relatively large operator, receiving nine out of a potential ten points for controller size under the Secretary's penalty criteria in his Part 100 regulations. *See* 30 C.F.R. § 100.3(b). Nothing in the record suggests that the penalty would impinge on Respondent's ability to remain in business. Moreover, M-Class was highly negligent in allowing its mining equipment to block much of the mine's alternate escapeway, and although the violation was not likely to cause injury or illness, the restricted escapeway affected a large number of persons. Nevertheless, I acknowledge Respondent's timely efforts to remedy the violative condition.

Considering all of the facts and circumstances of this matter, I conclude that the Secretary's proposed penalty is appropriate and assess a penalty of $425.00.

V. CITATION NO. 8424774—THE CLEAN COAL STACKER

A. Findings of Fact—Citation No. 8424774

On October 28, MSHA Inspector J. Scott Lee inspected the surface areas at M-Class's MC #1 Mine as part of a regular quarterly inspection of the mine. (Tr. 141:25–142:5.) Lee had worked for a total of 37 years in the mining industry, including 22 to 23 with mine operators and another 13 with MSHA. (Tr. 122:4–6.) Lee inspected coal stacker belts as a regular part of his job with MSHA and frequently as a safety inspector for the coal mines. (Tr. 122:21–25.)

The MC #1 Mine's stacker belt is powered by drive motors located at the bottom of the belt. (Tr. 144:8–13.) The top of the clean coal stacker belt contains a laser sensor that trips a mechanism to stop the motors if the belt becomes clogged. (Tr. 163:20–164:3.) The sensor switch is controlled from the main controller room, not from the top of the belt. (Tr. 166:23–25.) The laser sensor is connected to the main controller room with a low-voltage computer cable. (Tr. 163:20–164:12.) In addition, several lights hang from the coal stacker tower to illuminate the area below. (Tr. 167:18–168:7.) There are also a number of lights along the walkway leading to the top of the clean coal stacker. (Tr. 167:15–17.) No power distribution center or power box is located at the top of the clean coal stacker belt. (Tr. 170:2.)

Inspector Lee testified that he found permanent electrical installations, such as a circuit control panel, at the top of the mine's clean coal stacker. (Tr. 131:17–20.) Lee searched for but did not find a fire extinguisher at the top of the coal stacker. (Tr. 139:7–20.) Based on his observations, Inspector Lee issued Citation No. 8424774, alleging a violation of 30 C.F.R. § 77.1109(d): "There was no fire extinguisher located at the permanent electrical installation. This condition was observed at the drive motor for the clean coal stacker belt on top of the clean coal stacker." (Ex. GX–4.) Lee designated the violation as unlikely to cause injury and characterized M-Class's negligence as "moderate." (*Id.*)

When M-Class Mining's safety manager, Timothy Kirkpatrick, learned that Inspector Lee was issuing a citation for the lack of a fire extinguisher at the top of the tower, he asked Lee what equipment required a fire extinguisher. (Tr. 159:25–160:3.) Lee told Kirkpatrick the citation was for two gray boxes at the top of the tower. (Tr. 160:2–4.) When pressed by Kirkpatrick, Lee

indicated the citation was for the stacker belt's drive motors. (Tr. 160:5–10.) After Kirkpatrick informed Inspector Lee that the belt's drive motors were not located at the top of the tower, Lee indicated to Kirkpatrick that two gray boxes at the top of the tower required a fire extinguisher. (Tr. 160:11–20.)

Inspector Lee terminated the citation after M-Class placed a fire extinguisher on two gray boxes at the cited location that hold a carbon dioxide bottle. (Tr. 161:5–13, 163:1–9; Ex. GX–4 at 1, Ex. GX–5 at 3.) Inspector Lee did not go back to the top of the tower to see where M-Class placed the fire extinguisher. (Tr. 149:3–7.)

Inspector Lee did not mention the presence of the drive motor in his field notes, which Lee thought he filled out shortly after issuing the citation. (Tr. 125:16–24.) Lee's notes do not identify the installation requiring a fire extinguisher, but instead refer generally to an unspecified "permanent electrical installation." (Ex. GX–5 at 2.)

B. Analysis and Conclusions of Law—Citation No. 8424774

The threshold issue is whether the Secretary has established a violation of 30 C.F.R. § 77.1109(d). Inspector Lee issued Citation No. 8424774 for M-Class Mining's failure to provide a fire extinguisher at the top of the clean coal stacker belt. (Ex. GX–4.) To demonstrate a violation of 30 C.F.R. § 77.1109(d), the Secretary must prove by the preponderance of the evidence that the operator (1) failed to provide a fire extinguisher (2) commensurate with the fire hazard presented by an electrical installation.

In a sparse, two-page argument, the Secretary asserts that the citation should be affirmed because M-Class failed to provide a fire extinguisher for the sensor eye located at the top of the clean coal stacker belt. (Sec'y Br. at 16.) Notably, the Secretary's argument is a sharp diversion from the citation issued during Lee's October 28 inspection. Inspector Lee explained his erroneous wording in the citation as a clerical error that resulted from him using a template citation rather than starting from scratch. (Tr. 124:8–20.) Although the Secretary had ample opportunity to amend the citation to properly reflect the violative conditions discovered atop the clean coal stacker belt, he nevertheless declined to do so. Moreover, Lee's notes from the inspection provide no additional clarity. (Ex. GX–5 at 2–3.)

Inspector Lee's citation and notes are not the only shortcomings in the Secretary's case. At hearing, Lee's testimony was unclear at best. When the Secretary's counsel presented Inspector Lee with Respondent's photographs of the area at the top of the clean coal stacker belt, Lee could not identify with certainty a permanent electrical installation requiring a fire extinguisher nearby. (Tr. 129:23–130:7, 131:13–132:15.) When further prompted on direct examination to identify the location of the cited permanent electrical installation, Inspector Lee first stated he had a feeling the electrical installation was on one side of the stacker tower but then subsequently identified the culprit as a small metal box located on the opposite side of the tower. (Tr. 132:9–12, 134:13–135:1; Ex. GX–6 at 2–5.) Undeterred, Lee again switched his testimony on cross-examination, asserting that the cited permanent electrical installation was in the first location he identified. (Tr. 146:13–25.) The Secretary did not introduce his own photographs identifying the violative condition.

Inspector Lee also could not identify what the alleged permanent electrical installation was. Lee first testified that he would have cited a circuit control panel. (Tr. 131:17–20.) He subsequently testified that even a junction box, where two wires meet, would be a permanent electrical installation for the purposes of section 77.1109(d). (Tr. 135:17–19). On cross-examination, Lee testified that he had identified a circuit box or control panel that was used to distribute electricity to instruments at the top of the clean coal stacker belt. (Tr. 145:5–8.) Lee then expanded his definition of a permanent electrical installation to include all conduits. (Tr. 145:9–18.) When questioned whether his expansive understanding effectively includes all wires capable of carrying an electrical current, Lee backed off his testimony and again insisted he was looking for a box. (Tr. 145:19–146:6.) Lee further testified that he did not need to know the contents of a "silver box" in order to identify it as a permanent electrical installation. (Tr. 150:2–18, 151:19–23.) Indeed, Lee admitted that he had not thoroughly checked the alleged electrical installation he cited. (Tr. 151:20–152:3.)

Considering Kirkpatrick's testimony regarding the inspection, I do not find Inspector Lee's testimony to be credible. *See Grizzle v. Picklands Mather & Co.,* 994 F.2d 1093, 1096 (4th Cir. 1993) (indicating ALJs have the "sole power to make credibility determinations and resolve inconsistencies in the evidence"). Furthermore, the citation itself is admittedly inaccurate and the notes unilluminating. Altogether, the Secretary has provided no evidence to support his allegations that the top of M-Class Mining's clean coal stacker belt contained any permanent electrical installation requiring a fire extinguisher to be placed nearby. Although the Secretary in his reply brief points to the laser sensor as proof that a fire extinguisher was needed atop the clean coal stacker, he provides no details regarding the fire hazard posed by this low-voltage sensor and no theory suggesting what type of fire extinguishing equipment such an instrument would require.[7] The Secretary chose not to put Inspector Lee on the stand in rebuttal or call any rebuttal witnesses.

The Mine Act imposes on the Secretary the burden of proving the violation the Secretary alleges by a preponderance of the evidence. *See Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989) (citations omitted). Given the lack of evidence before me, I determine that the Secretary has not satisfied his burden of proof to demonstrate the elements of a violation of section 77.1109(d). Citation No. 8424774 therefore is vacated.

[7] Although MSHA has not provided direct guidance on what constitutes a permanent electrical installation for the purposes of section 77.1109(d), the agency's Program Policy Manual mentions "electric motors or transformers" as examples of such installations. V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 77, 199–200 (2003). Here, the Secretary has provided no evidence to suggest the low-voltage sensor shares any essential characteristics with the permanent electrical installations noted in MSHA's Program Policy Manual.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8424233 is **AFFIRMED**. It is further **ORDERED** that Citation No. 8424774 be **VACATED**.

WHEREFORE, Respondent is **ORDERED** to pay a penalty of $425.00 within 40 days of this Decision.[8]

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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[8] Payment should be sent to: U.S. Department of Labor, MSHA, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket and A.C. numbers.

ADMINISTRATIVE LAW JUDGE ORDERS

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October 29, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. EMERALD COAL RESOURCES, LP, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. PENN 2013-305 A.C. No. 36-05466 Docket No. PENN 2013-306 A.C. No. 36-05466 Mine: Emerald No. 1

ORDER ASSESSING PENALTY

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration ("MSHA") against Emerald Coal Resources, LP, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. These dockets involve two proposed penalties of $20,000.00, for a total penalty of $40,000.00, for violations of section 105(c)(1) of the Act. The parties have filed joint stipulations addressing the penalty criteria. For reasons that follow, I assess a total penalty of $40,000.00.

On June 6, 2013 this court issued an amended decision finding that Respondent had discriminated against two miners in violation of section 105(c)(1) of the Act. *UMWA o/b/o Mark A. Franks & Ronald Hoy*, 35 FMSHRC 1696 (June 2013) (ALJ). The Secretary was not a party to the discrimination proceedings and, as a result, civil penalties were not proposed prior to the hearing on the merits. Accordingly, no penalty was assessed in the decision and, rather, consistent with Commission Procedural Rule 44(b), the court referred the matter to the Secretary for the assessment of civil penalties. 29 C.F.R. § 2700.44(b). On July 18, 2013 the Secretary filed petitions for assessment of civil penalties for violations of section 105(c)(1) of the Act and the docket numbers listed above were assigned. Subsequently, on August 29, 2014, the Commission affirmed the decision that violations of section 105(c)(1) occurred. *UMWA o/b/o Mark A. Franks & Ronald Hoy*, 36 FMSHRC __, slip op. (Docket Nos. PENN 2012-250-D and PENN 2012-251-D) (Aug. 29, 2014). On September 29, 2014 Respondent filed a petition for review of the Commission's decision to the U.S. Court of Appeals for the Third Circuit. On October 14, 2014 the parties filed joint stipulations aimed at resolving the outstanding penalty issues related to the dockets on review to the U.S. Court of Appeals. As part of the stipulations, the parties agree that the two $20,000.00 penalties proposed by the Secretary may be assessed in these cases so that the penalties may be joined with the underlying discrimination matters on review. Jt. Stip. ¶ 6.

The principles governing the authority of Commission administrative law judges 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 and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act requires, that in assessing civil monetary penalties, the ALJ must consider " six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 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), aff'd, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion that includes a consideration of the penalty criteria and the deterrent purpose of the Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The parties have stipulated that the outcome of the proceeding before the Court of Appeals will ultimately control this matter, and that, to promote judicial economy and to facilitate the review of its case before the U.S. Court of Appeals, this court may proceed to impose the two $20,000.00 penalties sought by the Secretary in the above captioned proceedings. Jt. Stip. ¶ 6. Emerald agrees that, if the U.S. Court of Appeals finds that the violations of section 105(c) should be upheld, then the two $20,000.00 penalties may be imposed. Jt. Stip. ¶ 13. The parties agree that the stipulations do not preclude any argument that the parties may make as to the underlying discrimination case before the U.S. Court of Appeals, and that once an order assessing penalties is issued it is Respondent's obligation to seek review of the penalties in order for this matter to be joined with the matter currently pending before the U.S. Court of Appeals. Jt. Stip. ¶ 13.

The parties, in asking the court to impose the two $20,000.00 penalties, have acknowledged that the penalties are based on the Secretary's assignment of penalty points to the size of the controller, the size of the mine, the negligence, the gravity, and the history of 105(c) violations. Jt. Stp. ¶¶ 6-11. Moreover, Emerald agrees that the penalties as proposed will not affect its ability to continue in business. Jt. Stip. ¶ 12. Accordingly, each of the relevant penalty criteria have been addressed by the stipulations.

Given the stipulations of the parties, along with the fact, that I have found that the mine violated section 105(c) in my earlier decision, I assess a $20,000.00 penalty for the violation of section 105(c) addressed in the Docket No. PENN 2013-305. Further, on the same basis, I assess a penalty of $20,000.00 for the violation of section 105(c) addressed in Docket No. PENN 2013-306. The Respondent, Emerald Coal Resources, LP, is hereby **ORDERED** to pay the Secretary of Labor the sum of $40,000.00 within 40 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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December 2, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2013-781-M A.C. No. 10-00088-318512-01
v.	Docket No. WEST 2013-782-M A.C. No. 10-00088-318512-02
HECLA LIMITED, Respondent	Lucky Friday Mine

ORDER GRANTING INTERVENTION REQUEST

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Hecla Limited, 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"). These cases are set for hearing on February 24, 2015, in Coeur d'Alene, Idaho. On October 3, 2014, attorney Eric S. Rossman filed a letter stating that he represents Ron Barrett, Greg Hammerberg, Eric Tester, and Matt Williams (the "injured miners") who were injured by a rock burst that occurred at Hecla Limited's Lucky Friday Mine on December 14, 2011. Rossman stated that he sent the letter to inform the court that the injured miners seek to intervene in these cases pursuant to Commission Procedural Rule 4(b)(1). 29 C.F.R. § 2700.4(b)(1). The cases involve, in part, orders of withdrawal issued by MSHA following its investigation of the rock burst.

