

August 2014

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

Secretary of Labor, MSHA v. Mize Granite Quarries, Inc., Robert W. Mize; and Clayborn Lewis, Both Employed by Mize Granite Quarries, Inc., Docket Nos. SE 2009-401-M, SE 2009-402-M, SE 2009-553-M, SE 2009-554-M, SE 2010-849-M, SE 2010-850-M. (Judge Moran, August 29, 2014)

Secretary of Labor, MSHA v. Leeco, Inc., Docket No. KENT 2012-166

Review was not denied in any case during the month of August 2014.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, DC 20004-1710

August 12, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2010-1156
	:	
v.	:	
	:	
ARMSTRONG COAL COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, 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”). At issue is whether the Administrative Law Judge abused his discretion by issuing a decision approving settlement despite the Secretary of Labor’s alleged failure to comply with an order to show cause. For the reasons that follow, we affirm the Judge’s decision.¹

I.

Factual and Procedural Background

On February 25, 2010, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation to Armstrong Coal Company for a violation of 30 C.F.R. § 75.325(b) at its Parkway Mine. The Secretary subsequently proposed that Armstrong

¹ The Commission recognizes that the direction for review was issued in April 2012 and briefing was stayed at that time. The stay occurred during a period of rapid buildup in the Commission case load causing regrettable delays in issuing decisions. Having reviewed the petition for discretionary review (“PDR”) in this case, each Commissioner has determined that the PDR sets forth the petitioner’s position clearly and completely. Each Commissioner has further determined that briefing in this case would not aid resolution and would only cause further delay and expense. For this reason, we are issuing our decision without further briefing. The Commission assures every party that appears before it that its positions and arguments are fully and carefully considered by each Commissioner.

pay a civil penalty of \$40,300 for the violation. The operator challenged the citation and proposed penalty, and the matter was assigned to a Commission Administrative Law Judge.

On August 15, 2011, the parties informed the Judge that they had reached a settlement in this matter. Order to Show Cause at 1 (Feb. 14, 2012). The Judge subsequently directed the parties to submit the settlement motion within the next 20 days, consistent with the requirements of the pre-hearing order. *Id.* at 1-2. The Secretary failed to submit the settlement motion by this deadline and instead informed the Judge that he would file the settlement motion by September 23, 2011. *Id.* at 1. However, the Secretary failed to file the settlement motion on that date as well. *Id.* On February 2, 2012, the Secretary sent the joint settlement motion to Armstrong, requesting that it sign and return the settlement motion to the Secretary. On February 3, 2012, the operator signed and returned the motion to the Secretary.

On February 14, 2012, the Judge issued an Order to Show Cause directing the Secretary to show good cause, within 30 days: (1) why the Secretary had failed to submit the settlement motion within 20 days of August 15, 2011, (2) why the Secretary had failed to submit the settlement motion by September 23, 2011, and (3) why this matter should not be dismissed. Order to Show Cause at 2 (Feb. 14, 2012). On February 21, 2012, within a week of the show cause order, the Secretary submitted the settlement motion to the Judge. *Jt. Mot. to Approve Sett.* Neither the settlement motion nor any other communication to the Judge addressed the three questions in the show cause order. *Id.*

On March 15, 2012, the Judge approved the parties' settlement in a decision approving settlement. *Dec. Approving Sett.* at 1-2 (Mar. 15, 2012). Under the terms of the settlement, the parties agreed to reduce the penalty from \$40,300 to \$25,000 without any modification to the citation. *Id.*

Armstrong filed a petition for discretionary review, which the Commission granted. In its petition, the operator argues that the Judge abused his discretion by approving the parties' settlement despite the Secretary's procedural errors. The operator claims that the Secretary, by failing to explicitly answer the three questions in the show cause order, failed to respond to the show cause order. The operator argues that under Commission Procedural Rule 66(a), 29 C.F.R. § 2700.66(a), this failure to respond to the show cause order should have resulted in the Secretary's default and the dismissal of the Secretary's petition for assessment of civil penalty.² In essence, Armstrong argues that the Secretary's procedural errors should relieve it of liability for the penalty amount of \$25,000, which it had agreed to pay in settlement of the case.

Armstrong also argues that the Judge's approval of the settlement was unfair to it, since it had consistently complied with the Judge's instructions while the Secretary had repeatedly disregarded the Judge's instructions to timely file the settlement motion. The operator does not dispute that it agreed to the substantive terms of the settlement or claim prejudice due to the Secretary's delay in submitting the settlement motion.

² Rule 66(a) generally requires a Judge to issue an order to show cause before dismissing a case as a result of a party's procedural errors.

II.

Disposition

The Commission has recognized that the standard of review for a decision approving settlement is abuse of discretion. *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (Nov. 1981) (“if a judge’s settlement approval . . . is fully supported by the record before him, is consistent with the statutory penalty criteria, and is not otherwise improper, it will not be disturbed. In reviewing such cases, abuses of discretion or plain errors are not immune from reversal.”)

The Commission has also recognized that “a judge possesses the power to manage and control matters pending before him.” *Marfork Coal Co.*, 29 FMSHRC 626, 634 (Aug. 2007). “It is a bedrock principle that effective administration of justice requires that judges possess the capability to manage their own affairs.” *Id.* Furthermore, the Commission prefers to resolve cases on the merits instead of procedural defects. See *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Coal Prep Services Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). Accordingly, a Judge has the discretion to excuse procedural errors in appropriate circumstances.

We conclude that the Judge did not abuse his discretion by issuing the decision approving settlement. Dec. Approving Sett. at 1-2 (Mar. 15, 2012). As stated above, the Judge may excuse procedural errors by a party. By approving the settlement, the Judge implicitly accepted the Secretary’s submission of the settlement motion as an adequate response to the show cause order. *Id.* In this regard, the Judge excused the Secretary’s technical non-compliance with the show cause order, *i.e.*, the Secretary’s failure to answer the three questions in the show cause order.³

As stated above, Armstrong neither disputes the substantive terms of the settlement agreement nor claims that it was prejudiced by the Secretary’s delay in submitting the settlement motion. Rather, Armstrong simply seeks to escape liability for the amount it had agreed to pay

³ As discussed above, the operator invokes Rule 66(a) when arguing that the Secretary’s procedural errors should have resulted in dismissal of the Secretary’s petition for assessment of civil penalty. However, this rule does not limit in any way the Judge’s discretion to excuse a party’s procedural errors.

as art of the settlement agreement.⁴ The Judge appropriately exercised his discretion by approving a duly negotiated settlement that quickly and effectively disposed of this matter.

III.

Conclusion

For the reasons set forth above, we affirm the Judge's decision approving settlement.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

⁴ The operator also argues that it lacked notice that the Secretary had submitted the settlement motion to the Judge, or that the Judge intended to approve the parties' settlement despite the Secretary's technical non-compliance with the show cause order. In this regard, the operator points to the Secretary's failure to serve the operator with a copy of the settlement motion prior to filing it with the Judge. However, the operator had signed the joint settlement motion on February 3, 2012, indicating its awareness of, and agreement with, the settlement motion before the Secretary submitted the motion to the Judge on February 21, 2012. Moreover, the Judge was not required to notify the operator before approving a duly negotiated settlement.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

August 19, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 2006-853
	:	WEVA 2006-854
v.	:	WEVA 2007-666
	:	
WOLF RUN MINING COMPANY	:	

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

DECISION

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

These consolidated civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The lone remaining issue is whether the Administrative Law Judge erred when he concluded on remand that Wolf Run Mining Company’s violation of the lightning arrester requirement of 30 C.F.R. § 75.521 was not significant and substantial (“S&S”).² 33 FMSHRC 1197-1202 (May 2011) (ALJ). For the reasons that follow, that determination is reversed, and the penalty the Judge assessed is affirmed.³

¹ Commissioner Robert F. Cohen, Jr., is recused in this case.

² Section 75.521 states in pertinent part that “[e]ach ungrounded, exposed power conductor and each ungrounded, exposed telephone wire that leads underground shall be equipped with suitable lightning arresters of approved type within 100 feet of the point where the circuit enters the mine.” The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

³ All four Commissioners agree in result, though they split two to two with regard to the rationale for reversing the non-S&S determination under “*Mathies* Element Three.”

I.

Factual and Procedural Background

As discussed in greater detail in the Commission's earlier decision in these proceedings, 32 FMSHRC 1669 (Dec. 2010), 12 miners died and one was seriously injured in January 2006 as a result of an explosion caused by lightning at Wolf Run's Sago Mine, an underground coal mine in Upshur County, West Virginia. Our earlier decision involved five citations for violations of the requirements of section 75.521 issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") following its investigation into the Sago accident. Four of those five citations contained the same type of allegation: a lightning arrester was required but not provided for a power conductor or communications wire that was located in whole or in part aboveground on the surface at the Sago Mine, and either ran to, or originated in, an underground portion of the mine. 32 FMSHRC at 1671.

It is the last of those citations that remains unresolved. Citation No. 7335233 initially charged Wolf Run with violating the lightning arrester requirement with respect to telephone paging and trolley phone system wires that ran from the dispatcher's office and entered the mine through the track entry. Gov't Ex. 5. In his original decision, the Judge found that the trolley wires were grounded, and therefore lightning arresters were not required for them. 31 FMSHRC 640, 664 (June 2009) (ALJ).

With respect to the cited telephone and paging line,⁴ the Judge found a violation of section 75.521, because neither of the two conductors within the wires was grounded. 31 FMSHRC at 664. Wolf Run had abated the telephone line violation by installing two lightning arresters, one for each of the conductors. Tr. 685; Gov't Ex. 5.

In his initial decision, the Judge declined to uphold the designation of the violation as S&S, based on his finding that any electrical surge from lightning would destroy the wires before it entered the mine portal. 31 FMSHRC at 664. In our initial decision, we agreed with the Secretary that the Judge's conclusion regarding the capacity of the telephone wire was not supported by substantial evidence,⁵ in that the record only reflected "the voltage *normally*

⁴ The telephone and paging line ran to approximately 20 phones underground (Tr. 601-02), as well as to a loudspeaker used for paging (Tr. 623).

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

(continued...)

carried by Wolf Run's telephone wires and did not discuss the *capacity* of such wires." 32 FMSHRC at 1687. We also held that it was error for the Judge to fail to address MSHA Engineer Kevin Hedrick's statement that a surge of electrical energy from lightning could enter a mine via the wire before that energy destroyed the wire. *Id.* Consequently, we vacated and remanded, among other issues, the Judge's non-S&S finding for his consideration of the overall record with regard to whether the violation of section 75.521 was S&S. *Id.*

In his remand decision, the Judge found that there was a potential for such a surge to enter the mine. However, he again concluded the violation of section 75.521 was not S&S, because of the low probability of lightning striking the telephone wires and the fact that the absence of arresters does not increase the likelihood of such a strike. 33 FMSHRC at 1201. Both parties petitioned for review of various aspects of the Judge's remand decision. We limited our grant of review to whether the Judge erred in concluding that the lack of lightning arresters with respect to the telephone wires was not an S&S violation.⁶

II.

Disposition

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

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Under the Commission's *Mathies* test, it is the contribution of the violation at

⁵(...continued)
(quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

⁶ With its response brief, Wolf Run submitted a motion that the Commission hear oral argument in the case. Commissioners were polled and denied that request.

issue to the cause and effect of a hazard must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984).

Here, the Judge concluded that the first, second, and fourth elements of *Mathies* had been satisfied, because “on balance, the Secretary has demonstrated the subject telephone wire has the capacity to transmit a lightning surge underground that poses a risk of serious injury” to miners working there. 33 FMSHRC at 1199. The Judge found that the *Mathies* test was not entirely satisfied, however, because “the failure to equip exposed conductors with arresters does not increase the likelihood of a lightning strike.” *Id.* at 1201.

A. Mathies Element One

At this point there is no dispute that there was a violation of the lightning arrester requirement of section 75.521. In our initial decision, we affirmed the Judge’s original decision that a violation had been established with respect to the subject telephone wire. 32 FMSHRC at 1679-82.

B. Mathies Element Two

With regard to the second *Mathies* element of a measure of danger to safety contributed to by the violation, Wolf Run agrees with the Judge that the proper inquiry is whether the absence of lightning arresters would result in electrical current being carried into the mine. The Judge stated that “[t]he hazard posed by the subject section 75.521 violation is the potential transmission of a lightning surge underground through telephone power conductors on the surface that are not equipped with arresters.” 33 FMSHRC at 1201. Wolf Run argues, however, that substantial evidence does not support the Judge’s determination that the telephone line in question had the capacity to transmit dangerous amounts of electrical energy underground.⁷

The general danger that lightning poses if provided a path to travel underground was addressed in our first decision in this case. Summarizing the evidence and findings below, we stated that

a lightning strike from as much as a mile away can cause a surge of energy on a power conductor. *Id.* at 645. Even when it does not hit the conductors directly, such a strike can induce thousands of volts and amps of electric current into a power conductor. Tr. 238-40. The purpose of a lightning arrester required by section 75.521 is to minimize the amount of such energy entering into the underground portions of the mine. 31 FMSHRC at 643.

⁷ As the prevailing party below, Wolf Run may urge in support of the decision under review even those arguments that the Judge considered and rejected. *See, e.g., Sec’y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990).

Unless a power conductor entering a mine from the outside is protected by a lightning arrester, the excess energy from a lightning strike on the conductor would not be dissipated into the ground, but could instead travel into the mine via the conductor. *Id.* at 645. This could energize the frames of equipment, resulting in a shock or electrocution hazard, and the energy could cause an arcing that would pose a fire hazard and an ignition source for methane. *Id.*

32 FMSHRC at 1670-71 (footnote omitted).

The Judge based his determination that such a danger is posed by a telephone wire lacking a required lightning arrester on the testimony of MSHA Engineer Hedrick. Hedrick stated that lightning, either striking directly or even just nearby, has the potential to elevate the amount of electricity flowing through a telephone wire, and that therefore an arrester is needed to provide a path to ground for the excess electricity and reduce the amount of energy that can go underground via the telephone wire. 33 FMSHRC at 1198 (citing Tr. 631).⁸ The Judge also credited Hedrick's testimony that even if the power surge became so great that it eventually destroyed the wire and thus disconnected points further along the wire, the power that had already flowed to those points prior to the destruction would continue to pose a danger in the mine for a time afterwards. *Id.* at 1198-99 (citing Tr. 662). The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

Here, Wolf Run argues that the Judge should not have credited Hedrick's testimony because neither he nor any other witness could establish how much current would flow via the telephone wire into the mine due to a lightning strike occurring in the absence of a lightning arrester. The operator maintains that such evidence is necessary to determine whether the lack of an arrester posed a hazard in this instance.

The record in this case clearly establishes that the amount of electrical energy produced by a lightning strike can vary greatly, depending on the strength of the strike and its proximity. Tr. 310-12, 649. Moreover, it is not possible to predict which path the energy from it will travel. Tr. 314-16, 379, 538. Consequently, the maximum amount of energy a lightning arrester will need to prevent from traveling through a specific wire is simply not predictable, and therefore the lack of a specific amount is not a basis for overturning the Judge's crediting of Hedrick's testimony.

⁸ Below, the Secretary submitted an exhibit consisting of the 35 section 75.521 citations or orders that had been issued to other mines over the previous five years alleging that required lightning arresters were absent with respect to communication wires, including a number of which that had been designated S&S. Gov't Ex. 26.

Moreover, Wolf Run's argument is essentially a collateral attack on the terms of section 75.521. The regulation as it pertains to power conductors originated as section 305(p) of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"), and was carried over as the same section of the Mine Act, 30 U.S.C. § 865(p). The statutory language was promulgated as section 75.521 by a predecessor to MSHA, the Department of Interior's Bureau of Mines, after the enactment of the Coal Act. 35 Fed. Reg. 17,890, 17,910 (Nov. 20, 1970). The mandatory standard was then expressly extended in 1973 to include ungrounded, exposed telephone wires. *See* 38 Fed. Reg. 4974, 4975 (Feb. 23, 1973).

In proposing to extend the reach of the mandatory standard, the Bureau of Mines cited "operating experience gained to date under the [Coal Act], particularly since promulgation [of the 1970 regulations], and "determined [it] to be desirable to propose . . . revisions of several mandatory standards for electric equipment." 37 Fed. Reg. 11,777 (June 14, 1972). The agency's proposal went on to state that with regard to the lightning arresters that are required to be used in connection with ungrounded, exposed power conductors leading underground, "it is desirable that suitable, approved lightning arresters also be required on ungrounded, exposed telephone wires which lead underground." *Id.* at 11,778.

The danger posed by lightning-induced power surges on telephone wires was clearly enough to persuade MSHA's predecessor to bring them within the coverage of section 75.521. Accordingly, we conclude that the absence of evidence on the amount of current that would flow through a specific wire in the event of a lightning strike does not prevent a finding that the wire in question had the potential to carry dangerous amounts of current underground.⁹

The record also contains evidence that the anyone using the phone system during the time that lightning-induced excess energy was coursing over the unprotected telephone wires would be subject to the risk of an electrical shock. Tr. 635-36, 682. Consequently, we find that substantial evidence supports the Judge's finding that the Secretary satisfied the second *Mathies* element in this instance.

⁹ Similarly, we reject Wolf Run's argument that the hazard posed by the lack of an arrester in this instance cannot be established because the amount of electricity that an arrester would divert into the ground is unknown. The Judge credited Hedrick's testimony regarding the efficacy of lightning arresters in reducing the amount of energy that went underground in the event of a lightning strike. 33 FMSHRC at 1198 (citing Tr. 631).

C. *Mathies* Element Three

It is with regard to the third *Mathies* element that the Judge found that the Secretary had failed to establish that the violation of section 75.521 was S&S in this instance. However, the Judge's framing of the issue was in error. He stated that:

The question is whether it is reasonably likely that the hazard created by this violation will result in a lightning strike event in which there is serious injury. Resolution of this question is dependent on the contribution of the absence of arresters to the likelihood of a lightning strike that results in electrocution.

. . . . [T]he failure to equip exposed conductors with arresters does not increase the likelihood of a lightning strike. Although the absence of arresters does affect the hazard associated with lightning, their absence does not contribute to the likelihood of the occurrence of lightning. Since a lightning strike in proximity to a particular location is a rare event, the Secretary has failed to demonstrate that it is *reasonably likely* that the failure to install lightning arresters will result in an injury or illness of reasonably serious nature.

33 FMSHRC at 1201 (citations omitted) (emphasis in original).

The issue is not whether the absence of arresters on the telephone wires will affect the frequency or severity of lightning strikes on or in proximity to the wires. Lightning strikes are the result of atmospheric conditions entirely outside of the control of the operator and, as the Sago accident demonstrated, can occur just about anywhere, in varying degrees of intensity, and at any time with little or no warning. Tr. 294, 649. Thus, the frequency, proximity, and magnitude of lightning strikes are wholly unrelated to an operator's compliance with section 75.521 to protect against their effects, and the Judge erred in weighing such a consideration in his S&S analysis.

In addressing the Judge's determination to give dispositive weight to his finding that a lightning strike in proximity to a particular location is a rare event, the Secretary requests that we assume the occurrence of a lightning strike in determining whether a violation of section 75.521 is S&S. However, adopting such an assumption is not necessary to resolve this case.¹⁰

¹⁰ The Chairman and Commissioner Nakamura have cast the occurrence of a lightning strike as something that must be expressly assumed for the purposes of our S&S analysis. We disagree with this approach.

First, it is not necessary to assume anything. Congress in the Mine Act and the Secretary in rulemaking have determined that lightning may strike in close proximity to underground

(continued...)

First of all, there is no record evidence that supports the Judge's finding with respect to the Sago mine, because neither party submitted evidence on the issue. This is entirely understandable, given the nature of the accident that precipitated this proceeding.

Secondly, Congress, in passing the Coal Act and then the Mine Act, clearly did not consider the danger posed by a lightning strike on mine property to be remote. As previously outlined herein, it included the forerunner to section 75.521 in both of those statutes in substantially similar form.

Lastly, the Judge, in essence, held that no violation of the lightning arrester requirement, as well as any other lightning protection standard, could be S&S, regardless of the circumstances surrounding the violation and the number of miners exposed to the dangers resulting from lightning-induced energy having an uninterrupted conduit into the underground mine atmosphere. There is no basis for such an interpretation of S&S under the Mine Act, nor is there Commission precedent for such an application of the *Mathies* test. However rare a condition may be, if a mandatory standard addresses it, the S&S provision of the Mine Act is potentially applicable and the danger posed by the violation of the standard must at least be considered.

Even if this were a case in which the infrequency of lightning at or in dangerous proximity to the location in question had been established below, in an attempt to demonstrate that there was a minimal risk of harm posed by the violation of section 75.521, other considerations go into determining whether a violation was S&S under the circumstances. In this instance, such considerations include the expanse of cable or wire left unprotected under the standard and the number of miners subject to exposure to the dangers of a lightning-induced

¹⁰(...continued)

mines thereby presenting a danger to underground miners. A lightning strike is part of the operative context for evaluating the effectiveness of devices intended to deal with lightning strikes. Furthermore, as a matter of definition, we have noted that it is not possible to address the performance of safety features designed to arise in emergencies or highly-unusual situations without including the context. *See Cumberland Coal Res., L.P.*, 33 FMSHRC 2357, 2366 (Oct. 2011) ("The Commission has never required the establishment of the reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of evacuation standards are S&S."), *aff'd on other grounds*, 717 F.3d 1020 (D.C. Cir. 2013); *see also Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563-64 & n.5 (Aug. 2005).

Second, while there may be little apparent harm in assuming a lightning strike, which would have the same analytical utility in this case as our approach, expressing assumptions of certain facts or conditions when such assumptions are not necessary may embolden the Secretary to seek the assumption of other events, occurrences, or conditions. Without consideration of all possible permutations arising from this invitation to mischief, we cannot articulate a principled limit upon them. We therefore would hold that occurrence of a lightning strike is a necessary part of the context for evaluating measures that the Secretary has deemed prudent and necessary, whether or not it is likely to occur at a specific moment in time.

power surge via the cable or wire. Evidence was presented below on these issues, but it was not considered by the Judge in determining that the violation was not S&S.

Here, the undisputed evidence is that no lightning arresters were provided for the approximately 400 feet of telephone wire than ran to the mine portal. Tr. 613, 625-26; Gov't Ex. 11, 24. Thus, the amount of exposed wire was several times that which was permissible under section 75.521, which provides that a lightning arrester may be no more than 100 feet from where the circuit enters the mine. This had the effect of greatly increasing the risk posed by the lack of required lightning arresters. Tr. 633-34.

Similarly left unaddressed by the Judge was the un rebutted evidence regarding the underground telephone system and the use of the system. MSHA Electrical Engineer Russell Dresch, in testifying why he designated the citation as S&S with respect to the telephone wires, explained that it was designated as such because there was a discrete safety hazard associated with the violation in this instance. Tr. 681. Dresch testified that the key factor was that the wires were for

the telephone system. The communication system is used often. There is a dispatcher on the surface. He has to be in communication with the underground . . . all through the day. There are numerous reasons to use that system. So it's reasonably likely that miners will be using that system.

Tr. 681-82. Throughout the hearing the Secretary's witnesses had stressed that the system was "hard-wired," and Dresch explained that meant that anyone using any of the approximately 20 phones would be in contact with the system's electrical circuit and thus would be at increased risk for shock due to the absence of the lightning arrester required by section 75.521. Tr. 601-04, 683.

We have noted that an inspector's judgment is an important element in an S&S determination. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278 (Dec. 1998); *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825-26); see also *Buck Creek Coal*, 52 F.3d at 135-36 (stating that ALJ did not abuse his discretion in crediting opinion of experienced inspector). At a minimum, the judge should have addressed the explanation provided by Dresch.

While a remand to the Judge to consider the surrounding circumstances and, especially, the testimony of the MSHA witness who designated the citation as S&S is an option, the Secretary has requested that we reverse the Judge with respect to the third *Mathies* element. Given the record evidence in this case, we agree. See *American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

D. Mathies Element Four

As for the fourth *Mathies* element, the judge found a reasonable likelihood that an injury resulting from a lightning-induced power surge over the wires and underground mine telephone

system would be of a reasonably serious nature. 33 FMSHRC at 1199. Our review of the record evidence discloses substantial evidence in support of the Judge's conclusion.

MSHA Engineer Hedrick explained that anyone using a phone when lightning-induced energy coursed over the telephone wire would be subject to electrical shock. Tr. 635-36. Another member of the MSHA electrical investigation team at Sago, James Honaker, cited an instance in which a miner, while using a telephone two miles underground, suffered a shock. Tr. 836.

As for the seriousness of such shocks, MSHA Engineer Dresch testified that it could rise to electrocution levels. Tr. 682. MSHA Inspector Arthur Wooten described the factors that go into a person's susceptibility to electrocution and identified an instance in which electrical current as low as 32 volts had killed a miner. Tr. 310-11.

Because we have upheld the Judge on three of the *Mathies* elements and overturned his determination on the fourth, we reverse his conclusion that the Secretary failed to establish that Wolf Run's failure to equip the telephone wires with lightning arresters in violation of section 75.521 was S&S. The Judge, despite not agreeing with the Secretary that the violation was S&S, assessed the \$440 penalty the Secretary proposed. 33 FMSHRC at 1202. The Secretary has not requested a reassessment of the penalty and therefore we see no need to remand this case.

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

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

Chairman Jordan and Commissioner Nakamura, concurring:

We agree with our colleagues that the Judge erred in finding that the lightning arrester violation at issue was not significant and substantial. However, **we write separately** because in analyzing the issue of whether a violation of the lightning arrester standard was S&S, we would assume the existence of a lightning strike.

Under the S&S test articulated by the Commission in *Mathies Coal Co.*, 6 FMSHRC 1, 3 (Jan. 1984), the Secretary must demonstrate, among other things, a “reasonable likelihood that the hazard contributed to will result in an injury.” Here, the hazard is shock or electrocution. 32 FMSHRC at 1670-71. As the Secretary correctly argues, however, the lightning arrester safety standard is designed to protect miners from these hazards only in the event of a lightning strike. PDR at 19. Because the standard serves no purpose in the absence of lightning, it makes sense to assume the existence of a lightning strike when determining whether the lack of a lightning arrester is a significant and substantial violation. The relevant question then becomes whether, given the occurrence of lightning, the failure to have lightning arresters is reasonably likely to result in a serious injury or death.

The Judge in this case, however, demanded that the Secretary produce evidence of the possibility of a lightning strike. Since this is an impossible task, we agree with our colleagues that the Judge erred in requiring the Secretary to establish the reasonable likelihood of a lightning strike. His approach makes it almost impossible for the Secretary to successfully charge a lightning arrester violation as S&S. We doubt that Congress, which thought to include lightning arrester requirements in the Coal Act and Mine Act, slip op. at 6, would have approved such an outcome.

The lightning arrester standard exists to protect miners only in situations in which there is a lightning strike, so it is appropriate to assume the existence of a lightning strike in this case. *See Manalapan Mining Co.*, 18 FMSHRC 1375, 1384 (Aug. 1996) (holding that “the assumption sought by the Secretary (the existence of a fire or explosion) is to evaluate the effect of the violation (an inadequate fire deluge system) under the circumstances and conditions in which the standard was intended to provide protection”) (separate opinion of Chairman Jordan and Commissioner Marks). Forcing the Secretary to rely on meteorological evidence to prove the likelihood of lightning, as the Judge here seemed to do, diverts us from the true inquiry in this case.

The D.C. Circuit decision in *Cumberland Coal Resources, LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013), which affirmed our ruling below, is persuasive precedent for assuming a lightning strike in lightning arrester cases where S&S is at issue. In *Cumberland*, the operator was charged with failure to maintain adequate lifelines in the mine’s escapeways. In upholding our S&S determination, the court assumed the existence of an emergency when evaluating the significant and substantial nature of the violation.¹ In so doing, the court deferred to the

¹ The Commission decision in *Cumberland* also assumed an emergency, but not as
(continued...)

Secretary's reasonable interpretation of the significant and substantial provision of the Mine Act (section 104(d)(1), 30 U.S.C. § 814(d)(1)). 717 F.3d at 1026.

We are mindful that the standard in *Cumberland* was an emergency safety standard, while the lightning arrester standard in this case is not. The reasoning of the court, however, is completely apposite in this situation as well. In *Cumberland*, the court observed that if decisionmakers were told not to assume an emergency when deciding whether a violation of an emergency safety standard was S&S:

It would appear unlikely that any violation of those standards would ever be "significant and substantial." That is, the violation of those standards apparently would never, or at least rarely, contribute to the existence of the emergency so that the scale would be loaded against the finding. Given that the violation of those standards could be expected to have serious, indeed tragic, consequences, it is reasonable for the Secretary to interpret the statute and his own regulations to avoid that odd result.

Id. at 1026-27.

The Judge's approach in this case leads to the result that the *Cumberland* court, in the quotation set forth above, was determined to avoid. And, just as the D.C. Circuit acknowledged that "the likelihood of an emergency will usually have nothing to do with the violation of the emergency safety standard," *id.* at 1027, the likelihood of a lightning strike will usually have nothing to do with the violation of a lightning arrester standard.²

Our colleagues state that adopting an assumption of a lightning strike is not needed to resolve this case. Slip op. at 7. They find that the third prong of the test is met because of evidence regarding: (1) the expanse of cable or wire left unprotected; (2) the number of miners subject to exposure; (3) the frequent use of the telephone system; and (4) that the system was "hard-wired." Indeed, these are relevant factors, but only in the presence of lightning.

In addition, more puzzling is our colleagues' assertion that "[e]ven if this were a case in which the infrequency of lightning at or in dangerous proximity to the location in question had

¹(...continued)

explicitly as in the court of appeals opinion. In our decision finding that the lifeline violation was S&S, we stated that "with regard to evacuation standards, the applicable analysis under *Mathies* involves consideration of an emergency." 33 FMSHRC 2357, 2366 (Oct. 2011).

² Indeed, lightning striking a particular location is considered both proverbially and statistically rare and unpredictable. Its occurrence is not only independent of the violation at issue, but independent of the operator's mining operations. In legal parlance, it is described as an "act of God." Given this nature, it is particularly appropriate and reasonable to assume the occurrence of a lightning strike in determining whether the violation is S&S.

been established below, in an attempt to demonstrate that there was a *minimal risk of harm posed by the violation* of section 75.521, other considerations go into determining whether a violation was S&S under the circumstances.” Slip op. at 8 (emphasis added). We fail to understand how the violation could be sustained as S&S if it could pose only a “minimal risk of harm,” as S&S violations are inherently more serious.

For the reasons set forth above, we would reverse the Judge’s determination that the violation of section 75.521 was not S&S and affirm the penalty assessed by the Judge.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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August 20, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 2008-503-M
	:	
TILDEN MINING COMPANY, LC	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, 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”). At issue is whether the Administrative Law Judge correctly determined (1) that extension cords should be considered part of a grounding system subject to continuity and resistance testing under 30 C.F.R. § 56.12028¹ and (2) that the Secretary’s position requiring such testing did not constitute a substantive change in the standard requiring notice-and-comment rulemaking.

For the reasons that follow, we conclude that grounding systems include extension cords and power cables, and that the Secretary did not need to undertake rulemaking. Accordingly, we affirm the Judge’s decision.

¹ Section 56.12028 provides:

Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

30 C.F.R. § 56.12028.

I.

Factual and Procedural Background

Tilden Mining Company, LC, operates the Tilden Mine, a surface iron-ore mine in Michigan. On April 16, 2008, an inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) issued Citation No. 6400301 to Tilden, and on April 20, 2008, issued Citation No. 6400312 to Tilden. Both citations alleged a violation of 30 C.F.R. § 56.12028 for failing to test and record the resistance of extension cords used as part of the grounding system at the mine. Tilden subsequently contested the citations and proposed penalties before a Commission Administrative Law Judge.

On April 18, 2011, the Judge affirmed the citations in a decision on cross-motions for summary decision. 33 FMSHRC 876, 884-85 (Apr. 2011) (ALJ). The Judge ruled that extension cords and power cables must be tested for continuity and resistance because they are integral components of any grounding system. The Judge reasoned that a grounding system is only as protective as its weakest link, and that it is critical to ensure that all the necessary components of the grounding system are fully functional, including extension cords and cables. *Id.* at 881.

The Commission granted Tilden's petition for discretionary review.

II.

Disposition

On review, Tilden claims that the Judge's holding conflicts with *Hibbing Taconite Co.*, 21 FMSHRC 346, 355 (Mar. 1999) (ALJ), in which the Judge declined to require continuity and resistance testing on extension and power cords under section 56.12028. The operator further contends that the Judge in the instant case failed to recognize that grounding systems are stationary and involve ground beds and similar fixed facilities, while extension and power cords are mobile, scattered all over a facility, and capable of being plugged and unplugged routinely.

The operator also asserts that even if MSHA's new rule is interpretive in nature, rulemaking was required because the rule constituted a significant change in interpretation. The operator argues that MSHA's original 1988 Program Policy Manual (PPM) stated that continuity and resistance testing "do[...] not apply to grounding conductors in trailing cables, power cables, and cords which provide power to portable or mobile equipment" and that MSHA's 1994 Program Policy Letter (PPL) subsequently reversed its position on this issue. TM Br. at 13-14, *quoting* PPM at 52 (1988). The operator also argues that MSHA's allegedly inconsistent interpretations and lack of enforcement under its current interpretation render the Secretary's position unreasonable and unworthy of deference.

Finally, Tilden claims that it did not have notice that grounding systems could include extension cords without any notice-and-comment rulemaking because it reasonably relied upon the *Hibbing Taconite* decision to the contrary.

A. The Secretary’s interpretation of section 56.12028 as including extension cords and power cables within the definition of “grounding systems” is reasonable and entitled to deference.

The term “grounding systems” is undefined in the standard, and the standard is silent with regard to whether extension cords and power cables are part of a “grounding system.” Accordingly, we must defer to the Secretary’s interpretation of the standard as long as it is reasonable. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678–82 (Dec. 2010) (examining whether Secretary’s interpretation of own regulation is reasonable and entitled to deference); *Consolidation Coal Co.*, 14 FMSHRC 956, 966-69 (June 1992); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Sec’y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989).

Here, we conclude that the Secretary’s interpretation is reasonable. In order for a grounding system to function, it is essential that extension cords and power cables work properly. Extension cords supply power to tools and to portable and mobile equipment. The cords, along with all other aspects of the grounding system, must be tested for continuity, in order to prevent electric shocks to miners. Conducting a continuity test assures that the equipment being used is connected directly to the ground prong, and that the grounding circuit is complete. A grounding system is only as protective as its weakest link, which is why it is critical to ensure that all the necessary components of the grounding system are fully functional, including extension cords and cables. Otherwise, the grounding system will cease to function. *Cf. Daanen & Janssen, Inc.*, 20 FMSHRC 189, 193 (Mar. 1998) (“Because the definition of the term ‘system’ entails an interrelationship of component parts, it follows that for the system to be considered functional, each of its component parts must be functional.”).

We find unpersuasive the operator’s argument that the definition of “grounding systems” in the 1994 PPM, when read in conjunction with the three sections preceding section 56.12028, shows that extension cords and cables were not contemplated to be within section 56.12028. The three sections preceding section 56.12028 focus on *specific types of equipment* that must be *connected* to a grounding system, as opposed to the definition of “grounding system” itself.²

Similarly unavailing is the operator’s argument that “grounding systems” are stationary and involve ground beds and similar fixed facilities, and therefore do not include extension cords

² The three sections preceding section 56.12028 require the following:

All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment. 30 C.F.R. § 56.12025.

Metal fencing and metal buildings enclosing transformers and switchgear shall be grounded. 30 C.F.R. § 56.12026.

Frame grounding or equivalent protection shall be provided for mobile equipment powered through trailing cables. 30 C.F.R. § 56.12027.

and power cables, which are mobile and scattered all over a facility and are capable of being plugged and unplugged routinely. This distinction is contradicted by the language of the standards. Section 56.12025 broadly requires grounding of any metal-encased electrical circuit. Furthermore, section 56.12027 applies to any *mobile* piece of equipment powered by trailing cables. Therefore, any distinction between the stationary nature of ground beds and the mobile nature of extension cords is unpersuasive.

We also reject the operator's argument that MSHA's application of extension cords to "grounding systems" imposes an undue burden on mine operators. Although Tilden asserts that, under the Secretary's interpretation, operators would be required to test thousands of additional cords, Tilden offers no factual support for this claim.³

Accordingly, we conclude that the Secretary's inclusion of extension cords within the definition of "grounding systems" is reasonable and deserves deference.

B. The Secretary's application of extension cords and power cables to "grounding systems" is an interpretive rule that did not require notice-and-comment rulemaking.

We find that the Secretary's approach did not require additional rulemaking. The Administrative Procedure Act (APA) has several exceptions to the mandatory proposed rulemaking procedures for administrative agencies. The relevant exception here is that notice-and-comment rulemaking procedures do not apply to "interpretative rules," as opposed to legislative rules, which would require notice-and-comment rulemaking. 5 U.S.C. § 553(b)(3)(A), (B). A legislative rule is one that substantively amends the language of a regulation, whereas an interpretive rule clarifies or explains the regulation's existing language. *See, e.g., Philips Petroleum Co. v. Johnson*, 22 F.3d 616, 619-21 (5th Cir. 1994); *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331-33 (D.C. Cir. 1952).

We agree with the Judge that the Secretary's application of extension cords to "grounding systems" clarifies and explains the language of the standard, and is thus an interpretive rule. 33 FMSHRC at 881-83. As stated above, the Secretary's approach is a reasonable interpretation of section 56.12028. Accordingly, it did not require notice-and-comment rulemaking.

³ The Secretary states that the term "installation" in section 56.12028 only requires that continuity and resistance testing be done when an extension cord or cable is first put into use, as opposed to every time the cord or cable is subsequently plugged in. He further states that this interpretation does not impose an undue burden. *See* Sec. Response Br. at 14.

C. The existence of the 1988 PPM does not require the Secretary to undertake notice-and-comment rulemaking.

The fact that the Secretary's interpretation is arguably inconsistent with his prior interpretation in the 1988 PPM does not require the Secretary to undertake notice-and-comment rulemaking. The operator argues that the 1988 PPM had expressly exempted "grounding conductors in trailing cables, powers cables, and cords which provide power to portable or mobile equipment" from continuity and resistance testing requirements, and that MSHA's 1994 PPL subsequently reversed its position on this issue. TM Opening Br. at 13-14, *quoting* PPM at 52 (1988). Tilden relies on the D.C. Circuit's decision in *Alaska Professional Hunters v. Federal Aviation Administration*, 177 F.3d 1030, 1034 (D.C. Cir. 1999), which states that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."

The operator's reliance on *Alaska Hunters* is misplaced. That decision is readily distinguishable from the present case.⁴ *Alaska Hunters* has been interpreted by the D.C. Circuit narrowly. Under the decision, a requirement for notice-and-comment rulemaking was only triggered when an agency's previous interpretation was sufficiently definitive to justify a regulated party detrimentally relying on it. *See, e.g., Air Transp. Ass'n of America, Inc. v. FAA*, 291 F.3d 49, 56-58 (D.C. Cir. 2002); *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 579-80 (D.C. Cir. 2010). MSHA's original 1988 PPM was not definitive. Moreover, the operator cannot show substantial and justifiable reliance because it only alleges reliance on a non-precedential decision of an Administrative Law Judge rather than on MSHA's prior interpretation.

MSHA's 1988 interpretation was not definitive because it was internally inconsistent and therefore ambiguous with respect to whether section 56.12028 required annual testing of cables and cords. The operator's assertion that the 1988 PPM excepted the cables at issue here, stating that the annual test "does not apply to grounding conductors in trailing cables, power cables and cords," was contradicted by the very next sentence in the PPM, which stated that the same cables "require[d] more frequent testing," even though such testing was not mandated under any other standard.⁵ PPM at 52 (1998). MSHA's transition from the ambiguous interpretation in the 1988 PPM to the clarified interpretation in the 1994 PPL therefore did not require notice-and-comment rulemaking. In *Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Administration*, 296 F.3d 1120, 1126 (D.C. Cir. 2002), the D.C. Circuit held that prior regulatory guidance that

⁴ The Commission notes that the Supreme Court has granted certiorari to decide the general validity of the *Alaska Hunters* doctrine. *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted sub nom. Perez v. Mortgage Bankers Ass'n*, 82 U.S.L.W. 3533 (U.S. June 16, 2014) (No. 13-1041). However, we need not reach this issue because, as stated above, *Alaska Hunters* does not apply here.

⁵ To add to the ambiguity, although the 1988 PPM specifically stated that the "annual" test did not apply, it was silent as to whether testing nevertheless applied to trailing cables, power cables and cords under section 56.12028 when installed, modified or repaired.

“offer[ed] some support for the positions of both” parties could therefore “only be described as—at best—ambiguous.” A change to ambiguous guidance does not require notice-and-comment rulemaking because it “cannot be said to mark a definitive interpretation from which the agency’s current construction is a substantial departure.” *Id.*

Furthermore, the operator cannot show substantial and justifiable reliance here because: (1) it does not allege any reliance on the prior interpretation, and any reliance it might allege would not be sufficiently substantial; (2) the operator’s alleged reliance on *Hibbing Taconite* does not trigger the *Alaska Hunters* rule; and (3) even if the operator’s alleged reliance on *Hibbing Taconite* triggered *Alaska Hunters*, such reliance would not be justifiable in light of later events.

In *Alaska Hunters*, the Court placed great emphasis on the fact that the Alaskan guide pilots substantially relied on the prior agency interpretation when they made capital expenditures and significantly altered business practices. 177 F.3d at 1035. *Alaska Hunters* does not apply here because the operator did not make any such investments or other significant business decisions in reliance on MSHA’s prior interpretation. *Cf. Ass’n of Am. R.R. v. Dep’t of Transp.*, 198 F.3d 944, 950 (D.C. Cir. 1999). Indeed, the operator does not assert that it made any business decisions in reliance on the interpretation prior to the interpretive change in 1994. Rather, the operator asserts only that it relied upon the Judge’s ruling in *Hibbing Taconite* from 1999 onward to justify its non-compliance with MSHA’s interpretation of the standard.

The operator’s reliance on the Judge’s decision in *Hibbing Taconite* does not trigger application of *Alaska Hunters*. It is clear that ALJ decisions have no precedential value. Commission Procedural Rule 69(d), 29 C.F.R. § 2700.69(d). Under the operator’s theory of reliance, however, MSHA would nonetheless be required to engage in notice-and-comment rulemaking any time it enforced a regulation in a manner contrary to a non-precedential decision by a Judge. This theory has no support in the reasoning of *Alaska Hunters* or its progeny, which deal only with reliance on a definitive prior agency interpretation.

Even if, assuming arguendo, substantial reliance on a non-precedential adjudication could trigger *Alaska Hunters*’ notice-and-comment rulemaking requirement, such rulemaking would still not be necessary here because the operator’s reliance is unjustifiable in light of subsequent events. As the operator itself concedes, MSHA reiterated its 1994 interpretation of “grounding systems” when it published the revised PPM in 2003. PPM at 44-45 (2003). Thus, even if the operator had erroneously believed that MSHA had abandoned its 1994 interpretation when the Secretary decided not to appeal in the *Hibbing Taconite* decision, the 2003 PPM put the operator on notice that it had incorrectly perceived MSHA’s position.

D. The operator had actual notice of MSHA’s position regarding its interpretation of “grounding systems.”

As stated above, MSHA reiterated its 1994 interpretation of “grounding systems” when it published the revised PPM in 2003, five years before the Secretary undertook the current enforcement action. Therefore, the 2003 PPM provided actual notice to the operator of MSHA’s enforcement position. Due process is satisfied when an agency gives actual notice of its

interpretation prior to enforcement. *See, e.g., Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996) (holding that actual notice was provided by MSHA prior to issuance of citation); *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that agency's pre-enforcement warning to bring about compliance with its interpretation will provide adequate notice).

III.

Conclusion

For the reasons stated above, we affirm the Judge's denial of Tilden's motion for summary decision and his granting of the Secretary's cross-motion for summary decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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August 21, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. SE 2008-881
v.	:	SE 2008-268-R
	:	
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

This consolidated contest and civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). At issue is whether a Commission Administrative Law Judge abused his discretion in reducing a civil penalty assessed against Jim Walter Resources, Inc. (“JWR”) for a failure-to-wear-fall-protection violation of 30 C.F.R. § 77.1710(g).¹ 33 FMSHRC 362 (Feb. 2011) (ALJ). The citation was issued to JWR following a fall by an employee of JWR’s contractor, O&O Services. The Judge assessed a penalty of \$500 rather than the proposed penalty of \$45,000. *Id.* at 370-71. The Secretary of Labor filed a petition for discretionary review, challenging the penalty reduction, the Judge’s finding that JWR was not negligent, and the Judge’s related treatment of evidence regarding two prior incidents involving violations of section 77.1710(g) by JWR. For the reasons that follow, we affirm the Judge’s decision.

¹ 30 C.F.R. § 77.1710 provides in part that, “Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below.” Paragraph (g) provides:

Safety belts and lines where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

30 C.F.R § 77.1710(g).

I.

Factual and Procedural Background

The clean coal load-out facility at JWR's No. 4 Mine funnels clean coal into trucks and rail cars. Clean coal is moved by conveyor belt to the top of the facility, where it is dumped into a large, downward pointing metal cone-shaped loading bin. The cone surrounds an opening in the floor of a platform, which is approximately 21 by 48 inches in size. The cone funnels and loads the coal into trucks parked beneath the loading bin. Tr. 64, 117; JWR Exs. 6g-6i.

JWR contracted with O&O to provide the labor and supervision for a project to replace the cone-shaped bin. 33 FMSHRC at 364. O&O was to remove the eight sections of the cone and replace them with new sections.

O&O's work on the project began on December 2, 2007. *Id.* Loops, called "pad eyes" were welded onto the existing bin and the new sections of the cone. *Id.* at 370; Gov't Ex. 20F; Tr. 334-35, 389. The loops could be used to lift the structure's pieces or for miners to tie-off on them. Tr. 389. Removal of the cone sections exposed the hole in the floor of the platform. During part of the project, the hole was covered with a metal plate that had metal fins, or "gussets," protruding from it. Tr. 64-65.

On December 4, two issues arose regarding the project. Tr. 319-21. First, there were concerns that part of the structure had been unevenly cut, which could potentially result in gaps between the new cone sections. Tr. 233-36, 263-64, 277, 310. Second, O&O experienced difficulty in positioning some of the new sections of the cone into place because the metal fins on the metal plate covering the hole in the platform were interfering with placement of the pieces. Tr. 67-68, 312.

At some point during installation of the cone pieces, the metal plate was moved away from covering the entire hole and a section of 2 x 12 wooden board was placed over the open space, partially covering the hole. Tr. 78, 317, 393. Tony Pierce, an O&O employee, stood on the board using a pry bar to move the fifth cone section into place. Tr. 67, 109-10, 117-18, 316-17. The board was dislodged, and Mr. Pierce fell through the hole a distance of 25 feet and landed on a concrete platform. Tr. 81, 139. Pierce was not wearing a safety belt or fall protection. Tr. 113.

The Department of Labor's Mine Safety and Health Administration ("MSHA") investigated the accident. As a result of the investigation, MSHA Inspector Stephen Womack issued citations to O&O and JWR. The citation issued to O&O alleged a significant and substantial ("S&S") violation of section 77.1710(g) that had been caused by O&O's unwarrantable failure.² Gov't Ex. 2. The Secretary proposed a penalty of \$60,000 against O&O.

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and
(continued...)

O&O agreed to pay \$5,000 in settlement of the citation, and the Judge approved the settlement. 33 FMSHRC at 364 n.1; PDR at 3, 4.

The citation issued to JWR, Citation No. 7693051, alleged an S&S violation of section 77.1710(g) that had been caused by moderate negligence. Gov't Ex. 3. The citation was terminated on February 5, 2008, after "[JWR] management . . . submitted to MSHA a statement indicating that a greater emphasis on the use of PPE [personal protective equipment] will be related to contractors doing work on JWR No. 4 mine property, and during the process of hazard training will review recent accidents of contractor employees." *Id.* The Secretary proposed a special assessment of \$45,000 against JWR.³

JWR challenged the citation, and the parties conducted discovery and filed prehearing pleadings. Prior to and during the hearing, the Judge granted in part a motion in limine filed by the operator seeking to exclude evidence that had been the subject of previously issued protective orders. PDR at 3 n.1; Tr. 7-10. The Judge excluded evidence regarding a 2001 incident, including proposed Gov't Ex. 13A, which is a citation issued to JWR alleging a violation of section 77.1710(g). Tr. 7-8, 10. The Judge admitted evidence regarding a 2007 incident, including a citation issued to JWR for a violation of section 77.1710(g) arising from a fatal fall by JWR's contractor (Gov't Ex. 9) and a decision approving settlement regarding the 2007 incident (Gov't Ex. 11). Tr. 134-35. The Judge excluded other evidence regarding the 2007 incident. Tr. 5, 7.

Following a hearing on the citation issued to JWR, the Judge affirmed the citation and assessed a civil penalty of \$500 against JWR rather than the proposed penalty of \$45,000. 33 FMSHRC at 368, 370-71. He concluded that O&O violated the standard, and that the violation was S&S. *Id.* at 368-69. The Judge reasoned that because the Secretary may cite JWR as an owner-operator for its contractor's violations, JWR was also liable for the violation. *Id.* at 368.

Applying the factors set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), in his assessment of penalty, the Judge found that JWR is a large business, that there was no evidence that the proposed penalty would affect its ability to remain in business, and that the violation was abated promptly and in good faith. *Id.* at 369. The Judge further found that gravity was high, and that JWR had a significant history of violations. *Id.* at 368-69.

²(...continued)

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).

³ In the Secretary's determination of a proposed penalty amount, the Secretary may propose a "regular assessment" under 30 C.F.R. § 100.3 or a "special assessment" under 30 C.F.R. § 100.5.

Regarding negligence, the Judge noted that Inspector Womack testified that JWR was moderately negligent because it did not do “everything [it] could” to see that its contractor was following federal regulations. *Id.* at 369-70. The Judge reasoned that the Secretary was in essence suggesting that JWR must maintain direct and continuous supervision over its contractor’s employees, but that such a requirement is not required by law. *Id.* at 370. He stated that the closest the Secretary had come to providing notice as to the standard of care required of JWR was the abatement required regarding the 2007 incident. *Id.* Those abatement actions included additional training and requiring JWR to install an adequate anchorage system. *Id.* The Judge found that, in this instance, JWR had provided an adequate anchorage system and that O&O employees were provided adequate training prior to beginning work. *Id.* The Judge concluded, accordingly, that JWR exercised the standard of care required by law and that the Secretary failed to prove that JWR was negligent. *Id.*

The Secretary filed a petition for discretionary review challenging the Judge’s finding that JWR was not negligent, the Judge’s treatment of evidence regarding the 2001 and 2007 incidents, and the Judge’s reduction of penalty. The Commission granted the Secretary’s petition.

II.

Disposition

A. The Judge’s Finding that JWR was Not Negligent Is Supported by Substantial Evidence.

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.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider 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.⁴ *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

⁴ 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 JWR was negligent. 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). 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. *Deshetty, emp. by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984), *aff’g Sellersburg Stone Co.*, 5 FMSHRC 287 (Mar. 1983) (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties . . . we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”).

Considering JWR's conduct against this framework, we conclude that substantial evidence supports the Judge's determination that JWR was not negligent.⁵ The record demonstrates that JWR was not negligent in hiring O&O. O&O had no prior MSHA violations. Tr. 197, 333, 414. O&O had completed other projects for JWR safely, including three or four that year, and was considered an "approved vendor" for JWR. Tr. 274, 292-93. JWR also determined that O&O was appropriately aware of MSHA's regulations. JWR ensured that O&O had received required training before work on the project began. Tr. 299, 349-50. As part of their hazard training, O&O's employees watched an MSHA fall protection video. Tr. 387, 400-02. O&O's training program had been approved by MSHA. Tr. 185-86, 414. Robin O'Dell, an employee of O&O who provided training, was an MSHA certified trainer. Tr. 387, 398-401.

Furthermore, we disagree with the Secretary's argument that JWR failed to adequately monitor O&O's compliance with safety standards once O&O began work. The project was relatively brief in duration. O&O began the project during the night shift Sunday and had removed the cone and was in the process of replacing the fifth of eight cone pieces at the time of the accident on the following Tuesday morning. Tr. 67, 173, 232, 275. JWR Senior Maintenance Engineer Jerry Pullen met with O&O on Tuesday, and JWR Project Supervisor Randy Osborne and JWR Plant Manager Alan Smith met with O&O at the site on Monday and Tuesday mornings. Tr. 231-32, 261-62, 276-77. Osborne and Smith testified that at the time that they were on the site, they did not observe any miners who were in danger of falling who were not wearing fall protection. Tr. 260-61, 266, 299. Smith testified that he had previously seen O&O employees working at heights on previous projects, and that they had been wearing and using fall protection. Tr. 295. Inspector Womack testified that he had been informed by O&O Foreman Kris Gamble that Pierce had been wearing fall protection earlier in the day of the accident when he was on a ladder. Tr. 108-09, 177.

There is likewise no evidence that there was an unusual condition that should have alerted JWR to a hazardous condition. Fall protection equipment had been provided and was located in the area of the accident, and pad eyes used for tying off had been installed on the cone sections. 33 FMSHRC at 370; Gov't Exs. 20F, 20H; Tr. 73, 334. There were no allegations that use of the metal plate with gussets to cover the hole was negligent.

In addition, JWR had not been informed that O&O was having difficulty installing the cone sections because the gussets of the plate covering the hole interfered with placement of the sections. Tr. 231-32, 263-64, 268-69, 320-21. Pullen's and Osborne's testimony that they had not been informed of the problem with the plate was corroborated by O&O Foreman Gamble, who testified that although he discussed with Pullen and Osborne the problem involving the cone sections not matching up because one had not been cut level, he did not discuss the plate

⁵ When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

problem. Tr. 320-21. On the morning of the accident, Pullen and Osborne were in the area of the plate covering the platform but saw no hole in the platform because the hole was covered at the time of their visit. Tr. 235, 243, 245, 264-65, 267.

Substantial evidence also supports the Judge's finding that JWR was not aware that Pierce was working over the open hole or that Pierce failed to wear fall protection. 33 FMSHRC at 370. As discussed above, Pullen and Osborne testified that at the time they were at the site, the hole in the platform was covered. Tr. 243, 245, 265, 267. Smith testified that he was not aware that O&O had installed a plate over the hole or that it had been moved. Tr. 280-81.

The Secretary fails to describe any specific action that JWR did not take to meet its standard of care. Rather, Inspector Womack explained that the citation had been issued to JWR because MSHA believed there was negligence and JWR "did not do everything [it] could" to see that the contractor was following regulations. Tr. 125. The inspector's accident investigation report does not specify any actions or failure to act by JWR that contributed to the violation. Rather, the report only states that "the contractor [O&O] failed to adequately control the work site and workers actions." Gov't Ex. 6 at 2 (emphasis added); Tr. 126-27, 160-61, 211-12. We conclude that substantial evidence supports the Judge's determination that the Secretary did not meet her burden of proving negligence on the part of JWR. 33 FMSHRC at 370.⁶

B. The Judge Did Not Err in his Treatment of the 2001 and 2007 Incidents.

The Secretary contends that the Judge failed to consider the 2001 and 2007 incidents, which the Secretary argues should have put JWR on notice that it was not meeting its standard of care. He does not dispute the Judge's exclusion of evidence with respect to the 2007 incident but, rather, argues that the Judge failed to adequately consider the 2007 violation in finding that JWR was not negligent. Sec. Reply Br. at 1-2 n.1, 6. Regarding the 2001 incident, the Secretary contends that the Judge erred in excluding proposed Gov't Ex. 13A, the citation issued to JWR arising from the 2001 incident. Sec. Reply Br. at 1-2 n.1. The Secretary explains that the Judge

⁶ Our colleagues agree with us that the appropriate legal standard to determine negligence in this matter is the reasonably prudent person standard. Slip op. at 12. They would remand the case and instruct the Judge to apply this standard to the facts in the record. This would be an unnecessary exercise, since the Judge articulated and applied a standard that was similar, and that took into account the reasonableness of the operator's actions 33 FMSHRC at 369-70 ("Negligence has been defined as conduct involving an unreasonably great risk of causing damage or conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm."). Finally, even if the foregoing had not occurred, remand here is not necessary because the evidence in this case supports no other conclusion than that the Secretary failed to prove that JWR was negligent. *See American Mine Svcs., Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993) (holding that remand would serve no purpose because the evidence presented on the record supported no other conclusion than that the operator's conduct was not unwarrantable).

excluded the citation because “he believed it was ‘too old to represent an expression of the [Secretary’s] unreviewable prosecutorial discretion in late 2007.’” *Id.* at 3. The Secretary submits that his discretion to cite an owner for the violations of its independent contractor is unreviewable and because the Judge had no authority to even consider the Secretary’s prosecutorial discretion, he abused his discretion in excluding the citation. *Id.*

When reviewing a Judge’s evidentiary rulings, the Commission applies an abuse of discretion standard. *Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2356 (Aug. 2013). An abuse of discretion may be found when “there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” *Id.* (quotations and emphasis omitted).

In his negligence analysis, the Judge noted that the 2007 citation involved “a prior violation of the same standard by JWR about one month before the incident herein and involving a fatal fall accident of an employee of a JWR contractor.” 33 FMSHRC at 370. He considered the accident to determine the notice provided to JWR of the required standard of care. *Id.* The Judge noted the actions required by the Secretary for JWR to abate the 2007 violation (providing additional training and installing an adequate anchorage system to secure personnel from falling) and that JWR had taken those actions before the time that the subject accident occurred. *Id.* As noted above, the anchorage system available at the subject accident site and JWR’s actions in ensuring that O&O had received adequate training are relevant to the consideration of negligence. Accordingly, we conclude that the Judge adequately considered the 2007 violation in his negligence analysis.

We further conclude that the Judge did not abuse his discretion in excluding proposed Gov’t Ex. 13A, the citation issued to JWR arising from the 2001 incident. After viewing in context the Judge’s statement, it is clear that the Judge was not actually considering the Secretary’s prosecutorial discretion. *See, e.g.*, Tr. 25 (stating in part, “I am referring to notice. I don’t have any problem with exercising discretion”). Rather, the Judge’s statements demonstrate that he considered the standard of care required of an owner-operator in cases in which its independent contractor has been cited to be vague, and that the 2001 citation did not provide notice to JWR of what was expected of it at the time of the subject accident. Tr. 17-19, 25-27; *see also* 33 FMSHRC at 370 & n.5. Thus, the Judge’s exclusion of the 2001 citation was not based on an erroneous conclusion that he could consider the Secretary’s prosecutorial discretion in citing JWR.

In any event, even if we were to conclude that the Judge erred in excluding Gov’t Ex. 13A, we would find such error to be harmless. For the reasons discussed above, we find substantial evidence in the record supporting the Judge’s negligence holding, and consideration of the 2001 citation would not alter our conclusion.

C. The Judge Did Not Err in Reducing the Penalty Amount.

The Secretary argues that the Judge abused his discretion in reducing the penalty assessed against JWR from the proposed amount of \$45,000 to \$500. He asserts that the Judge failed to explain the reduction adequately, even if the reduction were based on his no negligence

finding, because the Judge also found the violation history to be significant and gravity to be high. The Secretary contends that a Judge may not give dispositive weight to any one penalty factor.

Commission Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *See, e.g., Cantera Green*, 22 FMSHRC 616, 620 (May 2000). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Although there is no presumption of validity given to the Secretary's proposed assessments, the Commission has recognized that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Cantera Green*, 22 FMSHRC at 620-21. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

We conclude that the Judge did not abuse his discretion in assessing the penalty. The Judge addressed and made findings on all six section 110(i) factors in his assessment of penalty. 33 FMSHRC at 369-70.

The Commission has recognized that in assessing a civil penalty, there is no requirement that equal weight must be assigned to each of the penalty assessment criteria. Rather, "Judges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001), *citing Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Indeed, the Commission has held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other

penalty criteria.⁷ *Lopke*, 23 FMSHRC at 713; *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

The Judge did not err by weighing the negligence criterion more heavily than the other section 110(i) factors in assessing the penalty against JWR. In proposing a penalty, the Secretary weighs the gravity criterion more heavily than the negligence criterion. PDR at 7. However, the Judge was not required to weigh the criteria in assessing the penalty in the same manner that the criteria are weighed in the proposal of a penalty. In determining the amount of a penalty, neither the Judge nor the Commission is restricted by the penalty proposed by the Secretary. *Musser Engineering*, 32 FMSHRC at 1288 (citations omitted). See also 29 C.F.R. § 2700.30(b) (“In determining the amount of a penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party.”).

Moreover, when cited for a contractor’s violation, an owner-operator is strictly liable for the violation and its fault, or lack thereof, may be taken into account only in the consideration of negligence during penalty assessment. *Int’l Union, UMWA v. FMSHRC*, 840 F.2d 77, 83-84 (D.C. Cir. 1988); *Musser*, 32 FMSHRC at 1272, citing *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff’d*, 868 F.2d 1195 (10th Cir. 1989) (“the operator’s fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty”). Here, the Judge appropriately considered JWR’s fault, or lack thereof, in his determination of negligence and assessment of penalty. Accordingly, we affirm the Judge’s assessment of a penalty of \$500.⁸

⁷ We conclude that *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511 (Sept. 1997), the case cited by the Secretary to support his argument, is distinguishable. In that case, the Commission vacated the penalty assessed by the Judge because the Judge only addressed and made findings with respect to one of the six criteria. 19 FMSHRC at 1518. Here, as noted, the Judge addressed and made findings on all six criteria.

⁸ We note that if the penalty had been proposed as a regular assessment (rather than a special assessment) with a finding of no negligence, the proposed penalty would have been within the general range of the \$500 penalty assessed by the Judge. Cf. *Sedgman*, 28 FMSHRC 322, 327 n.6 (June 2006) (noting that the Secretary proposed a penalty of \$1,270 against JWR for its violation of section 77.1710(g)).

III.

Conclusion

For the reasons discussed above, we affirm the Judge's determination that JWR was not negligent, his treatment of evidence regarding the 2001 and 2007 incidents, and his assessment of penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

Commissioners Young and Cohen, dissenting:

We cannot agree with the Judge's analysis of JWR's negligence in this case, which fails to fully appreciate the context in which this violation occurred or to analyze the operator's duty in that context. While we do not believe the record requires reversal, we would remand the case for re-evaluation of the negligence and, if necessary, reconsideration of the penalty.¹ Accordingly, we dissent.

The near-fatal fall in this case was the third time in seven years that a contractor's employee had fallen at a JWR operation while working, unprotected, at height. The previous two falls, in 2001 and 2007, had been fatal. The miner in this case fell 25 feet onto a concrete pad, was seriously injured, and easily could have been killed. Tr. 139.

The Judge seemed to lack sufficient grasp of the influence that the prior falls might reasonably have exerted on JWR's appreciation of the potential danger. It may well be that JWR was justified in trusting O&O to safely oversee its own workers, using JWR's remedial abatement measures and fall protection which O&O should have known was required under the circumstances. However, the owner-operator's conduct here must also be properly evaluated in light of the Act and the duties it imposes upon operators.

We thus agree with the Secretary that the Judge improperly imposed an additional burden on the Secretary to provide notice to an owner-operator of the standard of care owed to contractor employees. While the allocations of duty and responsibility may vary under different circumstances, an operator of a mine does indeed owe a high duty of care to all miners working in that mine, including contractor employees.

This is organic to the structure and purpose of the Act. Section 2 of the Mine Act notes the terrible toll exacted by unsafe and unhealthful conditions and practices in the nation's mines and provides that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines." 30 U.S.C. § 801(e).

Thus, while the Judge agreed with JWR that it had not been provided with notice of the standard of care, 33 FMSHRC 362, 369-70 (Feb. 2011) (ALJ), the Act itself imposes a duty to prevent unsafe conditions or practices. Furthermore, while 30 C.F.R. Part 100 is not binding on the Commission,² it clearly provides notice to operators of the Secretary's conception of the duty

¹ We agree with the majority that if the Judge properly analyzes the negligence element and explains a significant reduction in the penalty based on that element alone, as he did in this case, he has not abused his discretion.

² The majority misapprehends the significance of Section 100.3. *See slip op.* at 4, n.4.
(continued...)

owed to miners under the Act. Section 100.3(d) informs JWR and every other operator of the Secretary's expectation of the "high standard of care" owed to all miners in its mines, and of its responsibility to "be on the alert" for unsafe practices or conditions and "take steps necessary to correct or prevent them." PDR at 8-9, *citing* 30 C.F.R. § 100.3(d).³ The regulation goes on to flatly state that the failure to do so constitutes negligence. *Id.* The operator should have at least known the Secretary's expectations, expressed in a published regulation.

Thus, the question posed by this case is not whether JWR did "everything they [sic] could," 33 FMSHRC at 369, but whether the operator failed to apprehend the evident danger in this case and to take such steps as a reasonable person, familiar with the mining industry and the protective purposes of the Act, would take under the circumstances to prevent miners from being exposed to a risk of injury or death. The majority acknowledges this as the correct standard. Slip op. at 4, citing *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984). However, the majority then analyzes JWR's duty in terms of substantial evidence, disregarding the Judge's legal error in miscasting the concept of negligence in this case. Slip op. at 5.

In evaluating an operator's duty, and its possible breach, context is crucial. Yet the Judge utterly failed to consider two nearly identical, fatal injuries to contractor employees in JWR's recent history. One of the two falls happened a mere four months before the fall in this case. G. Ex. 9; PDR at 13-14. Instead of considering the two prior falls by contract employees, he misapplied the law and excluded evidence of the 2001 accident altogether, on grounds that it was "too old" to provide notice to JWR of MSHA's policy of prosecuting injuries to contract

²(...continued)

To the extent the Judge held that the operator did not have notice of the duty it owes its miners, he is refuted by a published regulation, and the well-understood operation of the broad definition of "miner" under the Act.

³ Section 100.3(d) provides in part:

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.

30 C.F.R. § 100.3(d) (emphasis added).

employees. Tr. 10.⁴ The Secretary correctly questions how a fatal accident only seven years earlier could have faded from memory. PDR at 13. Indeed, it is not unreasonable to expect it to have become part of JWR's consciousness on safety issues involving contractors.

As the Secretary notes (PDR at 12; Sec. Reply Br. at 4-5), as demonstrated by Alabama law, for example, a Judge should have considered both accidents as evidence of negligence, "so long as the conditions of the prior incidents are substantially similar" – in this case, they are nearly identical – "and are not too remote in time." *See e.g., Wyatt v. Otis Elevator Co.*, 921 F.2d 1224, 1227 (11th Cir. 1991). Here, the Judge did not do so, nor did he explain why a fatal accident seven years earlier at one of the operator's own work sites was too remote in time, a fact we cannot accept as self-evident.

If the 2001 fatality was at least arguably relevant to JWR's negligence, the 2007 fatality was doubly so. The Judge therefore was required to determine whether a reasonably prudent person would have recognized the danger that event evinced, as well as the possibility that this fall and the 2001 fatality may have represented a pattern of inadequate contractor attention to the safety standards governing fall protection. Instead, the 2007 accident, which was the subject of evidence presented to the Judge,⁵ is not meaningfully considered in his negligence analysis. The majority errs in miscasting the relevance of the very recent fatality in nearly identical circumstances. The important question is not JWR's notice of the standard of care. *See slip op.* at 7; 33 FMSHRC at 369-70. It is whether and how JWR's duty to protect the workers in its mines, in light of an incident that a reasonable person would have to consider in determining how to uphold that duty, was fulfilled.

The Judge therefore erred in two significant regards. His understanding of JWR's duty did not conform to the expectations of the Mine Act and the regulations implementing it, and he failed to consider incidents similar enough to be relevant to JWR's knowledge and actions in the context of this case. The result is an improperly constrained view of the operator's actions here. The Judge faults the Secretary for "suggesting that JWR must maintain direct and continuous supervision over its contractor's employees" to ensure fall protection is employed when required, 33 FMSHRC at 370. But his opinion is devoid of analysis of any lesser measures that JWR might have undertaken in these circumstances, in light of a recent history of contractor employees falling to their deaths.

⁴ The fact that the Secretary did not articulate the law properly below does not excuse the Judge's legal error, which we review *de novo*. As the majority acknowledges, a decision based on an improper understanding of the law is abuse of discretion *per se*. *Slip op.* at 7, citing *Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2356 (Aug. 2013).

⁵ The Judge also took testimony on the 2001 incident as a proffer to preserve the facts for a possible appeal. Tr. 222-26. As noted above, failure to consider the 2001 incident was erroneous.

The Judge thus never considered whether, for example, JWR might have averted the severe consequences in this case by taking a more safety-conscious approach, such as reminding the contractor specifically, before commencing work each day,⁶ of the steps JWR had taken to provide a safe work environment, and the need for the contractor to ensure its employees used the fall protection JWR had made available.

This is not a case where the operator “did nothing.”⁷ Nor is it a case where the operator should be excused without reflection for “not doing everything it could.” It is instead a garden-variety negligence case, in which the operator’s conduct must be properly evaluated against the expectations imposed upon a reasonable operator in the same context. The Judge failed to recognize this, and we therefore dissent and suggest that the case should be remanded for a proper analysis of the operator’s conduct.

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

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

⁶ Chris O’Dell of O&O testified that the contractor had a safety meeting each morning on the job and that fall protection was specifically addressed. Tr. 332. There is no evidence of any JWR representatives discussing fall protection with O&O employees at the daily meetings.

⁷ As the operator says in its brief, witnesses for O&O noted that JWR routinely applied pressure to contractors to abide by safety rules, especially those pertaining to fall protection. JWR Br. at 7; Tr. 330-31. JWR also discussed fall protection with O&O each time the contractor bid on a job, and JWR expressly told O&O that “[i]f we didn’t follow safety procedures as in tying off . . . we would be escorted off the site.” JWR Br. at 7; Tr. 384. We note that the Judge did not evaluate these actions either, and on remand would be required to do so under the appropriate standard of care.

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WASHINGTON, DC 20004

August 22, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. KENT 2008-260
v.	:	KENT 2008-986
	:	KENT 2009-1154
MCCOY ELKHORN COAL CORP.	:	
	:	
and	:	
	:	
JASON ROBINSON, employed by	:	
MCCOY ELKHORN COAL CORP.	:	

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

DECISION

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). They involve two citations issued by the U.S. Department of Labor’s Mine Safety and Health Administration (“MSHA”) to McCoy Elkhorn Coal Corporation for permitting combustible material to accumulate in the active workings of its mine and for its failure to record those accumulations in its preshift report. MSHA also sought to impose personal liability under Mine Act section 110(c), 30 U.S.C. § 820(c), against McCoy Elkhorn foreman Jason Robinson for the accumulations violation.¹ At issue is whether the Administrative Law Judge correctly determined that: (1) the accumulations violation was significant and substantial (“S&S”);² (2) the violation was a result of unwarrantable failure;³ (3) Robinson should be held personally

¹ MSHA also charged two other foremen – James Slone and Michael Diamond – with personal liability under section 110(c), but the Judge vacated the citations issued to Slone and Diamond. 33 FMSHRC 2403, 2424-25 (Oct. 2011) (ALJ).

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). (continued...)

liable for the accumulations violation; and (4) the preshift violation was a result of high negligence. 33 FMSHRC 2403 (Oct. 2011) (ALJ). For the reasons that follow, we affirm the Judge in result.

I.

Factual and Procedural Background

On October 17, 2007, at approximately 8:00 a.m., MSHA Inspector Brian Dotson arrived at McCoy Elkhorn's No. 15 Mine for an inspection. Tr. I 182-83; 33 FMSHRC at 2408. Before going underground, the inspector examined the preshift examination books at the mine office, and noted that no conditions were listed on the preshift books for the 001/002 section, the section at issue in this case. Tr. I 180; 33 FMSHRC at 2409. The 001/002 MMU section was known as a "supersection," in which two continuous miners cut simultaneously across nine entries. *Id.* at 2406. The left-side continuous miner mined entries one through four and the right-side continuous miner mined entries five through nine. In the mine office, Inspector Dotson also noticed that a computer screen which listed the belt lines and CO sensors depicted that the belts were operational and running. Tr. I 179, 352-53; 33 FMSHRC at 2408.

Inspector Dotson proceeded underground and arrived at the 001/002 MMU section at approximately 10:00 a.m. *Id.* at 2409. Foreman Jason Robinson was in charge of the first shift of the day at that time. Tr. I 80; *id.* at 2408.⁴ The inspector observed accumulations ranging from 8 to 24 inches in depth on the mine floor roadways, in four crosscuts and in all nine entries of the 001/002 section. Tr. I 171, 189; Gov't Ex. 5, 10/17/07 notes at 6; 33 FMSHRC at 2409. The accumulations consisted of float coal dust and loose coal that were dry and black in color and had not been rockdusted. Tr. I 189-90, 223-29; 33 FMSHRC at 2409.

The inspector's notes, written at the time of the inspection, indicated that foreman Robinson said that he knew the entire section "was dirty from the feeder to the face [and that the] third shift was supposed to clean [the night before] but didn't do [a] very good [job]." Tr. I 171; Gov't Ex. 5, 10/17/07 notes at 7. Dotson's notes also stated that Robinson said "when he arrived on the section this morning [Robinson] finished cutting . . . where the miners⁵ were in [the] 3R

³(...continued)

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."

⁴ At the time of the citations, there were three shifts at the mine. Jason Robinson was the section foreman for the first shift that worked from 6:00 a.m. to 2:00 p.m. James Slone was the section foreman for the second shift that began at 2:00 p.m. and ended at 10:00 p.m. Michael Diamond was the section foreman for the third shift that began at 10:00 p.m. and ended at 6:00 a.m. Tr. I 172; Gov't Ex. 5, 10/17/07 notes at 7-8; 33 FMSHRC at 2407.

⁵ The word "miners," as used by Inspector Dotson in his testimony and notes, refers to
(continued...)

and 5 Heading.” Tr. I 171, 191; Gov’t Ex. 5, 10/17/07 notes at 7; 33 FMSHRC at 2410. When the inspector arrived on the 001/002 section, no mining was ongoing, and Robinson’s crew was cleaning up coal accumulations with shovels. Tr. I 259; 33 FMSHRC at 2409.

Inspector Dotson issued Citation No. 7432120 under Mine Act section 104(d)(1), 30 U.S.C. § 814(d)(1), alleging a violation of 30 C.F.R. § 75.400,⁶ for permitting combustible materials to accumulate in active workings. Gov’t Ex. 7. The inspector designated the violation as S&S and a result of the operator’s unwarrantable failure. Gov’t Ex. 7. Because the extensive accumulations were not listed on the preshift book, the inspector also issued Citation No. 7420523 under Mine Act section 104(a), 30 U.S.C. § 814(a), alleging an S&S violation of 30 C.F.R. § 75.360(b)(3),⁷ for failure to perform an adequate preshift examination of the 001/002 section. 33 FMSHRC at 2411; Gov’t Ex. 8.

It required four hours for the entire crew to clean the section, shoveling and using two scoops as they became available. Tr. I 175, 267; Gov’t Ex. 5, 10/17/07 notes at 11-12, 23. The inspector abated the accumulations violation at approximately 2:30 that afternoon. Tr. I 267, 303-04; Gov’t Ex. 5, 10/17/07 notes at 23; Gov’t Ex. 7. Dotson remained on the section until the accumulations violation was abated. Tr. I 302. Upon returning to the surface, Dotson noted that the preshift record for the shift had been changed. Sometime after the inspector went underground, McCoy Elkhorn superintendent Gary Hensley had added the words “section needs cleaned” to the preshift report that had been signed by the previous shift foreman at 5:50 a.m. that morning. Tr. I 181-82; Gov’t Ex. 1; Gov’t Ex. 5, 10/17/07 notes at 24-25; 33 FMSHRC at 2411.

After further investigation, MSHA issued individual citations under section 110(c) against foremen Slone, Diamond and Robinson. 33 FMSHRC at 2405.

A hearing was held before an Administrative Law Judge, who determined that the conditions on the 001/002 MMU section on the morning of October 17, 2007 constituted an accumulations violation under section 75.400 that was S&S and a result of McCoy Elkhorn’s unwarrantable failure. 33 FMSHRC at 2412-19.

The Judge also concluded that, while Slone and Diamond did not have personal liability, foreman Robinson was liable under section 110(c) for knowingly permitting the combustible materials to accumulate. Critical to the Judge’s findings was his credibility determination that

⁵(...continued)
continuous mining machines rather than to human miners.

⁶ Section 75.400 provides in pertinent part that “coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings.”

⁷ Section 75.360(b)(3) provides in pertinent part that “the person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards [pertaining to accumulations of combustible materials].”

Robinson's crew had made two mining cuts before initiating cleanup on the section. 33 FMSHRC at 2416-18, 2425. The Judge credited the inspector's notes that were made at the time of the inspection, as well as other evidence, over Robinson's and two other miners' testimony that the two cuts were made later in the day after the section was cleaned. *Id.*

As to Citation No. 7420523, the Judge found a S&S violation because of preshift examiner Diamond's failure to report the extensive accumulations that existed at the time of the preshift. *Id.* at 2420-21. He raised the negligence from moderate to high because of the mine superintendent's addition of the notation that "section needs cleaned" to the preshift book many hours after the preshift had been completed. *Id.* at 2421. Reasoning that such "conduct undermines the fundamental role of the preshift examinations in promoting mine safety," the Judge raised the penalty from \$3,689, which was proposed by the Secretary, to \$6,500. *Id.* at 2422.

McCoy Elkhorn and Robinson filed appeals from the Judge's decision to the Commission. McCoy Elkhorn does not contest the fact of the violations, but disputes the Judge's findings of S&S and unwarrantable failure in Citation No. 7432120 (the accumulations violation) and the Judge's finding of high negligence in Citation No. 7420523 (the preshift examination violation).

II.

Disposition

A. Whether the Accumulations Violation was S&S

Under Commission case law, a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission set forth the following four-part test to evaluate whether a violation is properly designated as S&S:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming

continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

As an initial matter, McCoy Elkhorn asserts that the Judge erred in his S&S finding because it was in the process of cleaning the accumulations when the inspector arrived. It maintains that, assuming continued operations, those accumulations would have been removed before mining resumed.

We are not persuaded by McCoy Elkhorn's argument. The Commission has long held that an S&S determination must be made at the time the citation is issued "*without any assumptions as to abatement*" and in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (emphasis added). Thus, in *Gatliff Coal Co.*, 14 FMSHRC 1982, 1986 (Dec. 1992), the Commission determined that the Judge misapplied the *Mathies* test by inferring that the violative condition would cease. Further, the "operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations had continued." *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989). Clearly, mining had occurred during times when the accumulations existed. Moreover, we decline to assume that the operator would have completely abated the accumulations violation in the absence of the citation. Accordingly, we find no merit to the operator's abatement argument.⁸

We now examine each step of the *Mathies* test to determine whether the Judge correctly analyzed each element based on the record.⁹

The first *Mathies* element is satisfied by the Judge's determination of a violation, a finding which has not been appealed. 33 FMSHRC at 2413.

With respect to the second *Mathies* element, the Judge determined that the accumulations violation presented the hazard of combustion and propagation of a fire or explosion. *Id.* at 2414. Substantial evidence in the record supports this determination. The cited accumulations were

⁸ Commissioner Young notes that active abatement efforts may form part of the context for analyzing the continuation of normal mining operations, and that accumulations which are noted in examinations and promptly addressed may preclude a finding that the accumulations are S&S. However, in this case even if active abatement was underway at the time of the inspection, the operator fails to account for the fact that the accumulations presented a danger to miners for at least parts of two previous shifts. The S&S analysis at that point would have found that the discrete hazard contributed to by the violation – extensive, unreported accumulations of dangerous, combustible material – was reasonably likely to cause injury during that period.

⁹ When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

extensive, spanning all nine entries, and it took the entire first shift crew four hours to clean them. Tr. I 189, 302-04; Gov't Ex. 6; 33 FMSHRC at 2415. The accumulations consisted of highly-combustible float coal dust and loose coal. Tr. I 189-90, 238, 249.

The mine liberates large quantities of methane and is subject to 15-day methane spot inspections under Mine Act section 103(i), 30 U.S.C. § 813(i). Tr. I 156, 247-49. As the Judge held, "in the event of a methane ignition, the cited accumulations could be put in suspension, increasing the hazard associated with a fire or explosion." 33 FMSHRC at 2415. The inspector testified that methane increases the potential danger of explosion or fire and that methane at the explosive level had been detected at the mine. Tr. I 155-57. Additionally, potential ignition sources were present on the supersection in the form of the cutter heads on the continuous miners Tr. I 247; 33 FMSHRC at 2415. *See also* Tr. I 235-36; Gov't Exs. 6 & 7 (continuous miner electric cables passed through the accumulations). This hazardous situation lasted for the two shifts preceding Dotson's inspection. 33 FMSHRC at 2412; Tr. I 144, 251, Tr. II 600; Gov't Ex. 5, 10/17/07 notes at 8-9.

Given these conditions, the inspector testified that "if there was a face ignition with the amount of excessive accumulations of float coal dust . . . it would propagate and spread across the whole section." Tr. I 248-49. Accordingly, we conclude that the Judge's statement is an accurate description of the relevant hazard contributed to by the accumulations violation in this case, and that it is supported by substantial evidence.

In addressing the third *Mathies* element, the Commission has held that, in cases involving violations which may contribute to the hazard of methane explosions or ignitions, the likelihood of an injury resulting from the hazard depends on whether a "confluence of factors" exists that could trigger an explosion or ignition. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Some of the factors to be considered include the presence of methane, possible ignition sources, and the types of equipment operating in the area. *Id.*; *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997).

The Judge found that there was a reasonable likelihood that the combustion hazard caused by the violation would result in serious injury. 33 FMSHRC at 2414-15. Substantial evidence in the record supports his determination. Inspector Dotson testified that, due to the extensive nature of the accumulations and the mine's excessive methane liberation, an ignition would be reasonably likely to result in fatal injuries that would affect all 14 people on the section. Tr. I 246-49. As noted above, cutter heads from the continuous miners served as potential ignition sources. Accordingly, we affirm the Judge's determination that there was a confluence of factors present that would make a fire or ignition reasonably likely. 33 FMSHRC at 2414-15. *See Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997) (holding that an ignition source and large amounts of coal and coal dust that could propagate a fire or fuel an explosion satisfies the third element of *Mathies*).