On October 9, 2014, at my request, the injured miners filed a more detailed letter setting forth the reasons why they wish to intervene in these cases and why they believe that they are entitled to intervene under the cited procedural rule. Attached to this letter was a statement signed by the four injured miners stating that they were miners on December 14, 2011, at the Lucky Friday Mine and that they suffered injuries from the subject rock burst.

By order dated November 5, 2014, I asked the Secretary, Hecla, and the injured miners to file a short brief or statement setting forth their positions on the intervention request. I asked them to take into account my order in other Hecla cases (WEST 2012-760-M-A and WEST 2012-986-M) in which I denied the request of a different miner to intervene.

The Secretary and the injured miners filed responses in support of the intervention and Hecla filed a response opposing the intervention request. I grant the request of the injured miners to intervene in these cases subject to the conditions and limitations set forth below.

As stated above, I denied the request of another miner to intervene in different Hecla cases. *Hecla Limited,* 36 FMSHRC____, No. WEST 2012-760-M-A et al. (November 4, 2014). That miner was injured by a rock fall at the Lucky Friday Mine on April 15, 2011. My November 4, 2014, order is incorporated herein by reference.

Rossman does not seek to intervene on behalf of the injured miners as a "representative of miners" as that term is used in the Mine Act and the Secretary's regulations. Rather the injured miners seek to intervene in these Commission cases with Rossman as their representative. Commission Rule 4(b)(1) provides in pertinent part that "affected miners or their representatives shall be permitted to intervene [in Commission cases] upon filing a written notice of intervention . . . with the judge." 29 C.F.R. § 2700.4(b)(1). Section 3(g) of the Mine Act defines a miner as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). The term "affected miner" has not been defined by Commission case law. The only guidance provided by the Commission is the preamble to Rule 4. Although it focuses upon Rule 4(b)(2), it clarifies the intent behind rule 4(b) as a whole.[1]

In my prior order, I relied upon a number of factors to deny the intervention request but I principally focused upon the fact that the miner seeking intervention was no longer employed by Hecla. As a consequence, he was no longer a miner exposed to the hazards of falling rock at the Lucky Friday Mine. The adjudication of the issues would not affect the safety and health of that miner. As stated in the preamble, an interest in the issues is an insufficient reason to intervene.

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[1] The preamble states:

> The proposed rule added new procedures dealing with intervention and amicus curiae participation at the trial level. The Commission received a number of comments on these proposals and has modified the proposals. Paragraph (b)(2) provides that motions to intervene made by persons other than affected miners or their representatives shall be filed before the start of a hearing on the merits, unless the judge, for good cause shown, permits later filing.
>
> Some commenters suggested that the proposed criteria for intervention were too restrictive, and urged the Commission to permit intervention on the basis of an interest in the issues involved in a proceeding. The Commission has determined that interest in issues is too broad a criterion for intervention. Such a standard could serve to deprive the parties of control over the litigation and could encumber the Commission's simple administrative trial process. *See Mid-Continent Resources, Inc.*, 11 FMSHRC 2399 (December 1989)(discussing criteria for non-party standing to appeal a Commission judge's decision to the Commission). In denying a motion to intervene, however, a Commission judge may alternatively permit the movant to participate in the proceeding as amicus curiae (§ 2700.4(c)).

58 Fed. Reg. 12158, 12160 (Mar. 3, 1993).

In the present cases, I find that the injured miners must be classified as "affected miners." All the injured miners were employed by Hecla at the time of the roof fall and were allegedly injured by the roof fall. Three of four of the injured miners are currently employed as miners by Hecla. The Secretary contends that they are all affected miners. Under Rule 4(b)(1) affected miners "shall be permitted to intervene." Although the fourth miner, Matt Williams, may not qualify as an affected miner on his own, given that Rossman represents him and he was injured in the same accident, I will permit him to intervene.

Rossman represents all four miners in a state tort action brought against Hecla as a result of the accident. In the present cases, the Secretary's counsel is experienced in representing the interests of miners in cases brought before the Commission under the Mine Act. The injured miners stated in their brief filed by Rossman on the intervention issue that the "information and testimony developed in the course of these proceedings are vital to pursuing the civil litigation." Brief at 3. The injured miners and their representative must understand that the scope of these proceedings is narrow. The primary issues are whether Hecla violated the cited safety standards and, if so, the amount of the assessed civil penalty. Factors that I must consider in assessing a civil penalty include the "gravity" of the violations and the "negligence" of Hecla, as those terms are used in the Mine Act. I must also determine whether any violations were the result of Hecla's "unwarrantable failure" to comply with the cited safety standards, as that term is used in the Mine Act. I am not directly charged with the responsibility of determining the cause of the rock fall or whether Hecla is accountable for the rock fall.

Under Commission Procedural Rule 55, I am responsible for regulating the course of these proceedings. 29 C.F.R. § 2700.55. In the letter of October 9, 2014, the injured miners stated that they "will honor the procedures relating to these proceedings and any ruling of this court." Letter at 2. In accordance with Rule 55, I am entering certain conditions and limitations on the participation of the injured miners, as follows:

(1) Discovery – The injured miners, in their letter of October 9, 2014, state that they wish to intervene "in order to participate in and oversee the proceedings, discovery and submission of evidence and testimony." Letter at 2. It is not clear how the injured miners will "participate" in discovery. Because they are intervenors, their representative will be entitled to a copy of written discovery responses served by Hecla in response to discovery submitted by the Secretary and copies of the responses served by the Secretary in response to discovery submitted by Hecla. Any participation in discovery beyond that will require my prior approval and will not be favored.

(2) Sequestration – I require the sequestration of witnesses at my hearings because I must enter findings of fact. Sequestration is crucial because I must assess the credibility of witness testimony, which I cannot do if witnesses sit in the courtroom and listen to the testimony of other witnesses or discuss this testimony. As a consequence, if any party plans to call an injured miner to testify at the hearing, that miner will be subject to my usual rules of sequestration. He will not be permitted in the courtroom until he testifies, no other witnesses will be permitted to discuss their testimony with him until after the hearing is over, and he will not be permitted to discuss his testimony with anyone until the hearing is over. Counsel will be subject to the same restrictions concerning the discussion of testimony.

(3) Other Conditions – The injured miners state that they "have no intention of causing any unnecessary interference with the proceedings, but do wish to exercise their right to intervene and assist counsel for the United States and ensure the protection of their interests during the proceedings." Letter at 2. In that spirit, I may find it necessary to enter other conditions upon the participation of the injured miners as these proceedings progress.

For the reasons set forth above, Ron Barrett, Greg Hammerberg, Eric Tester, and Matt Williams are hereby **PERMITTED TO INTERVENE** in these cases. The injured miners and their representative must adhere to the Commission's procedural rules.

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

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December 5, 2014

POCAHONTAS COAL COMPANY, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. POCAHONTAS COAL COMPANY, INC., Respondent.	CONTEST PROCEEDINGS Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/2013 Docket No. WEVA 2014-711-R Order No. 7169717; 2/10/2014 Mine: Affinity Mine Mine ID: 46-08878 CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2014-1112 A.C. No. 46-08878-353252 Docket No. WEVA 2014-1160 A.C. No. 46-08878-354868 Mine: Affinity Mine

ORDER DENYING POCAHONTAS' REQUEST TO WITHDRAW

Before: Judge Miller

These cases are before me upon notices of contest filed by Pocahontas Coal Company and petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On November 17, 2014 Pocahontas filed a request to withdraw. The Secretary opposed the request, but opted to not file a formal written response. For reasons that follow, I **DENY** Pocahontas' motion.

On September 30, 2014 the court requested that the Secretary provide the roof control and ventilation plans in place when five 104(e) orders[1] that are contained in these dockets were issued, and identify the plan provisions that had allegedly been violated. Counsel for Pocahontas was copied on the email. Pocahontas objected to the Secretary's submission of the requested materials and argued that the materials should only be presented to the court in the context of a hearing. On October 15, 2014 the court clarified, by email, that only the plan cover pages and the plan provisions which were alleged to have been violated were being sought from the

[1] The orders at issue are Order No. 9002712, 9002713, 9002715, 7169717 and 3576153. The Secretary's submission explained that Order Nos. 9002712 and 9002713 had been modified post-issuance to reflect violations of other standards, and were no longer alleged to be violations of the mine's roof control plan.

Secretary. The court explained that requesting the materials is a practice that allows the court to prepare for hearing and help the parties narrow the issues. Further, if Pocahontas did not agree that the proper plans were submitted, it could advise the court and submit the plans that it believes were in place at the time the orders were issued. Finally, the court made clear that the submissions would not become part of the record at the time of submission, and that the parties would need to enter the plans into evidence at the hearing. On October 23, 2014 the Secretary, via email, submitted the requested materials to the court, with a copy sent to Pocahontas' counsel. On November 3, 2014, Pocahontas submitted a response in which expressed its concern with the Secretary's submission. Subsequently, on November 17, 2014, Pocahontas filed this request to withdraw in which it seeks to have the ALJ recused.

Pocahontas requests that the undersigned judge withdraw as the presiding judge in these cases and argues that the judge improperly requested, and viewed, documents from the Secretary which are not part of the record, thereby placing herself in the "dual role as both an investigator and adjudicator." Mot. 7. Rather, the judge should have reviewed the requested documents only in the context of a stipulation by the parties or a hearing where the documents could be properly introduced into evidence. In failing to do so, the presiding judge's conduct evidenced bias, or at least the appearance of bias, and deprived Pocahontas of a fair and impartial hearing. In other words, Pocahontas filed this motion, seeking to have the ALJ withdraw, based upon a request, made to both parties, for a copy of the roof control plan that was alleged as the basis for a number of citations. Because that plan was sought, Respondent argues that it cannot now receive a fair and impartial hearing on the many citations included in these dockets. I disagree.

Commission Procedural Rule 81, states that "[a] party may request a . . . Judge to withdraw on grounds of personal bias or other disqualification. A party shall make such a request by promptly filing an affidavit setting forth in detail the matters alleged to constitute personal bias or other grounds for disqualification." 29 C.F.R. § 2700.81(b). In *Medusa Cement Co.*, the Commission, in affirming a judge's decision to not recuse himself, explained that, while the role of its judges' is to adjudicate, and not litigate cases, the judges are active participants in the proceeding with a duty to conduct those proceedings in a manner that yields a just and true result. 20 FMSHRC 144, 148 (Feb. 1998) (citing *Secretary of Labor on behalf of Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985), and *Lonnie Jones v. D&R Contractors*, 8 FMSHRC 1045, 1053 (July 1986)). The Commission further explained, citing its decision in *Canterbury Coal Co.*, 1 FMSHRC 1311 (Sept. 1979), that while its judges are afforded "considerable leeway" in conducting proceedings and developing a record, the judge must not intervene so much that the parties are unable to develop their case. *Id*.

The court has not displayed any personal bias or other grounds which would justify withdrawal, nor has there been any intervention that would hinder the parties in developing their case. Here, the only action taken by the court was to request that the Secretary provide the roof control and ventilation plans that he believed were in force at the time the 104(e) orders were issued, and identify the plan provisions alleged to have been violated. The request was made with the knowledge of Pocahontas. The court advised the parties that, should Pocahontas dispute what was submitted, it would be given ample time to submit the plans it believed were in place when the orders were issued. Further, the court clarified that the material would not become part of the record until it was either stipulated to, or introduced at hearing. The court has not engaged,

and will not engage, in any decision making on the issue of what plans were in effect and which provisions were allegedly violated prior to a stipulation by the parties or a hearing where the plans are submitted into evidence. However, it is incumbent upon the court to utilize the powers afforded it to promote judicial economy by preparing for hearing and narrowing the issues. *See* 29 C.F.R. § 2700.55. The request for the plans relates to matters alleged in the orders issued by MSHA. By submitting the plans, the parties and the court are better able to understand what disputes may arise with regard to those plans, and how much time will be needed to hear arguments regarding the plans. I find that the arguments made by Pocahontas regarding the nature of the roof control plan and its use by the court are not only over-reaching but are histrionic. This is not a case of drama, but a case of fact, and each party has and will continue to have, the opportunity to present the facts so that the law may be applied as appropriate.

A proceeding involving an alleged violation of a mine plan presents a unique situation with regard to what legal standard will be applicable when deciding whether a violation exists. Unlike a typical proceeding where a citation or order alleges a violation of a mandatory standard promulgated by the Secretary or statutory provision constructed by Congress, citations and orders involving mine plans allege violations of the actual provisions in the plan. The language of those provisions is proposed by the mine operator, and approved by MSHA. The Commission has explained that plan provisions are enforceable as mandatory standards. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (Mar. 2011) (ALJ) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). In order to properly prepare for this hearing, the court should know what legal standard the parties believe is at issue. While Pocahontas argues that the Commission judges should do no research or prepare for hearing, the court disagrees. Rather, it is in both the court's and parties' best interests for there to be some clarity as to what the legal standard is, or could be, prior to hearing and what issues might be litigated. The court need not, and has not, reached any conclusion regarding what standard will be applied. However, the court has conducted, and will continue to conduct, research into the provisions advanced by the parties.

Judges listen closely, read carefully and research thoroughly, before issuing a reasoned, well-thought-out and impartial decision. Throughout the stacks of motions filed in these, as well as related cases, I have always listened, read and researched and intend to do so as the case proceeds. The fact that the Secretary was asked to produce, and the Respondent asked to comment on, a roof control plan, does not change that practice. Nor does it offer anything to the case except to narrow the issues and to present an opportunity for the court and the parties to understand what will be litigated and how much time that will take. Neither in intent or appearance has the Respondent been slighted or somehow been put at a disadvantage. If anything, it now has the advantage of having a better understanding of the allegations against it and can better prepare for those allegations.

Here, the Secretary has provided what he alleges are the proper plans and cited provisions. Pocahontas, has not provided plans or provisions and, rather, has only raised concerns that some of the 104(e) orders did not specify which plan provisions were allegedly violated, that it needs to depose the issuing inspector to determine whether the Secretary's submissions are accurate, and that the court should only review the plans and plan provisions on

the record in the context of direct and cross examination testimony. While Pocahontas' concerns are noted by the court, the court's request was harmless. The materials submitted are being used only for purpose of preparing for hearing and initial prehearing research of the issues in this matter. The court is aware of fact that, in order for the Secretary to prove a violation of a mine plan, he must identify a mine plan provision that has allegedly been violated, establish that the provision allegedly violated is part of the approved and adopted plan, and demonstrate that the condition cited actually did violate the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1281 (Dec. 1998) (citing *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). Nothing that the court has done relieves the Secretary of the burden that he will be required to satisfy at hearing, nor does it preclude Pocahontas from exercising its right to dispute the Secretary's case and put on evidence to the contrary. Accordingly, Pocahontas's motion to withdraw is **DENIED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 12, 2014

STAR MINE OPERATIONS, LLC, Contestant, v.	CONTEST PROCEEDING Docket No. WEST 2015-100-RM Written Notice No. 8834101; 09/25/2014
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Revenue Mine Mine ID 05-03528

ORDER GRANTING SECRETARY'S MOTION TO DISMISS

This case is before me upon the Notice of Contest filed by Star Mine Operations ("Star Mine" or "the operator") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. Star Mine filed this contest case on October 24, 2014, to seek review of the pattern of violations ("POV") notice that the Secretary of Labor ("Secretary") issued to Star Mine pursuant to his rule implementing section 104(e), 30 U.S.C. § 814(e).

I. Procedural Background

On November 13, 2014, the Secretary filed a Motion to Dismiss, asking that Star Mine's contest be dismissed with prejudice for lack of subject-matter jurisdiction. Thereafter, on November 24, 2014, Chief Administrative Law Judge Robert J. Lesnick assigned this contest case to me.[1] Star Mine filed its Response in Opposition to the Secretary of Labor's Motion to Dismiss on November 26, 2014.[2]

On September 25, 2014, the Secretary issued Written Notice No. 8834101 to Star Mine. (Mot. to Dismiss at 1; Resp. in Opp'n at 3.) Because a POV notice is not a citation or order

[1] The deadline to file a response in opposition was initially November 25, 2014. *See* 29 C.F.R. § 2700.10(d). However, on November 24, 2014, Star Mine filed an unopposed motion asking for a one-day extension to file its response to the Secretary's motion seeking dismissal. Commission Procedural Rule 55 grants Commission Judges broad powers to issue orders and procedurally manage the cases before them. 29 C.F.R. § 2700.55. The operator's unopposed motion is **GRANTED** and its Response in Opposition is hereby **ACCEPTED**.

[2] On December 3, 2014, the Secretary filed a motion seeking leave to file a reply to Star Mine's response in opposition. According to the Secretary, such a reply will allow him to "meaningfully respond" to Star Mine's "due process argument." (Mot. for Leave at 1.) I need not address the Secretary's motion for leave to file a reply because I have determined that I do not have jurisdiction in this case. *See* discussion *infra* Part III.

issued under section 104, the Secretary contends that the text of the Mine Act does not give the Commission and its Administrative Law Judges jurisdiction to hear this case. (Mot. to Dismiss at 1–4.) In support of his claim, the Secretary also argues that the Commission's own rules provide "no procedure for contesting or answering contests of a pattern of violations notice or any other notice." (*Id.* at 3.) Further, the Secretary highlights recent decisions from Chief Judge Lesnick and Administrative Law Judge Margaret Miller that dismissed contest cases involving POV notices for lack of subject-matter jurisdiction. (*Id.* at 3–4 (citing *Brody Mining*, *LLC*, 36 FMSHRC 284, 287 (Jan. 2014) (ALJ), and *Pocahontas Coal Co.*, 36 FMSHRC 1371, 1372–73 (May 2014) (ALJ).)[3] Accordingly, the Secretary contends that this contest case should be dismissed with prejudice.

In response, Star Mine notes that it sold the Revenue Mine to Fortune Minerals Limited ("Fortune") earlier this year. (Resp. in Opp'n at 3–4.) Although MSHA is now issuing citations and orders to Fortune, the agency apparently "refuses to change the information available to the public, continuing to state that Star Mine is the operator of the mine, and therefore, responsible for the issuance of the present [section] 104(e) orders." (*Id.* at 4.) Thus, Star Mine claims to have "an interest in having accurate information being publicly disseminated about its current ownership obligations." (*Id.* at 5.) In Star Mine's view, that interest requires a hearing under the Due Process Clause. (*Id.* at 5–8.) Moreover, the operator claims this contest case represents its only opportunity for relief before the Commission because Star Mine no longer owns or operates the Revenue Mine. (*Id.* at 5, 9.) Star Mine therefore argues it should be afforded a hearing and that MSHA should be ordered to correctly identify the operator of the Revenue Mine in its Data Retrieval System.[4] (*Id.* at 9.)

II. Principles of Law

A. Motion to Dismiss for Lack of Subject-Matter Jurisdiction

Although the Commission's Procedural Rules do not specifically enumerate the grounds for a motion to dismiss for lack of subject-matter jurisdiction, 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 12(b)(1) allows parties to move for

[3] Although both ALJ cases are currently on appeal, the operator in *Brody* did not raise this jurisdictional issue before the Commission. *Brody Mining, LLC*, 36 FMSHRC 2027, 2033 (Aug. 2014). However, the Commission has granted Pocahontas Coal Company's petition for discretionary review of Judge Miller's decision. *See* Unpublished Order Granting PDR dated June 25, 2014.

[4] Star Mine also attached four exhibits to its response, which included: (1) a redacted copy of the sales contract between the operator and Fortune; (2) a printout of a legal identity report submitted to MSHA's website that is dated March 10, 2014; (3) a printout from MSHA's Mine Data Retrieval System that is dated November 26, 2014; and (4) a section 104(e) withdrawal order that was issued to Fortune and dated October 29, 2014.

dismissal for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). When considering a motion to dismiss for lack of subject-matter jurisdiction, courts accept a plaintiff's well-pleaded factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Ctr. for Dermatology & Skin Cancer, Ltd. v. Burwell*, 770 F.3d 586, 588 (7th Cir. 2014); *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). However, such plaintiffs bear the burden of establishing that jurisdiction is proper. *Ctr. for Dermatology & Skin Cancer*, 770 F.3d at 589; *Leite*, 749 F.3d at 1117. Here, that burden is borne by Star Mine.

B. Subject-Matter Jurisdiction Under the Mine Act

Section 105(d) of the Mine Act allows mine operators "to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under [section 105(a) or (b)], or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 . . . ." 30 U.S.C. § 815(d). As Judge Miller noted in her order dismissing a contest case involving a POV notice, "[n]otably, the section does not afford a right to contest written notices." *Pocahontas Coal Co.*, 36 FMSHRC at 1372; *see also id.* at 1372–74 (examining statutory text and legislative history to conclude that Congress intended to treat POV notices differently than citations and orders).

III. Analysis and Order

Every adjudicatory body requires jurisdiction before it hears a case. As the party invoking the Commission's authority in this matter, Star Mine bears the burden of demonstrating that the Commission has subject-matter jurisdiction under the Mine Act to hear the contest case before me. Although section 105(d) is the Commission's jurisdictional touchstone, Star Mine has not explained how section 105(d) can be read to confer jurisdiction upon the Commission to hear this matter. Instead, the operator seizes on the unusual facts of this case to claim it will be denied due process if this case is dismissed. Because the operator sold its interest in the Revenue Mine, Star Mine contends it "has no other avenue of recourse before this Commission to challenge MSHA's decision to issue a Pattern Notice" other than the contest case before me.[5] (Resp. in Opp'n at 9.) Star Mine therefore claims that it will be denied due process if not afforded a hearing before the Commission regarding the POV notice. (*Id.* at 3.)

Star Mine seemingly hopes that I will ignore or contort the text of section 105(d) to accommodate its purported due process interests, but those interests are illusory.[6] Moreover, the

[5] In contrast, the mine operators in *Brody Mining* and *Pocahontas Coal Co.* retained control of the mine. Because those operators ultimately received withdrawal orders under section 104(e), they were free to challenge the POV notice after Commission jurisdiction attached to the resulting 104(e) withdrawal orders. *See Brody Mining*, 36 FMSRHC at 286–87; *Pocahontas Coal Co.*, 36 FMSHRC at 1373–74.

[6] Star Mine's due process argument puts the cart before the horse: it assumes that it has (continued…)

text of section 105(d) specifically limits the Commission's jurisdiction—and excludes contests of notices, POV or otherwise. Even accepting as true the factual allegations included in Star Mine's Notice of Contest and drawing all reasonable inferences in its favor, Star Mine simply has not met its burden of demonstrating that the Commission has jurisdiction over this case. In light of the text of section 105(d) and the persuasive analyses included in the recent decisions from Chief Judge Lesnick and Judge Miller, I conclude that I am without jurisdiction to hear a contest case regarding a POV notice. Accordingly, the Secretary's motion to dismiss this case with prejudice is **GRANTED**.

WHEREFORE, it is hereby **ORDERED** that Docket No. WEST 2015-100-RM be **DISMISSED** with prejudice.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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/pjv

[6] (…continued)
an interest protected by the Due Process Clause. Yet, due process protections only attach to life, liberty, and property interests. *See, e.g.*, *Bryn Mawr Care, Inc. v. Sebelius*, 749 F.3d 592, 598 (7th Cir. 2014) (indicating that a party must establish a protected interest before a court will determine what process is due). Notwithstanding Star Mine's claim that its "reputational" interest in "having accurate information about its current ownership obligations" entitle the operator to a hearing in this case (Resp. in Opp'n at 5–6, 8), Star Mine does not explain why its interests are cognizable under the Due Process Clause. *See Bryn Mawr Care, Inc.*, 749 F.3d at 598 (suggesting that reputational harms, alone, do not constitute interests protected by the Due Process Clause). Thus, I need not address the adequacy of the Commission's procedure for contesting the POV notice in this case because Star Mine has not demonstrated an interest to which due process protections attach.

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December 17, 2014

SECRETARY OF LABOR, MSHA, on behalf of JUSTIN GREENWELL, Complainant, v. ARMSTRONG COAL COMPANY, Respondent.	DISCRIMINATION PROCEEDING Docket No. KENT 2014-791-D MADI-CD 2014-11 MADI-CD 2014-12 Mine: Parkway Mine Mine ID:15-19358

ORDER DENYING COMPLAINANT'S MOTION TO JOIN & ORDER DIRECTING COMPLAINANT TO FILE 105(C)(3) CASE

This case is before me on a complaint of discrimination filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. On November 25, 2014, Complainant, Justin Greenwell, through his attorney, filed a motion to join Chris Oglesby as a respondent in this docket. On December 10, 2014, the Secretary, filed a response to Complainant's motion. For reasons that follow, Complainant's motion is **DENIED** and, pursuant to section 105(c)(3) of the Act, he is directed to file an action on his own behalf with the Commission.

Complainant alleges that on March 19, 2014 he was threatened by Chris Oglesby, an hourly employee of mine, for notifying MSHA about issues with the mine's respirable dust sampling. Two days later, on March 21st, Complainant filed a discrimination complaint with MSHA in which he named Oglesby, individually, as the person responsible for discriminatory action. The complaint did not name Armstrong Coal Company. The same day, MSHA contacted counsel for Complainant to advise him that, while Oglesby would continue to be listed on the complaint as the individual responsible for the discriminatory action, MSHA was changing the complaint to indicate that Armstrong was the entity against whom the complaint was filed. Counsel for Complainant objected to the change and, subsequently, MSHA advised Complainant's counsel that there had been a misunderstanding, the complaint had not been changed, and a notification letter had been sent to Oglesby informing him that a complaint had been filed against him.

On September 12, 2014 the Secretary, pursuant to section 105(c)(2), filed a complaint with the Commission against Armstrong alleging that the mine interfered with the exercise of protected activity by informing coworkers that Complainant had complained to MSHA, and soliciting coworkers to ostracize and harass Complainant due to his protected activity. Oglesby was not named as a respondent. On September 17, 2014, MSHA notified Complainant that it believed a violation of section 105(c) of the Act had occurred, and the Secretary had filed a complaint on behalf of Greenwell with the Commission. A copy of the letter was sent to Armstrong, but not to Oglesby. Thereafter, on November 25, 2014, Complainant, through his own counsel, filed the instant motion to join Chris Oglesby as a respondent.

Complainant argues that section 105(c) allows for the filing of discrimination complaints against individuals and, since the filing of his original complaint, he has sought to hold Oglesby individually accountable for violating the Act. Complainant asserts that the Secretary's case rests on the difficult to prove theory that the mine, in violation of the Act, encouraged Oglesby and others to harass Complainant as a result of his protected activities. Complainant, on the other hand, seeks to hold Oglesby personally liable for violating the Act. Complainant alleges that he "cannot obtain complete relief . . . unless Oglesby, the alleged perpetrator, is joined as a party herein." Mot. 6. Specifically, Complainant asserts that, conceivably, liability could be found against Oglesby under Complainant's theory, while no liability is found against Armstrong under the Secretary's theory. As a result, Complainant asserts that Oglesby is required to be joined as an indispensable party under Federal Rule of Civil Procedure 19. In the alternative, Complainant argues that Oglesby should be permissively joined as a respondent under Federal Rule of Civil Procedure 20 given that Complainant's right to relief arises out of the same occurrence raised by the Secretary under his theory of liability for Armstrong, and there are questions of law and fact common to both Armstrong and Oglesby.

The Secretary, in response, asserts that he is afforded wide discretion in his handling of 105(c)(2) complaints and, based on his investigation of the alleged incident, has determined that Armstrong created a work environment that interfered with Complainant's exercise of his rights under the Act. Further, Oglesby's reaction "flowed from the environment . . . created by Armstrong " and, as a result, the Secretary, in exercising his prosecutorial discretion, named Armstrong as the only respondent in this matter. Nevertheless, the Secretary acknowledges that Complainant is a party to this matter, that Oglesby is a "person" under the Act, and that the court may join Oglesby as a party.