As to the fourth *Mathies* element, the Judge determined that any injury resulting from the hazard contributed to by the violation would be serious. 33 FMSHRC at 2414. He relied on Inspector Dotson's testimony that an ignition was reasonably likely to result in fatal injuries to the miners on the section. Tr. I 246-49. As the Seventh Circuit explained in *Buck Creek*, 52 F.3d at

135-36, in affirming a Judge's S&S determination, nothing more was necessary to support an inspector's "common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation." See also *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120 (Aug. 1985) (recognizing that "ignitions and explosions are major causes of death and injury to miners").

On this record, substantial evidence supports the Judge's determination that the accumulations violation contributed to a discrete safety hazard which would be reasonably likely to result in an injury of a reasonably serious nature, as required by our S&S analysis. Thus, we affirm the Judge's finding that the accumulations violation was properly designated S&S.

B. Whether the Accumulations Violation Resulted from 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 such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek*, 52 F.3d at 136 (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 the 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.*

1. Extensiveness and Obviousness

Regarding the extensiveness and obviousness of the violation, the evidence demonstrated that the accumulations were extensive in nature in that it took the entire first shift four hours to clean up the condition. 33 FMSHRC at 2418; Tr. I 175, 267, 304. The accumulations consisted of combustible coal and float coal dust spillage and accumulations from mining cuts and in the roadways that were in all nine entries from the feeder to the face. 33 FMSHRC at 2409, 2412; Tr. I 171, 189; see Gov't Ex. 6 (Inspector's diagram showing extensive accumulations on 001/002 section). The inspector measured the accumulations as ranging from 8 to 24 inches in depth, and observed that they were dry and black in color. Tr. I 171, 189, 223, 229, 238-40; 33 FMSHRC at 2418. The inspector's notes contain Robinson's admission that the section was "dirty from feeder to face," and that "third shift was supposed to clean last night . . . but didn't do very good." Tr. I

171; Gov't Ex. 5, 10/17/07 notes at 7. One miner testified that the coal spillages were more extensive than normal. Tr. II 559. McCoy Elkhorn's production report from the shift preceding the citation also indicates that the section was not adequately cleaned. It reads that the crew "cleaned what we could." Gov't Ex. 2. Robinson's decision to have the entire crew of 14 persons engage in cleanup prior to the inspector's arrival also is indicative of the extensiveness and obvious nature of the accumulations.

Although McCoy Elkhorn disputes the obvious and extensive nature of the accumulations, substantial evidence in the record supports the Judge's determination that the accumulations were both extensive and obvious. For example, the Judge recognized that, as McCoy Elkhorn contended, some of the accumulations cited by Dotson were material that had sloughed from the ribs and had been sufficiently rock dusted to render them inert. 33 FMSHRC at 2412. However, the Judge credited Dotson's testimony that "while some accumulations were the result of non-violative sloughage, what he cited were accumulations from continuous miner cuts and roadway spillage in nine entries from the face to the feeder. (Tr. II 373)." *Id.*

2. Danger

With respect to the level of danger, we conclude that the violation posed a significant degree of danger. The accumulations created a hazard, which was reasonably likely to lead to, or propagate, a mine fire or explosion. Slip op., *supra* at 7; 33 FMSHRC at 2415.

3. Notice

As the Judge noted, McCoy Elkhorn had been issued 17 citations for accumulations violations under 30 C.F.R. § 75.400 at the No. 15 Mine in the two year period prior to October 2007. 33 FMSHRC at 2419; Gov't Ex. 10. Two of these citations had been issued in the week before Inspector Dotson's October 17, 2007 inspection, on October 11 and October 15. Tr. I 158-68; Gov't Ex. 4, 10/11/07 notes at 4; Gov't Ex. 5, 10/15/07 notes at 5; 33 FMSHRC at 2419. Dotson testified that on October 11, during a closeout conference with Superintendent Gary Hensley after his inspection, Dotson specifically addressed the excessive accumulations violations at the mine. Tr. I 160-61. The inspector's notes of October 11 state: "I explain[ed] to Mr. Hensley that he is on notice that he has been issued an excessive amount of 75.400 citations in the past 4 months and better efforts are required to remedy this condition." Gov't Ex. 4, 10/11/07 notes at 17. McCoy Elkhorn's assertion that its prior citations do not provide notice overlooks the inspector's actual notice given a week earlier that greater compliance efforts were needed with respect to combustible accumulations. *See* Tr. I 219; Gov't Ex. 5, 10/17/07 notes at 10 (Inspector noted that this is the third citation for accumulation of combustible material issued on this section in the past two weeks). Thus, substantial evidence in the record supports the conclusion that McCoy Elkhorn was on notice that it had an ongoing accumulations problem at the mine requiring greater compliance with section 75.400.

4. Duration

The record demonstrates that the majority of the accumulations resulted from mining cuts that were made on the second shift on October 16 from 2 p.m. to 10 p.m. Tr. I 251; Gov't Ex. 2

(McCoy Elkhorn's production report shows that 14 ½ cuts were made on second shift on October 16). Four of the cuts were unbolted and could not be cleaned up until the roof bolter went in on the third (maintenance) shift. Tr. II 600. The maintenance shift could not clean the accumulations satisfactorily, as recorded on the production report as follows: "cleaned what we could, had 2 scoops down." Gov't Ex. 2. The record demonstrates that the accumulations persisted at least for some of the second shift on October 16, through the third shift covering the night of October 16-17, and then into the first shift the morning of October 17, as shown by Robinson's admission that the section was dirty when he arrived on the section. Gov't Ex. 5, 10/17/07 notes at 7. Accordingly, we affirm that the accumulations existed for a sufficient duration to support a finding of unwarrantable failure. *See Buck Creek*, 52 F.3d at 136 (holding that accumulations that were present for more than one shift, after a pre-shift examination had been performed, were properly designated as unwarrantable).

5. Abatement Efforts

As the Judge found, McCoy Elkhorn was experiencing non-functioning scoop problems, which impeded efforts to clean up the accumulations. 33 FMSHRC at 2408-09, 2412-13, 2418. Without adequate and working scoops, the mine was unable to clean the coal accumulations caused by mining. Tr. I 125-26 (after cutting coal and roof-bolting, the scoop is supposed to come in and clean all loose coal). Second shift foreman Slone testified that on his October 16 shift he had two continuous miners operating but one of the three scoops was down with a part ordered and the other two scoops had dead batteries. Tr. I 117, 139-40. Given the time necessary to charge a scoop battery, Slone effectively had one working scoop for the two continuous miners. Tr. I 142-43. The inspector noted that, according to day shift foreman Ronnie Loyne, the section had four scoops and that "two stay broke down all the time." Tr. I 171-72; Gov't Ex. 5, 10/17/07 notes at 8. Slone conceded that there was a scoop "issue" at the mine, which "was part of the foul up." Tr. I 117. Day shift mine foreman Loyne said that they "had a problem with scoops broken down ever since he came to the mine two months ago." Tr. I 173; Gov't Ex. 5, 10/17/07 notes at 9. Jason Robinson reported to the inspector that he had two dead scoops and two broken down when he arrived on October 17. Tr. I 174; Gov't Ex. 5, 10/17/07 notes at 10. Third shift Foreman Diamond testified that "I quarrel with them a lot about their scoops." Tr. II 636-37; *see also* Gov't Ex. 2 (Diamond's production report noted that it had two scoops down).

The Judge determined that McCoy Elkhorn's persistent problem maintaining functioning scoops was an aggravating factor, rather than a mitigating factor as the operator contended. 33 FMSHRC at 2413, 2418. This is a proper finding. The operator is responsible for keeping its equipment in working condition. If its equipment needs repair or replacement, and the result is combustible accumulations or other conditions endangering the safety of miners, this certainly does not constitute a mitigating circumstance for purposes of an unwarrantable failure determination. The evidence demonstrates that McCoy Elkhorn did not maintain its scoops on this section in proper working condition.

6. Possible Mitigation

We are not persuaded by McCoy Elkhorn's argument that the unwarrantable failure finding should be mitigated because it was in the process of cleaning the section when the inspector

arrived. McC. Br. at 12-13. McCoy Elkhorn continued mining with inadequate scoops, despite prior warnings that greater compliance efforts were required, with the result that extensive, combustible accumulations persisted for at least two shifts. See *Consolidation Coal Co.*, 22 FMSHRC 328, 332-33 (Mar. 2000) (finding unwarrantable failure when operator had made some efforts to rectify the condition, but failed to expeditiously remedy the condition after receiving an inspector's admonition of the need for greater compliance).

In summary, we affirm as supported by substantial evidence the Judge's determination that McCoy Elkhorn's violation of section 75.400 was a result of its unwarrantable failure.¹⁰

C. Section 110(c) Liability of Foreman Robinson

Section 110(c) of the Mine Act provides in part:

Whenever a corporate operator violates a mandatory health or safety standard . . . , any . . . agent of such corporation who knowingly authorized, ordered or carried out such violation . . . shall be subject to . . . penalties.

The proper inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982). The Secretary need prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Const. Inc.*, 14 FMSHRC 1125, 1131 (July 1992). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998); *Kenny Richardson*, 3 FMSHRC at 16.

The Judge found that Robinson, who was aware of the extensive accumulations, directed his crew to make two mining cuts before initiating cleanup of the accumulations. 33 FMSHRC at 2416-18, 2425. On this basis, the Judge determined that Robinson deliberately failed to act to protect the miners on his crew by removing the combustible accumulations and was therefore liable under section 110(c). *Id.* Similarly, the inspector explained the section 110(c) allegation against Robinson: "Once he decided to go ahead and produce coal while those accumulations of combustible material were in the area, he knowingly and willfully violated the law at that time." Tr. II 359. See *Prabhu Deshetty*, 16 FMSHRC 1046, 1050 (May 1994) (foreman subject to section 110(c) liability for failure to address known accumulations).

¹⁰ We note that the Judge's unwarrantable failure finding also relied on his determination that foreman Robinson had taken mining cuts before ensuring cleanup of the accumulations. 33 FMSHRC at 2415-18. Irrespective of whether Robinson initiated mining before cleanup, a question on which Commissioners disagree, we unanimously conclude that the record supports an unwarrantable failure determination against McCoy Elkhorn.

On appeal, the central issue with respect to Robinson's section 110(c) liability is whether substantial evidence supports the Judge's determination that Robinson ordered the mining cuts at the 3-right crosscut (3-R) and the 5 Heading (5-H) before starting cleanup of the accumulations. McCoy Elkhorn and Robinson dispute the Judge's finding, based on the inspector's testimony and notes, that Robinson took two cuts before starting cleanup. Instead, Robinson testified that the two cuts in question were taken at 2:00 p.m. and 2:20 p.m., at the end of his shift. Tr. II 671.

Turning to the 3-R cut, we conclude that substantial evidence in the record supports the Judge's conclusion that Robinson's crew cut the 3-R on October 17 before Inspector Dotson arrived. The cuts for the two shifts leading up to Robinson's shift were listed in McCoy Elkhorn's production reports. Gov't Ex. 2. On the October 16 second shift, foreman Slone's crew made 14 ½ cuts but 3-R was not listed as one of them. On the following maintenance shift, foreman Diamond noted that his crew had "finished cutting 6L," but that was the only cut listed. Gov't Ex. 2; *see also* Tr. I 69, 71-72. Thus, the evidence indicates that the 3-R was not cut prior to Robinson's shift. While Dotson was on the section, he observed that the 3-R had been cut and improperly bolted. Tr. III at 438-39.¹¹ The inspector issued a citation for the inadequate bolting of the 3-R at 11:10 a.m. Tr. III at 438, 440; Gov't Ex. 9. The fact that 3-R had not been cut on previous shifts but was cut when Inspector Dotson observed it at 11:10 a.m. strongly supports the conclusion that it had been cut by Robinson's crew on the morning of October 17, before Dotson arrived.¹²

Inspector Dotson testified that when he discussed this with Robinson, Robinson said that he had been aware of the condition for about four hours. Tr. III 439; *see also* Gov't Ex. 5, 10/17/07 notes at 17. The inspector testified that this led him to believe that Robinson's crew had cut and bolted the 3-R that morning. Tr. III 438-40. As the Judge found, foreman Diamond's testimony was corroborating. 33 FMSHRC at 2416. Diamond testified that he had bolted all the cuts that had been made before Robinson's shift had begun. Tr. I 72-73, Tr. II 601. Accordingly, the Judge credited Inspector Dotson's testimony that the 3-R was cut on Robinson's shift prior to Dotson's arrival, and not later in the day as testified by Robinson. 33 FMSHRC at 2416.

Additionally, the inspector testified that he remained on the section until the citation was abated at 2:30 p.m., which is after Robinson testified that he made the cuts. Tr. I 267, 302; Gov't Ex. 7. The inspector further testified that he was not aware of any cuts made while he was on the section. Tr. I 302-03. This testimony undermines Robinson's claim that the two cuts were made

¹¹ Dotson found that the 3-R had been only partially bolted, observing that the last row of bolts was six to nine feet from the face. This was contrary to the approved roof control plan that required a minimum distance of four feet from the face. Gov't Ex. 9.

¹² We note that neither of McCoy Elkhorn's briefs addresses or explains when the cut actually occurred with respect to the 3-R bolting citation that was issued at 11:10 a.m. on October 17, 2007. Gov't Ex. 9. We also note that neither foreman from the two preceding shifts listed the roof bolting hazard in their preshift reports, which also supports the view that the 3-R cut was not made until Robinson's shift. Gov't Ex. 1. *See also* Tr. II 610 (Foreman Diamond's testimony that roof hazards must be listed on preshift reports).

at approximately 2:00 and 2:20 p.m. Presumably, if cuts were made at those times, Dotson would have been aware of them.

We also find that the contemporaneous inspector's notes support the Judge's section 110(c) finding. Those notes state that Robinson told him that "when [Robinson] arrived on the section this morning he finished cutting . . . where the miners were in 3R and 5 heading." Tr. I 171; Gov't Ex. 5, 10/17/07 notes at 7. The Judge credited the contemporaneous notes of the inspector that cuts in the 3-R and 5-H were taken before the cleanup over the testimony of Robinson and the McCoy Elkhorn miners that the cuts were taken at approximately 2:00 and 2:20 p.m. 33 FMSHRC at 2416-18; Tr. III 476-78. In addition, as the Judge found, the inspector was unequivocal that it was not possible that he misunderstood Robinson as to when he cut the coal. Tr. III 450-51; 33 FMSHRC at 2417 & n.6.

As we have long held, a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Credibility determinations reside in the province of the administrative law judge's discretion and are subject to review only for abuse of discretion. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010). We find that the record contains support for the Judge's credibility determinations.

Robinson argues that no coal was cut in the morning because the mine diagram drawn by the inspector, Gov't Ex. 6, indicates that the 3-R was clean, and, if there had been recent cuts, some coal should have been shown. McC. Br. at 9. It is true that the 3-R is marked as clean on Gov't Ex. 6. Nonetheless, according to Robinson, some cleaning of the section took place before inspector Dotson arrived in the morning, Tr. I 90, and 3-R may have been cleaned at that time.¹³

Although some of the operator's arguments with respect to a cut at the 5-H could be viewed as fairly detracting from the Judge's finding,¹⁴ our review of the record demonstrates that substantial evidence supports the conclusion that Robinson cut the 3-R before the inspector arrived. Accordingly, on balance we conclude that substantial evidence, including the Judge's credibility determinations, support the finding that Robinson's crew cut coal before it initiated cleanup of the extensive accumulations.

¹³ McCoy Elkhorn argues that the 3-R could not possibly have been cleaned with the scoops not fully charged. However, foreman Slone testified that cleaning was possible when a scoop just had "a little charge." Tr. I 142.

¹⁴ According to Dotson's sketch of the section, when he arrived, the face of the 5 Heading was flush with the inby ribs of the left and right crosscuts entering the 5 Heading. Gov't Ex. 6. One of these was the 6-L crosscut which Diamond's crew had completed on the previous shift. Tr. I 68-69. The substantial evidence rule requires that the Commission consider whatever in the record fairly detracts from the weight of the evidence supporting the judge's determination. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Our dissenting colleagues allege that we fail “to account for direct testimony and evidence which detracts from the Judge’s conclusion,” and that the Judge “failed to consider the evidence as a whole,” particularly the direct testimony by Robinson, right-side continuous miner operator William Lowe and left-side shuttle car operator Ricky Varney that no mining occurred on the morning of October 17. Slip op. at 17. These allegations are incorrect. The Judge specifically considered the testimony of Robinson, Lowe and Varney. With regard to Lowe, the Judge noted that “Lowe, the continuous miner operator responsible for cutting the five heading . . . conceded he could not recall if, or when, he cut the five heading on that day. (Tr. II 507-10).” 33 FMSHRC at 2418. With regard to Varney, the Judge concluded that Varney’s testimony “is entitled to little weight when considered in the context of Dotson’s conflicting contemporaneous notes.” *Id.* It is the Judge’s responsibility to resolve conflicts in the evidence, and the Judge did so here.

Additionally, our colleagues, taking us to task for relying on “minor circumstantial evidence,” characterize the 3-R cut as “small (perhaps 10 foot).” Slip op. at 18. However, Robinson testified that of the 40 feet he advanced on the October 17 shift, 25 or 30 feet – a not insubstantial distance – was in the 3 right while the 10 foot cut was in the 5 heading. Tr. III 478-79. Overall, he loaded 70 shuttle cars. *Id.* It is true that in affirming the Judge’s decision on Robinson’s liability, we are relying to a large extent on circumstantial evidence in the form of information obtained from McCoy Elkhorn production reports, together with the fact of the roof bolting citation issued at 11:10 a.m. on October 17. However, the Commission has long recognized that “the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence.” *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Thus, similar to our conclusion herein, the Commission held in *Windsor Coal Co.*, 21 FMSHRC 997, 1001-02 (Sept. 1999) that for purposes of unwarrantable failure, the duration of a violation may be proven by an operator’s preshift and onshift reports.

Finally, our colleagues argue that even if Robinson directed mining on the morning of October 17, he then stopped the mining and had the whole crew shovel the accumulations. This, according to the dissent, “undermines [our] conclusion that [Robinson] knowingly acted in failing to protect miners.” Slip op. at 21. However, the fact that Robinson had his crew shoveling the coal accumulations at the time Dotson arrived on the section does not exonerate him from previously mining coal in the presence of those accumulations. *See Warren Steen Construction, Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (section 110(c) violation occurred when supervisor authorized miners to perform actions violative of statute).

Ultimately, this is a case where, on this issue, any set of facts from the record is susceptible to rebuttal by another set of facts from the record. It is the Judge’s duty to weigh the competing facts and resolve the conflicts. Here, the Judge decided to believe Dotson and not Robinson, Lowe and Varney. The Commission’s task is to determine whether the Judge’s decision is supported by substantial evidence. Although it would be possible to reach a different result, we conclude that substantial evidence in the record supports the Judge’s determination that Robinson was personally liable under section 110(c) for his failure to clean up the extensive and combustible accumulations before cutting coal.

D. Finding of High Negligence Regarding the Preshift Violation

The Judge determined that McCoy Elkhorn's initial failure to note that the section needed cleaning on the preshift report was an S&S violation of section 75.360(b)(3). 33 FMSHRC at 2421. Section 75.360(b)(3) requires that, before a shift begins, a preshift examiner must conduct an examination for hazardous conditions at the mine such as accumulations of combustible materials. *Enlow Fork Mining*, 19 FMSHRC at 14-15 (holding that preshift examiner must record accumulations of combustible materials as hazardous conditions.) The preshift examination requirement "is of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995).

Although McCoy Elkhorn has not appealed the preshift violation or its S&S nature, it takes issue with the Judge's raising of the negligence level from moderate, as originally found by the Secretary, to high.¹⁵ The Judge raised the level because Hensley added the words that the "section needs cleaned" to the preshift report some time after the preshift examination had already been completed. Gov't Ex. 1, at 4 (Preshift Report); 33 FMSHRC at 2421-22. We agree with the Judge that the degree of negligence is high for the preshift violation; however, we do not endorse his reasoning. Accordingly, we affirm the Judge in result.

Substantial evidence on the record supports a determination of high negligence for the failure to report the extensive accumulations in the preshift book. The inspector testified that the negligence should have been marked as high because he believed that the accumulations had been there since the second shift on October 16 and were not noted by either the second or third shift foremen for the oncoming shifts. Tr. I 298-99; *see also* Gov't Ex. 5, 10/17/07 notes at 14 ("Mike Diamond did not list any hazards on his preshift on 10/17/07 for the day shift on 001/002 section. A 104(d) citation was issued for 75.400 across the section. Mr. Diamond should have known of condition – it has existed for at least 6 hours since preshift . . . [and] 14 men on dayshift crew were exposed to the condition.") At the hearing, Diamond conceded that he should "have tried to do more on the report." Tr. II 626.

We have already concluded that, at the time of the inspection, extensive and obvious accumulations of combustible coal and float coal dust were present in all nine entries on the 001/002 MMU section for at least two shifts. Slip op., *supra* at 8. Additionally, Inspector Dotson had specifically warned McCoy Elkhorn six days before the citation was issued that better efforts were required to remedy the accumulation problem in the mine. Tr. I 158-61; Gov't Ex. 4, 10/11/17 notes at 17. The operator then was on heightened awareness that it needed to expend greater efforts to clean up accumulations.

Given this warning, McCoy Elkhorn's failure to even list the extensive accumulations on its preshift reports so that its foremen could take appropriate cleanup efforts constitutes a high

¹⁵ The Commission reviews a Judge's negligence finding, which is a component of a penalty assessment, to determine whether it is supported by substantial evidence and consistent with the statutory penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986).

level of indifference to Mine Act requirements. *See National Mining Assoc. v. MSHA*, 116 F.3d 520, 540 (D.C. Cir. 1997) (“preshift examinations assess the overall safety conditions in the mine; . . . identify hazards . . . ; and through this identification facilitate correction of hazardous conditions.”) By failing to list obvious accumulations on the two preshift reports preceding the inspector’s arrival, McCoy Elkhorn disregarded the safety of the oncoming miners and displayed a high degree of negligence. *See Deshetty*, 16 FMSHRC at 1053 (failing to remedy known accumulation hazards indicates high degree of negligence).

Although the Secretary initially designated the negligence as only moderate, it is well established that the Commission and its Judges may modify the negligence determination. *Spartan Mining Co.*, 30 FMSHRC 699, 723-25 (Aug. 2008). In determining the amount of the penalty, neither the Judge nor the Commission shall be bound by a penalty recommended by the Secretary. *Sellersburg Stone*, 5 FMSHRC 287, 291 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Substantial evidence in the record supports a high level of negligence as well as an accompanying increase in the penalty amount to \$6,500. Accordingly, we affirm the Judge in result.

III.

Conclusion

For the foregoing reasons, we affirm the Judge’s determination that McCoy Elkhorn’s accumulations violation, as set forth in Citation No. 7432120, is S&S and the result of an unwarrantable failure to comply with section 75.400. We also affirm the determination that Jason Robinson was liable for a section 110(c) penalty with respect to that accumulations violation. We affirm in result the Judge’s determination that the preshift violation, set forth in Citation No. 7420523, was a result of high negligence and affirm the associated penalty.

/s/ Mary Lu Jordan, _____
Mary Lu Jordan, Chairman

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

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

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

We concur with our majority colleagues in affirming the Judge's findings that the accumulations violation was both significant and substantial and a result of McCoy Elkhorn's unwarrantable failure to comply with 30 C.F.R. § 75.400. We also agree with the majority's conclusion that substantial evidence supports the Judge's conclusion that McCoy was highly negligent in failing to conduct an adequate preshift violation. We therefore join our colleagues on those sections of their opinion. Slip op. at 4-10, 14-15.

However, we disagree with the majority's conclusion that McCoy's foreman Jason Robinson should be held personally liable for the accumulations violation pursuant to section 110(c), 30 U.S.C § 820(c), of the Mine Act. The majority fails to account for direct testimony and evidence which detracts from the Judge's conclusion that Robinson "'knowingly' permitt[ed] the combustible coal dust and loose coal . . . to develop without ordering the timely removal of the violative accumulations." 33 FMSHRC 2403, 2422 (Oct. 2011) (ALJ). As a result, the Judge failed to consider the evidence as a whole, especially evidence fatal to his conclusion that Robinson is personally liable under section 110(c).

Robinson testified that no mining occurred on the morning of October 17, the date of Inspector Dotson's inspection. Tr. II 671. The direct testimony of two other miners on Robinson's crew, right-side continuous miner operator William Lowe (Tr. II 457-58, 465-66), and left-side shuttle car operator Ricky Varney (Tr. II 534-35, 543, 570), corroborates Robinson's testimony. Further, Michael Diamond, the foreman on the shift preceding Robinson, and Robinson both testified that no scoop was available for use at the start of Robinson's shift, because one scoop was down and the other needed re-charging, making it virtually impossible for Robinson's crew to clean any coal cut on the morning of October 17, prior to Inspector Dotson's arrival. Tr. I 75, 82, 102-04. Moreover, there was no evidence of coal accumulations or coal being transported out of the mine on belts on the morning of October 17, which would have indicated that mining occurred. Gov't Ex. 6; Tr. I 353-54. Diamond also testified that on his shift, his crew finished the cut in 6-Left, which was started on the preceding shift, into the No. 5 entry. Tr. I 68-69, Tr. II 583-87. This is consistent with the mining pattern and the inspector's own map of the mine on the morning of his inspection, showing no cuts in the 3-right crosscut (3-R) and the 5 Heading (5-H), where the continuous miners were left by the third shift because they were the next cuts to be made in the mining sequence. Gov't Ex. 2; Tr. II 527, 604. The unequivocal and convincing evidence that no mining occurred in 5-H prior to the inspector's arrival and other direct testimony wholly undermines the inspector's notes that Robinson said he had mined 5-H. Inspector Dotson even admitted that the testimony of Diamond was consistent with the mine's normal mining pattern. Tr. I 205, Tr. III 449-50.

Against all this evidence, the majority relies on the inspector's discredited notes and only circumstantial evidence to support its conclusion that substantial evidence supports the Judge's finding that mining did take place on the morning of October 17 during Robinson's shift. Despite clear and convincing evidence that the inspector's notes were unreliable, the majority relies on the Judge's credibility determination regarding the inspector's notes. Slip op. at 12-13. The majority also falls into the trap of adopting the Judge's inference that because Dotson testified that he was told by Robinson that he knew about the inadequate bolting for about four hours, that means that

Robinson ordered the cuts at 3-R. Slip op. at 12; Tr. III 439; Gov't Ex. 5, 10/17/07 notes at 17. Finally, the majority relies on the operator's production reports of the preceding shifts, which did not note a small (perhaps 10 foot) cut in 3-R, to support the inference that Robinson made that cut on his shift. Slip op. at 11-12. However, as we will see, inferences drawn from minor circumstantial evidence falls far short when compared to direct testimony of four miners and the inspector showing that no mining occurred prior to the inspection. The totality of the evidence, indeed overwhelming evidence, supports the conclusion that mining resumed after Dotson's inspection.

As our majority colleagues state, section 110(c) of the Mine Act provides that a director, officer, or agent of a corporate operator who knowingly authorized, ordered, or carried out a violation of a mandatory health or safety standard shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

Below, the Judge predicated his conclusion that Robinson was personally liable under section 110(c) on his findings that Robinson, who knew of the extensive accumulations, allegedly directed his crew to make two small mining cuts before initiating cleanup of the accumulations. 33 FMSHRC at 2425. Based on this finding, the Judge concluded that Robinson deliberately failed to act to protect miners on his crew.

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

First, we conclude that substantial evidence does not support the Judge's finding that Robinson ordered the cuts on his shift. Both the Judge below and the majority on review discount or ignore direct testimony and rely principally on circumstantial evidence to support the Judge's finding that mining occurred on the morning of Inspector Dotson's October 17 inspection. This finding essentially serves as the entire basis of the Judge's conclusion that Robinson was liable under section 110(c).

In finding that Robinson ordered the cuts on 3-R and 5-H, the Judge relied almost exclusively on the inspector's notes, because the inspector had no independent recollection of his conversation with Robinson. 33 FMSHRC at 2425; Gov't Ex. 5, 10/17/07 notes, at 7; Tr. III 450-51, 479-81. Based on the inspector's notes and the inspector's testimony that Robinson acknowledged that on the morning of October 17 he was aware of the improperly bolted roof condition for four hours, the Judge found that Robinson's crew had made the cuts in the early morning hours of their shift.¹ Slip op. at 11-12 (citing Tr. III 438-40; Gov't Ex. 5, 10/17/07 notes at 17). The majority also relies on the production reports to support that the cuts had not been made on the prior shift. Slip op. at 11-12 (citing Gov't Ex. 2). This evidence, equivocal at best, is insufficient to support a conclusion that Robinson knowingly violated the Act in the face of testimony that refuted the inspector's thesis.

The Judge failed to adequately reconcile contrary direct evidence that wholly undermines the inspector's notes, namely the testimony of every miner corroborating Robinson's testimony that no mining was performed in the morning of the inspection. The evidence also demonstrated that the inspector's own map of the area was inconsistent with his notes and instead was consistent with the miners' direct testimony of no mining. Robinson and miners on his crew testified that no coal was cut on the first shift until around 2 p.m. 33 FMSHRC at 2416-18; Tr. II 377-78, 457, 466-67, 476-78, 499, 534-35, 543, 570. Because no scoops were available, had mining immediately commenced on the first shift, the coal almost certainly could not have been cleaned before the inspector's arrival. Tr. I 75, 82, 94-95, 102-04; Tr. II 457-58; Gov't Ex. 2. Yet, the area was clean. This direct evidence undermines the inference that the cuts were made at the start of Robinson's shift.

Regarding the alleged cut at 5-H, substantial evidence does not support a finding that a cut was taken before abatement. Such a cut would be inconsistent with (1) the inspector's own map which showed 5-H no further advanced than at the end of the preceding shift, and no coal accumulation in the area, which would indicate that it had been mined on the first shift (Gov't Ex. 6; Tr. I 191; Tr. II 673); (2) the testimony of highly experienced miners and the inspector about McCoy's usual mining sequences and that a cut at 5-H would contravene this mining pattern (Tr. I 71-73, 125-29, 205, 208, 428; Tr. II 458, 524-27); (3) Diamond's testimony that he finished the 6L cut and was flush with the entry, consistent with McCoy's normal mining pattern (Tr. II 512-13, 582-87); (4) the testimony of the right side miner operator, William Lowe, that when he got to the section he was told to standby and then was given a shovel, told to start shoveling, and spent the

¹ It appears that the Judge drew an inference based on circumstantial evidence consisting of the inspector's notes and certain testimony and record evidence that the cuts were not made on the prior shift, and hence, must have been made by Robinson's crew on the morning of October 17. 33 FMSHRC at 2416-18. While the Judge is permitted to draw inferences from the evidence before him, such inferences must be "inherently reasonable and there [must be] a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Here, the Judge failed to adequately take into account contrary direct evidence, which undermines the basis for his inference, instead "cherry picking" and crediting the evidence which only supports his ultimate finding.

next several hours shoveling (Tr. II 465-66); and (5) Robinson's own direct testimony. Thus, the clear weight of the evidence undermines reliance upon the inspector's notes.

As to the alleged cut at 3-R, the majority cites only circumstantial evidence for cutting on 3-R, largely ignoring the direct testimony of disinterested miners and Robinson himself. Slip op. at 11-12. Contrary to that circumstantial evidence is the direct testimony of the left side shuttle car operator who repeatedly testified that they did not cut coal in the morning and that they made a cut in 3-R that afternoon after 2:00 p.m. Tr. II 531-32, 543, 546-47, 560. Also, on direct examination, Robinson testified that there was a small cut in 3-R when he inspected the section in the morning:

Q. It was flush. What about in 3 right? Is there – from [the inspector's] diagram, does it look to you like anyone would have cut coal in 3 right on your shift?

A. No. Nobody cut coal on my shift. There was a small cut of 3 right, but it was not done by me or anybody on my shift.

Q. Okay. And if 3 right had been cut that morning on your shift, would it be clean as Mr. Dotson has written in that area?

A. If I would have cut – I didn't have a scoop till after Mr. Dotson got there. This is the only time I had ever used a scoop. So it couldn't have been cleaned. It had to be cleaned from the previous shift.

Tr. II 674. Likewise, the uncontroverted testimony is that no scoops were available during Robinson's shift. Hence, making it unlikely, if not impossible, for Robinson's crew to make the alleged cuts and clean up the section before Inspector Dotson arrived at 8:00 a.m. 33 FMSHRC at 2408; Tr. I 75, 82, 105, 191; Tr. II 471, 480-82, 557-58; Gov't Ex. 2.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Nonetheless, the Commission will not affirm such determinations if, as here, they are self-contradictory or dubious evidence supports them. *Keystone Coal Mining Corp.*, 17 FMSHRC, 1819, 1881 n.80 (Nov. 1995); *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989). We find the weight of this direct evidence so overwhelming as to undermine the Judge's credibility determination crediting the inspector's testimony and notes.

In whole, the totality of the evidence is insufficient to support the conclusion that Robinson "knowingly" violated the Mine Act by ordering mining to proceed in the face of accumulations. The inspector's notes-based testimony is contradicted by overwhelming direct evidence of McCoy's mining practices and the testimony of many miners as to the events leading up to and occurring on Robinson's shift, undermining a finding that mining occurred at the beginning of the first shift on October 17. Rather, the record as a whole proves that as soon as Robinson became

aware of the extent of the accumulations, he ordered his crew not to mine and to instead devote their resources exclusively to cleaning the accumulations. Tr. I 94-95, 103-04.

Second, even if we were to infer that the record shows that Robinson had permitted some small amount of mining to commence on the morning of October 17, even the majority points to Robinson's decision to stop mining and to have the entire crew of 14 persons engage solely in cleanup prior to the inspector's arrival. Slip op. at 8. This fact undermines the majority's conclusion that he knowingly acted in failing to protect miners. Rather, such evidence unequivocally undermines the Judge's conclusion that Robinson knowingly violated the Act.

Thus, even accepting the Judge's credibility determination and findings, the evidence at most shows that Robinson arrived at the section, performed an imminent danger run of the relevant area, prepared his crew for production, began production on the right side cutting into the 3-R section, before Robinson walked the section and saw accumulations, shut down production, and ordered his crew to stop mining and start cleaning the accumulations. Tr. I 94-95, 102-04.

Since the small cut in 3-R would have taken no more than 20 minutes (Tr. II 461), presumably all this would have happened within an hour or so of the start of the shift – before the inspector arrived at the mine. There is no evidence at all supporting any theory of aggravated conduct on Robinson's part, given Dotson's testimony that no mining occurred during his inspection. Tr. II 353-54. Thus, any production occurred either in a brief period before Dotson arrived, or after 2 p.m., as Robinson and every other miner testified.

Given the mine's conditions experiencing high rib sloughage, we cannot conclude that the foreman's actions rose to the level of conduct amounting to a violation of section 110(c). Even if the inspector's notes were accepted as reliable, Robinson did not commit a knowing violation by not immediately correcting a problem that had persisted over multiple shifts, when upon discovering the violative condition shortly after the start of his shift, he promptly stopped production to address it. This evidence even accepting the Judge's erroneous fact findings, as the majority has, does not demonstrate aggravated conduct constituting more than ordinary negligence. *See Roy Glenn*, 6 FMSHRC 1583, 1586 (July 1984) (stating that a violation of section 110(c) occurs "when, based upon facts available to him, [an agent] either knew or had reason to know that a violative condition or conduct would occur, but *failed to take appropriate preventative steps*") (emphasis added); *Cannelton Indus., Inc.*, 20 FMSHRC 726, 736-37 (July 1998) (holding that Judge erred by failing to take into consideration evidence regarding agents' efforts to clean up accumulations when determining section 110(c) liability).

Accordingly, we conclude that neither the record nor the law supports the Judge's holding that Robinson is personally liable under section 110(c).

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

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

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August 26, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEST 2009-241
	:	WEST 2009-580
v.	:	WEST 2009-820
	:	WEST 2009-1322
TWENTYMILE COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involve three citations issued to Twentymile Coal Company by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Two citations allege violations of the safety standard in 30 C.F.R. § 75.516-2(c), which requires that additional insulation shall be provided at points where a communication circuit passes over or under a power conductor. The third citation alleges a violation of the safety standard in 30 C.F.R. § 75.1107-16(b), which incorporates the requirements of six specific National Fire Protection Association Codes.

An Administrative Law Judge affirmed the two citations issued for alleged violations of section 75.516-2(c) and held that the standard directs mine operators to manually apply additional insulation to the exterior of communication circuits where they pass over or under any power conductor. 33 FMSHRC 1885, 1945 (Aug. 2011) (ALJ). The Judge, however, vacated the citation that alleged a violation of section 75.1107-16(b). The Judge concluded that the cited provisions of the National Fire Code did not constitute mandatory requirements. *Id.* at 1939. The Secretary of Labor and Twentymile both filed petitions for review of the Judge’s decision, and we granted both petitions.

For the reasons that follow, we reverse the Judge with respect to the alleged violations of section 75.516-2(c). We conclude that an operator may provide additional insulation through the installation of a compliant communication cable. With respect to the alleged violation of section 75.1107-16(b), we conclude that the Secretary failed to establish a violation of a cited provision.

Therefore, we affirm in result the Judge's decision to vacate the citation that alleged a violation of section 75.1107-16(b).

I.

Citation Nos. 8456301 and 8456311

A. Factual and Procedural Background

On February 19, 2009, MSHA Inspector Phillip Ray Gibson visited Twentymile's Foidel Creek Mine, a large underground coal mine in Colorado. During his inspection, Gibson observed that communication cables for the mine phone passed below an energized power conductor in the conveyor belt entry. 33 FMSHRC at 1940. The communication cables consisted of copper conductors that were covered in a layer of insulation, surrounded by foil shielding, and wrapped in a PVC jacket. 33 FMSHRC at 1941-43; Tr. 421, 446-47. The inspector observed that the exterior of the cables lacked an additional wrap of insulation where they passed across two power cables. 33 FMSHRC at 1940. Gibson issued Citation No. 8456301 for an alleged violation of the safety standard in 30 C.F.R. § 75.516-2(c). Gov. Ex. 26. The standard states, in pertinent part, that "[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor." 30 C.F.R. § 75.516-2(c).

On February 26, 2009, Gibson returned to the mine and observed that Twentymile had failed to manually wrap "additional insulation" on either the phone communication cable or the energized power cable at the point where they passed in a crosscut. 33 FMSHRC at 1940. Gibson issued Citation No. 8456311 for an alleged violation of the standard in section 75.516-2(c). Gov. Ex. 29. The citation was abated after Twentymile wrapped electrical tape around the communication cable at the required points. 33 FMSHRC at 1943.

Twentymile contested both citations before an Administrative Law Judge. The Judge concluded that the language of the regulation was clear and that mine operators are required to manually install "additional insulation" at the points where communication circuits pass a power conductor. *Id.* at 1945. The Judge credited the testimony of Twentymile's electrical department manager, who testified that the cables contained sufficient insulation to prevent the transfer of energy to the communication circuits. *Id.* at 1943-45; Tr. 446-48. Nevertheless, the Judge concluded that, because Twentymile did not manually wrap additional insulation around the exterior of the cables at the required locations, it had violated the safety standard. *Id.* at 1945. Accordingly, he affirmed the citations.

On review, Twentymile argues that the Judge erred in his interpretation of the safety standard. It maintains that the required "additional insulation" was "provided" when it installed a cable manufactured with sufficient insulation to meet the objective and requirement of the standard. The Secretary contends that the safety standard plainly requires the mine operator to install insulation "in addition to whatever insulation is provided (or not provided) by the manufacturer." S. Br. at 28.

B. Disposition

1. The standard is silent or ambiguous with regard to how compliance is to be achieved.

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

We conclude that the Judge erred in holding that the language of the safety standard had a clear meaning. 33 FMSHRC at 1945. Section 75.516-2(c) requires that a mine operator provide insulation on a cable *in addition* to the insulation requirements specified in section 75.516-2(b) at certain points.¹ However, the safety standard does not clearly prescribe how the additional insulation is to be provided. The language does not dictate a specific method, be it manually wrapping additional insulation on the exterior of the cable or the installation of cable that contains a greater amount of insulation than is required by section 75.516-2(b).

The Secretary contends that the plain meaning of the phrase “shall be provided” in section 75.516-2(c) is that the mine operator, and not a manufacturer, must provide the additional insulation. S. Br. at 27-28; Oral Arg. Tr. 29-30, 34-36. The Judge agreed that the language of the standard was “quite clear.” 33 FMSHRC at 1945. However, the phrase “shall be provided” is used elsewhere in the regulations in the context of equipment installed by a manufacturer at the factory. Those standards do not plainly require a mine operator to manually install the prescribed features. *See* 30 C.F.R. § 56.14131(a) (“Seat belts *shall be provided* and worn in haulage trucks.”); *see also* 30 C.F.R. § 77.1605(d) (“Mobile equipment *shall be provided* with audible warning devices. Lights *shall be provided* on both ends”) (emphasis added). The use of the phrase “shall be provided” elsewhere in the regulations demonstrates that it does not have a plain meaning which excludes installation by a manufacturer.

Finally, we find no guidance as to the meaning of the phrase “shall be provided” in the standard’s regulatory history. *See* 37 Fed. Reg. 11777 (June 14, 1972); 38 Fed. Reg. 4975 (Feb. 23, 1973). It suggests only that the Bureau of Mines originally proposed the rule to ensure proper insulation and prevent unintentional energization of communication circuits. *See* 37 Fed. Reg. at 11777-11778 (“unintentional energization of communication wires and cables can occur

¹ Section 75.516-2(b), which incorporates section 75.517-1 by reference, requires insulation with a dielectric strength that is at least equal to the voltage of the circuit. *See* 30 C.F.R. §§ 75.516-2(b) and 75.517-1. The Secretary does not contend that the insulation on any of the cited cables was less than the appropriate dielectric strength or that the amount of insulation was otherwise insufficient. Oral Arg. Tr. at 47.

if they are too close to power conductors . . . proper insulation of such wires and cables will result in less hazard and greater reliability”).

Similarly, we reject the Secretary’s argument that the phrase “additional insulation” can only mean extra insulation on the cable at the points where communication circuits pass over or under a power conductor. S. Br. at 29. The phrase “additional insulation” can also be understood as relative to the insulation which must exist on all communication cables which, pursuant to sections 75.516-2(b) and 75.517-1, must have “a dielectric strength at least equal to the voltage of the circuit.” 30 C.F.R. § 75.517-1. Thus, the regulation can reasonably be read to require insulation with a dielectric strength *greater* than the voltage of the circuit, at points where communication circuits pass over or under a power conductor.

Accordingly, we conclude that section 75.516-2(c) is silent or ambiguous as to how the additional insulation shall be provided by the operator.²

2. The Secretary’s proffered interpretation is not reasonable.

Where a mandatory standard is ambiguous, courts and the Commission defer to the Secretary’s reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec’y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation . . . is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Commission’s review similarly involves an examination of whether the Secretary’s interpretation is reasonable. *See Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992); *Rochester & Pittsburgh Coal Corp.*, 12 FMSHRC 189, 193 (Feb. 1990); *Missouri Rock, Inc.*, 11 FMSHRC 136, 139 (Feb. 1989).

The Secretary maintains that his interpretation of the standard is consistent with the standard’s purpose because it ensures that the operator will pay attention to insulation on the cables at the required points, safeguarding against unintentional energization. S. Br. at 30-31. The Secretary accepts “a wrap of electrical tape” at the required location to constitute the installation of additional insulation. 33 FMSHRC at 1943; Tr. 434-35. At oral argument, counsel for the Secretary also suggested that it is reasonable to require that the operator install the additional insulation to the exterior of the cable, because it signals to an inspector that the operator has examined the communication cable at the points where it passes the power cable. Oral Arg. Tr. at 27-28, 39, 50.

² We recognize that in *Western Fuels - Utah, Inc.*, 18 FMSHRC 1912, 1915 (Nov. 1996), the Commission said that “the language of section 75.516-2(c) is clear.” However, this was a case where the operator conceded that it had not provided additional insulation for a communication cable. The operator defended against the citation on the grounds that the first sentence of section 75.516-2(c) limited the subsection as a whole to track entries, a contention which the Commission rejected. The Commission did not address the issue of whether the phrase “shall be provided” in the second sentence of section 75.516-2(c) has a plain meaning which precludes installation of the additional insulation by a manufacturer of the cable.

We conclude that the Secretary's interpretation is not reasonable and does not advance mine safety. The Secretary would require the manual application of additional insulation to any cable, even a cable that contains abundant amounts of insulation. According to the Secretary, simply wrapping electrical tape around the communication cable or the power cable, regardless of the amount of insulation already existing, would be enough to comply with the standard. Oral Arg. Tr. at 62-63. The Secretary's interpretation is not supportable because it leads to results that may have the perverse effect of discouraging the purchase and use of communication cables that are manufactured with redundant layers of insulation.

We also find unpersuasive the Secretary's argument that the additional insulation must be manually installed over the manufacturers' cables to create a signal for the inspector. We fail to see the benefit of a signal that merely indicates that a communication cable was once examined at some unknown past time. Neither the language of the standard nor its regulatory history suggests that a mine operator is required to flag the areas in question as being compliant. Instead, the regulatory history suggests that the goal of the safety standard is to ensure the proper insulation of wires and cables to prevent unintentional energization. *See* 38 Fed. Reg. at 4975.

We conclude that the Secretary's interpretation should not be accorded deference as a reasonable interpretation. The safety standard simply requires the presence of "additional insulation" at points where communication circuits pass over or under power conductors. Accordingly, a mine operator may "provide" additional insulation by using a communication cable that contains insulation that is more than sufficient to comply with the requirements of section 75.516-2.³ The Judge's decision with respect to Citation Nos. 8456301 and 8456311 is reversed, and the citations are vacated.

II.

Citation No. 7622372

A. Factual and Procedural Background

On December 10, 2008, Inspector James Preece began an inspection of the Foidel Creek Mine. 33 FMSHRC at 1934. Preece observed that sprinkler heads for the fire suppression system along the Three Main North belt were covered in a layer of rock dust. *Id.* at 1934-35; Tr. 379, 381-82, 384-85; Gov. Ex. 21. He issued Citation No. 7622372 for an alleged violation of the safety standard in 30 C.F.R. § 75.1100-3, which provides that "[a]ll firefighting equipment shall be maintained in a usable and operative condition." Gov. Ex. 21.

³ We note that the Secretary takes issue with the Judge's statement that the requirement of additional insulation in section 75.516-2(c) is "obsolete" due to technological improvements in the insulation of communication circuits and power conductors. 33 FMSHRC at 1945; S. Br. at 29-30. Our determination that the Secretary's interpretation of section 75.516-2(c) is unreasonable is based on the considerations set forth herein. We are not suggesting in any way that the regulation is obsolete.

Prior to the hearing, the Judge granted the Secretary's motion to amend the citation to allege a violation of the safety standard in 30 C.F.R. § 75.1107-16(b). 33 FMSHRC at 1935. The standard provides that "[e]ach fire suppression device shall be tested and maintained in accordance with the requirements specified in the appropriate National Fire Code . . . National Fire Code 13A 'Care and Maintenance of Sprinkler Systems' (NFPA No. 13A - - 1971)." 30 C.F.R. § 75.1107-16(b) (herein after referred to as "NFPC 13A"). The Secretary alleged that Twentymile violated a provision of NFPC No. 13A, which states that "[s]prinklers should be checked regularly to make sure that they are in good condition, clean, free from corrosion or loading, not painted or whitewashed, and not bent or damaged."⁴ S. Post-Hearing Br. at 38-39; Gov. Ex. 23.

The Judge concluded that the Secretary failed to allege a violation of a mandatory safety standard. 33 FMSHRC at 1939. The Judge stated that section 75.1107-16(b) incorporates only the "requirements" of NFPC No. 13A. *Id.* He noted that the relevant provisions use the term "should" in their directive language, which normally indicates the non-mandatory nature of a regulation. *Id.* at 1938-39 (citing *Utah Power & Light Co.*, 11 FMSHRC 1926, 1931-32 (Oct. 1989)). Therefore, the Judge concluded that the cited provisions are not among the "requirements" that mine operators must comply with pursuant to section 75.1107-16(b). *Id.* at 1939. In a footnote, the Judge stated that "[e]ven if the subject National Fire Code provisions could be considered as mandatory safety standards, I find that the Secretary failed to establish a violation." *Id.* at 1939 n.5. The Judge credited the testimony of Edwin Brady, the maintenance manager who had worked at the mine for more than 20 years, over that of Inspector Preece. *Id.* at 1936-37, 1939 n.5.

On review, the Secretary maintains that it is irrelevant whether the cited provisions use advisory language because the cited provisions were made mandatory through incorporation by section 75.1107-16(b). The Secretary further alleges that the testimony of Inspector Preece was sufficient to establish a violation. Twentymile argues that the plain language of section 75.1107-16(b) incorporates only those provisions in the National Fire Code that are written with

⁴ In his post-hearing brief, the Secretary alleged that Twentymile had also violated a provision of NFPC No. 13A which provides: "[i]t is of prime importance to keep sprinklers in good condition. If they are subject to loading with dust or foreign material, the authority having jurisdiction should be consulted." S. Post-Hearing Br. at 39-40; Gov. Ex. 23. The Secretary alleged in the brief that Twentymile failed to consult with MSHA. S. Post-Hearing Br. at 39-40. However, Citation No. 7622372 did not allege a failure to consult with MSHA about the condition of the sprinklers. Gov. Ex. 21. Moreover, when asked about the basis for the citation, Inspector Preece testified about the requirement to maintain sprinklers in good condition, but did not mention a failure to consult with MSHA. Tr. 380-81, 395-96. In his brief to the Commission, the Secretary says in a one-sentence footnote that he also relies on the NFPC No. 13A provision requiring consultation with "the authority having jurisdiction." S. Br. at 19 n.11. No further explanation is provided. The Commission concludes that the Secretary's claim that Twentymile failed to consult with MSHA about the sprinkler was not supported by a sufficient allegation in the citation or by evidence at the hearing, and was essentially waived on appeal.

mandatory language, and that the Judge properly credited the testimony of Mr. Brady over that of Inspector Preece.

B. Disposition

We conclude that under the specific circumstances of this case, we need not reach the issue of whether 30 C.F.R. § 75.1107-16(b) makes the cited provisions of NFPC No. 13A mandatory. Even if we were to find the NFPC No. 13A provisions mandatory, the Secretary has not proven those provisions would be violated in this case.

Because this case involves an alleged violation due to the presence of rock dust on sprinklers heads, we must consider the case in the context of the use of rock dust in underground coal mining.⁵ It is undisputed that there was a coating of rock dust on the sprinkler. The inspector testified that he observed the sprinklers covered with rock dust and this is supported by Government Exhibit 22, photos of a sprinkler with rock dust all over its surface. However, and very importantly, it is also beyond dispute that rock dust is essential to safety in an underground coal mine.

Adequate rock dusting is necessary to prevent the propagation of a mine explosion – the deadliest danger in an underground coal mine. In enacting the Coal Act and subsequently the Mine Act, Congress was explicit about the requirement of rock dusting. Thus, section 304(c) of the Mine Act provides: “All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within forty feet of all working faces, . . . unless the Secretary or his authorized representative permits an exception upon his finding that such exception will not pose a hazard to the miners.” 30 U.S.C. § 864(c).

Moreover, Congress was explicit about where rock dust must be applied and the amount of rock dust necessary. Thus, section 304(d) of the Act provides:

(d) Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum.

⁵ At one point in his cross-examination, Inspector Preece mentioned that coal dust as well as rock dust was present on the sprinkler heads. Tr. 392. However, this contradicted all of his references to the substance of the sprinkler heads in his direct examination. Tr. 379, 381-82, 385. It also contradicted the citation Preece issued, which only refers to rock dust. Gov. Ex. 21. The Secretary adduced no evidence as to the amount of coal dust. Hence, the Secretary’s evidence fails to prove a violation of section 75.1107-16(b) based on the existence of material other than rock dust on the sprinkler heads at the mine.

30 U.S.C. § 864(d). Testimony at trial in this case established that rock dust is necessary in belt entries. Tr. 410.

The relevant provision of NFPC No. 13A at issue here states: “Sprinklers should be checked regularly to make sure that they are in good condition, clean, free from corrosion or loading, not painted or whitewashed, and not bent or damaged.” Gov. Ex. 23; Tr. 380-81. Although “clean” is not the term that comes to mind upon viewing the photos, the Secretary has failed to demonstrate through the evidence presented in this case that provisions of NFPC No. 13A have been violated by the presence of the depicted rock dust. As the Judge found, MSHA Inspector Preece’s knowledge of Twentymile’s sprinkler system, how it activates and whether the presence of rock dust would delay the activation was vague and not very convincing, and Inspector Preece appeared to misunderstand how the mine’s sprinkler system operated. 33 FMSHRC at 1939 n.5.

We find no evidence in the record of a regulatory connection between rock dust, which was likely not considered in drafting NFPC No. 13A, and the performance of sprinklers in a mine. No such connection is apparent on the face of the cited provisions,⁶ and the record raises a question as to the feasibility of implementing the Secretary’s interpretation in an underground mine.⁷ It would not be necessary that the Secretary prove a particular sprinkler was not functional for it to be deemed to be not “clean” if rock dust were within the scope of materials comprehended by NFPC No. 13A. However, to find that rock dust is a material covered by NFPC No. 13A, it is incumbent upon the Secretary to first show a sufficient regulatory connection between the performance of a fire protection suppression system and rock dust on the system.

In his post-hearing brief, the Secretary relied only on the definition of “clean” and even then argued only that “clean” is defined as “free from dirt or pollution.” The Secretary then went on to state that “pollution” means something that “contaminates (an environment) especially with man-made waste.” S. Post-Hearing Br. at 39. We do not agree that rock dust can reasonably be considered “man-made waste.” Indeed, rock dust is a substance that MSHA requires be applied liberally in underground mines. 30 C.F.R. §§ 75.402 and 75.403. Nor is rock dust “dirt” as the word is used in Volume V of MSHA’s Program Policy Manual. Gov. Ex. 24; Tr. 385-86.

⁶ Compare MSHA’s Program Policy Manual (referring to a different regulation (30 C.F.R. § 75.1107-4) where it states: “[t]o be effective, all heat detecting sensors, including sprinklers, must be kept free of oil, grease, rock dust, and other materials that may have an insulating effect.” V MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 75, at 115 (2003).

⁷ The operator’s witness testified that to remove the rock dust from the sprinklers, the sprinkler heads would need to be washed off with a high pressure hose, and that given the delicate nature of the sprinklers, washing with such a hose could potentially damage the heads. Tr. 411.

Therefore, the Secretary did not provide adequate evidence to establish that the circumstances of this case would fall within the scope of NFPC No. 13A. For the reasons stated above, we affirm the Judge in result.

III.

Conclusion

For the foregoing reasons, the Judge's decision with respect to Citation Nos. 8456301 and 8456311, which alleged violations of the standard governing additional insulation on communication cables, 30 C.F.R. § 75.516-2(c), is reversed, and those citations are vacated.

We also conclude that the Secretary failed to prove a violation of 30 C.F.R. § 75.1107-16(b). Accordingly, the Judge's decision to vacate Citation No. 7622372 is affirmed in result.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

/s/ William I. Althen
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August 26, 2014

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEST 2009-1323
	:	WEST 2010-38
v.	:	WEST 2010-578
	:	
TWENTYMILE COAL COMPANY	:	

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

DECISION

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

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), and involve an order and a citation that were issued to Twentymile Coal Company by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). Order No. 8460435 alleges that Twentymile failed to conduct adequate on-shift examinations as required by the mandatory safety standard in 30 C.F.R. § 75.362(b). Citation No. 8457448 alleges that Twentymile failed to provide additional insulation at the point where a communication circuit contacted power cables as required by the safety standard in 30 C.F.R. § 75.516-2(c).

The Administrative Law Judge vacated the order alleging an inadequate on-shift examination, concluding that the Secretary failed to offer any proof of coal production during the shift as required by section 75.362(b). 34 FMSHRC 2138, 2171 (Aug. 2012) (ALJ). The Judge affirmed the citation issued for inadequate insulation. *Id.* at 2144.

We conclude that the Judge erred in his findings of fact concerning Order No. 8460435. He mistakenly ruled that the cited examination occurred during a non-production maintenance shift, for which no on-shift examination is required. In addition, the Judge erred in finding that Twentymile did not provide additional insulation to the cable as required by section 75.516-2(c). Accordingly, we vacate the Judge’s decision with respect to the on-shift examination order (Order No. 8460435), vacate the additional insulation citation (Citation No. 8457448), and remand the cases for further proceedings consistent with our decision.

I.

The On-Shift Examination Order (Order No. 8460435)

A. Factual and Procedural Background

Twentymile owns and operates the Foidel Creek mine, a large underground coal mine in Colorado. 34 FMSHRC at 2139. On August 11, 2009, at 11:30 a.m., MSHA Inspector Randy Gunderson arrived at the mine's 8 Main North belt conveyor to conduct an inspection. *Id.* at 2167; Gov. Ex. 2. The mine was on a maintenance shift, and the conveyor belt was not running. 34 FMSHRC at 2171; Tr. 317, 347-49.

Inspector Gunderson observed coal accumulations along the belt haulageway that measured approximately 600 feet long, 6 feet wide and 20 inches deep. 34 FMSHRC at 2168; Tr. 294-298; Gov. Ex. 2. The accumulations contacted the belt at 12 points. 34 FMSHRC at 2168; Tr. 294; Gov. Ex. 2. Gunderson noted that rock dust was layered between the coal accumulations, which included both loose coal as well as dry coal fines. Tr. 296-97, 301, 354. Where the accumulations contacted the belt, however, there was no rock dust. 34 FMSHRC at 2168; Tr. 298. Based on his observations, the inspector issued a citation alleging a violation of the safety standard in 30 C.F.R. § 75.400, which prohibits the accumulation of coal in active workings. Gov. Ex. 2. Twentymile admitted that these cited conditions constituted a significant and substantial violation of the safety standard in section 75.400. 34 FMSHRC at 2168 n.28 (citing Unpublished Order at 1 (Sept. 21, 2011)); Tr. 302; Gov. Ex. 2; Gov. Ex. 40.

As a result of the inspection, Gunderson also issued Order No. 8460435, which alleged a violation of the on-shift examination requirement in 30 C.F.R. § 75.362(b) and specifically cited the August 10 and August 11 examiner reports as inadequate.¹ Gov Ex. 1. The cited examination reports did not contain any mention of the coal accumulations in the belt haulageway. Gov Ex. 4 at 18-22. The most recent of the examinations had been conducted between 6:57 a.m. and 8:06 a.m on August 11. *Id.* at 22.

Twentymile contested this order at a hearing on the merits. On August 9, 2012, the Judge issued a decision stating that while section 75.362(b) requires adequate examinations, this

¹ The standard requires that:

During each shift that coal is produced, a certified person shall examine for hazardous conditions . . . along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

30 C.F.R. § 75.362(b) (emphasis added).

particular standard only applies “during each shift that coal is produced.”² 34 FMSHRC at 2171. The Judge stated that the inspector testified that the operator’s examination was conducted on August 11 between 6:57 a.m. and 8:06 a.m. (hereinafter referred to as “the operator’s August 11 morning examination”) during a “maintenance shift.” *Id.* The Judge concluded that because the Secretary failed to offer any evidence of coal production during the shift when the order was issued, the Secretary had failed to prove that the standard was violated. Accordingly, the Judge vacated the order. *Id.* at 2171-72.

On review, the Secretary argues that the Judge erred because the record demonstrates that the operator’s August 11 morning examination actually was performed on a production shift – the shift that occurred directly before the “maintenance shift” during which the MSHA inspection occurred.

B. Analysis

1. The operator’s August 11 morning examination was not performed during the “maintenance shift,” but was performed on the preceding production shift.

The threshold question in this case is whether the operator’s August 11 morning examination occurred on a shift during which coal was produced. Specifically, we must determine whether this examination was performed during the production shift or the subsequent morning maintenance shift. Although the Judge found that the operator’s August 11 morning examination was performed on the “maintenance shift” (34 FMSHRC at 2171 (citing Tr. 317)), we conclude that this finding is not supported by substantial evidence.³

The Judge relied on the testimony of Inspector Gunderson but appears to have misunderstood the inspector’s statements. At the hearing, Inspector Gunderson testified as follows:

Q: And was the belt running during your inspection?

A: No

Q: Why not?

A: It was a maintenance shift, is what I was told.

² Conversely, the safety standard in 30 C.F.R. § 75.360 requires operators to conduct examinations at fixed intervals, regardless of whether coal is produced on a particular shift.

³ The Commission applies the substantial evidence test when reviewing a Judge’s factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the Judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Tr. 317. In the cited portion of the transcript, Gunderson was referring to the production status of the mine *at the time of his inspection*. Gunderson inspected the mine and issued the order at 11:35 a.m. Gov. Ex. 1. Gunderson did not testify about the production status of the mine *during the time at which the operator's August 11 morning examination was performed* (between 6:57 a.m. and 8:06 a.m.).

Although the Secretary did not introduce specific evidence of the mine's shift schedules or production reports, an examination of the record fully demonstrates that the cited August 11 morning examination occurred during the shift that *immediately proceeded* the maintenance shift. 34 FMSHRC at 2172. Twentymile repeatedly represented that its August 11 morning examination qualified as both an on-shift examination for the shift on which it was performed and a pre-shift examination for the shift that was about to begin. T. Post-Hearing Br. at 37 (stating "[t]here is no dispute that there was a pre-shift/on-shift examination conducted [on the morning of] August 11, 2009"), *see also id.* at 39-40; Oral Arg. Tr. 141-44. Section 75.362(b) provides that the on-shift and pre-shift exams may be conducted simultaneously, if the examination is conducted within three hours before the start of an oncoming shift. Because the August 11 morning examination was a "pre-shift/on-shift examination," a shift change must have occurred at the mine within the three hours that followed the examination. Stated another way, the inescapable conclusion drawn from Twentymile's own representations is that a shift change occurred at the mine between 8:06 a.m. (the time the operator's morning examination concluded) and 11:06 a.m. (the end of the three hour window referred to in section 75.362(b)). Gov. Ex. 4 at 22.

The order was issued at 11:35 a.m. (Gov. Ex. 1) after the shift change occurred. The inspector testified that the mine was on a maintenance shift at the time the order was issued. Tr. 317. Accordingly, the operator's August 11 early morning examination qualified as an on-shift examination for the night shift ending on the morning of August 11 (the "graveyard shift"), and as a pre-shift examination for the subsequent maintenance shift.

2. Twentymile conceded that coal was produced on the "graveyard shift."

In its post-hearing brief, Twentymile stated that it produced coal after it conducted the cited August 11 on-shift examination. *See* T. Post-Hearing Br. at 39-40 (stating that the accumulations "could have occurred in a 'couple of hours' considering the amount of coal running over the belt during the time after the pre-shift/on-shift and [the inspector] issuing his order and citation."); *see also id.* at 41 ("[The accumulations] developed within the approximate 3-hour span between when the pre-shift/on-shift examination was performed and when the condition was observed by the MSHA inspector").

At oral argument before the Commission, counsel for Twentymile agreed that there would have been no reason to conduct an on-shift examination during the "graveyard shift" if the company had not been producing coal on that shift. Oral Arg. Tr. 144 (Commissioner Young: "[i]f you say it's an on-shift examination, there's no reason to do one unless you're running coal, right?" Counsel: "That's correct").

Significantly, Matt Winey, the shift foreman, testified that the mine was running two ten-hour production shifts per day in August 2009. Tr. 357-59. On a typical shift, the mine produced about 1,500 tons of coal per hour. Tr. 359. Neither Winey nor any of Twentymile's other witnesses suggested that production did *not* occur during the shift on which the cited on-shift examination was made.

Based on the foregoing, we conclude that Twentymile conceded that it produced coal on the "graveyard shift," the shift for which the cited examination was performed. Therefore, according to the safety standard in 30 C.F.R. § 75.362(b), it was required to perform an adequate on-shift examination.

As noted above, however, Twentymile argued that the accumulation might have occurred after the on-shift report was prepared. Obviously, the Judge made no finding regarding that argument. Therefore, we remand this matter to the Judge for a determination of whether the cited examinations of August 10 and 11 were inadequate as alleged, and, if so, whether the violation was significant and substantial and the result of an unwarrantable failure by the operator.

II.

The Inadequate Insulation Citation (Citation No. 8457448)

A. Factual and Procedural Background

On June 23, 2009, MSHA Inspector Charles Bordea arrived at the Foidel Creek mine to conduct a regular inspection. Gov. Ex. 41 at 1-2. He traveled underground to Load Center No. 29, where he observed a communication cable contacting energized high voltage cables. *Id.* at 3. The communication cable consisted of two twisted pair wires, a ground wire, and shielding, all of which were wrapped in an outer jacket. *Id.* The power cables consisted of three power conductors, a ground monitor cable, and at least two ground wires, all of which were wrapped in an outer jacket. *Id.*

The mandatory safety standard in 30 C.F.R. § 75.516-2(c) requires that "[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor." Inspector Bordea issued Citation No. 8457448 to Twentymile and alleged that its failure to install an additional wrap of insulation at the point where the communication cable contacted the power cable constituted a non-significant and substantial violation of the standard. Gov. Ex. 33. Inspector Bordea determined that the violation was the result of moderate negligence on the part of the operator. *Id.*

Twentymile contested the citation, arguing that it did not violate the standard because it provided a communication cable that had been insulated, shielded, and jacketed by the manufacturer. Twentymile's Statement at 3.

In a previous Commission proceeding, Twentymile made the same argument to Administrative Law Judge Richard Manning when it contested two citations issued for violations

of section 75.516-2(c). 33 FMSHRC 1885, 1945 (Aug. 2011) (ALJ). Judge Manning concluded that the meaning of the language in the safety standard was clear, i.e., mine operators are required to manually install additional insulation at the points where communication circuits pass power conductors no matter how well insulated the circuits may be. *Id.* Twentymile filed a petition for discretionary review of Judge Manning’s decision with the Commission, which we granted.

On August 9, 2012, Judge David Barbour issued his decision on Citation No. 8457448. Judge Barbour adopted Judge Manning’s analysis, concluding that the standard clearly required that an operator must install insulation on the cable in addition to the insulation that is provided by the manufacturer. 34 FMSHRC at 2144. He concluded that “because Twentymile did not add any insulation to the cited communication cable [at the point of contact] . . . the company violated the standard.” *Id.* The Judge found that the violation was the result of low negligence on the part of the operator and assessed a civil penalty of \$100. *Id.* at 2184.

B. Analysis

Today, in a separate decision, the Commission is reversing Judge Manning’s August 2011 decision on the requirements of section 75.516-2(c). 36 FMSHRC ___, Docket Nos. WEST 2009-241 et al. (Aug. 26, 2014). In our concurrently issued decision, we conclude that the language of the safety standard in section 75.516-2(c) is silent or ambiguous with respect to how compliance with its requirements is to be achieved. Slip op. at 3. Specifically, we conclude that the phrase “shall be provided” does not plainly mean that the operator itself must install the “additional insulation.” *Id.* at 3-4. In fact, we note that the phrase “shall be provided” is used elsewhere in the Secretary’s regulations to describe equipment that is commonly provided by a manufacturer. *Id.* at 3 (*see, e.g.*, 30 C.F.R. § 56.14131 (“Seat belts shall be provided and worn in haulage trucks”)). We further conclude that the Secretary’s proffered interpretation – that the additional insulation must be manually installed over the manufacturers’ cables regardless of the amount of pre-existing insulation – was not reasonable and thus should not be accorded deference.⁴ *Id.* at 4-5.

The Commission holds that the safety standard in section 75.516-2(c) simply requires the presence of “additional insulation” at the points where the communication circuits pass over or under power conductors. *Id.* at 5. The insulation at those points must be greater than the insulation requirements of section 75.516-2(b), that is, the insulation must be at least as great as the dielectric strength of the voltage of the circuit. 30 C.F.R. §§ 75.516-2(b), 75.517-1.

The parties agree that the communication cable cited in Citation No. 8457448 is the same communication cable that was cited by the Secretary in the case before Judge Manning. Secretary’s Statement at 1; Twentymile’s Statement at 1. The communication cable consists of

⁴ These issues are explored more completely in the simultaneously issued decision. *See* 36 FMSHRC ___, Docket Nos. WEST 2009-241 et al. (Aug. 26, 2014).

copper conductors that were covered in a layer of insulation, surrounded by foil shielding, and wrapped in a PVC jacket. Slip op. at 2 (citing 33 FMSHRC at 1941-43); *see also* Gov. Ex. 41 at 3.

The Secretary has not demonstrated that the insulation provided was less than the dielectric strength of the voltage of the circuit. Accordingly, the Judge's decision with respect to Citation No. 8457448 is reversed and the citation is vacated.

III.

Conclusion

We conclude that the Judge's decision regarding Order No. 8460435 is not supported by substantial evidence in the record. Therefore, the Judge's decision is vacated and remanded for analysis of whether the cited examinations were inadequate as alleged, and if so, whether the violation was significant and substantial and the result of an unwarrantable failure.

We further conclude that the Judge erred in his interpretation of the safety standard in section 75.516-2(c). Because the record lacks evidence that Twentymile violated the standard, the Judge's decision with respect to Citation No. 8457448 is reversed and the citation is vacated.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

/s/ William I. Althen
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in an impermissibly retroactive manner to Brody Mining, LLC. For the reasons discussed below, we affirm the Chief Administrative Law Judge's interlocutory order upholding the rule, and remand the case for further proceedings. 36 FMSHRC 284 (Jan. 2014) (ALJ).

I.

Statutory and Regulatory Background

Section 104(e) sets forth provisions regarding the issuance and termination of a pattern of violations ("POV") notice. Section 104(e)(1) provides that if an operator has a pattern of violations of mandatory health or safety standards which are of such nature as 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 exists. If, within 90 days following issuance of the POV notice,

²(...continued)

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 or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

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

an inspector cites the operator for a significant and substantial (“S&S”) violation,³ then MSHA may issue a withdrawal order under section 104(e) of the Act. 30 U.S.C. § 814(e)(1).

The operator will thereafter be subject to additional withdrawal orders for each new S&S violation subsequently discovered until a complete inspection of the mine has revealed no further S&S violations. 30 U.S.C. § 814(e)(2). These withdrawal orders “cause all persons in the area affected by such violation . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.” 30 U.S.C. § 814(e)(1).

In enacting section 104(e), Congress explicitly recognized that the provision was necessary to “provide an effective enforcement tool to protect miners when the operator demonstrates [its] disregard for the health and safety of miners through an established pattern of violations.” S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977 (Legis. Hist.)*, at 620 (1978). Congress explained that MSHA’s then-existing enforcement scheme was unable to address the problem of mines with an inspection history of recurrent violations, and that some of the recurrent violations were tragically related to mining disasters:

The need for such a provision was forcefully demonstrated during the investigation . . . of the Scotia mine disaster which occurred in March 1976 in Eastern Kentucky. That investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address. The Committee’s intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.

Id. Congress stated its view that a POV notice indicates “to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards.” *Id.* at 621.

Despite its inclusion in the Mine Act from enactment, the pattern of violations sanction has only recently been employed by the Secretary as an enforcement tool. Regulations implementing section 104(e) were not promulgated until 1990 (“the 1990 rule”). *See* 55 Fed. Reg. 31,128 (July 31, 1990). Under the 1990 rule, MSHA engaged in an annual initial screening process, which included reviewing information regarding a “mine’s history of [S&S] violations.” 30 C.F.R. § 104.2(a)(1) (1990). Section 104.3 identified information that MSHA used to

³ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

identify mines with a “potential” POV (“PPOV”). Section 104.3(b) provided that only citations and orders that had become final orders were used to identify a mine with a PPOV. 30 C.F.R. § 104.3(b) (1990). When notified of a PPOV, an operator had an opportunity to engage in remedial measures, including the submission of a corrective action program. 30 C.F.R. § 104.4(a) (1990). If the MSHA District Manager continued to believe that a pattern of violations existed at the mine, he submitted a report to the appropriate MSHA Administrator, who issued a decision as to whether the mine was to be issued a POV notice. 30 C.F.R. § 104.4(b) (1990). The POV notice was terminated when an inspection of the entire mine revealed no further S&S violations or if no section 104(e)(1) withdrawal order was issued within 90 days of the POV notice. 30 C.F.R. § 104.5 (1990).

It was not until after the disasters at the Sago, Darby, and Aracoma mines in early 2006 that MSHA developed a Pattern of Violations Screening Criteria and Scoring Model, which was initiated in mid-2007. 76 Fed. Reg. 5719, 5720 (Feb. 2, 2011). The screening criteria and procedures were later revised in 2010. *Id.* MSHA used the screening criteria and scoring model to generate lists of mines with a PPOV. *Id.*

In 2010, the U.S. Department of Labor’s Office of the Inspector General (“OIG”) audited MSHA’s POV program. *See* 78 Fed. Reg. 5056, 5058 (Jan. 23, 2013). On September 29, 2010, the OIG published its audit report entitled, “In 32 Years MSHA Has Never Successfully Exercised its Pattern of Violations Authority.” *Id.* The OIG Report stated that during the 32 years since passage of the Mine Act, MSHA had only once issued a POV notice to an operator. Rep. No. 05-10-005-06-001 at 2.⁴ In that one instance, the Commission subsequently modified some of the citations and orders on which the POV notice was based, and, as a result, MSHA did not enforce the order. *Id.* at 4. The report included several recommendations, the first of which was: “Evaluate the appropriateness of eliminating or modifying limitations in the current regulations, including the use of only final orders in determining a pattern of violations and the issuance of a warning notice prior to exercising POV authority.” *Id.* at 24.

MSHA adopted this recommendation in revisions to the 1990 Rule, which became effective on March 25, 2013 (“current rule”). 78 Fed. Reg. 5056-74 (Jan. 23, 2013). The current rule implemented two major changes from the 1990 rule: (1) it eliminated the PPOV notice and review process; and (2) it eliminated the requirement that MSHA could consider only final orders in its POV review. *Id.* at 5056. In addition, section 104.2(a) of the current rule provides that at least once each year, MSHA will review the compliance and accident, injury and illness records of mines to determine if any mines meet the POV screening criteria. The review to

⁴ We take judicial notice of the OIG Report, which is referred to in the preamble of the final POV Rule (78 Fed. Reg. at 5058). *See Sec’y of Labor on behalf of Acton v. Jim Walter Res., Inc.*, 7 FMSHRC 1348, 1355 n.7 (Sept. 1985) (noting that the Commission may take judicial notice of public documents of MSHA).

identify mines with a pattern of S&S violations will include eight listed elements.⁵ Section 104.2(b) provides that “MSHA will post the specific pattern criteria on its Web site.” 30 C.F.R. § 104.2(b).

The 2013 POV screening criteria posted on MSHA’s website include two sets of criteria that are used to perform the review under section 104.2. *See* App. B. The first set pertains to numbers and rates of S&S citations and orders (some with considerations of negligence ratings of high or reckless disregard), rate of issuance of “elevated citations and orders [issued under sections 104(b); 104(d); 104(g); or 107(a) of the Mine Act],” and a comparison of “injury severity measure” (the number of lost workdays per 200,000 employee-hours). B. Mem. Supporting Appl. for Temp. Relief, Ex. 10 at 1. The alternative set of criteria sets forth greater rates of issuance of S&S citations and orders and elevated citations and orders. *Id.* The criteria provide that “[m]ines must meet [all] the criteria in either set to be further considered for exhibiting a pattern of violations.” *Id.*

The numerical criteria in the 2013 POV screening criteria are identical to the numerical screening criteria that were in effect under the 1990 rule in 2012, prior to promulgation of the current rule. *See* App. C; S. Mem. Supporting S. Mot. for Partial Summ. Dec. at 5-6 & Ex. 2. However, consistent with section 104.3(b) of the prior rule, the 2012 screening criteria, unlike the 2013 screening criteria, also provided, “For a pattern of violations review, mines identified during the initial screening must have at least five S&S citations of the same standard that became *final orders* of the Commission during the most recent 12 months *OR* at least two S&S unwarrantable failure violations that became *final orders* of the commission during the most

⁵ The eight listed elements include:

- (1) Citations for S&S violations;
- (2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
- (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator’s unwarrantable failure to comply;
- (4) Imminent danger orders under section 107(a) of the Mine Act;
- (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
- (6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
- (7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
- (8) Mitigating circumstances.

30 C.F.R. § 104.2.

recent 12 months.” S. Mem. Supporting Mot. for Partial Summ. Dec., Ex. 2 at 2 (emphasis in the original); App. C.

MSHA has available on its website a Monthly Monitoring Tool for Pattern of Violations. MSHA’s online Monthly Monitoring Tool provides mine operators with a statement of their performance with respect to the screening criteria. 78 Fed. Reg. at 5057, 5059.

MSHA also provides a POV Procedures Summary on its website. *See* B. Mem. Supporting Appl. for Temp. Relief, Ex. 11. Regarding the issuance of the POV notice, the summary provides in part that at least once each year, MSHA will review the violation and injury history of each mine to identify those that are exhibiting a pattern of violations. *Id.* at 1. The MSHA District Manager of a mine meeting the POV screening criteria performs a review to determine whether mitigating circumstances exist. *Id.* An MSHA POV panel subsequently reviews information provided by the District Manager, obtains any additional necessary information, and makes a recommendation regarding whether to postpone or not issue the POV notice. *Id.* The panel provides a report to the appropriate MSHA Administrator, who determines whether to issue the POV notice. *Id.* If so, the District Manager issues the POV notice. *Id.*

II.

Factual and Procedural Background

These consolidated proceedings arose from MSHA’s application of the POV procedures to Brody’s Mine No. 1. On October 24, 2013, MSHA issued a POV notice to Brody. MSHA made its POV determination based on a 12-month screening period extending from September 1, 2012, through August 31, 2013. S. Mem. Supporting Opp’n to Appl. for Temp. Relief, Ex. A at 9.

The POV notice issued to Brody states:

Pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act), you are hereby notified that a pattern of violations exists at the Brody Mine No. 1 (ID 46-09086). A review of the S&S violations cited at the mine demonstrates a pattern of violations. As illustrative of this pattern of violations, the following groups of violations are representative of violations 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[.]

Notice No. 7219154. The notice lists 54 citations and orders issued between October 9, 2012 and October 8, 2013, in groups regarding conditions and or practices that contribute to: (1) ventilation and/or methane hazards; (2) emergency preparedness and escapeway hazards; (3) roof and rib hazards; and (4) inadequate examinations. The notice further states that, “These groups of violations, taken alone or together, constitute a pattern of violations . . .” *Id.* The citations and orders listed in the POV notice were either contested or in the penalty assessment

process, but no citations or orders had become final Commission orders. 36 FMSHRC 284, 293 (Jan. 2014) (ALJ).

On October 30, 2013, Brody notified the Secretary that it was contesting the POV notice, and the contest was docketed as WEVA 2014-81-R. Chief Administrative Law Judge Lesnick dismissed the docket, holding that no provision of the Mine Act or the Commission's Procedural Rules authorized him to adjudicate a "notice." 36 FMSHRC 284, 287 (Jan. 2014) (ALJ). Brody has not sought review of the Judge's dismissal of this contest.

After the issuance of the notice, MSHA issued four section 104(e) withdrawal orders to Brody, and Brody contested those orders. B. Mem. Supporting Appl. for Temp. Relief at 8. Since that time, MSHA has issued numerous additional section 104(e) withdrawal orders, which Brody has also contested.

On November 4, 2013, Brody filed an application seeking temporary relief from the POV notice and withdrawal orders. Appl. for Temp. Relief at 3 ¶ 7. Brody's application was denied by an Administrative Law Judge because Brody failed to establish that granting temporary relief would not adversely affect the health and safety of miners. Unpublished Order dated Nov. 21, 2013, at 4-5. Brody has not sought review of that decision. See S. Br. at 5 n.7.

Brody subsequently filed a Motion for Summary Decision, and the Secretary filed a Motion for Partial Summary Decision and Opposition to Brody's motion. Among other issues, the parties disputed whether in the current rule MSHA properly eliminated: (1) the 1990 rule's PPOV notice and review process and (2) the requirement that MSHA could only consider final orders in its POV review.

On January 30, 2014, the Chief Judge issued an order denying Brody's motion and granting the Secretary's motion. 36 FMSHRC at 286. In granting the Secretary's motion, the Judge upheld the facial validity of the current rule against three lines of attack made by the operator. First, the Judge concluded that nothing in the Mine Act requires MSHA to rely on issuances that have become final orders in determining whether a mine operator should be considered for further evaluation and potentially issued a POV notice. *Id.* at 298-301. In so holding, he concluded that the term "violation," as used in section 104(e) of the Act, is ambiguous, and that the Secretary's interpretation of the term was reasonable and entitled to deference. *Id.* at 301.

Second, the Judge concluded that the Secretary's promulgation of the POV rule was not arbitrary, capricious, or an abuse of discretion in violation of section 706(2)(A) of the Administrative Procedures Act ("APA"). *Id.* at 301-04.

Third, the Judge concluded that the POV rule does not violate the Due Process Clause of the Fifth Amendment. *Id.* at 304-08. The Judge reasoned that the government's significant interest in the timely protection of public health and safety, particularly in light of an operator's opportunity for expedited post-deprivation review, justified the deprivation of the property interest associated with uninterrupted mine production, which Brody had "overstated." *Id.* at 305.

The Judge further concluded that the POV screening criteria are a valid statement of agency policy, and, as such, were not subject to notice-and-comment rulemaking requirements. *Id.* at 308-12. He reasoned that the criteria were not legislative rules because they did not bind or circumscribe MSHA’s discretion in determining whether a POV notice should be issued. *Id.* at 311-12. Finally, the Judge rejected Brody’s argument that MSHA applied the POV rule retroactively. *Id.* at 312-15.