Section 105(c) of the Act states that "[n]o *person* shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1) (emphasis added). The Act defines "person" to include "any individual." 30 U.S.C. § 802(f). Following a miner's filing of a discrimination complaint with the Secretary and subsequent investigation into the complaint, the Secretary is afforded wide discretion in determining whether to pursue a 105(c)(2) case by filing a complaint with the Commission. *Robert K. Rowland v. Sec'y of Labor*, 7 FMSHRC 630 (May 1985).

The Act permits Complainant to bring an action against Oglesby individually as Oglesby is an "individual" and therefore falls within the Act's definition of "person." Given that section 105(c) prevents any "person" from violating its provisions, it certainly applies to Oglesby, as well as to Armstrong in this case. While I find that Complainant may properly bring an action against Oglesby, joining him in the instant proceeding, brought by the Secretary pursuant to section 105(c)(2), is not the best mechanism to do so.

It is clear that Complainant's theory of liability differs from the Secretary's. While Complainant seeks to impose liability only individually against Oglesby, the Secretary's response makes clear that he intends to pursue his case against Armstrong as an entity, and not

against Oglesby as an individual. The Secretary's prosecutorial discretion affords him the ability to pursue a 105(c)(2) case in the way he sees fit, and the court cannot order him to pursue a particular case theory. Generally, the Secretary, upon completion of the investigation, sends a letter to Complainant stating whether a violation of section 105(c) has occurred. Here, following the investigation, the Secretary determined that the provisions of 105(c) had been violated and, pursuant to section 105(c)(2), filed a complaint with the Commission in which he named only Armstrong as a respondent. In declining to name Oglesby as a respondent, the Secretary effectively determined that, while the investigation revealed a violation of 105(c) under the Secretary's theory, Complainant's theory of individual liability did not amount to a violation. While the Secretary agrees that the court may join Oglesby in this matter, the court concludes that a better alternative would be for Complainant to pursue his claim of individual liability under section 105(c)(3) of the Act, which grants a miner the right to file an action on his own behalf following a determination by the Secretary that the provisions of 105(c) have not been violated. 30 U.S.C. § 815(c)(3). The Secretary's refusal to pursue Complainant's theory of individual liability, combined with the information contained in his response to the instant motion, are essentially a determination that no violation of 105(c) occurred in the manner alleged by Complainant. An action filed under section 105(c)(3) will allow Complainant to advance his own theory of the case, without the apparent interference of the Secretary, and pursue the complete relief he desires. Once the 105(c)(3) complaint is filed against Oglesby then it may be consolidated for purposes of hearing with this action against Armstrong.

Accordingly, Complainant's motion to join Chris Oglesby as a respondent in this proceeding is **DENIED**. I accept the Secretary's response in this case as a denial of the discrimination complaint filed against Oglesby individually, and I advise Complainant to file a separate action against Oglesby, within 30 days of this order, pursuant to section 105(c)(3) of the Act. Complainant should attach a copy, or make reference to, this order so that the Commission's docket office is made aware of the somewhat unusual circumstances of the action. Following the assignment of a docket number to that action, Complainant should notify the court so that it can take steps to have that matter consolidated for hearing with the above captioned docket.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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December 17, 2014

DANIEL B. LOWE, Complainant	DISCRIMINATION PROCEEDING Docket No. WEST 2014-614-DM WE-MD 14-04
v.	
VERIS GOLD USA, INC., Respondent,	Jerritt Canyon Mill Mine ID 26-01621

ORDER

Before: Judge Moran

In this discrimination proceeding brought under section 105(c)(3) of the Mine Act, Counsel for the Respondent, has asserted that, pursuant to the Order of the United States Bankruptcy Court, this matter and any other administrative proceeding, is to be stayed until the Bankruptcy Court lifts its stay.

Per an Order issued by the United States Bankruptcy Court for the District of Nevada ("Bankruptcy Ct NV") on September 3, 2014, which Order was issued under Chapter 15 of the Bankruptcy Code and "Pursuant to 11 U.S.C. §§ 1504, 1515, 1517, and 1521, recognizing Foreign Representative and Foreign Main Proceeding," that court, at Paragraph 13(c) of its Order, stated:

> [A]ll persons and entities are enjoined from commencing or continuing, including the issuance or employment of process of, any judicial, administrative or any other action or proceeding involving or against the Debtors or their assets or proceeds thereof that are located in the United States, or to recover a claim or enforce any judicial, quasi-judicial, regulatory, administrative or other judgment, assessment, order, lien or arbitration award against the Debtors or their assets or proceeds thereof that are located in the United States.

Counsel for Respondent, Veris Gold USA, Inc., takes the position that there is a uniqueness associated with the fact that this is a Chapter 15 Bankruptcy Proceeding. Working from that premise, Respondent contends that decisional law issued by the Federal Mine Safety and Health Review Commission ("Commission") holding that stays under other Chapters of the Bankruptcy Code *do not* apply to Commission proceedings are not relevant to a Chapter 15

proceeding. The essence of Respondent's argument is that because stays are not automatic under Chapter 15 and because the Bankruptcy Ct NV affirmatively issued its stay order, that order must be followed.

With great respect for the United States Bankruptcy Court for the District of Nevada, this Court concludes, for the reasons which follow, that the stay does not apply at this stage of this discrimination action. Chapter 15 is a new chapter added to the Bankruptcy Code which replaces section 304 of the Bankruptcy Code. The "Bankruptcy Basics" site for the U.S. Courts notes that Chapter's purpose is "to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants, and other parties of interest involving more than one country." http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx That site goes on to state that the objectives of Chapter 15 include providing "for the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor." *Id.*

In a December 3, 2014 email from Respondent's Counsel to the Court and the Complainant, the Court was advised that there is anticipation that the Respondent will emerge from this bankruptcy in early 2015. Respondent also related that it views the Commission decision in *MSHA v. Hidden Splendor Resources, Inc.* as distinguishable, from this matter, chiefly on the basis that the *Hidden Splendor* matter involved a Chapter 11 bankruptcy. Respondent also sees a distinction in that stays are automatic under Chapter 11, but require an affirmative invocation for a stay under Chapter 15.

Subsequently, on December 15, 2014, Respondent's Counsel supplemented its position on this issue,[1] after seeking input from the law firm representing Veris in the bankruptcy matter. That information, provided in a "Memorandum Regarding Recognition of Foreign Main Proceeding in Chapter 15 Case and Application of the Automatic Stay" essentially reiterated the arguments made by Veris' attorney in this discrimination proceeding. The law firm representing Veris in the bankruptcy matter emphasized in its memorandum that the stay order "operates as an injunction against all acts against a debtor on account of pre-petition debt[.]" Memorandum at 3 (emphasis added). The Memorandum goes on to note that the Complainant's action does not qualify as an exception to a stay, as it is not being brought by a governmental unit. It adds that the Complainant's sole remedy was to have filed a proof of claim in the foreign main proceeding in Canada, which it describes as "an exclusive process by which creditors could assert claims against Debtors."[2] *Id.* at 4-6. Finally, the Memorandum suggests that moving forward in the discrimination proceeding runs the risk that it could be deemed void *ab initio*.

[1] It is noted that Respondent's Counsel in this discrimination proceeding *is not* the Counsel for Veris Gold USA, Inc. in the Chapter 15 Bankruptcy proceeding.

[2] While not reflective of the basis for this Order, it is noted that Complainant could not have been properly served as the service was made to "Danny Lowe, Federal Mine Safety and Health Review, Commission Chief Administrative Law Judge Robert J. Resnick" without any other identifying information. Also, the Chief Judge is Robert J. Lesnick.

Complainant, Daniel B. Lowe, acting *pro se*, has expressed, as the Court construes his arguments, that the "Commission has consistently held that MSHA proceedings are not subject to the automatic stay bankruptcy provisions of section 362. *Sec'y of Labor o/b/o Michael L. Price and Joe John Vacha v. Jim Walter Resources, Inc.,* 12 FMSHRC 1521, 1528-30 *(August 1990); Sec'y v. L. Kenneth Teel,* 13 FMSHRC 1915, 1916-17 (December 1991) (ALJ) [and that other cases support that discrimination cases may go forward despite a bankruptcy action citing] *Midcontinent Resources Inc.,* 14 FMSHRC 882 (May 21, 1992). Complainant contends that "[e]nforcement proceedings before the Federal Mine Safety and Health Review Commission brought by the Secretary of Labor under section 105(c)(2) of the Mine Safety Act come within a statutory exception to the automatic stay provisions of the Bankruptcy Act." Mr. Lowe adds that [w]hen actions are brought under the provisions of section 105(c)(2) of the Mine Safety Act, this is an exercise of police and regulatory powers which places this proceeding within the section 362(b)(4) exemption to the automatic stay," [citing *NLRB v. Evans Plumbing Company*, 639 F.2d 291 (5th Cir. 1981); *In re Bel Air Chateau Hospital, Inc*., 611 F.2d 1248 (9th Cir. 1979), and *In the Matter of Shippers Interstate Service, Inc*., 618 F.2d 9 (7th Cir. 1980).] On the basis of those contentions, Complainant asserts that his action should receive similar treatment. Daniel Lowe email, December 7, 2014.

In response to Respondent's subsequent submission, Mr. Lowe adds that as he is "seeking relief in this action b[r]ought before and through the authority of the Federal Mine Safety and Health Review Commission under Section 105(c) of the [1977 Mine Act]," only the Commission can adjudicate that action and that the bankruptcy proceeding cannot dilute or reduce his rights under the Mine Act. Daniel Lowe email, December 16, 2014.

Discussion

The Commission has addressed matters involving the intersection of Mine Act and Bankruptcy actions in *Sec'y of Labor o/b/o Michael L. Price and Joe John Vacha v. Jim Walter Resources, Inc.,* 12 FMSHRC 1521, 1528-30 (August 1990), ("*Price & Vacha*") cited above. There, it held that the matter fell "within the exceptions to the automatic stay provisions of the Bankruptcy Code," citing the "governmental unit" exception of Bankruptcy Code section 362(b)(4). It added that the case was "brought by the government, through the Secretary, to effectuate and protect the rights secured by section 105(c)(1) of the Mine Act [and that] [t]his is the kind of 'police or regulatory' action covered by the exception to the automatic stay." Last, the Commission took note that "[s]ection 362(b)(5) also excepts from automatic stay 'enforcement of a judgment, *other than a money judgment*, obtained in an action or proceeding by a governmental unit's police or regulatory power . . . [and that the] Courts have recognized that adjudicatory bodies presiding over a governmental 'police or regulatory' action may *enter* a money judgment against a respondent-debtor but may not permit *collection* of that pecuniary judgment in an enforcement action." (emphasis in original).[3]

[3] The Court has concluded that *Midcontinent Resources Inc.,* 14 FMSHRC 882 (May 21, 1992), and *Sec'y v. L. Kenneth Teel,* 13 FMSHRC 1915, 1916-17 (December 1991) (ALJ) are not useful to the resolution of this issue. However, beyond *Price & Vacha*, the Commission has consistently held that the automatic stay provision does not apply. *Sec. v. Hidden Splendor Resources, Inc.*, 2013 WL 3759789, June 6, 2013.

In determining that this matter should go forward, the Court's decision is based upon the following observations. Review of the section of the Mine Act involved here, section 105(c)(3), evidences Congress' clear intent that a miner's right to bring his own action is to be recognized, notwithstanding the Secretary's determination not to go forward under section 105(c)(2). Indeed, Congress directed that such 105(c)(3) proceedings are to be "expedited." There is no hint in the language employed in the (c)(3) provision that the miner's option to proceed in his own behalf is to be viewed as a diminished right vis-à-vis a discrimination action brought by the Secretary.

In addition, as with *Price & Vacha*, this determination does not tread upon the *collection* of any monies. Mr. Lowe has not yet had his day in court. Unless and until he prevails in his 105(c)(3) action, there can be no monetary compensation available to him. Anyone reading Chapter 15, or any other Chapter of the Bankruptcy Act, realizes that its focus is upon claims against debtors or their assets. Veris Gold is not a debtor at this stage of this Mine Act discrimination proceeding. Accordingly, continuing with this discrimination claim does not threaten such assets at this juncture.[4] Given that it is expected that Veris Gold will have emerged from this bankruptcy by the spring of 2015, concerns about interference with the Bankruptcy Court's authority over its assets are illusory and, in any event, this Court, consistent with Commission case law, would not address any collection issue as long as the bankruptcy proceeding is active.

When balanced against the potential harm to Mr. Lowe's exercise of his Congressionally afforded right to pursue his discrimination claim, including the risk of faded memories or witnesses becoming unavailable, the Court construes the language of section 105(c)(3) to be within the spirit of the exception to the stay provision and therefore concludes that the matter is not foreclosed by the Bankruptcy Court's stay.

The parties are directed to participate in a conference call on December 19, 2014 at 6 p.m. EST, (3 p.m. PST) and to confirm this via email to the Court.

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

[4] This observation means that the specter raised by the Respondent, that proceeding with the Mine Act claim runs the risk of it becoming void *ab initio*, does not apply. First, the Bankruptcy Court could not void a proceeding brought under the Mine Safety and Health Act. At most, the Bankruptcy Court could void a monetary award. Second, as noted, this proceeding is a long way from such a possible development and if Veris Gold were still in bankruptcy at that point, no order against its assets would be issued by this Court until the Bankruptcy Court allowed that to occur.

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December 19, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. YORK 2014-28M A.C. No. 43-00490-335673
v.	
KIRK FENOFF & SON EXCAVATING, Respondent	Forest & Stream Gravel

ORDER

Before: Judge Moran

The Secretary has filed a motion to limit the Respondent's utilization of the discovery vehicle of written interrogatories to 25 (twenty-five) such inquiries ("Motion"). Initially, the Respondent filed 64 interrogatories and, with the Court's urging to see if the dispute could be resolved, that number was reduced to 39. The Secretary, believing the reduced number continuing to be excessive, filed the present motion. For the reasons which follow, the Court concludes that, consistent with the longstanding limit of 25 interrogatories under the Federal Rules of Civil Procedure, a party is presumptively limited to 25 questions in Mine Act litigation. Any party seeking more than the presumptive limit may be permitted to ask additional questions, but only after first applying to the Court for such relief and presenting the reasons justifying the request. After the opposing party has had an opportunity to respond, the Court will issue a ruling as to each requested additional question. This Order is being issued, in part, because Commission case law on this subject is sparse.

Background

Initially, it must be said that facts surrounding this matter do not appear to be exceptionally complex. Involving two section 104(d) orders, the first, citing 30 C.F.R. § 56.3200, asserts finding that "[t]he south east pit face was found to be undermined. The pit was evaluated to have a 30 foot wide X 15 foot high area undermined 2 ½ foot under the face. A vertical area above the affected area was evaluated to be 30 foot high to the catch bench. Multiple loader tracks and dig marks at the face toe and wall were observed. This condition creates a fall of material hazard. Kirk Fenoff, Owner engaged in aggravated conduct by knowing that miners had been loading from the pit high wall for periodically a two month period time. Mr. Fenoff has not gone to the pit in two months to examine the high wall for unsafe conditions." Order No. 8717168. The cited standard provides that "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry."

With the second Order, No. 8717169, arising out of the same facts, it repeated the narrative of the first Order, but cited 30 C.F.R. § 56.3401, which provides that "Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant."

The Discovery Dispute

Per the Court's request following the parties' inability to resolve the dispute over the permitted number of interrogatories, the Secretary filed the instant Motion to Limit Respondent's Discovery Pursuant to F.R.C.P. 33. That provision from the Federal Rules states:

> Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

Rule 33(a)(1) Interrogatories to Parties

As noted, Respondent initially presented 64 interrogatories. Beyond that, the Secretary represents that the Respondent intends to depose the Inspector who issued the Orders. Motion at 2.

The Secretary acknowledges that interrogatories and other forms of discovery are permitted under the Commission's Procedural Rules, 29 C.F.R. Part 2700. ("Rules"). However, those Rules, while recognizing the right to obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence, also temper that right by providing that, upon motion, a party or a person from whom discovery is sought may seek to have the judge, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense. 29 C.F.R. § 2700.56(c). As the Secretary points out, that limitation on discovery is made in the context of the express statement about the rules' construction that they are intended "to secure the just, speedy and inexpensive determination of all proceedings." 29 C.F.R § 2700.1(c). *Id.* at 3.

The Secretary makes it plain that its argument is not directed at any particular questions among the 39 interrogatories. Rather, its contention is that exceeding the Federal Rules' limitation of 25 interrogatories is *per se* excessive, asserting that "[a]ny interrogatories in excess of twenty five are [inherently] oppressive and create an undue burden on the Secretary in light of the limited facts at issue in this docket." *Id.* In seeking to limit the Respondent to 25 interrogatories, the Secretary also notes that there is guidance in construing the Rules which provides that "'[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure…' [citing]

30 C.F.R. § 2700.1(b)." *Id.* In turn, the Secretary notes that the applicable Federal Rule of Civil Procedure, F.R.C.P. 33, states "unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. F.R.C.P. 33(a)(1)." *Id.*

Adding context to its argument, the Secretary reiterates that the two orders, arising out of the same essential facts, are of "relative factual simplicity" and that the Respondent's discovery plans include deposing its witness on the same matters.[1]

Anticipating a contention by the Respondent, that Commission Rule 56(b) allows parties to discover any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence and therefore implicitly rejects the FRCP limitation on the number of interrogatories, the Secretary observes that Rule 56 speaks to the *scope* of permissible discovery, not the *quantity* of questions permitted by interrogatories. The Court agrees with the Secretary's interpretation.[2]

In its Response to the Motion,[3] Respondent's Counsel "strongly takes issue with the Secretary's allegation that [it] is in any way abusing the discovery process, imposing an undue burden on the Secretary, or frustrating the expeditious resolution of this matter." Response at 2. Respondent, apparently with no priority among its present 39 interrogatories, believes that the Secretary should have answered the first 25 of those interrogatories, with the burden then falling on the Respondent to compel answers to the unanswered remainders. Not that answering the first 25 would have satisfied the Respondent, because it believes that answers to all of its interrogatories "are essential . . . to the just and speedy determination of this matter." *Id.*

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[1] The Secretary also notes that courts have observed that using both interrogatories and depositions, though allowed, can be a source for oppression. *Schotthofer v. Hagstrom Const. Co.*, 23 F.R.D. 666 (S.D. Ill. 1958).

[2] Accordingly, this Court takes a different view from that expressed in *GTI Capital Holdings*, 23 FMSHRC 555 (ALJ 2001). In that case, another judge saw the respective burdens differently. While noting that Rule 56(c) permits a judge to limit discovery to prevent undue delay or to protect a party from oppression or undue burden or expense, that judge concluded that Federal Rule 33 does not apply to Commission proceedings and that a party must file a motion under Rule 56(c) to so limit discovery. It is true that although the Federal Rules do not *apply* to Commission proceedings, as noted, where a question is not regulated by the Commission's Rules, the Federal Rules of Civil Procedure are, where practicable, intended to be a source of guidance. Rule 2700.1(b). The difference between this Court and the view expressed in *GTI Capital Holdings* is one of the guidance of Rule 33 and upon which party should bear the burden of establishing that more questions should be permitted. In this Court's view, that burden should be on the party seeking to exceed the 25 question limitation.

[3] Respondent's Response incorrectly lists the docket in this matter as WEST 2014-103-M. That docket number involves an entirely different respondent and is not related to this matter in any way. However, the Respondent is the counsel for that other docket.

The Respondent, while acknowledging that discovery, as identified under Rule 2700.56(a), may be limited per Rule 2700.56(c), asserts that it is up to the party seeking to limit such discovery to establish good cause for such limitations. *Sec'y of Labor v. Newmont Gold Co.,* 18 FMSHRC 1304, 1305 (Jul. 10, 1996) ("*Newmont Gold*").[4] The Court believes that the Respondent's arguments are misguided. This dispute is not about the scope of discovery and consequently the related argument of good cause for limiting discovery is not material.[5]

The Secretary's objections, for now, deal with the distinct issue of the number of interrogatories. When the Respondent actually does speak to the issue at hand, it contends that the Commission's Rules *do* address interrogatories and apparently takes the position that because interrogatories are listed among other discovery tools, there is no need to consult with the Federal Rules of Civil Procedure. The Court does not share the Respondent's view of the all-encompassing nature of section 2700.58 and its suggestion that the provision closes the door on the need to look outside of its words. Respondent then repeats its contention that the Secretary should have at least answered 25 of its interrogatories, subject only to raising objections to those 25. The problem with this assertion is that the Respondent never advised the Secretary *to only answer* the *first* 25, nor did it identify *any particular* 25 among the 37 (or 39, depending upon which party correctly added the number above 25), nor did it identify *any particular* 25 interrogatories among the 64 interrogatories it originally propounded.

Last, the Respondent, who is at least consistent, completes its response with arguments that are not germane to the present issue by noting that as "the Secretary has the burden of proof in this action, it is clearly within Respondent's purview to assess and question the written documentation that the Secretary asserts to support the citations prior to a deposition." Respondent adds, for good measure, that "the time and costs associated with taking depositions on the subject Orders without the benefit of written discovery responses would far outweigh the costs associated with written discovery, which Respondent could utilize to clarify and narrow the scope of the questions that it intends to ask the inspector during the deposition." Response at 5.

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[4] The decision of the administrative law judge in *Newmont Gold* did not deal with the number of interrogatories allowable. Instead, that decision's focus was upon the scope of discovery and whether depositions would be permitted for certain high level agency officials. In resolving that dispute, the judge in *Newmont Gold* balanced section 2700.56(b) allowing discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence against section 2700.56(c) which empowers a judge, for good cause shown, to limit discovery in order to prevent undue delay or to protect a party or person from oppression or undue burden or expense. Thus, this Court, apart from the non-binding nature of a fellow administrative law judge's rulings on other judges' determinations, concludes that *Newmont Gold* is not pertinent.

[5] From that incorrect starting point, Respondent turns to a series of arguments that are also not pertinent to the present issue, including the risk of being exposed to a pattern of violations charge and the contention that discovery is not limited by the size of a proposed penalty. Simply stated, these are not material to the present issue. Because several of the Respondent's contentions spring from similar incorrect premises, they are not specifically addressed.

The Court's Determination

From the foregoing discussion it should be clear both that the issue to be decided is narrow and the Court's perspective on its resolution. The Commission's Procedural Rules do not speak to the number of interrogatories and, because of that silence, consultation with section 2700.1(b) is entirely appropriate.

Since 1993 the Federal Rules have reflected the determination that interrogatories should be limited to 25 without leave of court. As reflected in the following representative decisions, the resolution for this issue has been clearly articulated: *Chudasama v. Mazda Motor Corp.* 123 F.3d 1353 (11th Cir. 1997), *Walker v. Lakewood Condominium Owners Assn,* 186 F.R.D. 584 (Dist Ct C.D. Ca. May 26, 1999), observing that "Rule 33(a) expressly forbids a party from serving more than 25 interrogatories upon another party '[w]ithout leave of court or written stipulation.' Rule 33(a) was amended to include the numerical limit in 1993. The Rules' Advisory Committee Notes for the 1993 amendments further emphasize that '[t]he purpose of this revision [was] to reduce the frequency and increase the efficiency of interrogatory practice' since 'the device can be costly and may be used as a means of harassment.' See Advisory Committee Note to 1993 Amendment to Rule 33; Capacchione v. Charlotte–Mecklenburg Schools, 182 F.R.D. 486, 492 (W.D.N.C.1998); Safeco of America v. Rawstron, 181 F.R.D. 441, 443 (C.D.Cal.1998)." In *Safeco v. Rawstron,* 181 F.R.D. 44, (CD Ca. May 18, 1998) that court noted that "[t]he numerical limit was added in 1993. Before then, courts acknowledged that 'sheer numerosity is not an objection.'Compagnie Francaise d'Assurance Pour le Commerce Exterieur, 105 F.R.D. 16, 42 (S.D.N.Y.1984). As the Advisory Committee explained, '[t]he purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice.' See Advisory Committee Note to 1993 Amendment to Fed.R.Civ.P. 33, 146 F.R.D. 675, 675 (1993). The amendment was based upon a recognition that, although interrogatories may be a valuable discovery tool, 'the device can be costly and may be used as a means of harassment....' Advisory Committee Note, 146 F.R.D. at 675. 'The aim [of the numerical limit] is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device.' Advisory Committee Note, 146 F.R.D. at 676."

This Court takes the same perspective as those courts. A party seeking to present more than 25 interrogatories bears the burden of demonstrating a particularized need for each additional interrogatory beyond the permitted maximum of 25. In this instance the Respondent needs first to identify the 25 interrogatories it wants answered. The Secretary has no obligation to respond until the 25 are identified. If the Respondent wants to present additional interrogatories, it will need to present those questions to the Court, along with the justification for each one. Following that, the Secretary will have an opportunity to respond and the Court will then issue its ruling.

So Ordered.

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

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December 23, 2014

UNITED STEELWORKERS LOCAL NO. 5114, ON BEHALF OF MINERS, Applicant	COMPENSATION PROCEEDING Docket No. WEST 2012-466-CM
v.	
HECLA LIMITED, Respondent	Lucky Friday Mine Mine ID 10-00088

ORDER GRANTING, IN PART, HECLA'S MOTION FOR PARTIAL SUMMARY DECISION

Appearances: Susan J. Eckert, Esq., Santarella & Eckert, LLC, Littleton, Colorado, for Petitioner;
Laura Beverage, Esq., and Karen Johnston, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondent

Before: Judge Manning

This Compensation Proceeding is before me pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"), upon an application for compensation filed by the United Steel Workers, Local 5114 ("USW") on behalf of miners, against Hecla Limited. On November 14, 2014 Hecla and USW filed simultaneous motions for partial summary decision in this matter. On October 29, 2014, I issued a decision concerning the contest of the withdrawal orders related to this matter, WEST 2012-353-RM and WEST 2012-354-RM. *Hecla Limited*, 36 FMSHRC __, slip op., 2014 WL 5811359 (Oct. 2014). With the parties' agreement, the record from that hearing is hereby incorporated by reference in this proceeding.[1]

I. BACKGROUND

On November 16, 2011, a fall of ground occurred in the Lucky Friday Mine. At 2:25 a.m. that same day, MSHA issued Order No. 8605614 pursuant to section 103(j) of the Act. The order identified the affected area as the "54 Ramp from the 5700 intersection from the spray chamber cut out to the down ramp of the old day box cut out and the 5900 main haulage from 100 feet from the intersection of the lateral on the 5900 level to 30 feet before the chevron." Ex. G-1 at 1-2. At 1:05 p.m., MSHA issued modification No. 8605614-01, modifying Order No.

[1] I will reference Respondent's exhibits from the July 29-30, 2014 hearing as "Ex. R-X" and the Secretary's exhibits from that hearing as "Ex. G-X." References to that transcript shall be "Tr."

8605614 to a section 103(k)[2] order that allowed miners to begin repairs of the affected area, excluding the 54 ramp area.[3]

On November 20, 2011, MSHA issued modification No. 8605614-03 to permit the installation of three stress gauges in the 5900 main haulage drift.[4] The 5900 haulage drift was the primary access to the active mining area of the Mine at this time. The Lucky Friday Mine is a deep mine; the 5900 level is 5900 feet below the surface. The stress gauges were intended to monitor changes in pressure that could lead to a fall of ground. Modification No. 8605614-05[5] required Hecla to monitor the stress gauges on a shift to shift basis.[6]

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[2] Section 103(k) of the act states:

> In 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, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

[3] On November 17, 2011, MSHA also issued modification No. 8605614-02 to allow Hecla to scale, bolt, and repair through the fall at the 5900 haulage way and the 5700 sublevel of the 54 ramp.