On the same day that he issued his order, the Judge certified the order for interlocutory review. We granted interlocutory review of the following questions: (1) whether the POV rule is valid; (2) whether MSHA’s screening criteria are invalid because notice-and-comment rulemaking was required; and (3) whether MSHA impermissibly applied the POV rule retroactively. We also instructed the parties to address whether the Commission has jurisdiction to rule upon the validity of the current rule.

III.

Disposition

A. The Commission’s jurisdiction to rule on the validity of the current rule

Section 101(d) of the Mine Act vests exclusive jurisdiction over challenges to the validity of mandatory safety and health standards promulgated by the Secretary with the U.S. Courts of Appeals.⁶ Thus, if the POV rule were a “mandatory health or safety standard,” the Commission would lack jurisdiction to consider its validity.⁷

Section 3(l) of the Mine Act defines a “mandatory . . . safety standard” as “the interim mandatory health or safety standards established by subchapters II and III of this chapter, and the

⁶ Section 101(d), 30 U.S.C. § 811(d), provides in part:

Any person who may be adversely affected by a mandatory health or safety standard promulgated under this section may, at any time prior to the sixtieth day after such standard is promulgated, file a petition challenging the validity of such mandatory standard with the United States Court of Appeals for the District of Columbia Circuit or the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard The procedures of this subsection shall be the exclusive means of challenging the validity of a mandatory health or safety standard.

⁷ The Court of Appeals for the Sixth Circuit recently held that the POV rule is not a mandatory health or safety standard and that it lacks jurisdiction to consider an initial challenge to the validity of the rule. *Nat’l Min. Ass’n v. Sec’y of Labor*, Nos. 13-3324 & 13-3325. 2014 WL 4067861 (6th Cir. Aug. 19, 2014).

standards promulgated pursuant to subchapter I of this chapter.” 30 U.S.C. § 802(l). Subchapters II and III set forth interim mandatory standards, while Subchapter I contains sections 101 through 116 of the Mine Act. Section 101 provides the procedures for the development, promulgation and revision of mandatory safety and health standards by the Secretary. Section 101(d) explicitly confers exclusive jurisdiction in the U.S. Courts of Appeals of challenges regarding “a mandatory health or safety standard *promulgated under this section.*” 30 U.S.C. § 811(d).

The Commission and courts have generally distinguished mandatory health or safety standards promulgated under section 101 from regulations promulgated under other sections of the Mine Act. *Drummond Co.*, 14 FMSHRC 661, 673 (May 1992); *UMWA v. Dole*, 870 F.2d 662, 668 (D.C. Cir. 1989) (“Regulations promulgated pursuant to § 508 alone do not establish ‘mandatory health or safety standards’ for the purposes of § 101(a)(9)’s no-less protection rule.”); *see also Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 43-44 & n.2 (D.C. Cir. 1999) (holding that a violation of 30 C.F.R. § 50.11(b) could not be designated as S&S because the regulation was promulgated under section 508 rather than section 101). *Cf. Wolf Run Mining Co. v. FMSHRC*, 659 F.3d 1197, 1201-02 (D.C. Cir. 2011) (holding that a violation of a safeguard notice could be S&S because section 314(b) constitutes an interim mandatory standard and falls within section 3(l)’s definition).

The POV rule was not promulgated pursuant to section 101 of the Mine Act. Rather, the POV rule was promulgated pursuant to section 104(e)(4) and section 508, 30 U.S.C. § 957,⁸ of the Mine Act. *See* 78 Fed. Reg. at 5073. Therefore, we conclude that the POV rule is not a “mandatory safety and health standard” subject to exclusive court review.

We further conclude that we have the authority to consider the validity of the POV rule. The Commission is authorized pursuant to section 105(d) of the Mine Act, 30 U.S.C. § 815(d), to adjudicate contested orders, such as the section 104(e) withdrawal orders at issue in these proceedings. In exercising our jurisdiction, we may address Brody’s challenge to the validity of the POV rule underlying the withdrawal orders in order to fully dispose of the case. *See Drummond*, 14 FMSHRC at 674 (“[W]here the statute creates Commission jurisdiction, it endows the Commission with a plenary range of adjudicatory powers to consider issues . . . to dispose fully of cases committed to Commission jurisdiction.”).

B. Facial validity of the current rule

Section 104(e)(4) of the Mine Act grants the Secretary the authority to “make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.” 30 U.S.C. § 814(e)(4). In the rules under review, the Secretary explains that he will determine whether a pattern exists by considering cited violations designated as S&S, regardless of whether a citation has been contested by the

⁸ 30 U.S.C. § 957 provides, “The Secretary . . . [is] authorized to issue such regulations as [he] deems appropriate to carry out [a] provision of this chapter.”

operator. Brody challenges the Secretary's reliance on these "non-final citations" which, according to Brody, are merely unproven assertions or allegations of a violation.

In considering the validity of the Secretary's approach, we bear in mind that, in cases such as this one where "there is an express delegation of authority to the agency . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Brody submits that applying that standard here would require us to invalidate the current rule. It argues that, by its ordinary usage, the term "violations" in section 104(e) must be restricted to final orders, that is, violations cited by MSHA that were either unchallenged by the operator or upheld by the Commission. Had Congress intended POV sanctions to apply to "patterns of citations and orders," Brody contends that it would have said so. Furthermore, Brody notes that the Secretary, when considering an operator's "history of previous violations" for purposes of assessing a penalty under section 110(a), includes only those violations for which a penalty has been paid or which have been upheld in final orders of the Commission. B. Br. at 11. Finally, Brody relies on MSHA's request to Congress to amend the Mine Act to permit it to issue POV sanctions based on non-final citations, a request, which it argues would have been unnecessary if such action was already permissible.

Where the plain meaning of statutory language indicates that Congress has directly spoken to the precise question at issue, "'that intention is the law and must be given effect' in the regulation." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (quoting *Chevron*, 467 U.S. at 843, n.9) (other citations omitted). However, the Mine Act does not define "violation" or "pattern of violations." As such, Congress has not clearly addressed whether the term "violations" in section 104(e) refers only to final orders, but has instead expressly delegated to the Secretary responsibility for determining when a pattern of violations exists.

1. Meaning of the term "violations"

When statutory language is silent or ambiguous, we generally defer to an interpretation proffered by the Secretary "so long as it is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language." *Coal Employment Project*, 889 F.2d at 1131 (citations omitted); *Chevron*, 467 U.S. at 843 n.9. Thus, any ambiguity arising from the Act's omission of a definition for "violations" must be resolved in favor of a reasonable construction adopted by the Secretary.

As the Secretary points out, various provisions of the Mine Act allow enforcement actions based on the occurrence of a "violation" where the term can only reasonably refer to conditions that, in the inspector's determination, amount to a violation and warrant a citation, whether or not that determination has been subjected to review by the Commission. *See, e.g.*, 30 U.S.C. § 814(a) (providing that an operator must abate a "violation" within the time fixed in the citation); 30 U.S.C. § 814(b) (stating that an operator who fails to abate a "violation" within the time fixed in the citation for abatement can be issued an order requiring the withdrawal of miners from the affected area of the mine until the violation is abated). The ability of MSHA to compel

immediate compliance and to issue such orders does not depend on the finality of MSHA's determination that a violation exists.

The legislative history of the Mine Act indicates that the POV provisions of section 104(e) were intended to parallel the unwarrantable failure provisions contained in section 104(d).⁹ That provision empowers an inspector to issue a withdrawal order if he or she determines that a "violation" caused by an operator's unwarrantable failure to comply with a cited standard has occurred within ninety days of a prior violation determined to be both S&S and unwarrantable. 30 U.S.C. § 814(d)(1). The predicate "violation" may occur during the same inspection as the "violation" that is the basis for the withdrawal order. In such case, neither the predicate citation nor the subsequent withdrawal order would be based on determinations of violations that had been subjected to additional review.

Section 104(e), like subsections 104(a), (b), and (d), provides enforcement authority to ensure compliance with the Act. It is intended to be applied to repeat violators who have been undeterred by MSHA's other enforcement tools. It would indeed be anomalous if withdrawal orders directed to repeated serious violations were restricted to violations deemed "final" while other section 104 withdrawal orders need only be based on prior cited conditions.

We further observe that Congress recognized that the POV sanction was necessary to address mines with an "*inspection history* of recurrent violations." *Legis Hist.* at 620 (emphasis added). The use of the phrase "inspection history" demonstrates Congress' expectation that POV determinations would be based on violations found during inspections regardless of whether such violations had achieved a final status.

The legislative history supporting the Secretary's interpretation may be traced back to the Mine Act's antecedents, which clearly evince an intent to effectively address recurrent violations. The issuance of a section 104(b) withdrawal order is derived from section 203 of the Federal Coal Mine Safety Act of 1952, which authorized a representative of the Bureau of Mines to issue a withdrawal order if an operator had failed to abate a non-imminent condition and an extension of abatement time was not permitted. Pub. L. No. 82-552, 66 Stat. 692, 694-95. Section 203 of the 1952 Act was amended in 1966 to add a provision that is the basis for section 104(d) withdrawal orders. Pub. L. No. 89-376, 80 Stat. 85. The legislative history of the Federal Coal Mine Safety Act Amendments of 1966 reveals that the purpose of the revision was to provide inspectors "with increased powers to deal with recurrent or repeated violations." H. Rep. No. 89-181, at 7 (1965).

When these provisions were "unable to address" the problem of recurrent violations, Congress developed the POV sanction. *Legis. Hist.* at 620. Throughout this development,

⁹ The Senate report states that the section 104(e) "sequence parallels the current unwarrantable failure sequence of the Coal Act, and the unwarranted failure sequence of Section 10[4(d)] of the bill." *Legis. Hist.* at 621.

Congress provided the enforcement tool of a withdrawal order without requiring finality for the violation underlying that order. Thus, the Secretary's interpretation of the term "violation" is consistent with the language, structure and history of the Act.

Brody notes that section 110(i) of the Act – which sets forth criteria for the assessment of civil penalties – includes "the operator's history of previous violations" as one of the criteria to be considered. 30 U.S.C. § 820(i). Brody further notes that the Secretary's regulations implementing this provision interprets the language to include "only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission." 30 C.F.R. § 100.3(c). Brody contends that this definition of "previous violations" is necessarily binding on the Secretary in the context of section 104(e). B. Br. at 11. However, the statutory language of section 110(i) differs from the language in section 104(e). Section 110(i) uses the phrase "history of previous violations," which suggests past actions, while section 104(e) addresses an operator that "*has* a pattern of violations," which, in addition to past actions, suggests present and continuing actions. 30 U.S.C. § 814(e)(1) (emphasis added). The use of the word "violations" in section 104(e) is much more closely related to its use in sections 104(a), (b) and (d) where, unquestionably, "violations" does not require the administrative finality of the "previous violations" referred to in section 110(i). The fact that the Secretary made a policy choice in his penalty regulations to define "history of previous violations" to encompass only paid violations and final orders does not change our view that the phrase "pattern of violations" in section 104(e) may permissibly be interpreted to encompass non-final orders.

Brody also asserts that Congress and MSHA itself have agreed that the phrase "pattern of violations" in section 104(e) is limited to violations that have become final after review by the Commission. In support of this argument, Brody describes various bills relating to pattern of violations that have been proposed in Congress, and cites testimony before Congress by Assistant Secretary for Mine Safety and Health Joseph A. Main. According to Brody, Assistant Secretary Main stated that MSHA's POV authority was too limited in that MSHA "did not have the authority to issue a POV notice based on non-final citations and orders." B. Br. at 13-14. This argument places undue weight on Congressional inaction, and grossly mischaracterizes Assistant Secretary Main's testimony. The fact that Congress did not amend section 104(e) does not indicate Congressional intent. As the Supreme Court stated in *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994), "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." As for Assistant Secretary Main's testimony, the statement relied on by Brody was a statement in which the Assistant Secretary said that MSHA had been working on regulations to change the POV system – the regulations at issue in this case – since his confirmation, and that the proposed legislation "will expedite that needed reform." House Comm.on Education and Labor, Hearing on H.R. 5663, Miner Safety and Health Act of 2010, July 13, 2010, at 13, *reprinted in* Jt. App., Brody Ex. 7, at 218. This was in no way an admission that MSHA lacked authority to make this change itself through notice-and-comment rulemaking, as Brody alleges.

2. Determination of a "pattern of violations"

Brody next asserts that the Secretary's promulgation of the POV regulations was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in

violation of section 706(2)(A) of the APA, 5 U.S.C. § 706(2)(A). Brody argues that, in adopting a rule that bases a pattern determination on non-final S&S citations, MSHA failed to adequately consider that S&S determinations are overturned at a significant rate upon review. The operator also contends that the agency failed to consider the increased safety and compliance that had been afforded by the prior PPOV process.

In determining whether the Secretary acted arbitrarily and capriciously in issuing the current rule, we must consider whether the agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choices made. *Motor Vehicle Mfrs. Ass'n v. State Farm Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The Supreme Court has stated that an agency rule is arbitrary and capricious if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not [possibly] be ascribed to a difference in view or the product of agency expertise.

Id.

Brody's argument is unpersuasive. MSHA expressly considered evidence that S&S citations and orders may be subsequently changed to delete their S&S designations. 76 Fed. Reg. 5719, 5722 (Feb. 2, 2011). While the parties dispute the relevant figure regarding the rate at which S&S designations are altered in adjudication, they appear to agree that approximately 19% of contested S&S citations were vacated, dismissed, or modified to non-S&S in 2009-2010. *See* B. Br. at 16 ("In fiscal 2009 and 2010, nearly 20% of contested S&S violations were vacated or modified to non-S&S."); S. Br. at 13 n.13 ("MSHA represents that the 2009-2010 data show that just under 19% of contested S&S citations were vacated, dismissed, or modified to non-S&S.").¹⁰

Even assuming that approximately 19% of contested S&S citations were vacated, dismissed, or modified to non-S&S in 2009-2010, the fact remains that more than 80% of S&S designations remained unchanged after litigation. In this case, MSHA relies on 54 alleged S&S violations in four different categories. If 20%, or even 33%, of those citations and orders lose their S&S designation after litigation, it would still leave a significant number of S&S violations on which a pattern of violations could be found. We are thus satisfied that MSHA did not "entirely fail[] to consider an important aspect of the problem," and we find no abuse in the

¹⁰ Brody also alleged that 33% of S&S violations in 2011 were vacated, dismissed or modified. B. Br. at 16. MSHA said that it could not confirm this claim. S. Br. at 13, n.13. In any event, these percentages only relate to S&S citations and orders which were contested. If one were to consider the universe of S&S citations and orders that are issued – those contested and those not contested – the percentage of S&S citations and orders that were later changed would be lower.

Agency's decision to rely on non-final issuances even though some S&S designations may later be changed in adjudication. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. at 43.

Moreover, MSHA extensively addressed its decision to eliminate the final order requirement in the current rule's preamble, setting forth relevant data and articulating a satisfactory reason for its action. 78 Fed. Reg. at 5059-61. MSHA explained that the final order requirement had proven to be an impediment in MSHA's use of section 104(e) as contemplated by Congress. *Id.* at 5059. Because of delays that occur when citations and orders are litigated before the Commission, by the time finality is reached, a passage of months or years may have occurred, and conditions at the mine may no longer reflect the same conditions that existed when a hazard was originally identified and cited. *Id.* In sum, the prior rule prevented MSHA from basing POV determinations on an operator's recent compliance history. *Id.* at 5060.

MSHA's determination that POV status should be based on an operator's recent compliance history is consistent with Congress' intent that the agency have an effective tool for dealing with recurrent violations, "some of which were tragically related to . . . disasters," such as the one that occurred at the Scotia mine. *Legis. Hist.* at 620. In the preamble to the current rule, MSHA observed that, despite having "an egregious record of noncompliance," the Upper Big Branch mine avoided being placed on a POV under the prior rule, and that the conditions at the mine led to a disastrous explosion on April 5, 2010, in which 29 miners were killed and two were injured. 78 Fed. Reg. at 5057; 36 FMSHRC at 307.

Turning to Brody's argument that MSHA failed to consider the safety improvements afforded by the prior PPOV process, MSHA explicitly acknowledged comments pointing out that a majority of operators who received the PPOV notice reduced their S&S citations below the national average for similar mines. 78 Fed. Reg. at 5058. However, MSHA explained that, "Experience has shown that the existing PPOV provision created the unintended consequence of encouraging some mine operators to achieve short-term improvements instead of adopting systemic, long-term improvements in their health and safety management culture." *Id.* at 5059.

As noted by commentators on the proposed rule who favored elimination of the PPOV procedures, the PPOV process contained "the incentive for mine operators to make just enough short-term improvements to get off the PPOV list, but then backslide and wait for MSHA to issue the next PPOV notice." 78 Fed. Reg. at 5058. MSHA statistics established that in the period June 2007 through September 2009, a large majority of mines which received PPOV letters significantly reduced their rate of S&S citations and orders. However, compliance at 21% of the mines which received PPOV letters deteriorated enough over approximately a 24-month period to warrant a second PPOV letter. *Id.*¹¹ Moreover, 39% of the mines which received a

¹¹ Commissioners Young and Cohen believe that this deterioration is dramatically illustrated by the history of the Upper Big Branch Mine before the April 5, 2010 explosion, a history that exemplifies the Secretary's contention that the short-term improvements tolerated by the PPOV process were ineffective in protecting miners from routine exposure to deadly hazards. As Brody's counsel acknowledged at the oral argument, in 2007 MSHA put Upper Big
(continued...)

PPOV letter experienced an increase in the number of injuries in the second year following receipt of the PPOV letter compared to the first year. *Id.* at 5069.

In contrast, MSHA asserts that the changes implemented in the current rule will result in more sustained improvements. *Id.* at 5058. Enforcement based on real time status creates an incentive for operators to use the online Monthly Monitoring Tool, a program that allows them to continually monitor their compliance to ensure they are not in jeopardy of a POV designation. Operators are able to evaluate their performance and respond accordingly, including instituting voluntary efforts to improve compliance. *Id.* at 5059, 5061. Such an approach appropriately places responsibility on operators to ascertain whether they are at risk of a POV designation and, if so, determine what action they will take to avoid that result. As MSHA found, this incentivizes long-term compliance rather than short-term avoidance of POV. *Id.* at 5059.

In sum, we conclude that MSHA's regulation is not arbitrary, capricious, or an abuse of discretion, but rather is a reasonable approach consistent with the language and purpose of the Mine Act.

3. Procedural Due Process requirements

Compliance with the language of section 104(e) does not fully resolve Brody's challenge to the current rule. The Judge concluded that it is not until a withdrawal order is issued that an operator has the opportunity for a hearing in which it may contest the 104(e) order and the underlying POV notice.¹² 36 FMSHRC at 305. Brody argues that this process resulting in interruptions in its mining operations without a prior hearing violates the Fifth Amendment's provision that no person shall be deprived of property without due process of law.

¹¹(...continued)

Branch on a PPOV because its S&S rate was 11.6 per 100 inspection hours. The mine then got an improvement plan, and lowered its S&S rate to 5.6. Since this was greater than a 30% reduction, MSHA withdrew the POV threat. With the threat gone, the mine's S&S rate went back up. In the next screening cycle, Upper Big Branch would have received another PPOV notice except for an MSHA computer error. Oral Arg. Tr. 22-23; U.S. Dep't of Labor, Internal Review of MSHA's Actions at the Upper Big Branch Mine-South, Performance Coal Co., at 56-57 (Mar. 6, 2012)

(<http://www.msha.gov/PerformanceCoal/UBBInternalReview/UBBInternalReviewReport.pdf>). Thus, Upper Big Branch management evaded a POV by bringing down its number of S&S violations after receiving a PPOV so as to be removed from that status. It then committed an excessive number of S&S violations again after the POV threat was lifted. If management had the ability to dramatically reduce the rate of S&S violations, it obviously had the ability to maintain a reduced level. It chose not to do so, and thus endangered the lives of miners. If the current rule had been in effect, the Upper Big Branch disaster might have been averted.

¹² Brody has not challenged that holding before us.

As the Supreme Court has held, “some form of hearing is required before an individual is finally deprived of a property interest.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time in a meaningful manner.’” *Id.* (citations omitted).

Adequate post-deprivation procedures are sufficient to satisfy due process in some circumstances. *See Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) (“It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.”). In considering whether due process requires an evidentiary hearing prior to the deprivation of a property interest, even if such a hearing is provided thereafter, we must balance three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.

Considering the first factor, we conclude that Brody has a significant property interest in continuing its mining operations without withdrawing miners. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993). The POV sanction is one of the most severe enforcement tools that MSHA may use, indicating a specific Congressional intent that “the Secretary use the POV enforcement tool as a last resort when other enforcement tools . . . fail to bring an operator into compliance.” 78 Fed. Reg. at 5060.

Thus, we do not agree with the Judge’s conclusion that Brody’s description of the impact on its property interest is “overstated.” 36 FMSHRC at 305. A withdrawal order may affect only a part of a mine or a piece of equipment until the S&S violation is abated. However, the significant impact on Brody’s property interest comes from remaining on the “chain” of withdrawal liability until the chain is broken by a clean inspection. *See generally Naaco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987) (recognizing the “threat” of being placed on a withdrawal order chain as an incentive for operator compliance).

The third factor is also readily apparent. MSHA has a compelling interest in considering non-final S&S violations in making POV determinations. As the Supreme Court stated in *Hodel v. Va. Surface Mining & Reclamation Ass’n*, “[p]rotection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action.” 452 U.S. 264, 300 (1981). The Court observed that, in fact, “deprivation of property to protect the public health and safety is ‘[o]ne of the oldest examples’ of permissible summary action.” *Id.* (citations omitted).

MSHA has asserted that the major changes in the current rule were necessary to protect miner safety and health. The magnitude of the problem addressed by the current rule is fully described in the OIG Report, which recommended elimination of the final order requirement and the PPOV process, and was summarized there as follows:

In summary, during the 32 years that MSHA has had Pattern of Violations authority, it has never successfully used it against a mine operator. MSHA allowed the rulemaking to stall as stakeholders argued differing views on implementation. Moreover, for many years after the regulations were in place MSHA relied on District personnel to interpret and carry out those regulations. Only during the past few years had MSHA used a standardized method based on quantitative data for identifying potential POV mines. However, these analyses have proven to be complex and unreliable. Moving forward, it is imperative for MSHA to ensure that POV criteria and procedures are transparent and well reasoned.

Rep. No. 05-10-005-06-001, at 14. As discussed above, elimination of the PPOV process was intended to prompt operators to adopt “systemic, long-term improvements in their health and safety management culture” rather than just short-term improvements. 78 Fed. Reg. at 5059. The elimination of the final order requirement in the current rule was designed to “protect[] miners working in mines operated by habitual offenders whose chronic S&S violations have not been deterred by the Secretary’s other enforcement tools.” *Id.* at 5060. This is a clear and paramount governmental interest.

We disagree with our dissenting colleague’s assertion that “the balance between property rights and an immediate public interest tilts very sharply toward the property rights affected by a POV Notice” because the POV rule does not address a “situation of urgency.” Slip op. at 56. Just as the Judge understates the impact of the POV rule on the operator’s property interest, our dissenting colleague understates the public interest in mine safety embodied in the POV rule.¹³ As recognized by Congress and evident in disasters since enactment of section 104(e), miners are placed in a situation of urgency when working in mines where the operator has “demonstrate[d] [a] disregard for the health and safety of miners through an established pattern of violations.” *Legis. Hist.* at 620. Indeed, the legislative history establishes that Congress

¹³ Our dissenting colleague has characterized the public interest in safety reflected in the POV rule as a “spasm of pain and fear” which would “unnecessarily sacrifice basic rights.” Slip op. at 52 n.16. On the contrary, just as the original POV provision in the Mine Act represented a rational response to the problem of repeated disregard of the Act’s other enforcement approaches, the current POV rule may be seen as a rational response to the ineffectiveness of previous attempts to address the problem.

created the pattern of violations provision because of the explosions at the Scotia Mine which took the lives of 23 miners and three Federal inspectors:

The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster which occurred in March 1976 in Eastern Kentucky. That investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address.

Id. at 592, 620. Thus, we disagree with our dissenting colleague that “section 104(e) is not intended to deal with present or recently past hazards.” Slip op. at 52. Congress considered an operator which has “demonstrate[d] [a] disregard for the health and safety of miners” to constitute a present hazard. *Legis. Hist.* at 620.

Significantly, as described *supra*, at 11, Congress intended the pattern of violations provision to parallel the provision for withdrawal of miners from an area of a mine based on repeated unwarrantable failure violations contained in section 104(d) of the Mine Act. *Id.* at 621. Neither section 104(e) nor (d) contains any provision for a hearing or other due process protection prior to the withdrawal of miners from the area in question. Thus, Brody’s complaint of due process deprivation is not with the Secretary’s POV rule but rather with Congress’s enactment of section 104(e) itself.

Our holding thus turns on the second factor, the risk of erroneous deprivation under the POV rule’s procedures. Weighing this risk with the other two factors, we conclude that the current rule adequately addresses the potential for erroneous deprivation and satisfies procedural due process. We reach this conclusion based on the pre-deprivation and post-deprivation protections afforded operators. *See Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (“And, when prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that the predereprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a reasonable governmental official warrants them to be.”).

Before an operator is formally notified that it is in a pattern of violations, MSHA’s on-line Monthly Monitoring Tool provides operators with an opportunity to monitor notice of their status for the possibility that they might be subject to consideration for issuance of a POV notice. 78 Fed. Reg. at 5061. Operators can present information to support mitigating circumstances to

the MSHA District Manager at any time.¹⁴ *Id.* at 5063. Operators also have the opportunity at any time to implement a corrective action program to reduce S&S violations. *Id.* at 5063-64.

If MSHA's Monthly Monitoring Tool reveals that an operator has satisfied the screening criteria set forth on MSHA's website, MSHA also conducts a review to determine whether a POV notice should not be issued or should be postponed after considering any mitigating circumstances and other information.¹⁵ *Id.* at 5063. MSHA considers an operator's effective

¹⁴ MSHA has stated that “[t]he types of mitigating circumstances that could justify a decision not to issue a POV notice, or to postpone the issuance of a POV notice to reevaluate conditions in the mine, may include, but are not limited to . . . [a]n approved and implemented corrective action program . . . accompanied by positive results in reducing S&S violations; a bona fide change in mine ownership that resulted in demonstrated improvements in compliance; and MSHA verification that the mine has become inactive.” 78 Fed. Reg. at 5063.

¹⁵ As noted in the preamble to the current rule, MSHA has promulgated a Pattern of Violations (POV) Procedures Summary which is contained in the POV Single Source Page on MSHA's website. 78 Fed. Reg. at 5059. The POV Summary describes the procedures to be followed when an operator satisfies the POV screening criteria:

The Administrators will issue a memorandum to each District Manager who has mines within the district that meet the POV screening criteria with instructions for reviewing the designated mines for mitigating circumstances (see Appendix A – Mitigating Circumstances). Each memorandum will include the criteria and detailed data supporting a POV designation. The District Manager will, by memorandum to the Administrator, report facts relevant to whether there are mitigating circumstances that justify postponing or not issuing a POV notification.

.....

An MSHA POV panel will review the information provided by the District Manager. Within seven calendar days of receipt of the District Manager's memorandum, the panel will review the information, obtain any additional necessary information, and make a recommendation as to whether any of the mines meeting the screening criteria for a Pattern of Violations should be excluded from POV notification or have their POV notification postponed due to mitigating circumstances. The panel will provide a report of its findings to the Administrators, with a copy provided to the Assistant Secretary, Deputy Assistant Secretaries, the Director of Office of Assessments, Accountability,

(continued...)

implementation of an MSHA-approved corrective action program as a mitigating circumstance in its POV review. *Id.*

In addition, operators can discuss citations and orders with the inspector during the inspection and at the closeout conference.¹⁶ 78 Fed. Reg. at 5061. At any time after the issuance of an S&S citation or order, an operator may contest the citation or order and request an expedited hearing, particularly if MSHA's Monthly Monitoring Tool reveals that the operator may be approaching consideration for a POV notice.¹⁷ *See* 29 C.F.R. §§ 2700.20, 2700.52.

As for post-deprivation procedures, after a withdrawal order is issued under section 104(e), an operator may seek expedited temporary relief under section 105(b)(2) of the Act, 30 U.S.C. § 815(b)(2). *See also* 29 C.F.R. §§ 2700.46, 2700.47. *See Hodel*, 452 U.S. at 298-302 (holding that summary post-deprivation procedures satisfied due process). In addition, operators

¹⁵(...continued)

Special Enforcement and Investigations, and the Associate Solicitor for Mine Safety and Health.

The Administrators will determine whether to issue a POV Notice and notify the appropriate District Managers of the mines that meet the criteria and have no mitigating circumstances warranting postponement or non-issuance of a POV Notice. The District Managers will issue the POV Notices.

B. Mem. Supporting Appl. for Temp. Relief, Ex. 11 at 1. The present case illustrates that MSHA followed these procedures in a thorough manner. As more fully described *infra*, slip op. at 25, the MSHA POV Review Panel reviewed potentially mitigating circumstances pertaining to Brody's Mine No. 1, including a change in ownership and a corrective action plan, before recommending to the Administrator that a POV notice be issued.

¹⁶ Operators can request a conference with the MSHA field office supervisor or the District Manager to review citations and orders and present any additional relevant information. 78 Fed. Reg. at 5061. Whether such a request is granted is within MSHA's discretion, however. *See* 30 C.F.R. § 100.6(a).

¹⁷ We note that in *Rockhouse Energy Mining Co.*, 30 FMSHRC 1125, 1127-28 (Dec. 2008) (ALJ), although the Judge denied the motion for expedited review of 23 citations alleging S&S violations, the Judge provided a hearing less than a month after the case was assigned to him and approximately two months after the contests were received in the Commission's Docket Office. At oral argument in this case, the Secretary's counsel agreed that, as demonstrated in *Rockhouse*, if an operator became aware from MSHA's Monthly Monitoring Tool that it was in danger of receiving a POV notice, it could request an expedited hearing on S&S citations and orders which had been contested. Oral Arg. Tr. 88-89, 98-101.

may seek expedited proceedings on contests of section 104(e) withdrawal orders.¹⁸ See 29 C.F.R. §§ 2700.20, 2700.52.

Given these procedures, the relative cost of the alternative proposed by Brody is too high. Requiring MSHA to wait to issue a POV notice until the notice can be based on final orders would deprive MSHA of the ability to base POV determinations on an operator's recent compliance history. Moreover, elimination of the PPOV process does not deprive operators of adequate notice given the ongoing notice provided by MSHA's Monthly Monitoring Tool.

Brody's due process argument is a facial attack on the pattern of violations regulations contained in 30 C.F.R. Part 104. "To prevail in such a facial challenge, [Brody] 'must establish that no set of circumstances exists under which the regulation would be valid.'" *Reno v. Flores*, 507 U.S. 292, 301 (1993) (citations omitted). Brody has failed to establish such a basis for its due process challenge to the current rule. In sum, we conclude that the term "violations" in section 104(e) of the Mine Act permits MSHA to include non-final citations/orders in a pattern of violations. The Secretary's interpretation of the term "violations" in section 104(e) reasonably carries forth Congress' intent and is consistent with the express delegation in section 104(e) of the Act. We further hold that MSHA's adoption of the current rule was not arbitrary, capricious or an abuse of discretion. Finally, we conclude that the current rule satisfies procedural due process. Accordingly, we uphold the facial validity of the current rule.

C. Use of POV screening criteria not promulgated through notice-and-comment rulemaking

Section 104.2 of the POV rule sets forth the criteria included in MSHA's review to identify mines with a pattern of S&S violations. In promulgating current section 104.2, MSHA combined sections 104.2 and 104.3 of the 1990 rule. 78 Fed. Reg. at 5058. In so doing, the current rule eliminated the PPOV process and the requirement that MSHA consider only final orders when evaluating mines for a POV. *Id.* Current section 104.2(b) newly provides that MSHA will post specific pattern criteria on its website, and section 104.2(a) lists eight factors which include mitigating circumstances, that MSHA considers in making its POV determination.

MSHA uses the specific numerical criteria posted on its website as an initial screening to narrow the more than 14,000 mines within its jurisdiction to those mines that are suitable for further consideration for a POV notice. S. Br. at 26; Oral Arg. Tr. 43, 90. After that initial

¹⁸ Operators also have an opportunity to meet with District Managers for the purpose of correcting any discrepancies after MSHA has conducted its POV screenings and has issued a POV notice. 78 Fed. Reg. at 5065. Such discrepancies include, but are not limited to, "citations that are entered incorrectly or have not yet been updated in MSHA's computer system, . . . Commission decisions rendered, but not yet recorded, on contested citations, and citations issued in error to a mine operator instead of an independent contractor at the mine." *Id.*; B. Mem. Supporting Appl. for Temp. Relief, Ex. 11 at 1-2.

screening, MSHA applies the criteria set forth in section 104.2(a) in its determination of whether to issue a POV notice to a mine. S. Br. at 26-27.

Brody argues that the specific pattern criteria posted on MSHA's website are invalid because they are, in effect, legislative rules and should have also been the subject of rulemaking. We disagree.

Section 104(e)(4) of the Mine Act authorizes the Secretary to "make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists." 30 U.S.C. § 814(e)(4). Congress stated its "intention to grant the Secretary in Section 10[4(e)](4) broad discretion in establishing criteria for determining when a pattern of violations exists." *Legis. Hist.* at 621. Section 104(e)(4) does not explicitly require the Secretary to engage in rulemaking to establish POV criteria. Rather, the Secretary must "make such rules as he deems necessary to establish criteria."

Section 553 of the APA requires agencies to provide notice of proposed rulemaking and an opportunity for public comment prior to a rule's promulgation. 5 U.S.C. § 553. Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551(4). Legislative rules are subject to notice-and-comment requirements, while general statements of policy are not. 5 U.S.C. § 553(b)(3)(A); *Nat'l Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009) (citations omitted). The Secretary asserts that the POV screening criteria constitute a general statement of policy.

The Commission has recognized that the agency's own label of its action is indicative but not necessarily dispositive in classifying the type of action taken. *Drummond Co.*, 14 FMSHRC 661, 683 (May 1992) (citations omitted). Rather, "it is the 'substance of what the [agency] has purported to do and has done which is decisive.'" *Id.* (citations omitted).

In delineating the difference between legislative rules and general statements of policy, courts consider whether the agency action establishes a binding norm. *Nat'l Mining Ass'n*, 589 F.3d at 1371. The "key inquiry" is the "extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not follow that general policy. . . or whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion." *Id.* (internal quotations and citation omitted). Courts have explained that "[a]s long as the agency remains free to consider individual facts in the various cases that arise, then the agency in question has not established a binding norm." *Id.*

In *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 534, 538 (D.C. Cir. 1986), another case where the issue was whether MSHA's enforcement documents required notice-and-comment rulemaking, the Court held that MSHA's "Enforcement Policy and Guidelines for Independent Contractors" was a non-binding agency policy statement. The Court emphasized that the policy pertained to the agency's exercise of enforcement discretion "an area

in which the courts have traditionally been most reluctant to interfere.” *Id.* at 538. The Court stated that an agency action is not deemed a binding norm “merely because it may have ‘some substantive impact,’ as long as it ‘leave[s] the administrator free to exercise his informed discretion.’” *Id.* at 537 (citation omitted). Moreover, courts look at the language of an agency’s pronouncement for indications that the agency may exercise its discretion. *See, e.g., id.* at 537-38 (“We have, for example, given decisive weight to the agency’s choice between the words “may” and “will”).

In a subsequent case, the D.C. Circuit similarly ruled that Department of Health and Human Services’ communications implementing peer review policies for hospitals did not require notice and comment because they were procedural rules. *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1041 (D.C. Cir.1987). The Court declared that the directives “establish a frequency and focus of [peer] review, urging . . . enforcement agents to concentrate their limited resources on particular areas where HHS evidently believes . . . attention will prove most fruitful.” *Id.* at 1050. In finding that these procedures were exempt from notice-and-comment rulemaking, the Court noted that “[f]ar from imposing a new substantive burden on hospitals, the agency’s decision to focus its resources on such likely problem areas gives more full effect to the intent of the congressional framers of the peer review amendments” (*id.* at 1052), and that “agency decisions on where to concentrate enforcement efforts within a universe of valid targets need not be prefaced by notice and comment procedures” (*id.* at 1056).

After considering the 2013 POV screening criteria posted on MSHA’s website, we conclude that the screening criteria are a general statement of policy. As with the peer review policy at issue in *American Hospital Association*, the screening criteria assist MSHA in ascertaining how it will “concentrate enforcement efforts” regarding POV enforcement. *Id.* Moreover, the screening criteria set forth language that indicates that even if a mine meets the criteria, MSHA still exercises discretion in determining whether a POV notice should be issued to the mine. For instance, the screening criteria provide, “All non-abandoned mines . . . are reviewed to determine if a pattern of violations *may* exist.” B. Mem. Supporting Appl. for Temp. Relief, Ex. 10 at 1 (emphasis added). The screening criteria also provide, “The following two sets of screening criteria are used to perform the review required under 30 CFR § 104.2. Mines must meet the criteria in either set *to be further considered* for exhibiting a pattern of violations.” *Id.* (emphasis in original omitted and emphasis added).

Rather than automatic inclusion of all operators who meet the screening criteria, MSHA has provided a process for further review. As described *supra*, slip op. at 5-6, 19-20 n.15, after the screening criteria weed out the vast majority of mines,¹⁹ an MSHA Pattern of Violations Review Panel considers mitigating circumstances, and makes a recommendation to the

¹⁹ At oral argument, the Secretary’s counsel stated that “the Secretary has devised these numerical criteria to act as a screening device that will eliminate 99 percent or more of the mines and will identify only this small number of mines that are most likely to have a pattern of violations.” Oral Arg. Tr. 90.

Administrator. Our dissenting colleague's opinion gives the impression that MSHA's hands are tied when considering mitigating circumstances, because such circumstances are limited to three conditions. Slip op. at 33-34 & n.5. This is wrong. As we noted earlier, slip op. at 19, n.14, the preamble to the POV rule lists several types of mitigating circumstances that could justify a decision not to issue a POV notice, but explicitly states that such circumstances are not limited to those that were articulated. 78 Fed. Reg. at 5063. Appendix A of MSHA's Pattern of Violations Procedures Summary also states explicitly that the conditions in the mine that may justify such a decision may include but are not limited to, the conditions cited in the Appendix. B. Mem. Supporting Appl. for Temp. Relief, Ex. 11 at 3. Consequently, our colleague's statement that "[i]f an operator meets the specific pattern criteria, it is in POV status subject only to a separate decision that it has recently mitigated its history of violations by change of ownership or adoption of a previously-approved MSHA approved corrective action program" is incorrect. Slip op. at 49. Thus, MSHA's discretion in this regard is far broader than our colleague has acknowledged.

We also observe that section 104.2(a)(7) states that MSHA will consider whether there is other information that demonstrates a serious safety or health problem at the mine which warrants POV enforcement. The preamble states that under this rule, the information may *include, but is not limited to*, the following:

- Evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations;
- Repeated S&S violations of a particular standard or standards related to the same hazard;
- Knowing and willful S&S violations;
- Citations and orders issued in conjunction with an accident, including orders under sections 103(j) and (k) of the Mine Act; and
- S&S violations of health and safety standards that contribute to the cause of accidents and injuries.

78 Fed. Reg. at 5062 (emphasis added).²⁰ The application of section 104.2(a)(7) demonstrates an exercise of discretion similar to that exercised under the prior rule. *See* 30 C.F.R. §§ 104.3(a)(1) & (2) (1990). Thus, the dissent is incorrect in asserting that MSHA does not retain discretion in its POV determination.

²⁰ We note that the POV notice issued to Brody pared down the number of violations considered in the numerical screening to 54, and grouped the violations into four categories of "[r]epeated S&S violations of a particular standard or standards related to the same hazard." 78 Fed. Reg. at 5062. MSHA also considered Brody's failure to accurately report its injury rate. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 11-12. Thus, it appears that MSHA applied section 104.2(a)(7) separately from the numerical screening criteria.

In this case, the Review Panel considered two potentially mitigating circumstances, a change in ownership and a corrective action plan. The Panel noted that a change in Brody's controlling entity occurred on December 31, 2012, that there were subsequent "wholesale" changes in company officers and mine management, and that Brody implemented a corrective action plan in January 2013 and an updated and revised corrective action plan in March 2013. The Panel further noted that the rate of S&S issuances had declined during the first part of 2013. However, the rate of S&S issuances climbed back to its previous level in July and August 2013. The Panel further noted an increase in unwarrantable failure issuances in June and July 2013, and the issuance of training and imminent danger orders in August. Hence, the Panel concluded that the changes in personnel and the corrective action plan did not achieve "measurable improvements in compliance." S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 8. The Panel also "considered the fact that Brody does not accurately report injury and employment information." *Id.* at 11. Based on this review, the Panel recommended issuance of a POV notice to Brody Mine No. 1. *Id.* at 8-12. The process for further review in this case illustrates that the Administrator is free to exercise his informed discretion in the issuance of a POV notice, despite the existence of the numerical screening criteria.

Accordingly, we conclude that the screening criteria posted on MSHA's website amount to a general statement of policy and are not subject to notice-and-comment rulemaking requirements.

D. Application of the current rule to violations occurring before its effective date

Finally, Brody argues that the Secretary impermissibly included 24 citations in the POV notice that had been issued prior to the March 25, 2013 effective date of the current rule, and that such inclusion is improper because it gives retroactive effect to the rule. It asserts that if the 24 citations were not included, it would not have satisfied the initial screening criteria.

Agencies have the power to issue legislative rules only to the extent Congress has conferred that power. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). A statutory grant of legislative rulemaking power will not be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *Id.*; see also *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 158 (2d Cir. 1999).

It is recognized that "a law is not retroactive merely because it is applied to conduct before the law was passed or upsets expectations based in prior law." *Durable Mfg. Co. v. DOL*, 578 F.3d 497, 503 (7th Cir. 2009) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994)). "Rather, a law has retroactive effect if it 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* To determine whether a rule is retroactive, a court must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event," guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

We hold that the inclusion of the 24 citations that pre-dated the current rule's effective date in the POV notice issued to Brody was not a retroactive application of the rule. Application of the rule to include those citations did not increase Brody's liability for past conduct. As the Secretary argues, section 104(e) may be analogized to "repeat offender" provisions under which an enhanced penalty is not an "additional penalty for the earlier crimes," but rather was a "stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732 (1948). Inclusion of the citations in the POV notice is not retroactive because it alters the present situation, not "the past legal consequences of past actions." *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009).

Nor does inclusion of the citations in the POV notice take away or impair vested rights that Brody had under the prior rule. The current rule does not affect Brody's right to contest the 24 citations after their issuance or affect any penalty assessed. By including the citations, MSHA is considering Brody's past inspection history without affecting Brody's right to contest the citations. *Cf. Ass'n of Accredited Cosmetology Sch. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992) (holding rules not retroactive that permit past default rates to be basis for termination for eligibility in student loan program where default rates were permissible under prior law).

Considerations of fair notice, reasonable reliance, and settled expectations do not alter our conclusion. Brody has not alleged that if it had known that the 24 citations would be included in the POV notice, it would have engaged in different conduct. Brody contested the 24 citations, just as it would have if they had been issued after the effective date of the rule. Indeed, the incentive for operators to contest S&S citations was, if anything, greater before the effective date of the current rule because, under the prior rule, a contest of an S&S citation would delay the time it would become final, and thus eligible for consideration toward a POV notice.

Even before the current rule took effect, Brody knew that certain conduct could constitute an S&S violation and that, under section 104(e), a pattern of S&S violations could trigger POV sanctions. In fact, MSHA had sent Brody a PPOV letter on March 1, 2013, prior to the effective date of the current rule. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 10. As discussed above, nothing in the Mine Act requires that the violations in a pattern notice be final orders. *See Tarver v. Shinseki*, 557 F.3d 1371, 1375 (Fed. Cir. 2009) (considering whether claimant could point to anything she would have done differently in analysis of retroactivity).²¹

In addition, the numerical portion of the 2013 POV screening criteria applied to Brody was the same as the numerical criteria posted by MSHA in 2012 under the prior rule, and both

²¹ We are not persuaded by Brody's contention that elimination of the PPOV process was retroactively applied to it. Brody has failed to make allegations to support its claim. In any event, the information provided by a PPOV was available to Brody online through MSHA's Monthly Monitoring Tool.

used data collected over 12 months.²² The proposed rule also referred to the screening criteria on MSHA's website and indicated that it would eliminate the final order requirement. 76 Fed. Reg. at 5720, 5721; *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 164 (D.C. Cir. 2010) (concluding that notice of proposed rulemaking provided notice of agency's likely approach). Thus, Brody knew before the effective date of the rule that the numerical criteria would use data that covered an entire year, based on the date that MSHA chose to run its screening criteria.

²² MSHA issued a press release and posted the screening criteria on its website in September 2010. www.msha.gov/MEDIA/PRESS/2010/NR100928.pdf. The numerical criteria of the 2010 screening criteria are the same as the numerical criteria applied to Brody. MSHA's Monthly Monitoring Tool became available in April 2011. 78 Fed. Reg. at 5059; www.msha.gov/MEDIA/PRESS/2011/NR110406.asp.

IV.

Conclusion

For the reasons discussed above, we conclude that the current rule is facially valid and consistent with the requirements of procedural due process, that MSHA's screening criteria were not required to be the subject of notice-and-comment rulemaking, and that the current rule was not applied in an impermissibly retroactive manner to Brody. Accordingly, we affirm the Judge's interlocutory order and remand for further proceedings.

/s/ Mary Lu Jordan _____
Mary Lu Jordan, Chairman

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

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

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

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

Commissioner Althen, dissenting:

Part 104 of the regulations of the Mine Safety and Health Administration (MSHA) governs “Pattern of Violations” (hereinafter “POV”), pursuant to section 104(e) of the Mine Act, 30 U.S.C. § 814(e). 30 C.F.R. § 104. Section 104.2, entitled “Pattern criteria,” establishes criteria for determining the existence of a pattern of “significant and substantial,” or “S&S,” violations of the Mine Act. 30 C.F.R. § 104.2. Subsection (a) of section 104.2 states that at least once each year MSHA will determine if any mine meets the pattern of violations criteria and identifies a number of criteria relevant to POV status. Subsection (b) of section 104.2 establishes use of specific numerical pattern criteria and states that “MSHA will post the specific pattern criteria on its Web site.” 30 C.F.R. § 104.2(b).

In upholding the regulations as validly issued, the majority here permits issuance of specific binding pattern criteria without compliance with the notice-and-comment requirements of the Administrative Procedure Act (APA). In so doing, it wholly disregards the binding effect of the specific pattern criteria upon MSHA and accepts MSHA’s assurance that the specific pattern criteria are only “screening criteria.”

The majority also accepts MSHA’s claim that it may enforce a POV Notice severely impacting property rights of mine operators before rather than after any form of hearing even though such issuance of a POV Notice requires more than a year of analysis and MSHA has many other enforcement weapons to deal with current, recent, or ongoing violations of its regulations. In light of MSHA’s enforcement tools, old and new, and MSHA’s official definition of a POV as stated in this litigation, that decision is plainly wrong. MSHA can provide meaningful due process procedures to operators before issuance of POV Notice. The Commission should require it to do so.

I.

APPLICATION OF THE ADMINISTRATIVE PROCEDURE ACT

A. The Determination of POV Status

1. 30 C.F.R. § 104

Although Section 104(e) of the Mine Act was enacted in 1977, MSHA did not adopt regulations implementing Section 104(e) of the Mine Act until 1990. 55 Fed. Reg. 31,128-01 (July 31, 1990). Those regulations set forth a two-step process for issuance of POV Notice. Original section 104.2, entitled “Initial screening,” identified criteria for selecting mines that would then be further reviewed for possible issuance of a POV Notice under “pattern criteria” set forth in original section 104.3 of the regulation. The screening criteria listed included the mines’ compliance records; enforcement measures taken by MSHA at the mine other than under section 104(e) of the Mine Act; the extent of a lack of good faith on the part of the operator in

addressing the conditions that were leading to repeated S&S violations; the mine's history of accidents and injuries; and any mitigating circumstances. 30 C.F.R. § 104.2 (1990).

Later, MSHA eventually posted two sets of "Initial Screening Criteria" on its website. Under the prior regulations, if a mine met either set of these screening criteria, the mine was then further reviewed under "Pattern Criteria" set forth in section 104.3 of the regulations. The pattern criteria were used to determine if the operator "habitually" allowed the recurrence of S&S violations, for the purpose of deciding whether there was a "pattern" to such violations. The pattern criteria identified in original section 104.3(a) of the regulations were: (1) a history of repeated S&S violations of a particular standard, (2) a history of repeated S&S violations of standards related to the same hazard, or (3) a history of repeated S&S violations caused by an unwarrantable failure to comply. Under original section 104.3(b), these criteria were applied only to citations/orders that had become final. 30 C.F.R. § 104.3 (1990).

MSHA adopted the revised regulations at issue here on January 23, 2013, with an effective date of March 25, 2013. 78 Fed. Reg. 5056, 5073-74 (Jan. 23, 2013). The revised regulations substantially changed the process for issuance of a POV Notice.

First, the former section 104.3 setting forth pattern criteria linking POV Notices to "habitual" S&S violations related to particular standards or hazards or unwarrantable failures was eliminated and not replaced.¹ Although not couched in terms of a "definition" of a POV, the former section 104.3 essentially defined the "pattern" aspect of a POV by referring to habitual S&S violations and based such habitual pattern on repeated violations of a particular standard or standards related to the same hazard or to unwarrantable failures. Although the revised regulation deleted section 104.3, it did not fashion a replacement definition of the "pattern" of conduct that would result in POV status.

Second, the pre-deprivation procedures set forth in section 104.4 were eliminated and not replaced. In responding to comments regarding the elimination of such procedures, MSHA stated that it would allow operators to request a conference with the field office supervisor or district manager regarding particular S&S citations, for the limited purpose of discussing discrepancies and/or errors in data such as incorrectly entered citations. 78 Fed. Reg. at 5065-66.

¹ The preamble to the revised regulation inaccurately states that the revised regulation "combines existing §§ 104.2 and 104.3 into a single provision." 78 Fed. Reg. at 5058. In fact, the revised regulations simply changed the prior screening criteria at section 104.2 into "pattern criteria" and added the new subsection establishing the specific numerical pattern criteria. A specific reference to unwarrantable failures that had not expressly appeared in the prior section 104.2 was added but undoubtedly was within the scope of other "enforcement measures" in prior section 104.2.

In response to criticism by commenters that the deletion eliminated due process protections, MSHA cited a new enforcement tool provided on its website that allows an operator to undertake continuing evaluation of its performance against the specific pattern criteria referred to in the regulation. 78 Fed. Reg. at 5066. In doing so, MSHA guaranteed operators that they would not be subject to a POV Notice if they avoided coming within the limits of the specific pattern criteria. MSHA stated that, because operators not falling within those specific criteria would not be subject to receipt of a POV Notice, the enforcement tool, along with the possibility for expedited post-deprivation hearings, provided due process. Thus, MSHA bound itself to the specific pattern criteria — operators are assured that if they do not fall within the specific pattern criteria they will not be issued a POV Notice. 78 Fed. Reg. at 5064.

A third change in the rules was the elimination of the limitation that POV Notices could be issued only on the basis of final citations and orders. MSHA stated that it was not feasible to issue POV Notices on the basis of final violations and that orders under other provisions of the Mine Act could be issued on the basis of non-final citations and orders. 78 Fed. Reg. at 5060.

Fourth, section 104.2 was rewritten. As demonstrated in Table 1 below, the “Initial Screening Criteria” in the prior regulation were converted into “Pattern Criteria” at section 104.2(a). Second, and more importantly for present purposes than the conversion of “screening criteria” into “pattern criteria,” a new subsection (b) was added to the regulation. It provides: “MSHA will post the specific pattern criteria on its Web site.” 30 C.F.R. § 104.2(b). Therefore, subsection (b) plainly creates “specific pattern criteria” but provides for their posting on MSHA’s Website.²

Table 1

New Section 104.2 – “Pattern Criteria”	Prior Section 104.2 “Initial Screening”
At least once each year, the compliance and accident, illness, and injury records of mines are reviewed to determine if any mines meet the pattern of violations criteria. MSHA’s review to identify mines with a pattern of S&S violations will include:	At least once each year, MSHA shall review the compliance records of mines. MSHA’s review shall include an examination of the following:
104.2(a)(1) History of S&S citations	104.2(a)(1) History of S&S citations
104.2(a)(2) Closure orders under Mine Act section 104(b)	104.2(a)(2) Closure orders under Mine Act section 104(b)

² Perhaps, MSHA was attempting to “split the baby” by establishing the existence of specific criteria in the regulation and making that available by notice for comment while posting the actual numerical specific criteria on its website to permit changes without compliance with the APA. Such gamesmanship is contrary to the APA.

104.2(a)(3) Citations and orders under Mine Act section 104(d)	104.2(b)(1) and (2) Enforcement measures other than 104(e); evidence of lack of good faith through repeated S&S violations
104.2(a)(4) Imminent danger orders	104.2(a)(3) Imminent danger orders
104.2(a)(5) Orders under Mine Act section 104(g)	104.2(b)(1) and (2) Enforcement measures other than 104(e); evidence of lack of good faith through repeated S&S violations
104.2(a)(6) Enforcement measures other than 104(e)	104.2(b)(2) Enforcement measures other than 104(e)
104.2(a)(7) History of accident, illnesses, injuries	104.2(b)(3) History of accident, illnesses, and injuries
104.2(a)(8) Mitigating circumstances	104.2(b)(4) Mitigating circumstances
New Section 104.2(b) “MSHA will post the specific pattern criteria on its Web site.”	No comparable provision

The screening criteria posted on MSHA’s website under the prior rule identified two sets of criteria with numerical specifications for screening. The introduction to the criteria was entitled Initial Screening Criteria and stated that “[t]he following two sets of screening criteria are used to perform the initial screening required under 30 C.F.R. § 104.2. Mines must meet the criteria in either set to be further considered for exhibiting a potential pattern of violations.” S. Mem. Supporting Mot. for Partial Summ. Dec., Ex. 2 at 1 (emphasis omitted).

In promulgating the revised regulations, MSHA utilized the same specific numerical criteria that had been on the website under the prior regulation. However, they were now issued as “specific pattern criteria” in accordance with the establishment of specific pattern criteria in the regulation in section 104.2(b). MSHA also modified the introductory language to confirm the criteria as the specific pattern criteria referenced in the regulation itself. The outcome determinative importance of the specific pattern criteria created in the regulation itself and then posted on the website was emphasized in the preamble to the final POV: “Final § 104.2(b), proposed as § 104.2(a), provides that MSHA will post, on its Web site at <http://www.msha.gov/POV/POVsinglesource.asp>, the specific criteria, with numerical data, that the Agency will use to identify mines with a pattern of S&S violations.” 78 Fed. Reg. at 5064. The introduction to the specific criteria confirmed the numerical specific criteria as “Pattern

Criteria”³ and provided: “The following two sets of screening criteria are used to perform the review required under 30 C.F.R. § 104.2. Mines **must** meet the criteria in either set to be further considered for exhibiting a potential pattern of violations.” B. Mem Supporting Appl. for Temp. Relief, Ex. 10 at 1 (emphasis added).

The text of the introduction continues to use the term “screening criteria.” However, the language no longer refers to use for an “initial screening” but rather for the “review required under 30 C.F.R. § 104.2” – namely, the pattern criteria. More importantly, MSHA demonstrates the actual use of the specific pattern criteria in its POV Procedures Summary. A mine satisfying either set of specific pattern criteria is in POV status and will receive a POV Notice unless MSHA separately decides that the mine has mitigated its tendency toward S&S citations/orders/violations.⁴

2. Process for Designation of POV Status

MSHA provides a Pattern of Violations (POV) Procedures Summary on its website. B. Mem. Supporting Appl. for Temp. Relief, Ex. 11. If a mine does not meet the specific pattern criteria, it is not in POV status and no consideration of issuance a POV notice is given to it. On the other hand, when an operator meets the specific pattern criteria MSHA considers it in POV status and moves only to a consideration of possible mitigation.

At that point, MSHA headquarters seeks input from the appropriate District Manager, but not with respect to any of the Pattern Criteria, but rather with regard to three described and narrowly-drawn “mitigating circumstances” – namely, the mine has been deactivated, mine ownership has changed to an operator less likely to incur S&S violations, or the operator has adopted a corrective action plan approved by MSHA. B. Mem. Supporting Appl. for Temp. Relief, Ex. 11 at 3. Upon receipt of the District Manager’s report on mitigating circumstances,

³ “Words have power and names have meaning.” Unknown author. The majority persists in incorrectly referring to the “pattern criteria” established in section 104.2(b) and on MSHA’s website as “screening criteria.” The change from “screening criteria” to “pattern criteria” is not outcome determinative but neither is it inconsequential. It demonstrates the substantive change in section 104.2 with the elimination of the prior section 104.3.

⁴ Here, we are concerned with whether meeting the specific pattern criteria for POV status means the operator is in POV status and receives a POV notice subject only to a separate mitigation review. Because the 104.2(a) criteria are virtually identical to the specific criteria, but without numerical targets, and the process calls for a review only of mitigation factors after the operator is in POV status, an operator is in POV status after it falls within the specific pattern criteria.

an “MSHA POV panel” is to review the mitigation information provided by the District Manager.⁵ *Id.* at 1.

3. Panel Recommendation Leading to POV Notice

The POV Panel recommendation related to Brody is dated October 22, 2013, and comports with the Procedures Summary. S. Mem. Supporting Opp’n to Appl. for Temp. Relief, Ex. A. After an introduction in which the specific numerical pattern criteria (and only the specific numerical pattern criteria) are quoted, the Panel memorandum focuses exclusively on, and rejects, possible mitigation. In Section 1, the Panel discusses and rejects a change of ownership as a possible reason for mitigation. *Id.* at 8-10. In Section 2, the Panel discusses and rejects Brody’s corrective action program as a possible reason for mitigation. *Id.* at 10-11. Finally, in Section 3, the Panel discusses and rejects inactivation as a possible reason for mitigation. *Id.* at 12.

Thus, POV status was established to the satisfaction of MSHA by the specific pattern criteria and was then subject to a separate review of narrow mitigation circumstances. No discretionary consideration appears on the record to have been exercised by MSHA regarding the POV status once the specific criteria were met; instead, the only discretionary element was the determination whether MSHA should postpone issuance of a POV Notice on the basis of a mitigating factor.

The process flowed from the specific pattern criteria, to an inquiry to the District Manager regarding mitigation, to Panel review of mitigation, to issuance of a POV notice. Although 253 unproven citations/orders were the basis for Brody’s POV status, the POV Notice cited 54 citations/orders for S&S violations grouped in four categories of alleged violations in

⁵ The majority asserts that the mitigating circumstances are not limited to the three types of mitigation identified in the POV Procedures Summary because the Appendix uses the stock phrase “may include, but are not limited to.” Slip op. at 24. Nowhere in the POV Procedures Summary, the proposed regulation, or the final regulation does the Secretary discuss or give any other example of a possible mitigating circumstance. Further in the Panel recommendation leading to the POV Notice to Brody, the Panel discusses and dismisses each, and only each, of the three possible reasons for mitigation. S. Mem. Supporting Opp’n to Appl. for Temp. Relief, Ex. A at 8-12. Even more importantly, as discussed at length in the text *infra*, consideration of mitigation comes after an operation is evaluated as being in POV status under the specific pattern criteria on the website. Therefore, although consideration of mitigation may bear at a later stage upon issuance of a POV Notice, it is not relevant to the determination under the specific pattern criteria that an operator is in POV status. Therefore, it is not a discretionary consideration with respect to whether the operator has reached a number of S&S citations/orders/violation to be in POV status. Nor does it bear upon whether the operator may not be considered to be in POV status because it has not reached the outcome determinative number of citations/orders/violations.

categories of related hazards. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 9; Notice No. 7219154. The groupings ranged from seven to 20 citations/orders.⁶ Notice No. 7219154.

4. Definition of Pattern of Violations

MSHA's regulation does not define a pattern of violations. However, in this litigation, the Secretary has now defined a "pattern of violations." Citing Black's Law Dictionary, the Secretary defines the word "pattern" to mean "[a] mode of behavior or series of acts that are recognizably consistent." S. Br. at 19-20. MSHA does not elaborate upon the meaning of "recognizably consistent."

Then, the Secretary provides specificity as to the number of S&S violations that will constitute a "series" or "pattern" stating that: "Courts interpreting the term 'pattern' as used in other federal statutes have held that as few as two instances may suffice . . . The risk of an erroneous POV determination should be measured against that low threshold. . . . [A]s discussed above, a POV notice may lawfully be predicated on as few as two or three S&S violations." S. Br. at 19, 22 (citations omitted).

Therefore, the Secretary's interpretation of a "pattern of violations" within the meaning of Section 104(e) of the Mine Act effectively comes down to a "mode of behavior or series of acts [meaning at least two or three S&S violations] that are recognizably consistent." The definition does not include any notion of elevated violations, high degree of negligence, or accident or injury rate, etc.⁷

⁶ Three of the citations/orders occurred after the end of the review period of September 2012 to August 2013, an anomaly that MSHA was not able to explain at oral argument. *See* Notice No. 7219154; Oral Arg. Tr. 55-56.

⁷ While this definition has been submitted in briefs before us, the reasonableness of this definition was not certified to the Commission and was not briefed by the parties. Therefore, whether this definition is a reasonable interpretation of section 104(e) of the Mine Act is not before the Commission. Not only is the issue not before us but also MSHA does not further define the meaning of "recognizably consistent." Nonetheless, it should be noted that asserting that a "series" of two or three S&S violations constitutes a POV within the meaning of section 104(e) appears perilously close to being plainly inconsistent with MSHA's own recognition in the preamble to the final regulations that POV status is aimed at a small number of recalcitrant operators. According to "MSHA's Key Indicators Report, Citations and Orders Issued Report, All Coal 10/01/2010 - 09/30/2011," the number of just coal mine 104(a) citations that were designated S&S averaged 32,616 annually for the four years from 2008 through 2011. Consequently, a definition of a POV as two or three S&S violations in a series that are recognizably consistent would appear to put every mine in the mining industries in POV status at
(continued...)

The Secretary applies its definition to Brody. The POV Notice divides the 54 alleged violations in Brody’s POV Notice into four categories. One of those categories consists of seven citations/orders citing conditions and/or practices that allegedly contribute to inadequate examinations. The Secretary asserts that, separate and apart from other citations identified in the POV Notice, proof of those seven citations/orders (or some unidentified lesser number but presumably diminishing to two or three) would suffice to prove a pattern of violations. S. Br. at 22.

The Secretary contends that the statement of specific pattern criteria which is provided for at 30 C.F.R. § 104.2(b) and published on MSHA’s website is a statement of policy. Brody characterizes them as substantive (also referred to as “legislative” rules) requiring notice and comment. Therein rests the APA notice and comment dispute.

B. The Distinction Between Statements of Policy and Substantive Rules

The importance of notice and comment to transparent and principled governance needs no elaboration. *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987); *Batterton v. Marshall*, 648 F.2d 694, 700-02 (D.C. Cir. 1980); *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Nor is it necessary to recite from the litany of cases noting the difficulty encountered in distinguishing among substantive rules, interpretive rules, and statements of policy. *Am. Min. Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); *Cmty Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). Finally, by way of preamble, although the APA provides exemptions from its notice-and-comment requirements, such exemptions must be narrowly construed. *Am. Hosp. Ass’n v. Bowen*, 834 F.2d at 1044 (“In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in [section] 553 to swallow the APA’s well-intentioned directive.”).

Our recourse, of course, is to the case law that determines the fate of the parties’ arguments. Are the specific pattern criteria established at 30 C.F.R. § 104.2(b) and published on MSHA’s website merely a statement of policy or are they a substantive rule? If the specific pattern criteria are merely a statement of policy, then “[t]he agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm.” *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).⁸ If the specific pattern criteria constitute a substantive rule then MSHA may not

⁷(...continued)
MSHA’s election. Only the specific numerical pattern criteria not considered “substantive” by the Secretary stand in the way of such industry-wide application.

⁸ The Secretary has not argued that the specific pattern criteria are an interpretive rule.
(continued...)

implement the specific pattern criteria without following the notice-and-comments requirements of the APA. 5 U.S.C. § 553.

Citing *Drummond Co.*, 14 FMSHRC 661, 686 (May 1992), the Secretary describes the distinction between a statement of policy and a rule as based upon a two-fold test of whether the agency's action: (1) "acts prospectively, *i.e.*, 'does not impose any rights or obligations,'" and (2) "leaves the agency and its decision-makers free to exercise discretion." S. Br. at 25. Brody takes only a longer route to reach the same test. It first recites in a more general fashion the general distinction between substantive rules and statements of policy as set forth in *Pacific Gas & Electric Co. v. FPC*, 506 F.2d at 38, and then urges the same test as MSHA, quoting from the same page of the same case relied upon by the Commission in *Drummond* – namely, *American Bus Association v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). B. Br. at 31.

As an initial step in differentiating statements of policy from substantive rules, it is useful to examine the agency's basis for its promulgation. Is the agency exercising statutory authority to supply substance for vague or open-ended statutory guidance? If so, the agency's action is likely to be viewed as legislative or substantive. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir.1997) ("If the statute or rule to be interpreted is itself very general, using terms like 'equitable' or 'fair,' and the 'interpretation' really provides all the guidance, then the latter will more likely be a substantive regulation."); see also *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989). Although *Paralyzed Veterans* involved an interpretive regulation, the importance of its analysis applies equally well to a promulgation establishing binding enforcement parameters for an open-ended statute such as section 104(e) that instructs MSHA to develop, by rule, "criteria" for a wholly undefined "pattern of violations." 30 U.S.C. § 814(e)(4).

Moreover, an agency's creation of a numerical prescription by which it will exercise its authority is especially needful of notice and comment. In *Catholic Health Initiatives v. Sebelius*,

⁸(...continued)

In *American Mining Congress v. Mine Safety and Health Administration*, the District of Columbia Circuit Court distinguished between statements of policy and interpretive rules for purposes of analyzing whether the promulgation is a substantive rule. It first concurred with the application of a two-step test in cases involving statements of policy. *Id.* at 1111 (citations omitted). With respect to interpretive rules, the Circuit Court applied a "legal effect" test consisting of:

- (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties;
- (2) whether the agency has published the rule in the Code of Federal Regulations;
- (3) whether the agency has explicitly invoked its general legislative authority; or
- (4) whether the rule effectively amends a prior legislative rule.

Id. at 1112. Given the Secretary's position and the nature of the specific pattern criteria, we need not concern ourselves with that test in this case.

617 F.3d 490 (D.C. Cir. 2010), the District of Columbia Circuit Court described the relationship between an agency's establishment of numerical targets and rulemaking:

We too have recognized that “numerical limits cannot readily be derived by judicial reasoning,” *Mo. Pub. Serv. Comm’n v. FERC*, 215 F.3d 1, 4 (D.C. Cir. 2000). Our statement in *Missouri Public Service* relied on *Hoctor v. USDA*, 82 F.3d 165, 170 (7th Cir. 1996). *Hoctor* held that an agency performs a legislative function when it makes “reasonable but arbitrary (not in the ‘arbitrary or capricious’ sense) rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation. A rule that turns on a number is likely to be arbitrary in this sense.”

Id. at 495 (footnote omitted).

In *Hoctor*, 82 F.3d at 167-68, the Department of Agriculture established a minimum height for fences enclosing dangerous animals. The minimum height requirement was established through an interpretation of the agency's valid regulation governing the structural strength of enclosures for housing animals. The height requirement was arbitrary – again in the sense that a different height could have easily been selected. Thus, not only was the interpretation binding, but also public comment was especially useful and important. The Circuit Court found the numerical requirement constituted a substantive rule that could be issued only after notice and comment.⁹ *Id.* at 171-72.

⁹ The *Hoctor* Court expresses especially eloquently the importance of notice and comment when rights are affected by numerical limits arbitrarily established by the agency:

There is no process of cloistered, appellate-court type reasoning by which the Department of Agriculture could have excogitated the eight-foot rule from the structural-strength regulation. The rule is arbitrary in the sense that it could well be different without significant impairment of any regulatory purpose. But this does not make the rule a matter of indifference to the people subject to it. There are thousands of animal dealers, and some unknown fraction of these face the prospect of having to tear down their existing fences and build new, higher ones at great cost. The concerns of these dealers are legitimate and since, as we are stressing, the rule could well be otherwise, the agency was obliged to listen to them before settling on a final rule and to provide some justification for that rule, though not so tight or logical a

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Indeed, in *Hoctor*, the Seventh Circuit effectively intertwined the likelihood that an agency pronouncement effectuating a vague statutory instruction is legislative with a finding that a numerically based rule binding the agency in the course of implementing a statute is almost inevitably substantive: “[W]hen a statute does not impose a duty on the persons subject to it but instead authorizes (or requires – it makes no difference) an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency.” *Id.* at 169; *see also Mission Grp. Ks., Inc. v. Riley*, 146 F.3d 775, 782-84 (10th Cir. 1998).

Consequently, promulgation of arbitrary numerical criteria pursuant to a statutory directive to implement vague statutory terms creates a strong appearance of legislative type action. Nonetheless, it is still necessary to apply the acid test, the “rubber meets the road test,” cited by the parties to determine whether the promulgation is a statement of policy or substantive rule.

Although the test is described as two-fold, it may aptly be thought of as two sides of a common coin. *See McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988 (“In practice, there appears some overlap in the *Community Nutrition* criteria; the second criterion may well swallow the first.”). If the agency binds itself or others to a set of criteria, then, as the *Hoctor* Court expressed, it is vital for the public to have a right to comment.¹⁰

The Commission recognized this principle in *Drummond*, when it cited *Batterton v. Marshall*. In *Batterton*, the Circuit Court reviewed a new methodology for determining unemployment statistics issued by the Department of Labor without following the notice-and-comment procedures of the APA. The new methodology adversely affected payments to the State of Maryland under the Comprehensive Employment and Training Act. Maryland filed an action seeking to vacate the new methodology. Concluding that the new

⁹(...continued)

justification as a court would be expected to offer for a new judge-made rule. Notice and comment is the procedure by which the persons affected by legislative rules are enabled to communicate their concerns in a comprehensive and systematic fashion to the legislating agency.

Id. at 171.

¹⁰ In *General Electric Company v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002), the District of Columbia Circuit noted that separate standards had developed for differentiating statements of policy from substantive rules. One is the two-step test cited in *Drummond*, 14 FMSHRC at 686, and by the parties; the other a three-step test described in *Molycorp., Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999). The Court found the tests overlapped at the step “in which the court determines whether the agency action binds private parties *or the agency itself*.” 290 F.3d at 382 (emphasis added).

formula constrained discretion, the Circuit Court found the methodology constituted a substantive rule requiring notice and comment.¹¹ 648 F.2d at 696-97, 711.

Voluminous precedent establishes that action by an agency that binds the agency, the affected public, or both, is a substantive rule. *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 7 (D.C. Cir. 2011) (“Our cases ‘make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding.’”) (citation omitted); *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) (“[B]ecause the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy; it is a rule.”); *CropLife Am. v. EPA*, 329 F.3d 876, 882 (D.C. Cir. 2003) (“EPA has enacted a firm rule with legal consequences that are binding on both petitioners and the agency. . . .”); *Gen. Elec. v. EPA*, 290 F.3d at 382 (“[T]he court determines whether the agency action binds private parties or the agency itself”); *Syncor v. Shalala*, 127 F.3d at 94 (“The primary distinction between a substantive rule . . . and a general statement of policy, then, turns on whether an agency intends to bind itself to a particular legal position.”); *U.S. Tel. Ass’n v. FCC*, 28 F.3d 1232, 1234-35 (D.C. Cir. 1994) (“[W]e have said repeatedly that it turns on an agency’s intention to bind itself to a particular legal policy position. . . . [T]he Commissioner has sought to accomplish the agency hat trick – avoid defense of its policy at any stage.”); *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988) (Rule “substantially curtails EPA’s discretion in delisting decisions and accordingly has present binding effect.”); *Cnty. Nutrition v. Young*, 818 F.2d at 948 (“[A]gency’s own words strongly suggest that action levels are not musings about what the FDA might do in the future but rather that they set a precise level of aflatoxin contamination that FDA has presently deemed permissible.”).

The remaining task regarding the APA dispute, therefore, is to determine whether the specific pattern criteria established in 30 C.F.R. § 104.2(b) and identified on the website are binding on MSHA or are binding upon members of the public.

¹¹ In doing so, the Circuit Court cited *Pickus v. U. S. Bd. of Parole*, 507 F.2d 1107 (D.C. Cir 1974), in which the Circuit Court set aside criteria for determining the granting of parole, issued by the U.S. Board of Parole without notice and comment. The Circuit Court found that the challenged rules greatly impacted the chances for parole and thus substantially affected the rights of persons subject to the regulations. *Id.* at 1112-13. In *Batterton, supra, Pickus*, and here, the rules are “formulalike” and are binding both with respect to operators that are not in POV status and operators that are in POV status. Indeed, the criteria in *Pickus* were not outcome determinative, and therefore, had less of a binding effect upon decision making than the specific pattern criteria.

C. Specific Pattern Criteria Established at 30 C.F.R. § 104.2(b) and Published on MSHA’s Website Constitute a Substantive Rule Requiring Notice and Comment.

The problem for the Secretary here is that the specific pattern criteria are not actually “screening” procedures; they are outcome determinative specific numerical standards for POV status. Indeed, the Secretary relies upon the binding effect of the specific pattern criteria for its due process defense. Further, although the Secretary claims MSHA exercises discretion in deciding upon POV status after application of the specific pattern criteria, the procedures used by MSHA and the facts of this case compellingly demonstrate otherwise.

With respect to the claimed exercise of discretion, review of the limited mitigation circumstances occurs after an operator is in POV status under the specific pattern criteria. The limited mitigation opportunities do not relate to whether the operator is in the POV status. There is no further discretionary consideration of that issue. Only if an operator meets a separate mitigation procedure may POV status be avoided. Finally, if the mine does not meet the specific pattern criteria, it is assured by MSHA that it is not in POV status.

1. The Specific Criteria Are Issued Pursuant to a Statutory Directive to Issue Rules Implementing Section 104(e) of the Mine Act and Identify Specific Numerical Criteria for the Determination of POV Status.

In *Drummond*, the Commission noted the limited significance of an agency’s classification of its action, recognizing that the agency’s label might be “indicative” but certainly is not “dispositive.” 14 FMSHRC at 683. “[I]t is the substance of what the [agency] has purported to do and has done which is decisive.” *Chamber of Commerce v. OSHA*, 636 F.2d 464, 468 (D.C. Cir. 1980) (internal quotations and citation omitted); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-38 (D.C. Cir. 1986). In determining the substance of what MSHA has done, we look not just at the wording of the promulgation but also its source and purpose, the methodology used, and most importantly its binding effect upon MSHA and the public.

Section 104(e) of the Mine Act provides for the issuance of POV Notices, but does not define a pattern of violations. Instead, Congress gave MSHA the authority and duty to issue rules determining when a pattern of violations exist. Indeed, the statute provides that “[t]he Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.” 30 U.S.C. § 814(e)(4).

In issuing the rules defining and governing patterns of violations, MSHA performs essentially a “legislative” function delegated to it by Congress. *Paralyzed Veterans*, 117 F.3d at 588. Further, MSHA has implemented numerical criteria as “specific pattern criteria.” Obviously, the criteria are “arbitrary” in the sense of being “impossible to give a reasoned distinction between numbers just a hair on the OK side of the line and ones just a hair on the not-OK side.” *Mo. Pub. Serv. Comm’n v. FERC*, 215 F.3d 1, 5 (D.C. Cir. 2000). The ratio of S&S citations/orders per 100 inspection hours could have been 7.0, 7.5, 8.5, 9, etc., but MSHA chose

8.0. Perhaps that is a reasonable number but, regardless, it is arbitrary. MSHA, therefore, has identified with arbitrary numerical specificity the specific criteria to be used in establishing whether operators are, or are not, in the POV status broadly created by Congress – a classic legislative function.

Further, the use of the specific pattern criteria is established in the rule itself at 30 C.F.R. § 104.2(b). MSHA apparently recognized it was necessary to use substantive rulemaking to establish specific pattern criteria. However, it then decided to place the enumeration of the specific criteria on a website away from notice and comment by the public. It gave public notice of, and right to comment upon, the ghost of specific pattern criteria but the substance remained shielded from public comment.

It is oxymoronic to establish the use of specific pattern criteria in the rule itself but then establish the specific pattern criteria that contain both numerical and durational specifications on a website immune from public notice or comment. If MSHA may take such an approach here, there is little to constrain MSHA from creating other standards in the body of the regulations while placing the substantive terms on its website where they will be sheltered from the APA.¹² If MSHA may create the existence of criteria by rule but shuffle off the actual substance of the criteria to a website away from public notice and comment, little is left of the APA.

2. The Specific Criteria of Section 104.2(b) and Published on the Website are Binding upon MSHA. The Public Was Entitled to Comment Upon Specific Criteria Eliminating Mines from POV Status.

The Secretary argues that “the screening [specific pattern] criteria do not narrowly circumscribe MSHA’s discretion.” S. Br. at 26. That statement is clearly false with regard to a determination that an operator is not in POV status. The specific criteria fully circumscribe MSHA’s discretion regarding finding operators that are not POV violators.

Recall, while an agency’s characterization of its pronouncement should be given some weight, the language of the agency pronouncement is far more important. In *American Bus Association v. United States*, the District of Columbia Circuit gave decisive weight to the Interstate Commerce Commission’s use of the word “will.” Use of “will” rather than “may” demonstrated that the pronouncement was not a statement of policy. 627 F.2d at 532. In this case, MSHA’s specific pattern criteria assures operators that “[m]ines *must* meet the criteria” to be considered for POV status. B. Mem. Supporting Appl. for Temp. Relief, Ex. 10 at 1

¹² In the preamble to the regulation, MSHA offered a nonbinding promise that it will notify the public of impending changes to the specific pattern criteria and offer a chance for comment. 78 Fed. Reg. at 5064. Having not given the public a chance to comment upon the institution of the specific pattern criteria established in section 104.2(b), there seems little reason to accept as meaningful in any way an informal MSHA assurance that it will want, invite, or listen to public comments in the future. In any event, the APA does not envision promised invitations as a substitute for legal rights.

(emphasis added). Use of the imperative “must” demonstrates compellingly that the agency has bound itself to not find an operator in POV status if it does not meet the specific criteria.

Indeed, in MSHA’s promulgation of the revised regulation and even in its defense of the regulation, the Secretary has assured operators that the specific criteria will be the final determinant that they are not in POV status if they stay below the numerical limits for POV status established in the specific criteria. In the preamble to the final rule, MSHA stated that it was posting the specific criteria on its website and that such posting constitutes the

specific criteria, with numerical data, that the Agency will use to identify mines with a pattern of S&S violations. MSHA has determined that posting the specific criteria on its Web site, together with each mine’s compliance data, will allow mine operators to monitor their compliance records to determine if they are approaching POV status.

78 Fed. Reg. at 5064.

Thus, the agency reaffirms that an operator not meeting the specific criteria will not be found in POV status. Without doubt, section 104.2(b) serves as a binding commitment by MSHA that it will not assert POV status against any operator not meeting the specific pattern criteria provided for in section 104.2(b) of the regulation and amplified upon on the website. Because the Secretary has defined a POV as two or three S&S violations in a series that is recognizably consistent, almost every mine in the mining industries could be issued a POV Notice absent the assurance provided by MSHA through use of the specific criteria to limit the number of mines reaching POV status.¹³ Therefore, not only are the specific criteria binding on MSHA but that binding status upon MSHA provides an important assurance to operators that POV status will be used not as a typical “enforcement” tool but rather, as intended, only as an severe weapon directed at those few operators that have demonstrated over a long period a repeated disregard for the health and safety standards issued under the Mine Act. 78 Fed. Reg. at 5058. At the same time, it positively precludes MSHA from issuing a POV Notice to an operator that has a pattern of recognizably consistent significant and substantial violations of even the most important safety standards, if the entirety of the operator’s record remains within the “safe zone” of the specific pattern criteria.

Perhaps the Secretary simply misperceived that only operators that might be designated for POV status have an interest in, or right to comment upon, numerical specific pattern criteria for establishing POV status. If so, MSHA forgets the far broader public that has an interest in

¹³ Just as an example, according to MSHA’s Key Indicators Report, Citations and Orders Issued Report, All Coal 10/01/2010-09/30/2011, the average number of coal mine 104(a) citations that were designated S&S averaged 32,616 annually for the four years from 2008 through 2011.

such standards. Those in the public, the many safe and responsible operators, miners, miners' representatives, safety societies, and others were not given any chance to comment on the specific pattern criteria positively eliminating operators from POV status.

The right to notice and opportunity to comment upon threshold levels for exclusion from POV status is as important as the right to comment upon threshold levels for inclusion. Notice and comment must be available not only to those who may claim the standards are too strict but also to those who may believe the standards are too lenient. Self-evidently, broad public sectors had a right to comment upon these substantive specific pattern criteria that exclude operators from POV status.

3. The Specific Criteria of Section 104.2(b) and Published on the Website Effectively are Used by MSHA to Determine POV Status and, Therefore, are Binding upon Mine Operators with Respect to POV Status.

Given the clarity of the APA that MSHA is required to grant the industry, miners, and public an opportunity to comment upon specific criteria binding upon MSHA in finding an operator is **not** in POV status, we could perhaps forego discussing whether the specific pattern criteria also are the substantive bases for finding an operator is in POV status. However, the desire for those with power to have “flexibility” in the exercise of that power is a common affliction. It is a danger against which the APA is intended to safeguard.

It is vital, therefore, to constrain unlawful reaches for flexibility by Federal agencies. So, we must also determine whether MSHA's stretch for “flexibility” by setting the table for specific pattern criteria by rule 104.2(b) but then putting all the food off the table without permitting comment by the public is lawful or instead creates a template for an ever broadening host of website criteria that “flexibly” impose duties and penalties without APA notice-and-comment procedures. This case illustrates the phenomenon observed by the District of Columbia Circuit in *Appalachian Power Company v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000):

Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. “It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures.” Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 48 Admin. L. Rev. 59, 85

(1995). The agency may also think there is another advantage – immunizing its lawmaking from judicial review.