[4] On December 2, 2011, MSHA issued modification No. 8605614-04 to allow the mine to restore utilities through the 5900 drift where the fall occurred.

[5] Originally, Modification No. 8605614-05 was issued as a second Modification No. 8605614-03. MSHA issued Modification No. 8605614-06 to redress this problem.

[6] Modification No. 8605614-05 states, in pertinent part:

> This modification is to allow limited travel through the affected area of the 5900 main haulage and of the 54 ramp at the 5700 level.
>
> This modification is based upon no movement of the affected area has occurred since monitoring began (about four days) after shotcrete and bolting following the mine's level three bolting plan were followed. Stress monitors indicate the area is d[i]stressed as compared to other active areas of the mine.
>
> This action is to allow very limited activities utilizing the 5900 main haulage based upon the temporary repairs already conducted by the mine until the engineered culvert arrives and more permanent repairs are made.
>
> Upon arrival of the culvert from the manufacturer, the mine will stop work to install the culvert and only those miners working on the culvert will travel in the affected area.

(continued…)

MSHA approved Hecla's proposal to install a steel liner (culvert) in the affected area of the 5900 haulage drift. The steel liner was intended to protect miners in that area from any fall of ground. On December 14, 2011, at approximately 7:40 p.m., a rockburst occurred in the 5900 pillar, injuring seven miners working to install the steel liner. MSHA issued Order No. 8605622,[7] a section 103(j) order that removed all miners working in the 5900 main haulage. Order No. 8605622 encompassed all underground areas of the mine including the area affected by Order No. 8065614. On December 15, 2011, MSHA issued modification No. 8605622-01, modifying Order No. 8605622 to a section 103(k) order that required the operator to obtain prior approval for all actions taken to recover and restore operations anywhere in the Mine.[8]

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[6] (...continued)

> This modification is based upon the mine will conduct two daily surveys at the start and end of the 1st shift to determine whether movement is occurring at the survey stations of the 5900 main haulage near the chevron.
>
> This modification is based upon no foot travel will occur in the affected area and that each mobile equipment operator will conduct a visual inspection of the affected area before travel occurs.
>
> This modification is based upon the mine has developed a written plan to address any cracking or closure of the main haulage, and that the mine will stop travel in the affected area should detectable movement, distortion, cracking or damage occur….
>
> Any significant changes will be reported to MSHA to include additional stressing, closure, cracking or squeeze and deformity.
>
> This modification allows approximately 3 trucks per shift to make 10 rounds each per shift. It allows mechanics/electricians to travel through the area if required to repair equipment. It allows only miners necessary to conduct normal mining activities to travel through the area.

Ex. G-1 at 1-2.

[7] Order No. 8605622 mandates:

> An accident occurred at this operation on 12/14/2011 at approximately 19:40 pacific standard time. As rescue and recover work is necessary this order is being issued under 103j of the Federal Mine Safety and Health Act of 1977 to assure the safety of all persons at this operation. This order is being issued to prevent the destruction of any evidence which would assist in investigating the cause or causes of the accident. It prohibits all activity in all underground areas of the mine except to the extent necessary to rescue an individual or prevent or eliminate an imminent danger until MSHA has determined it is safe to resume normal mining operations underground. This order applies to all persons engaged in the rescue and recovery operation and any other persons on site. This order was initially issued orally to the miner operator at 21:00 pacific standard time (the local time at the mine) and has now been reduced to writing.

Ex. G-8 at 25

On December 21, 2011, MSHA issued Citation No. 8565565 alleging that Hecla worked in the face of Order No. 8605614 by failing to perform the stress gauge reading directly before the rockburst as required by Order No. 8605614-05. Hecla contested this citation, but the parties reached a settlement of Citation No. 8565565, which the court approved.

In the ensuing months, MSHA conducted several regular inspections as well as an impact inspection because the mine had previously suffered multiple groundfalls. MSHA maintained the two 103(k) orders and also issued numerous citations and orders during these inspections. MSHA did not lift the 103(k) orders until Hecla abated all the cited conditions. Many of these enforcement actions concerned ground support issues, but several were unrelated. One violation required Hecla to clean down the entire Silver Shaft to remove concrete debris from the sides of the shaft. This took over 14 months to complete and left the entire Mine with no power, no water, and no compressed air. This citation and other citations contributed to Order Nos. 8605614 and 8605622 remaining open for an uncommonly long period of time.

On April 2, 2013, MSHA issued modification No. 8605622-13 to allow the operator to construct sand walls on the North and South sides of the rockburst area in the 5900 main haulage drift and subsequently backfill the area. A barricade was moved pursuant to modification No. 8605622-13. On June 12, 2013, Stembridge issued modification Nos. 8605614-07 and 8605622-14, terminating Order Nos. 8605614 and 8605622.

On January 31, 2012, the USW filed this claim for compensation under section 111.

II. DISCUSSION

The entire record shows that there is no genuine issue of material fact and Hecla is entitled, in part, to partial summary decision as a matter of law. For the reasons set forth below, I **GRANT**, in part, Hecla Limited's Motion for Partial Summary Decision.[9] I retain jurisdiction of

[8] MSHA issued a total of 14 modifications to Order No. 8605622. On August 9, 2012, MSHA issued modification No. 8605622-10 to allow the operator to drive a bypass around the 5900 main haulage drift.

[9] Commission Procedural Rule 67 sets forth the grounds for granting summary decision as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, 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."' *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). The Commission has also analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See Also Energy West Mining Co.*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Cartrett*, 477 U.S. 317,237 (1986)).

(continued...)

this case until the parties agree to a specific dollar amount that will be awarded as compensation to the miners.

Section 111 mandates that operators pay wages to miners idled by section 103, 104, and 107 orders issued by MSHA. The four sentences of section 111 create a "graduated scheme of increasing compensation commensurate with increasingly serious operator conduct." *Local Union 1261, District 22 United Mine Workers of America v. Consolidation Coal Co.*, 11 FMSHRC 1609, 1613 (Sept. 1989). The fourth sentence of section 111 addresses the most culpable operator conduct, the failure to comply with a withdrawal order:

> Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated.

30 U.S.C. § 821. Each of the four sentences in section 111 allows for greater miner compensation than the previous sentence; this escalation is based upon "what the operator has done[.]" *Local Union 1889, District 17, United Mine Workers of America v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1327 (Sept. 1986). Application of the fourth sentence of section 111 is an issue of first impression.

The compensation provided by section 111 is, first and foremost, intended to protect miner safety; it encourages miners to report withdrawal-worthy dangers without fear of losing wages as a result. *See Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975). Although the culpability of the operator influences the compensation available to miners, the senate did not intend for compensation to be punitive. S. Rep. No. 95-181, 95th Cong., 1st Sess. 46-47 (1977), reprinted in *Legislative History of Federal Mine Safety and Health Act of 1977*, at 634-635 (1978). The Commission has found a nexus requirement in section 111, stating that "we will examine the relationship between the underlying reasons for the withdrawal and for the order, and will give balanced consideration both to the limited and purely compensatory character of section 111 and to the overall safety purposes of the 1977 Mine Act and section 111 itself." *Local Union No. 781, District 17, United Mine Workers of America v. Eastern Associated coal corp.*, 3 FMSHRC 1175, 1178 (May 1981).

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[9] (...continued)

When the Commission reviews a summary decision under Comm. P. R. 67, it looks "'at the record on summary judgment in the light most favorable to … the party opposing the motion,' and that 'the inferences to be 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 motion.'" *Hanson Aggregates New York Inc*., 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

I find that the fourth sentence of section 111 applies to Order No. 8605614-05 because Hecla violated this order as set forth in Citation No. 8565565.[10] Hecla failed to monitor the stress gauges directly before the rockburst. The nexus between the underlying events and the withdrawal order that an award of section 111 compensation requires exists between Citation No. 8565565 and amendment 05 of Order No. 8605614. The issuance of Citation No. 8565565 for Hecla's failure to check pressure gauges as mandated by Order No. 8605614-05 is the violation of a withdrawal order that fourth sentence compensation requires. Order No. 8605614, issued on 11/16/2011, withdrew miners and mandated that only people authorized by MSHA could enter the affected area. Ex. G-1 at 2. Order No. 8605614 did not include the requirement to check stress gauges because the stress gauges at issue were not installed at that time. On 12/06/2011, Order No. 8605614-05 allowed limited travel in the 5900 haulage area based upon Hecla's agreement to "conduct two daily surveys at the start and end of the 1st shift to determine whether movement is occurring[.]" Ex. G-1 at 7. A nexus exists between the triggering event, Citation No. 8565565, and the specific amendment 05 of Order No. 8605614 because MSHA issued Citation No. 8565565 for Hecla's failure to monitor stress gauges, which Order No. 8605614-05 required. The nexus between the triggering event and the initial issuance of Order No. 8605614 and its other amendments is weaker and extending the compensation period to those amendments would not make miners safer; the miners who were in the 5900 area at the time of the rockburst were permitted in the area under amendment 05 of Order No. 8605614.[11] Giving balanced

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[10] Citation No. 8565565 states:

> The mine operator worked in the face of 103(k) order 8605614, this order was issued by MSHA on November 16, 2011. This order was issued to insure the safety of miners at the mine after a violent rock burst occurred and was subsequently modified to insure a safe means to repair the damaged area. Subsequent action number 8605614-[05] states that the mine operator will conduct daily surveys at the start and end of the first shift to determine [whether] movement is occurring to indicate if stress levels are increasing. The operator submitted a plan that these readings would be taken twice a day at the same time. On December 14, 2011 the operator failed to take the last reading just prior to another violent rock burst that resulted in serious injuries to seven miners. The Mine Superintendent stated that the readings could not be taken because [the] steel liner was installed over the gauges and the gauges could not be read. Upon inspection it was found that the stress gauges were provided with extended wire so that they could be read during the installation of the liner. If this reading was taken it may have indicated high levels, which have removed miners from the 2nd rock burst. This condition has not been designated as "significant and substantial" because the conduct violated a provision of the Mine Act rather than a mandatory safety standard.

Ex. G-9.

[11] Although amendment 05 is a modification to Order No. 8605614, I consider it separately in this case for compensation purposes. Order No. 8605614-05 is a withdrawal order, but it did not withdraw any miners from the Mine as Order No. 8605614 initially did. Rather, Order No. 8605614-05 permits miners to enter the affected area, but imposes upon Hecla the

(continued...)

consideration to the limited and purely compensatory character of section 111 and the overall safety purposes of the Act, I find that the miners represented by USW are entitled to compensation under the fourth sentence of section 111 beginning on December 6, 2011 at 15:16 (3:16 p.m. local time).

I find that miner compensation should end at 21:00 (9:00 p.m. local time) on December 14, 2011 when MSHA issued Order No. 8605622 because Hecla complied with Order No. 8605614-05 for the purposes of section 111 at that time.[12] A section 103 order is usually issued as soon as MSHA is aware of an accident to quickly remove miners from the potentially dangerous mine and to give MSHA control of the mine to initiate an investigation. *See Miller Min. Co., Inc. v. Federal Mine Safety and Health Review Com'n*, 713 F.2d 487, 490 (9th Cir. 1983). Congress drafted sentence four of section 111 to compensate miners "who would have been withdrawn from, or prevented from entering" a mine where MSHA forbid access. Although it applies in other situations, such as the current case, sentence four of section 111 generally applies to situations where MSHA issues a withdrawal order and the operator fails to withdraw miners, or allows miners to enter the mine in violation of a withdrawal order. For most section 103 orders, the only action required of an operator in those situations is to remove miners from the mine; when a mine does so, they comply with the affirmative requirements of most section 103 orders.[13] In the situation before me, however, the operator violated a modification to a 103(k) order and not the original order or the basic withdrawal requirement.

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[11] (...continued)
affirmative action of monitoring the stress gauges. This distinction is critical for compensation purposes, since section 111 focuses upon operators violating a withdrawal order by failing to remove miners from an area where MSHA forbid the presence of miners, but this case focuses upon the violation of an additional affirmative requirement.

[12] I reject USW's assertion that the ending date of compensation must be June 12, 2013 because MSHA terminated Order No. 8605614 on that date and I found in my October 29, 2014 decision that MSHA's action to maintain both 103(k) orders was not arbitrary or capricious. The Commission evaluates official MSHA enforcement activity concerning withdrawal orders separately from their effect upon compensation. Compensation analysis focuses "upon the conduct of the operator and the conditions in the mine, not the sequencing of MSHA enforcement activity." *Local Union*, 1889, 8 FMSHRC at 1327; *See Local Union 1609, District 2, United Mine Workers of America v. Greenwich Collieries, Division of Pennsylvania Mines Corp.*, 8 FMSHRC 1302, 1306 (Sept. 1986) (refers to "safety" and "compensation" considerations separately). Although the timelines of the underlying orders and the compensation period often coincide, the Commission bifurcates the analysis because it is possible, as in this case, that MSHA's enforcement decisions do not determine the duration of compensation. I found that the 103(k) orders were not maintained in an arbitrary or capricious manner in a decision separate from the current compensation case. Although those orders directly underlie and are related to this compensation case, they do not control this compensation case; USW repeatedly argues against a "formalistic emphasis on sequencing" but chooses to place that emphasis upon the orders when convenient for its own claims.

[13] After withdrawal, a 103 order remains in effect and the operator can still violate such an order by entering the mine against the prohibition of the 103(j) or 103(k) order, which could trigger sentence four compensation. In that situation, the operator would comply with the 103
(continued...)

Order No. 8605614-05 included the affirmative requirement that Hecla must monitor stress gauges to continue work in the affected area; once Order No. 8605622 forbade work in the 5900 haulage area, however, that requirement was complied with for the purposes of sentence four, section 111 compensation.[14] The order required the monitoring of gauges due to the presence of miners in the area; once the miners were withdrawn and work in the area was forbidden, that requirement fell away. For this reason, both Inspectors Brad Breland, a supervisory mine inspector, and Kevin Hirsch, the assistant district manager at the time of the accident, testified that Order No. 8605622 superseded Hecla's requirement to monitor the stress gauges. Not only was the monitoring no longer required after the issuance of Order No. 8605622,[15] but Inspector Breland testified that to believe so was "silly[.]" (Tr. 108).