Id. at 1020 (footnote omitted).

The decision as to whether a purported policy statement effectively circumscribes discretion is not a mechanical test. *Am. Bus Ass'n v. U.S.*, 627 F.2d at 529-30. A close examination is required of the language of the pronouncement, its intended effect, and the effect upon the regulated community.

a. Comparison of 104.2(a) and 104.2(b)

Here, the only commonsense reading of section 104.2 is that operators failing the specific criteria are in POV status. Thus, they will receive a POV Notice unless MSHA makes a separate, later finding of mitigation under one of three narrow circumstances.

As demonstrated by the table set forth as Table 2 below, the criteria of section 104.2(a) merely duplicate the specific criteria of section 104.2(b) except the section 104.2(a) criteria do not identify numerical standards for POV status.

Table 2

POV Pattern Criteria Established and Listed in 30 C.F.R. § 104.2(a)	POV Pattern Criteria Established in 30 C.F.R. § 104.2(b) and Listed on Website
<p>(1) Citations for S&S violations;</p> <p>(2) Orders under section 104(b) of the Mine Act for not abating S&S violations;</p> <p>(3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator’s unwarrantable failure to comply;</p> <p>(4) Imminent danger orders under section 107(a) of the Mine Act;</p> <p>(5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;</p> <p>(6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;</p> <p>(7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and</p>	<p>(1) At least 50 citations/orders for significant and substantial (S&S) violations issued in the most recent 12 months.</p> <p>(2) A rate of eight or more S&S citations/orders issued per 100 inspection hours during the most recent 12 months OR the degree of negligence for at least 25 percent of the S&S citations/orders issued during the most recent 12 months is “high” or “reckless disregard.”</p> <p>(3) At least 0.5 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] issued per 100 inspection hours during the most recent 12 months.</p> <p>(4) An Injury Severity Measure (SM) for the mine that is greater than the overall Industry SM for all mines in the same mine type and classification over the most recent 12 months.</p> <p style="text-align: center;">OR</p> <p>(1) At least 100 S&S citations/orders issued in the most recent 12 months.</p>
<p>(8) Mitigating circumstances.</p>	<p>(2) At least 40 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] issued during the most recent 12 months.</p>

Section 104.2(a)(1) duplicates section 104.2(b)(1) and (2) but with less specificity. Sections 104.2(a)(2)-(6) duplicate sections 104.2(b) (2) and (3). Section 104.2(a)(7) essentially duplicates section 104.2(b)(4) but again with less specificity.

The Secretary asserts the criteria are not duplicative relying entirely upon 104.2(a)(7) as the basis for its purported exercise of discretion in deciding upon POV status. In doing so, he

cites the preamble to the regulation asserting “other factors listed” in the 104.2(a) criteria that are supposedly not addressed in the specific pattern criteria. S. Br. at 26-27. The cited passage of the preamble provides that these “other factors” are:

- Evidence of the mine operator’s lack of good faith in correcting the problem that results in repeated S&S violations;
- Repeated S&S violations of a particular standard or standards related to the same hazard;
- Knowing and willful S&S violations;
- Citations and orders issued in conjunction with an accident, including orders under sections 103(j) and (k) of the Mine Act; and
- S&S violations of health and safety standards that contribute to the cause of accidents and injuries.

78 Fed. Reg. at 5062.

Of course, a commonplace rule of construction is the “specific governs the general.” See *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012) (“When the conduct at issue falls within the scope of both provisions, the specific presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general.”). Although not directly applicable here, the principle illuminates that the Secretary’s assertion that MSHA exercises discretion based on generalized “other factors” fails to explain how MSHA could apply section 104.2(a) criteria to find an operator not to be in POV status once an operator meets the specific pattern criteria for POV status. Although MSHA lists “other factors” in the preamble, the Secretary has not suggested how these factors are (1) not subsumed within the specific criteria; (2) how or when, under MSHA’s procedures, MSHA reviews these factors to possibly find that an operator that meets the specific pattern criteria for POV status actually is not in POV status; or (3) when such criteria were examined with respect to Brody.

The first “other factor” suggested by MSHA is “lack of good faith.” Because the operator has already met the specific criteria for POV status, it is impossible to see how a further demonstration of the absence of good faith could cause MSHA to determine the operator is not in POV status; it only adds fuel to the POV status fire. It cannot mean an exercise of “good faith” because MSHA expressly limits a “good faith defense” to a request for mitigation under the strictly limited basis of an MSHA-approved Corrective Action Program. MSHA’s intent not to consider “good faith” is completely encompassed by the limited and specific mitigation opportunities.

The second “other factor” is repeated S&S violations affecting the same standard or hazard. Surely, the Secretary cannot be asserting seriously that it may find an operator that,

under the numerical specific criteria, must have exceeded the national average for S&S violations by at least two hundred and fifty percent is not in POV status because the S&S violations are spread over a wide variety of standards or hazards. This is especially true as MSHA states in the same section of the preamble that its “data and experience show that violations of approval, training, or recordkeeping regulations, for example, can significantly and substantially contribute to health or safety hazards, and may be a contributing cause of an accident.” 78 Fed. Reg. at 5062-63. Thus, MSHA expanded the range of citations/orders meriting POV status across the entire gamut of its regulations to training and recordkeeping. Finally, the third, fourth, and fifth “other factors” are duplicative of the specific criteria for elevated citations/orders and the Injury Severity Measure of the specific pattern criteria.

It defies logic to credit the Secretary’s suggestion that a review of section 104.2(a) factors, other than the separate and subsequent consideration of mitigation, could remove an operator from POV status after a finding by MSHA that the operator meets the numerical specific pattern. The case for POV status under section 104.2 can only be made stronger by the so-called “other factors” because the specific criteria are minimum thresholds for POV status.¹⁴ We must apply here the District of Columbia Circuit Court’s caution related to another Federal agency: “EPA’s claim to have been open to consideration of other factors does not make the VHS model any less of a rule.” *McLouth Steel Prod.*, 838 F.2d at 1322.¹⁵

¹⁴ Although the revised rule has been in effect only since March 25, 2013, MSHA conceded at oral argument that, to this point, all operators that have met the specific regulatory criteria have been issued POV notices.

¹⁵ The majority cites two cases in support of treating the specific pattern criteria as a statement of policy. Neither case supports the majority’s position. In *Brock v. Cathedral Bluffs*, 796 F.2d at 538, the Circuit Court emphasized the Secretary’s warning that nothing in the Appendix altered production-operators’ responsibilities. Moreover, nothing whatsoever constituted a binding norm on the agency to take or refrain from taking any action. Indeed, the Court emphasized the substantive difference between suggestive words such as “may” and determinative words such as “will.” *Id.* (In this case, the key word is “must”). Further, the Court noted the *Attorney General’s Manual on the APA* and found that it had elaborated on it so that “a general statement of policy, on the other hand, does not establish ‘a binding norm.’” *Id.* at 537.

As demonstrated above, the specific pattern criteria clearly establish a binding norm for what does not constitute a Pattern of Violations as well as what does constitute a Pattern of Violations. *Am. Hosp. Ass’n*, 834 F.2d at 1051, not only is not helpful to the majority, but actually reinforces the need for notice and comment. The standards under review only asked that HHS examine a greater share of operations in given medical areas. On the other hand, the Court stated: “Were HHS to have inserted a new standard of review governing PRO scrutiny of a given procedure, or to have inserted a presumption of invalidity when reviewing certain operations, its
(continued...)

b. MSHA’s Procedures and Panel Review Accept the Specific Pattern Criteria as Outcome Determinative

The Pattern of Violations (POV) Procedures Summary states that a District Manager is only to “report facts relevant to whether there are mitigating circumstances that justify postponing or not issuing a POV notification.” B. Mem. Supporting Appl. for Temp. Relief, Ex. 11, at 1. Nowhere is there so much as a hint that the District Manager with the most direct knowledge and information related to the operator is asked for advice or information related to the 104.2(a) or 104.2(b) pattern criteria, except the narrow and separate possibility for mitigation unrelated to determining POV status in the first instance.

Again, MSHA’s own statement of procedures circumscribes such review by requiring that the POV panel’s task is only to make a recommendation whether the mine “should be excluded from POV notification or have their POV notification postponed due to mitigating circumstances.” *Id.* at 1. So, when the procedures call for the POV panel to consider the information provided by the District Manager, the call is for a review only of information related to possible mitigation rather than the already met specific criteria for POV status.

In sum, after Brody fell within the specific pattern criteria, MSHA asked the District Manager for information about, and only about, possible mitigation. The Panel then considered the information supplied by the District Manager, rejected mitigation, and recommended issuance of the POV notice. Thus, the process flowed smoothly, as intended, from specific pattern criteria, to District Manager notice, to Panel review, to issuance of a POV notice.

POV status was determined by Brody’s failure under the specific pattern criteria. There is no inkling, let alone evidence, that MSHA considered in any meaningful way factors under 30 C.F.R. § 104.2(a) that could only have strengthened the case for POV status. Operators failing under the specific criteria are for all practical and legal purposes in POV status thereby facing a POV Notice, subject only to a consideration of mitigation.

¹⁵(...continued)

measures would surely require notice and comment, as well as close scrutiny to insure that it was consistent with the agency’s statutory mandate. *See, e.g., Pickus.*” *Id.*

Indeed, the Court cited and distinguished the guidelines before it from the case of *Pickus v. U.S. Board of Parole*, 507 F.2d at 1112–13, where, similarly to the Secretary’s actions in this case, the parole board established “guidelines establishing specific factors for determining parole eligibility that were “calculated to have a substantial effect on ultimate parole decisions.”” *Am. Hosp. Ass’n*, 834 F.2d at 1046; *see also Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014). Here, the actions by the Secretary established specific binding norms for operators that would and would not be in POV status. Further, by deleting the prior section 104.3 and inserting the specific binding pattern criteria established in section 104.2(b) and published on the website, the Secretary effectuated a change in an existing rule thereby requiring notice and comment.

c. **The Revised Regulation Converted “Screening” Criteria into “Pattern Criteria Demonstrating Their Binding Effect.”**

The prior regulation contemplated and provided for a further actual review after evaluation of what were then “Initial Screening Criteria” in section 104.2. Nothing in the present regulation, procedures, or actions of MSHA demonstrates anything approaching a discretionary analysis of pattern factors bearing on POV status after an operator meets the specific pattern criteria. The prior regulation not only contemplated but also actually provided for a discretionary review; the revised regulation does not. If an operator meets the specific pattern criteria, it is in POV status subject only to a separate decision that it has recently mitigated its history of violations by change of ownership or adoption of a previously MSHA-approved corrective action program.

Without the notice-and-comment period required by the APA, MSHA in its discretion may change the numerical or durational (e.g. review every three, four, five, etc. months) requirements of the specific pattern criteria. The specific pattern criteria are substantive. They deserve and require public notice and comment.

II.

DUE PROCESS PROCEDURES

The parties focus much of their attention upon MSHA’s use of non-final citations/orders for issuance of a POV Notice. Brody contends that “violations” as used in Section 104(e) of the Mine Act may only reasonably mean final actions. Thus, according to Brody, MSHA’s use of non-final citations/orders to issue a POV Notice fails to reflect proper consideration of the change from the prior rule and violates the Constitution by depriving Brody of a pre-deprivation hearing.

The Secretary contends that other sections of the Mine Act use the term “violations” to mean non-final citations/orders. He further argues that using final actions for issuance of a POV Notice is impractical and would frustrate the very safety purpose of the statute.

While the Secretary agrees that a valid POV Notice requires the Secretary to prove a pattern of significant and substantial violations, he asserts that proof of final violations may await a contest by an operator of a subsequently issued withdrawal order. Consequently, the critical issue considered below is the point at which MSHA must prove final violations to sustain a POV Notice – before or after issuance of the POV Notice and the resultant deprivation of property rights.

A. Due Process

The first principle of due process is that “an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary

situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.” *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (“The right to prior notice and a hearing is central to the Constitution’s command of due process.”). Due process ordinarily requires an opportunity for that hearing before the deprivation at issue takes effect. *E.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U. S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). This is the “root requirement” of the due process clause. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

The Secretary concedes that Brody has a property interest in uninterrupted mining activities. S. Br. at 15. That concession brings the due process clause into play. *Boddie v. Connecticut*, 401 U.S. at 378-379. Of course, application of the due process clause is “intensely practical.” *Goss v. Lopez*, 419 U.S. 565, 578 (1975). Whether a governmental interest justifies postponing the hearing until after the deprivation is judged by application of the familiar three factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976):

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

B. Private Interest that will be Affected

The parties diverge on the magnitude of effect a POV will have upon Brody. Brody asserts that its right to operate its mine, including ownership rights and revenues constitute significant property rights subject to due process protections. *See James Daniel Good Real Prop.*, 510 U.S. at 48-49. It further asserts that a POV Notice will cause a perpetual series of temporary shut-downs of portions of its mines resulting in serious harm to its property interests. It cites Commission cases in which the severe consequences of a POV notice were noted. *Aracoma Coal Co.*, 32 FMSHRC 1639, 1641 (Dec. 2010) (Opinion of Chairman Jordan affirming ALJ's decision); *Rockhouse Energy Mining*, 30 FMSHRC 1125, 1128 (Dec. 2008) (ALJ).

The Secretary concedes that an operator has a property interest in continuing its mining operations without withdrawing miners and that such interest is adversely affected by the POV rule "because a withdrawal order reduces an operator's control over its property and imposes costs on the operator to regain control." S. Br. at 15-16. However, the Secretary asserts Brody's "property rights" are weak because of the large number of citations that have been issued to it and that, in any event, Brody exaggerates the disruption caused by a withdrawal order.

MSHA's position is undercut by its own preamble to the final POV. In its analysis of compliance costs, MSHA states: "Withdrawal orders issued under the final rule can stop production until the condition has been abated. The threat of a withdrawal order provides a strong incentive for mine operators to ensure that S&S violations do not recur." 78 Fed. Reg. at 5070.

For this reason, all Commissioners agree that Brody "has a significant property interest in continuing its mining operations without withdrawing miners." Slip op. at 16.

C. The Safety Interest

Given the significant harm to property rights and the much preferred right to a pre-deprivation hearing, the constitutionality of MSHA's failure to develop or utilize pre-deprivation procedures for issuance of a POV notice rests in very large measure upon whether the Secretary has identified circumstances that warrant bypassing the constitutionally-preferred pre-deprivation hearing. In due process cases, the Supreme Court focuses upon whether the circumstance "falls under this emergency situation exception to the normal rule that due process requires a hearing prior to deprivation of a property right" and is one of those "situations in which swift action is necessary to protect the public health and safety." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300-01 (1981).

In their work lives, miners have a right to a safe and healthful life, not a life shortened or diminished by carelessness or violations of law by their employer. When there is an imminent danger to the safety or health of a miner, immediate governmental intervention is required and constitutionally justified. The Secretary cites the events at Upper Big Branch (UBB) mine in

April 2010, a horrific tragedy claiming the lives of 29 miners. After such tragedy, there inevitably arise a host of speculative “what if” questions. What if MSHA had issued UBB a final POV notice rather than a Potential POV notice? What if MSHA’s computers had not failed to identify UBB as a continuing violator that deserved a final POV Notice?

It does no disservice to these inevitable concerns to require a dispassionate review of whether the POV rule is aimed at situations permitting MSHA to override the basic constitutional right to pre-deprivation due process. Especially in the aftermath of tragedy, there is a need for clear-eyed reflection lest we unnecessarily sacrifice basic rights to a spasm of pain and fear. If section 104(e) were aimed at imminent safety and health hazards, then MSHA’s failure to implement it for 37 years would be reason for a scathing rebuke of MSHA and a galling monument to government ineptitude. In fact, an objective review demonstrates that section 104(e) of the Mine Act is not aimed at immediate, current, or even recent hazards; instead, it is a vaguely worded direction for an extreme remedy taken after lengthy deliberation in order to change the long-term culture at those few mines that habitually disregard health and safety standards in a significant and substantial way.¹⁶ MSHA has acknowledged:

[T]he majority of mine operators are conscientious about providing a safe and healthful work environment for their miners. The POV regulation is not directed at these mine operators. Consistent with the legislative history, it is directed at those few operators who have demonstrated a repeated disregard for the health and safety of miners and the health and safety standards issued under the Mine Act.

78 Fed. Reg. at 5058.

MSHA, therefore, has found that section 104(e) is not intended to deal with present or recently past hazards. Instead, its remedial purpose is to change the culture of operators that are habitually significant and substantial violators of mandatory safety and health rules and to serve as a warning to any operator that may become lax in adhering to those standards.

¹⁶ Contrary to the majority’s contention (slip op. at 18 n.13), I do not characterize the public interest in safety reflected in the POV rule as a “spasm of pain and fear.” I have only cautioned that after natural or man-made disasters there is a natural tendency to overreact, sometimes at the cost of constitutional rights and privileges. I would have thought the truth of that observation obvious to any reader of American history of the 20th or 21st centuries, let alone those of us who have lived through part of that history. There are over 10,000 S&S citations/orders issued in the mining industry each year. *See* slip op. at 35 n.7. Each responds to a situation allegedly creating a situation reasonably likely to result in a reasonably serious injury. Yet, I do not think any Commissioner would suggest that operators may be found presumptively to have committed an S&S violation without a chance to defend. The alleged commission of S&S violations does not justify deprivation of basic constitutional rights.

Pursuant to the binding specific pattern criteria, practically speaking, MSHA cannot issue a POV Notice for at least 14 months from the beginning of the period during which a pattern of violations is found to exist. It does not diminish the longer term importance of section 104(e) to acknowledge that the POV rule does not deal with any recent mine hazard. A POV Notice is not issued in response to day-to-day or even month-to-month violations.¹⁷

A partial summary of MSHA's more immediate enforcement powers under the Mine Act includes:

1. Section 103(a) – Requires “frequent” inspections; underground mines must be completely inspected at least four times each year in their entirety and other mines must be inspected in their entirety at least twice each year.
2. Section 103(i) – Requires spot inspections of methane liberating mines every five, ten, or fifteen days depending upon amount of methane liberated.
3. Section 103(j) – Requires operators to notify MSHA of any accident and requires that such notice be provided within 15 minutes for fatal accidents or an injury or entrapment of an individual which has a reasonable potential to cause death. Section 110(a)(2) provides for a penalty for failure to provide a required 15 minute notice of up to \$65,000.
4. Section 104(a) – MSHA may issue citations to operators for any violation of any mandatory health or safety standard, rule, order, or regulation and set a mandatory abatement period. Section 110(a)(1) provides for penalties up to \$70,000 for violations depending upon penalty criteria set forth in section 110(i) of the Mine Act.
5. Section 104(b) – MSHA may issue a withdrawal order requiring withdrawal of miners from areas in which a citation has not been abated within the time specified by MSHA. Section 110(b)(1) provides for a penalty of up to \$7,500 for each day of failed abatement.
6. Section 104(d)(1) – If, during an inspection, an inspector finds a S&S violation of a mandatory safety or health standard by an unwarrantable failure and during that same inspection or any other inspection within 90 days finds another unwarrantable failure, the inspector shall issue a withdrawal order for the area affected by the violation. Section 110(a)(3)(A) provides for a minimum penalty of \$2,000 for a 104(d)(1) violation.
7. Section 104(d)(2) – If an inspector issues a withdrawal order under 104(d)(1), a withdrawal order shall promptly be issued upon a finding in any subsequent inspection of the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph section 104(d)(1) until such time as an inspection of such mine discloses no

¹⁷ The majority euphemistically refers to this 14-month period as “recent compliance history.” Slip op. at 21.

similar violations. Section 110(a)(3)(B) provides for a minimum penalty of \$4,000 for a 104(d)(2) violation.

8. Section 107 – An inspector shall issue a withdrawal order if the inspector finds an imminent danger – that is, any condition or practice which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated results in a withdrawal order.

9. Section 108 – Provides for an injunction action in Federal court as a result of various actions by an operator, including a violation of, or failure to comply with, an order or decision.

10. Section 110(b)(2) – MSHA may seek a penalty of up to \$242,000 for any “flagrant” violation of the Act.

11. Section 110(c), (d), (e), (f), (g), (h) – These sections provide circumstances under which civil and criminal penalties may be imposed upon officers, directors, agents of a corporate operator, and others for violations.

12. Higher penalties under the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”) – The average penalty has increased substantially since passage of the MINER Act. Further, penalty points are assessed on the basis of both the history of violations and repeat violations. *See* 30 C.F.R. § 100.3. Therefore, the sort of conduct that may cause POV trouble for an operator far more quickly results in greatly enhanced penalties.

13. Impact Inspections – In April 2010, MSHA began to conduct especially intensive inspections, called “impact” inspections, at mines it determines merit increased attention due to such matters as numerous violations or withdrawal orders, failures in plan compliance, inadequate examinations, roof issues, and accidents, injuries, or illnesses. MSHA Press Release No. 14-1376-NAT, July 24, 2014.

Impact inspections deserve particular attention with respect to the interplay with the POV rule. Because MSHA tracks violations by operators on a monthly basis, it flags operators with actually recent disturbing violation trends for impact inspections. As of July 2014, MSHA had conducted 780 intensive impact inspections resulting in 12,627 citations, 1,170 orders, and 54 safeguards. *Id.*

The enhanced penalty amounts together with the intensity of impact inspections, means that MSHA can and does deal immediately with recalcitrant operators in a very real and targeted manner. Indeed, the Assistant Secretary for Mine Safety and Health has stated recently that “[a] review of mines receiving impact inspections between September, 2010 and September 30, 2013 that have had at least one follow-up inspection also shows that these inspections have made a real difference.” Remarks of Joseph A. Main, Assistant Sec’y of Labor for MSHA, NSSGA Meeting, March 5, 2014; <https://www.msha.gov/MEDIA/SPEECHES/2014/NSSGAremarksfinal.pdf>.

The working conditions at mines are by their very nature difficult and hazardous. Tragically, fatalities and injuries continue to occur despite the best efforts of MSHA, operators, and miners. However, there is a significant array of regulatory weapons at MSHA's disposal to deal with current and recent hazards. Section 104(e)'s purpose is different; it is a long-term weapon aimed at culture rather than specific hazards.

D. Risk of Erroneous Deprivation and Value of Additional Safeguards

Having recognized the "significant property interest" at stake for Brody and, realistically knowing that the POV rule is not aimed at circumstances of immediate or even current harm, the only conceivable ground upon which to base a denial of a fundamental constitutional right is that there is no risk of erroneous deprivation so the due process rights are insignificant.¹⁸

The *Mathews v. Eldridge* test is a balancing test of the three factors. However, "balancing" does not mean assigning a 33.33% share to each of the three factors. The factors must be balanced holistically. The potential for immediate severe harm to the public interest may play a greater role than the other two factors. Conversely, the seriousness of the property rights involved may affect the view taken of the other elements, especially if the contemplated government action is not in response to immediate or recent circumstances.

That understanding is important here because the property rights of Brody and the "safety" element are not in equipoise. While the Secretary now disputes the high value of Brody's property right to continued operation of its mine, as we have seen, even MSHA in the preamble to the rule asserted that a POV Notice is "severe." Indeed, there is little challenge to Brody's assertion that issuance of POV Notice may result in the demise of an operation.

¹⁸ In this respect, the majority finds the property interest and the safety interest to be in equipoise thereby allowing it to assert that Brody's due process rights depend solely on its analysis of the adequacy of pre- and post-deprivation procedures. The majority also incorrectly has analogized the deprivation of any pre-hearing procedure under the Secretary's POV rule with the issuance of withdrawal orders under section 104(d). The sections are not similar in any manner relevant to due process rights. First, section 104(d) deals with a chain of immediate "unwarrantable failures" in which at the very point of issuance an operator must have demonstrated "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987); *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995). Therefore, this is a situation in which the allegation of immediate operator faults rises to a high level. Further, the chain of withdrawal orders may be broken by avoiding for the requisite period any additional unwarrantable failures. For section 104(e), however, the operator must go through an entire mine inspection without an alleged S&S violation rather than an unwarrantable failure.

Further, the POV rule does not address a situation of urgency or even recency.¹⁹ The POV rule deals with long-term conduct rather than any immediate, current, or even recent violation or danger. As it takes more than a year to reach the point of considering a POV Notice, there is no immediate safety concern counterbalancing the destruction of property interest. Therefore, the balance between property rights and an immediate public interest tilts very sharply toward the property rights affected by a POV Notice.

Because a pre-deprivation hearing is constitutionally preferred, cases in which only post-deprivation procedures are found sufficient generally involve a threat of an imminent or immediate harm to an important public or governmental interest. This element of imminent harm is found in the cases cited by the majority. In *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), there was an immediate danger to public safety through the imminent distribution of mislabeled drugs. In *Mackey v. Montrym*, 443 U.S. 1 (1979), the Court found an immediacy to the danger posed by drunk drivers. Finally, *Hodel*, 452 U.S. 264, involved the likelihood of significant, imminent mining disasters.

In *Hodel*, for example, the Court affirmed that “[o]ur cases have indicated that due process ordinarily requires an opportunity for ‘some kind of hearing’ prior to the deprivation of a significant property interest.” 452 U.S. at 299. However, the Court found the emergency situation of an imminent mine disaster justified a post-deprivation hearing summary administrative action stating: “[t]he question then, is whether the issuance of immediate cessation orders under § 521(a) falls under this emergency situation exception to the normal rule that due process requires a hearing prior to deprivation of a property right.” *Id.* at 300. Citing *Mytinger*, the Court found an immediate cessation order responded “to situations in which swift action is necessary to protect the public health and safety. This is precisely the type of emergency situation in which this Court has found summary administrative action justified.” *Id.* at 301.

Under the case law, therefore, the application of the factor of risk of erroneous deprivation of property rights in this case arises in the context that (1) due process ordinarily requiring a pre-deprivation hearing, (2) issuance of a POV Notice will be highly destructive of property rights, and (3) the POV Rule applies after a lengthy analysis to long-term situations and, thus, is not the type of situation justifying summary administrative procedures.

¹⁹ The majority, much as its wrongfully characterizes my observation of the need to dispassionately consider the effect of government action upon constitutional rights after a disaster lest we let the disaster override constitutional rights, also wrongfully seizes upon the word “urgency” in this sentence as if it is used in the sense of “importance” or “significant concern.” Slip op. at 18. Obviously, the point is that the POV rule is not dealing with preventing or remedying an immediate danger. Congress found that dealing with operators engaged in a long-term ongoing pattern of numerous S&S violations is important, and it is. However, it is not a situation that requires the government to forego elementary and most important due process rights.

If the Secretary's definition of "pattern of violations" is sustained, which has not yet occurred, and if the Secretary is able to establish a "recognizable pattern" on the basis of two or three violations, which also has not been confirmed, it would seem likely that MSHA could cull a small number of provable S&S violations out of dozens or hundreds of unproven citations/orders. However, allegations of violations and citations are not based upon objective tests. They are issued by inspectors with all the possibilities for errors, misperceptions, and human emotions. Further, the Secretary agrees that a substantial number (perhaps 19%) are set aside in litigation.

Because the POV rule has been issued so long after passage of the Mine Act and the remedy provided by it is so severe, there may be an inclination that it is so "important" that it should benefit from some sort of special analysis or constitutional blessing. From a constitutional law perspective, the POV rule does not deal with an imminent, current, or recent hazard but rather longer term issues and, thus, does not justify deprivation of an owner's vital property interests without some kind of a pre-deprivation hearing.²⁰

Under the POV rule there simply are no pre-deprivation procedures. An operator may contest individual S&S citations/order but it has no way of knowing whether those citations/orders would fit into the vaguely-defined notion of a "pattern of violations."²¹ The Secretary contends that operators may request a conference with a field office supervisor but fails to mention that Brody requested five Part 100 conferences with District Managers involving 22 S&S citations/orders and a grand total of *zero* were granted. B. Br. at 3. Further, a meeting may be held with a District Manager before issuance of a POV Notice but only "for the purpose of correcting any discrepancies. 78 Fed. Reg. at 5061.

The on-line monitoring tool is a useful tracking tool for which MSHA deserves credit. However, issuance of S&S citations/orders are entirely within the discretion of MSHA inspectors and, especially in an era of targeted impact inspections based upon computerized tracking, it does not satisfy due process to assert that an operator may have access to tool that, if used, may help avoid receiving a POV Notice. The right to a hearing before imposition of a severe penalty in a non-emergency context is not satisfied by an asserted opportunity to self-police oneself to foresee and avoid violations of governmental regulations.

²⁰ This is not a suggestion that the only form of pre-deprivation procedures satisfying due process rights would be litigation of each citation/order through to a final non-appealable order. The Secretary, acting through MSHA, should have considered a host of alternatives such as a pre-issuance notice sufficient to allow an operator to know the specific allegations upon which the POV Notice was based and for expedited review within a time frame and to an extent reasonably gauged as adequate from a constitutional perspective.

²¹ The Secretary's suggestion for such challenges may result in greatly increased litigation and fewer settlements.

Finally, the extent of citations/orders/violations asserted in a POV Notice is totally within the control of MSHA. The time it will take to make final determinations upon the citations/orders that must be proven to sustain a POV Notice ultimately depends upon the type and number of citations/orders upon which MSHA decides to base a POV Notice. MSHA has the same right to seek expedited hearings as operators. The Commission's procedural rules allow "any party" to file a motion for expedition of proceedings. 29 C.F.R. § 2700.52(a). Further, once an expedited hearing is requested, the length of time necessary to conduct such hearing does not depend upon which party requested it.²²

MSHA uses computerized tracking capability of citations/orders for impact inspections. Therefore, MSHA may determine to seek expedited hearings on citations/orders issued to an operator approaching POV status under the specific pattern criteria.²³ Rather than filing a final POV Notice approximately 14 months after the beginning of the analysis period without any pre-deprivation due process procedure, MSHA could have proceeded promptly to an expedited hearing on citations/orders forming the basis for its POV Notice as it monitors its self-built tracking software.

Here, Brody met the specific pattern criteria on the basis of 253 citations/orders. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A at 9. The POV Notice asserted 54 violations in four categories, the smallest of which was seven citations. Notice No. 7219154. The Secretary asserts that under its definition of a POV, a hearing on those seven citations could suffice to prove a pattern of violations.

If MSHA had chosen to base the POV Notice on seven citations as it claims it could, it could have also expeditiously obtained a decision from an Administrative Law Judge on those seven citations. Even if MSHA concluded that it needed to cite more citations either for fear of rejection of its definition of a POV or as a matter of litigation strategy, the decision was entirely within MSHA's hands. It is ironic for the Secretary to say with one breath that it may prove a POV through proof of seven (or fewer) citations/order but in the next breath say that expedited hearings would take too long to provide the constitutionally required hearing. By deciding upon

²² MSHA can and does work on a POV case before making a "final" decision. Here, for example, the Panel Memorandum recommending that a POV Notice be issued is dated October 12. S. Mem. Supporting Opp'n to Appl. for Temp. Relief, Ex. A. The POV Notice was sent on October 24 listing 54 citations/orders. Notice No. 7219154. Obviously, therefore, MSHA was culling citations/orders for use and preparing the POV Notice for delivery before "final" approval.

²³ MSHA cannot seek an expedited hearing until a citation/order is contested and operators do not need to contest a citation/order until a penalty is assessed. However, as with all other aspects of the regulatory process, the timing of penalty assessments is wholly within the control of MSHA.

the number of citations/orders/violations necessary to prove the existence of a POV, MSHA determines the amount of time that will be required to prove its case and MSHA may seek expedited hearings at any time.

Even when the private party's odds of prevailing are small, the due process clause commands respect for constitutional rights. Observance of due process requirement for pre-deprivation hearings does not just protect property interests. In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), Justice Frankfurter reflected upon due process as bedrock upon which our democracy is built:

“[D]ue process,” unlike some legal rules, is not a technical conception addressed with a fixed content unrelated to time, place and circumstances. Expressing, as it does in its ultimate analysis, respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.

Id. at 162-163.

Justice Frankfurter's words have not been lost. The Supreme Court often restates the principle that the due process clause not only protects the property interests of citizens, it also supports the conveyance of a feeling that the government is fair and just; that it does not take property at will; and that all the rights of citizens are respected. See *Carey v. Piphus*, 435 U.S. 247, 266-267 (1978); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Nelson v. Adams*, 529 U.S. 460, 468 & n.2 (2000).

From these considerations it is clear that: (1) 30 C.F.R. § 104 is an adjunct to a host of other powerful and immediate enforcement provisions dealing with current or recent alleged violations; (2) it minimally takes 14 months to implement a POV Notice from the beginning of the relevant time period; (3) the number of citations/orders/violations supporting prosecution is controlled exclusively by MSHA; and (4) MSHA may initiate hearing processes, with expedited consideration, even before the end of the 12-month review period. Thus MSHA, rather than the operator, has virtually complete control over the timing of, and time required for, a hearing on citations/orders/violations underlying a POV Notice.

Due process is a flexible concept and may be tailored to the circumstances of the specific situation. *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972). During rulemaking MSHA could and should have considered differing possibilities for affording some form of pre-deprivation

impartial judicial type review of alleged violations upon which a POV Notice is to be based. This is a matter upon which MSHA should have reflected and acted seriously before dispensing with vital constitutional rights.

III.

CONCLUSION

Congress and Federal courts wisely have found that notice of and the opportunity to comment upon rules binding a Federal agency or members of the public are the foundation of fair and transparent government. In its rulemaking at issue here, MSHA bound itself and members of the public to arbitrary numerical and specific pattern criteria. In the name of “flexibility” it has deprived the public of any opportunity to comment upon such criteria. That is an unlawful failure to obey the Administrative Procedure Act and should be rejected.

Separately, the Secretary defines a pattern of violations to mean a minimal number of proven violations and, acting through MSHA, controls every aspect of the proceedings upon which issuance of a POV Notice is based from initial inspection through monitoring of violations to deciding upon the number and timing of prosecution of citations/orders. Further, MSHA has, and aggressively uses, a broad and forceful array of enforcement weapons to deal with violations likely to cause injury and operators that commit such violations. Under these circumstances, the conditions necessary to warrant denial of some form of a pre-deprivation due process do not exist.

I would vacate the judge’s decision and not permit the Secretary to proceed with POV notices until he conducts a rulemaking consistent with this opinion.

William I. Althen
William I. Althen, Commissioner

APPENDIX A

WEVA 2014-82-R
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

APPENDIX B

Pattern of Violations Screening Criteria - 2013

A computer-generated report is run that retrieves data for the most recent 12 months in which data are available for every mine under MSHA's jurisdiction. All non-abandoned mines (on the date the report is generated) are reviewed to determine if a pattern of violations may exist.

Pattern Criteria (30 CFR §104.2)

The following two sets of screening criteria are used to perform the review required under 30 CFR §104.2. Mines must meet the criteria in **either** set to be further considered for exhibiting a pattern of violations.

Mines meeting **all** of the following four criteria:

1. At least 50 citations/orders for significant and substantial (S&S) violations **issued** in the most recent 12 months.
2. A rate of eight or more S&S citations/orders **issued** per 100 inspection hours during the most recent 12 months **OR** the degree of negligence for at least 25 percent of the S&S citations/orders **issued** during the most recent 12 months is "high" or "reckless disregard."
3. At least 0.5 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] **issued** per 100 inspection hours during the most recent 12 months.
4. An Injury Severity Measure (SM) for the mine that is greater than the overall Industry SM for all mines in the same mine type and classification over the most recent 12 months.¹

Or

Mines meeting **both** of the following criteria:

1. At least 100 S&S citations/orders **issued** in the most recent 12 months.
2. At least 40 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] **issued** during the most recent 12 months.

¹Severity Measure is the number of lost workdays per 200,000 employee-hours. The Severity Measure formula is number of lost workdays x 200,000 divided by the number of employee hours. Office worker and contractor hours and lost workdays are excluded. Lost workdays consist of days away from work and days of restricted work activity, or statutory days charged as prescribed from a table of standard charges, e.g., 6,000 days for a fatality or permanent total disability. Only statutory days are used in the fatality and disability cases.

The Severity Measure for each mine is computed for all lost-workday accidents that occurred during the most recent 12 months for which injury and employee hour data (as reported under 30 CFR Part 50) is available. Each mine's severity measure is compared to the applicable severity measure for the six mine types and classifications over the most recent five years for which closed out data reported under 30 CFR Part 50 is available.

There are six mine types and classifications used to calculate the Severity Measure for pattern of violation screenings: underground coal mines; surface coal mines; surface coal facilities; underground metal and nonmetal mines; surface metal and nonmetal mines; and surface metal and nonmetal facilities. The Severity Measures for CY 2008-2012 are:

Mine Type and Classification	Severity Measure (SM) CY 2008-2012
Facility Coal	183.43
Facility M/NM	199.15
Surface Coal	131.72
Surface M/NM	142.51
Underground Coal	438.85
Underground M/NM	278.76

APPENDIX C

Pattern of Violations Screening Criteria - 2012

A computer-generated report is run that retrieves data for the most recent 12 months in which data are available for every mine under MSHA's jurisdiction. All non-abandoned mines (on the date the report is generated) are reviewed to determine if a potential pattern of violations may exist.

Initial Screening Criteria (30 CFR § 104.2)

The following two sets of screening criteria are used to perform the initial screening required under 30 CFR § 104.2. Mines must meet the criteria in **either** set to be further considered for exhibiting a potential pattern of violations.

Mines meeting **all** of the following four criteria are further screened to identify those that meet appropriate criteria, as specified in 30 CFR § 104.3, for a potential pattern of violations.

1. At least 50 citations/orders for significant and substantial (S&S) violations **issued** in the most recent 12 months.
2. A rate of eight or more S&S citations/orders **issued** per 100 inspection hours during the most recent 12 months **OR** the degree of negligence for at least 25 percent of the S&S citations/orders **issued** during the most recent 12 months is "high" or "reckless disregard."
3. At least 0.5 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] **issued** per 100 inspection hours during the most recent 12 months.
4. An Injury Severity Measure (SM) for the mine that is greater than the overall Industry SM for all mines in the same mine type and classification over the most recent 12 months.ⁱ

Or

Mines meeting **both** of the following two criteria are further screened to identify those that meet appropriate criteria, as specified in 30 CFR § 104.3, for a potential pattern of violations.

1. At least 100 S&S citations/orders **issued** in the most recent 12 months.
2. At least 40 elevated citations and orders [issued under section 104(b); 104(d); 104(g); or 107(a) of the Mine Act] **issued** during the most recent 12 months.

Pattern Criteria Screening (30 CFR § 104.3)

30 CFR § 104.3 requires that one of the following pattern criteria be met: (1) a history of repeated S&S violations of a particular standard; (2) a history of repeated S&S violations of standards related to the same hazard; or (3) a history of repeated S&S violations caused by unwarrantable failure to comply. Only citations and orders that are final may be considered in determining if these criteria have been met.

For a pattern of violations review, mines identified during the initial screening must have at least five S&S citations of the same standard that became **final orders** of the commission during the most recent 12 months **OR** at least two S&S unwarrantable failure violations that became **final orders** of the commission during the most recent 12 months.

ⁱ Severity Measure is the number of lost workdays per 200,000 employee-hours. The Severity Measure formula is number of lost workdays x 200,000 divided by the number of employee hours. Office worker and contractor hours and lost workdays are excluded. Lost workdays consist of days away from work and days of restricted work activity, or statutory days charged as prescribed from a table of standard charges, e.g., 6,000 days for a fatality or permanent total disability. Only statutory days are used in the fatality and disability cases.

The Severity Measure for each mine is computed for all lost-workday accidents that occurred during the most recent 12 months for which injury and employee hour data (as reported under 30 CFR Part 50) is available. Each mine's severity measure is compared to the applicable severity measure for the six mine types and classifications over the most recent five years for which closed out data reported under 30 CFR Part 50 is available.

There are six mine types and classifications used to calculate the Severity Measure for pattern of violation screenings: underground coal mines; surface coal mines; surface coal facilities; underground metal and nonmetal mines; surface metal and nonmetal mines; and surface metal and nonmetal facilities. The Severity Measures for CY 2007-2011 are:

Mine Type and Classification	Severity Measure (SM) CY 2007-2011
Facility Coal	188.4
Facility M/NM	190.3
Surface Coal	155.3
Surface M/NM	144.2
Underground Coal	482.6
Underground M/NM	297.9

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 29, 2014

UNITED MINE WORKERS OF AMERICA	:	
(UMWA), on behalf of MARK A. FRANKS	:	
	:	
v.	:	PENN 2012-250-D
	:	
EMERALD COAL RESOURCES, LP	:	
	:	
UNITED MINE WORKERS OF AMERICA	:	
(UMWA), on behalf of RONALD M. HOY	:	
	:	
v.	:	PENN 2012-251-D
	:	
EMERALD COAL RESOURCES, LP	:	

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

DECISION

These proceedings are before the Commission based on complaints of discrimination filed by the United Mine Workers of America (“UMWA”) on behalf of Mark A. Franks and Ronald M. Hoy pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”).

On June 3, 2013, an Administrative Law Judge issued a decision concluding that Franks and Hoy had demonstrated by a preponderance of the evidence that they were unlawfully discriminated against by Emerald Coal Resources, LP as a result of their participation in activities protected by section 105(c)(1) of the Mine Act.¹ 35 FMSHRC 1696 (June 2013) (ALJ).² The Judge further ordered Emerald to pay Mark Franks and Ronald Hoy back pay in the amounts specified in her order. *Id.* at 1707. Emerald filed a petition for discretionary review of the Judge’s decision, which the Commission granted.

¹ Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this [Act].

² On June 6, 2013, the Judge issued an amended decision to correct a clerical error.

As set forth below, a majority of Commissioners affirms the Judge's decision that violations of section 105(c)(1) occurred. Commissioners Young and Cohen would affirm the decision based on the support of substantial evidence in the record. Chairman Jordan and Commissioner Nakamura would affirm the decision in result on the basis that the evidence supports a finding of interference with the miners' protected rights under the Act. Commissioner Althen concludes that the operator did not violate section 105(c)(1).

Opinion of Commissioners Young and Cohen, affirming the Judge's decision:

On review, Emerald argues that the Judge's decision contains errors of fact and law. Emerald's arguments primarily fall into two distinct categories. First, Emerald contends that the Judge erred in concluding that the activities of Franks and Hoy, taken as a whole, were protected by the Mine Act. Second, Emerald alleges that the Judge erred in determining that its asserted business reason was pretextual and not legitimate.

In response, Franks and Hoy contend that the Judge's decision was correct and that her findings are supported by substantial evidence in the record. For the reasons that follow, we agree with the complainants and would affirm the decision of the Judge.

I.

Factual and Procedural Background

A. Franks and Hoy complained of unsafe practices at the mine to their safety committeeman.

This decision concerns activities at Emerald's Mine No. 1 from July 2011 through November 2011. Mine No. 1 is an underground coal mine located in Greene County, Pennsylvania. Jt. Stip. 1. During this period, Franks and Hoy were each employed as beltmen at the mine. Jt. Stips. 3-7.

On two separate occasions in August 2011, Franks and Hoy complained of unsafe practices at the mine to David Moore, a representative of the UMWA safety committee. Tr. 24-25, 53, 55-56. Specifically, on or around August 17, 2011, and on or around August 29, 2011, the miners complained that they suspected that one or more firebosses had failed to walk the length of the beltline while they were performing a preshift examination. Tr. 24-25, 53, 55-56.

Hoy testified that he complained about an examination conducted on July 15, 2011. Tr. 35; C. Ex. 1. Franks testified that he complained about an examination conducted on July 27, 2011. Tr. 61. Franks also testified that he identified a specific fireboss to Moore. Tr. 47, 49. The Judge concluded that Franks and Hoy testified credibly. 35 FMSHRC at 1699.

B. The MSHA Investigation

On or about September 22, 2011, an anonymous complaint was filed with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 103(g) of the

Mine Act.³ Jt. Stip. 12. The complaint contained six allegations, one of which was an allegation that firebosses were not conducting adequate inspections of the beltline.⁴ 35 FMSHRC at 1697-98; Jt. Ex. 1. Inspectors from MSHA investigated the allegations in the complaint. In the process they took statements from approximately 34 miners and supervisory personnel, including Franks and Hoy. Jt. Stips. 13-15, 29, 31-33, 38.

On September 28, 2011, MSHA inspector Thomas Bochna arrived at the mine to continue the investigation into the section 103(g) complaint. Jt. Stip. 13. Inspector Bochna approached Franks and asked him if he had ever observed a fireboss “[fail to] perform[] proper preshift conveyor belt examinations.” Jt. Stip. 14. Franks responded that he was aware of an incident, the fireboss responsible, and the date on which it occurred. *Id.*

On that same shift, Franks was called out of the mine and into a meeting which included: MSHA inspectors Bochna and David Severini; Emerald compliance manager, William Schiffko; Emerald management trainee, Adam Strimer; the local UMWA president, Anthony Swetz; and a miner’s representative, Bruce Plaski. Jt. Stips. 15, 16. At the meeting, inspector Severini informed the group that Franks had spoken to inspector Bochna earlier that day, and that Franks was aware of a specific incident of a failure to perform an adequate examination by a fireboss. Jt. Stips. 17, 19, 20. Franks refused his request to name the fireboss or the date on which the allegedly inadequate examination occurred. Jt. Stip. 22.

Later that day, Franks was called back into a meeting with the MSHA inspectors, the UMWA local president, Emerald management, and a miner’s representative. Jt. Stip. 24. Inspector Severini again asked Franks to name the fireboss; Franks again declined to disclose any details. *Id.*

On September 29, 2011, Franks met with inspector Bochna, compliance manager Schiffko, and local president Swetz. Jt. Stip. 26, 27. Franks stated that he had written the name of the fireboss in his personal calendar, along with the date of the unperformed exam. Jt. Stip. 27. Franks stated that he would not produce these written records; he did not consider it “worth it” for him to do so. *Id.*

³ Section 103(g)(1) provides a miner the “right to obtain an immediate inspection by giving notice to the Secretary” if he “has reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists.” 30 U.S.C. § 813(g)(1). Section 103(g)(1) further provides that “[t]he name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification.”

⁴ The Complaint specifically alleged: “(1) Emerald Mine not being inspected properly by State or MSHA; (2) Beltlines look like a powder keg; (3) C3 longwall belt, E-district belts very dirty with coal; (4) North Main belt is only 12 blocks long and fireboss wrote up 40 bad rollers and company did nothing; (5) Belt firebosses ride 4 wheelers and only stop at manddoors to check belts; (6) Slope belt dirty.” Jt. Ex. 1.

On October 4, 2011, Hoy was called into Schifko's office for a meeting. Jt. Stip. 29. The meeting included MSHA inspectors Severini and Anthony Setaro, Schifko, Strimer, UMWA member Donald Cogar, and UMWA committeeman Douglas Scott. Jt. Stip. 33. Hoy declined a request to provide the name of the fireboss who failed to conduct a proper preshift conveyor belt examination. Jt. Stip. 34. Hoy was asked to name the foreman who he had heard complaining about inadequate conveyor belt preshift examinations. Jt. Stip. 35. Hoy also refused to disclose this information. *Id.* Hoy was also asked to provide written records, contained in his personal calendar of the names of firebosses who had failed to conduct preshift conveyor belt examinations and the corresponding dates. Jt. Stip. 36. Hoy declined to disclose this information as well. *Id.*

On October 4, 2011, MSHA concluded its investigation into the allegations in the anonymous complaint. Jt. Stip. 37; Jt. Ex. 2. MSHA issued seven citations to Emerald, but did not find evidence that firebosses had failed to perform adequate examinations of the belt line. Jt. Stip. 38; Jt. Ex. 2. The citations were issued in response to three of the allegations contained in the section 103(g) complaint, specifically: "(2) Beltlines look like a powder kegs, (3) C3 longwall belt, E-district belts very dirty with coal," and "(6) Slope belt dirty." Jt. Ex. 2.

C. Emerald's Investigation

After MSHA completed its investigation, Emerald began its own investigation of the allegations that were made in the anonymous complaint. Jt. Stip. 39.

On October 20, 2011, Emerald human resources supervisor Christine Hayhurst, UMWA local president Swetz, and Committeeman Scott met with Franks and then with Hoy. Jt. Stips. 40; 42. The miners refused to provide any further details or produce written records. Jt. Stips. 40-42. On October 24, 2011, Franks met with Hayhurst, Schifko and Swetz and declined to provide any further information. Jt. Stip. 43.

On November 9, 2011, Franks and Hoy each met with Emerald's safety manager, Joseph Pervola, Hayhurst, and committeeman David Baer. Jt. Stips. 45, 48. Again, Franks and Hoy both declined to name a fireboss or give the date of the unperformed examination. Jt. Stips. 45, 48. Franks and Hoy were subsequently suspended from work without pay for seven days. Jt. Stips. 46, 49. Their suspension letters state that the suspensions were the result of a "failure to provide information [] concerning serious allegations of safety violations." Jt. Stip. 46; Jt. Exs. 3, 4.

Franks and Hoy contend that they refused to provide any information during the investigations for essentially two reasons: (1) they had previously provided the information to David Moore, the UMWA safety representative, pursuant to mine policy and (2) they believe that because MSHA was conducting an investigation pursuant to section 103(g), they were not required to disclose the names of miners to management. Tr. 18-22, 32-33, 38-39, 47, 50, 58.

D. Franks and Hoy's Complaint of Discrimination

On November 10, 2011, Franks and Hoy filed separate discrimination complaints with MSHA alleging that they had been “targeted by” Emerald and “singled out” “for participating and cooperating in a section 103(g) complaint investigation conducted by MSHA.” 35 FMSHRC at 1697; Compl. of Discrim., Ex. A at 2, 4. MSHA investigated the allegations and concluded that the “facts disclosed during the investigation do not constitute a violation of Section 105(c).” Compl. of Discrim., Ex. B.

On April 23, 2012, pursuant to section 105(c)(3) of the Mine Act, the complainants, through the UMWA, filed a complaint of discrimination with the Commission alleging that Emerald interfered with their right to provide information to MSHA during the course of its investigation and discriminated against them for their exercise of that right.⁵ Compl. of Discrim. at 8. The miners sought lost wages including regular, overtime, and holiday pay, and to have any reference to this matter removed from their personnel files. *Id.* at 10.

E. The Judge's Decision

On June 6, 2013, an Administrative Law Judge issued a decision concluding that Franks and Hoy had demonstrated a prima facie case of discrimination, which Emerald failed to rebut with a credible business reason. 35 FMSHRC at 1703-07. The Judge determined that Franks and Hoy engaged in protected activities when: (1) they made multiple safety complaints to a member of the safety committee; (2) they provided information to MSHA during the course of its investigation; and (3) they provided information to Emerald during the operator's follow-up investigation regarding the allegations in the section 103(g) complaint. *Id.* at 1703. The Judge held that the seven-day suspension was an adverse action. *Id.*

Furthermore, the Judge concluded that the evidence demonstrated that Franks and Hoy were treated with hostility by Emerald as a result of their protected activities. *Id.* at 1704. In particular, Emerald management personnel repeatedly called both miners into the office and demanded that they name a fireboss, even though Franks and Hoy previously provided identifying information to a representative of the UMWA safety committee, pursuant to accepted mine policy. *Id.* The Judge concluded that because Moore investigated a complaint about a fireboss, and informed Schifko of the exact shift he had investigated, Emerald management was aware of the identity of an accused fireboss. *Id.* Despite Moore's involvement, the Judge found that Emerald never asked Moore for the name of a fireboss during its investigations. *Id.* In addition, the Judge noted that Hoy stated that a co-worker had warned him that he “had a big target on [his] back for talking to the inspectors,” demonstrating hostility. *Id.* (citing Tr. 33). The Judge stated that “[t]he miners utilized the avenue open to them, making a complaint through a safety representative, to avoid the very thing that happened to them, constant

⁵ Section 105(c)(3) permits a miner to file a discrimination claim on his own once the Secretary of Labor decides that he will not pursue a case on the miner's behalf. *See* 30 U.S.C. § 815(c)(3).

harassment and finally retaliation for expressing concern over what they believed to be a fireboss' failure to carry out his duties.” *Id.* at 1704-05.

The Judge rejected Emerald’s argument that it suspended the miners because they refused to name a fireboss responsible for an inadequate examination, stating that Emerald had presented no evidence of a policy that required personnel to report unsafe conditions or practices directly to mine management. *Id.* at 1705-06. Instead, it was accepted practice at the mine for miners to report safety hazards either to representatives of the union safety committee or to mine management. *Id.* at 1706. The Judge additionally found that compliance manager Schifko was aware of the identity of the fireboss who allegedly failed to perform a preshift examination. *Id.*

The Judge concluded that “[b]ased upon all of these facts, I cannot agree that Emerald has demonstrated a legitimate business purpose for the discipline.” *Id.* Instead, the Judge determined that Emerald’s stated business purpose was a pretext to punish Franks and Hoy for their protected activities. *Id.*

II.

Disposition

Section 105(c)(1) of the Mine Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or. . . because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. 815(c)(1).

A complainant alleging discrimination prohibited by the Mine Act establishes a prima facie case by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity, that there was an adverse action, 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 (May 2011); *Sec’y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor 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 was also 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).

A. Prima Facie Case

1. Protected Activity

a. Complaints to Moore and Participation in Investigations

The Judge found that Franks and Hoy each complained to David Moore, a representative of the UMWA safety committee, about inadequate preshift examinations of the beltline. 35 FMSHRC at 1699-1700. Complaints of an alleged safety or health violation to “the operator or the operator’s agent, *or the representative of the miners . . .*” are protected by section 105(c)(1) of the Mine Act. 30 U.S.C. § 815(c)(1) (emphasis added). We conclude that substantial evidence in the record supports the Judge’s finding that Franks and Hoy engaged in protected activities.⁶ Both Franks and Hoy testified that they met with Moore to complain about firebosses on August 17, 2011, and August 29, 2011. Tr. 24-25, 53, 55-56. David Baer, a miner, corroborated their testimony, testifying that he observed both Franks and Hoy meet with Moore and overheard their conversations on both occasions. Tr. 63-65.

The Judge noted that Moore’s testimony conflicted with Franks’, Hoy’s, and Baer’s recollection. 35 FMSHRC at 1699. She found Moore’s testimony to be “opaque and evasive.” *Id.* Instead, the Judge credited the testimony of Franks and Hoy, corroborated by Baer. *Id.* She concluded that even if Franks and Hoy did not remember the exact date of the meetings correctly, it did not change her assessment. *Id.* at 1700. It is well settled that a Judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Consol. Coal Co.*, 35 FMSHRC 2326, 2329 (Aug. 2013) (citations omitted).

Emerald contends that neither Franks nor Hoy provided Moore with enough information to discover the identity of a fireboss who had been responsible for the allegedly inadequate preshift examinations. E. Br. at 18-22. We find this contention to be without merit. In fact, Emerald’s argument is directly contradicted by Moore’s own testimony. Moore testified, “I knew who the fireboss was [Hoy] was talking about . . . [Hoy] gave a specific date. I knew the date he recalled because I already investigated it, so I knew who he was talking about.” Tr. 129. Moore said he investigated the allegation that firebosses were signing the date board without conducting an adequate examination, by checking the date board to see if it had been signed.

⁶ The Commission applies the substantial evidence test when reviewing a Judge’s factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the Judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Tr. 123-25; 30 C.F.R. § 75.360(f).

Having provided the necessary identifying information to Moore, Franks and Hoy declined to restate the substance of their complaints during the course of MSHA's section 103(g) investigation, or during the mine's follow up investigation. However, Franks and Hoy did confirm during those investigations that they had observed inadequate examinations, they knew which fireboss was responsible, and they had reported this information to Moore. Jt. Stips. 14, 20, 22, 24, 26-27, 34, 36, 40, 42-43, 45; Tr. 18-21. The Judge concluded that to the extent that Franks and Hoy participated in these investigations, their activities were protected. 33 FMSHRC at 1703. Section 103(g)(1) specifically provides that the anonymity of the complaining miner and *the miners referred to in the anonymous complaint will be protected*. 30 U.S.C. § 813(g)(1) (“[t]he name of the person giving such notice [to MSHA] and the names of individual miners referred to therein shall not appear in such copy or notification”) (emphasis added). Indeed, the statutory right of anonymity in complaints would be illusory, if miners could later be compelled to identify unnamed miners during the investigation of the complaint. Furthermore and most importantly, Franks and Hoy had previously provided the necessary identifying information to Moore, pursuant to mine policy.

b. Emerald's Policy

The Judge found that Emerald had a safety policy that permitted miners to bring safety concerns either to a representative of the UMWA safety committee or to mine management. 35 FMSHRC at 1700-01, 1706. If a miner chose to report a concern to the union, the safety committeeman would then investigate the allegation, and upon finding a valid safety concern, would report the unsafe condition or practice to management. *Id.* at 1701, 1706.

The Judge's finding is supported by substantial evidence in the record. Indeed, the testimony of Emerald's own witnesses demonstrates that the accepted practice at the mine was for miners to bring safety concerns either to their safety committeeman or to mine management. Schiffko, the compliance manager, testified that miners “have the right to take [safety complaints] to management or their safety committee.” Tr. 84-86. Swetz, the local union president, testified that a miner “can do it either way” and if a safety committeeman finds validity to a complaint “then he has to go to management with it.” He stated that “[w]e tell everybody . . . Go to your mine committee. Go to your safety committee. If you are not satisfied with that, you can go to management.” Tr. 145, 151.

In enacting the Mine Act, Congress indicated that the concept of protected activity in section 105(c) “be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” S. Rep. 95-181, at 36, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legis. History of the Federal Mine Safety and*

Health Act of 1977, at 624 (1978).⁷ We conclude that the Judge correctly concluded that Franks and Hoy engaged in protected activity.

2. Adverse Action

The Judge found that Franks and Hoy each suffered adverse action in the form of a seven-day suspension as a result of their involvement in the section 103(g) complaint. 35 FMSHRC at 1703. This finding is unchallenged on review.

3. Discriminatory Motive

To establish a prima facie case, Franks and Hoy must show a connection between the protected activity and the adverse action. Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983); *Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1398-99 (June 1984). The Commission has determined that hostility or “animus” towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment may all be considered in determining the existence of a connection between the protected activity and the adverse action. *Chacon*, 3 FMSHRC at 2510-11.

The Judge concluded that Franks and Hoy triggered hostility as a result of their protected activity. 35 FMSHRC at 1704. She noted that mine management repeatedly called Franks and Hoy into the mine office, and demanded that they name the fireboss. *Id.* The Judge concluded that because Emerald’s management was already aware of the identity of the accused fireboss(es), and because Moore, who had investigated the complaints, was not questioned as part of Emerald’s investigation, “it is reasonable to infer that Emerald’s continuing questioning and harassment of Franks and Hoy amounted to hostility toward them for making accusations against a fireboss.”⁸ *Id.*

Emerald maintains that the factual findings the Judge relied on to support her determination that Emerald had a discriminatory motive are not supported by substantial evidence in the record. E. Reply Br. at 6-11. More specifically, Emerald contends that the Judge

⁷ Under the previous Coal Act, the D.C. Circuit held that the reach of “protected activity” extends to even bad faith or frivolous complaints. *Munsey v. FMSHRC*, 595 F.2d 735, 742-43 (D.C. Cir. 1978).

⁸ While Schifko testified that he did question Moore about the identity of the fireboss, Tr. 94-95, there is no evidence in the record suggesting that Moore was the subject of a pattern of continued questioning, harassment, and threatened disciplinary action.

erred in stating that Schifko was aware of the identity of the fireboss(es) who were accused of performing inadequate examinations.⁹

Substantial evidence in the record supports the Judge's conclusion that Schifko knew which firebosses had been accused. Schifko testified that Moore had told him that he had received a complaint about the adequacy of preshift examinations of the beltline. Tr. 95. Schifko also testified that Moore informed him that in response to the complaint he had investigated a specific date and time. Tr. 95-96. Schifko testified that he cross-referenced the examination books, and learned that two firebosses were responsible for the beltline on the date Moore mentioned. Tr. 95-96. Schifko also knew the identity of the fireboss who was alleged not to have properly performed the preshift examination because, as he told Hoy, he had obtained identifying information from Mark Cole, another beltman at the mine. Tr. 22, 81.

Therefore, Emerald management was aware of five critical facts at the time they demanded that Franks and Hoy provide the name of a fireboss: (1) an anonymous section 103(g) complaint had been filed with MSHA regarding examinations of the beltline; (2) an unnamed miner or miners had complained about the preshift examinations of the beltline to Moore; (3) Moore had investigated whether an inadequate examination of the beltline had been performed on a specific date in response to the complaint; (4) the specific date and shift which Moore had investigated; and (5) Franks had spoken with a MSHA inspector and told him that he had information relating to the allegation in the section 103(g) complaint.

Emerald argues that its actions did not demonstrate a hostility toward Franks and Hoy based on the miners' protected activity because the operator may have also had the intent to build a record to substantiate a disciplinary action against an accused fireboss. E. Reply Br. at 7. We find the argument unpersuasive in light of Emerald management's knowledge of the specific facts set forth above and how they were acquired.

Emerald knew everything it needed to know to determine the identity of the allegedly-derelict fireboss(es). Furthermore, it gained some of that knowledge from Moore, a person Franks and Hoy were permitted to use as a conduit for their safety concerns. Mine management also knew that, consistent with practice at the mine, Moore had investigated complaints about a fireboss. Yet the record does not indicate that Emerald put any real pressure on Moore to provide support for a purported disciplinary action against a fireboss.¹⁰

⁹ Emerald also argues that the Judge's finding that Franks and Hoy disclosed the identity of the accused firebosses to Moore is not supported by substantial evidence. We have addressed this argument in our analysis of protected activity and concluded that substantial evidence does indeed support the Judge's finding.

¹⁰ Additionally, the fact that Mark Cole made a similar complaint and was not punished at all after recanting his complaint would seem to be contrary to the interests of any disciplinary action. If mine management thought that Cole's complaint might be valid, allowing a witness to change his story would be harmful to the operator's investigation, while pressuring a witness to

(continued...)

Thus, Emerald's continued questioning of Franks and Hoy, after the MSHA investigation had been closed, supports the Judge's reasonable inference that Emerald demonstrated hostility toward miners who had complained about preshift examinations of the beltline. While other miners claimed to know the identity of the fireboss(es) at issue, only Franks and Hoy were pressured to cooperate and punished for failing to do so.

B. Emerald's Attempted Rebuttal

The operator may attempt to rebut a prima facie case by showing either (1) that the complainant did not engage in protected activity or (2) that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20.

1. Emerald's Loss of Protection Argument

On review, Emerald argues that the miners' refusal to identify a fireboss or a specific examination during the section 103(g) investigation and Emerald's internal investigation caused Franks and Hoy to lose the protection afforded by section 105(c). Franks' and Hoy's protected activities included the safety complaints made to their committeeman, as well as their participation in MSHA's section 103(g) investigation, and in Emerald's internal investigation into the substance of the anonymously filed complaint. 35 FMSHRC at 1703. Both the MSHA investigation and Emerald's internal investigation were in response to the filing of an anonymous section 103(g) complaint.¹¹

Emerald contends that the Judge erred in finding that Franks and Hoy did not lose the protection of the Mine Act, and in holding that the Commission's decision in *Secretary of Labor on behalf of Pack v. Maynard Dredging Co.*, 11 FMSHRC 168, 172-73 (Feb. 1989) was distinguishable. In *Pack*, a mine security guard was discharged after he failed to report an unsafe condition to mine management prior to reporting the condition to MSHA. The Commission affirmed the Judge's decision that Maynard did not violate section 105(c) when it discharged the miner. *Id.* at 173. *Pack* was fired as a result of his failure to perform his job duties as a security guard, which included reporting unsafe conditions to management. *Id.*

The Judge correctly held *Pack* to be distinguishable. Company policy at Maynard Dredging required miners to report unsafe conditions directly to management. 35 FMSHRC at 1705-1706. Franks and Hoy, however, followed Emerald's accepted policy and reported an

¹⁰(...continued)
recant and rewarding him for doing so could only serve the interest of burying the issue. 35 FMSHRC at 1706.

¹¹ Commissioner Althen states that "the record does not reflect that the 103(g) complaint itself, including who may have filed it, was raised at any of the meetings . . ." Slip op. at 43. This is incorrect. The substance of the anonymous complaint was the subject of discussion at each meeting between Emerald management and the miners. *See* Jt. Ex. 1.

unsafe practice to a representative of their safety committee. Hence, Franks and Hoy were correctly found to have engaged in protected activities.^{12 13}

2. Emerald's Legitimate Business Purpose Argument¹⁴

Even if the Commission finds that miners engaged in protected activity, an operator may rebut a prima facie case by proving that the adverse action was in no part motivated by the protected activity. *Robinette*, 3 FMSHRC at 818 n.20. The Commission has enunciated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in questions. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

An asserted reason may be found to be pretextual "where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). A complainant may establish that an operator's explanation is not credible by demonstrating: (1) that the proffered reason has no basis in fact; (2) that the proffered reason actually did not motivate the adverse action; or (3) that the proffered reason was insufficient to motivate the adverse action. *Turner*, 33 FMSHRC at 1073 (citations omitted).

The Judge found that Emerald's explanation for the suspensions – that Franks and Hoy were disciplined because of their failure to identify one or more firebosses who they alleged had failed to perform an adequate preshift examination of the beltline – was "without merit." 35 FMSHRC at 1706. The Judge concluded that the proffered reason did not motivate the suspensions, but was instead a pretext to punish the miners for making complaints about a fireboss. *Id.* In this regard, she concluded that it was clear that Emerald had previously

¹² We note parenthetically that we find it very troublesome that MSHA and Emerald conducted meetings, both jointly and separately, in which they attempted to force Franks and Hoy to disclose the names of the miners who were the subject of the anonymous complaint. We find it even more troubling that inspector Severini informed Emerald management that Franks was aware of information relating to the unsafe practice that had been reported anonymously to MSHA pursuant to section 103(g). *Jt. Stips.* 17-20. We believe that by outing Franks as an informant to his employer, inspector Severini actively discouraged the filing of anonymous complaints by miners, irrespective of whether Franks was responsible for the filing of the complaint.

¹³ Even our dissenting colleague does not agree with Emerald that Franks and Hoy lost the protection of the Mine Act. Instead, he would conclude that the complainants engaged in both protected and unprotected activities. *Slip op.* at 41.

¹⁴ Our affirming colleagues state that "substantial evidence does not support the Judge's finding that the operator's proffered motive was pretextual." *Slip op.* at 18. However, they do not identify findings of fact in the Judge's decision that are not supported by the record.

permitted miners to report unsafe practices to a representative of their safety committee, and had not previously required the complaining miner to report the information directly to management. *Id.* at 1703, 1706. She concluded that Franks and Hoy not only alerted a representative of the safety committee that there was an issue, but also identified the fireboss.¹⁵ *Id.* at 1706. The safety committee representative, Moore, informed management of the details of his investigation, including the date and shift that he investigated.¹⁶ *Id.* at 1706-07. The Judge also concluded that based on information from Moore and Cole, mine management knew which fireboss was accused of not having made a proper examination.¹⁷ Therefore, the Judge determined that Emerald failed to prove that it had a legitimate business reason to suspend Franks and Hoy.¹⁸ *Id.* at 1707.

Emerald argues, based on Schifko's testimony, that it was justified in its continued interrogation and ultimate suspension of Franks and Hoy because it did not have sufficient knowledge of the identity of any firebosses who allegedly did not properly perform their jobs. E. Br. at 27-29. In particular, Emerald challenges the Judge's conclusion that Schifko had knowledge based on the first interview of Mark Cole. E. Br. at 28. According to Schifko, in Cole's first interview – conducted by MSHA – he had identified a fireboss, but in a subsequent interview – conducted solely by Emerald – Cole had recanted. Tr. 77-78. Schifko said that Cole appeared “very confused and didn't have much understanding what was alleged” in the MSHA interview. Tr. 78. But when he was interviewed without the presence of MSHA, Cole changed his testimony “completely,” said that he “wasn't even on that belt line,” and “alluded to the fact that he was coerced into backing people up. . . coerced into what he said originally.” Tr. 78-79.

Schifko's testimony about what Cole said in the two meetings must be viewed through the lens of his credibility. The Judge rejected Schifko's testimony, finding him “to be a polished but disingenuous witness.” 35 FMSHRC at 1700-01. The Judge's characterization is supported by the record. For example, regarding Emerald's policy that a miner may report safety complaints either to management or to the UMWA safety committee, Schifko had to be asked the question five times before he would acknowledge that a miner may report a safety problem to the safety committee rather than to management. Tr. 84-86. Additionally, Schifko testified that when he first heard the dates and shifts of the fireboss runs from Cole, he could not determine the identity of the fireboss because that particular belt is split for purposes of fireboss runs, and Cole did not say whether it was inby or outby of the split. Tr. 81-82. But this testimony was

¹⁵ Her finding is supported by substantial evidence in the record. *See* slip op. at 7-8; Tr. 24-25, 47, 53, 55-56, 63-65, 123-24; 129. Moore disputed the testimony of Franks and Hoy that they identified the fireboss to him, but the Judge found him not to be credible because “[h]is answers were opaque and evasive.” 35 FMSHRC at 1699.

¹⁶ Her finding is supported by substantial evidence. Slip op. at 10; Tr. 95-96.

¹⁷ This finding is also supported by substantial evidence. Slip op. at 10; Tr. 22, 81, 95-96.

¹⁸ Furthermore, there is no indication in the record that Franks or Hoy had ever received a disciplinary action or had a poor work performance history. *Id.* at 1706.

inconsistent with Hoy's testimony (which the Judge found credible) that Schifko acknowledged to him that he knew who the fireboss was based on what Cole had said. Tr. 22. Hence, the Judge was justified in concluding that Schifko was able to determine – from Cole as well as Moore – the identity of firebosses whose work was being questioned.

We conclude that substantial evidence supports the Judge's conclusion that Emerald's asserted business justification was not credible.¹⁹ Franks and Hoy reported unsafe practices to Emerald in a manner that was entirely consistent with the mine's policy and practice. The miners at Emerald were permitted to report unsafe practices to management through an intermediary on the safety committee *or* the miners could choose to report directly to management. Mine management had sufficient information to identify firebosses who had allegedly not properly performed their jobs. Yet, management continued to interrogate Franks and Hoy, and ultimately suspended them. In the context of retaliation cases under the National Labor Relations Act, it is recognized that a company's proffered "legitimate business reason" for the interrogation of an employee is pretextual when the company already knew the answers to the questions it was asking the employee. *United Serv. Auto. Ass'n v. NLRB*, 387 F.3d 908, 916 (D.C. Cir. 2004). Thus, Emerald failed to rebut the complainants' prima facie case by presenting a legitimate and credible business reason.

Emerald also contends that irrespective of mine policy, Franks and Hoy were required to inform management of the details of the complaint that they previously made to their safety committeeman because management had subsequently become aware that they had complained.

¹⁹ It is well established that courts must usually rely upon circumstantial evidence and reasonable inferences to establish motivation in discrimination cases. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003) (Utility of circumstantial evidence in discrimination cases has often been acknowledged; such evidence "may [] be more certain, satisfying and persuasive than direct evidence."); *Sec'y of Labor on behalf of Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1089 ("The Commission has recognized that direct evidence of motivation is rarely encountered; more often, the only available evidence is indirect.")

Thus, while our concurring and dissenting colleagues would reverse the Judge's conclusion that the operator's purported motivation was pretextual, allegedly due to a lack of substantial evidence, their opinions do not properly address the circumstantial evidence in context. The opinion of Chairman Jordan and Commissioner Nakamura does not analyze the issue. Commissioner Althen acknowledges the role of circumstantial evidence but then discusses the elements of the prima facie case and rebuttal in isolation, without considering the interrelationship of the facts respecting each element. Further, he rejects the Judge's finding that Emerald had knowledge of the identity of the firebosses without considering the information Schifko received. He also fails to consider disparate treatment shown by the lack of pressure put on Moore by Emerald. And he fails to recognize the Judge's credibility determinations, especially with regard to Schifko. These facts justify the Judge's finding of pretext. *See Jim Walter Res. Inc.*, 28 FMSHRC 983, 991 n.10 (Dec. 2006) (Absence of direct evidence does not necessarily undercut reasonableness of inferences drawn "when it is difficult or impossible to obtain direct evidence on the fact to be inferred.")

E. Br. at 17-18. This *ad hoc* revocation of an established policy is evidence that Emerald's asserted rationale is out-of-line with its normal business practices. *See Price*, 12 FMSHRC at 1534. Furthermore, Emerald failed to present any evidence that it had disciplined miners in the past for reporting an unsafe practice to a safety committeeman and not mine management.²⁰ *See Bradley*, 4 FMSHRC at 993-94.

Finally, we find it relevant that Emerald's internal investigation concerned the same allegation that was reported anonymously to MSHA and resulted in a MSHA investigation and the questioning of 34 Emerald employees. Because of the overlap of the complaints of Franks and Hoy with the substance of the anonymous section 103(g) complaint, it is impossible to untangle their discipline from the filing of the section 103(g) complaint. For these reasons, we affirm the decision of the Judge that Emerald failed to establish that its asserted business justification was legitimate. Substantial evidence supports the Judge's finding that Emerald's rationale was a pretext. Accordingly, Emerald has not rebutted the complainants' prima facie case of discrimination.²¹

We are cognizant of a mine operator's responsibility to investigate misconduct in a mine. Miners who engage in a pattern of systemic unsafe practices, such as failing to walk the belt during a pre-shift examination, should face discipline. However, this is *not* a case in which the complainants were accused of unsafe behavior or practices; rather, it is a case regarding miners who reported possible misconduct through established channels of communication. As the Judge recognized, reporting possible misconduct to an intermediary allows a miner to make a complaint without fear of harassment or retaliation. 35 FMSHRC at 1704-05. Once that policy is established, a miner should be able to reasonably rely on its protection. To hold otherwise would have the effect of discouraging miners from reporting unsafe practices, to the detriment of the policy goals of the Mine Act.

²⁰ Evidence that the operator has discharged employees, in the past, for failing to conduct adequate examinations does not establish that the discipline of Franks and Hoy was consistent with Emerald's policies. Franks and Hoy have not been accused of failing to perform adequate examinations.

²¹ Having failed to rebut the prima facie case, an operator may still prevail by establishing an affirmative defense to the allegations. A mine operator may affirmatively defend against a prima facie case by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799-800. This kind of situation is referred to as a "mixed motive" case. However, on review Emerald did not argue that it took the adverse action because of both protected and unprotected activity, and that the miners' unprotected activity, by itself, was sufficient justification for the adverse action. *See E. Br. at 23-29*. Accordingly, we need not address this issue.

III.

Conclusion

We conclude that the Judge below correctly applied the law to the facts and that her decision is supported by substantial evidence. We would therefore affirm the Judge's decision.²²

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

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

²² The Secretary did not participate in this case either before the Judge or before the Commission. However, after the oral argument, the Secretary, with the Commission's permission, filed an *amicus curiae* brief on the issue of interference with protected rights. Emerald has filed a response brief, and we have considered both briefs. The Secretary argues that Franks and Hoy have asserted colorable claims of interference with protected activity under section 105(c) of the Mine Act, and that these claims should be adjudicated. The Secretary's position is consistent with an argument by the UMWA on behalf of Franks and Hoy. Complainants Br. at 34-35 ("C. Br."); Oral Arg. Tr. 79-80.

We agree with the Secretary and the UMWA that the Mine Act establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the *Pasula - Robinette* framework. This cause of action has been implicitly recognized by the Commission. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982); *Sec'y on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 7-8 (Jan. 2005). The interference cause of action is based on the language of section 105(c)(1) of the Mine Act: "No person shall discharge or in any way discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner 30 U.S.C. § 815(c)(1) (emphasis added). Moreover section 105(c)(2) grants the right to file a complaint of discrimination with the Secretary to "[a]ny miner . . . who believes that he has been discharged, *interfered with*, or otherwise discriminated against" 30 U.S.C. § 815(c)(2) (emphasis added).

Although the complaints of Franks and Hoy may be colorable as interference claims, it is not necessary to reach this issue since we find that substantial evidence supports the Judge's determination of discrimination under the *Pasula - Robinette* framework. Moreover, consideration of this case as an interference claim would require the Commission to define the parameters of interference claims, and set forth what is required of a complainant in proving such a claim and what is required of an operator in defending against such a claim. The Judge here acknowledged the interference component of this case, but chose to analyze it within the *Pasula - Robinette* framework. We defer full Commission analysis of interference claims to an occasion when a Judge has actually considered a section 105(c) case as an interference claim.

Separate opinion of Chairman Jordan and Commissioner Nakamura:

I. Introduction

This discrimination proceeding involves two miners who confidentially complained to their elected union safety committeeman about firebosses conducting inadequate preshift examinations. After MSHA initiated an investigation pursuant to a section 103(g) safety complaint, during which the miners' confidentiality was breached, Mark Franks and Ronald Hoy were suspended for failing to divulge the names of the firebosses to mine management.

The Judge upheld the miners' complaints of discrimination under section 105(c)(3) of the Mine Act. 35 FMSHRC 1696 (June 2013) (ALJ). Although we determine that substantial evidence does not support the Judge's finding that the operator's proffered motive was pretextual, we nevertheless affirm the Judge's ruling that Emerald violated section 105(c) of the Mine Act. We do so because we conclude that the interrogations of the miners and the resulting suspensions amount to an unjustified interference with their ability to exercise their statutory rights.

This case requires us to confront the tension that can arise between the need to ensure that miners are not deterred from lodging safety complaints, and the need for mine managers to investigate safety issues at their mines. Although we acknowledge the critical importance of an operator's need to investigate all allegations of unsafe practices at its mine, that need must be balanced against the potential chilling effect such investigation may have on the miners' willingness to make safety complaints in the future. Ironically, if an investigation is conducted under circumstances and in a manner perceived by the miners as coercive, it may in the long-term result in a reduction in safety, because miners will be reluctant to speak up about safety issues.

Investigations in which miners are asked about alleged unsafe activities of their co-workers are especially delicate. Such questioning has the potential to squelch miners' initiative to report such safety problems in the future. Because many miners will be reluctant to criticize the actions of their fellow miners, any investigation with the potential of eliciting such information must be narrowly and carefully conducted, to avoid a chilling effect on safety complaints. The manner in which both MSHA and the operator carried out their investigations in the instant case could not be further from this description. Indeed, we conclude that in light of the particular record in this case, the procedures employed by Emerald to investigate the complaint regarding inadequate belt exams will so significantly deter miners from making any future safety complaints, that the operator cannot rely on Franks and Hoy's failure to publicly identify the belt examiners as justification for its disciplinary action.

II. Factual and Procedural Background

We adopt the "Factual and Procedural Background" portion of the opinion of Commissioners Young and Cohen.

III. Analysis

A. Discrimination claims under the interference clause of section 105(c)(1)

1. Statutory language and Commission case law

Because we are deciding this case under the interference prong of section 105(c), we first set out the law in this area. Section 105(c)(1) of the Mine Act states that “[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner.” 30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c) contains additional references to discrimination complaints based on interference with protected rights. For instance, section 105(c)(2) permits the filing of a discrimination complaint by a miner, applicant or representative of miners “who believes that he has been discharged, interfered with, or otherwise discriminated against.” 30 U.S.C. § 815(c)(2). That subsection also refers to the Secretary’s complaint to the Commission, which may allege “discrimination or interference.” Section 105(c)(3) also permits an individual to file a complaint charging “discrimination or interference” in violation of section 105(c)(1).

The Senate Report states that “[i]t is the Committee’s intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more subtle forms of interference, such as promises of benefits or threats of reprisal.” S. Rep. 95-181 at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

In *Moses v. Whitely Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff’d*, 770 F.2d 168 (6th Cir. 1985), the Commission relied on the “interference” prong of section 105(c) in ruling that an operator’s interrogation and harassment violated that provision. *Id.* at 1478-79. Although Elias Moses had not engaged in protected activity, he was questioned by his foreman as to whether he had called MSHA after inspectors arrived at the mine to investigate a bulldozer accident. On two subsequent occasions, in front of the other employees, the foreman again accused Moses of reporting the accident to MSHA. *Id.* at 1476-77. Moses was subsequently laid off and never recalled to work.

In addition to concluding that the operator had discharged Moses in violation of section 105(c), the Commission also considered whether coercive conversations and harassment alone could constitute a violation of that statutory section. We determined that they could, finding them to be among the “more subtle forms of interference.” *Id.* at 1478-79. We explained that:

A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who

wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act.

Id. (footnote omitted). Considering the persistence with which the subject of Moses' supposed reporting of the accident was raised and the accusatory manner in which it was done, the Commission determined that the conversations constituted prohibited interference under section 105(c)(1). *Id.*

We recognized, however, that:

This is not to say that an operator may never question or comment upon a miner's exercise of a protected right. Such question or comment may be innocuous or even necessary to address a safety or health problem and, therefore, would not amount to coercive interrogation or harassment. Whether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions.

4 FMSHRC at 1479, n.8.

In *Secretary of Labor on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005), we stated that the issue of whether a management official's conduct constitutes interference proscribed by the Act "must be determined by what is said and done, and by the circumstances surrounding the words and actions." *Id.* at 8 (quoting *Moses* at 1479 n.8). *Gray* involved conversations between the assistant superintendent and two miners who had testified before a grand jury about smoking, ventilation and roof support violations at the mine. *Id.* at 2. Visited at his home and repeatedly asked about the grand jury proceeding, miner Mark Gray told assistant superintendent Brummett that he did not want hard feelings between them because of the testimony. Brummett replied, "No, they ain't no hard feelings, unless you put the screws to me, then I'll kill you" and then laughed. *Id.* The next day, Brummett sought assurances from Gray that Ray Young, the second miner, had not testified against him. *Id.* at 3. Brummett told Gray that "if anyone had laid the screws to him that he would whip their ass." *Id.* Shortly thereafter, Gray left his job at North Star and went to work for another mining company.

The Judge dismissed Gray's discrimination complaint, finding that Brummett's statement to Gray at Gray's home was just an "exaggerated expression, commonly used between friends," and that his statement to Gray on the following day was directed at Young, not Gray. *Id.* at 5. In vacating the decision, the Commission held that the judge examined Brummett's statements too narrowly, focusing mostly on the supervisor's intent or motive. Moreover, the fact that Brummett's "whip ass" statement to Gray at the No. 6 mine was directed at Young, not Gray, was "not determinative of whether, under the circumstances, the statement may have tended to coerce Gray in the exercise of *his* Mine Act rights." *Id.* at 11, n.13. We pointed out that an interference analysis must "take into account the economic dependence of the employees on their

employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *Id.* at 9 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Moreover, we explained that, unlike the analysis generally referred to as the *Pasula-Robinette* test, which is more commonly used in analyzing section 105(c) discrimination complaints, see *Sec’y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981), a miner’s complaint of interference with protected rights does not require proof of an operative’s motive to discriminate. *Gray*, 27 FMSHRC at 8, n.6. ¹

In addition, the Commission in *Gray*, in following the analysis set forth in *Moses* for evaluating an operator’s statements in an interference case, explained that *Moses* drew on principles developed under the National Labor Relations Act.² We noted in *Gray* that the National Labor Relations Board had articulated the following test for determining whether a violation of section 8(a)(1) of the NLRA occurred (that section makes it unlawful for an employer “to interfere with, restrain, or coerce employee’s” exercise of protected rights):

[I]nterference, restraint, and coercion under Section 8(a)(1) of the [NLRA] does not turn on the employer’s motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the [NLRA].

Gray, 27 FMSHRC at 9 (quoting *American Freightways Co.*, 124 NLRB 146, 147 (Jul. 1959) (citing 29 U.S.C. § 158(a)(1))).³

¹ We thus reject as inconsistent with our rulings in *Moses* and *Gray*, Emerald’s assertion that there is no separate “interference” claim under section 105(c) of the Mine Act. Emerald Response to Amicus Br. at 12. Its efforts to distinguish these cases is unavailing. *Id.* at 13.

² The Commission has previously relied on case law interpreting analogous provisions of the NLRA for guidance in construing Mine Act provisions. See *Sec’y of Labor on behalf of Bernardyn v. Reading Anthracite*, 23 FMSHRC 924, 934 n.8 (Sept. 2001); *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1368-69, n.11 (Dec. 2000).

³ Consistent with our decision in *Gray*, we reject the operator’s contention, Emerald Response to Amicus Br. at 14-15, that section 8(a)(1) of the NLRA is not analogous to the Mine Act’s discrimination provision in section 105(c).

2. The Secretary's proposed test for interference claims

In his amicus brief in this matter, the Secretary has proposed the following test for evaluating interference claims brought pursuant to section 105(c). He suggests that an interference violation occurs if:

(1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and

(2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights

Sec'y Amicus. Br. at 10.⁴

The Secretary suggests that when each of these interests are significant, the inquiry turns to whether the operator's actions were sufficiently tailored to advance its business justification without causing unnecessary harm to protected rights. *Id.* at 20.

The Secretary's proposed test is consistent with our prior precedent in this area, reflecting the standard we articulated in *Gray*, 27 FMSHRC at 9 (analyzing "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the exercise of [protected] rights") (citation omitted) and *Moses*, 4 FMSHRC at 1478-79 (concluding that conduct that would "chill the exercise of protected rights" violates section 105(c)).⁵ Accordingly, we adopt this standard as the "interference test" in appropriate section 105(c) cases, and apply it to the evidence in the record of this case.

⁴ Given that this standard incorporates action that can be "reasonably viewed from the perspective of members of the protected class," we are not persuaded by Emerald's contention that this is a subjective test based on the claimant's state of mind. Emerald Response to Amicus Br. at 17.

⁵ The second prong of the proposed test is also consistent with our case precedent, as we acknowledged in *Moses* that not all questioning by an operator about a miner's exercise of a protected right necessarily violates section 105(c). *See* page 20 *infra*.

B. Interference claims of Franks and Hoy⁶

1. Franks and Hoy's expectation that they could make a confidential safety complaint

In order to assess the interference claim, it is critical to understand the need of the miners to make a confidential complaint. After reviewing the record, it is difficult to overstate how important confidentiality was to Franks and Hoy when they chose to make their complaint about inadequate preshift exams to their union safety committeeman. When asked about going to his safety committeeman rather than going directly to the company with a safety complaint, Hoy explained "I thought it would be confidential more with Dave Moore and he would look into the matter deeper." Tr. 43. Franks testified that he complained to Dave Moore, the safety committeeman, because he had a "fear of retaliation from the company" and that he expected to be protected from that retaliation if he went through Moore. Tr. 52. Franks also indicated that by going to Moore he was trying to avoid getting flack from his fellow miners. Tr. 48. Franks testified that by going to Moore, he "assumed he [Moore] would approach the company with the information that I gave him." Tr. 47. Hoy also testified that he expected Moore to "check into the matter," (Tr. 19) and that when he gave the names to Moore "[h]e should have done something about it." Tr. 39.

Given the implications of their complaints, it is not surprising that Franks and Hoy sought confidentiality. The complaints they made about the firebosses were serious charges. A preshift examiner is required under law to make thorough examinations of certain areas of the mine and certify in writing that he conducted the exam and noted any hazardous conditions found. As local union president Anthony Swetz testified, a fireboss who does not conduct an adequate exam yet certifies that he did so, is not only subject to discipline by his employer, but also subject to criminal charges brought by government authorities. Tr. 142-43. The firebosses at the Emerald Mine were hourly union employees. Tr. 39.

Franks and Hoy, in choosing to go to their union safety committeeman - not once, but twice - were taking the initiative in trying to correct what they viewed as a significant safety problem, while at the same time ensuring that their complaint would remain confidential. Again

⁶ Emerald argues that the Commission's consideration of a separate interference claim will require the development of new record evidence. Emerald Response to Amicus Br. at 4. However, the operator was on notice well before trial that the miners had raised this cause of action and consequently, it had the opportunity to defend against this claim at trial. Compl. of Discrim. at 9 ("Emerald, by and through its agents, has interfered with both Complainants and other miners' right under Section 103(g) of the Mine Act to make a complaint about an alleged danger or safety and health violation without disclosing to Emerald the names of individual miners referenced in the complaint by interrogating both Complainants about the identity of individual miners referenced in such a complaint. Such interference violates Section 105(c)(1) of the Mine Act.")

and again the record shows that confidentiality was uppermost in their minds. This puts into stark perspective the potential impact of the very public interrogations that ensued.

Such concerns about confidentiality because of fear of retaliation are very real and have been recognized by both the courts and Congress. The Seventh Circuit's discussion of the informer's privilege in *Dole v. Local 1942, Int'l Bhd. of Elec. Workers*, 870 F.2d 368, 372 (7th Cir. 1989), is in many respects applicable to miners cooperating in mine safety investigations:

The doctrine of the informer's privilege is not a recent phenomenon, having its roots in the English common law. . . . The underlying concern of the doctrine is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation. . . . The privilege recognizes the responsibility of citizens to cooperate with law enforcement officials and, by providing anonymity, encourages them to assume this responsibility. With the threat of reprisal real and unprotected against, well-intentioned citizens may hesitate or decline to assist the government in tracking down wrongdoers. The threatened reprisal may be physical, but the privilege also recognizes the subtler forms of retaliation such as blacklisting, economic duress and social ostracism. . . . The most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant's strategic position and also encouraging others similarly situated who have not yet offered their assistance.

Id. at 372.

Congress has been motivated by such concerns in enacting "whistleblower" statutes. Aware of these kinds of issues in the mining industry, Congress included section 103(g) in its enactment of the Mine Act. Section 103(g) allows a miner to make complaints to the Secretary about violations of the Mine Act or any mandatory health or safety standard, or an imminent danger. 30 U.S.C. § 813(a). The legislative history of the Act emphasized that this provision, which was carried over from the Coal Act, was based on the firm belief "that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards." S. Rep. No. 95-181, at 30 (1977), *reprinted in Legis. Hist.* at 618.⁷ To protect the reporting miner from

⁷ MSHA's *Program Policy Manual* has recognized the need to protect the identity of miners who make safety complaints to MSHA. The PPM provides that "[i]nformation received about violations or hazardous conditions should be brought to the attention of the mine operator (continued...)

retaliation, section 103(g) provides that the notice of the complaint provided to the mine operator by the Secretary is not to include the name of the reporting miner nor the names of the individual miners involved in the alleged violations. The importance of maintaining confidentiality was emphasized in the legislative history:

The Committee is aware of the need to protect miners against possible discrimination because they file complaints, and accordingly, the Section requires that the name of the person filing the complaint and the names of any miners referred to in the complaint not appear on the copy of the complaint which is served on the mine operator. While other provisions of the bill carefully protect miners who are discriminated against because they exercise their rights under the Act, the Committee feels that strict confidentiality of complainants under Section [103(g)(1)] is absolutely essential.

Id. at 617.

This review of the importance of protecting the confidentiality of miners making complaints of others violating the Mine Act provides the backdrop to our analysis of whether a reasonable miner in Franks and Hoy's position would be reluctant to lodge future safety complaints at the mine, given the actions of the operator. The interrogations that resulted in the suspensions of Franks and Hoy were in fact triggered by a person or persons filing a 103(g) complaint. The complaint alleged, among other things, that the firebosses "only stop at the manddoors to check belts," that the beltlines "look like a powder keg" and that the mine was "not being inspected properly by State or MSHA." Jt. Ex. 1.

As part of his investigation into the section 103(g) complaint, MSHA inspector Thomas Bochna came to the mine, approached Franks, and asked him if he had ever seen a fireboss fail to perform a proper belt examination. Jt. Stip. 14. Franks told him that he knew of an incident, the fireboss responsible, and the date on which it happened. *Id.*

Given the importance of confidentiality surrounding a 103(g) complaint, it is astounding that in conducting its interviews, MSHA so publicly revealed Franks and Hoy to both company and union representatives as persons who could identify firebosses who had performed inadequate preshift exams. Our dissenting colleague states that any error MSHA might have made in its handling of the section 103(g) investigation by bringing Franks and Hoy into an

⁷(...continued)

without disclosing the identity of the person(s) providing the information." III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 43, at 8 (2003). It further provides that "[i]f a special inspection is conducted, the MSHA inspector will notify the operator of the complaint pursuant to 30 C.F.R. 43.4(c), but the inspector must not divulge to the operator the name of the complainant or the names of any individuals referred to in the complaint." *Id.*

interview attended by management cannot be a basis for finding interference by the operator. Slip op. at 52. We reiterate that we are not imputing any discriminatory intent (to MSHA or Emerald) in this analysis; nor do the miners need to prove intent under the interference prong of section 105(c). Rather, as *Gray* instructs, we must consider the “totality of the circumstances” in ascertaining whether the operator’s conduct interfered with the exercise of statutory rights. 27 FMSHRC at 10. In this case, for better or worse, the circumstances included the fact that MSHA had conducted an investigation in which it made public that Franks and Hoy had knowledge supporting the allegations of inadequate preshift exams.

Franks and Hoy’s desire for confidentiality was also grounded in their concern about retaliation from fellow miners if it became public that they had accused the examiners of unsafe practices. The firebosses about whom they complained were also union members, (Tr. 42) and this influenced Franks and Hoy’s decision to go their union safety representative. *Id.* Hoy testified that he expected to receive some protection by going through Moore. Tr. 43.

Franks and Hoy’s desire for confidentiality was justified, given their description of the reactions of their fellow employees. After Franks was questioned as part of MSHA’s investigation, he explained that when he came back to work he “was receiving a lot of flack from the other workers: they told me not to give the name of the individual.” Tr. 48.

This incident makes clear that others at the mine knew that Franks had spoken with the MSHA inspectors. This is not surprising, given that the MSHA and management interviews with Franks and Hoy were not conducted in private, but were attended by many other individuals. Slip op. at 3-4.

Hoy, for his part, was so troubled that he telephoned MSHA Inspector Severini on October 5, the day after he had been summoned to a meeting with management and MSHA officials. Hoy testified that he called MSHA because “I was in the lamp room, and a gentleman came up to me and told me I had a big target on my back for talking to the inspectors.” Tr. 33. Hoy confirmed that this gentleman was an hourly employee. Tr. 34.⁸

Franks and Hoy’s wish for confidentiality seemed to be thwarted at every turn,⁹ beginning with Franks being called out of the mine to meet with MSHA, Jt. Stips. 15, 16. Given their preference to report their allegations of safety violations through the private channels offered by their union safety committeeman, it is not surprising that they would perceive the repeated interrogations by management (set forth in detail by our colleagues, slip op. at 3-4) as

⁸ Hoy also testified that after he talked to Dave Moore he was moved to the opposite side of the coal mine. A transfer he attributed to complaining about the firebosses. Tr. 37. Frank testified that he also was moved to the opposite end of the mine from where Dave Moore worked. Tr. 59-60.

⁹ Indeed, Hoy ultimately concluded “[a]pparently there is no confidentiality at all, I found out.” Tr. 44

coercive. The constant questioning was additionally problematic to them because Franks and Hoy believed that they did not have to provide the information, due to the existence of the 103(g) complaint. Tr. 19, 20, 39. Indeed, Franks stated explicitly that “I thought I was protected under the 103(g).”¹⁰ Tr. 58.

Unfortunately, the presence of the local union president probably did nothing to assuage their concerns. Although Anthony Swetz gave lip service to his job as looking out for “everybody at the local” (Tr. 150), he specifically testified: “There was a blanket allegation made against 18 firebosses, no specifics, no names, no anything. Several of these firebosses were very concerned: Am I the focus of this investigation? That’s why I was there [at the meetings with MSHA and Hoy and Franks].” Tr. 149-50.¹¹

It is against this singular backdrop – of MSHA’s very public 103(g) investigation, the seven citations MSHA subsequently issued to Emerald, the additional fifteen interviews that management conducted with other miners after the end of the MSHA investigation (after MSHA interviewed 34 miners), perceived pressure from fellow union employees, local union officials representing the interests of the firebosses during the interrogations, and the unwavering expectations of Franks and Hoy that they could make a safety complaint confidentially – that we will examine whether Emerald’s interrogations and suspensions of these miners were coercive. Slip op. at 3-5, 23, 25-26. We emphasize again that for the miners to prevail on their interference claim, proof of the operator’s intent to interfere with the miners’ statutory rights is not required.

2. Whether the operator’s actions can be reasonably viewed to interfere with protected activity

We now turn to the specific discrimination claims of Franks and Hoy under the interference prong of section 105(c). As we discuss below, under the unique circumstances of this case, we conclude that Emerald interfered with the protected right of Franks and Hoy to lodge a safety complaint with their union safety committeeman. The events occurring at this mine coalesced in such a way so that, from the perspective of a miner employed at this mine, the ability to make such a safety complaint without reprisals was compromised.

The presence of numerous Emerald managers when Franks and Hoy were questioned during the MSHA investigation and later during Emerald’s investigation, undoubtedly created a coercive environment to the meetings. *See Stoodly Company*, 320 NLRB 18, 18-19 (Dec. 1995)

¹⁰ The record does not establish the identity of the individual who made the 103(g) complaint. Moreover, even if Franks and/or Hoy had made the 103(g) complaint, their views on the confidentiality rights afforded to them are not necessarily correct. Nonetheless, their statements demonstrate their views about the importance of 103(g) to miners who make safety-related complaints and their on-going wish to maintain the confidentiality of their complaints.

¹¹ We note that if disciplinary action were taken against the firebosses and grievances were filed by the union, Swetz and the local union would have represented them.

(interrogation found coercive when high level supervisor conducted the questioning in his office (“the core of management authority”)) (citation omitted). More than one manager attended most of these sessions. William Schiffko, the Emerald Compliance Manager, and Christine Hayhurst, a high-ranking official in the human resources division, attended all of these meetings. The final meeting with Franks and Hoy also included Joseph Pervola, Emerald’s safety manager. Jt. Stips. 46, 49. Although our dissenting colleague notes Hoy’s statement during the October 4 meeting with MSHA that he was comfortable with having everyone in the room, slip op. at 42, Hoy explained in his testimony that he had never been part of a safety hazard investigation before and that he did not know he had the right to object to some of the participants at the meeting. Tr. 41.

Franks testified that in his first interview with MSHA, the inspector told him everything would be confidential, that he would not be discriminated against and there would be no retaliation from the company. Although Franks acknowledged that he told the inspector he was comfortable with everyone in the room, he testified that “I never participated in a federal investigation before. I figured this was his investigation,” and that he did not know he had any right to object. Tr. 49.¹²

The persistence of the managers’ questioning, in the face of the miners’ repeated refusal to provide the names of the firebosses, also added to the coercive quality of the questioning. *See Moses*, 4 FMSHRC at 1479. Emerald’s inquiries continued despite the miners’ prior refusal to provide the names to the MSHA inspectors and the information to management. Franks was interviewed by MSHA and management a total of six times; Hoy was interviewed at least three times. Emerald’s numerous demands that Franks and Hoy reveal the names of the firebosses, when the miners had clearly made their complaints via what they believed was a confidential process, highlights the coercion the miners perceived when repeatedly asked a question they had refused to answer. In fact, Hoy explicitly told Schiffko that his questions constituted harassment and that he would be filing a complaint of discrimination under section 105(c). 35 FMSHRC at 1699.

The consistent responses that Franks and Hoy gave over the course of the nine total interrogations they endured made it obvious that confidentiality was their foremost concern. At no time did they retract their complaints that inadequate preshifts had been conducted. Instead they continued to point out that they had given the requested names and dates to their union safety committeeman. In short, for fear of retaliation, they did not want to be made to publicly “finger” offending union firebosses.

It is also relevant that the Emerald managers did not try to dispel the coercive effect of their questioning by telling Franks and Hoy why they needed them to reveal the identities of the

¹² The stipulations also suggest that Franks was brought out of the mine during the middle of his shift and upon entering the meeting room was asked whether he was comfortable with everyone in the room. It was only after he had answered “yes,” that he was identified by the inspector as someone who had admitted to having information regarding the inadequate examinations. Jt. Stips. 18, 19.

firebosses and guaranteeing that no adverse action would be taken based on the answers. These are practices the NLRB takes into account when evaluating whether the questioning of an employee is coercive. *Johnnie's Poultry Co.*, 146 NLRB. 770, 775 (Apr. 1964), *enforcement denied on other grounds*, 344 F.2d 617, 619 (8th Cir. 1965).

Considering the totality of the circumstances in the case, we conclude that the suspensions of Franks and Hoy undoubtedly will have a profound impact on many, if not most, of the miners' willingness to make safety complaints in the future. Emerald suspended Franks and Hoy for seven days without pay for the "[f]ailure to provide information you have concerning serious allegations of safety violations." Jt. Exs. 3 and 4. It would be the brave miner, indeed, who would voluntarily allege safety violations in the future, knowing that he or she might risk suspension (or perhaps discharge) if the information provided was deemed insufficient by the operator. As counsel for Franks and Hoy correctly pointed out, a "reasonable miner . . . would be disinclined to risk such consequences by reporting future [safety problems]." C. Post-Hearing Br. at 27.

In *Multi-Ad Services, Inc., v. National Labor Relations Board*, 255 F.3d 363 (7th Cir. 2001), the Seventh Circuit ruled that substantial evidence supported the conclusion that management violated the NLRA by coercively interrogating an employee in a closed-door meeting about interest in forming a union. The Court set forth the following test to determine whether an employee would perceives an employer's actions as coercive:

Factors that ought to be considered in deciding whether a particular inquiry is coercive include the tone, duration, and purpose of the questioning, whether it is repeated, how many workers are involved, the setting, the authority of the person asking the question, and whether the company otherwise had shown hostility to the union. We also consider whether questions about protected activity are accompanied by assurances against reprisal and whether the interrogated worker feels constrained to lie or give noncommittal answers rather than answering truthfully.

Id. at 372 (citation omitted).

The Court based its finding of coercion on the following: a closed-door meeting was conducted in a manager's office by two people who had authority to fire the worker being interrogated; they questioned him regarding why he would want to bring a union into the company; they asked about the worker's own career advancement; they did not assure him that reprisals would not be taken against him, and the meeting was conducted after company managers had expressed uneasiness over union activity. *Id.*

As this case illustrates, the inquiry regarding whether interrogations are coercive involves many factors, several of which are present here. To summarize, we find that the operator's actions (questioning Franks and Hoy and then suspending them) would be viewed by a reasonable miner, under the totality of the circumstances, as tending to interfere with the exercise

of protected rights because: repeated interviews took place where numerous workers were questioned; upper level management conducted the interviews; the managers questioning the miners gave no assurances against reprisal, and Franks and Hoy were suspended.

3. The operator's need for the requested information

Under the next step of the Secretary's suggested interference test, Emerald must justify its actions "with a legitimate and substantial reason." Its rationale, adamantly and consistently presented both to the judge and to us, is its right – indeed, its responsibility – to investigate safety complaints at the mine.

We recognize, of course, the right and essential responsibility of mine owners to investigate safety complaints. The Mine Act itself states that "operators of [coal or other] mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." 30 U.S.C. § 801(e). This bedrock principle is vital to miner safety.

Our decision in *Secretary of Labor on behalf of Pack v. Maynard Branch Dredging Company and Roger Kirk*, 11 FMSHRC 168 (Feb. 1989), emphasized the need of an operator to require miners to report dangerous conditions. In that case, the Secretary argued that when a miner reports a dangerous condition to MSHA, this "insulates [the miner] from being discharged for failing to also report that condition to his foreman or co-workers." *Id.* at 172. We stated that this position failed to consider the operator's right to require the reporting of dangerous conditions:

While section 2(e) of the Mine Act provides that mine operators have the primary responsibility to prevent unsafe conditions in mines, that section adds that miners are to provide assistance to operators in meeting that responsibility. It would make little sense to assert that an operator may not receive such assistance because a miner elects instead to report such a condition only to MSHA.

Id. at 173.

William Schifko, the Emerald compliance manager, explained why he needed the miners to provide the names: "[I]f you are going to make an accusation against somebody, you have got to be able to know the facts, and, I mean, you can't accuse somebody of something without having some concrete evidence." Tr. 74. As Christine Hayhurst, Emerald's human resources supervisor testified, in actions against individuals for violating safety rules "[w]e need facts. We need witnesses to stand up against the facts." Tr. 107.

4. Balancing the miners' need for confidentiality with the operator's need for the requested information

With both of these core concepts in mind – the need for miners to make safety complaints with no fear of reprisal, and the need for mine operators to fully investigate safety complaints – we now turn to a balancing of these important interests.

To determine whether Emerald interfered with Franks' and Hoy's protected rights, we balance the operator's right to obtain information about an important safety matter with the rights of Franks and Hoy to make confidential safety complaints. The Secretary articulates this process in his proposed test by suggesting that, for the operator to prevail, its actions must present a "reason whose importance outweighs the harm caused to the exercise of protected rights."¹³ Sec'y Amicus Br. at 10.

We conclude that the operator's need to obtain the names of the firebosses and other pertinent information from Franks and Hoy in the circumstances of this case does not outweigh the harm to the miners' protected rights. We fear that other miners at Emerald's No. 1 Mine, like Franks, will decide that reporting violations of the Mine Act "[isn't] worth it." We are convinced that the manner in which MSHA conducted the section 103(g) interviews, along with the multiple interrogations and the resulting suspensions, created an atmosphere where miners will be extraordinarily reluctant to complain to a safety committeeman or file a section 103(g) complaint with MSHA. This will work to the detriment of the miners' safety, because some of the most important safety mechanisms created by Congress will have been brought to a halt at this mine.

We articulated a similar concern in our decision in *Secretary of Labor on behalf of Pendley v. Highland Mining Company*, 34 FMSHRC 1919 (Aug. 2012). Although we applied the traditional *Pasula-Robinette* standard in that case, we recognized that some acts by operators are materially adverse to miners when they are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* at 1932 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)). We emphasized that the Mine Act "recognizes that retaliatory action does not only affect the targeted miner, but other miners on whom it could have a chilling effect regarding the reporting of safety hazards." *Id.*

In weighing the concerns at stake here, we must examine what information the operator had already obtained and what additional information it needed to conduct an adequate investigation into the allegations of unsafe practices at the mine. Obviously the identity of the firebosses was critical to this inquiry. In evaluating Emerald's need to extract this information from Franks and Hoy, however, we are mindful that the operator was not completely handcuffed by their refusal to reveal the firebosses' identity. Management, by speaking with safety committeeman Dave Moore, could have determined the specific date and shift which Moore had investigated, and thus discovered the identities of the firebosses working those shifts.

¹³ Counsel for the miners appears to agree with this general approach, stating at oral argument that "it's important to allow . . . the operator to collect enough information to take action on a safety hazard while still balancing the protection for miners." Oral Ar. Tr. 77.

Furthermore, Shifko testified that Moore told him that he had received a “generic” complaint about inadequate preshift exams and had investigated and found no merit to the complaint. Tr. 94-95. At that stage of its investigation, the operator could have reviewed the particulars of Moore’s investigation to determine if there was any merit to the allegations. Thus, although Emerald’s investigation was admittedly made more complicated by Franks’ and Hoy’s refusal to name the examiners, the inquiry was not rendered impossible by their reluctance to accuse a fellow miner during the operator’s investigation. Emerald had other avenues for obtaining this information, and this is an important consideration as we compare its need to make Franks and Hoy reveal the names with the long-term ramifications such a demand would have on miners’ safety complaints in the future.

Thus, although the operator has raised a serious concern, and on a different factual record the operator’s need for information might tip the scales in its favor, here we find that Emerald’s desire to make Franks and Hoy reveal the firebosses’ names did not outweigh the harm caused by the chilling effects of its efforts. In other circumstances, where, for example, the inquiries were held in private, one-on-one meetings, the union protection was undiluted, and there was no background of an MSHA investigation gone awry by being conducted in such a public fashion, an operator might prevail.¹⁴ But that is not the record in this case, nor the circumstances under which Franks and Hoy were forced to navigate after attempting to make a confidential safety complaint.

¹⁴ In balancing these two important interests, we also ask whether the operator’s actions were narrowly tailored enough to promote its business justification without undue interference to the rights of the miners. In the context of the NLRA, for example, it has been held that a company rule must be “narrowly tailored to achieve the employer’s purpose without chilling protected activity.” *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 376-376 (D.C. Cir. 2007) (quoting *Cnty. Hosps. of Cent. Cal. v. NLRB*, 335 F.2d 1079, 1088 (D.C. Cir. 2003)). Given Franks and Hoy’s reaction to the MSHA interviews, it should have been clear to the operator that the way it conducted its subsequent investigation would hardly foster an atmosphere conducive to Franks and Hoy providing the names of the offending firebosses. In addition to safety manager Shifko, also present for Emerald at these meetings was human resources representative Catherine Hayhurst. As before, union officers were present, but Swetz testified, they were there to protect the interests of the accused firebosses. Tr. 149-50.

Given the particular context in which the events at the Emerald mine unfolded, we conclude that the operator's actions, if allowed to stand, would have a chilling effect on the miners there, who, we believe, will think carefully before voicing a safety concern to MSHA or a safety committeeman in the future. We believe that the operator's need to obtain the information was, in this case, outweighed by the potentially chilling effect of the investigations and suspensions that occurred. Consequently, we would affirm the Judge's decision finding a violation of section 105(c) of the Mine Act.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

Commissioner Althen, dissenting:

The willful refusal of miners to cooperate with a safety investigation is contrary to the fundamental principle of miner participation and assistance in achieving a safe and healthful mining environment. Such conduct imperils rather than empowers miners and is properly subject to discipline.

I.

Governing Legal Principles

A. Framework for Analysis

The National Labor Relations Act (NLRA) and the Mine Act protect miners against discrimination by management because of activities protected by the respective laws. They also protect miners against interference with the statutory rights provided by the respective statutes. Therefore, it is appropriate that the National Labor Relations Board and Federal Mine Safety and Health Review Commission should look to one another's enforcement of such rights for legal principles related to the protection of miners. *Sec'y on behalf of Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 9 (Jan. 2005); *see also Moses v. Whitely Development Corp.*, 4 FMSHRC 1475 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). It is equally important to understand that different concepts animate the relationship between management and miners in labor matters versus safety matters.

The premise of the NLRA is that miners and management are adversaries with respect to wages, hours, and terms and conditions of employment. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965) ("Having protected employee organization in countervailance to the employers' bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the [NLRA] also contemplated resort to economic weapons should more peaceful measures not avail."); *Tearing Down the Wall: The Need for Revision of NLRA § 8(A)(2) to Permit Management-Labor Participation Committees to Function in the Workplace*, 26 Tex. Tech L. Rev. 1391, 1398 (1995) ("The NLRA is structured on an adversarial model of labor relations that views the interests of management and labor as mutually exclusive."); David Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 Colum. L. Rev. 1775, 1778 (1989) ("Labor relations and labor law in the United States have been shaped by underlying assumptions about organizational hierarchies and adversarial relationships between management and labor in the industrial work place. The . . . [NLRA] posits a fundamental dividing line between labor and management.").

The Mine Act is based upon a wholly different vision of the relationship between miners and mine management regarding the safety and health of the workforce. Congress foresaw the desirability of, and need for, cooperation between management and miners on safety and health. It provided for an active role for miners in assisting in the achievement of safe and healthful work environments.

Section 2(e) of the Mine Act provides that “the operators of such mines *with the assistance of miners* have the primary responsibility to prevent the existence of such [unsafe and unhealthful] conditions and practices in such mines” 30 U.S.C. § 801(e) (emphasis added). Miner participation in safety and health matters was of such concern that the Senate report on the Mine Act explicitly recognized the importance of active participation by miners in the “joint” task of providing a safe and healthful workplace.

[T]he Committee recognizes that creation and maintenance of a safe and healthful working environment is not the task of the operator alone. If the purposes of this legislation are to be achieved, the effort must be a joint one, involving the miner and his representatives as well as the operator.

S. Rep. No. 95-181, at 18 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 606 (1978).

Indeed, the Senate Committee recognized the need for, and explicitly endorsed, disciplinary actions as appropriate to effectuate the safety purposes of the Act:

Operators have the final responsibilities for affording safe and healthful workplaces for miners, and therefore, have the responsibility *for developing and enforcing through appropriate disciplinary measures*, effective safety programs that could prevent employees from engaging in unsafe and unhealthful activity.

Id. (emphasis added).

In construing the protections afforded miners under section 105(c), the Commission has emphasized that participation of miners in safety is a goal of the Mine Act, finding the “Mine Act was drafted to encourage miners to assist in and participate in its enforcement.” *Sec’y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2789 (Oct. 1980), *rev’d on other grounds* 663 F.2d 1211 (3d Cir. 1981).

The Commission has not merely endorsed cooperation and participation by miners. It has accepted the directive of the Senate Report and made disciplining miners an integral part of operators’ duties under the Mine Act. For example, to comply with 30 C.F.R. § 77.1710(g) regarding fall protection, an operator not only must provide fall protection and train employees to wear safety belts but also must show that it has “engaged in sufficiently specific and diligent enforcement of the safety belt requirement to discharge its obligation under the standard.”

Sw. Ill. Coal Corp., 7 FMSHRC 610, 612 (May 1985); *Austin Power, Inc.*, 9 FMSHRC 2015, 2020 (Dec. 1987) (“the Commission concluded that section 77.1710(g) mandates that an operator establish a program requiring the wearing of safety belts and lines where dangers of falling exist and enforce the requirement diligently.”).

Thus, the Commission has demanded that operators discipline employees for choosing not to protect themselves. It would be odd if management is required to discipline miners for choosing not to protect themselves but must allow miners to decide not to protect fellow miners by choosing not to participate fully and honestly in a safety investigation.

Enforcement of discipline in the context of a refusal to answer questions in a safety investigation accords not only with the purposes of the Mine Act but also clear and commanding Commission case law. *Secretary on behalf of Pack v. Maynard Branch Dredging Co.*, 11 FMSHRC 168 (Feb. 1989), *aff’d*, 896 F.2d 599 (D.C. Cir. 1990), is on point. In *Pack*, the Commission upheld the discharge of a security guard who failed (as opposed to refused) to inform the operator of a safety violation during his shift and then reported it directly to MSHA. The Commission spoke broadly about the duty of employees to the safety of themselves and other workers, holding:

It is beyond dispute that a mine operator has the right to hire individuals whose job duties include the reporting of dangerous conditions. The Mine Act itself recognizes the importance of such an arrangement. While section 2(e) of the Mine Act provides that mine operators have the primary responsibility to prevent unsafe conditions in mines, that section adds that miners are to provide assistance to operators in meeting that responsibility. It would make little sense to assert that an operator may not receive such assistance because a miner elects instead to report such a condition only to MSHA. . . . [I]t would prohibit an operator from disciplining a pre-shift examiner who, rather than reporting dangerous conditions to the operator, chose instead to report to MSHA, while the miners on the incoming shift entered the mine unaware of the dangers. We do not believe this is what anti-discrimination provisions of the Mine Act contemplated.

Id. at 173.¹

¹ The Judge attempts to “distinguish” *Pack* on the grounds that, in *Pack*, the operator had a written policy requiring the reporting of dangerous conditions. The real distinction between this case and *Pack*, which makes this case even more compelling, is that here the miners voluntarily reported through MSHA a dangerous practice and then refused to cooperate in the investigation and correction of such ostensible danger. It is untenably inconsistent with section 2(e)’s reference to the assistance of miners to suggest a written policy is the difference between a

(continued...)

Obviously, if a safety investigation is a pretense for interference with statutory rights or a means to discriminate against a miner because of protected activity the action is unlawful. However, in situations where an investigation is warranted and legitimate, the assistance of miners in reporting unsafe conditions or practices and responding to questions about reports of unsafe working conditions fulfills the basic tenet of Congress that miners assist and participate in achieving a safe and healthful workplace. Perforce, if miners may be required to report dangerous conditions, they may be required to provide information to management about the conditions once they have reported them.

2. Proof of Unlawful Discrimination

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 Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799; *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. *Id.* at 817-18 (citing *Pasula*, 2 FMSHRC at 2799-800); *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Of course, circumstantial evidence may support a claimed violation of section 105(c). In *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), the Commission identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility or animus towards protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510. Further, the Commission may find the proffered reason may be a pretext provided the claimant establishes "(1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the discipline], or (3) that they were *insufficient* to motivate discharge." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1073 (May 2011) (emphasis in original).

Regarding inferences, the Commission has emphasized that inferences drawn by the Judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res.*,

¹(...continued)
miner cooperating in safety investigations and choosing to permit perpetuation of a danger through a deliberate refusal to cooperate.

Inc., 6 FMSHRC 1132, 1138 (May 1984); *accord Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989). Black’s Law Dictionary defines “inference” as “a conclusion reached by considering other facts and deducing a *logical* consequence from them.” Black’s Law Dictionary 897 (10th ed. 2014) (emphasis added). Inferences must be based upon findings of fact followed by a logical and rational conclusion and may not be spun out of speculation or be piled one on another to an inferred result that collapses under the weight of its own insubstantial structure.

3. Proof of Unlawful Interference with Statutory Rights

A causal connection also must be proven to sustain a violation of section 105(c) of the Mine Act for interference with a statutory right. In that respect, section 105(c)(1) provides:

No person shall . . . interfere with the exercise of statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation,

Consequently, in an interference claim, the Commission asks a question similar to a discrimination case. Has the operator interfered with the exercise of a statutory right to make a complaint and, if so, was such interference caused by the miner having engaged in protected activity? However, a somewhat different standard is applied. The Commission stated in *Moses*, 4 FMSHRC at 1478-79, that:

We find that among the “more subtle forms of interference” are coercive interrogation and harassment over the exercise of protected rights. A natural result of such practices may be to instill in the minds of employees fear of reprisal or discrimination. Such actions may not only chill the exercise of protected rights by the directly affected miners, but may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights. This result is at odds with the goal of encouraging miner participation in enforcement of the Mine Act.

In his amicus brief, the Secretary states that his test for interference “echoes” *Moses* but is drawn from cases by the National Labor Relations Board for violations of section 8(a)(1) of the NLRA. Asserting entitlement to deference, the Secretary contends that the test for an “interference” violation should be whether:

(1) a person’s action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights; and

(2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Sec’y Amicus Br. at 10.

Because the Commission frequently emphasizes the need to look to the totality of the evidence, there appears to be no, or only a virtually indecipherable, difference between the test for interference established by the Commission and the first step of the Secretary’s test. The Secretary’s test does contain a second articulated step of a justification that requires weighing any harm caused to protected rights against a legitimate and substantial reason for the inquiry. However, the Commission certainly did not intend in *Moses* to dismiss the possibility of finding an overarching purpose from the imposition of discipline as compared to any chilling effect.

The Secretary correctly emphasized the need for the Commission’s Judges and the Commission itself to review the totality of the evidence lest we be tempted to apply the four indicia of discrimination articulated in *Chacon* without considering that, looking at the totality of the evidence, facts may cut against discrimination. Therefore, in cases under section 105(c), the Judges and Commission must review the totality of the evidence.

4. Substantial Evidence

In considering the presence of substantial evidence, we review the totality of the evidence. We must affirm a Judge’s finding of fact if it is supported by substantial evidence. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support [the Judge’s] conclusion.” *Consolidation Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). In assessing whether a finding is supported by substantial evidence, the record as a whole must be considered including evidence in the record that “fairly detracts” from the finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison*, 305 U.S. at 229).

II.

Appropriate Disposition of this Case

A. Substantial Evidence Does Not Support a Finding that the Operator Discriminated Against Franks and Hoy Because of Protected Activity.

Review of the Judge’s discussion of the *Chacon* factors and the totality of the record demonstrates substantial evidence does not support the Judge’s decision that protected activity

motivated the one week suspensions of Franks and Hoy.² Moreover, if it were possible to find such motivation, the operator successfully asserted an affirmative defense.

1. The Judge's Decision

The Judge does not find that a willful refusal to answer questions in a safety investigation is protected. Instead, apparently assuming that such a refusal would warrant discipline, the Judge finds the operator's assertion that it disciplined the miners for their refusal to respond was a pretext. The Judge finds that the real reason for the discipline was "for making a safety complaint and participating in the 103(g) investigation." 35 FMSHRC at 1705.³

There is no dispute that Franks and Hoy willfully refused to identify the firebosses with respect to whom they claimed to have direct evidence of dangerous malfeasance. Further, there is no direct evidence that the operator discriminated against Franks or Hoy on the basis of protected activity. Therefore, as the Judge realized, a case against the operator could only be built upon reasonable inferences drawn from circumstances showing the asserted reason for discipline was a pretext.

Consequently, the operator may be found to have violated section 105(c) only if substantial evidence supports a finding that circumstantial evidence permits an inherently reasonable inference that the discipline was at least partly motivated by protected activity – that is, protected activity rather than Franks and Hoy's outright and repeated refusal to identify wrongdoers. *See Turner*, 33 FMSHRC at 1073.⁴ Further, there must be a logical and rational connection between evidentiary facts and that ultimate inferred fact. *Mid-Continent*, 6 FMSHRC at 1138. The Judge below considered the four *Chacon* factors before ultimately basing an inference of pretext upon one finding of disputed fact.

² Commissioners Young and Cohen essentially adopt and re-state the Judge's decision. Little need be said with specific reference to their opinion

³ Notably, the Judge did not find that the operator discriminated against Franks and Hoy because the operator suspected that Franks and Hoy filed the section 103(g) complaint. Commissioners Young and Cohen state: "Both the MSHA investigation and Emerald's internal investigation were in response to the filing of an anonymous section 103(g) complaint." Slip op. at 12. As will be noted below, there is no evidence that the operator asked any question or sought any information related to the filing of the 103(g) complaint.

⁴ Because substantial evidence does not support a finding that protected activity partly motivated the disciplinary action, it is not necessary to discuss the operator's affirmative defense. If there were, the consideration would be whether the operator would have been motivated to impose discipline based upon an insubordinate refusal to cooperate with a safety investigation of a complaint of substantial safety hazards. On these facts, the operator certainly would not and should not have permitted miners to walk away from their obligation to cooperate with a safety investigation.

a. Timing

The Judge correctly finds the suspension was close in time to protected activity – namely, volunteering information to the inspector conducting the 103(g) inspection and complaining that belt inspections had not been conducted. However, the timing factor obviously is insignificant in this case because the protected activity and unprotected activity occurred virtually simultaneously.

In their first meetings with MSHA, Franks and Hoy engaged in protected activity by vocalizing their complaint. Immediately thereafter, in the same meeting, they engaged in unprotected activity by refusing to name the firebosses with respect to whom they claimed actual knowledge of malfeasance.

There is no significance to the fact that the discipline was close in time to the protected discussions with MSHA because the reason asserted for the discipline occurred essentially at the very same moment. Thus, from a timing perspective, the discipline makes sense for the unprotected refusal to provide names of the alleged malefactors.⁵ In the same meeting, Franks and Hoy crossed a line between protected and unprotected activity. They were then disciplined for the unprotected activity. See *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981), *rvg. Pasula*, 2 FMSHRC 2786 (Oct. 1980). The timing of the discipline does not support a finding of a violation.

b. Hostility and Harassment

The Judge found the operator showed “hostility” towards Franks and Hoy by interviewing them on several occasions and “harassing” them. The Judge does not cite any evidence in support of that conclusion, except by finding hostility and harassment in management meetings twice with Hoy and three times with Franks.

Hoy was first interviewed by MSHA, not the operator, on October 4. Jt. Stip. 31. Operator and union representatives were present. MSHA asked Hoy if he was comfortable with having everyone in the room, and he responded affirmatively. Tr. 31. Hoy did not recall whether the MSHA representative told him that he could talk to him confidentially. However, Hoy did recall that the MSHA representative gave him his office and cell telephone numbers –

⁵ Typically, in a pretext case, there is protected activity and then a subsequent entirely distinct incident close in time for which the operator takes adverse action. For example, in *Moses*, 4 FMSHRC at 1475, a bulldozer overturned on June 19 and an MSHA inspection occurred the next day. Thereafter, an operator representative told Moses that he suspected Moses had informed MSHA of the bulldozer overturning. Near the end of June, Moses was laid off due to a shutdown dozer. When Moses went to the operation on July 3 to see if he still had a job, he was offered a job other than his normal work. After an argument, he was discharged. In that case, time is a factor because an entirely separate and distinct incident was blamed for the discipline.

numbers that Hoy later used. Tr. 31, 41. There is no evidence in the record that a management representative spoke during that meeting.

MSHA asked Hoy to name the firebosses with respect to whom he claimed to have personal knowledge and documentary evidence of malfeasance. Hoy refused to name any firebosses and refused to produce any records. Jt. Stip. 35.

The operator interviewed Hoy twice – on October 20 and November 9.⁶ On October 20, he was interviewed by William Schifko, Emerald’s compliance manager, and Christine Hayhurst, a human resources supervisor. Hoy was accompanied by two union representatives – Messrs. Swetz and Scott. Thus, there were two management representatives and two union representatives present. Jt. Stip. 42. On November 9, Hoy again met with operator representatives and was again accompanied by a union representative. Jt. Stip. 48.

The record does not reflect the length of these meetings or much of what was actually said. The record does show that, just as Hoy had refused to provide the names of the firebosses to MSHA, he refused to provide their names to the operator and refused to give a date of any unperformed belt examination. Jt. Stips. 42, 48.

The record does not reflect any harassing or hostile statements by any manager in the meetings. Nor does the record contain testimony by Hoy that he felt hostility or harassment at the meetings. Obviously, a finding that the mere fact of a safety investigation is per se hostile or harassing would be wholly at odds with the Mine Act’s presumption of participation and assistance by miners in safety and health matters.⁷

The same pattern applies to the interviews of Franks, except he was interviewed three times. He also was interviewed by compliance manager Schifko and human resources supervisor Hayhurst and was assisted by union representatives at every meeting. Indeed, in his

⁶ At the hearing, Hoy testified that he might have been interviewed on another occasion in late October, but he could not, or at least did not, provide any date or otherwise testify about such a possible interview. Tr. 20.

⁷ The Judge mentions that Hoy testified that another miner told him that “he had a target on his back after making the complaint.” 35 FMSHRC at 1704. The Judge also noted in the Background section of the decision that the miners had alleged that they were “targeted” in their complaint. *Id.* at 1697. Regarding the “targeting” testimony, it is notable that firebosses at this operation are hourly employees represented by the union. From Hoy’s testimony, it is obvious that if there was a “target on his back” it was from fellow hourly employees. Hoy testified that he complained to MSHA about the remark based upon assurances that he would not face retaliation from anyone for meeting with MSHA. Tr. 40-42. However, MSHA did not respond to his call. It is not conceivable that, if MSHA thought management had placed a “target on his back,” it would have ignored Hoy’s complaint. Other testimony in the record demonstrates Franks and Hoy were concerned about retaliation from other hourly employees. Tr. 38, 41, 48.

complaint, Franks expressly notes that, with respect to the October 24 meeting, union representative “Scott attended at Franks’[] request.” Compl. of Discrim., Ex. A, at 5, ¶ 16. Like Hoy, Franks did not testify that he ever expressed any discomfort with the meetings. Again, there is no evidence in the record of hostility or harassment or insulting statements by a manager.⁸

Although Franks and Hoy voluntarily complained of malfeasant firebosses and the same complaint had been made in the 103(g) complaint, the record does not reflect that the 103(g) complaint itself, including who may have filed it, was raised at any of the meetings, including the MSHA interview. Thus, there is no evidence that Franks or Hoy were “grilled” by management, threatened by them, yelled at, or in any other way harassed or treated with hostility.

Going further, the record does not reveal that Franks or Hoy provided management with a reason for refusing to give the names. At the hearing, after they had obtained first-rate professional representation, they asserted the reason they refused to answer was they thought they were protected by 103(g). However, there is no evidence that they ever asserted such a reason during their meetings with MSHA or the operator.

Summed up, the Judge found hostility and harassment but there is no evidence, none, of any hostile statements or actions other than the Judge’s conclusory finding of harassment from two and three brief interviews, respectively, by appropriate managers with Franks and Hoy accompanied by their union representatives. From the record, therefore, it is only possible to discern a professional approach towards seeking important safety cooperation needed by the operator. There quite simply is no record evidence of hostility, let alone substantial evidence, of such treatment.

c. Disparate Treatment

The Judge found that Franks and Hoy suffered disparate treatment as compared to other miners. The theory is that Franks and Hoy, who complained about firebosses were disciplined, whereas other miners who did not complain about firebosses were not disciplined.

No weight may be placed on this patently irrelevant observation. There is no allegation by Franks or Hoy or other evidence that any other miner refused to cooperate with the investigation. Thus, the record does not suggest any refusal to answer questions by those employees. There is no evidence the other miners were uncooperative in any way or refused to answer any question.

Because the other miners did not engage in conduct similar to the refusals of Franks and Hoy, there was no basis for disciplining cooperating miners. The Judge engages in wholly unsupported speculation that the reason for different treatment was that Franks and Hoy said

⁸ The record does reflect minor sarcasm by Franks. Tr. 48, 54.

they had evidence of misconduct by firebosses when the logical reason is that the others cooperated whereas Franks and Hoy refused. Different treatment of miners who conduct themselves in different ways – some cooperating with the investigation and others not cooperating – does not support an inference of discrimination. If anything, it supports an inference that the disciplining of Franks and Hoy was based upon their refusal of cooperation.

d. Knowledge of the Protected Activity

Knowledge, the last of the four indicia of *Chacon*, is usually considered in the context of knowledge of the protected activity. If an operator does not know of the protected activity, it could not have been discriminating against the miner on the basis of that activity.⁹ In this respect, such knowledge is as irrelevant to this case as timing. The operator gained knowledge of the protected activity and unprotected refusal to cooperate at virtually the same moment.

Here, the entire weight of the decision rests upon the Judge's conclusion that the operator knew or could/should have known the identities of the allegedly malfeasant firebosses. Without explaining her view, the Judge summarily concludes it was not necessary to insist that Franks and Hoy provide the identities. Thus, the Judge finds two or three interviews by the operator to be inherently hostile, harassing, and discriminatory. Essentially, the Judge's entire finding of discrimination is based upon this one unexplained finding.

Assuming the Judge is correct that the names were or should have been known by the operator, simply knowing the names of the firebosses is not sufficient to permit an authoritative response by the operator to the misconduct by the firebosses. It is vitally important that the only witnesses claiming actual, direct knowledge of the malfeasance step up to the plate. Disciplinary action could not be taken against any fireboss without the cooperation of Franks and Hoy – that is, without their willingness to name the firebosses.

⁹ The “knowledge” factor may be satisfied even if a claimant did not actually engage in a protected activity if the operator actually suspected the claimant of protected activity and took adverse action toward the miner because of that suspicion. *Moses*, 4 FMSHRC at 1480 (“[t]he complainant establishes a prima facie case by proving that (1) the operator suspected that he had engaged in protected activity, and (2) the adverse action was motivated in any part by such suspicion). Here, suspicion of protected activity did not play a role in the Judge's decision as the decision is based upon the protected activity of talking with an inspector during the 103(g) investigation and operator's own investigation. The Judge's decision is not based upon speculation that the operator might have suspected Franks and Hoy of having filed the 103(g) complaint. There is no evidence in the record that the 103(g) complaint, its genesis, or any other aspect was discussed in the interviews with the operator or, for that matter, with MSHA.

The testimony is indisputable that the operator disciplines miners for failing to make proper examinations.¹⁰ The operator discharged a foreman and an hourly employee for not making proper examinations. Tr. 82, 141. Indeed, the discharge of the foreman for an insufficient examination arose out of a complaint by an hourly worker. Tr. 82. Additionally, as the Judge surely understands and as the local union president testified, hearsay evidence would not support a disciplinary action against firebosses, especially when they would be represented by the union in a grievance proceeding. Tr. 140. Thus, more than sufficient evidence was produced showing a legitimate reason for the direct witnesses to identify malfeasant firebosses. The Judge erroneously failed to consider or discuss that evidence and simply dismissed any need for Franks and Hoy to cooperate.

Finally, the Judge also found the operator failed to acknowledge the “right” of Franks and Hoy to make their complaint through their union representative rather than directly to management. 35 FMSHRC at 1704. Again, the Judge is incorrect. The operator agreed that safety complaints may be made directly to management or through a union representative. So far as it goes, that was fine. However, the initial expression of a complaint had little or nothing to do with the safety investigation that necessarily follows such a complaint.

Even presuming Franks and Hoy complained to the union representative, gave him the names, and he gave the names to management, a follow-up investigation was inevitably necessary, after MSHA brought Franks and Hoy to the attention of the operator. The Commission has instructed MSHA to examine for failures of the operator’s supervision, training, or **disciplining** of miners. *S. Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (“[W]here a rank-and-file employee has violated the Act, the operator’s supervision, training, and disciplining of its employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.”).

An operator cannot let allegations of failures to conduct belt examinations go uninvestigated and unpunished. Yet, it could not discipline the firebosses without direct evidence of the malfeasance. It was necessary for the operator to have direct evidence of the malfeasance to take action and the only persons claiming to have such evidence were Franks and Hoy. It cannot rationally be inferred that the necessary follow-up investigation by management to a claim of serious malfeasance, conducted in an appropriate manner through two and three

¹⁰ Commissioners Young and Cohen remark that there was no evidence that, before this incident, the operator had disciplined employees for refusal to cooperate. Slip op. at 16. This remark does not counter the evidence that the operator discharged a foreman and an hourly employee for failed examinations. Tr. 82. Surely, the Commissioners are not suggesting that the operator later discharged a foreman and, separately, an hourly employee for failing to make examinations as a means of defending this case. The evidence of the seriousness with which the operator treats such failures to examine is probative regarding the rationality of inferring discrimination entirely on the basis that the operator had indirect and unusable allegations of malfeasant firebosses.

interviews, respectively, by appropriate personnel with union representatives present is hostile, harassing, and discriminatory.

It is apparent, therefore, that even without considering the totality of the evidence, there is insufficient evidence that an inference of discrimination is inherently reasonable through a logical and rational connection between the evidentiary facts and the ultimate facts inferred. When considered in the context of the totality of the evidence, the Judge's finding of discrimination completely collapses.

2. The Totality of the Evidence

The Judge ignored a host of factors cutting against an inference of discrimination. The entirety of the record undercuts the brief and conclusory basis cited by the Judge for inferring discrimination.

It is true that MSHA was conducting its investigation pursuant to a section 103(g) complaint. However, miners Franks and Hoy voluntarily told MSHA of their complaint. Whether they did not request anonymity or were not offered that opportunity by MSHA, the fact is that MSHA informed the operator of their identities and complaint. There is no evidence that the operator sought them out. Nor is there any evidence that, after the meeting called by MSHA, the operator made any inquiry of Franks or Hoy relating to the 103(g) complaint.

Further, upon Franks and Hoy saying they were comfortable with the presence of operator representatives, it was MSHA that permitted the operator to attend its interviews of the miners. The operator took no action whatsoever to discover the identity of any complaining miners. They were presented by MSHA with the names of Franks and Hoy. That disclosure by MSHA and MSHA's handling of the meeting cannot be held against the operator as evidence of a discriminatory motive or improper action by the operator.¹¹

Although MSHA could not or, in any event, did not act upon Franks and Hoy's complaint after they refused to identify any offending firebosses, the operator had a right, or even a duty, to continue the investigation. If an operator failed to investigate miners' allegations to MSHA of neglect by a fireboss and, subsequently, a belt fire caused serious or fatal injuries to miners, a regulatory typhoon properly would engulf the operator. An investigation conducted by the operator into voluntary charges of serious safety misconduct was necessary and does not

¹¹ It should be obvious that failures by MSHA cannot be held against the operator. However, in footnote 12, Commissioners Young and Cohen appear to link actions by MSHA and the operator. Again, they cite no evidence; they just cite MSHA's actions as "troublesome" and link MSHA to the operator. This irrelevant side-remark is as misleading as the clearly erroneous suggestion that Hoy's call to MSHA about a target on his back might refer to the operator when all the evidence demonstrates that the only rational understanding was that, as the firebosses are hourly employees and fellow union members, it was co-workers, if anyone, who were "targeting" him. *See supra* n.7.

comport with the Judge's finding that the actions of the operator were a pretext to disciplining Franks and Hoy.

Certainly, when Franks and Hoy complained of their concern about firebosses to a union committeeman, MSHA, or the operator, they were engaged in protected activity. Further, as MSHA and the operator interviewed them about their complaints they were protected. However, they crossed an important, outcome determinative line from protected to unprotected activity when they refused to assist in the operator's investigation by refusing to name malfeasant firebosses. This crossing is demonstrated, albeit in different circumstances, in *Consolidation Coal Co. v. Marshall*. There, the United States Court of Appeals for the Third Circuit reversed a Commission decision. The miner had crossed the line from protected to unprotected activity when he decided to turn off a mining machine and announce that no one was going to operate the machine. The court found "[t]he 'real' reason for his dismissal was that he turned off the continuous miner machine. This activity was not protected by the Mine Act." 663 F.2d at 1221.

Similarly, here, the totality of the evidence demonstrates that the real reason Franks and Hoy were suspended was that they refused to identify non-performing firebosses. In the Third Circuit case, the miner arbitrarily decided to attempt to shut down the operation; Franks and Hoy decided that they would arbitrarily refuse to provide the critically important information to support their complaint. Just as the miner in the Third Circuit case crossed the line from protected to unprotected activity when he attempted to shut down the operation, Franks and Hoy crossed the line from protected to unprotected activity when, having volunteered safety information, they refused to protect themselves and their fellow miners by cooperating with the operator's investigation.

MSHA interviewed approximately 35 miners in its 103(g) investigation. Tr. 73. In addition to attending many of those interviews, the operator interviewed an additional 15 or so miners with respect to Franks and Hoy's allegations after MSHA abandoned the investigation upon Franks and Hoy's refusal to cooperate. Tr. 76. Such extensive interviews simply do not comport with the notion of using Franks and Hoy's refusal to answer as a pretext to impose discipline.

Further, contrary to the Judge's statement about hostility, the evidence regarding the interviews, such as it exists, is that they were conducted by appropriate personnel (the compliance manager and a senior human resources manager) without acrimony and in the presence of the miners' union representatives. In other words, the interviews were conducted in a wholly appropriate manner with the miners' rights to representation observed. Those actions are also inconsistent with hostility, harassment, or discrimination.

Additionally, the evidence demonstrates that the decision whether to impose discipline and what discipline to impose was made in a professional and dispassionate manner. When asked how the decision was reached, the senior human resource professional described a meeting

of senior managers to consider discipline (Tr. 104) and then explained how they arrived at a seven-day suspension:

Well, been doing this for about 24 years. The [other meeting participants] probably a lot longer. We took into the consideration what the infraction was, that, you know, a message has to be sent that safety is very serious, so we didn't feel we could sweep it under the rug when allegations of that nature were made. Through talking with everyone, we were at three days to termination, and we came up with seven days.

Tr. 104-105.

Finally, and most telling of all, at every point in the investigation, Franks and Hoy could have avoided discipline by disclosing the names of firebosses whom they said were failing to perform the important belt inspections. Franks and Hoy brought themselves into the investigation by voluntarily and openly making the complaints to MSHA. They were willing, they claimed, to give the names of the firebosses to the union and for the union to disclose the names of the firebosses to the operator. MSHA brought them to the attention of management and then walked away when Franks and Hoy refused to cooperate. It is incredibly far-fetched to find that the operator somehow seized upon Franks and Hoy's refusal to cooperate as a pretext to "set up" discipline. MSHA brought them to the attention of the operator and at any moment, Franks and Hoy could have given the name of the firebosses to MSHA or the operator and avoided discipline.

Indeed, it appears that Franks and Hoy never even gave MSHA or the operator a reason for refusing to do so. Their complaint refers to Franks' initial meeting with MSHA Supervisor Severin and states: "Schifko asked Franks why he would not provide a name or date and Franks responded that he could not do so at that time." Compl. of Discrim., Ex. A, at 4, ¶ 10.

The pertinent question here is: if Franks and Hoy had already provided the names and knew the operator had the names, why did they refuse to give the names thereby avoiding discipline? Their refusal to provide the names amounts to no more than saying "we don't want to." They gave management virtually nothing to work with in terms of justifying or excusing their lack of cooperation.

For all these reasons, the totality of the evidence leads to the conclusion that the miners were suspended for, and only for, their willful refusal to cooperate in a necessary safety investigation – that is, they refused to identify to management one or more firebosses whom they said they personally observed failing to perform his/her/their duties. When they refused to cooperate with a safety investigation with respect to which they claimed to be the only witnesses with actual knowledge of the offenses, they crossed an important, outcome determinative line between protected activity and unprotected activity.¹²

¹² Regarding an affirmative defense, if one were to somehow conclude that discrimination played some part in the imposition of discipline on Franks and Hoy, an

(continued...)

B. The Evidence Does Not Support a Finding of, or Remand for Consideration of, Interference with Statutory Rights.

The Judge below did not enter any finding regarding Franks and Hoy's claims of interference with statutory rights in violation of section 105(c) and, thus, did not adjudicate that claim. For that reason, the parties paid little attention to the issue of interference in their briefs. However, Franks and Hoy did reserve the issue in their brief to the Commission and asked for a remand to permit the Judge to consider the issue. C. Br. at 34.

Thereafter, the Secretary appeared before the Commission via a late-filed, lengthy amicus brief to take the position that Franks and Hoy had advanced colorable claims of interference that should be adjudicated (Sec'y Mot. at 5) and to set forth the Secretary's view of the basic elements of a cause of action for unjustified interference. Sec'y Mot. for Leave to File an Amicus Curiae Br. at 3 ¶¶ 5-6. The Secretary supported a remand for a review of "colorable" claims of interference.¹³

¹²(...continued)

affirmative defense succeeds. Their refusal to provide critical information in an important and ongoing safety investigation warranted discipline. The Commission has held that "[o]nce it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." *Chacon*, 3 FMSHRC at 2516. The Judge was not entitled to substitute her personal business judgment for the business judgment of the operator. The operator is entitled to prevail on an affirmative defense. However, given the totality of the evidence, it is more appropriate to find that protected activity did not motivate the discipline.

¹³ Commissioners Young and Cohen find the actions of MSHA "troublesome." Slip op. at 12 n.12. The participation by MSHA and the Secretary in this case has indeed been curious. Initially, MSHA investigated a 103(g) complaint and found a number of violations. It was during that investigation that Franks and Hoy voluntarily came forward to MSHA. MSHA informed the operator of their identities and brought them into meetings that included the operator. In light of the refusal of Franks and Hoy to cooperate, MSHA took no action on their volunteered fireboss complaint. During the course of the meeting with Hoy, MSHA assured him that no one would be permitted to retaliate against him. Yet, when Hoy informed MSHA that a fellow hourly worker told him he had a "target on his back," MSHA took no action to investigate the workers threatening or otherwise harassing Hoy. Subsequently, MSHA investigated and dismissed Franks and Hoy's 105(c) complaint as meritless. However, two months after oral argument and the Commission meeting on the case, the Secretary filed an amicus brief asserting a desire for the first time since passage of the Mine Act to provide the Commission his interpretation of interference with statutory rights under section 105(c). The Secretary also provided, at greater length, a list of insubstantial reasons why the Secretary thought Franks and Hoy had presented colorable interference claims. The Secretary's amicus brief does not explain whether the Secretary contacted or conferred with the MSHA personnel who had found Franks and Hoy's interference claims meritless. The Secretary does not explain the basis for the change
(continued...)

The Secretary also asserted that the appropriate test of interference with statutory rights under section 105(c) should be borrowed from the NLRB and provides that the Commission should find impermissible interference if:

- (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights; and
- (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Sec'y Amicus Br. at 10. Despite the failure of the Judge to rule upon the issue, the record demonstrates that a reasonable Judge could not find substantial evidence supporting interference with statutory rights because of Franks and Hoy's refusal to cooperate.

The first step in analysis is identification of the rights with which the operator assertedly interfered. Although Franks and Hoy and the Secretary naturally word their designation of rights slightly differently, they essentially identify the same alleged rights with respect to which they assert the operator may have interfered. These are:

1. The right to file 103(g) safety complaints and/or other anonymous safety complaints and maintain anonymity throughout the investigation process. Sec'y Amicus Br. at 32; C. Br. at 34.
2. The right to be protected from coercive questioning by advance notice of rights, identifying specifically the rights applied by the NLRB in *Johnnie's Poultry*, 146 NLRB 770, 775 (Apr. 1964), such as voluntariness. Sec'y Amicus Br. at 33-34; C. Br. at 34-35.

At the outset it is notable there is a high, perhaps insuperable, barrier to the Secretary's and Franks and Hoy's argument that rights of the workforce might have been wrongfully chilled. Anthony Swetz, President of United Mine Workers of America, Local Union representing the miners at the operation, testified at the hearing as the representative of the miners at the operation. Tr. 6.

Testifying in his capacity as the official representative of the miners at the operation, Swetz stated:

Q. And let me ask you -- we will sort of cut to chase. These two individuals were suspended for seven days?

¹³(...continued)

in position. Finally, while the Secretary must have re-examined the case in deciding to file an amicus brief, the Secretary's brief did not address MSHA's finding that Franks and Hoy's discrimination claims are meritless.

A. Correct.

Q. Do you disagree with that action by the company?

A. No.

Q. Why not?

A. I look at it, it's everyone there's responsibility is for everybody's safety in that mine. During this very serious allegation, we take this very seriously. Our local, myself, and the safety committee have zero tolerance for any type of unsafe activity, especially of this nature.

Tr. 138.

Swetz emphasized the danger of unexamined belts and the lack of any tolerance for failures in that area. Tr. 138-40. From the local union's testimony, it appears the miners recognized their most important right is the right to a safe and healthful workplace and that assistance and cooperation by miners is vital to assuring that right. Obviously, however, as the Judge, the Secretary, and Chairman Jordan and Commissioner Nakamura ignore this testimony, they do not accept the union's testimony.

Therefore, it is necessary to consider fully the Secretary and Franks and Hoy's arguments for a remand and my colleagues' decision to affirm the Judge in result. The Secretary's arguments, which capture Franks and Hoy's arguments, are fully described in the Secretary's amicus brief. The Secretary's first assertion is "the background of how the company's internal investigation came about could have created a coercive setting that would deter miners from making future Section 103(g) complaints." Sec'y Amicus Br. at 32. This appears intended to support a notion that any investigation by the operator may have chilled the miners' willingness to make anonymous complaints via section 103(g) or by speaking directly with MSHA.

The obvious error is that the operator had nothing whatsoever to do with "how the company's internal investigation came about." MSHA brought Franks and Hoy into the investigation and brought them to the operator. The operator's colloquies with Franks and Hoy did not begin with an operator investigation. Franks and Hoy voluntarily complained to MSHA outside the presence of the operator that they had personal knowledge of firebosses not performing necessary examinations. It was MSHA that then brought the operator into the investigation through meetings with Franks and Hoy. Jt. Stips. 15, 16, 33.

There is no evidence that the operator sought to find out the identity of the 103(g) complainant(s). Indeed, no evidence whatsoever has been produced suggesting inquiries by the operator at any time on that topic. No evidence is cited in the record that the operator directly or indirectly, explicitly or implicitly, expressed or had a suspicion that Franks and Hoy had filed the 103(g) complaint. No evidence in the record is cited to show that the 103(g) complaint played

any role in the operator's interviews – no evidence of any kind about a mention of 103(g) or that any miner utilized his or her 103(g) right. The operator's interviews sprang entirely out of the voluntary statements of Franks and Hoy at meetings convened by MSHA.

It is ironic that the Secretary cites actions attributable to MSHA as grounds for finding interference by the operator with statutory rights. Disclosure by MSHA of Franks' and Hoy's identities is the sole genesis of the operator's necessary investigation. If MSHA erred in its handling of its investigation by bringing Franks and Hoy into an interview also attended by management personnel, such error rests with MSHA. MSHA simply walked away from the investigation when Franks and Hoy refused to name wrongdoers. The operator, charged by law with preserving safety compliant mining conditions, simply could not ignore the complaints. This was not a "business" decision by the operator to continue the investigation but instead recognition of its obligation to provide a workplace compliant with standards of safety.¹⁴

Second, the Secretary suggests that elements of coercion may have been present in two ways, asserting:

(1) "Emerald Coal managers asked miners directly whether they had information about the firebossing allegation contained in the anonymous hazard complaint." Sec'y Amicus Br. at 33. A complaint about firebossing was made in a 103(g) complaint. However, the operator's questions to the miners were about the information the miners volunteered to MSHA that they had personal knowledge and documentary evidence of misconduct – the information that MSHA turned over to the operator. No one knows who filed the 103(g) complaint but everyone knows that the operator's interaction with Franks and Hoy began with MSHA introduction of them to the operator as part of the MSHA investigation.

At the risk of repetition, the transcript does not contain any evidence that the operator ever said anything about the 103(g) complaint to the miners. The Commission has found: "[i]t would make little sense to assert that an operator may not receive [cooperation regarding a safety hazard] because a miner elects instead to report such a condition only to MSHA." *Pack*, 11 FMSHRC at 173. A finding that the operator's investigation of a condition reported in a 103(g) complaint is interference with the rights of miners effectively would bar operators from

¹⁴ The Secretary interprets the second step of the NLRB standard for interference as requiring a "business justification." Sec'y Amicus Br. at 20. This demonstrates the danger of simply accepting NLRB case law for Mine Act cases without refinement for the different underlying purposes of the labor and mine safety laws. In the narrow sense that everything a business does is a business decision, an operator's duty to maintain a safety compliant work environment is a "business" decision. However, it is not simply a decision; it is an obligation imposed by law and ethical standards of today's workplace. For a mine operator, the duty to investigate a safety complaint is not a matter of a "dollars and cents" business decision. It is a duty. Even if it were properly characterized as a "business" decision, there would be no more pressing business obligation than maintaining a safety compliant workplace.

undertaking potentially life-saving investigations, and is at odds with the purpose of the Mine Act and an operator's duties under it.

Of course, such an investigation cannot be used by an operator in an effort to discover the identity of a 103(g) complainant, but no evidence of such purpose has been cited here. When MSHA presented the operator with witnesses claiming direct knowledge of potential lethal misconduct, the operator could not ignore it.

(2) Because 45 other miners did not provide any evidence of failures by firebosses, the Secretary argues: "the responses that miners gave during the company interviews could suggest that a coercive dynamic was at play." Sec'y Amicus Br. at 33. The Secretary conjures a "suggestion" of coercion out of an investigation that included interviews by MSHA of approximately 30 to 35 miners and operator interviews with 14 additional miners. One can easily imagine what the Secretary's argument would have been if the operator had not interviewed other miners – the Secretary would contend that interference (and perhaps even discrimination) was proven by the "focus" on Franks and Hoy – that is, other potential witnesses were not interviewed.

A finding of interference cannot be premised upon a chain of unsupported speculation including an implication by the Secretary that other miners lied during the interviews.¹⁵ Here, the Secretary unacceptably speculates that (a) because two miners say they saw firebosses skip inspections, (b) it must be true, so (c) other miners must also have witnessed it, and so (d) other miners lied during their interviews, and (e) such lying must have been coerced by someone and, (f) that someone must be the operator notwithstanding the Secretary's voicing of suspicion that the local union supported the firebosses. Findings of violations must be based upon a preponderance of the evidence, not rank and unsupported speculation.

Third, Franks and Hoy, with the support of the Secretary assert that the interviews of them should be deemed coercive because they were not advised of, or given by, the operator a "right" to choose not to be interviewed. Hinging their argument on labor law, they apparently argue that the interrogation of a miner about a critical danger to safety is inherently coercive and that such coercion may be avoided only by advising miners that cooperation with the operator on an important safety matters is discretionary. Incredibly, the Secretary charged with securing mine safety actually supports Franks and Hoy's argument, essentially suggesting a per se rule that reporting of safety hazards and participation in safety interviews must be voluntary and the operator must advise the miner of such voluntariness in advance:

[I]t does not appear from the record that Emerald Coal took steps to minimize the potential chilling effect of its questioning on

¹⁵ The Secretary goes so far as to say that one witness' praise of the firebosses could be taken as showing that the miners were being "untruthful" and, hence, were being coerced. The Secretary does not suggest whether the coercion was coming from the operator or, as implied by his claim that it was representing the firebosses, the union. Sec'y Amicus Br. at 24-25, 34.

hazard reporting to MSHA. It did not inform miners that cooperation with the company investigation was voluntary, nor did it appear to provide a way for miners to anonymously provide feedback regarding the firebossing allegations contained in the hazard complaint.

Sec’y Amicus Br. at 34.

In support of his position, the Secretary cites a decision of the Sixth Circuit approving a decision of the NLRB finding an employer committed an unfair labor practice by instituting a rule the effect of which would be to require employees to cooperate in management’s investigation of unfair labor practice charges against it. *Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 478 (6th Cir. 2002), *enforcing* 332 NLRB 347, 349 (2000). The Secretary ignores Commission case law and, even more importantly, the profound differences between the animating spirit of the NLRA and the Mine Act.

In *Pack*, the Commission rejected an argument by the Secretary that a rule requiring miners to report unsafe conditions “chilled” their statutory rights. The Commission upheld the discharge of a miner even though the miner had reported the danger to MSHA. Concurring in part and dissenting in part, Commissioner Backley strongly remonstrated:

Elsewhere the Secretary states, “even where a miner believes that an imminent danger exists Section 103(g) does not require the miner to report that condition to the operator” Sec. Br. at 7.

I find the Secretary’s position on this issue to be perverse. The Secretary apparently condones the manner in which Mr. Pack acquitted himself – leaving the mine knowing that a dangerous condition existed, yet failing to warn oncoming fellow workers. In her zeal to find a way to prevail in this case, the Secretary seems to be willing to turn a blind eye toward the fundamental goal of the Act – to ensure that every miner does all that he can to make the work environment safe.

Pack, 11 FMSHRC at 174.

In *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201 (Feb. 1994), the Commission considered whether a safety program requiring the reporting of injuries was unlawful. The Commission found the reporting of injuries was a protected activity. But, it also held that requiring the reporting of injuries did not interfere with miners’ rights. Finding the program lawful, the Commission hearkened back to Commissioner Backley’s opinion in *Pack*, and held:

In *Secretary on behalf of Pack v. Maynard Branch Dredging Co.*, 11 FMSHRC 168, 172 (February 1989), *aff’d*, 896 F.2d 599 (D.C.

Cir. 1990), the Commission rejected a similar argument as to the chilling of reporting, raised against a company policy that required employees to report dangerous conditions to the company. The Secretary asserted that such a policy would intimidate miners from exercising their rights under sections 103(g) or 105(c) of the Act. *Id.* at 172-73. The Commission held that the operator was entitled to initiate such a policy that called for miner participation in the maintenance of safety. *Id.* As Commissioner Backley stated in *Pack*, a “fundamental goal of the Act [is] to ensure that every miner does all that he can to make the work environment safe.” *Id.* at 174 (concurring in part and dissenting in part).

Id. at 208.¹⁶

Apparently in the same spirit of zealotry, the Secretary again fails to appreciate the fundamental difference between the NLRA and the Mine Act. The NLRA protects the right of employees to take concerted action for their benefit against an inferentially adverse employer. In *Beverly Health*, cited by the Secretary, the Sixth Circuit upheld an NLRB order against an employer rule requiring an employee to answer the employer’s questions related to unfair labor practice charges against that very employer. There is no semblance of applicability of such a principle under the NLRA to requiring a miner under the Mine Act to report safety hazards or to aid in an investigation into claims of acts of malfeasance that could result in a mine explosion. It remains perverse for the Secretary to assert what would amount to a per se rule that miners’ cooperation in reporting safety hazards and cooperating with safety investigations must be voluntary.

Having rejected the Secretary’s arguments, it is imperative to discuss the thoughtful opinion of Chairman Jordan and Commissioner Nakamura. It appears they find three “interferers” in this case – the local union or workforce, MSHA, and the operator. Reading their opinion, one may feel some sympathy for Franks and Hoy whom Chairman Jordan and Commissioner Nakamura find were classically put between a rock and hard place – that is, between intimidation by fellow miners and the demand for cooperation by management. Moreover, Chairman Jordan and Commissioner Nakamura appear to find the operator least culpable of the three interferers – the actions by MSHA were neglectful and actions by the union

¹⁶ Without doubt, reporting of injuries is a protected activity. Therefore, also without doubt, requiring miners to report injuries and, as a result, face suspension or discharge is far more likely to inhibit miners from engaging in protected activity than requiring that, when miners make a safety complaint, they provide details permitting the operator to address the complaint properly. Regarding the requirement for reporting injuries, the Commission found the benefit of having miners do all they could to ensure safety resulted in the policy not being facially invalid. If miners’ statements must only be made on the basis of voluntariness, then it would appear all mandatory reporting programs, regardless whether stated in a written policy, would be facially violative of section 105(c). Congress cannot have intended such a result.

or workforce were intentional. Chairman Jordan and Commissioner Nakamura reiterate that they do not impute any discriminatory intent to the operator or MSHA. Slip op. at 26.

Their opinion premises operator interference upon a duty to understand and accept the difficult position of Franks and Hoy. They essentially find that the operator interfered with the miners' rights by failing to realize and accommodate that, if Franks and Hoy were required to do their duty and cooperate on safety, other members of the local union, fearing they also might someday have to do their duty, would not make confidential safety complaints. I have some differences with a few specific points in their opinion.¹⁷ But, their basic position gives reason to pause. Expression by miners of safety concerns are an important part of their duty to assist and participate in achieving compliance with the Mine Act. Therefore, as my colleagues correctly observe, actions by management that chill the willingness of miners to present safety concerns raise issues under section 105(c), even if such result is not intended.

However, on the basis on the totality of the evidence and especially given the seriousness of the allegations against firebosses, I would find that the operator's investigation did not violate section 105(c) under either prior Commission case law or the test espoused by the Secretary. Thus, I would not find a section 105(c) violation.

First, errors by MSHA and naked intimidation by co-workers is an unsuitable basis to find the operator chilled the reporting of safety complaints at the mine. To do so would be

¹⁷ Particularly troublesome are my colleagues' characterization of the managers' questioning as persistent. Slip op. at 28. In my opinion, two and three interviews, respectively, of the miners does not fit the definition of "persistent." This case likely would be before us even if the two had been disciplined following the first interview. Secondly, my colleagues object to the interviews being conducted by the compliance manager and a human resource representative they call "high-ranking." Slip op. at 28. The compliance manager was overseeing an important safety investigation, and thus his participation was appropriate, and it was beneficial to have a human resources professional present to assure proper practices. My colleagues would also have the interviewers attempt to dispel coercion, by informing the miners of the purpose of their questions. Slip op. at 29. My reading of the record is that Franks and Hoy were intelligent persons who understood that management was attempting to determine which firebosses were not performing their jobs so the situation could be addressed. Of particular concern is my colleagues asking whether "the operator's actions were narrowly tailored enough to promote its business justification." Slip op. at 32 n.14. In my opinion, to describe the operator's interest in a necessary safety investigation, aimed at fulfilling an operator's duty to comply with the law, as a mere "business justification," downplays what was at issue in the investigation. Moreover, it is hard to see how an interview consisting of one question – who are the malfeasant firebosses? – could be more narrowly tailored. Finally, I take issue with the relevancy of NLRB cases cited in my colleagues' opinion for support. *Multi-Ad Services, Inc. v. NLRB*, 255 F.3d 363 (7th Cir. 2001), involved actually coercive questioning (including a suggestion that the employee quit) regarding concerted, protected labor matters, while *Stoody Co.*, 320 NLRB 18 (1995), arose out of wholly different facts that are irrelevant to this Mine Act case.

capitulation to thuggish behavior that seriously endangers miners and, unchecked, will continue to inevitable tragic results – an unacceptable public policy.

Second, such a finding would place operators whose workers adopt clannish characteristics in a legally untenable position. They cannot effectively investigate and take action upon safety complaints, anonymous or volunteered, directed at individuals if they do not have and cannot obtain admissible evidence on the culpability of the allegedly malfasant miner. But, unlike MSHA, they should not and cannot ignore or just walk away from such claims risking a tragic consequence for the workforce.

Further, I do not find the operator's action could or will significantly chill the atmosphere for safety complaints aimed at other workers beyond its apparently nearly frozen state. Because Franks and Hoy's fears, and consequent desire for confidentiality, arose from the possible need to identify other union workers, the operator's action only could affect complaints involving allegations of specific misconduct by other hourly employees.

Regarding that narrow subset of complaints, it is clear there was and will be, until the culture of the mine changes, a desire for anonymity regarding such complaints. The operator's actions in this matter, however, will not increase the desire for anonymity but only may heighten somewhat the care a miner may take in protecting that anonymity. On the other hand, this case involves claims that deliberate misconduct by firebosses endangered the very lives of miners. Weighing any slight increase in vigilance for their anonymity by complaining miners against a vitally important effort to get information that could prevent a mine disaster, I cannot find a case of interference. This is not a "business justification" defense; it is a business and moral imperative.

Congress recognized that operators need the cooperation of miners to fulfill the operators' duty to provide safe and healthful working conditions. Such cooperation is an integral part of protecting the lives of miners. Although liability rests with the operator, safety is a "joint" task.

We must understand that, for operators to fulfill their primary obligation to safety and health, they need from time-to-time to demand cooperation from miners through reporting unsafe conditions and assisting with discovering unsafe working conditions and those responsible for them. When a miner with expressed knowledge of unsafe conditions or practices, especially when the alleged practice threatens a tragic disaster, arbitrarily refuses to identify those responsible for the practices in response to management questioning, the miner should be disciplined.

CONCLUSION

I am in the unenviable position of a one-person minority. Nonetheless, I find some solace in the opinions of the Commission issued today.

The majority of the Commission has rejected the Judge's finding of discrimination. Given the lack of substantial evidence of a motive to discriminate on the basis of protected activities that is an appropriate result.

Chairman Jordan and Commissioner Nakamura's opinion appears to be based upon the unique and specific facts of this case. Therefore, I do not see disturbance to management policies related to reporting safety or health hazards or injuries. Nor should it affect the necessary cooperation between miners and management on matters of safety and health.

Third, the postulate that a coercive dynamic began with a misplaced loyalty to, or a fear of, other miners (individually or through the local union) to protect malfeasant firebosses is a call to action. The mining community will benefit if the entire community (MSHA, management, unions, training programs, and schools) recognizes and acts on the need to train current and prospective miners that solidarity is shown through performing jobs safely and through willingly reporting those few miners who endanger the safety and health of their brothers and sisters. Miners must not fear retaliation from their co-workers for reporting safety failures of other miners any more than fearing retaliation by an operator.

Perhaps, therefore, this case may spur action to increase miners' awareness of their duties to one another and, through that awareness, increase the joint efforts of labor and management to achieve safe and healthful working conditions — a goal sought by Congress and all persons interested in the welfare of our nation's miners.

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 5, 2014

CLOVERLICK COAL COMPANY, LLC,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. KENT 2012-699R
	:	Order No. 8374442; 2/17/2012
v.	:	
	:	Docket No. KENT 2012-700R
SECRETARY OF LABOR	:	Citation No. 8374443; 2/17/2012
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2012-943
Petitioner	:	A.C. No. 15-18241-286281
	:	
v.	:	
	:	
CLOVERLICK COAL COMPANY, LLC,	:	Mine: No. 1
	:	
Respondent	:	

DECISION AND ORDER

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, Department of Labor, Nashville, Tennessee for Secretary of Labor

R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania for Cloverlick Coal Company, LLC

Before: Judge McCarthy

I. Statement of the Case

These cases are before me upon two notices of contest and a related 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). On February 17, 2012, in response to an anonymous 103(g) complaint alleging dangerous conditions at the highwall, MSHA launched an investigation of Cloverlick Coal Company’s No. 1 mine. As a result of the investigation, MSHA issued imminent danger Order No. 8374442 to Cloverlick Coal Company, LLC (“Cloverlick”), which required the withdrawal of miners from the site of a recent excavation at the surface of the mine. MSHA also

issued Citation No. 8374443, which alleged that the operator failed to maintain safe access to all working places. On February 21, 2012, a duplicate safe access citation, Citation No. 8374444, was issued to Cumberland Mine Service, Inc. (“Cumberland”), the contractor in charge of the excavation and related construction project.¹

On June 27, 2013, a hearing was held in Tazewell, Tennessee, after unsuccessful settlement negotiations.² Thereafter, post-hearing briefs were filed. The primary issues presented are whether the section 107(a) imminent danger Order No. 8374442 was properly issued to Clovelick, and whether Cloverlick violated 30 C.F.R. § 77.205(a), as alleged in Citation No. 8374443.