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[13] (...continued)
order when it removed the miners from the mine. The operator would compensate miners beginning with the issuance of the 103 order until their removal from the mine because at that time the operator would once again be in compliance with the order. In this situation, compensation runs from the time of the initial order to monitor stress gauges until stress gauges no longer needed to be monitored. In either situation, the compensation would not extend into the future for as long as the 103 order remained in effect.

[14] Within days of the December 14, 2011 rockburst, Hecla notified MSHA that it would abandon the 5900 haulage drift and drive a bypass around that area.

[15] The Commission has ruled that 103(k) orders should not preclude compensation under section 111. This ruling, however, primarily dealt with the interplay between section 103 withdrawal orders, which are usually issued immediately when an accident occurs, and other types of withdrawal orders. *Local Union 1889*, 8 FMSHRC at 1323. It does not address interactions between multiple 103 orders. When MSHA issues a 103 order, it has control of the affected area and any entrance into that area, which precludes the necessity to issue an additional, overlapping 103 order. In this instance, MSHA took the unusual action of issuing two 103 orders that were in effect at the same time and governed overlapping areas. I found that this action was not arbitrary or capricious. That finding was based upon the chaotic situation at the mine, which caused MSHA to maintain Order No. 8605614 as a "spotlight" on the dangerous 5900 area. *Hecla Limited*, 36 FMSHRC __, slip op. at 6. MSHA retained both 103(k) orders for an administrative or managerial purpose; Order No. 8605614 was not modified or used to control the mine after the issuance of Order No. 8605622. Instead, Order No. 8605614 simply served as a "spotlight" to prevent the most dangerous area in the mine from being overlooked. Although Order No. 8605622 could be terminated before Order No. 8605614, it was not necessary to keep Order No. 8605614 active; MSHA could have modified Order No. 8605622 to continue control over the 5900 area. Order No. 8605614 was a placeholder. It had no affirmative requirements or power once MSHA issued Order No. 8605622. Under Section 111, "the limited nature of compensation…represents a careful and deliberate balancing by Congress of the competing interests of miners and mine operators[,]" but it does not consider the administrative or managerial motives of MSHA when it controls a mine under a 103(k) order. *Local Union 1261*, 11 FMSHRC at 1613. In this case, Order No. 8605622 does not preclude compensation, but it does affect the length of the compensation period. It is possible that a situation would arise that two 103(k) orders would interact differently with regard to section 111. My ruling is limited to the facts before me today.

The fourth sentence of section 111 applies in this case because Hecla violated Order No. 8605614-05 by failing to monitor pressure gauges. Hecla's culpability in this compensation case relates to that action and requirement, a requirement that MSHA admits Order No. 8605622 superseded. The extended closure of the mine after the issuance of Order No. 8605622 focused upon myriad issues, most of which were unrelated to the 5900 area and none of which addressed monitoring the stress gauges at issue.[16] Section 111 focuses upon the culpability of mine operators relating to specific actions concerning withdrawal orders. *Local Union 1889*, 8 FMSHRC at 1327. Although Hecla was responsible for all the violations that MSHA required Hecla to abate before the termination of Order No. 8605622, the remediation of those violations did not address Citation No. 8565565, which is the action that sentence four of section 111 compensation hinges upon. When MSHA issued Order No. 8605622 it "superseded" the requirement of Order No. 8605614-05 to monitor the stress gauges, which meant Hecla was then in compliance with Order No. 8605614-05 and sentence four, section 111 compensation ceased.[17]

The fourth sentence of section 111 contemplates a situation where an operator fails to withdraw miners. The case before me involves the violation of a 103(k) order, but not due to a failure to withdraw miners. The compensation period therefore does not begin at the time of the initial order of withdrawal, but rather when MSHA required Hecla to begin monitoring the stress gauges. After the violation of the withdrawal order, the unusual sequence of events obscures the end of the compensation period; the limited nature of section 111 warrants the compensation period to end when the operator could no longer comply with the specific requirement of the withdrawal order at issue.

I find that only miners who worked in the area controlled by Order No. 8605614-05 from the time the stress reading was not taken until the time that miners were withdrawn as a result of the rock burst in the pillar are entitled to compensation. Sentence four of Section 111 only mandates compensation for miners "who would have been withdrawn from, or prevented from entering" the mine. 30 U.S.C. § 821. Section 111 uses the phrase "who would have been" because it addresses only those miners who worked in the face of a withdrawal order. The issuance of Order No. 8605614 on November 16, 2011 idled many miners, but they would not have been withdrawn from the area restricted by Order No. 8605614-05 on December 15 because they were not there to be withdrawn. The plain language of section 111 dictates that only miners who worked in the face of Order No. 8605614-05 are entitled to compensation; miners who worked in the 5900 haulage drift, the 54 ramp, or the 5700 level after Hecla failed to monitor the stress gauges are therefore entitled to compensation.

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[16] Order No. 8605622 closed the Silver Shaft, a decision that had no relation to the November 16, 2011 or December 14, 2011 rockbursts in the 5900 area, Order No. 8605614, or Citation No. 8565565. The remediation MSHA required in the Silver Shaft caused Order No. 8605622 to stay in place for over a year and did not address the 5900 area, rockbursts, or pressure gauges.

[17] My analysis determining the end date of compensation is similar to the nexus analysis to determine the relation of a withdrawal order to the idling of miners.

The entire record shows that there is no genuine issue of material fact and Hecla is entitled, in part, to partial summary decision as a matter of law as set forth above. Miners who worked in the 5900 haulage area, the 54 ramp, or the 5700 level during the time between Hecla's failure to check the stress gauges and the December 14, 2011 rockburst are entitled to compensation under sentence four of section 111. The compensation period begins on December 6, 2011 at 15:16 and ends on December 14, 2011 at 21:00.[18] I **GRANT**, in part, Hecla's Motion for Partial Summary Decision. Although I hold that select miners are entitled to compensation under the fourth sentence of section 111 of the Mine Act, I **DENY** the USW's motion for Motion for Partial Summary Decision as set forth in this order. I **ORDER** the parties to agree to the specific miners due compensation and the amount of that compensation; until I approve that submission, I retain jurisdiction of this matter.

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

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[18] The Commission has held that interest should be included in the payment of compensation to miners:

> To make the miners whole for the time value of their compensable pay, therefore, we hold in affirmance of the judge that interest is appropriate on sums of compensation due from the date that the compensable pay would have been paid but for the idlement until the date that the compensation due is tendered. This result comports with the interest approach followed in discrimination cases under Arkansas–Carbona. 5 FMSHRC at 2051–53 & n. 15.

Local Union 2274, District 28, United Mine Workers of America v. Clinchfield Coal Co., 10 FMSHRC 1493, 1503 (Nov. 1988).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 30, 2014

BRODY MINING, LLC,
Contestant,

v.

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

CONTEST PROCEEDINGS

Docket No. WEVA 2014-82-R
Order No. 9003242; 10/28/2013

Docket No. WEVA 2014-83-R
Order No. 7166788; 10/28/2013

Docket No. WEVA 2014-86-R
Order No. 4208892; 10/29/2013

Docket No. WEVA 2014-87-R
Order No. 4208893; 10/29/2013

Docket No. WEVA 2014-97-R
Order No. 7166790; 11/04/2013

Docket No. WEVA 2014-151-R
Order No. 9003246; 11/07/2013

Docket No. WEVA 2014-161-R
Order No. 9004638; 11/12/2013

Docket No. WEVA 2014-190-R
Order No. 4208898; 11/14/2013

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Order No. 7166793; 11/18/2013

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Order No. 4208899; 11/19/2013

Docket No. WEVA 2014-193-R
Order No. 9005720; 11/20/2013

Docket No. WEVA 2014-221-R
Order No. 8155306; 11/26/2013

Docket No. WEVA 2014-244-R
Order No. 9005722; 12/03/2013

Docket No. WEVA 2014-284-R
Order No. 8154092; 12/05/2013

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Order No. 7166798; 12/09/2013

Docket No. WEVA 2014-447-R
Order No. 7166805; 01/15/2014

Docket No. WEVA 2014-448-R
Order No. 7166806; 01/15/2014

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Order No. 7166807; 01/15/2014

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Order No. 7166808; 01/15/2014

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Order No. 8154104; 01/15/2014

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Order No. 9005729; 01/13/2014

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Order No. 9005731; 01/13/2014

Docket No. WEVA 2014-454-R
Order No. 9005732; 01/14/2014

Docket No. WEVA 2014-455-R
Order No. 9005733; 01/14/2014

Docket No. WEVA 2014-456-R
Order No. 9005735; 01/15/2014

Docket No. WEVA 2014-457-R
Order No. 9005736; 01/15/2014

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Order No. 7166815; 01/23/2014

Docket No. WEVA 2014-480-R
Order No. 7166816; 01/23/2014

Docket No. WEVA 2014-529-R
Order No. 7166817; 01/27/2014

Docket No. WEVA 2014-530-R
Order No. 9005739; 01/27/2014

Docket No. WEVA 2014-531-R
Order No. 9005747; 02/10/2014

Docket No. WEVA 2014-537-R
Order No. 9007544; 02/04/2014

Docket No. WEVA 2014-539-R
Order No. 7166822; 01/28/2014

Docket No. WEVA 2014-561-R
Order No. 9005740; 01/27/2014

Docket No. WEVA 2014-562-R
Order No. 9005742; 01/29/2014

Docket No. WEVA 2014-563-R
Order No. 7166826; 02/04/2014

Docket No. WEVA 2014-570-R
Order No. 9005750; 02/19/2014

Docket No. WEVA 2014-571-R
Order No. 7166824; 01/29/2014

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Order No. 9005741; 01/29/2014

Docket No. WEVA 2014-593-R
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Order No. 7166831; 02/11/2014

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Order No. 9005754; 02/24/2014

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Order No. 9005762; 03/04/2014

Docket No. WEVA 2014-640-R
Order No. 9003274; 03/04/2014

Docket No. WEVA 2014-641-R
Order No. 9005763; 03/04/2014

Docket No. WEVA 2014-672-R
Order No. 9005758; 02/25/2014

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Order No. 7166838; 02/24/2014

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Order No. 7166837; 02/24/2014

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Order No. 8135796; 03/11/2014

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Order No. 9005764; 03/05/2014

Docket No. WEVA 2014-722-R
Order No. 9007123; 03/23/2014

Docket No. WEVA 2014-745-R
Order No. 9969627; 03/24/2014

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Order No. 9005343; 04/03/2014

Docket No. WEVA 2014-805-R
Order No. 9005768; 04/03/2014

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Order No. 9005769; 04/07/2014

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Order No. 9005770; 04/07/2014

Docket No. WEVA 2014-811-R
Order No. 9005344; 04/09/2014

Docket No. WEVA 2014-813-R
Order No. 9005772; 04/09/2014

Docket No. WEVA 2014-814-R
Order No. 9005773; 04/09/2014

Docket No. WEVA 2014-819-R
Order No. 9005774; 04/15/2014

Docket No. WEVA 2014-854-R
Order No. 9005778; 04/21/2014

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Order No. 9005347; 05/01/2014

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Order No. 9007426; 05/13/2014

Docket No. WEVA 2014-1012-R
Order No. 9005786; 05/29/2014

Docket No. WEVA 2014-1013-R
Order No. 9005787; 05/29/2014

Docket No. WEVA 2014-1035-R
Citation No. 9005792; 06/12/2014

Docket No. WEVA 2014-1036-R
Citation No. 9005362; 06/11/2014

Docket No. WEVA 2014-1037-R
Citation No. 9005360; 06/04/2014

Docket No. WEVA 2014-1038-R
Citation No. 9005361; 06/11/2014

Docket No. WEVA 2014-1135-R
Order No. 9905374; 07/15/2014

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Order No. 9009660; 07/22/2014

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Order No. 9005384; 07/30/2014

Docket No. WEVA 2014-1994-R
Order No. 9005383; 07/30/2014

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Order No. 9005382; 07/30/2014

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Order No. 9005380; 07/30/2014

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Order No. 9003948; 09/08/2014

Docket No. WEVA 2014-2173-R
Order No. 9005393; 09/09/2014

Docket No. WEVA 2014-2174-R
Order No. 9005398; 09/10/2014

Docket No. WEVA 2014-2175-R
Order No. 9005400; 09/10/2014

Docket No. WEVA 2014-2221-R
Order No. 9007439; 09/17/2014

Docket No. WEVA 2015-59-R
Order No. 7272454; 10/07/2014

Docket No. WEVA 2015-60-R
Order No. 7272462; 10/07/2014

Docket No. WEVA 2015-61-R
Order No. 7272494; 10/07/2014

Docket No. WEVA 2015-63-R
Order No. 9005704; 10/14/2014

Docket No. WEVA 2015-66-R
Order No. 9005705; 10/14/2014

Docket No. WEVA 2015-67-R
Order No. 9006768; 10/14/2014

Docket No. WEVA 2015-68-R
Order No. 9006769; 10/14/2014

Docket No. WEVA 2015-121-R
Order No. 7219154; 10/24/2014

Mine: Brody Mine No. 1
Mine ID: 46-09086

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS
v.	Docket No. WEVA 2013-370 A.C. No. 46-09086-308309 Docket No. WEVA 2013-564 A.C. No. 46-09086-310927 Docket No. WEVA 2013-997 A.C. No. 46-09086-321030 Docket No. WEVA 2013-1055 A.C. No. 46-09086-323691 Docket No. WEVA 2013-1189 A.C. No. 46-09086-326531 Docket No. WEVA 2013-619 A.C. No. 46-09086-342759 Docket No. WEVA 2013-620 A.C. No. 46-09086-342759 Docket No. WEVA 2014-702 A.C. No. 46-09086-344708 Docket No. WEVA 2014-842 A.C. No. 46-09086-347271
BRODY MINING, LLC, Respondent.	Mine: Brody Mine No. 1

Before: Judge William B. Moran

Order on the Secretary's Motion for Certification for Interlocutory Review and Order on the Secretary's Renewed Emergency Motion to Stay the Court's Order Dismissing the Pattern of Violations Notice

Upon consideration of the Secretary's Motions and the response thereto, for the reasons which follow, the Court GRANTS the Motion for Certification for Interlocutory Review and DENIES the Secretary's Renewed Emergency Motion to Stay.[1]

[1] The use of the term "Emergency" is the Secretary's self-characterization of its motion to stay. The Court does not subscribe to the accuracy of that characterization.