After careful review of the record, I find that the MSHA inspector was reasonable in his determination that the conditions at Cloverlick No. 1 mine presented an imminent danger to miners. As extant Commission and United States Court of Appeals precedent precludes review of the Secretary’s discretion to issue a citation or order to a production operator or independent contractor, or both, I affirm Order No. 8374442. Although a hazardous condition existed, I find that Citation No. 8374443 alleges an impermissibly broad interpretation of the safe access standard. Because the Secretary has failed to establish that safe access was not provided, Citation No. 8374443 is vacated.

¹ Cumberland contested the proposed civil penalty for Citation 8374444 and the case was docketed as KENT 2012-999. On January 8, 2013, Administrative Law Judge Janet Harner approved a settlement of this docket reducing the proposed penalty from \$3,224 to \$2,400.

² After hearing, the parties agreed to settle Citation No. 8399036, which alleged a violation 30 C.F.R. § 75.220(a)(1). According to the terms of the proposed settlement, Citation No. 8399036 remains unchanged, but the Solicitor justifies a reduction in penalty from \$3,143 to \$2,500 by stating that there is a legitimate factual and legal dispute regarding gravity. I have considered the representations and documentation submitted with the partial settlement, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

On the entire record, including my observation of the demeanor of the witnesses,³ and after considering the post-hearing briefs, I make the following:

II. Stipulations

The parties agreed to the following stipulations.

- 1) Cloverlick is an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), at the coal mine at which the Order and Citation at issue in this proceeding were issued.
- 2) The Cloverlick No. 1 Mine, an underground bituminous coal mine at which the Order and Citation were issued in this proceeding is subject to the jurisdiction of the Mine Act.
- 3) Cumberland Mine Service is an independent contractor and is an “operator” as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), at the coal mine at which the Order and Citation at issue in this proceeding were issued.
- 4) This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.
- 5) The individual whose signature appears in Block 22 of the Citation and Order at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the Citation was issued.
- 6) A true copy of the Citation and Order at issue in this proceeding was served on Cloverlick, as required by the Mine Act.
- 7) The total proposed penalty for the Citation in this proceeding will not affect Cloverlick’s ability to continue in business.
- 8) Cloverlick had contracted with Cumberland Mine Service to perform work on its stacker belt, which included installing additional supports so that the stacker tube could be removed. Such work included excavation for the foundation of a new support for the belt. Such excavation included use of a track-mounted excavator, which is shown in the photograph marked as R. Ex. 11.

³ In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

- 9) As a result of the inspection, Cumberland received Citation No. 8374444 alleging a violation of 30 C.F.R. § 77.205(a) on February 21, 2011. MSHA proposed a penalty of \$3,224. Cumberland paid a penalty of \$2,400.⁴
- 10) Cloverlick Mine No. 1 is in non-producing status at the time of this stipulation.

Jt. Ex. 1.⁵

III. Findings of Fact

Cloverlick Mine No. 1 is an underground bituminous coal mine located near Cumberland, Kentucky. Jt. Ex 1; R. Br. 2.⁶ In February 2012, Cloverlick contracted with Cumberland to construct an elevated coal stacker belt to transport coal from inside the mine to the pit area. In the pit area, coal is stockpiled until it can be loaded onto trucks and transported off the property. Tr. 67; *see also* R. Ex. 1. The elevated belt was to be supported by cables anchored to two support structures located at the top and bottom of a steep hill. R. Ex. 1.

On February 17, 2012 at 12:10 p.m., MSHA received an anonymous safety complaint through its 1-800 hotline. P. Ex. 2.; Tr. 40. The complaint alleged dangerous conditions at the Cloverlick Mine No. 1. P. Ex. 2. Because the record of the complaint produced at hearing was heavily redacted to protect the identity of the anonymous complainant, the only description of the alleged hazard in the redacted complaint is that “[t]he wall has water coming out of it and hazardous rocks coming down.” P. Ex. 2.

At 12:30 p.m., the complaint was forwarded to the MSHA district office and subsequently emailed to Robert Rhea, MSHA field office supervisor in Harlan, Kentucky. P. Ex. 2, at 2. Based on the information in the initial complaint, Rhea drafted a “sanitized” complaint that stripped out any facts that might identify the anonymous complainant. Tr. 42-43; *see also* P. Ex. 2, at 1. The sanitized complaint lists Cloverlick as the operator, but Rhea wrote “N/A” to

⁴ The stipulation has been changed to reflect a proposed assessment, rather than an assessment, and to correct the amount of the proposed assessment.

⁵ In the interest of brevity, stipulations regarding the authenticity of exhibits have been omitted.

⁶ In this decision, “Tr.” refers to the hearing transcript; “J. Ex. #” refers to the parties’ joint exhibits; “P. Ex. #” refers to the Secretary’s exhibits; “R. Ex. #” refers to the Respondent’s exhibits. P. Exs. 1-9 and R. Exs. 1-12 were received into evidence. Tr. 13, 15, 103, 130, 167, 179, 222, 244.

indicate not applicable, in the space allotted for the contractor's name. P. Ex. 2, at 1; Tr. 52, 53.⁷ The sanitized complaint describes the alleged hazardous condition as "Highwall dangerous - Rock & loose materials falling." P. Ex. 2, at 1. While Rhea was working on the paperwork, MSHA supervisor Lester Cox called inspector Silas Brock at home and asked him to come to the Harlan field office to help respond to the safety complaint. Tr. 44-45, 61.

At 12:50 p.m., Rhea called Cloverlick's maintenance foreman, Ralph Martin, to warn the company about a credible allegation of a possible imminent danger. Tr. 46-49, 55; P. Ex. 6, at 1.⁸ Rhea did not issue an imminent danger order during the call, but he requested that Cloverlick remove all miners in the affected area until an investigation could be completed. Tr. 46-49. After the call, Rhea briefed inspector Brock on the complaint. Brock reviewed the un-redacted complaint and was given a copy of the sanitized complaint to present to the operator. Tr. 62.

Brock's contemporaneous notes indicate that he arrived at the Cloverlick mine at 2:05 p.m. Within minutes of arriving, Brock began drafting an imminent danger order and citation to issue to Cloverlick. P. Ex. 6, at 1.⁹ Brock drove down to the pit area, where he met Cloverlick superintendent, Lake Standridge, and vice president of Cumberland, Craig Garland. Tr. 65-66.

Standridge and Garland explained to Brock that Cumberland had excavated a hole at the base of the hill to build a foundation for one of the legs that would support the new coal stacker belt and a retaining wall for the hillside. Tr. 67, 82. Standridge told Brock that once Cloverlick was contacted by Rhea, the miners were removed from the area around the hole and no further work was done to the site. Tr. 70. Garland told Brock that "the next step would be to get into

⁷ Although the sanitized report lists assistant district manager Ed Sparks as the recipient of complainant's call, it is clear from the testimony that the call was made to MSHA's 1-800 hotline, not directly to MSHA. Tr. 40; *see also* P. Ex. 2, at 2. The 1-800 hotline is managed by an independent contractor. Tr. 40-41.

⁸ It is not common for MSHA to notify a mining operator in advance of sending an inspector to investigate a safety complaint. Tr. 55. In this situation, however, Rhea considered the threat to miner safety to be serious and credible enough to warrant a departure from normal practice. *Id.*

⁹ Although Brock testified that he issued the imminent danger order and citation after a 45-60 minute investigation, the citation, order, and his contemporaneous notes indicate that the order and citation were issued at about 2:09 p.m., several minutes after Brock arrived on site. P. Ex. 3; P. Ex. 4; P. Ex. 6, at 2-3; *but see* Tr. 71, 93-94, 119; P. Ex. 6, at 5 (indicating that Brock had been at the mine for an hour before issuing the citation and order). In resolving this apparent conflict, I find it most likely that Brock began drafting the citation and order as soon he reached the mine based on the information in the complaint and his discussion with Rhea. After the investigation was complete, Brock may have added additional findings before formally issuing the order and citation to Cloverlick.

the hole that they excavated, build forms, and put rebar in there so they can pour concrete.” Tr. 70-71.

Brock testified that the hillside directly above the work site was very steep and contained a significant amount of loose dirt and rocks, as well as concrete blocks and scrap metal. Tr. 65, 83, 86; *see also* P. Ex. 7-B. In addition, water was draining out of the side of the hill and had accumulated at the bottom of the hole “a little over ankle deep.” Tr. 78. Brock testified that when he saw “all that loose material, I believe[d] in my heart that there was an imminent danger there and that if anyone was in that hole they would be in [the] line of a mud slide.” *Id.*

During the investigation, Garland informed Brock that the hole had been excavated that morning and that no miner had accessed the hole prior to the inspector’s arrival. Tr. 96, 107. Garland testified that on the morning of the inspection, miners were working near the hole tying rebar in preparation for building the structure’s foundation. Tr. 181. After receiving the call from Rhea, Garland testified that his foreman moved the miners and rebar to another location, away from the dig site. Tr. 180-81.

Inspector Brock, unable to rely upon facts gleaned from the anonymous complaint, was only able to testify that no miners worked in or near the hole during his time at the mine. Tr. 95-96. Brock, however, did notice orange paint along the side of the hole, but was unsure if miners had entered the hole to make the marks. *Id.*, *see also* R. Ex. 3-C. Contemporaneous photographs taken during the inspection reveal three horizontal lines of distinctive orange marking paint along the sides of the hole. R. Ex. 3-C.¹⁰ Garland testified that he did not know who made the markings, nor what the paint was intended to signify. Tr. 207.

According to Garland, Cumberland had identified the loose material on the bank as a potential hazard prior to MSHA’s intervention, and the contractor was considering various means of addressing the hazardous conditions. Tr. 179, 189, 202; *see also* Jt. Ex. 3.¹¹ Garland

¹⁰ I take administrative notice of the fact that brightly-colored spray paint is commonly used in construction and mining sites as a way to mark surveying points, potential hazards, or locations of future construction.

¹¹ Garland testified that the dangerous conditions on the hill were noted during the pre-shift examination of the work site. Tr. 209. At the request of the undersigned, the parties were asked to produce a copy of the pre-shift examination report to be marked as Joint Exhibit 3. Tr. 211. The report indicates that during an examination on February 17, 2012 at 7:00 a.m., unsafe conditions were noted at the highwall near the stacker belt. Jt. Ex. 3. The report was signed by the foreman, but the co-signature for the mine manager/mine foreman/superintendent was left blank. Under action taken, foreman Johnny Gray wrote, “check for cracks.” *Id.* Under remarks, Gray wrote, “unsafe highwall, built berm’s, (sic) cautioned off area, advised men of the condition’s (sic).” *Id.* At hearing, however, it was undisputed that the area was not cautioned off and berms were not built until after inspector Brock was on site. Tr. 90, 125, 137-38, *see also* R. Letter Accompanying Submission of Jt. Ex. 3. As the report included facts that were not
(continued...)

indicated that Cumberland had tried to clean up the hillside with an excavator, but was concerned that it was unsafe for miners to work in close proximity to the hillside. Tr. 202, 239. Brock confirmed that the bank showed markings, which indicated that an excavator had scraped off loose material on at least two occasions. Tr. 128. According to Garland, Cumberland did not intend to allow miners into the hole. Instead, Cumberland was considering two alternatives: (1) using an excavator outside the hole to lift the form and rebar into place, or (2) redesigning the coal stacker belt to move the support out further from the side of the hill. Tr. 202-03.

At hearing, Garland and Brock gave conflicting testimony as to whether it was possible for Cumberland to place a wooden frame and pre-assembled rebar into the hole using the excavator, without requiring miners to be in the hole. Based on his limited experience building forms for concrete, Brock did not think it was possible for the excavator to place the forms, constructed outside the hole, into place in the hole, without requiring miners to access the alleged unsafe area at the base of the embankment. Tr. 77-79. Garland, however, maintained that he had done so in the past, but admitted that a miner would have to be near the hole to adjust the form when it is lifted into place by the excavator. Tr. 190-91.

Brock testified that Garland was resistant to the idea of moving the foundation away from the hillside. In fact, Garland told Brock that because “times are tough in the coal industry,” Cumberland would have to lay off the miners if Cumberland could not proceed with construction that day. Tr. 94-95. Based on Cumberland’s eagerness to proceed with the construction project, Brock determined that it was likely that miners would have to access the area at the base of the bank and be exposed to a significant risk of injury from falling earthen material. Tr. 93-94. Accordingly, Brock issued a section 107(a) imminent danger order to Clovelick, but not Cumberland. Order No. 8374442 specifically alleges:

The operator has excavated a hole approximately 4 to 5 feet deep by 10 feet wide by 20 feet long at the construction project at the coal stockpile area. This hole is the site where workers are about to construct concrete forms for a restraining wall. The adjacent hillside at the hole is very steep and covered with wet loose earth, water is observed coming out of the hillside and is accumulating in the hole. This 107(a) Order is issued to stop the project and prohibit any activity at this site due to the threat of falling rock and/or sliding earth material.

P. Ex. 3.

¹¹(...continued)
available during the pre-shift examination, I find the reliability of the report suspect and that at least certain portions of the report were created after the fact.

In conjunction with the imminent danger order, Brock also issued a section 104(a) safe access citation to Cloverlick.¹² Citation No. 8374443 specifically alleges a violation of 30 C.F.R. § 77.205(a), as follows:

Safe access is not provided at the retaining wall construction work site near the coal stockpile area. The operator has excavated a large hole, to build concrete forms, beside a steep hill side, that is covered with wet loose earth, water is observed coming out of the hillside and is accumulating in the hole. This condition puts miners at risk of being struck by falling rocks or loose earth materials. A 107(a) imminent danger order #8374442, has also been issued concerning this matter. No miners have yet been observed in the area cited.

P. Ex. 4. The Citation originally alleged that the conditions on the hillside were highly likely to result in a lost workdays or restricted duty injury to four miners. The Citation designated the violation as S&S, and attributed moderate negligence to Respondent Cloverlick. *Id.*

At 4:35 p.m., Citation No. 8374443 was terminated when a berm was erected around the hole and the area was cautioned off with tape. Tr. 147-48, 194-95; *see also* P. Ex. 7-G. Brock, however, did not terminate the imminent danger order because it was his understanding that Cumberland was planning to resume construction of the foundation. Tr. 148. Further, Brock admitted to Garland that he did not know how the operator could abate the imminent danger and promised to return to the mine with a ground control specialist or engineer to provide further instruction. Tr. 94.

On February 21, 2012, Brock returned to the mine site with MSHA mining engineer, Kevin Doan. Tr. 99. Upon re-examination of the site, Brock observed that a significant amount of material had fallen from the hillside into the hole. Tr. 100. Based on the size and amount of material in the hole, Brock amended Citation No. 8374443 to allege that the hazard would be reasonably likely to result in permanently disabling injuries. Tr. 109.

The imminent danger order was terminated after Doan discussed the problem with Garland and Curtis Scott, general manager for Cloverlick. Tr. 117-18. As a result of those discussions, Cloverlick agreed to fill the hole and re-engineer the project so that the foundation could be constructed further away from the hillside. *Id.*

¹² As noted above, a duplicate safe access citation that issued to Cumberland was settled.

IV. Disposition and Analysis

A. Order No. 8374442

1. Validity of Imminent Danger Order

An imminent danger exists whenever “the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” 30 U.S.C. § 802(j); *see also Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *E. Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted)). For an imminent danger order to issue under section 107(a), there must be some degree of imminence such that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. *Id.* The Secretary bears the burden of proving the reasonableness of the imminent danger order by a “preponderance of the evidence.” *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993).

The concept of imminent danger is not limited to hazards that pose an immediate danger. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2163 (citing *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741 (7th Cir. 1974)); *see also Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996); *VP-5 Mining Co.*, 15 FMSHRC 1531, 1535 (Aug. 1993); *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (Mar. 1993). Although the Commission has cautioned against narrowly construing imminent danger to include only immediate threats, there must be some degree of imminence to support an imminent danger order. That is, a hazard must be impending so as to require the withdrawal of miners. *Island Creek Coal Co.*, 15 FMSHRC at 345.

The undersigned “must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.” *Wyoming Fuel*, 14 FMSHRC at 1291 (quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 31 (7th Cir. 1975)). An inspector abuses his discretion “if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners.” *Island Creek*, 15 FMSHRC at 345. An abuse of discretion also “includes errors of law.” *See, e.g., Utah Power*, 13 FMSHRC 1617, 1623, n. 6 (Oct. 1991).

Both parties agree that the earthen material on the steep bank of the hill posed a danger to anyone working in the excavated area at the time the Order was issued. Cloverlick, however, claims that an imminent danger did not exist because miners were never exposed to the danger. R. Br. at 11. Cloverlick relies on the fact that Brock did not see anyone working in the hole during his inspection, and he was unable to testify definitively that miners had accessed the hole prior to the inspection. Cloverlick further argues that any future action by Cumberland that might place a miner in the excavation is mere speculation on the part of the inspector because Cumberland was aware of the problem, but had not yet decided how to proceed. *Id.*; *see also* Tr. 160, 164, 168, 170. Thus, Cloverlick contends that the Secretary has failed to meet his burden to show that the danger was imminent.

Upon examination of the record, I find Cloverlick's arguments unconvincing. I do not credit Garland's self-serving testimony that Cumberland had not made a decision about how to proceed with the construction project. After the danger posed by the embankment was brought to the attention of management, Cumberland did not halt construction while it weighed its options. Rather, Cumberland proceeded to prepare the site for construction. By the time the imminent danger order was issued, Cumberland had all of the materials needed for building the foundation at the site and had begun to prepare the area for construction. That morning, Cumberland, armed with the knowledge of the danger the embankment posed, excavated the hole and instructed miners to begin building forms and tying rebar. Tr. 160. Once these tasks were completed, construction of the foundation could begin immediately. See Tr. 170.

While it is possible that Cumberland could have aborted the project at the last minute, such a scenario is unlikely given steps that Cumberland had taken up to this point. Furthermore, Brock convincingly testified that Garland was intent on completing the project expeditiously and was resistant to the idea of re-engineering the project to move the foundation away from the embankment. Tr. 94-95. According to Brock, Garland said that there would be adverse financial implications for the company if Cumberland was unable to continue construction, and Cumberland would have to lay off the miners involved in the construction project. *Id.*

Having found that construction was imminent, I turn to Cloverlick's argument that the foundation could be constructed in such a way that miners would not have to work in the hazardous area. It is clear that at least one miner had already accessed the recently excavated hole on the morning of the inspection. Despite Garland's testimony to the contrary, the Secretary has produced the proverbial "smoking gun" in the form of testimony and photographic evidence clearly showing that the walls of the excavated area had been marked with spray paint. Tr. 96; P. Ex. 7a. Cloverlick has not offered any evidence that would refute the reasonable inference that any miner that applied these markings would have to be in very close proximity to the base of the dangerous embankment on the morning of the inspection, when the hole was excavated.

Accordingly, I find that Cumberland had already allowed miners to work in the hole despite its knowledge of the danger. Given this finding, it is reasonable to infer that Cumberland would have continued to do so, absent the anonymous complaint and quick intervention by MSHA.¹³ Even assuming arguendo, that placing the forms and rebar with the excavator was possible, I find that miners would, at some point, have to access the hole during the course of continued mining operations. At hearing, Garland conceded that a miner would typically need to be positioned nearby to adjust the form as it is lifted into place. Tr. 190-91. Further, it strains credulity to assume that miners would not need to enter the hole to secure the form to the ground before pouring the concrete for the foundation.

¹³ Cumberland's voluntary withdraw of miners from the excavation site does not preclude the issuance of an imminent danger order. The immediacy of the danger is determined by assuming continued normal mining operations, not operations that have been altered after MSHA alerts a mine of the danger. *E. Assoc. Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277 (4th Cir. 1974).

Accordingly, I find that the Secretary has shown by a preponderance of the evidence, that inspector Brock's determination that the embankment posed an imminent danger to miners working in the excavated hole was reasonable. The credible evidence proffered at hearing strongly refutes Garland's assertions that miners had not accessed the hole earlier in the morning and would not be required to do so under continued normal mining operations. Despite knowing the danger that the embankment posed, Cumberland continued to prepare the site for construction. Given the adverse financial implications for Cumberland were it to halt construction, and given the effort that Cumberland had already expended to commence construction, it is reasonable to expect that construction would have continued, absent MSHA's intervention, and miners inevitably would have been placed in harm's way.

2. Abuse of Discretion

Cloverlick argues that the Secretary abused his discretion by issuing the imminent danger order to Cloverlick, and not Cumberland. R. Br. 21. Cloverlick maintains that since it retained Cumberland to construct the stacker belt and since the contract required that Cumberland and its employees comply with all relevant MSHA standards, Cloverlick should not be liable for the hazardous conditions solely within the control of Cumberland. *Id.* Cloverlick argues that, although the hazardous condition was located at its mine, it did not contribute to the alleged violative conditions in any way. *Id.* at 23.

Cloverlick further argues that by citing the production operator, MSHA has departed from its own norms without explanation. R. Br. 22, 23. Respondent adduced evidence that MSHA has not typically issued dual enforcement actions to Cloverlick and its contractor. R. Ex. 8, 9; Tr. 159. Moreover, Cloverlick points to the fact that the Secretary has promulgated official agency guidelines that set forth when an order can be issued to a production operator in addition to the contractor. *See* Independent Contractors: Final Rule, 45 Fed. Reg. 44495 (1980). Cloverlick argues that the order should be vacated because the inspector did not comport with these guidelines when issuing the imminent danger order to the production operator.

Section 107(a) of the Mine Act states in pertinent part that “[i]f . . . an authorized representative of the Secretary finds that an imminent danger exists, such representative shall . . . issue an order requiring *the operator of such mine* to cause all persons . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.” (emphasis added).

All of the courts that have had occasion to address the question have held that the Secretary may define an “operator” to include the production operator, the contractor, or both. *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 155 (D.C. Cir. 2006); *Int’l Union, United Mine Workers of Am. v. FMSHRC*, 840 F.2d 77, 83 (D.C. Cir. 1988); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 797 n. 2 (4th Cir. 1981); *Bituminous Coal Operators’ Ass’n v. Sec’y of Interior*, 547 F.2d 240, 246 (4th Cir. 1977) (addressing the issue under the Mine Act’s precursor, the Federal Coal Mine Health and Safety Act of 1969). That Cloverlick could contract away its duties under the Mine Act is anathema to the Act’s enforcement scheme. As the Commission has ruled, “it

bears emphasis that the miners of an independent contractor are invited upon the property of the mine owner to perform work promoting the interests of the owner. A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.” *Republic Steel Corp.*, 1 FMSHRC 5, 11 (Apr. 1979).

Accordingly, it is clear that the Secretary retains some discretion in determining which operator to cite for any given citation or order and that the contractual relationship with an independent contractor does not limit the production operator’s liability for violations of health and safety standards occurring at its mine. The only issue remaining is whether there are any bounds to the Secretary’s discretion in deciding to issue an imminent danger order to a particular operator, which warrant Commission review.

Historically, the Commission has held that the Mine Act grants it an independent adjudicatory role in reviewing the Secretary’s enforcement actions for abuse of discretion.¹⁴ See *Bulk Transp. Servs., Inc.*, 13 FMSHRC at 1360-61 (reviewing the Secretary’s choice to issue a citation to both the operator and contractor under an abuse of discretion standard); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (Aug. 1989) (same); see also *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1120 (9th Cir. 1981) (applying abuse of discretion test to Secretary’s decision to issue an imminent danger order to a production operator). The position of the Commission was informed by the language of the Mine Act, which gives it jurisdiction over “substantial question[s] of law, policy or discretion,” 30 U.S.C. § 823(d)(2)(A)(ii)(IV), and the Mine Act’s legislative history, which makes clear that “[t]he Commission was established as the ‘ultimate administrative review body’ under the Act due to the recognition that ‘an independent Commission is essential to provide administrative adjudication which preserves due process and instills much more confidence in the program.’” *Old Ben Coal Co.*, 1 FMSHRC 1480, 1484 (Oct. 29, 1979) (finding that the Secretary’s decision to proceed against a production operator for a contractor’s violation is reviewable by the Commission), citing S. Rep. No. 95-181, at 13 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 601, 635 (1978) (“Legis. Hist.”).¹⁵

¹⁴ In the past, the Secretary has proposed that imminent danger orders be reviewed under an arbitrary or capricious standard to determine if the order was issued to the proper operator. *Cyprus Indus. Minerals, Corp.*, 1 FMSHRC 2069, 2087 (Jan. 1980) (ALJ).

¹⁵ The Supreme Court has also recognized the *unique* role of the Commission as the arbiter of questions of interpretation of the Mine Act. Compare *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) with *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 157-58 (1991) (emphasizing the narrowness of the holding that OSHRC is authorized to review the Secretary’s interpretations only for consistency with the regulatory language and for reasonableness); see also *Speed Mining, Inc.*, 28 FMSHRC 773

(continued...)

More recently, the D.C. Circuit Court of Appeals and the Fourth Circuit Court of Appeals have departed from this traditional view of the scope of the Commission's authority. These courts have ruled that the discretion of the Secretary to issue a *civil penalty* to the production operator and/or the independent contractor is unreviewable. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006); *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310 (4th Cir. 2008). The *Twentymile* and *Speed Mining* cases both find that the Commission lacks any policy-making role and thus may not create standards to review the Secretary's enforcement actions in furtherance of the Mine Act's purpose and safety objectives. Without a Commission-made standard or a standard expressly set forth in the Mine Act, no judicially manageable standards exist for determining which operator to cite. Therefore, the courts reason that, despite the general presumption of reviewability of agency actions, the Secretary's decision to cite a production operator is unreviewable. *Speed Mining*, 528 F.3d at 317-17; *Twentymile*, 456 F.3d at 157.

Although *Twentymile* and *Speed Mining* address the Secretary's authority to issue civil penalty citations to multiple operators, their underlying rationale appears to proscribe Commission review of other enforcement actions, such as in the context of imminent danger orders.¹⁶ Aside from the Secretary's enforcement guidelines, the record does not provide any evidence of a standard by which the Commission may review the properness of the Secretary's decision to issue the imminent danger order to Cloverlick. The Commission and courts, however, have universally held that the enforcement guidelines are merely a general statement of policy that do not curtail the Secretary's discretion. *See, e.g., Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (Scalia, J.).

¹⁵(...continued)
(Sept. 2006) (Chairman Duffy, concurring and providing a detailed examination of the differences in the OSH Act and the Mine Act).

¹⁶ There are some important differences that arise in the context of imminent danger orders that are not present in the circuit courts' decisions dealing with civil penalty citations. Unlike civil penalty citations, the purpose of an imminent danger order is to promptly counteract dangerous conditions that present a threat to the safety of miners, not to punish or assign liability to an operator. *See* S. Rep. No. 95-181, at 38, Legis. Hist. at 626. This specific purpose makes the discretion exercised by the Secretary less like the type exercised in a prosecutor's charging decision, and more akin to an exercise of police power to protect the general welfare, over which the courts traditionally have review. *See Plymouth Coal Co. v. Com. of Pennsylvania*, 232 U.S. 531, 545 (1914) (seizing mine property to further a safety interest is an exercise of police powers and the arbitrary exercise of such powers is subject to judicial review). An imminent danger order grants the inspector the awesome power to essentially seize an operator's property and issue a withdrawal order to protect the health and safety of miners. Such decisions are made quickly, often without review of the inspector's superiors or agency counsel. *See Island Creek Coal Co.*, 15 FMSHRC at 346.

Similarly, I find that the enforcement guidelines lack the certainty to bind the Secretary's discretion in choosing which party to issue a citation or order. Although the guidelines were published in the Federal Register and later incorporated into the Secretary's Program Policy Manual ("PPM"), the language of both iterations does not seem to constrain the discretion of the Secretary in any way. The four enumerated instances when the Secretary may issue a citation or order to a production operator are merely illustrative examples to put the industry on notice of when it is "normally appropriate" to deviate from the standard procedure of issuing a citation to the party responsible for the hazardous condition or practice. Furthermore, the PPM makes clear that "MSHA's enforcement policy regarding independent contractors does not change production-operators' basic compliance responsibilities" to "assur[e] compliance by independent contractors with the Act and with applicable standards and regulations." U.S. Dep't of Labor, MSHA, Program Policy Manual, Vol. III, Part 45, at 10, (2003), *available at* www.msha.gov/REGS/COMPLIAN/PPM/PMMAINTC.HTM (last accessed July 17, 2014).

Although the guidelines do not have binding effect, the Secretary is still obligated to provide a reasoned explanation for a departure from established agency policy. *Telecomms. Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir.1986) ("When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms."). Not all agency pronouncements and advice, however, rise to the level of agency policy or norms. For the enforcement guidelines to be considered official policy, the record must demonstrate a pattern of reliance on the guidelines to support agency decisions to cite a particular operator. *See Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 539 (D.C. Cir. 1988).

There is insufficient evidence in the record to determine the extent of the Secretary's reliance on the enforcement guidelines. Although Respondent offered evidence that MSHA had not cited it for contractor violations in the past, inspector Brock testified that he had not reviewed the guidelines on the day of the initial inspection and did not appear to strictly follow the guidelines as a matter of general practice. Tr. 143, 146 (Brock testified that he normally issued dual enforcement actions when there are a significant number of contractor violations at a mine, which is not a consideration in the enforcement guidelines). Further, there is nothing in the record that indicates that MSHA expected that its inspectors would strictly adhere to the guidelines or that inspectors normally refer to the guidelines in determining which operator to cite.

Accordingly, under extant Commission and U.S. Circuit Court precedent I am constrained to find that the authority of the Secretary to issue an imminent danger order to a particular party is unreviewable. The undersigned sympathizes with Respondent's concern that the reversal of the Commission's authority to fully review the Secretary's enforcement discretion may lead to arbitrary enforcement.¹⁷ The clear intent of Congress, as thoughtfully set forth by

¹⁷ In the present case, there exists some evidence that the initial decision to issue the citation and order to Cloverlick could be construed as arbitrary and capricious, and not the product of reasoned decision making on the part of the Secretary. The sanitized complaint

(continued...)

former Chairman Duffy in the wake of the *Twentymile* decision, was for the Commission to ensure the consistent application of mine safety and health law and policy. *See Speed Mining, Inc.*, 28 FMSHRC 773, 775-86 (Sept. 2006) (Duffy, concurring). This interpretation of the Commission's role, however, has thus far failed to gain traction against the indiscriminate application of *Martin v. OSHRC* to Commission cases. Thus, I defer to the Commission's rather reluctant adoption of the principles set forth in the *Twentymile* and *Speed Mining* decisions. *See Imerys Pigments, LLC*, 28 FMSHRC 788 (Sept. 2006).¹⁸ Having found neither a judicially manageable standard by which to measure the appropriateness of the Secretary's actions nor an obligation for the Secretary to explain a departure from apparent agency policy, this administrative tribunal lacks a basis for curtailing the Secretary's enforcement discretion. Accordingly, Order No. 8374442 is affirmed.

B. Citation No. 8374443

Citation No. 8374443 alleges a violation of 30 C.F.R. § 77.205(a), which states in pertinent part that a "[s]afe means of access shall be provided and maintained to all working places." While MSHA has not established an official policy for this standard, it has published guidance on its website about issues that operators should consider when determining compliance. U.S. Dep't of Labor, MSHA, Top 20 Violations: Tips, *available at* www.msha.gov/STATS/Top20Viols/tips/11001.htm#.Uz7_KFdhoTk (last accessed July 17, 2014). These issues include:

¹⁷(...continued)

indicates that Brock went into the inspection with the belief that a subcontractor was not involved. P. Ex. 2, at 1. Inconsistencies in Brock's time line of events make it appear that he decided to cite Cloverlick for the violative condition before the inspection was complete. *See supra* note 9. At hearing, Brock was evasive when asked why he decided to issue the citation and order to Cloverlick, and not to Cumberland. Tr. 141-43. Furthermore, I am unconvinced by the Secretary's argument that the citation and order were issued to Cloverlick because Gilliam's notes showed that Cloverlick had actual knowledge of the condition prior to MSHA's intervention. *See* P. Br. 22. I credit Gilliam's testimony that he made his notes about the incident after the imminent danger order was issued, and that the notes represent a third-hand account of discussions between Cumberland employees. *See* Tr. 240-44.

¹⁸ In *Imerys Pigments, LLC*, the Commission applied the D.C.'s Circuit Court of Appeals's finding in *Twentymile* even though the operator could have appealed the case to the 11th Circuit Court of Appeals pursuant to section 106(a)(1) of the Act. *See Imerys Pigments, LLC*, 28 FMSHRC 788 (Sept. 2006). 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).

Is permanent or temporary access provided to all working places? Are miners climbing the equipment or machinery to access work places? Are fall-of-person hazards created by a lack of a stairway, ladder, ramp, etc.? Are handholds provided, if necessary? Are crossovers or crossunders provided where needed?

Id.

By all accounts, inspector Brock was unsure how to classify the hazard when drafting the citation. Garland recalled that when he asked Brock how the hazard could be remedied, Brock replied, “I don’t know enough about this to even make a citation.” Tr. 193. Similarly, Brock testified that before issuing the citation under § 77.205(a), he spoke with the MSHA assistant district manager by telephone and said, “I really don’t know what we could put on that [citation]. This is really not a high wall as far as rock or a high wall on a surface. If anything, it’s a matter of safe access.” Tr. 141-42. When asked at hearing how he reached this conclusion, Brock replied:

Safe access is a broad reaching standard, but it just means that if a miner has to work in an area, then that area has to be made safe for him to work there. And safe access was not provided at this retaining wall construction project due to the threat of land slides and mud slides from that steep embankment Because there’s nothing there to protect them from that wall of mud that’s ready to slide off. And if that’s the work site, then that’s definitely not safe access to the work site.

Tr. 106.

Section 77.205(a), however, is not nearly as broad as the inspector suggests.¹⁹ It is an oft-repeated legal maxim that “[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails.” *W. Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989). If the regulation is plain on its face, effect should be given to its clear meaning. *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990).

The clear meaning of § 77.205(a) only requires that the *means of access to a workplace* – be it a ladder, walkway, elevated platform, or other designated route – be free from safety hazards. The standard does not impose, as the inspector suggests, a “general duty” on operators to maintain safe workplaces. Such a duty would run afoul of the intent of Congress, who

¹⁹ The Secretary has not offered anything in the way of legal precedent or agency interpretation that supports reading the safe access standard so broadly. On post-hearing brief, the Secretary simply states, without further elaboration or support, that “[t]he Secretary submits that [§ 77.205(a)] has unquestionably been violated.” P. Br. 20.

purposely did not include in the Mine Act the type of general duty clause present in the Occupational Safety and Health Act.²⁰

Further, inspector Brock is mistaken in his assertion that ground control standards would not adequately address the hazardous condition at issue. While the hazard did not involve a “highwall” as was originally described in the 103(g) complaint, MSHA ground control standards for surface areas of underground coal mines specifically apply to embankments.²¹ For example, § 77.1004 requires inspection of banks and terrain that slopes into a working area, and requires miners to be withdrawn pursuant to § 77.1713 if hazardous conditions are present. Similarly, § 77.1006 proscribes miners from “work[ing] near or under dangerous highwalls or banks.”

As the Secretary has not opted to plead these other standards in the alternative, this case must rest on whether the Secretary can support the assertion that a danger to safety existed to miners accessing the work site. The Secretary acknowledges in his brief, “[t]he conditions described by Mr. Brock in his direct testimony, the photographs, and the written notes and testimony of Mr. Gilliam clearly establish that it was unsafe and extremely hazardous *for miners to work installing rebar in this hole* that had been dug at the base of the high wall created by this excavation.” P. Br. 20-21 (emphasis added). Similarly, Brock testified that “[t]he imminent danger only existed if you were in the hole.” Tr. 148; *see also* Tr. 151. While a hazard existed once a miner was in the hole, there was no evidence adduced at hearing to suggest that access to the workplace was itself dangerous. Accordingly, the citation is vacated.

²⁰ When the Conference Committee was reconciling the differences between the House and Senate versions of the Mine Act, the committee explicitly removed a general duty clause that was contained in the original Senate version of the Act. The Senate Conference Report explained:

The Senate bill contained a “general duty” clause which required operators to furnish safe and healthful working conditions free from recognized hazards likely to cause death or harm to miners and to comply with rules, regulations and orders promulgated under the Act. This provision would have permitted the issuance of citations or the assessment of civil penalties based on violations of the general duty. The House amendment had no general duty clause.

S. Conf. Rep. No. 461, 95th Cong., 1st Sess. 38–39, Legis. Hist. at 1316-17.

²¹ The mound of earth directly adjacent to the excavation site was referred to as a “bank” or “embankment” throughout the hearing. *See, e.g.*, Tr. 30, 106, 163, 179, 180, 183, 185, 186, 204, 205. In the citation, order, and inspector’s notes, it is referred to as a “hillside.” P. Exs. 4-6. For purposes of this decision, banks and hillsides are synonymous. *See* Dictionary of Mining, Mineral, and Related Terms 77 (1968) (defining bank as “a hill or brow”); Merriam-Webster’s Online Dictionary, <http://www.merriam-webster.com/dictionary/bank> (last accessed July 18, 2014) (defining bank as “a steep slope (as of a hill)” or “a mound, pile, or ridge raised above the surrounding level”).

V. Order

I find that inspector Brock reasonably determined that the conditions at Cloverlick No. 1 mine presented an imminent danger to miners. The Secretary, however, failed to prove by a preponderance of the evidence that Respondent Cloverlick violated 30 C.F.R. § 77.205(a) by failing to provide and maintain a safe means of access to all working places. Accordingly it is **ORDERED** that Order No. 8374442 be affirmed and that Citation No. 8374443 be **VACATED**.

It is further **ORDERED** that the operator pay a penalty of \$2,500.00 for settled Citation No. 8399036 within thirty days of this order, if it has not already done so.²²

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

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/tjr

²² Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 5, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2007-0447-M
Petitioner	:	A.C. No. 09-00023-125618 E027
	:	
v.	:	
	:	
S&S DREDGING COMPANY,	:	Mine: Lithona Mine Site
Respondent	:	

DECISION ON REMAND

Appearances: Robin Rosenbluth, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Petitioner
W. Christian Schumann, Esq. Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Petitioner
Melanie Garris, MSHA, U.S. Department of Labor, Arlington, VA
Terry Schildt, S&S Dredging, 405 Pope Trail, Covington, GA, 30014, for the Respondent

Before: Judge L. Zane Gill

This case is before me upon remand by the Commission to determine an appropriate civil penalty for Citation No. 7794620. This case was originally decided by Administrative Law Judge Avram Weisberger who retired prior to the issuance of the Commission’s remand.

Citation No. 7794620 charges a violation of 30 C.F.R. § 56.14100(b), which provides that: "Defects on any equipment, machinery and tools that affect safety shall be corrected in a timely fashion to prevent the creation of a hazard to persons." The citation was issued by the Secretary of Labor (“Secretary”) under 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1). 33 FMSHRC 1324 (May 2011) (ALJ). The Respondent contested the Secretary’s allegation that the violation was significant and substantial (“S&S”) and was the result of its unwarrantable failure to comply with a mandatory safety standard. *Id.* at 1325-1327. After a hearing, Judge Weisberger vacated both the S&S and unwarrantable failure designations. *Id.* at 1327.

The Secretary filed a petition for discretionary review, which was granted by the Commission. 35 FMSHRC 1979, 1980 (July 2013). The Secretary contended that the judge erred in overturning the S&S determination, and the Commission agreed. *Id.* The Secretary did not, however, petition for review of the judge’s decision regarding the operator’s unwarrantable

failure. *Id.* at n2. The Commission found that “[t]he judge erred by limiting S&S violations to those that are reasonably likely to result in injuries that require hospitalization, surgery, or require a long period of recuperation.” *Id.* at 1981. The Commission reversed the decision regarding whether Citation No. 7794620 should be designated as S&S, and affirmed the S&S designation. *Id.* at 1983. The proceeding was remanded to this court so that the appropriate penalty could be assessed. *Id.*

According to Section 110(a)(3)(A), the minimum penalty for any citation or order issued under Section 104(d)(1) shall be \$2,000. 30 U.S.C § 820(a)(3)(A). However, under Section 104(d)(1), the Secretary has the burden of proving that there was a violation of a mandatory health or safety standard, that such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and that such violation was caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standard. 30 U.S.C. § 814(d)(1). In this case, the judge found that a health and safety standard, namely Section 56.14100(b), was violated. 33 FMSHRC at 1325. Additionally, the Commission affirmed that Citation No. 7794620 should be designated as significant and substantial. 35 FMSHRC at 1983. The judge also determined that the unwarrantable failure standard was not met, and this determination was not included in the petitioned for review. *Id.* at n2. Therefore, because the Secretary did not meet his burden to prove the existence of an unwarrantable failure, the Section 104(d)(1) order must be amended to a citation under Section 104(a). *See VA Crews Coal Co.*, 15 FMSHRC 2103, 2105-2106 (October 1993). Thus, there is no statutory \$2,000 minimum in this case.

The assessment of the penalty then turns to Section 110(i) of the Mine Act. Under Section 110(i) the Commission is to consider the following when assessing a civil 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 in abatement of the violative condition. 30 U.S.C § 820(i). 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, which is bounded by proper consideration for the statutory criteria. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In exercising this discretion, the Commission has continuously found that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the de novo assessment of civil penalties does not require “that equal weight must be assigned to each of the penalty assessment criteria.” *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination “substantially diverge[s] from those originally proposed, it behooves the . . . judge to provide a sufficient explanation of the bases underlying the penalties assessed.” *Spartan Mining*, 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, the “credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.” *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (March 1983). As Senior Judge Zielinski recently expounded in *American Coal Co.*, 35

FMSHRC ____, slip op at 54-55, No. LAKE 2008-666 (May 19, 2014), the purpose of explaining significant deviations from proposed penalties is to avoid the appearance of arbitrariness. *See Sellersburg*, 5 FMSHRC at 293.

The Secretary's regulations for the determination of a penalty amount by a regular assessment take into consideration all of the statutory factors that the Commission is obligated to consider under section 110(i) of the Act.¹ 30 C.F.R. § 100.3. The product of that regular assessment formula provides a useful reference point, which promotes consistency in the imposition of penalties by Commission judges. *See Magruder Limestone Co.*, 35 FMSHRC 1385, 1411 (May 2013) (ALJ).

The stipulations agreed to by the parties and filed at the hearing were numerous and many speak to the 110(i) factors that are used to assess a penalty. It was stipulated that Respondent had six violations of a mandatory health and safety standard in the 15 months preceding the citation at issue, and that Respondent had one repeat violation of the mandatory safety standard cited in the citation at issue in the 15 months preceding the issuance of the citation. At the trial, Robert Knight, the site inspector who issued the citation at issue stated that S&S Dredging had received citations in the last two years, which showed other issues with mobile equipment that were not taken care of in a timely manner. (Tr. 42:14-19).

As to the size of the business, there was uncontradicted testimony that only two persons worked at the mine. 33 FMSHRC at 1327.

The judge determined that the operator was negligent to a high degree. *Id.* The parties stipulated that: 1) the L160 Michigan loader ("Loader") at issue had been used extensively with a broken bottom step and a bent and partially caved in second step, sometimes on a daily basis; 2) the Loader at issue had been used in the violative condition for approximately two years prior to the citation at issue; 3) the Loader operators mounted and dismounted the Loader several times during a work day; 4) the second step on the Loader from the ground, which was the first usable step due to the condition of the broken bottom step, was three feet from the ground; 5) the second step on the Loader from the ground was bent, and partially caved in; 6) the operator's owner, Patty Schildt, was aware of the damaged condition of the Loader steps for approximately two years prior to the issuance of the citation; 7) the violative condition was obvious; and 8) Ms. Schildt and another employee of Respondent regularly operated the Loader and climbed the steps of the Loader while in the violative condition. Additionally, Robert Knight testified that the

¹ Under the regulations, penalty points are assigned based on the size of the operator and the operator's controlling entity; the operator's history of previous violations; the operator's history of repeat violations of the same standard; the degree of the operator's negligence; and, the gravity of the violation, including the likelihood of an occurrence of an event against which a standard is directed, the severity of injury or illness if the event were to occur, and the number of persons potentially affected if the event were to occur. A penalty amount is determined by applying the total of the points assigned to a "Penalty Conversion Table," which specifies penalties ranging from \$112 for 60 or fewer points, up to the statutory/regulatory maximum of \$70,000 for 144 or more points. That figure may then be adjusted by reducing it by 10% if the operator demonstrated good faith in abating the violation. 30 C.F.R. § 100.3(f). A further reduction may occur if the operator can demonstrate to MSHA's District Manager that the penalty will adversely affect its ability to continue in business. 30 C.F.R. § 100.3(h).

negligence is high because management was aware of the condition and allowed it to exist for two years. (Tr. 39:18-22).

The parties stipulated that the Respondent was out of business at the time of the hearing.

As to the gravity of the violation, the Commission found that there was an S&S violation due to the factors stipulated above and the trial testimony. Robert Knight testified that a potential injury from the broken Loader step could cause a lost workday or lost time injury (Tr. 29:13-14); there are no other means to access the cab besides the broken steps (Tr. 35-36: 24-2); and the likelihood of injury was reasonably likely to occur since the Loader was used in that condition for the last two years (Tr. 39:15-18). Additionally, Ms. Schildt testified that she possibly suspected that the condition of the Loader steps violated MSHA standards (Tr. 61:5-8); she did not do anything to find out whether the condition of the loader steps was a violation of MSHA standards (Tr. 61:9-12); and she did not correct the condition of the loader step (Tr. 61:13-15).

Finally, the parties stipulated that Respondent made no effort to abate the condition cited prior to May 3, 2007.

Considering all of these factors, I find that a penalty of \$350.00 is appropriate.

WHEREFORE, it is **ORDERED** that Citation No. 7794620 be changed from a 104(d)(1) citation to a 104(a) citation, and it is **ORDERED** that S&S Dredging pay a penalty of **\$350.00** within thirty (30) days of the filing of this decision.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution (*Via Certified Mail Return Receipt Requested*):

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 6, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2013-66-M
Petitioner,	:	A.C. No. 30-01283-310585
	:	
v.	:	
	:	
HANSON AGGREGATES NEW YORK,	:	Mine: St. Johnsville Plant
INC.,	:	
Respondent.	:	

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

Appearances: Emily O. Roberts, Esq., U.S. Department of Labor, Nashville, Tennessee, for Petitioner;

David P. Kurz, Hanson Aggregates New York, Inc., Jamesville, New York, 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”) under section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act” or “the Act”), 30 U.S.C. § 815(d). An authorized representative of the Secretary, on behalf of the Mine Safety and Health Administration (“MSHA”), issued Citation No. 8708748 to Hanson Aggregates New York, Inc. (“Hanson” or “Respondent”) for a violation of 30 C.F.R. § 46.9(b) because Hanson did not list the names of the training instructors or the duration of the training on MSHA Form 5000-23. Hanson, which is *pro se*, timely contested the citation and the case was assigned to me for disposition. The parties have jointly stipulated to the facts and filed cross-motions for summary decision.

I. STATEMENT OF THE CASE

Rather than hold a hearing, representatives for the Secretary and Hanson agreed that the facts in this matter were not in dispute and the case could be disposed through summary

decision. The parties jointly filed Stipulated Facts, then each filed cross-motions for summary decision. In addition, the Secretary filed a reply to Respondent's motion.¹

The Secretary asserts the following: (1) that 30 C.F.R. § 46.9(b) requires operators using MSHA Form 5000-23 to include the information listed in section 46.9(b)(1) through (b)(5); and (2) that the plain language of the regulation and other explanatory materials provided fair notice of these requirements to Hanson. (Sec'y Mem. at 3–8; Sec'y Reply at 1–2.) Hanson contends that 30 C.F.R. § 46.9(a) limits the application of section 46.9(b) to forms other than MSHA Form 5000-23. (Resp't Mot. at 1–2.) Hanson also disputes the reasonableness of the Secretary's interpretation because MSHA Form 5000-23 does not provide spaces for the information required by section 46.9(b). (*Id.* at 2.) Further, Hanson claims it did not receive fair notice because MSHA inspectors did not bring the regulation to its attention prior to issuing Citation No. 8708748. (*Id.*) Finally, Respondent argues that MSHA Form 5000-23 does not provide fair notice because it does not explain that the information listed in section 46.9(b) is required. (*Id.*)

II. ISSUES

The issues before me are as follows: (1) whether 30 C.F.R. § 46.9(b) requires operators to provide the information listed in paragraph (b) when using MSHA Form 5000-23; (2) whether Hanson had fair notice of the Secretary's interpretation of section 46.9(b); and, (3) if a violation is found, whether the proposed penalty is appropriate. For the reasons that follow, the Secretary's motion for summary decision is **GRANTED** and Hanson's motion for summary decision is **DENIED**.

III. FACTUAL BACKGROUND

As set forth in the Stipulated Facts, the parties have stipulated to the following preliminary facts:

- (1) On November 27, 2012, Respondent (hereinafter "Hanson") was the operator of [the] St[.] Johnsville Plant, a crushed/broken limestone surface mine (hereinafter "[the] Plant"), in Montgomery County, New York, Mine ID No. 3001283;
- (2) The Plant is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h);
- (3) On November 27, 2012, products of the Plant entered commerce, or the operations or products thereof affected commerce, within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. § 803;

¹ For the purposes of this Decision, I refer to the Secretary's Memorandum in Support of the Secretary of Labor's Motion for Summary Decision as "Sec'y Mem.", Respondent's Motion for Summary Decision as "Resp't Mot.", and the Secretary's reply brief as "Sec'y Reply."

- (4) Approximately 9,007 hours were worked at the Plant in the year [in] which the contested citation was issued;
- (5) A copy of the citation at issue in this proceeding was served on Hanson by an authorized representative of the Secretary;
- (6) Hanson timely contested the citation;
- (7) Hanson is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case; and
- (8) The proposed penalty will not affect Respondent's ability to remain in business.

The parties further stipulate to the following facts regarding Citation [No.] 8708748:

- (1) In 2012, Hanson completed the annual refresher training required by 30 C.F.R. § 46.8;
- (2) Hanson used MSHA form 5000-23 to certify that the training had been completed. A copy with two examples of form 5000-23 as Hanson completed them for the 2012 training is attached as Exhibit 1;
- (3) Hanson did not record on MSHA form 5000-23 a list of competent instructor(s) who conducted [the] training or the duration of the training;
- (4) MSHA form 5000-23 does not indicate a space in which to write the information described in (3);
- (5) Hanson did not complete a supplement to MSHA form 5000-23 providing the information described in (3);
- (6) MSHA Inspector Kevin Forgette issued Citation [No.] 8708748 to Hanson on November 27, 2012 under 30 C.F.R. § 46.9(b) because Hanson did not include the information described in (3) in its certification of annual refresher training;
- (7) To abate the citation, Hanson entered the information described in (3) on the previously completed MSHA forms 5000-23. A copy of the forms as they appeared after abatement is attached as Exhibit 2.

(Stipulated Facts at 1–2.)

IV. PRINCIPLES OF LAW

A. Summary Decision

Commission Rule 67 provides the standard for granting any motion for summary decision:

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

B. Principles of Regulatory Interpretation

Regulatory interpretation is a two-step process. *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1080 (10th Cir. 1998). First, the Commission determines whether a regulation is ambiguous. *Id.* A regulation is ambiguous when its meaning is open to “plausible and divergent interpretations.” *Daanen & Janssen*, 20 FMSHRC 189, 192 (Mar. 1998). Unambiguous regulatory provisions “must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results.” *Jim Walter Res., Inc.*, 28 FMSHRC 579, 587 (Aug. 2006). Second, if the regulation is ambiguous, the Commission “determine[s] whether the Secretary’s interpretation of [a] regulation is reasonable and whether the operator was given fair notice of its requirements.” *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992). The Secretary’s interpretation of its own regulation is controlling unless “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

C. Fair Notice

An operator has received fair notice when “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). Published notices informing the regulated community of the Secretary’s interpretation are a factor in determining fair notice. *See Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010).

V. DISCUSSION, ANALYSIS, AND CONCLUSIONS OF LAW

A. Summary Decision is Appropriate

The parties have jointly stipulated to the facts but disagree over the application of the regulation to those facts. Based on the entire record, I determine that there is no genuine issue as to any material fact. Therefore, I conclude that the issues before me are appropriate for summary decision pursuant to Commission Procedural Rule 67(b), 29 C.F.R. § 2700.67(b).

B. Interpretation of 30 C.F.R. § 46.9(b)

MSHA cited Hanson for violating section 46.9(b), which is a recordkeeping regulation for purposes of miner training oversight. Section 46.9(b) states that “[t]he form must include . . . the duration of training [and] the name of the competent person who provided the training. . . .” 30 C.F.R. § 46.9(b). Hanson stipulated that it did not include the duration of training and the name of the competent person who provided the training when filling out MSHA Form 5000-23. (Stipulated Facts at 2.) Thus, the issue here is whether the “form” mentioned in section 46.9(b) includes MSHA Form 5000-23. For the reasons below, I determine that the regulation is ambiguous, but the Secretary’s interpretation of the regulation is reasonable and entitled to deference. Consequently, I conclude that section 46.9(b) requires operators using MSHA Form 5000-23 to provide the information listed in section 46.9(b)(1) through (b)(5), even though MSHA Form 5000-23 does not request or provide space for that information.

1. The regulation is ambiguous.

A regulation is ambiguous when it is open to “plausible and divergent interpretations.” *Daanen & Janssen*, 20 FMSHRC at 192. The Secretary asserts that the term “form” clearly applies to MSHA Form 5000-23. (Sec’y Mem. at 3.) However, section 46.9(b) does not define “form” or explicitly include MSHA Form 5000-23. 30 C.F.R. § 46.9(b). Instead, paragraph (a) of section 46.9 discusses two types of “form[s]” that section 46.9(b) may include. *See generally Morton Int’l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) (requiring provisions to be read harmoniously). Section 46.9(a) states as follows: “You must record and certify on MSHA Form 5000-23, or on a form that contains the information listed in paragraph (b) of this section, that each miner has received training required under this part.” I note that section 46.9(a) uses commas to set apart from “MSHA Form 5000-23” the phrase “or on a form that contains the information listed in paragraph (b) of this section.” 30 C.F.R. § 46.9(a). This phrasing therefore permits an alternative interpretation whereby the “form” mentioned in section 46.9(b) could refer *solely* to “a form that contains the information listed in paragraph (b) of this section” mentioned in section 46.9(a), thereby excluding MSHA Form 5000-23. Accordingly, I determine that the regulation is ambiguous. *See Daanen & Janssen*, 20 FMSHRC at 192.²

² Section 46.9(b) does not specifically reference MSHA Form 5000-23, and I need not address the form’s implications because I have determined that the text of section 46.9 itself
(continued...)

2. The Secretary's interpretation of the regulation is reasonable and entitled to deference.

As I have determined the regulation to be ambiguous, I must therefore determine whether the Secretary's interpretation of the regulation is reasonable. *See Walker Stone Co.*, 156 F.3d at 1080. The Secretary interprets "form" in section 46.9(b) to include both MSHA Form 5000-23 and the alternative "form" mentioned in section 46.9(a). (Sec'y Mem. at 3.) For the following three reasons, I determine the Secretary's interpretation of the regulation to be reasonable. First, the Secretary's interpretation is consistent with the language of the regulation. Here, the Secretary interprets "form" in section 46.9(b) as a general term that encompasses every type of form mentioned in section 46.9(a), including MSHA Form 5000-23. (Sec'y Mem. at 3.) Looking at the text, the regulation does not provide definitions that restrict the meaning of "form" in section 46.9(b) to a particular type of form. 30 C.F.R. § 46.9. Although the lack of definitions does not necessarily prohibit a more restrictive reading, the Secretary's interpretation is a permissible reading of the regulation.

Second, the Secretary's interpretation is consistent with the dual purposes underlying this recordkeeping regulation: (1) consistency of information; and (2) flexibility. *See* Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines: Final Rule, 64 Fed. Reg. 53,080, 53,099, 53, 121 (Oct. 2, 2000) [hereinafter "Final Rule"]; *see also Ideal Cement Co.*, 12 FMSHRC at 2414 ("[A regulation] must be construed in light of its underlying purpose."). Indeed, MSHA intended for section 46.9(b) to apply generally to "training records and certificates" rather than a particular type of form. Final Rule, 64 Fed. Reg. at 53,099. Further, section 46.9(a) allows operators flexibility in choosing a form approved by the Secretary with the intent to minimize their paperwork burden. *Id.* at 53,121. Accordingly, section 46.9(a) operates to approve any form containing the "minimum information" listed in section 46.9(b). *Id.* Specifically, section 46.9(a) approves the use of existing MSHA Form 5000-23, which some operators have used to comply with the Secretary's Part 48 rules.³ *Id.* Thus, the Secretary's interpretation of "form" in section 46.9(b) to include MSHA Form 5000-23 ensures that mine operators will provide the required information regardless of the form used and allows those operators flexibility in the form used. The Secretary's interpretation is therefore consistent with

² (...continued)

permits alternative readings. Nevertheless, I note that MSHA Form 5000-23 includes neither space for operators to provide the information required by section 46.9(b) nor instructions to do so. (*See* Stipulated Facts at 2, Ex. 1.) Such a design likewise contradicts the Secretary's claim that section 46.9(b) unambiguously applies to MSHA Form 5000-23.

³ The preamble explains that operators already used MSHA Form 5000-23 to comply with training certification requirements under 30 C.F.R. part 48. Final Rule, 64 Fed. Reg. at 53,121. Accordingly, section 46.9(a) allows operators to adapt MSHA Form 5000-23 for dual use under 30 C.F.R. part 46, rather than developing another form, "so long as the information required by final [section] 46.9(b) is included on the form." *Id.*

his purpose of maintaining consistent records and allowing operator flexibility to reuse MSHA Form 5000-23 for 30 C.F.R. part 46 compliance.

Third, the Secretary's interpretation of the regulation is consistent with the safety-promoting purposes of the Mine Act. *See Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (requiring regulatory interpretations to be consistent with the purpose of the underlying statute). Miner training is a critical element of an effective safety and health plan that protects the safety of the miner. *See* 30 U.S.C. § 801. The duration of the training and the name of the instructor who provided the training allow MSHA to determine if operators have provided adequate training to their miners. Final Rule, 64 Fed. Reg. at 53,122. Requiring operators using MSHA Form 5000-23 to provide the information listed in section 46.9(b) facilitates effective oversight of miner training, which promotes the health and safety of miners. Conversely, a more restrictive reading of "form" in section 46.9(b) would permit operators using MSHA Form 5000-23 to withhold important information at the expense of the health and safety of their miners.

Where the Secretary's interpretation of a regulation is reasonable, deference is accorded to that interpretation even if it differs from what "a first-time reader of the regulation . . . might conclude was the 'best' interpretation of [the] language." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1994) (citation omitted). Because I have determined that the Secretary's interpretation of the regulation is reasonable and consistent with the purposes of the regulation and the Mine Act, I must defer to the Secretary's interpretation.

C. MSHA Provided Fair Notice of the Secretary's Interpretation

The Secretary does not claim that Hanson had actual notice, and I have determined section 46.9(b) to be ambiguous. However, MSHA does not have to provide Hanson with actual notice, inasmuch as MSHA has provided sufficient notice of the Secretary's interpretation by publishing multiple explanatory notices on its Web site. *See generally Mainline Rock & Ballast*, 693 F.3d 1181, 1187 (10th Cir. 2012) (holding that adequate notice of regulatory requirements can be derived from published explanatory notices). These explanatory notices plainly indicate that operators must include the duration of training and a list of competent instructors on MSHA Form 5000-23 if they elect to use the form under part 46. (Sec'y Mem. at Ex. P-3, Ex. P-5.) Moreover, the Final Rule implementing section 46.9(b) also indicates that training records and certificates must include this information regardless of the particular type of form. 64 Fed. Reg. at 53,121. A reasonably prudent person familiar with the mining industry and the protective purposes of this recordkeeping regulation would have availed themselves of the various materials that described the specific requirements of this standard. Accordingly, I conclude that Hanson had fair notice regarding the requirements of section 46.9(b).

In sum, I defer to the Secretary's reasonable interpretation and determine that section 46.9(b) requires operators using MSHA Form 5000-23 to provide a list of the competent instructor(s) who conducted the training and the duration of the training. Hanson stipulated to omitting this information on MSHA Form 5000-23. Furthermore, MSHA provided Hanson with

fair notice of the Secretary's interpretation of 30 C.F.R. § 46.9(b) by publishing explanatory notices on its Web site. Consequently, I conclude that Hanson violated 30 C.F.R. § 46.9(b), and the Secretary is entitled to summary decision as a matter of law under Commission Rule 67, 29 C.F.R. § 2700.67(b). Citation No. 8708748 is, therefore, **AFFIRMED** as written.

VI. PENALTY

The Commission assesses penalties *de novo* for violations of the Mine Act. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600–01 (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. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

I recognize that this case is before me because Hanson relied on common sense rather than a lawyer. In fact, when informed of the section 46.9(b) requirements, Hanson provided the requested information to abate the citation in good faith. (Stipulated Facts at 2.) Perhaps Hanson would have provided the required information earlier if it had engaged in a detailed, legal analysis of an ambiguous regulation. Instead, Hanson trusted that MSHA Form 5000-23 would contain all the requirements for compliance. It may be time for MSHA to reconsider its earlier determination and provide the regulated community with a straightforward, sensible form. Although section 46.9(a) does not mandate the use of MSHA Form 5000-23, the form's design predictably misleads operators into violating the standard. Indeed, commentators predicted this misplaced trust and suggested that MSHA Form 5000-23 be revised because it was "confusing." Final Rule, 64 Fed. Reg. at 53,121. Despite MSHA's determination that MSHA Form 5000-23 was not "so confusing as to be unusable," *id.*, the Secretary may be well-advised to adopt loftier goals than providing a "[not] unusable" form. Given the circumstances and confusing design of the form, I find Hanson's negligence to be on the very low end of the spectrum.

Moreover, I find that the gravity of the violation is minimal, as I agree that Hanson's failure to provide complete training records in this case created no likelihood of injury and was expected to result in no lost workdays because the required training had been provided. (Sec'y Mem. at Ex. P-1; Stipulated Facts at 2.) Looking at MSHA's public, online retrieval database, I note Hanson's insignificant history of prior violations at the St. Johnsville Plant, which is limited to eight citations and does not include any prior citations regarding section 46.9(b). *See Mine Safety & Health Admin., Mine Data Retrieval System*, <http://www.msha.gov/drs/drshome.htm> (last visited August 5, 2014). I have also considered Hanson's size and the penalty's lack of effect on Hanson's ability to continue business. (Stipulated Facts at 1–2.) In light of the factors above, especially as they relate to Hanson's degree of negligence, I conclude that a penalty of \$50.00 is appropriate for Citation No. 8708748.

VII. ORDER

In light of the foregoing, **IT IS ORDERED** that the Secretary's motion for summary decision is **GRANTED** and Hanson's motion for summary decision is **DENIED**. Hanson Aggregates New York, Inc. is hereby **ORDERED** to **PAY** a penalty of \$50.00 within 40 days of this decision.⁴

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

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David P. Kurz, Hanson Aggregates New York Inc., P.O. Box 513, Jamesville, NY 13078

/mlb

⁴ 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.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 7, 2014

KNIFE RIVER CONSTRUCTION,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2013-0827-RM
v.	:	Order No. 8699159; 05/01/2013
	:	
	:	Docket No. WEST 2013-0828-RM
SECRETARY OF LABOR	:	Citation No. 8699160; 05/01/2013
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2013-0829-RM
Respondent	:	Citation No. 8699161; 05/01/2013
	:	
	:	Knife River Vernalis Plant
	:	Mine Id. 04-05459
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2013-1009-M
Petitioner	:	A.C. No. 04-05459-327568
	:	
v.	:	Knife River Vernalis Plant
	:	
KNIFE RIVER CONSTRUCTION,	:	
Respondent	:	

DECISION

Appearances: Courtney Przybylski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Nicholas Scala, Esq., Law Office of Adele L. Abrams PC, Beltsville, Maryland, for Respondent.

Before: Judge Manning

These cases are before me upon notices of contest by Knife River Construction and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Knife River Construction, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Sacramento, California and filed post-hearing briefs. One section 107(a) order and two section 104(a) citations were adjudicated at the hearing. The mine is an aggregate operation in San Joaquin County, California.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Order No. 8699159 and Citation No. 8699160

On May 1, 2013, MSHA Inspector Brian Chaix issued Order No. 8699159 under section 107(a) of the Mine Act and Citation No. 8699160 under section 104(a). Order No. 8699159 is an imminent danger order and Citation No. 8699160 alleges a violation of section 56.14101(a)(1) of the Secretary's safety standards. (Exs. G-1,3). Both the order and citation state that "scraper #1690402/LD9W95 did not stop on a grade when tested. The equipment was in service at the time of inspection, handling both raw feed and waste. The grade on which it was tested measured approximately 12-14%" *Id.* The order also states that "[a] verbal imminent danger order was issued to the site Foreman and regional Safety Director at approximately 0935, requiring that the scraper be removed from service until the brakes had been repaired and confirmed." (Ex. G-1).

Citation No. 8699160 also states that "[m]iners operating equipment which are not capable of stopping as required by the standard risk grave injury." (Ex. G-3). With regard to the citation, Inspector Chaix determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was Significant and Substantial ("S&S"), the operator's negligence was moderate, and that one person would be affected. Section 56.14101(a)(1) of the Secretary's safety standards requires, in pertinent part "[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(1). The Secretary proposed a penalty of \$1,140.00 for this citation.

For the reasons set forth below, I affirm Order No. 8699159 and modify Citation No. 8699160 to be non S&S.

Discussion and Analysis - Order No. 8699159

Inspector Chaix issued an oral imminent danger order immediately upon witnessing a scraper with defective brakes and then reduced that oral order into writing shortly thereafter in Order No. 8561259.

Section 3(j) of the Mine Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). The Commission has held:

Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Act or the Secretary's regulations. This is an extraordinary power

that is available only when the “seriousness of the situation demands such immediate action.”

Utah Power & Light Co., 13 FMSHRC 1617, 1622 (Oct. 1991) (quoting the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the predecessor to the 1977 Act).

An imminent danger exists “when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989). While the concept of imminent danger is not limited to hazards that pose an immediate danger, “an inspector must ‘find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.’” *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006). Inspectors must determine whether a hazard presents an imminent danger without delay, and an imminent danger determination must be supported “unless there is evidence that [the inspector] had abused his discretion or authority.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2164.

While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. Under the circumstances, an inspector must make a reasonable investigation of the facts and must make his determination upon the basis of the facts known or reasonably available to him. As the Commission explained in *Island Creek Coal Co.*:

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector’s subjective “perception” that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving his case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector’s imminent danger finding is subject to subsequent examination at the evidentiary hearing.

15 FMSHRC 339, 346-47 (Mar. 1993). An inspector “abuses his discretion...when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners.” *Utah, Power & Light Co.*, 13 FMSHRC at 1622-23.

I find that Inspector Chaix did not abuse his discretion when he issued Order No. 8699159; his belief that the defective brakes could lead to a serious injury of the operator of the equipment or the inspection party was reasonable. The inspector saw a large piece of equipment carrying a heavy load upon a steep grade. The brakes of that equipment did not function

properly and could not stop the vehicle upon the grade. Although the cited brakes were not completely incapacitated, defective brakes have caused numerous injuries and fatalities in mines. Defective brakes could reasonably cause a serious injury to miners and therefore constitute an imminent threat to miners. Considering the facts, Inspector Chaix's decision to issue an oral imminent danger order was reasonable. Order No. 8699159 is **AFFIRMED**.¹

Discussion and Analysis - Citation No. 8699160

Respondent does not contest the fact of violation for Citation No. 8699160, but disputes the penalty as well as the S&S,² highly likely, and fatal designations.

I find that the Secretary did not fulfill his burden to establish that Citation No. 8699160 was S&S because the Secretary failed to show that the violation was reasonably likely to contribute to an injury. Although the brakes on the cited scraper were defective, they did not render the equipment uncontrollable. The brakes failed to stop the equipment on the grade, but stopped the equipment quickly at the bottom of the grade. (Tr. 113). At all times, the scraper moved at a slow velocity, traveling only two to three miles per hour when descending the grade. (Tr. 155). It was uncommon for the scrapers to travel this grade at the mine and the scraper had not done so for more than a month. (Tr. 141). I credit Kevin Farwell, the operator of the scraper at the time, that he would usually not use the brakes on the grade and would have stopped operating the vehicle when he thought it posed a danger. (Tr. 161, 170). He testified that he would rely on the engine retarder to "hold the rig back." (Tr. 161). Furthermore, there was no equipment working in the area and no pedestrian traffic. The inspection party was present, but at the top of the hill rather than downgrade from the scraper. The cited area was a cut grade, which means it was surrounded by walls that contained the scraper. (Tr. 77).

¹ I reject Respondent's argument that if a citation issued in conjunction with an 107(a) order that addresses the same condition as the 107(a) order is not S&S then the 107(a) order must be vacated. A judge considers all evidence that the parties present de novo when reviewing an S&S designation. When reviewing a 107(a) imminent danger order, the judge reviews the order to determine if the inspector, who must make a quick decision at the time of issuance, "abuses his discretion[.]" *Utah, Power & Light Co.*, 13 FMSHRC at 1622-23. The difference between the review processes, although the underlying events are the same, means that a 107(a) order can be upheld without an underlying S&S violation. The Commission, furthermore, has held that the condition underlying an imminent danger order does not necessarily have to violate the Act, which suggests that no S&S violation is required to uphold a 107(a) order. *Id.*

² An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The Commission has held that "[t]he test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury." *Musser Eng'g, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

The Secretary relies upon the size of the equipment and steepness of the grade to support his S&S designation, arguing that each contributed to the likelihood of an injury as a result of an overtravel hazard. Both the mass of the equipment and the grade it travels upon may contribute to the likelihood of an injury by making the vehicle more difficult to stop. Although the operator of the scraper could be hurt in a sudden stop or collision with the wall, considering continued normal mining operations, the speed of the scraper, and the condition of the brakes, I find it was unlikely that the operator would be injured as a result of the cited condition. I credit the testimony of Farwell that, at a speed of three miles per hour, the engine retarder would keep the scraper under control. I agree with the Secretary that, as a general matter, operating heavy equipment on a grade without functioning service brakes creates a potential S&S violation, but under the facts here it was unlikely that Farwell would have lost control of the equipment. It was also unlikely that, in the event of an emergency, the malfunctioning service brakes would have contributed to an accident in which there was an injury. The Secretary did not present evidence to show that the cited condition was reasonably likely to contribute to a serious injury under continued normal mining operations and therefore the violation was not S&S.

Although the cited condition was unlikely to lead to an injury, if an injury occurred as a result of the condition it was reasonably likely that injury would be serious. As there were no miners working in the area, the operator was the most likely person to be injured. In the event of a rollover of the vehicle, the operator could suffer permanently disabling injuries. Due to the low speed of the vehicle, however, a rollover was unlikely. The most likely injury would be a lost workdays restricted duty type of injury. The gravity of this violation was serious.

I find that the violation was the result of Respondent's moderate negligence. The service brakes failed to hold when Farwell operated the scraper upon the grade, but performed well upon flat surfaces, which made it difficult for the operator to know that the brakes were defective. Farwell tested the brakes on the level route he expected to travel at the start of his shift and the brakes functioned properly. (Tr. 150). A berm blocked the area of the mine with the grade at the beginning of the shift and the operator only entered the area after production shut down and the berm was removed. Farwell did not expect to operate the vehicle on the grade the day of the inspection and had not traveled down the grade before the inspector witnessed it. That trip was Farwell's first opportunity to test the brakes on the grade. (Tr. 151). Farwell credibly testified that, under normal circumstances, he would have tested the brakes on this first run down the grade and, if the brakes failed to stop the scraper on the grade, he would have taken the scraper out of service to have the brakes checked and repaired as needed. (Tr. 163-65). After the brakes failed to hold the scraper on the grade in the presence of the inspector, however, Farwell should have stopped the equipment to take it out of service rather than driving back around the other side to return to the inspection party.

I hereby **AFFIRM** Order No. 8699159 and **MODIFY** Citation No. 8699160. With regard to Citation No. 8699160, I find that the cited condition was unlikely to contribute to an injury and therefore is non-S&S; a penalty of \$900.00 is appropriate for this violation.

B. Citation No. 8699161

On May 1, 2013, Inspector Chaix issued Citation No. 8699161 under section 104(a) of the Mine Act, alleging a violation of section 56.14107 of the Secretary's safety standards. (Ex. G-10). The citation states, in part, that "[t]wo vehicles were observed unattended on a grade on the mine haul road, while neither ribbed, banked, nor chocked. Neither vehicle was carrying chocks, but a bank was available." *Id.* Inspector Chaix 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. He determined that the operator's negligence was moderate, and that one person would be affected. Section 56.14207 of the Secretary's safety standards requires "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank." 30 C.F.R. § 56.14207. The Secretary proposed a penalty of \$100.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8699161.

Discussion and Analysis

I find that the cited conditions violated section 56.14107 because the two vehicles cited were parked on a grade, but the wheels were not chocked or turned into a bank. Section 56.14207 can be broken down into four requirements for parked mobile equipment: (1) an unattended vehicle (2) must be placed in park (3) with the parking brake set and (4) tires must be chocked or turned into a bank if a vehicle is on a grade. The cited vehicles were unattended, parked with parking brakes set on a grade, but the tires were neither chocked nor turned into a bank.

I find that the vehicles were unattended because no operator was in a position to immediately control the vehicles. Although Respondent argues that the vehicles were not unattended because the operators were not far from the vehicles, Respondent's witnesses agree with Inspector Chaix that they exited their vehicles. (Tr. 57-58, 121-22, 182). A miner outside of, but close to, a vehicle cannot operate the vehicle and therefore cannot attend the vehicle under the standard. *Nevada Cement Co.*, 18 FMSHRC 1653, 1655 (Sept. 1996) (ALJ). A miner in proximity to an improperly parked vehicle, furthermore, is exposed to an overtravel hazard if the vehicle rolls. A vehicle is unattended, regardless of the proximity of miners to the vehicle, if the operator is not in a position to immediately operate that vehicle.

Respondent argues that the vehicles were not actually "parked" because the drivers were going to immediately return to their vehicles. Section 56.14207, however, focuses upon unattended vehicles. When the standard states "when parked on a grade," the word "parked" is not an additional requirement within the standard. It references the fulfillment of the first three requirements of the standard. A vehicle is parked if it is unattended. If a vehicle is unattended and placed in park with a parking brake set, the vehicle is clearly "parked" under the safety standard and by any definition of the word. It is immaterial if the vehicle is in an area that vehicles are not commonly parked; the point of the standard is to create uniform procedures for operators to follow when exiting and parking vehicles anywhere in the mine.

The vehicles were placed in park with parking brakes set, and all the witnesses agree that the cited vehicles were parked upon a grade or slope. (Tr. 58, 131, 197).³ The tires were not chocked or turned into a bank. The condition cited in Citation No. 8699161 violates section 56.14207. The gravity of this violation was low.

I find that Respondent's moderate to high negligence caused the conditions cited in Citation No. 8699161. Respondent's witnesses, who parked the cited vehicles improperly, contend that they did not park the vehicles properly because the inspector insisted upon stopping immediately, the tires were turned toward the bank, it was unusual to stop in the area, and that the SUV was new. Both a foreman and the safety supervisor for the region parked vehicles improperly. Both men were responsible for parking properly, regardless of whether the inspector said to stop or they stopped independently.⁴ The fact that both men failed to park in compliance with the standard and produced an array of excuses as to why they did not suggests that employees working at the mine likely ignored proper parking procedures and the two witnesses were simply doing what was routine for them. Regardless of whether that is true, both should have known to comply with section 56.14107(a) and did not do so. A penalty of \$200.00 is appropriate for this violation. I increased the penalty from that proposed by the Secretary taking into consideration that the negligence actions were committed by two management employees.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Report, which was submitted by the Secretary. (Ex. G-14). The Secretary's records show that Respondent had only one violation in the previous 24 months and the violation was not S&S. Based on the penalty points assigned by the Secretary in Exhibit A to the petition for penalty, Respondent is a medium to small-sized operator. *Id.* The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon the ability of Knife River Construction to continue in business. The gravity and negligence findings are set forth above.

³ Respondent argues that the cited vehicles passed a roll test and therefore did not violate the standard. Kevin Smudrick, the Northern California Safety manager and operator of one of the vehicles, performed the roll test, however, after moving the vehicle, which did not show that the location where the vehicles were cited did not have a grade. All three witnesses agree that the vehicles were originally parked on a grade.

⁴ I find no merit in Respondent's argument that the inspector "set up" Respondent when he asked to stop. Even if this contention is true, furthermore, it is not grounds to vacate a citation. MSHA inspectors must cite any violations they find. 30 U.S.C. § 814(a). The inspector did not cause this violation by asking to stop; the operators had the opportunity to properly park the vehicles before exiting.

III. ORDER

For the reasons set forth above, I **AFFIRM** Order No. 8699159 and Citation No. 8699161 and **MODIFY** Citation No. 8699160. Knife River Construction is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,100.00 within 30 days of the date of this decision.⁵ The three contest proceedings are hereby **DISMISSED**.

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

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⁵ 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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August 11, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	DOCKET NO. WEVA 2011-0287
Petitioner,	:	A.C. No. 46-06578-236066
	:	
v.	:	
	:	
VIRGINIA DRILLING COMPANY, LLC	:	Mine: Red Fox Surface Mine
Respondent.	:	

AMENDED DECISION

Appearances: Virginia Fritchey, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Gene W. Bailey, Hendrickson & Long, PLLC, Charleston, West Virginia, for Respondent.

Before: L. Zane Gill, U.S. Administrative Law Judge

This case involves a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Virginia Drilling Company, LLC, at its Red Fox Surface Mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (2012) (the “Mine Act” or “Act”). The case comprises a single 104(d) (1) citation written on April 14, 2010, Citation No. 8107680. The parties presented testimony and documentary evidence at the hearing held in Beckley, West Virginia, on October 2, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations

The parties submitted the following stipulations prior to the hearing and on the date of hearing:

1. Virginia Drilling is a drilling and blasting company licensed by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”).
2. Virginia Drilling’s corporate offices are located in Vansant, VA.
3. Virginia Drilling was providing ATF-licensed blasting services at the Red Fox Surface Mine in April 2010 when Citation No. 8107680 was issued.

4. In April 2010, Red Fox Surface Mine was operated by Justice Highwall, Inc., a subsidiary of Justice Energy.
5. Justice Highwall, Inc was an “operator” as defined in Section 3(d) of the Act at the coal mine which the citation in this proceeding was issued.
6. The products of the mine at which Citation No . 8107680 was issued entered commerce, or the operation or products thereof affected commerce, within the meaning and scope of Section 4 of the Act.
7. The penalty which has been assessed for this violation pursuant to 30 U.S.C. § 820 will not affect the ability of Virginia Drilling to remain in business.
8. MSHA Coal Mine Inspector John Stone, whose signature appears in Block 22 of Citation No. 8107680, was acting in his official capacity as an authorized representative for the Secretary of Labor when the citation was issued.
9. True copies of Citation No. 8107680, with any and all modifications and abatements, were served on Virginia Drilling or its agent as required by the Act.
10. Citation No. 8107680, along with any and all modifications and abatements, were issued on the dates stated therein and were issued by a duly authorized representative of the Department of Labor, MSHA.
11. The Citation contained in Exhibit S-1 attached hereto is an authentic copy of Citation No. 8107680, including any and all modifications or abatements.
12. Citation No. 8107680 was timely abated.
13. Citation No. 8107680, along with any and all modifications and abatements, may be admitted into evidence, without objection, although Respondent may dispute specific allegations contained within the order.
14. On April 14, 2010 MSHA issued Citation No. 8107680 citing a violation of 30 C.F.R. § 77.1303(pp) of the Federal Mine Safety and Health Act.
15. Citation No. 8107680 states as follows

A cutoff shot was discovered on Monday 4/12/2010 at the 9 seam put in which 12 holes did not shoot. An adequate inspection of this blast area was not performed by the blaster after the shot was discharged at the end of the day shift on Saturday 4/10/2010.

Exhibit S-1 is a copy of the order.

16. Citation No. 8107680 was issued as an S&S, unwarrantable failure §104(d)(1) citation. It was assessed as being reasonably likely to cause a permanently disabling injuries to 7 miners. The negligence level was designated as high. The Citation was assessed for a total civil penalty of \$23,229 against Respondent.
17. Corey New is a licensed and certified surface blaster who has worked with Virginia Drilling since March 2008.
18. Mr. New earned his West Virginia blasting license in 2006.
19. Mr. New was the blaster who conducted the post-blast examination at issue at Red Fox Surface Mine on the afternoon of April 10, 2010.
20. Chad Coleman was the Virginia Drilling blaster-in-charge at the Red Fox Surface Mine on April 10, 2010.
21. Mr. Coleman, a salaried employee, was a member of Virginia Drilling mine management.
22. Mr. Coleman was not present when the April 10, 2010 post-blast examination at issue occurred.
23. Mr. New has conducted post-blast examinations hundreds of times previous to the blast at issue on April 10, 2010.
24. Mr. New had worked at Red Fox Surface Mine performing blasting services for three to four years.
25. Exhibit S-2 is a copy of map of the blast site that Corey New drew at his August 21, 2012 deposition of the post-blast examination site at issue. The X on the berm marks the location that Mr. New identified as the place that he stood when he conducted the post-blast examination.
26. The shot configuration at issue was two separate non-electric shots, a short hole shot and a deep hole shot, tied together by surface cap delays.
27. All of the blasts contained in the short hole shot detonated.
28. Based upon the visual observation from the location on the berm designated on Exhibit S-2, Mr. New concluded that all of the holes in the blasting pattern had detonated.

29. Red Fox Surface Mine Superintendent Kirby Bragg informed Mr. Coleman of the discovery of the undetonated blasts on the morning of April 12, 2010.
30. Virginia Drilling Safety Director Anthony Kidd was not present at Red Fox Surface Mine on either April 10 or April 12, 2010.
31. Virginia Drilling Vice President Kester "Red" Kennedy was not present at Red Fox Surface Mine on April 10, April 12 or April 14 of 2010.
32. Exhibit S-3 are the notes of Inspector John Stone taken on April 14, 2010 at the Red Fox Surface Mine. These notes pertain to the issuance of Citation No. 8107680. The parties agree that there are no authenticity issues with regard to these notes, although Respondent does not agree to the veracity of any statements made by Inspector Stone in the notes.
33. Exhibit S-4 is the April 10, 2010 blasting log completed by Virginia Drilling employee, Corey New, for the shot at issue in this case.
34. Exhibit S-5 is MSHA's Assessed Violation History Report, R-17 report, accurately sets forth the history of violations by Virginia Drilling for the time period specified. Such history of violations may be used to calculate penalty assessment amounts for the citations at issue.

(Sec'y Proposed Stip. 1-3; Parties Second Set of Stip. 1)

Findings and Discussion

On April 14, 2010, MSHA Inspector John Stone issued Citation No. 8107680 as a result of an investigation at the Red Fox Surface Mine, stemming from reports of undetonated explosives. Upon investigation, approximately 10 to 12 undetonated explosives were discovered by a mine employee nearly two days after the original blast occurred. Citation No. 8107680 noted a violation of 30 C.F.R. §77.1303(pp) and the Secretary of Labor assessed a penalty of \$23,229 and determined the violation to be significant and substantial and an unwarrantable failure.

Citation No. 8107680

After receiving a report from an employee at the Red Fox Surface mine of a potential Mine Act violation, Inspector Stone arrived at the mine site on April 14, 2010. Inspector Stone conducted an investigation, interviewed several individuals, and issued a the citation alleging a violation of 30 C.F.R. §77.1303(pp). The citation states:

A cutoff shot was discovered on Monday 4/12/2010 at the 9 seam put in which 12 holes did not shoot. An adequate inspection of this blast area was not performed by the blaster after the shot was discharged at the end of the day shift on Saturday 4/10/2010.

Inspector Stone also determined that the violation was significant and substantial and an unwarrantable failure.

(Ex. S-1)

Inspector Stone determined that as a result of this violation a permanently disabling injury was reasonably likely to occur, the violation was significant and substantial (“S&S”), 7 persons would be affected, and the violation was the result of high negligence on the part of the operator. (Ex. S-1) The Secretary assessed a civil penalty of \$23, 229.00. (Pet. Assessm’t. Civ. Pen. Ex. “A”)

The Violation

Citation No. 8107680 was issued under 30 C.F.R. § 77.1303(pp), which states:

Blasted areas shall be examined for undetonated explosives after each blast and undetonated explosives found shall be disposed of safely.

To prove a violation of 30 C.F.R. §77.1303(pp), the Secretary must show that there was no examination, or that if an examination was performed, it was not adequate. *Sec’y of Labor v. Star Fire Mining*, 21 FMSHRC 61, 63 (Jan. 1999).

Virginia Drilling Company (“VDC”) asserts that this violation should be vacated because their certified blaster, Corey New (“New”), conducted a post-blast examination to determine whether there were any undetonated explosives, and despite the fact that he was unable to find any misfires, he was competent and acted in accordance with every protocol. (Tr.25:18-23) VDC argues that New’s visual observation from a single vantage point was an adequate examination.

New testified that he could not see the entire blast area and only looked at the holes from one vantage point. He thought he had seen everything necessary to determine that the blasts went off successfully.¹ Larry Schneider, an experienced blaster and blasting instructor (Tr.200:4-6; Tr.201:20-23), testified at the hearing that the best person to determine whether a shot has gone off properly would be the blaster-in-charge. (Tr.205:3-11) Schneider testified that the visual observations of the blaster after the blast and the appearance of no apparent problems is all that a reasonable and prudent blaster would need to do to conduct an adequate post-blast examination. (Tr.205:12-16; Tr.211:23-212:8) Thomas Lobb, a physical scientist and expert

¹ New stated that he did not walk the entire shot, did not see the back of the wholes and could not see the area that was shot so he couldn’t make a determination that the holes did not discharge. (Tr.51:16-21)

blaster,² testified that a blaster can conduct a post-blast examination from one vantage point if he can see the entire blast site. (Tr.134:8-13) However, both Lobb and Schneider testified that if the blaster cannot see the entire blast site, it would not be possible for him to perform an adequate post-blast examination. (Tr.134:13-15, Tr.219:12-16; Tr.219:20-22) Furthermore, Lobb testified that if 12 of 25 holes did not detonate it would be obvious to the blaster because the highwall would still be intact. (Tr.148:2-7) In contrast, such misfires would not be so obvious if there were 500 or 1000 holes and only a few of the holes did not detonate. Under that scenario it would be reasonable for a blaster not to notice it. (Tr.149:1-22). Finally, Lobb testified that a reasonable and prudent blaster would have noticed the misfires (Tr.147:12-18).³

The Commission has held that an adequate examination must discover hazardous conditions. *Sec'y of Labor v. Dynatec Mining Corporation*, 20 FMSHRC 1058 (Sept. 1998).⁴ VDC maintains that it conducted an adequate blast examination on April 10, 2010, but if that were the case, it would have discovered the 12 misfires that were so obvious to a non-certified blaster from afar. The Federal Safety and Mine Act of 1977 is a strict liability statute. The mere fact that the post-blast examination was done does not expiate the violation, as VDC argues, because the examination was not done adequately. An adequate examination would have detected such a gross departure from the industry standard for misfires. I find that although a post-examination was conducted, it was not adequate to discover the misfires and prevent the hazard that was created by the violation. I conclude that VDC violated 30 C.F.R. § 77.1303 (pp) by failing to conduct an adequate post-blast examination and missing 10 -12 misfires at the Red Fox Surface Mine.

² Lobb was a certified blaster in West Virginia in the early 1970s. (Tr.123: 12-13) Lobb started working at MSHA in 1997 as the explosive and blasting expert and senior physical scientist. (Tr.123: 17-19)

³ Lobb also testified that such a high rate of misfires would have been obvious to a certified blaster. (Tr.149:22-150:2)

⁴ In *Dynatec*, ALJ Manning determined that the Secretary had established that the Respondent had not conducted an adequate examination of the raise structure. If the Respondent had, ALJ Manning reasoned that it would have revealed the hazardous conditions that lead to the collapse of the raise structure. As such, although the Respondent had conducted an examination it was “not adequate to pinpoint the problems in the raise structure so that the problems could be corrected *before the miners were exposed to the hazards.*” 20 FMSHRC 1058, 1088 (Sept. 1998) (ALJ Manning).

Negligence

The Commission provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, “whether the operator was negligent.” 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

“Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless negligence is present when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* No negligence is when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

VDC argues that this violation did not result from high negligence because New acted in accordance with industry standards. I disagree. High negligence results when the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances. Table X of 30 C.F.R. §100.3 New should have known not to release the blast area because there were obvious indicators that a misfire had occurred. New stated that he was responsible for the blast and was the blaster-in-charge of the blast. (Tr.52:1-10) Both expert witnesses determined that the blaster-in-charge was the best person to determine if there were any

misfires.⁵ New also testified that he only viewed the blast area from one vantage point and admittedly could not see the deep holes yet assumed the blast went off as expected.⁶ Both expert witnesses also testified that the failure of a blaster to examine the entire blast area was not reasonable and prudent and that such an oversight would not be considered adequate.⁷ In light of the fact that the indicators of a misfire were so obvious to a person without blasting experience,⁸ New should have known of the violative condition. VDC's own expert admitted that if a lay person could see something out of the ordinary, a blaster should have seen it as well. (Tr.223:1-6)

Given the obvious indicators of this violation, New should have known that there were misfires when he shot the holes on April 10, 2010. Additionally, there were no mitigating factors presented to warrant a finding of a lower degree of negligence. There is no reason to reduce the level of negligence. I conclude that this violation resulted from high negligence .

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sep. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood

⁵ Schneider testified on direct examination that a certified blaster-in-charge would be the best person to determine if the blast performed as planned. (Tr.205:3-11). Lobb testified that the blaster-in-charge is the best person on the mine site to determine the pre and post-blast examinations. (Tr.185:15-22)

⁶ New revealed to Insp. Stone that he was a certified blaster, that he did not walk the shot and relayed that he thought that all the holes had been discharged so he did not look in that area where the deep holes misfired. (Tr.46:2-16)

⁷ Lobb stated that a reasonable and prudent blaster would have noticed that 12 of the 48 holes did not detonate. (147:12-18) Lobb stated that if half of the blasts didn't detonate it would be obvious because the high wall would still be intact. (Tr.148:2-7)

⁸ Mr. Bragg stated to Stone that the misfire should have been found and that anybody that would have examined that shot would have found these conditions and noticed that the wall was not straight. When he arrived at the mine on Monday morning, he said he was traveling down the road and realized the wall had a curve in it and got out of his vehicle to investigate it. (Tr.51:3-16).

of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Stone determined the gravity as reasonably likely to result in injury because there were 10 to 12 live holes, men and equipment were working within the blast area, and it was reasonably likely that an injury would occur if the misfires detonated. (Tr.56:12-21) Lobb also indicated that he had investigated numerous mine accidents in which misfires detonating caused injury or death.⁹ Stone classified the violation as permanently disabling because of the live holes and large equipment removing the overburden in the area which could set off the explosives and expose miners to blunt-type trauma from impact, flyrock, or even the movement of the machine itself. (Tr.58:4-15) He determined that seven miners could be affected. He considered the nature of the operation, how the men worked the equipment, what equipment is usually used in that type of shot, and the fact that trucks travel in and out of the area. (Tr.58:22-59:8) There is no doubt that if mining operations had continued without detecting and disposing of the misfires, it was at least reasonably likely that an injury could have occurred which could seriously injure several miners.¹⁰ Therefore, I concur that the violation was reasonably likely to cause injury.

Significant and Substantial

In *Mathies Coal Co.*, the Commission explained:

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

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

In *U.S. Steel Mining Co.*, the Commission held:

We have explained further that the third element of the Mathies formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” [. . .] We have emphasized that, in

⁹ Lobb has investigated blasts sites where workers dug into areas of undetonated holes and were seriously hurt or killed. (Tr.150:22-151:1)

¹⁰ MSHA has recorded approximately 30 to 40 accidents related to misfires since 1978. (Tr.158:22-59:3)

accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.”

7 FMSHRC at 1129 (emphasis in original) (citations omitted).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *See Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *see also Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999).

The underlying violation here is the failure of VDC to conduct an adequate post-blast examination, which gave rise to a discrete safety hazard, i.e., that undetonated explosives were left in an area that was cleared for miners to resume work. As discussed above, there is reasonable likelihood of permanently disabling injury resulting from this violation. A discussion of the severity of the injury that would result from this violation follows.

On April 10, 2010, New detonated holes at the Red Fox Surface Mine. (Tr.20:19-23) After conducting a visual post-blast examination from the berm (Tr.310:6-14),¹¹ New sounded the all clear for the miners to resume work. (Tr.311:20-21) Between Saturday, April 10, 2010, and Sunday, April 11, 2010, mining crews operated heavy equipment to remove the shot rubble. (Tr.21:7-11) Approximately 12 misfired shots were discovered on Monday, April 12, 2010, by Red Fox Mine employee Kirby Bragg. (Tr.59:9-60:5) New learned of the misfires on April 12, 2010. (Tr.312:21 - 313:1) On April 14, 2010, Stone learned of the violations and issued VDC Citation No. 8107680 for violation of 30 C.F.R. § 77.1303(pp). (Tr.55:17-56:11) VDC failed to conduct an adequate post-blast examination to discover undetonated blasting material.

Lobb testified that the undetonated blasts are dangerous to miners (Tr.158:19-22) and that ordinary mining operations, such as drilling and digging with mining equipment or running over rocks close to undetonated blasts, could cause them to explode. (Tr.159:7-15) Lobb also testified that the Bureau of Mines has determined that only 15 pounds of pressure on detonators can cause them to explode. (Tr.141:13-16) Stone testified that the CAT front end loader was removing overburden from the lower level of the blast site, and rock trucks were loading the rocks and depositing the rocks in other areas of the job. (Tr.43:1-15) The CAT loader weighs approximately 200 tons. (Tr.42:10-23) Lobb testified that he had investigated numerous misfire

¹¹ Lobb stated that the blaster should have looked at the holes from multiple directions to determine that there were no undetonated blasts. (Tr.157:18-22)

accidents and noted that injury from undetonated holes could be fatal.¹² Lobb also testified that even if the blast does not injure anyone in the immediate vicinity, flyrock from the blast could.¹³

If only 15 pounds of pressure is needed to detonate misfires, a 200 ton machine is certainly capable of detonating the misfired shots in this case. If the misfires had detonated, it would have potentially killed or severely disabled miners in the blast area and up to 2,000 feet away from the blast area. Therefore, the Secretary has met his burden of proving the *Mathies* elements. The result of this violation was that undetonated blasts were undiscovered until several days and several shifts later. If the misfired blasts had been detonated by the miners resuming work in the area cleared by VDC's certified blaster, there would be a reasonable likelihood that the blasts would cause injury to the miners and that the injury would be permanently disabling. For these reasons, the violation was appropriately classified as significant and substantial.

Unwarrantable Failure

The term "unwarrantable failure" comes from section 104(d) of the Act. 30 U.S.C. 814(d) (2012). Taken together with "significant and substantial," it creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability.

In *Emery Mining Corp.*, the Commission determined that the essence of unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure has been paraphrased as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). *See also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). In *Gatliff Coal Co.*, the Commission drew a clear contrast between negligence and unwarrantable failure, noting that the difference is not merely semantic. 14 FMSHRC 1982 (Dec. 1992). Consistent with the discussion of enhanced enforcement above, the Commission stated that an unwarrantable failure may trigger the "increasingly severe enforcement sanctions of section 104(d)" whereas "[n]egligence [. . .] is one of the criteria that the Secretary and the Commission must consider in proposing and assessing [. . .] [all] civil penal[t]ies." *Id.* at 1988 (quoting *E. Assoc'd Coal Corp.*, 13 FMSHRC 178, 186 (Feb. 1991)). Further, "[h]ighly negligent' conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence." *Gatliff Coal*, 14 FMSHRC at 1989 (quoting *E. Assoc'd Coal*, 13 FMSHRC at 186).

The Commission has examined various factors to assist in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time it has existed,

¹² Lobb also noted that he has investigated blasts sites where workers dug into areas of undetonated holes and were seriously hurt or killed. (Tr.150:22-151:1)

¹³ Lobb testified that flyrock can travel over 2,000 feet (Tr.164:16-17) and that it doesn't need to be large o kill someone. (Tr.164:10-11)

whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also considered an operator's knowledge of the existence of the dangerous condition. *See, e.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator was aware of a brake malfunction failed to remedy the problem); *Warren Steen*, 14 FMSHRC at 1126–27; 1129 (knowledge of a hazard and failure to take adequate precautionary measures support unwarrantable determination). *See also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). What is apparent from the foregoing list of factors is that they are fact-specific examples of conduct and circumstances tending to show unwarrantable failure as something more than ordinary negligence. They are suggestions only and are not intended to be an exhaustive or exclusive catalog. The essential aspect of the unwarrantable failure analysis is whether there is aggravated conduct constituting more than ordinary negligence. Any analysis of unwarrantable failure must identify the evidence or factors that prove aggravated conduct and discuss them thoroughly. *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1350–51 (Dec. 2009).

New could not see into the deep holes to see if shots had discharged. He assumed everything went off and made no attempt to look at the blast area from another perspective, even though he could not see the entire blast area.¹⁴ Thomas Lobb and Larry Schneider testified that it is customary for a blaster to view the area from different perspectives if everything cannot be viewed from one perspective.¹⁵ The misfires were left undetected from April 10, 2010 to April 12, 2010, during which time miners had resumed work in the blast area.¹⁶ The danger posed to the

¹⁴ New stated that he did not walk the entire shot. He did not see the back of the holes and could not see that area that was shot, so he could not make a determination that the holes did not discharge. (Tr.51:16-21) New told Stone that he was a certified blaster; he did not walk the shot; and he thought that all the holes had been discharged, so he did not into look in the area where the deep holes misfired. (Tr.46:2-16)

¹⁵ Usually a blaster can conduct his post-blast examination from a single vantage point if he is able to see the entire blast site. (Tr.134:8-13) However, if a blaster cannot see the entire blast site, he cannot perform an adequate post-blast examination. (Tr 134:13-15)

¹⁶ The condition of the holes was obvious and extensive, had existed since April, 4, 2010, at 3:30 pm, but was not discovered until Monday, April 4, 2010, by Kirby and Bragg. (Tr.59:9-60:1-5) New determined that the shots detonated and cleared the blast area. (Tr.13-21) New learned of undetonated holes on Monday, April 4, 2010. (Tr.312:21-313:1) The CAT front end loader was removing overburden from the lower level of the blast site and rock trucks are loading the rocks and depositing the rocks in other areas of the job. (Tr.43:1-15)

miners resuming work was severe, in that it could result in severe injury or death.¹⁷ Given his years as a blaster,¹⁸ New should have been able to see the misfires or at least the indicators of a misfire. New's premature clearance of the blast area and failure to notice any indicators of a misfire is particularly serious because the indicators of a misfire were so obvious to Bragg, who though not employed in the blasting industry, was able to see that there was something amiss from a casual look at the blast area.¹⁹ It is significant that VDC's expert witness admitted that if a lay person could see something out of the ordinary, a trained blaster should have seen it as well. (Tr.223:1-6) If an adequate examination had been done on April 10, 2010, it would have revealed the numerous misfires.

I am persuaded by the testimony of Lobb, Schneider, and Stone that if the entire blast area could not be viewed, the proper protocol would be to view the blast area from various vantage points. New's failure to conduct an adequate post-blast examination, and the conspicuous nature of the violation to individuals outside of the blasting industry, demonstrate a serious lack of reasonable care in the manner in which New conducted the post-blast examination. More troubling than New's failure to discover the misfires through his own examination is the fact that the violation went undiscovered for several days, and this violation would have persisted if it had not been discovered by Bragg. Based on this evidence, I conclude that New demonstrated a serious lack of care in conducting his post-blast examination amounting to an unwarrantable failure to comply with the standard.

Penalty

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

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the

¹⁷ Lobb testified that undetonated blasts are dangerous to miners. (Tr.158:19-22)

¹⁸ New has been certified blasted in West Virginia for about six years. (Tr.305:13-15)

¹⁹ Stone assessed the violation as unwarrantable failure because: (1) the operator exhibited less care than should be expected; (2) the violating conditions were extensive, namely two rows of holes were visible to Kirby from the road; (3) a resulting injury could be very serious; and (4) the condition existed for an extended period. (Tr.60:6-19)

effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Applying the 30 C.F.R. § 100.3 penalty calculation to the findings and conclusions above, the penalty recommended by the matrix is \$23, 229.00. I accept the Secretary's evidence regarding the mine size, the size of the controlling entity, the ratio of violations per day, the number of persons involved, and the severity of a potential event. I concur with the Secretary's assessment of this violation as significant and substantial, reasonably likely to result in permanently disabling injury and high negligence which amounts to unwarrantable failure. After considering all of the penalty criteria, I assess a penalty of \$23, 229.00 for this citation. I apply the percentage point reduction for good faith abatement to come to that figure.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a total penalty of \$23, 229.00. Virginia Drilling Company is hereby ORDERED to pay the Secretary of Labor the sum of \$23,229.00 within 30 days of the date of this decision.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution: (*Electronic Mail and Certified Receipt Return*)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 15, 2014

THOMAS E. PEREZ, Secretary of Labor,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	DOCKET NO. VA 2014-95
Petitioner,	:	
	:	A.C. NO. 44-07159-338294
v.	:	
	:	
BRISTOL COAL CORP.,	:	MINE: MINE #9
	:	

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the court upon a petition for the assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a Joint Motion to Approve Settlement. The Secretary’s Motion advises that “[i]n reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt [sic]. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above. . . . Consistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the parties’ settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).” Joint Motion at 2.

The Court notes that in its brief before the Commission upon interlocutory review, challenging the rejection of its proposed settlement in *Sec. of Labor v. The American Coal Company*, LAKE 2011-13 (“*American Coal*”: and in its underlying submission to this Court in that case, the Secretary repeatedly invoked the claim that its approach for settlement submissions promotes transparency and satisfies the need for public scrutiny, objectives to which it professedly subscribes. *See, for e.g.* Sec’s Brief in *American Coal* at 43.

The Secretary, in this Court’s view, has not caught on to the trend that began in the late twentieth century that more, not less, public information from government is the preferred practice. As the dictionary explains, to be “transparent” means to be “easily detected . . . characterized by visibility or accessibility of information especially concerning business practices.” Merriam-Webster.com. Instead, in its Motion before this Court in *American Coal*,

the Secretary merely proclaimed, in a decidedly non-transparent manner that “[a]fter further review of the evidence, the Secretary has determined that a reduced penalty is appropriate in light of the parties’ interest in settling this matter amicably without further litigation. In recognition of the nature of the citations at issue, and the uncertainties of litigation, the parties wish to settle the matter with a 30% reduction in the assessed penalty with no changes to gravity or negligence for any of the citations at issue.” *See, American Coal* Motion at 2-3. In the Court’s view, such an approach is at odds with the normal sense of the meaning of transparency and, importantly, makes public scrutiny impossible. Further, the Secretary exaggerates, and some might fairly state outright misrepresents, what is required for a settlement to pass muster, by asserting that the Commission’s approach requires “the Secretary to supply *extensive* information to justify proposed settlements.”¹ *See, Sec’s Br.* at 5, presently before the Commission under interlocutory review in *American Coal*.

The Present Motion in Bristol Coal Corporation

In its Bristol Coal Corp. Motion, the Secretary relates that the Respondent agrees to pay the penalty proposed by the Secretary for the violations alleged in the following citations:

<u>Citation Number</u>	<u>Penalty</u>
8208907	\$100
8208908	\$100
8208910	\$100
8208911	\$100
8208912	\$100
8208913	\$100
8208914	\$263
8208918	\$224
8208920	\$392
8208921	\$392
8208922	\$392
8208923	\$100
8208924	\$100
8208925	\$285
8208926	\$100
8208928	\$224
8208930	\$100
8208932	\$100
8208933	\$224

¹ The Secretary continues this theme of exaggeration by remarking that “settlement is an indispensable part of a well-functioning enforcement and adjudicatory regime,” as if anyone takes issue with that view. *See, Sec’s Br.* at 7, presently before the Commission under interlocutory review in *American Coal*.

Recalling its protest, as noted above, that “[i]n reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt [and that] [t]he Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above [and that] [c]onsistent with the position the Secretary has taken before the Commission in *The American Coal Company, LAKE 2011-13*, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the parties’ settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k);” it is fair to inquire in the representative example provided by the motion in this matter, involving Bristol Coal Corporation, just exactly what is the *extensive information* the Secretary must supply to justify its proposed settlement here?

The answer need not be speculative because the Secretary has grudgingly provided the required information but only *in the alternative* to its completely unenlightening first line position:

“The bases for the settlement of the remaining citations at issue in this docket, including the individual settlement amounts, are set forth below:

Citation Number 8208909

75.380(d)(7)(viii):

Basis of Compromise: Negligence and Number Affected.

At hearing, Respondent would present evidence that the condition had not existed at the time of the preshift exam. Further, the condition was not noted in the books therefore had likely just occurred. Hence, the negligence is overstated. Further, the Respondent alleges that nine miners would not be affected. Respondent asserts that the number affected should be modified to no more than four or five. Therefore, Respondent would argue that the citation should be modified to “low negligence” with four affected and the penalty should be reduced.

The Secretary, in reply to Respondent’s statements and contentions, states that he recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary agrees to accept a reduced penalty.

Amount of the penalty proposed by the Secretary: \$1,304.

Amount of the penalty agreed on by the parties: \$472.

Basis of Compromise: Negligence and Number Affected.

At hearing, Respondent would present evidence that the stopping had been knocked out accidentally by a piece of equipment but the condition had not existed very long. Further, the inspector does not know how long the condition existed and cannot say for certain that it had been busted for a week. Finally, if a fire did occur, it would not affect nine miners.. Therefore, Respondent would argue that the citation should be modified to “low negligence,” two affected and the penalty should be reduced.

The Secretary, in reply to Respondent’s statements and contentions, states that he recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary agrees to accept a reduced penalty.

Amount of the penalty proposed by the Secretary: \$1,304.

Amount of the penalty agreed on by the parties: \$472.”

The Court finds this information adequate to explain the basis for the proposed reduction and consequently that it meets the statutorily mandated requirement for the Commission to approve the motion under Section 110(k) of the Mine Act. Accordingly, *by its own* Motion, the Secretary has demonstrated the ease with which sufficient, and certainly not extensive, information can be provided in its motions, belying its claims to the contrary. It is important to note that, simple as it is to provide the information necessary for a settlement approval, by putting that information in the motion, the Secretary is then on record as to the explicit basis for the reduction and in the unlikely event that the representations were untrue, the record of the basis would be there for accountability. In contrast, the Secretary’s initial posture, absent of transparency as to the basis, would not provide a basis for a post hoc review of the legitimacy of the settlement, because it gives no useable information for such a review.

Accordingly, based on the above discussion and the representations in the Motion, the Court, having considered the representations and documentation submitted in these cases, concludes that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The settlement amount is as follows:

<u>Citation Number</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8208097	\$100	\$100
8208908	\$100	\$100
8208909	\$1,304	\$472
8208910	\$100	\$100
8208911	\$100	\$100
8208912	\$100	\$100
8208913	\$100	\$100
8208914	\$263	\$263
8208918	\$224	\$224
8208920	\$392	\$392
8208921	\$392	\$392
8208922	\$392	\$392
8208923	\$100	\$100
8208924	\$100	\$100
8208925	\$285	\$285
8208926	\$100	\$100
8208928	\$224	\$224
8208930	\$100	\$100
8208932	\$100	\$100
8208933	\$224	\$224
8208934	\$1,304	\$472
TOTAL	\$5,919	\$4,440

It is further **ORDERED** that the operator pay a penalty amount of \$4,440 in thirty days. Upon receipt of the payment, this case will be **DISMISSED**.

/s/ William Moran
 William Moran
 Administrative Law Judge

Distribution:

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Hank Matney, President, Bristol Coal Corporation, P.O. Box 1426, Grundy, VA 24614

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August 19, 2014

CAM MINING, LLC,	:	CONTEST PROCEEDINGS
Petitioner	:	
	:	Docket No. KENT 2013-196-R
	:	Citation No. 8273702; 10/17/2012
v.	:	
	:	Docket No. KENT 2013-197-R
SECRETARY OF LABOR	:	Order No. 8273703; 10/17/2012
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID: 15-18911
Respondent	:	Mine: No. 28

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor

Mark E. Heath, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of Contestant Cam Mining, LLC

Before: Judge Andrews

STATEMENT OF THE CASE

These contest proceedings are pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). A hearing was held on an expedited basis in Pikeville, Kentucky on January 10, 2013, at which the parties presented testimony and documentary evidence. This matter concerns Citation No. 8273702 and Order No.

8273703 both issued on October 17, 2012 under Section 104(d)(1) of the Act. After the hearing, Post Hearing Briefs and Reply Briefs were submitted.¹ The issue presented is whether the citation and order were validly issued

JOINT STIPULATIONS

The parties agreed to the following stipulations at the hearing:

1. Cam Mining, LLC is subject to the Federal Mine Safety and Health Act of 1977, as amended (“the Mine Act”).
2. At all relevant times, Cam Mining, LLC and the mine, No. 28, mined and produced coal which entered Commerce, or had operations or products which affected commerce, within the meaning of the Mine Act.
3. Cam Mining, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the administrative law judge has the authority to hear the case and issue a decision.
4. At all relevant times, Cam Mining, LLC was an “operator,” as defined in the Mine Act, at the mine No. 28, when the citations at issue in this proceeding were issued.
5. The mine, No. 28, is a “coal or other mine” within the meaning of the Mine Act.
6. Cam Mining, LLC is a large operator, and imposition of a reasonable penalty will not affect the ability of Cam Mining, LLC to remain in business.
7. Each of the citations at issue in this proceeding was properly served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Cam Mining, LLC.

DEFINITIONS AND PRELIMINARY MATTERS:

The Citation and Order in the instant case were issued during retreat mining. Retreat mining consists of a “pillaring” process where the coal pillars that are left for roof support after advance mining are later mined as the miners and machinery “retreat” back out of the mine. *See,*

¹ I have fully considered the contents of the Official File including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence. The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Excel Mining v. Secretary of Labor, 34 FMSHRC 99, 102. When retreat mining, the coal is taken out of these large pillars or blocks according to a specific sequence and to dimensions prescribed in the approved Roof Control Plan (“RCP”). *Id.*

To avoid confusion, it is necessary to assign a common meaning to different terms used by witnesses to describe the same or similar things. Therefore, in this decision the following terms will be used:

Pillar - this will describe the large 60 foot long by 50 foot wide blocks of coal left for roof support as mining advances into a coal seam. “Pillar” and “block” share the same meaning and both will be used in this decision.

Cuts - this term will describe the 12-foot wide parts of the pillar or block of coal that are mined or cut out. Exhibit Rx-E. Witnesses also used the terms “sumps” and “lifts” and these have the same meaning, but “cut” will be substituted in this decision.

Stump - this will describe the material left at the outby corners of each pillar or large block of coal after all cuts have been taken out of the pillar. This stump extends from the floor to the roof of the mine. Witnesses also referred to this as a corner. The RCP refers to that part of a pillar not to be mined as the “stump” and also as the “outby corner”. Exhibit Gx-3, Rx-E. Where witnesses referred to the remaining material as a pillar, the term “stump” will be substituted.

Web - also referred to as a wedge, this is the 3-foot column of coal left between the 12-foot cuts into a pillar. See Exhibit Rx-E, where two of these webs are labeled on each side of the mined pillars.

Row - also referred to as a line, this is the entire horizontal row of pillars in the section being mined. On Exhibit Rx-G, a row of pillars would consist of all of the pillars or large blocks of coal from the red “L” on the left in a straight horizontal line to the red “Bs” on the right. Row and line will share the same meaning in this decision.

Breakers - the timber posts set in each entry along the breaker line of the pillars or blocks being retreat mined. A breaker line may be visualized on Exhibit Rx-G as extending along the inby edge of a line of pillars or blocks where the letters “CL” have been placed in blue ink in each of the squares representing a pillar.

At the outset of the hearing, the Secretary objected to so much of Contestant’s Exhibit Rx-G that depicts the pillars or blocks of coal with 2 cuts taken in each as not being an accurate illustration of the actual number of cuts being taken. The Exhibit was admitted, but on study of the entire record I find that the objection as it pertains narrowly to the number of cuts per block of coal should have been sustained. As will be discussed in greater detail in this decision, credible testimony and simple calculations reveal that the illustration of pillars with two cuts is

misleading, inaccurate and self-serving, and therefore this part of the exhibit is found to have little probative value.

However, Exhibit Rx-G was useful for other purposes and extensively marked up during the hearing to show the location of entries, pillars, stumps, timber posts, check curtains, breaker lines and persons in the area. For these purposes *only*, and to help understand testimony, the Exhibit will be referred to frequently in this decision.

CITATION NO. 8273702

EVIDENCE

On October 17, 2012, at 1020 hours MSHA Inspector Carl Keith Little (“Inspector Little” or “Little”) issued this citation with the following Condition or Practice:

The approved roof control plan, dated 4-15-2011, is not being complied with on the 001-0/003-0 super section. Pages 24-26 of the approved plan require a minimum of 6 foot of the coal pillar to the left on each side of the entries at the outby corners of the coal pillars during retreat mining. The size of the coal pillars left on each side of the entries 1 thru 7 range in size from 1 foot to 5 feet with none of the stumps not mined being large enough to meet the minimum requirement of 6 feet. This violation is an unwarrantable failure by the operator to comply with a mandatory standard.

Standard 75.220(a)(1) was cited 15 times in two years at mine 1518911 (15 to the operator, 0 to the contractor). This violation is an unwarrantable.

After training on retreat mining the Citation was terminated at 1235 hours.

Gx-1.²

The cited regulation provides:

(a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

30 C.F.R. § 75.220

A revised Roof Control Plan for Cam Mine #28 was submitted to MSHA on April 12, 2011 and approved on April 15, 2011. This approved plan was in effect on October 17, 2012. A

² Hereinafter, Government exhibits will be referred to as “Gx” followed by a number. Contestant’s exhibits will be referred to as “Rx” followed by a letter. Citations to the transcript will be labeled “Tr.” followed by the page number(s).

substantial portion of the mine's plan covers safety precautions for retreat mining. Gx-3, pp.20-26. Pages 24, 25 and 26 are illustrations of the extraction plan showing the sequence, placement and dimensions of the cuts that may be taken in each 60-foot long by 50-foot wide pillar or block of coal. Also shown and explained are the minimum dimensions of the coal webs left in the block and the stumps left at the outby corners of each block. The minimum requirement for the stumps is to leave 6 feet at each corner. Gx-3, P. 24.

Inspector Little traveled to Mine No. 28 on October 17, 2012 arriving at about 8:00 am for a continuing EO1 inspection. Tr. 257, Gx-5, pp 1, 2. Little is a ventilation specialist for MSHA, having worked for MSHA for almost 8 years. Tr. 253. He has 40 years of underground mining experience, most of which as a Section Foreman, and has experience with retreat or pillar mining.³ Tr. 254.

Inspector Little informed Foreman Jody Heath Baldwin ("Foreman Baldwin" or "Baldwin") of the inspection, checked the mine maps, and decided to go the 001-0/003-0 area, where they were retreat mining. Accompanied by Baldwin, they arrived at about 10-10:15 am. Tr. 257, 258; Gx-5.

Inspector Little testified that mines engaging in retreat mining are visited at least once a month to make sure they are complying with their pillar plan.⁴ Tr. 253-255. Little described the process of observing the conditions in the line of blocks that had already been retreat mined as going to the breakers of the blocks being actively mined and looking inby at the stumps to see the size of the stumps that had been left. Little testified that to comply with the plan the outby stump has to be a minimum of 6 feet from the corner of the block back to where cutting into the block started.⁵ Tr. 255, 256. Little also testified to make sure there is compliance with the mine's plan, an area they have mined is observed, and then the active mining cycle is observed. Tr. 328.

Inspector Little has at least 6 years of experience judging stump size. Tr. 263. He pointed out that there is a considerable difference between a 3 foot and 6 foot stump, and that it is easy to observe the size of a stump from twenty feet while standing in the breaker timbers. Tr. 264, 275, 297. He could also see the lines where the miner head had cut into the entries⁶ and not left the right size stumps Tr. 307. He further testified that when a cut is finished, you can see if the 6 foot is left. Tr. 317.

³ See Employment History at Gx-6.

⁴ References to the "pillar plan" are to pages 24-26 of the mine's roof control plan containing the specifications for the coal to be left for roof support.

⁵ See Exhibit Rx-E (illustrating the outby corners of the pillars and the 12 foot wide cuts into each side of the pillars).

⁶ The continuous miner cuts into the pillar or block of coal from the entry. According to the mine's Roof Control Plan, each of these cuts should be 12 feet wide and the depth is limited to 35 feet. See exhibit Rx-E for an illustration of a row or line of mined-out pillars of coal.

Beginning at the No. 1 entry⁷ to start the imminent danger check, Inspector Little observed from the breakers that the left side of the block just inby had not been mined. Tr. 36, 259, 260. Little explained that an imminent danger check is a requirement of all E01 inspections and consists of when an inspector goes to the section, looks at all the faces, and the pillar line, etc. to ensure there is nothing going on to cause an injury or fatality before it can be corrected. Tr. 259. When he begins the imminent danger check, he goes to one of the outside entries. Tr. 255. As he starts across the entries, he goes back to the breakers of the blocks that are being minded. *Id.* He then takes the curtain hung in front of the timbers and goes inby the curtain to observe the conditions that they had mined in the line of blocks before. *Id.* Based on the pillar plan the outby stump has to be a minimum of 6 feet from the corner of the pillar to where they start cutting. Tr. 256. Little testified that an inspector must also check all the breaker timbers and ensure they are set on 4-foot centers and do not exceed 4 feet from the coal ribs. *Id.* He further testified that the timber placement and the size of the stumps that are left are part of the inspection to ensure compliance with the pillar plan. *Id.*

At the number 2 entry, observing from the breakers, Inspector Little found that the left stump was approximately 2 feet wide back from the rib line,⁸ and the right stump lacked about 16-18 inches where a cut had been taken clipping off the inby side of that stump. Tr. 260-262. Little went on into each entry, from number 3 to number 7, again observing from the breaker line, and recording the stump dimensions in his notes. Gx-5, pp. 4, 5.

When moving across the section, at the middle entry, mining was halted outby by Foreman Baldwin until the inspection was finished. Tr. 266. While in the active section, he and Baldwin walked by the number 4 entry right at the intersection in front of the one block being mined that day, and the stumps there were not adequate either. He did not need to use his tape measure; he could see they were not big enough. Tr. 280, 281, 294, 295. Inspector Little had already told Baldwin that a citation for not complying with the pillar plan would be issued, and he also told Baldwin that if the conditions continued across the section, it would be a (d)(1) and he would need to stop mining and pull back leaving a row of blocks because roof support had been compromised. Tr. 260, 323, 324.

Inspector Little testified that the minimum 6-foot stumps required at the front of all of the blocks were not left. Tr. 269, 305. The largest was the left stump in the last entry, which was 60 inches as measured by Little with his tapeline.⁹ Tr. 266, 267. He pointed out that it is really easy when at the breaker line to see the stumps just 20-25 feet away. Tr. 275. He stated it was very obvious the stumps were not adequate; you can look and tell the difference between a 6-foot and a 2-foot stump. Tr. 284. Little also testified that when he went behind the curtains into the timbers he would move around and look at the stumps from different angles, and it did not take

⁷ The numbers across the bottom of exhibit Rx-G provide an example of how entries are numbered.

⁸ A “rib line” is an imaginary line projected across the outby edges of a line of pillars of coal as illustrated on Exhibit Rx-E in red ink and labeled “Rib Line.”

⁹ The right pillar was not mined in this entry. Gx-5, p. 5; Rx-G.

an educated guess to see that they were smaller than required. Tr. 302, 303. He and Baldwin had cap lights, and Baldwin's was pretty bright. Tr. 305.

Since the same conditions existed in 6 entries, Inspector Little asked that the next outby line of blocks where entry 4 was then being mined be breakered off and to restart the mining cycle in the second line of blocks back, or outby.¹⁰ Tr. 290. A safety meeting was held with training on the pillar plan, and then Little went back to make sure the timbers had been set and the places breakered off. Tr. 292. The section was pulled back one entire crosscut and when the new breaker line was set the citation was terminated at 1235 hours. Gx-1. After the new breaker line was set, no one would be allowed inby that location.¹¹ Tr. 293.

Inspector Little testified that the part of the roof control plan violated in Mine No. 28 was the fact that they did not leave the minimum 6-foot stumps at the front of the blocks as required. Tr. 268. Little stated that the reason the front stumps were of most concern to him was because, "If those stumps are smaller than the required minimum and you have a roof fall starting back in there, in the area that's already mined, those stumps will have a tendency to stop that roof fall of that wide area that you've already pillared out before it comes into the intersection where most people will be working." Tr. 269. Little explained that the effect of having less than adequate stumps is that it compromises safety for the next block that will be pulled.¹² Tr. 269, 270. He added that if you don't leave the minimums, a roof fall could come through into the active mining section and down the entry. Tr. 282. In the notes he recorded at the time he wrote: "Likely to cause a very serious accident or fatality if practice continues." Gx-5.

Inspector Little noted that the miners were taking 3 cuts in all the blocks. Tr. 278, 300. Little learned this in a conversation with a miner, who told him it was hard to take 3 cuts and leave the 6 foot minimum stump. Tr. 279, 311, 339. According to the miner men, a cut will usually range from 14 to 16 feet wide. Tr. 280. Little calculated the size of the block compared to the usual width mined into the block and determined it would be difficult to leave the minimum 6 foot stump. Tr. 279, 280. He testified that by looking back into the pillar line, they had taken 3 cuts, because if there had not been 3 cuts, there would have been bigger stumps evident. Tr. 311. Inspector Little concluded that all of the stumps were deficient as they failed to meet the required 6 foot minimum in the roof control plan. Tr. 282, 284. When asked about a continuous miner rubbing an outby corner and knocking off the corner, Little testified that he did not see where a continuous miner had knocked anything off of a corner. He added that he could see the lines where the miner head had cut into a block and not left the right size of the stumps. Tr. 306, 307. Little pointed out that the presence of paint lines would tell you nothing about the size of the stumps being left; the size can be determined only when the area has been mined. Tr. 276. In his notes, Little documented that General Manager James Slone ("Manager Slone" or

¹⁰ The new breaker line was one full row of pillars back or outby from the breaker line where Little observed the pillar stumps. The new breaker line is indicated by the initials CL adjacent to each entry in blue marker pen on Rx-G.

¹¹ See also Gx-3, page 21, paragraph 16 of the roof control plan: "No person shall work or travel inby the posts installed at the breakline where full or partial pillaring has been performed".

¹² "Pulled" is taken to mean "mined".

“Slone”) arrived on the section and Little invited him to travel the line and observe the cited conditions. Slone declined to observe to size of the stumps complaining he was tired and his back hurt. Gx-5, page 10.

Robert Henry Bellamy (“Graduate Engineer Bellamy” or “Mr. Bellamy”) also testified for the Secretary. Referring to Exhibit Rx-E, he testified that it shows the minimum size of the blocks and the number and width of the cuts or lifts that can be taken out of a block. Tr. 351, 352. The top and bottom remnants of a block have a minimum size and are most important for stability of the mine roof. *Id.* Mr. Bellamy explained this is because you don’t want to take out so much coal that the roof starts falling in on you. Tr. 353. Enough coal is to be left to where the block can be mined, it will remain standing, and miners can get out of the area. Tr. 354. When asked about the possibility of a back block sloughing off, crushing out, or equipment rubbing against it, Mr. Bellamy testified that one foot would not be as much of a concern as a 2, 3, or 4 foot reduction. Tr. 354, 355. However, he also testified that if there were a reduction from 6 foot to 5 foot across an entire section, indicating a practice of not maintaining the minimum amount, this would be a big concern. Tr. 355. As an Inspector, Mr. Bellamy stated he had issued citations, considering that stumps smaller than the plan provides to be a hazard. Tr. 356. He further testified where across a section an entire row of back blocks did not meet the minimum, this would be citable. Tr. 359. In addition, Mr. Bellamy testified that where you leave the coal is important; you want to leave it next to intersections and at the bottom of the block for support and to keep the roof from riding in on the pillar you are mining. Tr. 377.

Graduate Engineer Bellamy had conversations with Inspector Little and Danny Robinette (“Robinette”) after the citation and order were issued. He became aware that Robinette had gone up the bleeder line¹³ and looked at the pillar line from 2 rows of blocks below where Little had been. Tr. 367, 368. Mr. Bellamy testified that since Robinette had not looked at the same thing as Little, it was not surprising Robinette had said the mine was in compliance. Tr. 369.

James Tackett Jr. (“State Inspector Tackett” or “Tackett”) is an Inspector for the Office of Mine Safety and Licensing for the state of Kentucky. Tr. 234. He testified he was familiar with the No. 28 mine, and was there on October 18th. Tr. 234, 235. On Exhibit Rx-G, he indicated by a circle with a “B” inside in black ink where he was at the breaker line of entries 2 and 3. The pillars he noticed had not been pulled and he was told an order was issued and they had to pull back a line. Tr. 236, 237. Tackett also testified that when backing out, the breaker timber posts all across a row of pillars must be set in place prior to mining. Tr. 247. On the 18th, the entire row where mining was taking place was breakered off. Tr. 237-239. He did not go inby because it was breakered off and it was against the law for anyone to go inby. Tr. 239, 240. He could see the pillars that had not been pulled, but had no way of knowing about the size of the stumps that had been pillared inby the check curtain line.¹⁴ Tr. 240, 241. Although he had been at the mine several days before, on October 15th, he did not record in his notes any observations of residual stumps. Gx-4.

¹³ Identified by the double line of large red letter “B”s on Exhibit Rx-G

¹⁴ The check curtain line is illustrated on Exhibit Rx-G by the letter “C” in all entries except entry 4.

Contestant's first witness was General Mine Foreman Jody Heath Baldwin ("Foreman Baldwin" or "Baldwin"). He has been a coal miner for 19 years and employed at Mine No. 28 for 5 years. Tr. 34. He has underground mine foreman and MET certifications and has been involved in pillaring for 12 to 14 years. Tr. 34, 35. He accompanied Inspector Little on October 17, 2012 in the retreat mining section. Tr. 36. Referring to page 24 of the Roof Control Plan, Exhibit Rx-E, Baldwin testified that 2 cuts of coal per side were taken out of the blocks on October 17th. Tr. 37, 42, 51. Referring to Exhibit Rx-G, he explained that there were 7 entries and the center entry, number 4, was where mining would begin after the 8 breaker timber posts were set.¹⁵ Tr. 39-41. He testified that each cut from a block is 12 feet wide. Tr. 43. Baldwin further testified the minimum stump is 6 foot, and the mine foreman marks this on the rib and roof for the miner operator. Tr. 45-49. He also testified that when each group of timber posts is set, no one can go past or inby that point. Tr. 50, 51; Ex. Rx-E

Foreman Baldwin testified that on October 17th, the top 2 rows of blocks had been finished and mining was in entry No. 4 of the middle row of blocks.¹⁶ Tr. 53. He and Inspector Little went to entry No. 1 through the check curtain and to the breaker timbers¹⁷ and looked up into the worked out area. At this location Little stated that the stump could possibly be too small.¹⁸ Tr. 56. Baldwin also testified that the distance from where they were standing to the stump was approximately 28 feet. Tr. 57.

From the same location in the number 2 entry, Little again stated to Baldwin that a corner (stump) was too small and informed Baldwin if any more corners looked the same he would write a "d" citation and a "d" order. Baldwin testified he did not think anything was wrong with them. Tr. 58. Again from the same location in entry No. 3 Little told him a corner was too small and in addition to the citations mining would cease and pull back one full row; Baldwin testified he could not tell that the stump was not 6 feet. Tr. 59.

In the number 4, 5, and 6 entries Little stated to Baldwin both corners were too small. Tr. 68, 69. At entry number 7 Baldwin testified he could not judge whether the corner was too small. Little went to the corner and measured it with his tapeline as 5 feet 4 inches or 5 feet 6 inches. Tr. 70, 71. Baldwin then told Little you could see where the corner had been rubbed by the miner, Tr. 97, and that could cause the measurement to be 5 feet. Tr. 101. Baldwin instructed the Section Foreman to pull back one row, pull the belt, and timber the row of pillars off.¹⁹ Tr.

¹⁵ The small circles on Exhibit Rx-E represent the timber posts.

¹⁶ The middle row is the third row from the top of exhibit Rx-G.

¹⁷ This area is illustrated by a large letter "C" and small circles in the entries just outby the mined out area on exhibit Rx-G.

¹⁸ The drawn red circle with the number 2 adjacent on the left side of exhibit Rx-G illustrates the location of this stump in entry number 1.

¹⁹ The new breaker line was then at the top of the row of blocks with the large letter "F" on exhibit Rx-G.

61, 62, 73. In further testimony, Baldwin acknowledged that a minimum of 6 foot must be left on the outby corners of a block. Tr. 88, 96.

Danny Russell Robinette (“Robinette”) retired from coal mining after 44 years and 8 months, having spent 10 years and 3 months with MSHA, for a total of 34 years in the industry. Tr. 121. During that time, he held all positions from equipment operator to management. *Id.* Robinette was also a foreman during that period of time and had experience with pillaring. Tr. 122. His specialty while working with MSHA was roof control. *Id.* In his testimony, he described that his approach to inspecting active retreat mining as not worrying about anything inby the breaker line. Tr. 129, 131. On October 19th, he went to the breaker line, which was the same as the day before. Tr. 132. He did not go to the blocks where Inspector Little had issued the paper. Tr. 129. He testified that from where he was standing he could see the No. 2 block (stump) which looked smaller than 6 feet, but from the distance he could not tell and he was not going through the breaker timbers to go up there and measure it. Tr.134. He gave considerable testimony about rounding and other reductions in corner size due to the operation of machinery. Tr. 137, 139, 142, 150, 151. However, he acknowledged that only one corner of a block is allowed to be rounded. Tr. 153, 154.

James Slone (“Manager Slone” or “Slone”) is the Mine No. 28 Mine Manager. He has held this position for 4 and a half years, and had been a coal miner for 38 years. He also has a mine foreman certification. Tr. 167. Slone recalled on October 17th he was told that the section had been shut down and they were pulling back a row since Inspector Little was going to issue a citation and an order. Tr. 168, 169. The area cited had been mined on the 16th. Tr. 201. He went underground at about 12:00 to 12:30 pm, Tr. 192, to the entry No. 7 breaker posts, where he observed the No. 7 corner to have quite a bit of sloughage off of the rib but he did not see a plan violation. Tr. 170, 171. He then went to entries 6, 5, and 4 and observed no violations of the plan Tr. 170-174. Slone testified that in entries 7, 6 and 5 he could see painted lines on the roof 6 feet inby the imaginary rib line. Tr. 172-174. He met Baldwin and Little at entry 4. Tr. 174. He did not go to entry 3. Inspector Little invited Slone to go back over the area with him, but Slone testified he absolutely did not want to go with Little. Tr. 174, 175.

The next day, October 18th, Manager Slone testified he went back through all seven entries, saw painted marks on the roof, but did not see a violation of the roof control plan. Tr. 180. In his opinion, you cannot see any useful information about a stump from 28 to 34 feet away after pillaring has been completed. Tr. 184. He also testified that he took no notes on the 17th, 18th, or 19th. Tr. 192.

Jackie Lynn Holbrook (“Manager Holbrook” or “Holbrook”) is the General Manager of Operations at Cam Mining, having been involved with Mine 28 for 8 years. Tr. 212. Manager Holbrook has been a coal miner for 27 years and has certifications in surface and underground mining as well as a mine foreman certificate. *Id.* In addition, Holbrook has 27 years of experience in pillaring. Tr. 216. Holbrook testified that on the morning of October 18th, he and Slone went to the breaker timbers of every entry from 1 to 7 and he did not observe any violation. Tr. 214, 215. He also testified that from a 25 to 30 foot distance he could not see well enough to tell anything about a 6-foot corner. Tr. 222. He met James Tackett between entries 5 and 6. Tr. 225. He acknowledged that Tackett’s notes revealed he was one crosscut inby Spad

No. 6671. This location, with the initials "JT" in black ink on Rx-G, is behind the new breaker line set the day before.

CONTENTIONS

Cam Mining argues that Citation No. 8273702 incorrectly alleges a violation of 75.220(a)(1) that the approved roof control plan for the 001/003 section was not being followed. Cam further argues that 6 feet of the outby corners of pillars as measured from the starting point where the miner head cuts into the pillar were left as provided in the RCP. Cam asserts that only 2 cuts were taken from each side of a pillar and more coal than anticipated by the RCP was being left. Cam contends that any appearance of a stump less than 6 foot can be caused by the continuous miner and shuttle cars contacting a stump while maneuvering, collapse of the stump under normal roof pressure, or viewing the stump from the breaker line 25 to 26 feet away with only cap lights. Cam also maintains that the Foreman paints a 6 foot mark on the rib prior to mining, but the paint may not be visible after the ripper head cuts into it. Cam supports its arguments by referencing Roof Control Specialist Robinette's statement to Mine Manager Slone on October 19, 2012 that he did not see a violation.

The Secretary contends that the operator failed to follow the approved RCP on October 16, 2014 by not leaving the minimum 6 foot stumps. The Secretary asserts that each stump in the row of pillars mined on the 16th was readily visible looking inby from the breaker line and each was smaller than required by the RCP. The Secretary argues that a miner admitted to the Inspector they could not leave the minimum stumps with the cutting plan they were using. The Secretary contends any paint lines would only show where the Foreman intended to cut and not where cuts were actually made, and any residual paint cannot establish compliance with the RCP. The Secretary further argues that the testimony of the Inspector is more credible than that of the mine's witnesses because none of them took notes regarding the stumps and they did not see the stumps as observed by the Inspector since the breaker line on October 18th was one full row of pillars outby where it was at the time of the inspection.

DISCUSSION AND ANALYSIS

Inspector Little and Foreman Baldwin arrived at the area of active mining at about 10:00 to 10:15 AM on October 17, 2012. On that day, compliance with the mine's approved RCP was a part of the regular inspection of retreat mining at Mine No. 28. Little had considerable mining experience, including as a Section Foreman in retreat mining and at least 6 years judging stump sizes. The process he uses to inspect for RCP compliance is to begin at the breaker line of an outside (left or right) entry and then, when travelling across each entry, he goes back to the breaker line of the row of pillars being mined. He moves inby the curtain to look at both the timber post placements and the sizes of the stumps left after the previous row of pillars, just inby, were mined. When standing in the timbers he moves around to look at those residual stumps from different angles.

At entry number 1, only the right pillar had been mined, and Inspector Little observed that the minimum stump had not been left. As he moved from entry to entry, from a distance of about 20 to 24 feet across the crosscut, he observed that the stumps were smaller than required.

At the last, number 7 entry, only the left pillar was mined, and with his tapeline Little measured the residual stump as about 5 feet 4 inches to 5 feet 6 inches. Little concluded that none of stumps remaining in the row of mined out pillars met the 6 foot minimum requirement, and the citation issued reflects this finding.

Since roof support had been compromised for the area of active mining, the row of pillars just outby the noncompliant stumps, Inspector Little asked that this row of pillars be breakered off and mining moved back to the second row of pillars outby. This was accomplished in about 2 hours and the citation was terminated at 1235 hours. The new breaker line was now one full row of 60-foot long pillars back or outby from where Little observed the noncompliant stumps. It is important to note that prior to mining the next row of pillars, the breaker line timber posts must be set in place across the entire row. This means that as of the afternoon of October 17th, the new breaker line was two crosscuts and one full pillar length, or about 100 feet, from the stumps observed by Little. It is uncontroverted that no one²⁰ is allowed inby a breaker line²¹.

From the testimony and notes of Inspector Little, the following chart is a summary of the approximate stump sizes he found at each entry.

<u>Entry</u>	<u>Left Stump</u>	<u>Right Stump</u>
1	not mined	minimum not left
2	2 feet	42 inches (Lacks 16-18")
3	4 feet	3 feet
4	3 feet	18 inches
5	2 feet	4 feet
6	3 feet	1 feet
7	5 feet	not mined

Gx-5, Tr. 321, 322.

I find the testimony of Inspector Little to be credible. He made careful, direct observations and specific size estimates and documented his findings in his notes. Far from speculation, his conclusions were grounded by judgment based on his underground experience, knowledge and expertise including retreat mining. Further, at entry 7, Little even used his tapeline to confirm that the left stump was too small. What is remarkable about the residual stump sizes, as shown by the chart, is that most of the stumps were *so far reduced in size* that failure to meet the minimum was very obvious. Even the largest stump was measured at less than 6 feet.

From the above discussion it follows that I find credible the determination of Inspector Little that 3 cuts were being taken from each side of each pillar. While this was not a part of the condition or practice described in Citation No. 8273702, Contestant has argued that only 2 cuts

²⁰ The exception is that a MSHA Inspector may go inby, as Little did to measure the stump at entry 7.

²¹ See Exhibit Gx-3, the RCP, page 21, paragraph 16.

were taken out of each side of the pillars, in an effort to show that the minimum 6 foot stumps were left after mining. This argument fails. Little's conversation with a miner that morning when added to his own observations is very revealing. The miner told him it was hard to take 3 cuts and leave the 6-foot minimum stump. The miner also said the cuts taken were 14 to 16 feet wide. Little noted that if there had *not* been 3 cuts, the stumps would have been bigger.

This can easily be understood using only simple calculations. Where the length of a pillar is 60 feet and 3 12-foot cuts are taken leaving 2 3-foot webs, a total of 42 feet of the length of the pillar is accounted for leaving 18 feet or about *9 feet* available for each outby corner stump. But if 3 14 to 16 foot wide cuts are taken, as reported by the miner, the residual stumps would be reduced to 6 feet or less.

Where, as contended, only 2 cuts are taken leaving 1 3-foot web and the cuts are 12 feet wide, only 27 feet of the 60 foot length of the pillar is accounted for leaving 33 feet or about *16 feet* for each outby corner stump. Even using 2 14 to 16-foot wide cuts the residual stumps would still be about *12 to 15 feet* at each corner.

With about 9 or more feet left for each corner stump, a considerable amount of coal is left to account for the "sloughage" and "rounding" so much contended by Contestant. It follows that if less than 6 feet is actually left for a corner stump, more coal is being removed than allowed by the RCP. The consequence is less roof support to protect the miners working just outby in the next row of pillars. Contestant's attempt to show that only 2 cuts were being taken, including the illustration of 2 cuts on Exhibit Rx-G, is simply not believable. Indeed, the miner's report to Inspector Little of 14 to 16 foot cuts when combined with 3 cuts on each side of a pillar better accounts for the noncompliant remnants actually left, especially with the "sloughage" and "rounding" the Contestant contends occurred.

I find the testimony of Graduate Engineer Bellamy to be credible and supportive of the testimony of Inspector Little. Mr. Bellamy candidly testified that a 1 foot reduction in the size of *one* stump would not be a concern, but also testified that further reduction in that stump size or a reduction of 1 foot in *all* stumps across a row would be a big concern. As an inspector, he had issued these kinds of citations since smaller stumps than allowed would be a hazard. Mr. Bellamy pointed out that the minimum size is important for stability of the mine roof; you don't want to take out so much coal that the roof falls in. Mr. Bellamy testified that where you leave the coal is important, next to intersections and at the bottom of the block for support.

State Inspector Tackett's testimony is notable because he was there on October 18th, the day after the breaker line had been moved one row of pillars outby, and from this new breaker line he saw pillars that had not been pulled. The entire row where mining was taking place was breakered off. He did not know anything about the next inby row of pillars. Therefore, he and anyone else in the area on October 18th could not see what Inspector Little observed and cited the day before.

Foreman Baldwin accompanied Inspector Little on October 17th across each entry and was present at the breaker line as Little made his observations. Baldwin was in the best position to rebut the findings of the Inspector. Yet his testimony falls far short. Unlike the detailed

estimates of Little, Baldwin only stated that he *did not think anything was wrong with the corners* and he *could not tell or judge if a stump was too small*. He provided no estimate of the dimension of any stump.

Further, Baldwin referred to Exhibit Rx-E, page 24 of the RCP, and testified that only 2 cuts of coal were being taken out of the blocks on October 17th. But the noncompliant stumps were left by the previous mining cycle, the day before. What was happening in active mining at the time of the inspection would not necessarily be the same as the conditions during the prior mining cycle that left the noncompliant stumps. However, during the inspection, Inspector Little walked right by where active mining was just ceased in entry 4, and observed that the stumps there were also too small. Vague and evasive, Baldwin's testimony is not credible and does nothing to discredit the findings of Inspector Little.

Manager Slone in his testimony attempted to contradict the findings of Inspector Little as well. Slone stated he "felt like what [he] had observed was in compliance." But Slone went to the area *after* it was shut down, and when invited to accompany Inspector Little across the line and look at what was being cited he claimed the onset of back pain and tiredness and refused the invitation. Gx-5, p. 6. Remarkably, he testified that he absolutely would not go with Inspector Little. This thinly veiled expression of hostility, even in the context of the excuse offered, was perhaps due to mining pulled back a full row and the loss of that revenue²², or perhaps to the discovery by the Inspector that the mine was taking more coal than allowed by the RCP. Looking at only a part of the area on the 17th with the knowledge that citations were going to be issued, Slone, who had worked as General Mine Manager for Mine No. 28 for 4 and a half years, would be more likely to fail to perceive any violation of the roof control plan.

Manager Holbrook and Manager Slone went to every entry the next day, October 18th. Both testified they did not observe any violation. Both testified to the effect that from the distance across a crosscut, you cannot see well enough to tell anything useful about a stump. But in his testimony, Holbrook acknowledged he was behind the new breaker line set the day before. Therefore, on October 18th, neither Slone nor Holbrook saw what Inspector Little observed, documented and cited.

It is particularly telling that Slone did not document any of his observations on any day, and did not venture an actual estimate of the size of any stump across the row. His testimony was also vague, essentially stating his opinion that the mine was "in compliance". The testimony of this witness was so vague and self-serving that I cannot find it to be credible. Holbrook's testimony is discounted as not relevant to the citation issued.

Robinette's notes recorded on October 19th do not show anything other than he did not observe a violation. Rx-C. He did not go to the places where Little issued the paper. He was 2 crosscuts and a row of pillars outby the stumps cited by little, a distance of over 100 feet. Graduate Engineer Bellamy testified that since Robinette had not seen the same thing as Little, it was not surprising Robinette had said the mine was in compliance. This comment is made only to show that Contestant's attempt to support its arguments by referring to Robinette's statement to Manager Slone on October 19th is misplaced.

²² Tr. 15, 219.

The mine is required to mark the coal ribs to indicate the minimum size of the stump not to be mined. Gx-3, page 20, paragraph 3. Slone testified he could see painted lines on the *roof* 6 feet *inby* the rib line. However, the presence of paint on the roof is not controlling; it is the size of the residual stump left after a pillar is mined that is important. This testimony by Slone is remarkable as it tends to eviscerate one of Contestant's primary arguments (and Slone's own testimony) that you cannot see anything useful from across a crosscut. Certainly, if a paint mark can be seen from 20 to 25 feet away and estimated to be 6 feet *inby* the rib line, one would also be able to see and estimate the size of the stump at that same location.

I find that it is entirely possible to estimate, from the breaker line, the size of the residual stumps left after coal pillars are mined. As will be set forth below, it is also *necessary* to perform this task.

From the above it follows, and I specifically find, that there was a violation of 30 C.F.R. 75.220(a)(1).

Order No. 8273703

EVIDENCE

After arriving at the mine on October 17, 2012 Inspector Little checked the record books and found there was a retreat mining section and that no hazards were reported for the 001-0 and 003-0 areas. Gx-5, pp. 2,3. After discovering the violation discussed above, at 1100 hours he issued this Order with the following Condition or Practice:

A perfunctory pre-shift exam was conducted on the 001-0/003-0 super section on 10-17-2012. The hazardous conditions cited in citation 8273702 which were created by not leaving the required size coal stumps to protect miners from falls caused by retreat mining should have been observed by the examiner, reported to the operator, and corrected prior to beginning mining. This citation is evaluated S&S due to the failure of the examiner to recognize and correct the conditions created by faulty pillar recovery. This violation is an unwarrantable failure by the operator to comply with a mandatory standard. This violation is an unwarrantable failure to comply with a mandatory standard.

After a safety meeting, the Order was terminated at 1330 hours.

The section of Title 30 of the regulations cited was §75.360(b)(3).

Gx-2.

Preshift examinations at fixed intervals are governed by 30 CFR §75.360. As relevant to this case:

(a)(1)...a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed...

The specific section of the regulation cited for this Order provides, in pertinent part:

(b) The person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section...at the following locations:

(3) Working sections and areas...if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas...and the examination shall include tests of the roof, face and rib conditions...(emphasis added)

Paragraph (b)(11) links preshift examinations to other regulatory provisions, and subsection (i) requires that preshift examinations include identification of violations of roof control standards:

(11) Preshift examinations shall include examinations to identify violations of the standards listed below:

(i) §§ 75.202(a) and 75.220(a)(1)--roof control...

As set forth above, §75.220(a)(1) requires the mine to follow its approved Roof Control Plan.

Inspector Little had told Foreman Baldwin that the preshift examiner is required to look for hazardous conditions, including violations of the roof control plan. Tr. 286. Little further told Baldwin that the pre-shift examiner was to record hazardous conditions and correct them before mining began. Tr. 286. At the time, there should have been 2 preshift examinations by 2 foremen, 1 on the 16th and the 1 before the current shift started, providing at least 2 shots at finding and correcting the conditions. Tr. 270, 306.

Little testified that when he had conducted preshift examinations on a retreat section, he looked for several things. He usually began by checking the entries that would be pillared in. Tr. 271. He checked the test holes to see if there was any separation above the roof bolts. *Id.* He checked the timbers to ensure they were not broken in the entries that had been breakered up ready to mine. *Id.* He also checked back in the pillar line that had been mined the shift before to see the condition of the roof in that area, and see if timbers were broken. *Id.* Little also indicated that the back breakers on the last center block must be checked to ensure they are all in place, unbroken and in proper numbers with proper spacing. *Id.*

Inspector Little testified a preshift examiner is supposed to look for violations of the RCP, report such violations and take corrective action. Tr. 272. Little stated that when observing the size of stumps from the breakers, people are not in danger since that is where the ventilation check curtains are hung and retrieved. Tr. 272. He noted that when the preshift examiner is in

the breakers, not only is a gas test taken, but the ribs, top, timbers and stumps are checked. Little also testified that the time required to make an observation regarding the size and quality of the stumps is five minutes per entry, and that it is real easy to see the stumps just 20 to 25 feet away. Tr. 273, 275. Looking at the corners from the timber line, both he and Baldwin had cap lights, and Baldwin's light was pretty bright. Tr. 305. He pointed out you do not have to enter the worked out area to observe the stumps, and whether the area inby the breakers has the right amount of support has an effect on the active section. Tr. 329, 330.

Inspector Little testified he did not tell anybody they had to go inby the breaker line because no one is allowed beyond the breakers except an Authorized Representative.²³ Tr. 286, 287. He also testified that if the operator hanging a curtain and writing danger on it precluded inspectors from going to the breaker line, any type of violation could be hidden behind that curtain. Tr. 287. Little stated the mine's examiners must look for violations of the approved RCP, and this includes retreat mining. Tr. 331. Little noted the only way you can make sure of compliance with the RCP is to observe an area that has been mined. Tr. 328.

In the notes he recorded regarding this Order, Inspector Little wrote:

Hazardous conditions observed & cited in citation #8273702 should have been observed and corrected prior to the start of production on the 001-0/003-0 MMU's. Conditions were obvious and should have been observed by examiner to be sure pillar plan was being followed.

GX-5. In addition to the mined area just inby the breakers, Inspector Little testified he walked right by the number 4 entry where they were pillaring and he could see the stumps were not big enough; he did not need to measure them with his tape. Tr. 294, 295.

Graduate Engineer Bellamy, the roof control and impoundment supervisor for District 6 MSHA, in his testimony supported Inspector Little's conclusions. Mr. Bellamy testified that the roof control plan requires an examiner to check the line of pillars being mined. Tr. 362. Mr. Bellamy stated that in a retreat mining section, a mine examiner should look back thru the breakers to see what is going on just inby. The examiner should determine if the roof is showing signs of being weak, the stumps are starting to crush out, or the timbers are breaking, all before you start mining a new line. The examiner should look at the front stumps. Tr. 361-364. This is in addition to taking air readings and conducting a gas test. Tr. 362.

Foreman Baldwin testified for Respondent that a preshift examiner at the check curtain would check a number of things, but would not look at the stumps in the worked out area to figure out the dimensions. Tr. 80, 81, 110. Robinette responded to leading questions that he had never told an operator a preshift examiner was required to check the corners of a previously mined pillar line, and that he did not worry about anything inby the breaker posts. Tr. 130, 131. Baldwin, Robinette, Slone and Holbrook all testified that the way to check compliance with the RCP is during active mining. Tr. 85, 86, 125, 190, 224. Robinette, Slone and Holbrook all testified to the effect that you cannot tell anything useful about a stump from the breaker line. Tr. 123, 184, 222.

²³ A MSHA Inspector may be accompanied by a Miner's Representative.

CONTENTIONS

Cam argues no mine examiner should be required to examine and try to determine the size of the stumps left on the outby corners of the previous row of mined pillars. Cam asserts that the Secretary's position is virtually impossible to comply with. Cam contends that if mine examiners are required to go to the breaker line timbers they would be exposed to unnecessary risks and hazards. Cam further argues the order was issued for an area not a part of the preshift examination. Cam maintains there was no hazardous condition.

The Secretary contends the operator failed to conduct an adequate preshift examination of the retreat mining section on October 17, 2012 since all hazards and violations were not recorded in the preshift book. The Secretary maintains that the mine's personnel do go to the breaker line timbers and observe a number of required conditions including the timbers, roof, ribs and air direction. The Secretary argues that neither Inspector Little nor anyone from MSHA has stated that they expect an examiner to go *beyond* the breaker line to evaluate the size of stumps. The Secretary asserts the operator was taking the 3 cuts allowed by the RCP out of the pillars but the remaining outby stumps were less than the required 6 foot minimum. The Secretary further maintains the practice of leaving less than the minimum sized stumps is very dangerous to miners exposing them to the hazard of a roof fall.

DISCUSSION AND ANALYSIS

If, as Contestant argues, the residual stumps along a row of pillars just mined cannot be part of a preshift examination, ongoing violations of the RCP could be effectively hidden from the required process of observation, reporting and correction of hazardous conditions. Even though the RCP specifies the size of each stump to be left, the mine's own examiners, according to Contestant, would not check for compliance. Notwithstanding that the examiners go to the breakers to check air quality and direction, and observe the timbers, roof and ribs, Contestant asserts they could not and should not look across the crosscut to make sure the residual stumps are the correct size and hence adequate for roof support and the safety of miners working just outby.

The controlling regulations are clear that the preshift examination includes identification of violations of roof control plans. Paragraph (b)(11) of §75.360 refers directly to roof control standard §75.220(a)(1), set forth above. The Cam Mine #28 RCP specifies that the outby corners of pillars left after retreat mining, the stumps, must be a minimum of six feet. To comply with §75.360 and the RCP, each examination should and indeed must include a check of the pillars just mined.

Contestant argues that the preshift examiner cannot observe the residual stumps. However, I have already found, above, that it is entirely possible to observe and estimate the size of the stumps from the breaker line across a crosscut. I also find there is virtually no additional danger to the examiner who is already in the area for other observations and tests, and simply checking the stumps would take a minimal amount of additional time.

Contestant's compliance arguments regarding paint marking the six foot dimension before the beginning of a cut by the miner is clearly an incorrect reading of the mine's RCP. The plan specifies "a minimum of 6' will be left on the outby corner of the block". The plain meaning of "will be left" is the amount of coal remaining *after* the block is mined. Contestant's attempts to change the meaning of the requirement through testimony at hearing fail. Where paint marks are placed does not control. It is the required dimensions and hence volume of the residual stumps left to support the roof that is important to the safety of miners.

The remaining compliance argument is essentially that at issue is a worked out area not subject to preshift examination requirements. Contestant identifies the area as "off the section" and worked out" and not a "working section" pursuant to §75.360(b)(3). Contestant points out the rule against going past the last open crosscut to examine a worked out area has not been relaxed.

The regulation includes not only working sections but also approaches to worked-out areas. Also, it is clear that examiners are not required to cross into or enter an area that has been mined and breakered off. Standing at the breaker line does not violate the rule. I find that the act of walking up to the breaker line to perform a number of observations and tests fits comfortably into the phrase "approaches to worked out areas". And, as noted by the Secretary, the roof and timbers located in the intersection beyond the breaker line are checked for hazardous conditions. Certainly, if the roof and timbers can be checked, so can the readily visible stumps only 20 to 25 feet away.

I find Inspector Little's testimony to be the most credible as he followed the general procedure he uses for all inspections²⁴ and the validity of this was confirmed by the testimony of Graduate Engineer Bellamy. Mr. Bellamy testified that the roof control plan requires an examiner to check the line of pillars being mined. Mr. Bellamy added that the examiner should go up to the pillar line and see what is going on just inby in addition to taking air readings and conducting a gas test. *Id.*

Respondent's witnesses testified that compliance with the RCP should be checked during active mining. But that would be in *addition to*, and not *instead of*, checking the residual stumps. Baldwin testified that as an examiner he would not look at the stumps, and Robinette, Slone and Holbrook testified that you cannot tell anything useful about a stump from the breaker line. None of this testimony is persuasive, nor is Robinette's response to leading questions that he did not worry about anything inby the breaker posts. Robinette also testified that the preshift examiner must only examine a worked out area where miners are going to work and travel. This assertion is an incorrect statement of the law. 30 CFR 75.360(b)(11) requires the preshift examiner to identify violations of the list of standards contained in that subsection, without qualifying that requirement by showing that miners will work and travel in that area. 30 CFR 75.360(b)(11)(i) specifically requires that the preshift examination include identification of violations of roof control standards.

²⁴ Little's procedure is consistent with MSHA Handbook Number PH 13-V-4, appendix J, which names as *critical* pillar retreat sections, and instructs that inspections should check the dimensions of final stumps among other things. The Handbook section was in effect in October 2012.

Because the preshift examiner did not examine for hazardous conditions by looking into the area recently mined and checking compliance with the RCP, Contestant violated 30 CFR §75.360(b).

CONCLUSION

For the reasons set forth above, I find the Contestant mine did violate 30 CFR § 75.220(a)(1) and 30 CFR § 75.360(b)(3) and Citation No. 8273702 and Order No. 8273703 were Validly issued to Cam Mining LLC.

ORDER

The valid Citation and Order issued to the Contestant are **AFFIRMED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 20, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2011-119-M
Petitioner	:	A.C. No. 04-01299-232472
	:	
	:	Docket No. WEST 2011-465-M
	:	A.C. No. 04-01299-241610
	:	
v.	:	Docket No. WEST 2011-1239-M
	:	A.C. No. 04-01299-258369
	:	
	:	Docket No. WEST 2012-516-M
ORIGINAL SIXTEEN TO ONE MINE,	:	A.C. No. 04-01299-278376
INCORPORATED,	:	
Respondent	:	Mine: Sixteen to One Mine

DECISION

Appearances: Douglas L. Sanders, Esq., U.S. Dept. of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Michael M. Miller, President, Original Sixteen to One Mine, Inc., Alleghany, California, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) against Original Sixteen to One Mine, Incorporated (“Original Sixteen”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Secretary seeks a total civil penalty in the amount of \$2,582.00 for twenty-two violations of his mandatory safety standards.

A hearing was held in Nevada City, California. The following issues are before me: (1) whether Respondent violated the standards; (2) whether the violations were significant and substantial, where alleged; (3) whether the violations were attributable to the level of gravity

alleged; and (4) whether the violations were attributable to the level of negligence alleged.¹ The parties' Post-hearing Briefs are of record.

For the reasons set forth below, I **VACATE** two citations; **AFFIRM** nine citations, as issued, and eleven citations, as modified; and assess penalties against Respondent.

FACTUAL BACKGROUND

Original Sixteen operates the Sixteen to One Mine, an underground gold mine in Alleghany, California. Tr. 289, 336. On May 10, 2011, Bruce Allard, an MSHA inspector for approximately twelve years, conducted a regular inspection of the mine.² Tr. 12-14. He observed several conditions for which he cited Original Sixteen: a fire extinguisher that had not been inspected since February 2007; a ladder with broken rungs; a fire suppression system that had been turned off; an out-of-adjustment stationary grinder; bolts strewn on a storage room floor; uncovered plastic pails containing oil and other combustible materials; and unlabeled pails containing oil and other combustible materials. Exs. P-4, P-5, P-7, P-8, P-9, P-10, P-11; Tr. 17, 21, 25, 31, 35, 38, 41. Allard returned to the mine on May 11 and issued citations to Original Sixteen for excess timber stored within 100 feet of the mine portal, and for failure to keep a record of defects on a front-end loader. Exs. P-12, P-13; Tr. 44-45, 47-48.

On July 20, 2010, MSHA Inspector William Berglof inspected the mine. Tr. 113, 116-17. He issued a citation to Original Sixteen for an arc welder with an uninsulated stinger. Ex. P-14; Tr. 115-16. The following day, he returned to the mine and issued citations for failure to conduct underground evacuation drills within a six-month period, and for exceeding the noise limit to which a miner may be exposed without enrolling him in a hearing conservation program. Exs. P-15, P-16; Tr. 122, 127.

On October 20, 2010, Berglof returned to the mine, accompanied by MSHA Inspector Joshua Love. Tr. 150-51. Berglof issued several citations for violations which he encountered: a broken shovel; two fire extinguishers that had not been inspected since September 2009, and one that had not been inspected since August 2007; a power cord with a damaged outer jacket; an out-of-adjustment stationary grinder; dry vegetation near a diesel storage tank; and missing berms on an access road. Exs. P-17, P-18, P-24, P-21, P-19, P-20, P-22, P-23; Tr. 152, 155, 161-62, 159, 163-64, 170, 176-77, 182. The next day, Berglof and Love returned to the mine, and Berglof issued a citation for an open hole adjacent to a travelway. Ex. P-25; Tr. 186-87.

On December 13, 2011, Jerry Hulsey, an MSHA inspector for approximately thirteen years, inspected Sixteen to One. Tr. 107-08, 112. He issued a citation for Original Sixteen's

¹ The Secretary's Motion for Partial Summary Decision on MSHA's jurisdiction over the mine was granted from the bench, incorporating by reference an earlier decision finding jurisdiction, docket No. WEST 2009-63-M. Tr. 4-5.

² Allard left MSHA in January 2012 and at the time of the hearing, worked for the California Department of Industrial Relations, Division of Occupational Safety and Health. Tr. 13-14.

failure to conduct continuity and resistance testing for its electrical grounding system.³ Ex. P-2; Tr. 112.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Citation No. 8561729

Inspector Allard issued 104(a) Citation No. 8561729, alleging a violation of section 57.4201(a)(2) that was “unlikely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Original Sixteen’s “high” negligence.⁴ The “Condition or Practice” is described as follows:

A 10 lb. fire extinguisher located on the 1300 level at 49 Winze had not received an annual inspection of the mechanical parts and extinguishing agent since February 2007. The fire extinguisher appeared to be in good condition. The area is normally accessed by one miner once a month. Three citations were issued at this mine for similar violations on the last inspection.

Ex. P-4. The citation was terminated after a compliant fire extinguisher was brought to the 1300 level.

A. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152) (Nov. 1989)).

Allard testified that the standard requires fire extinguishers to be inspected annually, and that this fire extinguisher’s inspection tag indicated that its last inspection had occurred in February of 2007. Tr. 17-18. Allard opined that if the fire extinguisher were defective, a miner fighting fires would suffer burns or smoke inhalation; however, because this extinguisher was charged and in good condition, injuries would be unlikely. Tr. 18-19.

Michael Miller, President of Original Sixteen, disagreed, opining that there was no likelihood of injury, since no ignition source was present. Tr. 340-41. The record indicates that the fire extinguisher had not been inspected in over three years, and I credit Allard’s testimony that burns or smoke inhalation, while unlikely, would result in lost time or restricted duty injuries. Therefore, I find that the Secretary has proven a violation of section 57.4201(a)(2).

³ At hearing, Original Sixteen withdrew contest of Citation No. 8609870, and agreed to pay-in-full the Secretary’s proposed penalty of \$100.00. Tr. 111-12.

⁴ 30 C.F.R. § 57.4201(a)(2) provides that: “Firefighting equipment shall be inspected according to the following schedules: [a]t least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively.”

B. Negligence

Allard opined that Original Sixteen's negligence was high, since it had received three citations on a previous inspection for failure to inspect Sixteen to One's fire extinguishers. Tr. 18-19. Miller argued that the area was not a travelway, that no work was taking place in the location during the inspection, that the mine had a small crew of experienced miners, and that this extinguisher had not been cited in four years, all mitigating factors in his view. Tr. 340. Miller added that Original Sixteen had at least 50 fire extinguishers in the mine. Tr. 413.

I credit Miller's testimony that no miners were working on the 1300 level at the time of inspection, and that there were at least 50 fire extinguishers in the mine. Original Sixteen may have neglected to inspect the subject fire extinguisher, which was not located in an active mining area, based on the sheer abundance extinguishers in the mine, irrespective of notice that greater efforts at compliance were necessary; simply put, it was likely overlooked. Therefore, I find that the negligence in violating the standard was lower than alleged, and that Original Sixteen was moderately negligent.

2. Citation No. 8561730

Inspector Allard issued 104(a) Citation No. 8561730, alleging a "significant and substantial" violation of section 57.11050(a) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.⁵ The "Condition or Practice" is described as follows:

The secondary escapeway was not properly maintained in that the upper wooden stairway/ladder in the 49 Winze would not support the weight of a miner. The second and third rungs broke during this inspection. It is reasonably likely that unmaintained stairway/ladders in this travelway would result in serious injuries to the miner who travels it monthly for inspection and to check the water level in the winze.

Ex. P-5. The citation was terminated after a new ladder was installed.

A. Fact of Violation

Allard testified that the second and third rungs broke when either he or the accompanying miner mounted the ladder. Tr. 21-22. He opined that MSHA's Program Policy Manual requires that escapeways provide miners with safe means of egress to the surface during an evacuation. Tr. 23; Ex. P-6. Without a functional ladder, a miner would be unable to safely negotiate the ten-foot vertical distance between the upper and lower levels to escape in an emergency. Tr. 23-24. Allard testified that it would be reasonably likely that a miner attempting to climb the ladder would break through the rungs and fall 1½ feet, sustaining strains, sprains or a broken ankle.

⁵ 30 C.F.R. § 57.11050(a) provides that: "Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body."

Tr. 24-25. Allard also opined that Original Sixteen was moderately negligent, because the ladder was used infrequently. Tr. 25.

Miller made counter arguments that the area was not an escapeway and that it was infrequently used, that Original Sixteen could not anticipate the rungs breaking, and that miners were trained to act properly in emergencies. Tr. 342-47. The operator also argues that because it was exploring or developing an ore body on the 1000 level, a secondary escapeway was not required. Resp't Br. at 2; Tr. 346. Unfortunately, the record is devoid of evidence supportive of Original Sixteen's contention. I find, based on record evidence that the ladder was defective, that Original Sixteen violated the standard.

B. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is "significant and substantial" ("S&S") under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of violation has been established, and a miner using the ladder to conduct monthly inspections or as part of an escapeway would be subjected to the hazard of a 1½ foot fall. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

I find that a miner breaking through the ladder rungs and falling 1½ feet would be reasonably likely to suffer musculoskeletal injuries such as sprains, strains and fractures. Therefore, I find that the violation was S&S.