I. Order on the Secretary's Motion for Certification for Interlocutory Review

The Secretary's Motion for Certification for Interlocutory Review ("Motion for IR") requests that this Court certify its November 1, 2014 Order, which among other actions and findings, dismissed the claim that Brody had a pattern-of-violations ("POV"), as asserted in the POV notice issued by the Secretary to Brody Mining on October 24, 2013. Pursuant to Commission Rule 76 (29 C.F.R. § 2700.76), the Secretary now requests that the ALJ certify its Order for interlocutory review.

In support of its Motion for IR, the Secretary states that the Court's Order is interlocutory because it did not resolve the 357 citations and orders not designated as "significant and substantial" ("S&S") that were included with the 54 S&S citations and orders.[2] It notes that "[a]n order qualifies for interlocutory review under Rule 76 if: (i) the interlocutory ruling involves a controlling question of law, and (ii) immediate review may materially advance the final disposition of the proceeding [and the Secretary maintains that] both requirements are met here." Motion for IR at 2.

The IR motion continues with the Secretary stating that the "dismissal order presents the following controlling questions of law: (i) whether the ALJ had jurisdiction to adjudicate the validity of the POV notice issued to Brody when the hearing notice listed only the civil penalty dockets containing the citations and orders underlying the POV notice, and not the dockets containing Brody's contests of the withdrawal orders issued pursuant to the POV notice; (ii) whether the ALJ erred as a matter of law in finding that the Secretary failed to comply with the ALJ's oral pre-hearing order; and, (iii) whether the Secretary's definition of "pattern of violations" satisfies the requirements of Section 104(e)(4) of the Mine Act and the Due Process Clause of the Fifth Amendment to the United States Constitution."[3] Motion for IR at 2.

The Court does agree with the Secretary's assertion that "[i]mmediate review may materially advance resolution of this proceeding by allowing the POV issues, which are legal issues that may be resolved independently from the rest of the case, to be adjudicated on appeal without awaiting the ALJ's adjudication of the 357 non-S&S citations and orders—*which have no bearing on the POV issues*—contained in the civil penalty dockets pending before the ALJ." Motion for IR at 2-3.[4] (emphasis added).

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[2] The Secretary adds that "[t]o the extent that the contested POV withdrawal orders were properly before the ALJ—and the Secretary contends they were not—the fact that the ALJ did not adjudicate those orders not only prevents the order from being final but also deprived the ALJ of jurisdiction to rule on the validity of the POV notice." Motion for IR at n.1.

[3] The quoted language reflects the Secretary's characterization of the issues.

[4] The Secretary adds that "[a]lternatively, the ALJ may wish to consider directing that his November 1, 2014 order of dismissal be entered as a final, appealable order pursuant to Federal Rule of Civil Procedure 54(b), citing *Westmoreland Coal Co.*, 5 FMSHRC 1406, 1411-12 (1983)("*Westmoreland*"). Motion at 3, n. 2. The Commission observed in *Westmoreland* that Rule 54(b) permits adjudication of fewer than all claims presented in an action and that the judge in that case could have applied that Rule allowing him to resolve two of the three claims while

(continued...)

Finally, the Secretary notes that it "contacted Brody's counsel, who stated that he does not oppose the motion to certify the ALJ's decision vacating the pattern of violations notice, but reserves the right to address any particular assertion by the Secretary in this motion." Motion for IR at 3. Brody, in a December 17, 2014 email response to an email inquiry from the Court about the Secretary's characterization of its position, advised that while it does "not necessarily agree with the Secretary's formulation of the three issues [presented in the Secretary's Motion for certification for Intelocutory Review] [it believes that] the fundamental issue of whether the vacation of the POV notice (which in the Secretary's view raises those three issues) is properly [the] subject of interlocutory review and the Judge could rule on it without further submission by Brody."

Based on the foregoing, the Court GRANTS the Secretary's Motion and in so doing certifies that the determinations made by it in its November 3, 2014 Order are interlocutory in the sense that a large number of citations and orders are associated with the listed dockets which do not involve claims that they were S&S, and that the rulings which were made in the November 3, 2014 Order involve controlling questions of law and that, in the Court's opinion, immediate review will materially advance the final disposition of the proceeding.[5]

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[4] (...continued)

retaining jurisdiction of the third. The Commission noted that had the Judge issued a decision resolving the first two claims and that, as there was no just reason to delay that decision, the decision would have been a final decision, subject to the review procedures of the Mine Act and that such an outcome would also have been in harmony with then Commission Rule 64(a), (now Rule 2700.67(a)), which then and now provides in pertinent part that at any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the judge to render summary decision disposing of all or part of the proceeding. The Commission held that the resolution of such a question "belongs within the informed discretion of the judge." However, in *Westmoreland* as here, neither party suggested applying Federal Rule 54(b) and the hearing has occurred for the critical aspects of the Secretary's Pattern claim. While it would appear that this option is not available, as noted in the body of this Order, the Court may avail itself of procedural rule section 2700.76(a)(1)(i), addressing interlocutory review and does so.

[5] Brody has also urged the Court to leave no doubt that its decision vacating the pattern notice "automatically converts the Section 104e orders based on the POV notice to 104a citations." Brody email dated December 17, 2014. Although the Court believes that its Order clearly conveyed that its decision had that effect, it hereby reaffirms that its decision, which vacated the claim that Brody had a pattern of violations. That determination automatically converts all Section 104e orders based on the POV notice to 104a citations. That result is ineluctable. When faced with the evidentiary burdens at the hearing, the Secretary's Pattern of Violation Notice turned out to be stillborn. Beyond listing some 54 citations with, at 25, nearly half of its basis for the claim determined not to be S&S, the Secretary was also unable to present a coherent basis for its claim that there was a pattern of violations by Brody.

II. Order on the Secretary's Renewed Emergency Motion to Stay the Court's Order Dismissing the Pattern of Violations Notice

The Secretary has also filed a Renewed Emergency Motion to Stay the Court's Order Dismissing the pattern of violations notice[6] ("Renewed Motion"). The Motion correctly asserts that the Court's November 1, 2014 Order "effectively preclud[es] the Secretary from issuing any further withdrawal orders pursuant to that notice so long as the ALJ's order remains in effect." Renewed Motion at 1.[7]

As the Renewed Motion essentially repeats the arguments made in its first Emergency Motion, an extended discussion is not required. Although the Secretary expends effort on a contention that, in its most favorable construction, could be described as a semantic dispute, there is no genuine question about the subjects that were litigated during the three weeks set aside for hearing. In this regard the Court would comment that, in reaction to the Secretary's claim that the Court cannot address the validity of a POV notice, the heart of the matter at issue here need not be made more complex than it deserves. Arguments over nomenclature should not control the resolution of this matter. For example, one could contend that a POV *notice* stands forever, unassailable by itself, but such notice has no meaning, effect or impact until the first 104(e) withdrawal order flows from it. At that point, all would agree that whether there is in fact a pattern of violations and whether the alleged violations in support of that claim are present may be challenged. And that is exactly what occurred here with the end result of this Court dismissing the Secretary's claim that it demonstrated a pattern of violations.

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[6] The Renewed Motion notes that the Secretary previously filed an "Emergency Motion to Stay Order" with the Court on November 4, 2014, which Brody opposed and which was denied on November 26, 2014. This is an opportune moment to note the extent to which Brody has been adversely impacted by a process which was advertised by MSHA as being designed for the expeditious resolution of challenges to POV notices. With the pattern-of-violations notice having been issued to Brody Mining on October 24, 2013, more than a year and two months now have elapsed since then and there is no near term resolution of Brody's challenges to that POV notice in sight. To maintain legitimacy, enforcement of the Mine Act's provisions, through measures such as a charge of a pattern of violations, must still be about fair procedures. A stay would effectively mean that Brody, though it prevailed at the hearing, would continue to face an indefinite, and likely prolonged, period of new section 104(e) withdrawal orders, each of which in this Court's determination stem from the same defective notice. In this Court's view, such a result is inconsistent with procedural due process.

[7] In what the Court views as a troublesome inclusion, the Secretary has inserted the irrelevant and inaccurate claim that "[i]n the six weeks since issuance of the ALJ's order dismissing the POV notice, Brody's rate of "significant and substantial" violations has tripled." Renewed Motion at 2. The Court views this inclusion as emblematic of the Secretary's continuing conflation of charges with proof of violations, as if they were the same thing. Brody's rate of *citations* being issued with the significant and substantial element may have increased threefold, but that does not mean that its rate of *established violations* with that element has tripled, unless the Secretary believes that leveling the charge is all that is needed.

In his January 30, 2014 Order, Chief Administrative Law Judge Robert Lesnick noted that the basis for the Secretary's pattern notice rested upon 54 S&S citations and orders, which were "grouped according to the hazards they allege[d] (ventilation and methane hazards, emergency preparedness and escapeway hazards, roof and rib hazards, and inadequate examination hazards)" 36 FMSHRC 284, 293 (Jan. 2014). Thus, it has been clear since the inception of the issuance of the pattern notice that the 54 citations and orders were the foundation upon which that pattern charge was built. Contrary to the implication of the Secretary that "[t]he ALJ subdivided the hearing into three separate parts, each part corresponding to one subgroup of the 54 S&S citations and orders relating to one of the distinct patterns identified by the POV notice," (Renewed Motion at 3) the Court didn't invent those groupings; they were presented by the Secretary, with a hearing week dedicated to each group. Importantly, Chief Judge Lesnick took note that "[s]ince the issuance of Notice No. 7219154, MSHA has issued (and continues to issue as of the date of this order) numerous section 104(e) withdrawal orders. Brody has contested, and continues to contest, all of these orders (since Brody received its POV notice, and as of the date of this order, it has been issued 28 section 104(e) orders that have been contested and docketed at the Commission). *As additional contests are filed with the Commission*, [the Chief Judge announced in his January 30, 2014 Order that he would] "*consolidate them with these proceedings*."[8] 36 FMSHRC 284, 293 (Jan. 2014)(emphasis added).

The overriding point is that the Secretary completely understood that the hearing before the Court had a twofold purpose associated with the POV notice: 1. the Secretary had to present a coherent basis for its claim that the 54 citations/orders constituted a pattern of violations and 2. upon setting forth that basis, the Secretary was then obligated to prove that each of the citations/orders making up the claim of a pattern of violations were factually established as having the significant and substantial trait. The Secretary failed in both regards. The Secretary never explained the basis for his claim that the alleged violations constituted a pattern and, of no small consequence, at the hearing he failed to establish for nearly half, 46.3%, of the citations/orders that they were in fact S&S violations. With these, twin, *significant and substantial failures* on the Secretary's part, no pattern of violations was established and the claim that Brody had engaged in a Pattern of Violations was properly dismissed. As the foundation for its Pattern of Violations Notice crumbled, the required consequence was that *all* subsequently issued 104(e) orders built on that defective foundation were necessarily converted to 104(a) citations.

Brody submitted a Response in Opposition. As the Court is denying the Secretary's Renewed Motion, the discussion of that Response will be brief. However, the Court would comment that it largely endorses Brody's contentions. For example, the Court agrees that the Secretary's claim of lack of jurisdiction is hollow.[9] So too, the Court rejects the Secretary's

[8] It should also be noted that if the docket numbers containing Brody's contests of the withdrawal orders were deemed to have been improperly included, subsequent litigation would change nothing - the core issues have already been litigated and decided. Thus, in the Court's estimation, this is simply an attempt by the Secretary to avoid facing up to its twin failings in its pattern of violations claim.

[9] As Brody observed in its Response, "The Secretary first raised such argument in his posthearing brief but had not previously raised that issue. . . . In his Position Statement to the

(continued...)

claims regarding the likelihood that the movant will prevail on the merits of its appeal; that irreparable harm will result to the movant if the stay is not granted; that there is an absence of adverse effects on other interested parties; and that it has established that the stay is in the public interest. See the Court's November 26, 2014 Order Denying the Secretary's first emergency motion to stay.

Conclusion

On the basis of the foregoing, the Court DENIES the Secretary's Renewed Emergency Motion to Stay the Court's Order Dismissing the Pattern of Violations Notice.

So Ordered

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

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[9] (...continued)

ALJ, filed July 17, 2014, which included docket numbers for prepenalty contests of Section 104(e) orders in its caption, the Secretary clearly evidenced an understanding that any hearing would include the contests of the POV notice (Position Statement at 11). In his prehearing statement filed August 25, 2014, the Secretary again included as part of the caption four prepenalty contests of Section 104(e) orders in addition to the civil penalty dockets that he now includes in the caption by themselves. . . . It has been clear in each notice of contest filed by Brody that the POV notice is at issue. It has also been clear that the Secretary concedes that in the contest of a Section 104(e) order, the POV notice can be challenged. . . . It is clear that the Secretary fully understood that the validity of the POV was at issue prior to and during the hearing and his removal of the docket numbers from his last submissions is either inadvertent or disingenuous. . . .

It is clear that throughout the 7 days of hearing that the Secretary believed that the issue of the POV notice and a pattern was at issue as evidenced by a discussion of the docket numbers at hearing:

MR. MOORE: -- are related to every prepenalty contest in the 104(e) order that's pending before the Commission, and there are approximately a hundred – a hundred of those, some of which were before the commission on the appeal, the interlocutory appeal. So I'm a little bit – I want to be careful that we're – all understand that, while we're looking at individual citations for civil penalty dockets, we're also looking at the broader issue or else we wouldn't even have to talk about that. . . . The Secretary did not object to such assertion." Response at 7-9.

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