C. Negligence

I also find that the defect was not obvious based on the fact that it was not readily apparent until the rungs broke. Ex. P-5 at 3. While it is clear that the ladder was old and that periodic, precautionary replacement would have been prudent to prevent an accident, it is speculative to pinpoint when that should have happened. Therefore, I find that Original Sixteen was negligent, but that its negligence was low.

3. Citation No. 8561731

Inspector Allard issued 104(a) Citation No. 8561731, alleging a violation of section 57.4560(a) that was “unlikely” to cause an injury that could reasonably be expected to be “fatal” and was caused by Original Sixteen’s “high” negligence.⁶ The “Condition or Practice” is described as follows:

The fire suppression system provided for the timber in the mine portal was not maintained. The water supply has been turned off and two sprinkler heads leaked when the water was turned on. A fire in the portal could result in fatal injuries to the three miners who normally work underground. A 480 volt power cable entering the mine through the portal provides a possible ignition source. This same condition of the fire suppression system has been cited previously at this mine.

Ex. P-7. The citation was terminated after the water supply was turned on.

A. Fact of Violation

Original Sixteen has conceded the violation, but contests the gravity and negligence designations. Tr. 16.

Allard opined that when mine fires occur in the portal, carbon monoxide is pulled into the mine which, historically, has fatally poisoned miners. Tr. 29. However, he also testified that miners would be able to escape from the Sixteen to One mine. Tr. 29.

On the other hand, Miller testified that Original Sixteen is ventilated by natural air flow and that in May, when the citation was issued, air was flowing out of the mine. Therefore, by his account, should a fire have occurred, no carbon monoxide would be entering the mine. Tr. 349; Resp’t Br. at 3. Allard agreed that the mine has a natural ventilation system, and that air flows in or out depending on temperature. Tr. 60-61.

I find that, in the unlikely event of a fire which could occur from the ignition source of the 480-volt cable running through the portal, based on Allard’s testimony that miners could escape, that miners would be likely to suffer lost time or restricted duty or, at worst, permanently disabling respiratory injuries. I further note that the likelihood of a miner suffering permanently disabling injuries is lessened by Miller’s unchallenged testimony that the portal was ventilated with out-flowing air, which would dilute noxious fumes. Therefore, I find that the Secretary has proven that the violation of section 57.4560(a) was unlikely to result in lost workdays or restricted duty, rather than fatal injuries.

⁶ 30 C.F.R. § 57.4560(a) provides that: “For at least 200 feet inside the mine portal or collar timber used for ground support in intake openings and in exhaust openings that are designated as escapeways shall be . . . a fire suppression system, other than fire extinguishers and water hoses, capable of controlling a fire in its early stages [.]”

B. Negligence

Allard opined that Original Sixteen's negligence was high, because it had been cited for this condition on at least two previous occasions; he testified that he had issued one of these citations. Tr. 30. These prior citations, he argued, put Original Sixteen on notice of the requirement that the portal have a functional sprinkler system. Tr. 30-31. In response, Miller argued that Original Sixteen was using fire retardant paint which, according to him, is acceptable as a fire suppression system. Tr. 348. There is no support in the record for Original Sixteen's contention that fire retardant paint satisfies the requirement for a fire suppression system, and I also find that Original Sixteen had been put on notice that greater efforts at compliance were necessary. Therefore, I find that Original Sixteen was highly negligent in violating the standard.

4. Citation No. 8561732

Inspector Allard issued 104(a) Citation No. 8561732, alleging a "significant and substantial" violation of section 57.14115(b) that was "reasonably likely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.⁷ The "Condition or Practice" is described as follows:

The adjustable tool rest on the "Bitco" stationary grinder located in the upper shop was not adjusted so that the distance between the grinding surface of the wheel and the rest was not greater than 1/8". The tool rest was 5/16" from the grinding wheel. It is reasonably likely that the miner who uses the grinder several times per month would suffer serious injuries from small parts being caught between the rest and the grinding wheel.

Ex. P-8. The citation was terminated after the tool rest was properly adjusted.

A. Fact of Violation

Allard testified that if the distance between the wheel and the tool rest is greater than 1/8 inch, a small object being ground could be pulled in between the wheel and the rest, pulling a miner's hand along with it into the wheel. Tr. 31-32. He opined that the wheel could be spinning as fast as 3400 revolutions per minute, and contact with the wheel could result in abrasions and broken bones to the hand. Tr. 33-34. Original Sixteen argues that the purpose of the standard is to ensure that grinders can be adjusted to 1/8 inch, and that this grinder had that adjustment. Resp't Br. at 4.

Contrary to Original Sixteen's contention, the standard requires that grinders be set so that the distance between the wheel and the rest does not exceed 1/8 inch. Clearly, the condition of the grinder was in violation of the standard.

⁷ 30 C.F.R. § 57.14115(b) provides that: "Stationary grinding machines, other than special bit grinders, shall be equipped with adjustable tool rests set so that the distance between the grinding surface of the wheel and the tool rest is not greater than 1/8 inch [.]"

B. Significant and Substantial

The fact of violation has been established, and miners using the wheel out-of-adjustment would be subjected to broken bones or lacerations to the hands and fingers. Moving to the third and fourth *Mathies* criteria, the focus is whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Allard opined that since the grinder was used several times per month, it would be reasonably likely that a tool would be pulled in between the wheel and the tool rest. Tr. 34. Jonathan Farrell, former mine manager at Original Sixteen, disagreed, arguing that the $\frac{5}{16}$ inch distance between the wheel and the tool rest would be insufficient to cause injury. Tr. 300-01. However, he admitted that it would be unsafe to grind a tool smaller than the size of the gap. Tr. 325. I find that a miner would be reasonably likely to sustain broken bones and lacerations to the hands or fingers should a small hand tool be pulled in between the wheel and the tool rest. Therefore, I find that the violation was S&S.

C. Negligence

Allard opined that management may not have been aware of the condition, and miners had likely received safety training on operating the grinder. Tr. 34-35. Farrell testified that when he was in charge of the workforce, he stopped miners from using equipment unsafely and trained them in proper usage. Tr. 7, 301. There is no indication in the record of Farrell's period of employment at the mine, however, and without establishing that he was working there in May of 2011, his testimony is of no value in assessing the operator's negligence. I credit Allard's testimony, and find that Original Sixteen was moderately negligent in violating section 57.14115(b).

5. Citation No. 8561733

Inspector Allard issued 104(a) Citation No. 8561733, alleging a "significant and substantial" violation of section 57.20003(a) that was "reasonably likely" to cause an injury that could reasonably be expected result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence.⁸ The "Condition or Practice" is described as follows:

The bolt storage room in the upper shop was not kept clean and orderly. The floor was covered with bolts of various sizes and other small parts. It is reasonably likely that the miner who accesses the room several times daily would suffer serious injuries from slipping on small rolling objects.

Ex. P-9. The citation was terminated after the bolts and parts were removed from the floor and returned to their container.

⁸ 30 C.F.R. § 57.20003(a) provides that: "At all mining operations [w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly [.]"

A. Fact of Violation

Allard testified that he observed that a container of bolts, nuts and other small parts had been emptied onto the storage room floor, and not cleaned up afterwards. Tr. 35-36; Ex. P-9 at 2. Original Sixteen offered no challenge to the inspector's allegation. I credit Allard's testimony that the storage room floor was littered with small objects, and I find that Original Sixteen violated section 57.20003.

B. Significant and Substantial

Allard opined that miners accessing the room several times daily could slip and fall on these small, rolling objects, resulting in sprains and broken bones. Tr. 36-37. Miller testified, on the other hand, that miners do not often enter the room, located in a remote area, and that they only do so if looking for an irregular-sized bolt. Tr. 351-53; Resp't Br. at 4. He opined that a miner faced no danger of injury because the room was not open to everyone. Tr. 352.

I find that the hardware debris littering the storage room floor posed a slip-and-fall hazard, and that a miner slipping and falling would be reasonably likely to suffer musculoskeletal injuries including strains, sprains, and broken bones. Therefore, I find that the violation was S&S.

C. Negligence

Allard testified that the miners had received some training in housekeeping of the storage room. Tr. 37. According to Miller, the miner leaving the hardware strewn on the floor was following Original Sixteen's safety first policy, "SQUARE," of mining first, then housekeeping later, time permitting.⁹ Tr. 353.

By Original Sixteen's admission, mining was prioritized over housekeeping. Allard and Miller both pointed out that miners had received safety training. Although the condition was obvious, the room was remotely located and, therefore, management may not have been aware of the condition. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

6. Citation No. 8561734

Inspector Allard issued 104(a) Citation No. 8561734, alleging a violation of section 57.4104(a) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "high" negligence.¹⁰ The "Condition or Practice" is described as follows:

⁹ "SQUARE" is an acronym for Safety-Quality-You-Accountability-Responsibility Efficiency. Resp't Br. at 16.

¹⁰ 30 C.F.R. § 57.4104(a) provides that: "Waste materials, including liquids, shall not accumulate in quantities that could create a fire hazard."

About 11 open plastic five gallon pails containing used oil and other combustible waste were being stored in a small room in the upper shop. There were also about 12 closed pails of used oil in the room. Serious injuries to the one miner normally in the area could result from a fire in this area. This condition was open and obvious.

Ex. P-10. The citation was terminated after the waste oil was transferred to closed containers.

A. Fact of Violation

Allard testified that he observed eleven uncovered five-gallon pails containing oil, oil filters, and waste rags that were being stored in the upper shop, as well as twelve additional pails that were closed. Tr. 38-39. He opined that oil is a combustible material within the purview of the standard, and that were a fire to occur, miners would suffer burns and smoke inhalation. Tr. 38-40. Allard also noted, however, that because oil does not readily burn, and since the pails were not stored in the sunlight, a fire was unlikely to occur. Tr. 40.

Original Sixteen argues that the Secretary has not satisfied the “quantity” requirement of the standard and, therefore, that he has failed to prove a violation. Resp’t Br. at 5. In somewhat confusing testimony, Miller stated that there was no waste oil in the area, then identified the area as designated for used oil storage. Tr. 355-56. He was also of the opinion that a fire would not occur because there was no ignition source, and that miners would not enter the area, except to store oil. Tr. 355.

The Secretary did not provide any evidence demonstrating that the quantity of oil being stored created a fire hazard. It is evident that Allard cited Original Sixteen because the pails were uncovered, and that he was not of the opinion that the quantity of oil created a hazard, since the violation was abated by transferring the oil to closed containers, rather than reducing the amount being stored. Therefore, I find that the Secretary has failed to prove a violation of section 57.4104(a), and I vacate the citation.

7. Citation No. 8561735

Inspector Allard issued 104(a) Citation No. 8561735, alleging a violation of section 47.41(a) that was “unlikely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Original Sixteen’s “moderate” negligence.¹¹ The “Condition or Practice” is described as follows:

About 23 plastic five gallon pails containing used oil stored in a small room in the upper shop were not labeled to indicate their contents. Serious injuries to the one

¹¹ 30 C.F.R. § 47.41 provides that: “The operator must ensure that each container of a hazardous chemical has a label. If a container is tagged or marked with the appropriate information, it is labeled.”

miner normally in the area could result from improper use or contact with the contents.

Ex. P-11. The citation was terminated after a sign was posted in the area to indicate the pails' contents.¹²

A. Fact of Violation

Allard testified that the standard ensures that miners handling the containers are informed of their contents, so as to assure proper usage. Tr. 41. He stated that waste oil, a carcinogen, is classified by MSHA as a hazardous chemical. Tr. 41-42. He explained that the pails had originally contained other substances, and then recycled to store Sixteen to One's used oil; some pails were labeled, but with information pertaining to the original contents. Tr. 42. According to him, given waste oil's hazardous classification, improper use could cause miners to suffer lost workdays from long-term health issues, but miners were unlikely to suffer injury in this case because they were aware of the containers' contents. Tr. 42-43.

Original Sixteen's argument that the containers were appropriately marked in compliance with the standard, is contradicted by Miller's own testimony that the pails could not be labeled. Resp't Br. at 5; Tr. 357. Original Sixteen also argues that Allard provided no evidence that waste oil is a hazardous chemical as defined by Part 47, that an exemption in section 47.91 for consumer products applies, that the mine has been inspected by CAL/OSHA four times a year and never cited for improper storage of waste oil, and that Allard provided no evidence of how a miner would suffer injury as a result of this condition. Resp't Br. at 5-6. Miller maintained that miners would be aware that the containers contained waste oil, and that they are not normally in the area and would only enter to dispose of oil. Tr. 356-57.

Section 47.11 defines a hazardous chemical as "any chemical that can present a physical or health hazard." 30 C.F.R. § 47.11. I credit Allard's testimony that MSHA classifies waste oil as a hazardous chemical, and Original Sixteen has presented no evidence beyond Miller's bare assertion, that the exemption for consumer products or hazardous substances regulated by the Consumer Product Safety Commission applies. In short, none of Original Sixteen's arguments exempt it from the labeling requirement. Therefore, I find that the standard was violated.

While I find that Original Sixteen violated the standard, in light of credible evidence that the miners were fully aware that the pails contained waste oil, the Secretary has presented no evidence respecting how they would suffer injury from inadequate labeling. Therefore, I find that this violation had no likelihood of causing injuries that would reasonably be expected to result in lost workdays or restricted duty injuries.

¹² I note that the action taken to abate the condition, posting a sign rather than labeling each unit, did not bring the containers into compliance with section 47.41.

B. Negligence

The record establishes that the condition was obvious and had existed over an extended period of time, and Miller should have known that the oil was classified as hazardous, given that he is an experienced miner and mine owner. See Tr. 360. However, the area's known designation for used oil storage and the miners' knowledge and familiarity with the contents of the containers mitigated Original Sixteen's negligence. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

8. Citation No. 8561736

Inspector Allard issued 104(a) Citation No. 8561736, alleging a violation of section 57.4131(a) that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.¹³

The "Condition or Practice" is described as follows:

More than one day's supply of timber was stored within 100 feet of the mine portal. About 100 pieces of timber ranging from 6" x 10" x 10' to 2" x 6" x 8" were stacked from 30' to 90' from the portal. In the unlikely event that the timber caught on fire, the three miners normally underground could suffer fatal injuries from toxic gases.

Ex. P-12. The citation was terminated after the timbers were moved away from the portal.

A. Fact of Violation

Allard testified that the regulation allows the operator to store only as much timber as the mine can normally use in one day, within 100 feet of the portal. Tr. 97-98. He opined that the amount of timber present exceeded a day's worth of timbering and, thus, Original Sixteen was storing for future timbering in violation of the standard. Tr. 93, 97-98. In support of his observation, he recalled that miner Mark Loving told him that timber was being stored near the portal because it was easier than going up the hill to retrieve it. Tr. 57, 99. Addressing the gravity of the violation, Allard opined that the timbers were relatively dry, that a power line, cutting torches, or smoking could serve as ignition sources, and that if a fire occurred, carbon monoxide could be pulled underground, fatally poisoning miners. Tr. 46-47, 88-92. However, in his opinion, combustion was unlikely to occur. Tr. 46-47.

Miller disagreed with Allard's assessment that 100 pieces of timber were being stored, estimating the count to range from 50 and 60 pieces, an amount that the miners could transport

¹³ 30 C.F.R. § 57.4131(a) provides that: "On the surface, no more than one day's supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation."

into the mine in a day and, in fact, in one shift. Tr. 362-63. However, Miller also testified that he believed that it is permissible to store more than one day's supply of timber, and that combustion was impossible, given that the timber was wet and no ignition sources were present. Tr. 363, 366-67, 374. Specifically, Miller stated that an electrical line that Allard identified as a possible ignition source was, in fact, a phone line. Tr. 89, 366-67; Ex. P-12 at 3-4.

I credit Allard's testimony and find that Original Sixteen was storing more than one day's supply of timber. While I credit Miller's testimony that the electrical line was a phone line, Allard's un rebutted testimony was that cutting torches and smoking were possible ignition sources. Consistent with my earlier finding respecting the fire suppression system, in the unlikely event of a fire, the miners would likely escape the mine. Therefore, I find that Original Sixteen violated the standard, and that the violation was unlikely to result in permanently disabling, rather than fatal, injuries.

B. Negligence

While Loving's statement to Allard suggests that Original Sixteen, as a general practice, had been storing excess timber at the portal for an extended period of time, I credit Allard's testimony that management may not have been aware of the practice. Therefore, I find that Original Sixteen was moderately negligent in violating section 57.4131(a).

9. Citation No. 8561737

Inspector Allard issued 104(a) Citation No. 8561737, alleging a violation of section 57.14100(d) that had "no likelihood" of causing "no lost workdays," and was caused by Original Sixteen's "moderate" negligence.¹⁴ The "Condition or Practice" is described as follows:

A record of the defects on the 966 FEL located at the upper shop could not be produced. The loader was tagged out of service with no record of the defects.

Ex. P-13. The citation was terminated after the defects on the loader were documented.

A. Fact of Violation

Allard testified that the loader had been tagged "Do Not Use," but that Original Sixteen had not recorded the nature of the defect. Tr. 48. Allard opined that this was a paperwork violation, with no likelihood of injury. Tr. 49. Miller reasoned that he tagged-out the loader because he could not find the pre-operational examination record; therefore, according to him, the

¹⁴ 30 C.F.R. § 57.14100(d) provides that: "Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to, and recorded by, the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary."

loader was not defective, and no record of the defect was kept. Tr. 385. Moreover, Original Sixteen argued that a log book is not an MSHA requirement. Resp't Br. at 7.

When Original Sixteen tagged-out the loader, it was required to record the defect and, therefore, I find that Original Sixteen violated the standard.

B. Negligence

Allard testified that the operator knew of the recording requirement and failed to report this defect, but that it had prevented miners from using unsafe equipment by tagging it out. Tr. 49-50. Miller testified that he believed Original Sixteen to have complied with the regulation by tagging-out a piece of equipment which did not have a pre-operational examination record. Tr. 378, 384-85.

I credit Miller's testimony that he, in good-faith, believed that he had complied with the standard. In fact, Miller took extra safety precautions by tagging out the loader, even though he was uncertain of its defects. However, the standard is clear, and Miller should have known of its recording requirement. Therefore, I find Original Sixteen's violation of the standard was caused by low, rather than moderate negligence.

10. Citation No. 8561105

Inspector William Berglof issued 104(a) Citation No. 8561105, alleging a violation of section 57.12030 that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.¹⁵ The "Condition or Practice" is described as follows:

The stinger located on the Lincoln Arc Welder, Ideal Arc R3R, located in the lower shop near the portal was defective, creating an electrocution hazard. Both the top and bottom tip and half of the bottom insulated components on the stinger were partially missing exposing the bare conductor. Miners use this welder as needed to fabricate and make repairs as needed in and around this shop. The welder was not tagged out of service and was accessible to any of the 4 miners working on site this day. This condition needs to be corrected prior to energizing the welding lead. A miner stated he had used this welder approximately 2-3 weeks ago. The welder was immediately tagged out of service.

Ex. P-14. The citation was terminated after the stinger was cut off of the positive lead on the welder.

¹⁵ Berglof did not testify at the hearing. The Secretary called Inspectors Jerry Hulsey or Joshua Love to testify, respecting citations issued by Berglof.

30 C.F.R. § 57.12030 provides that: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

A. Fact of Violation

Inspector Jerry Hulseley opined that electricity is transmitted through a stinger, which is connected to welding leads and clamps to the welding rod. Tr. 119-121. Viewing the photograph of the stinger, Hulseley opined that the bottom portion of the stinger was missing, exposing the bare conductors. Tr. 120-21; Ex. P-14 at 4. According to him, if the stinger were connected to a metal object, an arc flash could occur, potentially causing the person holding the stinger to be electrocuted. Tr. 118, 121. The Secretary argues that when Berglof inspected the welder, the stinger was energized with its bare conductors exposed. Secy' Br. at 20.

Miller opined that the stinger was obviously damaged, and that a miner would not energize the welder in such defective condition. Therefore, he asserted, the stinger was not energized, it did not create a hazard, and Original Sixteen could have repaired it before use. Tr. 387-90. Miller testified that only two miners would use the welder, but admitted that it had not been tagged-out. Tr. 388.

Berglof's inspection notes state that he "Interviewed certified welder, he stated he used the welder 2 -3 weeks ago, it was not damaged like it is now. States he . . . would never use it with a broken stinger." Neither the face of the citation, nor Berglof's notes indicate that the welder was energized and, because Berglof was not called to testify, I find that the welder was not energized. Although the welder was not tagged-out of service, the damaged stinger was obvious, and the standard provides an opportunity for correction of a potentially dangerous condition before energizing equipment. Therefore, based on my finding that the welder was not energized when Berglof cited the operator, I vacate this citation.

11. Citation No. 8561106

Inspector Berglof issued 104(a) Citation No. 8561106, alleging a violation of section 57.4361(a) that was "unlikely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "high" negligence.¹⁶ The "Condition or Practice" is described as follows:

There has [sic] been no underground evacuation drills conducted at this mine this year. The underground drill is required at least every 6 months. These drills are required to assess the ability of all miners underground to reach the surface or refuge chambers within the time limits of the self-rescue devices. There were three miners working underground at the time of issuance.

¹⁶ 30 C.F.R. § 57.4361(a) provides that: "At least once every six months, mine evacuation drills shall be held to assess the ability of all persons underground to reach the surface or other designated points of safety within the time limits of the self-rescue devices that would be used during an actual emergency."

Ex. P-15. The citation was terminated after an unannounced underground evacuation drill was conducted.

A. Fact of Violation

Original Sixteen conceded the violation, but contests the gravity and negligence designations. Tr. 396.

Miller opined that miners would evacuate the mine through their regular entrance and exit route and, therefore, there was no possibility that a miner would be killed in an emergency. Tr. 396-97.

Berglof's notes do not provide a justification for designating this violation as "fatal," and Hulseley did not address this issue. Ex. P-15 at 2. Berglof's notes state that injury was unlikely because miners were only working on the 1000 level of the mine. I find that were an emergency to occur, miners would be able to escape through their familiar routes. However, miners untrained in quick evacuation response could trip-and-fall, leading to musculoskeletal injuries such as sprains, strains, broken bones and head trauma or, in the event of a fire, smoke inhalation and burns. Thus, I find that failure to conduct regular evacuations in accordance with the standard would be reasonably expected to result in permanently disabling, rather than fatal injuries.

B. Negligence

Miller testified that Original Sixteen was not negligent because it has conducted emergency evacuation drills, including unannounced drills, and that miners were trained in how to exit the mine. Tr. 397-98.

Berglof's notes state that "Mr. Miller stated they just forgot to do it Mr. Miller also believes this is not required since he [is] in non-producing status" Ex. P-15 at 2. Based on the record, I find that Original Sixteen's management was aware of the requirement to conduct evacuation drills, and that it has provided no justification for failure to comply with the standard. Therefore, I find that there are no mitigating factors, and that Original Sixteen was highly negligent in violating section 57.4361(a).

12. Citation No. 8561107

Inspector Berglof issued 104(a) Citation No. 8561107, alleging a violation of section 62.120 that was "unlikely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Original Sixteen's "moderate" negligence.¹⁷ The "Condition or Practice" is described as follows:

¹⁷ 30 C.F.R. § 62.120 provides that: "If during any work shift a miner's noise exposure equals or exceeds the action level the mine operator must enroll the miner in a hearing conservation program that complies with § 62.150 of this part."

The results of an MSHA full shift noise sample taken on 07/21/10 showed the utility miner working underground received an action level noise dose of 132.0%. This exceeds the action level dose or 50% plus the error factor (or 66%). The miner was not enrolled in a hearing conservation program as required by 30 C.F.R. 62.120.

The abatement date for this citation is to allow the mine operator time to enroll the miner into a formal hearing conservation program which meets all the requirements of 30 C.F.R. 62.150.

Ex. P-16. The citation was terminated after the operator offered audiograms to all miners.

A. Fact of Violation

Hulsey testified that if a noise sample exceeds the action level limit, the operator must enroll miners in a hearing conservation program. Tr. 128-130. The noise sample showed that the utility miner received a noise dose of 132% which, as Hulsey opined, is double the permissible limit of the action level, including an error factor. Tr. 129-130; Ex. P-16 at 3. According to Berglof's notes, the miner exposed to the excess noise was not enrolled in a hearing conservation program. Tr. 130; Ex. P-16 at 3. Berglof's notes also state that a miner exposed to excessive noise would suffer permanently disabling hearing loss, but that it would be unlikely to occur, because the miners wore ear plugs and muffs. Ex. P-16 at 3.

Miller agreed that the sample accurately reflected the noise dose that the miner received, but testified that Original Sixteen offered miners the opportunity to enroll in a hearing conservation program, which they refused. Tr. 399-400. He testified that as Berglof was conducting the test, he stated that an air leak distorted the test and made it noisier than normal levels. Tr. 398. Original Sixteen argues that application of this standard is inappropriate to Sixteen to One because the mine does not have a predictable noise level; rather, the noise reading was anomalous. Resp't Br. at 8-9; Tr. 400.

Miller conceded that the miner received a noise dose in excess of the action level limit, and Original Sixteen's contention that it offered miners enrollment in a hearing conservation program falls short of the requirement of actually enrolling the miner. A miner exposed to excessive noise over a prolonged period may suffer permanently disabling hearing loss. Therefore, I find a violation of section 62.120, and that it was unlikely to cause permanently disabling injuries.

B. Negligence

Berglof's notes state that the miners had received training on the importance of hearing protection, and that they were provided ear plugs and ear muffs. Ex. P-16 at 3. No evidence has been produced to rebut Original Sixteen's argument that it does not have a history of noise violations. While these factors mitigate Original Sixteen's negligence, the noise dose received by the miner far exceeded the action level. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

13. Citation No. 8561177

Inspector Berglof issued 104(a) Citation No. 8561177, alleging a “significant and substantial” violation of section 57.14100(b) that was “reasonably likely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Original Sixteen’s “moderate” negligence.¹⁸ The “Condition or Practice” is described as follows:

The square nosed shovel, located at the shop, had a damaged splintered handle. The 32 inch handle had a 3 ½ inch splintered end with sharp ends. The shovel is used for clean-up. The shovel was not tagged out of service and is readily available to any of the five miners on site. This condition exposes miners to a hand injury hazard.

Ex. P-17. The citation was terminated after the damaged section of the shovel was repaired.

A. Fact of Violation

Inspector Joshua Love testified that he had been an MSHA inspector since June 2009, and that he accompanied Inspector Berglof on his October 20 and October 21 inspections of Sixteen to One, and observed each of the conditions cited during the inspections. Tr. 150-51. He stated that the shovel with the broken handle was available for use, and miners using it would be subjected to hand lacerations and possible infection. Tr. 153; Ex. P-17 at 3. Miller, on the other hand, testified that miners working at Sixteen to One would not have picked up the broken shovel, especially given that a new shovel was standing next to it. Tr. 403, 405. Miller also argued that the standard does not apply to a shovel because it is not a mechanical tool. Tr. 409. Original Sixteen argues that it satisfied the standard by removing the shovel in a timely manner. Resp’t Br. at 9-10.

The evidence establishes that the shovel had a splintered handle, and that it was available for use. Miners using the shovel would be subjected to any of the injuries associated with handling splintered wood, lacerations and splinters penetrating the fingers or hands, and infection; therefore, the tool could not be used safely. I credit Miller’s testimony that a new shovel was readily available next to the splintered one and, therefore, conclude that the violation was unlikely to result in an injury that would not require lost workdays. Therefore, I find that Original Sixteen violated the standard, but I also find that the violation was non - S&S.

B. Negligence

Love agreed with Berglof’s assessment of moderate negligence, and opined that the break in the shovel was obvious, but that the operator had trained miners to repair broken shovels and had provided other shovels in good condition. Tr. 154-55. The record establishes that the hazard

¹⁸ 30 C.F.R. § 57.14100(b) provides that: “Defects 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.”

was obvious, but that Original Sixteen had provided adequate training and made available tools in good condition, which I consider mitigating factors. Therefore, I find Original Sixteen's violation of the standard to be caused by its low, rather than moderate negligence.

14. Citation No. 8561178

Inspector Berglof issued 104(a) Citation No. 8561178, alleging a violation of section 57.4201(a)(2) that was "unlikely" to cause an injury that could reasonably be expected to result in "lost workdays or restricted duty," and was caused by Original Sixteen's "moderate" negligence. The "Condition or Practice" is described as follows:

The fire extinguisher, located at the shop, did not have the required annual maintenance inspection conducted within the last 12 months. The last maintenance inspection was done on September 2009. The fire extinguisher has no visible damage to the cylinder and the hose was in good condition. This condition exposes miners to the hazard of fighting a fire without a fire ready fire extinguisher.

Ex. P-18. The citation was terminated after the out-of-compliance extinguisher was replaced by one inspected within the last year.

A. Fact of Violation

Original Sixteen conceded the violation, but contests the gravity and negligence designations. Tr. 412.

Inspector Love testified that a miner fighting a fire with a defective extinguisher would suffer smoke inhalation and first-degree burns; however, in his opinion, injury was unlikely because there was no visible damage to the extinguisher. Tr. 158. Miller opined that this fire extinguisher was not required, and that it was in good condition. Tr. 413.

Original Sixteen argued that "miners were not endangered due to the paper oversight." Resp't Br. at 10. The record makes clear that the fire extinguisher was in good condition. Therefore, I find a violation that was unlikely to cause a miner to suffer injuries resulting in lost workdays or restricted duty.

B. Negligence

Love and Miller agreed that there were other annually-inspected fire extinguishers in the area. Tr. 158, 413. While the inspection date on the extinguisher was obvious, I find that the availability of the other extinguishers mitigated Original Sixteen's negligence. Therefore, I find that Original Sixteen was moderately negligent in violating the standard.

15. Citation No. 8561181

Inspector Berglof issued 104(a) Citation No. 8561181, alleging a violation of section 57.4201(a)(2) that was “unlikely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Original Sixteen’s “moderate” negligence. The “Condition or Practice” is described as follows:

The fire extinguisher, located at the upper shop, did not have the required annual maintenance inspection conducted within the last 12 months. The last maintenance inspection was done on August 21, 2007. The fire extinguisher has no visible damage to the cylinder and the hose was in good condition. This condition exposes miners to the hazard of fighting a fire without a ready fire extinguisher.

Ex. P-21. The citation was terminated after the out-of-compliance extinguisher was replaced by one that was in compliance.

A. Fact of Violation

Love stated that based on Berglof’s notes, this fire extinguisher had not been inspected in approximately three years, and agreed with Berglof’s gravity determinations for the reasons that he articulated respecting the prior citation. Tr. 160-61; Ex. P-21 at 3. Original Sixteen offered no new arguments for its failure to maintain its fire extinguishers in accordance with the standard. Therefore, I find that Original Sixteen violated the standard.

B. Negligence

Love testified that he agreed with Berglof’s negligence determination for the reasons that he articulated respecting the prior violation. Tr. 161. Applying the same analysis as in the previous violation, I find that Original Sixteen was moderately negligent.

16. Citation No. 8561184

Inspector Berglof issued 104(a) Citation No. 8561184, alleging a violation of section 57.4201(a)(2) that was “unlikely” to cause an injury that could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Original Sixteen’s “moderate” negligence. The “Condition or Practice” is described as follows:

The fire extinguisher, located at the 800 level MCC, did not have the required annual maintenance inspection conducted within the last 12 months. The last maintenance inspection was done on September 2009. The fire extinguisher has no visible damage to the cylinder and the hose was in good condition. This condition exposes miners to the hazard of fighting a fire without a fire ready fire extinguisher.

Ex. P-24. The citation was terminated after the out-of-compliance extinguisher was replaced by one that was in compliance.

A. Fact of Violation

Love testified that based on Berglof's notes, this fire extinguisher had not been inspected in approximately one year and agreed with Berglof's gravity determinations, for the reasons he articulated for the last citation. Tr. 162-63; Ex. P-24 at 3. Original Sixteen offered no new arguments for this citation. Therefore, I find that Original Sixteen violated the standard.

B. Negligence

Love stated that he agreed with Berglof's negligence determination for reasons that he had articulated respecting the previous fire extinguisher violations. Tr. 163. Therefore, I find that Original Sixteen was moderately negligent.

17. Citation No. 8561179

Inspector Berglof issued 104(a) Citation No. 8561179, alleging a violation of section 57.12004 that was "unlikely" to cause an injury that could reasonably be expected to result in "no lost workdays," and was caused by Original Sixteen's "moderate" negligence.¹⁹ The "Condition or Practice" is described as follows:

The 120v power cord to the overhead light in the change room, had a damaged outer jacket, exposing the inner insulated conductors to mechanical damage. The outer jacket had a ¼ inch cut in the outer jacket. Miners use the change room daily. This condition exposes miners to an electric shock hazard.

Ex. P-19. The citation was terminated after the operator repaired the cable.

A. Fact of Violation

Love testified that the quarter-inch cut in the outer jacket exposed the inner electrical wires to mechanical damage. Tr. 164-67; Ex. P-19 at 3. He opined that the cut indicated that the cable had been damaged, and that something had sliced it. Tr. 167. According to Love, injury was unlikely because a miner would have to intentionally reach overhead to contact the cable. Tr. 169-170. A miner contacting the wires would merely be shocked which, in Love's opinion, would not result in lost work time, since the injury would be less severe than first degree burns. Tr. 168-69.

¹⁹ 30 C.F.R. § 57.12004 provides that: "Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected."

Original Sixteen argues that an outer jacket is not required. Resp't Br. at 11. Miller admitted that the outer jacket was damaged, but opined that a miner would not be shocked because the inner wires were not exposed to mechanical damage. Tr. 419-420.

I find that the cut in the outer jacket exposed the inner electrical wires to mechanical damage and that, in the unlikely event that a miner were to contact the exposed wires, an electrical shock would occur, and any injury would be minor.

B. Negligence

Love agreed with Berglof's assessment that Original Sixteen was moderately negligent, opining that management may not have been aware of the condition of the cable because the room is typically used only by rank-and-file miners, and that the damaged cable would be difficult to contact. Tr. 170. I find that Original Sixteen was moderately negligent in violating the standard.

18. Citation No. 8561180

Inspector Berglof issued 104(a) Citation No. 8561180, alleging a "significant and substantial" violation of section 57.14115(b) that was "reasonably likely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Original Sixteen's "moderate" negligence. The "Condition or Practice" is described as follows:

At the fabrication storage, the tool rest on the bench grinder was not set properly. The bench grinder was 120V and plugged in. The tool rest was set at 1¼ inch opening. The bench grinder has a speed of 1750 RPM. The grinder was readily accessible to any of the 5 miners on site. This condition exposes miners to a serious injury from contacting the grinder wheel.

Ex. P-20. The citation was terminated after the tool rest was adjusted.

A. Fact of Violation

Love testified that the distance between the wheel and tool rest on this grinder was 1¼ inch. Tr. 173; Ex. P-20 at 3-4. Original Sixteen reiterated its argument respecting the prior grinder citation, that the standard ensures only that the rest be adjustable to 1/8 inch, rather than requiring that the distance between the wheel and tool rest not exceed that maximum setting. Resp't Br. at 11. Miller asserted that "everything the inspector wrote was pure speculation." Tr. 421. As has been discussed, I find Original Sixteen's position unavailing, and I conclude that the condition of the grinder violated the standard.

B. Significant and Substantial

Love agreed with Berglof's determination that permanently disabling injuries, such as cuts and lacerations to the hands were reasonably likely to occur, because a hand-held tool would be

pulled into the gap between the wheel and the rest. Tr. 174-75. Again, Miller contended that the gap would not cause an accident. Tr. 421.

As with the prior citation for an out-of-adjustment grinding wheel, I find that a miner would be reasonably likely to suffer broken bones and lacerations should his hands or fingers be pulled in between the wheel and the tool rest. Therefore, I find that this violation was S&S, and that broken bones or lacerations to hands or fingers would be reasonably likely to result in lost workdays or restricted duty, rather than permanently disabling injuries.

C. Negligence

Love, also in agreement with Berglof's determination of moderate negligence, opined that, while the condition was open and obvious, miners had received training in properly adjusting the grinder. Tr. 175-76. Miller testified that the only miner who would use the grinder was experienced. Tr. 421. Based on the obviousness of the condition and evidence that miners had received training on properly adjusting the machine, I find that Original Sixteen was moderately negligent in violating the standard.

19. Citation No. 8561182

Inspector Berglof issued 104(a) Citation No. 8561182, alleging a violation of section 57.4130(b) that was "unlikely" to cause an injury that could reasonably be expected be "permanently disabling," and was caused by Original Sixteen's "moderate" negligence.²⁰ The "Condition or Practice" is described as follows:

The area around the diesel storage tank was not clear of dry vegetation. The diesel storage tank capacity is 5000 gallons. There is an estimated 300 gallons of diesel in the tank. There was [sic] large amounts of dry branches 5' in front of and 15' behind the fuel storage. Miners access the area as needed to fuel service vehicles. This condition exposes miners to fire hazards.

Ex. P-22. The citation was terminated after the vegetation was removed.

A. Fact of Violation

Love opined that the regulation applies to the diesel storage tank, because it stores combustible liquid.²¹ Tr. 178-79. He testified that because there were no identifiable heat

²⁰ 30 C.F.R. § 57.4130(b), pertaining to surface electric substations and liquid storage facilities, provides that: "The area within the 25-foot perimeter shall be kept free of dry vegetation."

²¹ 30 C.F.R. § 57.4130(a)(2) provides that: "If a hazard to persons could be created, no combustible materials shall be stored or allowed to accumulate within 25 feet of . . . [u]nburied,
(continued...)"

sources, a fire would be unlikely to occur. Tr. 180. He also opined that the tank was infrequently used, but a fire could result from any vegetation accumulated under a heated engine when fueling a vehicle. Tr. 180. Love disagreed with Berglof's severity-of-injury determination, however, testifying that if a fire were to occur, miners would suffer smoke inhalation and first-degree burns, which would be reasonably likely to result in lost workdays or restricted duty, rather than permanently disabling injuries. Tr. 179.

Original Sixteen argues that the photograph taken by the inspector shows vegetation more than 25 feet away from the tank, and that no consideration was given regarding the current conditions at the mine. Resp't Br. at 12. Miller testified that no miner was fueling equipment when the condition was cited, and that no ignition sources were present. Tr. 421-23.

I find that dry vegetation was present within the 25-foot perimeter of the fuel storage tank, and that the tank was infrequently used. I also find that in the unlikely event of a fire, miners would be subjected to injuries from smoke inhalation and first degree burns, resulting in lost workdays or restricted duty. Therefore, I find that Original Sixteen violated the standard.

B. Negligence

Love agreed with Berglof's assessment of moderate negligence, because the operator removed some of the vegetation prior to the citation being issued. Tr. 180-81; Ex. P-22 at 5. Original Sixteen argued that it was pulling the dry vegetation away from the tank when the inspector arrived. Resp't Br. at 12. While the condition was obvious, the evidence is lacking as to how long the condition had existed; indeed, Original Sixteen was engaged in removing the dry vegetation when the condition was cited. Therefore, I find that Original Sixteen's negligence in violating the standard was low, rather than moderate.

20. Citation No. 8561183

Inspector Berglof issued 104(a) Citation No. 8561183, alleging a "significant and substantial" violation of section 57.9300(a) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Original Sixteen's "moderate" negligence.²² The "Condition or Practice" is described as follows:

The berms along the bank of the access road to the Tightener Portal were not being maintained. There are two missing berms at the culverts. The road had an average width of 11 feet. The openings in the berms are between 12-15 feet wide. The remainder of the berms showed signs of degrading. The estimated drop is 150+

²¹(...continued)

flammable, or combustible liquid storage tanks."

²² 30 C.F.R. § 57.9300(a) provides that: "Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

feet fall to the floor below. Miners recently accessed the road for the installation of a fan in the Tightener Portal. This condition exposes miners to a roll over vehicle hazard.

Ex. P-23. The citation was terminated after a gate and delineators were installed and a warning sign was posted.

A. Fact of Violation

Love testified that loaders and service trucks, not equipped with rollover protection, typically travel on the roadway and, if they were to leave the road, they would fall 150 feet to the ground below and roll over. Tr. 184-85. Miller argued that miners were in no danger of running through the berms. Tr. 427. Original Sixteen contends that the mine roads were maintained, and that the abatement, mere installation of a sign, indicates that the missing berms posed no danger. Resp't Br. at 13.

I find that there were two 12 to 15-foot gaps between the berms, and that they were reasonably likely to result in service trucks and loaders leaving the road and plunging down the 150 foot embankment. Therefore, I find that Original Sixteen violated the standard.

B. Significant and Substantial

In Love's opinion, because the road was rough, uneven and rutted, it would be reasonably likely that a truck would travel through a berm, resulting in the operator's death. Tr. 185-86. Miller opined that miners infrequently traveled in the area, and that no danger was present. Tr. 424-27.

I find that a truck or loader, without rollover protection, running through a berm and plunging 150 feet and overturning, would be reasonably likely to result in the driver sustaining severe injuries ranging from head trauma to crush injuries, which are potentially fatal. Therefore, I find that the violation was S&S.

C. Negligence

Love agreed with Berglof's assessment of moderate negligence, opining that weather had deteriorated the berms. Tr. 186, 268. The evidence establishes that the condition of the berms was obvious, and that they had been eroded by weather. I find that, in failing to maintain the berms in good condition, Original Sixteen was moderately negligent in violating the standard.

21. Citation No. 8561185

Inspector Berglof issued 104(a) Citation No. 8561185, alleging a "significant and substantial" violation of section 57.11012 that was "reasonably likely" to cause an injury that

could reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Original Sixteen’s “moderate” negligence.²³ The “Condition or Practice” is described as follows:

The travelway leading to the 1088 timber repair area has an open hole where persons or materials may fall and was not protected with a barrier, cover or railing, creating a slip, trip and/or fall hazard. The open hole is located at the 1084 dump point. The unprotected area is approximately 8 feet in length with a gradual downward slope, consisting of loose and unconsolidated material ranging in size from dust to 14-inches in diameter. A miner slipping and/or falling in this area would reasonably likely sustain an ankle or knee strain or sprain type injury. The travelway through this area narrows down to 24 inches, with visible under-cutting the east side rail noted. Miners access this travelway daily.

Ex. P-25. The citation was terminated after the hole was covered.

A. Fact of Violation

Love referred to Berglof’s notes, which stated that miners traveled this travelway at least twice daily to get to the 1088 timber repair area. Tr. 188, 271-72; Ex. P-25 at 5. Love opined that the hole was eight feet wide by approximately two feet deep, large enough for a person to fall through, and that it was being used by Original Sixteen to dump ore. Tr. 188-91, 194; Ex. P-25 at 6. He testified that there was no railing, barrier, cover, sign or barricade. Tr. 195.

Jonathan Farrell testified that the hole was against the mine ribs, which is not where miners walked, but admitted that the hole was near a travelway. Tr. 317-322. He opined that a warning light installed by Original Sixteen brought the operator into compliance with the standard. Tr. 449. Miller also believed that the light provided adequate warning, referencing another case in which an MSHA special investigator had advised him that a warning light provides sufficient notice of a hazardous condition. Tr. 455-56. Original Sixteen argues that Love has limited experience inspecting underground mines, and no experience inspecting gold mines. Resp’t Br. at 15-16.

I find that the hole was near the travelway used by miners, and that Original Sixteen failed to protect miners from falling into it. While the warning light illuminating the hole alerted miners to the hazard, it did not prevent them from falling into the hole as a result of slipping or tripping, and a protective barrier, as required by section 57.11012, was not impractical. Therefore, I find that Original Sixteen violated the standard.

²³ 30 C.F.R. § 57.11012 provides that: “Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.”

B. Significant and Substantial

Love agreed with Berglof, testifying that because miners often traveled the walkway which, at one point, narrows to 24 inches, a fall into the hole was reasonably likely, and a miner would receive muscle strains, twisted ankles or broken bones. Tr. 190, 193.

Farrell testified that miners, familiar with the area, would not trip and fall into the hole and, even if a fall occurred, the miner would not be harmed. Tr. 310, 313. Miller also opined that the miners would not fall into the hole, given that the floor was flat and a mine car would not flip over, and that the area was infrequently traveled. Tr. 429, 431, 433.

The record establishes that the hole was located near a travelway used, at least infrequently, by miners, and I find that a miner falling into the hole and down the slope of unconsolidated material would be reasonably likely to suffer musculoskeletal injuries such as sprains, strains and broken bones. Therefore, I find that the violation is S&S.

C. Negligence

Love opined that Original Sixteen's negligence was moderate, because the operator may have reasonably believed that no cover was needed for an area where work was being performed. Tr. 194. I find that the hole was obvious, and that Original Sixteen held a good faith belief that the warning light was sufficient to warn against the danger. However, the standard requires a physical barrier, and erecting one would not have blocked access to the hole. Therefore, I find that providing the warning light mitigated Original Sixteen's negligence, and that it was low, rather than moderate.

PENALTIES

While the Secretary has proposed a total civil penalty of \$2,582.00 for the violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). *Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Original Sixteen is a small operator with an overall history of violations that is not an aggravating factor in assessing appropriate penalties.²⁴ I also find that Original Sixteen demonstrated good faith in achieving rapid compliance after notice of the violations.

Addressing Original Sixteen's ability to pay, Miller testified that the operator does not have the assets to pay the penalty proposed by the Secretary, that he would be paying the penalties personally, and that he does not have sufficient funds to continue operating the mine. Tr. 442. In support of its contention, Original Sixteen submitted a gold production report and its

²⁴ The presumption of Original Sixteen's relevant history as a non-aggravating factor is occasioned by the Secretary's failure to put in evidence the Assessed Violation History Report.

Quarterly Report to the Securities and Exchange Commission for the quarter ending March 31, 2012. Exs. R-1, R-7.

The Commission has held that the mine operator has the burden to prove that the proposed penalty will affect its ability to continue in business. *Sellersburg*, 5 FMSHRC at 294. The financial report submitted by Original Sixteen is unaudited which, as other judges have recognized, is insufficient support for an inability-to-pay defense. *Apex Quarry*, 33 FMSHRC 3158, 3162-63 (Dec. 2011) (ALJ) (citing *Johnco Materials, Inc.*, 33 FMSHRC 1431, 1433-34 (June 2011) (ALJ)). Without adequate documentation of Original Sixteen's financial status, the effect of the proposed penalties on its ability to continue in business cannot be determined. Therefore, I find that Original Sixteen has not met its burden, and that the proposed civil penalties will not affect the operator's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violations and Original Sixteen's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

1. Citation No. 8561729

It has been established that this violation of section 57.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. The Secretary proposed a penalty of \$100.00. In consideration of my finding as to negligence, I find that a penalty of \$70.00 is appropriate.

2. Citation No. 8561730

It has been established that this S&S violation of section 57.11050(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen's negligence was low, and that it was timely abated. The Secretary proposed a penalty of \$100.00. In consideration of my finding as to negligence, I find that a penalty of \$80.00 is appropriate.

3. Citation No. 8561731

It has been established that this violation of section 57.4560(a) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was highly negligent, and that it was timely abated. The Secretary proposed a penalty of \$224.00. In consideration of my finding as to gravity, I find that a penalty of \$160.00 is appropriate.

4. Citation No. 8561732

It has been established that this S&S violation of section 57.14115(b) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted

duty, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$100.00, as proposed by the Secretary, is appropriate.

5. Citation No. 8561733

It has been established that this S&S violation of section 57.20003(a) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$100.00, as proposed by the Secretary, is appropriate.

6. Citation No. 8561734 - VACATED

7. Citation No. 8561735

It has been established that this violation of section 47.41(a) had no likelihood of causing an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. The Secretary proposed a penalty of \$100.00. In consideration of my finding as to negligence, I find that a penalty of \$100.00 is appropriate.

8. Citation No. 8561736

It has been established that this violation of section 57.4131(a) was unlikely to cause an injury that could reasonably be expected to be permanently disabling, that Original Sixteen was moderately negligent, and that it was timely abated. The Secretary proposed a penalty of \$100.00. In consideration of my finding as to gravity, I find that a penalty of \$100.00 is appropriate.

9. Citation No. 8561737

It has been established that this violation of section 57.14100(d) had no likelihood of resulting in an injury that could reasonably be expected to result in no lost workdays, that Original Sixteen's negligence was low, and that it was timely abated. The Secretary proposed a penalty of \$100.00. In consideration of my finding as to negligence, I find that a penalty of \$70.00 is appropriate.

10. Citation No. 8561105 - VACATED

11. Citation No. 8561106

It has been established that this violation of section 57.4361(a) was unlikely to cause an injury that could reasonably be expected to be permanently disabling, that Original Sixteen was highly negligent, and that it was timely abated. The Secretary proposed a penalty of \$207.00. In consideration of my finding as to gravity, I find that a penalty of \$170.00 is appropriate.

12. Citation No. 8561107

It has been established that this violation of section 62.120 was unlikely to cause an injury that could reasonably be expected to be permanently disabling, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$100.00, as proposed by the Secretary, is appropriate.

13. Citation No. 8561177

It has been established that this violation of section 57.14100(b) was unlikely to cause an injury that could reasonably be expected to result in no lost workdays, that Original Sixteen's negligence was low, and that it was timely abated. The Secretary proposed a penalty of \$100.00. In consideration of my findings as to gravity and negligence, I find that a penalty of \$70.00 is appropriate.

14. Citation No. 8561178

It has been established that this violation of section 57.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$100.00, as proposed by the Secretary, is appropriate.

15. Citation No. 8561181

It has been established that this violation of section 57.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$100.00, as proposed by the Secretary, is appropriate.

16. Citation No. 8561184

It has been established that this violation of section 57.4201(a)(2) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$100.00, as proposed by the Secretary, is appropriate.

17. Citation No. 8561179

It has been established that this violation of section 57.12004 was unlikely to cause an injury that could reasonably be expected to result in no lost workdays, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$100.00, as proposed by the Secretary, is appropriate.

18. Citation No. 8561180

It has been established that this S&S violation of section 57.14115(b) was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen's negligence was moderate, and that it was timely abated. The Secretary proposed a penalty of \$108.00. In consideration of my finding as to gravity, I find that a penalty of \$100.00 is appropriate.

19. Citation No. 8561182

It has been established that this violation of section 57.4130(b) was unlikely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen's negligence was low, and that it was timely abated. The Secretary proposed a penalty of \$100.00. In consideration of my findings as to gravity and negligence, I find that a penalty of \$70.00 is appropriate.

20. Citation No. 8561183

It has been established that this S&S violation of section 57.9300(a) was reasonably likely to cause an injury that could reasonably be expected to be fatal, that Original Sixteen was moderately negligent, and that it was timely abated. Therefore, I find that a penalty of \$243.00, as proposed by the Secretary, is appropriate.

21. Citation No. 8561185

It has been established that this S&S violation of section 57.11012 was reasonably likely to cause an injury that could reasonably be expected to result in lost workdays or restricted duty, that Original Sixteen's negligence was low, and that it was timely abated. The Secretary proposed a penalty of \$100.00. In consideration of my finding as to negligence, I find that a penalty of \$80.00 is appropriate.

ORDER

WHEREFORE, it is **ORDERED** that Citation Nos. 8561734 and 8561105 are **VACATED**.

It is further **ORDERED** that Citation Nos., 8609870, 8561732, 8561733, 8561107, 8561178, 8561181, 8561184, 8561179 and 8561183 are **AFFIRMED**, as issued.

It is further **ORDERED** that the Secretary **MODIFY** Citation No. 8561729 to reduce the degree of negligence to "moderate;" Citation Nos. 8561730, 8561737 and 8561185 to reduce the degree of negligence to "low;" Citation No. 8561735 to reduce the level of gravity to "no likelihood;" Citation Nos. 8561736 and 8561106 to reduce the level of gravity to "permanently disabling;" Citation Nos. 8561731 and 8561180 to reduce the level of gravity to "lost workdays

or restricted duty;” Citation No. 8561182 to reduce the level of gravity to “lost workdays or restricted duty,” and the degree of negligence to “low;” and Citation No. 8561177 to reduce the level of gravity to “unlikely,” “non-significant and substantial” and “no lost workdays,” and the degree of negligence to “low;” and that the citations are **AFFIRMED**, as modified.

It is further **ORDERED** that Original Sixteen to One Mine, Incorporated, **PAY** a civil penalty of \$2,113.00 within 30 days of the date of this Decision.²⁵ **ACCORDINGLY**, these cases are **DISMISSED**.

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

Distribution:

Gregory W. Tronson, Esq., U.S. Department of Labor, Office of the Solicitor, 1999 Broadway, Suite 800, Denver, CO 80202

Michael M. Miller, President, Original Sixteen to One Mine, Inc., P.O. Box 909, Alleghany, CA 95910

/ss

²⁵ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket numbers and A.C. numbers.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 21, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-1027
Petitioner	:	A.C. No. 46-08884-323446
	:	
v.	:	
	:	
PAY CAR MINING, INCORPORATED,	:	Mine: No. 58
Respondent	:	

DECISION

Appearances: Anthony M. Berry, Esq., U.S. Dept. of Labor, Office of the Solicitor,
 Nashville, Tennessee, for Petitioner;

 James F. Bowman, Bowman Industries, LLC, Midway, West Virginia, for
 Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of his Mine Safety and Health Administration (“MSHA”) against Pay Car Mining, Incorporated (“Pay Car”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary seeks a civil penalty of \$70,000.00 for an alleged violation of section 75.370(a)(1).

A hearing on the merits was convened in Charleston, West Virginia. Prior to the presentation of Pay Car’s case, the parties successfully negotiated a settlement whereby 104(d)(1) Order No. 8142339 shall remain as issued, and Pay Car shall pay a reduced civil penalty of \$14,000.00 based on legitimate disputes as to the gravity and negligence designations. The Secretary credited the testimony indicating the limited duration of the violation, that the roof bolters would not have been aware of the change in the air velocity, and that the water box located on the roof bolter lessened the likelihood of serious injury. The settlement agreement was tentatively approved on the record, pending filing of the written motion to approve settlement. Tr. 173-74. After the hearing, the parties filed a Joint Motion to Approve Settlement.

Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike paragraphs three and four from the Joint Motion as immaterial and impertinent to the issues legitimately before the

Commission.¹ The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations and Congressional intent regarding settlements under the Mine Act.

I have considered the representations and documentation submitted in the case under section 110(k) of the Act. Specifically, the Secretary has credited Respondent's contentions that the roof bolter was equipped with a water box that would have sequestered any respirable dust produced, and that the miners operating the roof bolter would have been unable to determine that a deficiency in the air existed. I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approve of settlement is **GRANTED**, and it is **ORDERED** that Pay Car Mining, Incorporated, **PAY** a penalty of \$14,000.00 within 30 days of the date of this decision.² **ACCORDINGLY**, this case is **DISMISSED**.

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

Distribution:

Anthony M. Berry, Esq., United States Department of Labor, Office of the Solicitor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

James F. Bowman, Representative, Bowman Industries, LLC, P.O. Box 99, Midway, WV 25878

/ss

¹ The Joint Motion to Approve Settlement reads in pertinent part:

3. In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expanded in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citation as indicated above.

4. Consistent with the position that the Secretary has taken before the Commission in The American Coal Company, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the parties' settlement under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

² Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 27, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2014-374
Petitioner,	:	A.C. No. 46-09092-338087
	:	
v.	:	
	:	
MARFORK COAL COMPANY, INC.,	:	
Respondent.	:	Mine: Allen Powellton Mine

DECISION AND ORDER

Appearances: Emily O. Roberts, Office of the Solicitor, U.S. Department of Labor, Nashville, TN for Petitioner;

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

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration (“MSHA”) against Marfork Coal Company, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This docket involves 16 citations, with penalties assessed pursuant to section 110(i) of the Mine Act. The parties have agreed to settle 15 of the 16 violations, leaving one for decision here. The parties presented testimony and evidence at a hearing held on July 9, 2014 in Charleston, West Virginia.

The parties agree that Marfork Coal Company, Inc., a subsidiary of Alpha Natural Resources, Inc., owns and operates the Allen Powellton Mine located in Raleigh County, West Virginia. Marfork is an operator as defined by the Act, and is subject to the jurisdiction and provisions of the Mine Safety and Health Act. The parties further agree that the mine is a large operator and payment of the penalty as assessed will not hinder its ability to continue in business. Exhibit G-1.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Inspector Ordie J. Sigmon issued Citation No. 7183407 on August 27, 2013 during the course of a regular inspection. The Secretary asserts that the Respondent violated 30 C.F.R § 75.1722(b), which requires guards at conveyor drives and pulleys to extend a distance sufficient

to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. The citation states, in pertinent part, that “. . . the guarding around the tail roller did not extend a distance sufficient enough to prevent miners from contacting the rotating moving parts of the tail roller The tail roller shaft extended outward 2 1/2 inches and the guarding . . . was left unsecured.” Inspector Sigmon indicated that the violation was significant and substantial and the negligence was moderate. The proposed assessed penalty amount is \$1,111.00.

While traveling along the belt line of the Powellton Mine, on August 27, 2013, Inspector Sigmon observed a turning shaft at the tail pulley that was not completely guarded. Mine Inspector Ordie Sigmon has been an inspector for 2 years and, prior to that time, worked in the mining industry for 15 years. The mine does not dispute that the guard was in the condition as described by Inspector Sigmon, and the mine’s only witness agrees that the shaft at the tail pulley was partially covered by a piece of rubber belt used as a guard. The parties agree that the shaft is located under the feeder and that it was guarded, at least partially, with a piece of rubber belt, but that a portion of the moving shaft extended a number of inches beyond the rubber guard. The rubber guard was close to 24 inches long but, to cover the entire area, abate the citation, and avoid contact with the moving part, the guard was extended to a length of about 36 inches. The inspector explained that the rubber guard was not secured and the mine witness agreed that the shaft had pushed the guard out from its original position. Further, Sigmon explained that at one time the guard had been long enough to cover the entire area, but had been cut or trimmed with a knife, most likely as it wore away. The inspector surmised that the rubber belt guard had been somehow altered during a recent belt move. The mine agreed that the belt line is moved every other day but did not address any changes that had been made to the rubber guard. The area along the belt line is traveled every shift and, during most shifts, it is shoveled or the area around the feeder, tail pulley and shaft is otherwise cleaned.

Like most guarding violations, the dispute here is whether the area around the moving parts was accessible to any miner and, if so, would a miner come into contact with the shaft or tail pulley and become entangled in the moving parts. It is undisputed that the area around the pulley and shaft often has spillage that must be cleaned, and that cleaning is done with a four foot long shovel, usually while the miner is on his knees to clean under and around the belt. Cleaning of the area around the belt line, and specifically around this feeder and tail pulley, is conducted while the belt is in operation and it is done nearly every shift, and sometimes more often. Here, the evidence demonstrates that with the 24 inch long rubber guard in place, there remains room for a miner to put his arm inside to such an extent that it would contact the moving parts. It would be difficult to do that after the guard was extended to a length of 36 inches, based simply on the length of the average human arm.

Jeremy Ball, the mine foreman at the time of the violation, explained that, in his view, the moving parts could not have been contacted even before the citation was issued and the mine extended the rubber guard. He reasoned that because the shaft and tail pulley are under the feeder, and the miner is using a four foot long shovel, the moving parts would not be contacted. Ball indicated that the uncovered part of the shaft was visible when approaching the area from the front, but not from the side. He further indicated that the tail roller was completely covered by the guard and it was only a part of the shaft that remained unguarded. It is his view that a

miner would have to want to reach the shaft, and it would not happen accidentally or when cleaning or greasing the belt area. While the belt is shut down during maintenance or repairs, it continues to operate while cleaning is conducted around the tail pulley area.

Ball did not address why the guard was not secured as Sigmon indicated it should be, but the representative of the mine who accompanied Sigmon explained at the time that someone must have forgotten to secure the guard when it was last moved. Ball explained that the belt is moved every few days and Sigmon confirmed that leaving the guard unsecured after a move made it even easier for a miner to access the moving part. Sigmon testified that the goal is to have the guard be of sufficient length so that a miner will not contact the moving parts if he reaches an arm in to remove debris or is shoveling and gets pulled in by the tail pulley. Leaving enough room to shovel is important, but it must be narrow enough that an arm cannot fit into the guard while the belt is operating.

After considering the testimony of both witnesses, I find that the Secretary has met her burden to show a violation. The rotating shaft area did not have a guard that extended its entire length. Instead, the rubber guard was 24 inches long and should have been 36 inches in length. Hence, the guard, as observed at the time of the violation, did not extend a distance sufficient to prevent contact with the moving parts of the shaft and tail roller. I find further that the violation was significant and substantial.

A “significant and substantial” violation is described in section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial “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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term “significant and substantial” to be:

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.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC

1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal*, 33 FMSHRC 2357, 2365 (Oct. 2011) where it “emphasized the well-established precedent that ‘the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.’” (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The S&S determination should also include a consideration of the length of time that the violative condition existed prior to the citation, and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). In addition, the question of whether a particular violation is S&S is a circumstantial inquiry that must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Based on the witness testimony and the documentary evidence, the mine argues that this violation is not S&S for two reasons. First, no one would get close enough to contact the moving part during the routine cleaning of the belt and, second, the area was protected by the feeder that sat on top of the tail roller and shaft. The Secretary argues on the other hand, that there was room not only for a shovel to contact the moving part, but for an arm to reach under the guard, even though located under the feeder, and come in contact with the unguarded moving shaft. The belt line, and particularly around the tail pulley, is cleaned every shift while it is in operation and at times, more often. The miner normally must get on his knees to reach into the area under the belt to clean, giving him less stability while shoveling. It would not be uncommon to reach up to unclog the area around the tail pulley during the cleaning.

The Commission has determined that an experienced MSHA inspector’s opinion that a violation is significant and substantial is entitled to substantial weight. *Harland Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999). Sigmon reaffirmed that conditions he observed, that is the turning shaft that was not completely guarded with a loose rubber guard, created a hazardous condition for anyone shoveling along the tail pulley area. A miner trying to dislodge rocks or coal from the tail pulley or shaft area could reach his arm into the area to a point where he could contact the moving parts. In addition, when shoveling under and around this area of the belt, the shovel could get caught in the moving shaft, pulling the miner off his knees and as far as the moving part. Contact with the moving shaft would result in broken bones, cuts, or even a crushing injury that could result in amputation. The resulting injury was reasonably likely to be permanently disabling.

This finding is consistent with other ALJ decisions. For example, in addressing a violation of 75.1722(b), a Commission ALJ found that failure to guard the end of the discharge roller at a conveyor drive was an S&S violation. The ALJ rejected the operator’s argument that the low seam minimized the risk of tripping or falling because miners worked from their knees

and found that working while on their knees increased the likelihood of inadvertent contact because, among other things, it is more difficult to maneuver from that position. *Williams Brothers Coal Co.*, 24 FMSHRC 110 (Jan. 2002) (ALJ). The operator cites to a recent decision by an ALJ in which he found that a violation of 75.1722(b) was not S&S because a feeder sat on the belt, making the unguarded area difficult to reach. *Big Ridge Inc.*, 34 FMSHRC 63 (Jan. 2012) (ALJ). However, the ALJ in that case relied upon the fact that someone would have to crouch down to reach the unguarded area and there was no evidence that it was necessary to crouch, unlike here where the facts indicate that the miner must be on his knees to shovel under the belt. As the Commission stated in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), guarding standards should be interpreted to take into consideration a “reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.” “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). In doing so, that employee may reach into the tail pulley area to dislodge a rock, even with the belt in operation.

I have found that there is a violation of the mandatory standard and that the violation creates the discrete safety hazard of contact with rotating moving parts on the tail roller of the conveyor belt. Given that the area around the shaft and tail pulley is cleaned while in operation every day, and sometimes more often, it is reasonably likely that someone will contact the moving part when shoveling or trying to dislodge coal from the belt. When contacting the moving part, the miner is likely to be pulled and, as a result, suffer broken bones or serious crushing injuries. Therefore, I find that the violation is significant and substantial.

II. PENALTY

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).

In the instant case, the operator is large, does not have an unusual history of these types of violations, and abated the condition in good faith. The inspector indicated that the negligence was moderate and, given the facts discussed above, I agree. I have discussed the gravity and S&S nature above and find that the \$1,111.00 penalty proposed by the Secretary is appropriate in these circumstances.

The parties agreed to settle the remaining violations and I find the settlement to be appropriate. The terms of the settlement are as follows:

Citation/Order No.	Originally Proposed Penalty	Settlement Amount	Modifications
7183405	\$1,111.00	\$700.00	Reduce seriousness of injury from permanently disabling to lost workdays or restricted duty
7183406	\$1,111.00	\$1,111.00	Reduce seriousness of injury from permanently disabling to lost workdays or restricted duty.
9001693	\$634.00	\$634.00	None.
9001694	\$2,282.00	\$1,500.00	Modify the number of people from 13 to 7.
9001704	\$2,901.00	\$2,901.00	None.
9001707	\$2,282.00	\$2,282.00	None.
9001708	\$5,503.00	\$5,503.00	None.
9001709	\$5,961.00	\$2,500.00	Reduce probability of injury from reasonably likely to unlikely; Remove the significant and substantial designation.
9001712	\$2,901.00	\$2,000.00	Reduce the level of negligence from moderate to low.
9002149	\$585.00	\$585.00	None.
9002152	\$2,282.00	\$1,500.00	Reduce seriousness of injury from fatal to lost workdays or restricted duty; Modify the number of people affected from 20 to 12.
9002661	\$2,901.00	\$2,901.00	None.
9002662	\$687.00	\$500.00	Modify the number of people affected from 12 to 7.
9002665	\$585.00	\$585.00	None.
9002666	\$3,405.00	\$1,352.00	Reduce the seriousness of injury from fatal to lost workdays or restricted duty; Modify the number of people affected from 12 to 4.
TOTAL	\$35,131.00	\$26,554.00	

I accept the representations and modifications set forth both at hearing, and in the Motion to Approve Settlement and Order Payment. I have considered the representations and documentation submitted. I find that the modifications are reasonable and conclude that that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The Motion to Approve Settlement is **GRANTED**.

III. ORDER

Given my above findings, I assess a total penalty of \$27,665.00 for both the settled citations and the citation addressed at hearing. The Respondent, Marfork Coal Company, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$27,665.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution:

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Arthur Wolfson, Jackson Kelly, PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, D.C. 20004-1710

August 28, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2010-450-M
Petitioner	:	A.C. No. 02-03243-203823 (NWB)
	:	
v.	:	
	:	
RECON REFRACTORY &	:	Mine: Drake Quarry
CONSTRUCTION,	:	
Respondent.	:	

DECISION AND ORDER

Appearances: Douglas L. Sanders, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Eugene F. McMenamin, Esq., Atkinson, Andelson, Loya, Ruud & Romo, Cerritos, California, 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 five section 104(a) citations issued by the Mine Safety and Health Administration (“MSHA”) to Recon Refractory & Construction (“RECON” or “Respondent”) as a subcontractor at Drake Cement Company’s Drake Quarry 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. SOL v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998). This standard requires the Secretary to demonstrate that “the existence of a fact is more probable than its non-existence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

I. STATEMENT OF THE CASE

Four of these alleged violations involve electrical equipment at Drake Quarry, and the fifth alleged violation involves workplace examination procedures at the site. First, Citation No. 6453940 charges RECON with a violation of 30 C.F.R. § 56.12025 for the failure to install a grounding rod on a power generator. Second, Citation No. 6453941 charges RECON with a violation of 30 C.F.R. § 56.12028 because continuity and resistance testing had not been

performed on the aforementioned power generator. Third, Citation No. 6453945 charges RECON with a violation of 30 C.F.R. § 56.12004 for leaving 13 damaged electrical extension cords unprotected. Fourth, Citation No. 6453946 alleges a violation of 30 C.F.R. § 56.12025 because the ground prongs on five electrical extension cords and one grounding device were broken or missing. Finally, Citation No. 6454808 charges RECON with a violation of 30 C.F.R. § 56.18002(a) for a failure to perform and document required workplace examinations. The Secretary designated each violation as significant and substantial (“S&S”).¹ The Secretary proposed a total civil penalty of \$2,535.00 for these five citations.

A hearing was held in Riverside, California. The Secretary presented testimony solely from MSHA Inspector Enrique Vidal. (Tr. 16:17–101:9; Sec’y Preh’g Statement at 4.) RECON called three witnesses: Joseph Longstreet, Vice President of RECON; Benjamin Allen, RECON’s Cost Controls Manager; and Gregory Howearth, RECON’s Corporate Health and Safety and Environmental Manager. (Tr. 103:8–108:11; 110:17–117:6; 118:4–133:15.)

II. ISSUES

The Secretary argues that the conditions were properly cited as violations and that the allegations underlying the citations are valid. (Sec’y Post Trial Br. at 15.) RECON denies each violation, arguing that the Secretary has failed to meet his burden of proof for each citation. (Resp’t Post Trial Br. at 5.)

Accordingly, the following issues are before me: (1) whether, for each citation, the Secretary proved that a violation of a mandatory safety or health standard occurred at Drake Quarry; (2) whether the Secretary proved that each alleged violation was S&S; (3) whether the Secretary proved that RECON acted with moderate negligence regarding each violation; and (4) whether the Secretary’s proposed penalties are appropriate.

For the reasons that follow, I **AFFIRM** as written Citation Nos. 6453940, 6453941, 6453945, and 6453946, and I **VACATE** the fifth, Citation No. 6454808.

III. FINDINGS OF FACT

A. Operations at Drake Quarry

Prior to hearing, the Secretary filed a motion for partial summary decision to establish that RECON was subject to MSHA jurisdiction. (Sec’y Mot. for Partial Summ. Dec.) I held that the Drake Quarry site was a “mine” under the Mine Act, that the quarry was subject to MSHA jurisdiction, and that the MSHA inspectors had the authority to issue RECON the citations at issue in this case. *Recon Refractory & Constr., Inc.*, 34 FMSHRC 1722, 1731 (2012) (ALJ). Accordingly, I granted the Secretary’s motion for partial summary decision solely on the issue of jurisdiction. *Id.* My findings of fact from that order are reproduced below:

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

On April 6, 2009, MSHA assigned a mine identification number to Drake Quarry, a surface metal/nonmetal mine owned by Drake Cement Company (“Drake”) and located near Paulden, Arizona. On October 6 and 7, 2009, MSHA Inspector Enrique Vidal conducted a routine health and safety inspection of the Drake Quarry site. On October 8, 2009, MSHA Inspector Kyle Griffith continued the inspection of the Drake Quarry site.

RECON was hired as a subcontractor by CCC Group to build a facility on the Drake Quarry construction site. During the October 2009 inspections, the Secretary's inspectors issued RECON seven citations, five of which are before me.

Recon Refractory & Const., Inc., 34 FMSHRC 1722, 1724 (2012) (ALJ).

B. October 6–7, 2009 Inspection

Upon arriving at Drake Quarry on October 6, Inspector Vidal noticed a power generator (“Gen-set”). (Tr. 20:18–20.) Vidal discovered that the Gen-set did not have a grounding rod. (Tr. 20:20–21.) A grounding rod is required to prevent the metal generator from becoming electrified. (Tr. 23:24–24:4.) Inspector Vidal stated that miners regularly came into direct contact with the generator, which placed them in danger of fatal electrocution. (Tr. 24:5–25:2.) Based on his observations, Vidal issued Citation No. 6453940 alleging a violation of 30 C.F.R. § 56.12025. (Ex. G–2.) He determined that this violation was reasonably likely to result in a fatal injury to one miner due to the operator’s moderate negligence. *Id.* MSHA proposed a penalty of \$873.00 for this violation.

Moreover, because the grounding rod was not installed, testing on the rod could not be performed. (Tr. 34:21–22.) Accordingly, Vidal also issued Citation No. 6453941 alleging a violation of 30 C.F.R. § 56.12028. (Ex. G–5.) He determined that this violation was reasonably likely to result in a fatal injury to one miner due to the operator’s moderate negligence. *Id.* MSHA likewise proposed a penalty of \$873.00 for this violation.

Thereafter, during the inspection of the lay-down area² in Drake Quarry, Vidal saw a gang box and asked one of Drake Quarry’s employees about its contents. (Tr. 42:16–17.) The unidentified employee told Vidal that the gang box contained extension cords available for use by the miners. (Tr. 42:15–24.) Vidal further observed that out of 13 electrical extension cords, 11 had compromised outer protective jackets along with some damage to the inner conductors. (Tr. 46:7–11;49:4–17.) In addition, two of the electrical extension cords had completely exposed bare wiring that could expose miners to 110 volts of electricity. (Tr. 46:7–11;49:4–17.) Vidal testified that the unidentified employee told him the gang box containing the wires was unlocked and accessible by any miner. (Tr. 43:22–44:9.) As a result of his observations, Vidal issued

² The “lay-down area” consists of an office, fabricating area, and shop-area covered by a tarp. (Tr. 42:25–43:3.)

Citation No. 6453945 alleging a violation of 30 C.F.R. § 56.12004. (Ex. G–8.) He determined that this violation was reasonably likely to result in lost workdays or restricted duty to one miner due to the operator’s moderate negligence. *Id.* MSHA proposed a penalty of \$263.00 for this violation.

While inspecting the gang box, Vidal also noticed that the ground prongs on five of the extension cords were either removed, missing, or broken. (Tr. 51:21–52:8.) Further, an on-site ground fault current interceptor (“GFCI”)—which is a device intended to prevent electrocution— was damaged. (Tr. 52:16–53:8.) Based on his observations, Vidal issued Citation No. 6453946 alleging a violation of 30 C.F.R. § 56.12025. (Ex. G–11.) He determined that this violation was reasonably likely to result in lost workdays or restricted duty to one miner due to the operator’s moderate negligence. *Id.* MSHA proposed a penalty of \$263.00 for this violation.

C. October 8, 2009 Inspection

On October 8, 2009, Inspector Kyle Griffith issued Citation No. 6454808 at Drake Quarry alleging a violation of 30 C.F.R. § 56.18002(a). (Ex. G–14.) The citation has boxes checked noting that the violation was reasonably likely to result in lost workdays or restricted duty to one miner due to the operator’s high negligence. *Id.* MSHA proposed a penalty of \$263.00 for this violation. The citation alleges that RECON failed to perform or document such workplace examinations. (Ex. G–14.) However, neither Inspector Griffith nor any other authorized representative of the Secretary testified regarding the issuance of this citation.

IV. PRINCIPLES OF LAW

A. Independent Contractors

The Commission has held that an independent contractor performing services at a mine is an operator of the mine within the meaning of section 3(d) of the Mine Act. *Ames Construction, Inc.*, 33 FMSHRC 1607 (July 2011), *aff’d*, 676 F.3d 1109 (D.C. Cir. 2012) (“independent contractors who exercise supervision and control—in other words, ones also covered by the production-operator portion of § 3(d)—are [strictly] liable”). Moreover, the Commission has a “longstanding view that the purpose of the [Mine] Act is best effectuated by citing the party with immediate control over the working conditions and the workers involved when an unsafe condition arising from those work activities is observed.” *Old Dominion Power Co.*, 6 FMSHRC 1886 (Aug. 1984) (citing *Phillips Uranium Corp.*, 4 FMSHRC 549 (Apr. 1982)).

B. 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. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

Aside from specifying the elements I must consider in examining an S&S designation, the Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission found 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 135–36 (stating that ALJ did not abuse discretion in crediting the opinion of an 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.*, 3 FMSHRC 822,827 (Apr. 1981). Moreover, the Commission has indicated “[t]he 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, 1742–43 & n.13 (Aug. 2012). Finally, the Commission indicated an 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)).

C. Regulatory Interpretation

Interpreting the Secretary’s regulations that implement the Mine Act is a two-step process. First, unambiguous regulatory provisions “must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results.” *Jim Walter Res., Inc.*, 28 FMSHRC 578, 587 (Aug. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987), and *Utah Power & Light Co.*, 11 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004)). Second, if the meaning of the regulation is ambiguous, the Secretary’s reasonable interpretation of the regulation is entitled to deference. *Mach Mining, LLC*, 34 FMSHRC 1784, 1806 (Aug. 2012).

V. ADDITIONAL FINDINGS OF FACT — ANALYSIS — CONCLUSIONS OF LAW

A. Electrical Violations

1. Citation No. 6453940 – The Grounding Rod

Section 56.12025 requires operators to ensure that all metal used to enclose or encase electrical circuits be grounded or provided with equivalent protection.³ 30 C.F.R. § 56.12025.

³ Section 56.12105 provides: “All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.” 30 C.F.R. § 56.12025.

Moreover, section 56.12025 is a performance standard; thus, it does not specify or require that the operator ground the metal in a specific manner. *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 387 (Mar. 1996) (ALJ). Accordingly, an operator violates section 56.12025 when it fails to ground the metal that encloses electrical circuits. *See Brown Bros. Sand Co.*, 17 FMSHRC 578, 584 (Apr. 1995).

a. *Contractor Liability*

Inspector Vidal issued Citation No. 6453940 for RECON's failure to install a grounding rod on the power generator he observed. (Ex. G-2.) RECON does not dispute that a grounding rod was absent but instead argues that the Secretary should have issued this citation to the general contractor, CCC Group, which brought the power generator to the Drake Quarry but failed to install it properly. (Resp't Preh'g Report at 3.) Joseph Longstreet, RECON's Vice President, testified that, under the contract with CCC Group, RECON was not allowed to maintain any equipment provided by CCC Group, including the power generator. (Tr. 104:15-22.) However, despite this testimony, RECON failed to provide a copy of the specific contract provision that spelled out the prohibition it alleges.

Nevertheless, Respondent's argument misses the mark. The Mine Act is a strict liability statute that imposes liability without fault for things within one's control or supervision. *See Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F. 3d 788, 795 (D.C. Cir. 2009). It is undisputed that the power generator was located on RECON's work site. (Tr. 76:25-77:6.) Therefore, the power generator was under RECON's control and supervision at the time the citation was issued.

Although CCC Group installed the power generator, RECON—as a subcontractor hired to perform work at the mine—is deemed an operator of the mine within the meaning of section 3(d) of the Mine Act. *Ames Construction, Inc.*, 33 FMSHRC 1607 (July 2011), *aff'd*, 676 F.3d 1109 (D.C. Cir. 2012). Consequently, RECON is strictly liable for the cited condition that occurred in connection with the power generator. Further, Respondent does not dispute that the power generator lacked a grounding rod. Accordingly, I conclude that RECON violated 30 C.F.R. § 56.12025.

b. *S&S*

RECON's violation of 30 C.F.R. § 56.12025 establishes the first element of the *Mathies* test for an S&S violation. The second element of the *Mathies* test requires that the violation contribute to a safety hazard. In this case, Inspector Vidal testified that the power generator's lack of a grounding rod would expose anyone who came into contact with the energized generator to approximately 240 volts of electricity. (Tr. 23:24-24:4.) Further, Vidal testified that the power generator was located right next to where miners worked, and thus miners could come in direct contact with the generator. (Tr. 24:21; 25-2.) Moreover, Vidal indicated that 240-volt electrocution would likely be fatal. (Tr. 25:14-17.) I give great weight to Inspector Vidal's testimony based on his 15 years as a MSHA inspector. Therefore, given Vidal's testimony, I determine that the third and fourth *Mathies* elements are established and, thus, conclude that this violation was appropriately designated as S&S.

c. *Negligence*

The Secretary's regulations define negligence as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risk of harm." 30 C.F.R. § 100.3(d). Moderate negligence is appropriate when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Inspector Vidal stated that looking for a grounding rod is a "very basic" practice (Tr. 20:20) and information regarding grounding rods is readily available on the Internet. (Tr. 30:1-3.) Thus, RECON knew or should have known that the power generator required a grounding rod. Nevertheless, I note that RECON's status as an independent subcontractor in conjunction with its understanding that CCC group, as the general contractor, was responsible for the installation of the power generator somewhat mitigates RECON's negligence in this case. Thus, I agree with Inspector Vidal's determination and conclude that Citation No. 6453940 was properly designated as "moderate" negligence.

Based on the above analysis, I conclude that RECON violated section 56.12025, that the violation was S&S, and that the violation occurred as a result of RECON's moderate negligence.

2. Citation No. 6453941 – Continuity Testing

Section 56.12028 states the following: "Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative." 30 C.F.R. § 56.12028.

Inspector Vidal issued Citation No. 6453941 for RECON's failure to perform continuity and resistance testing on the same power generator cited in Citation No. 6453940. Respondent argues that the absence of a grounding rod forecloses a claim for failure to perform the required continuity and resistance testing. (Resp't Reply to Sec'y Post-Trial Br. at 2.) Essentially, Respondent argues that Citation No. 6453941 cannot be sustained if I affirm Citation No. 6453940. Curiously, Respondent cites no case law for the proposition that its duty to comply with section 56.12028 depends on whether it has satisfied its duty to comply with section 56.12025. Notwithstanding Respondent's efforts to make compliance with section 56.12025 a necessary element of section 56.12028, I note that the Mine Act is a strict liability statute, and it requires operators to comply with the Secretary's safety and health standards. *Cf. Rock of Ages Corp.*, 20 FMSHRC 113-14 (Feb. 1998) (stating that the Mine Act imposes strict liability and refusing to insert an unwritten element into the text of a regulation). Moreover, the Secretary argues that Respondent misinterprets the phrase "immediately after installation" in 30 C.F.R. § 56.12028 by reading it narrowly to mean "immediately after installation of the grounding rod." (Sec'y Post-Trial Br. at 8.) Instead, the Secretary claims that "installation" refers to installation of the equipment, rather than the grounding rod. (*Id.*) In addition, the Secretary asks that I defer to his interpretation of the regulation. (*Id.* at 9.)

a. *Ambiguity of the Phrase “Immediately After Installation”*

As explained above, the parties interpret the phrase “immediately after installation” differently. Neither the Mine Act nor the regulation provides a definition for the phrase. Looking at the text of the regulation and the parties’ alternative interpretations, I conclude that it is in some respects ambiguous. *Island Creek Coal Co.*, 20 FMSHRC 14 (Jan. 1998) (citing *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992)); Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 6 (5th ed. 1992) (“Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.”). As the Supreme Court stated in *Boston & Maine*, “[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context.” 503 U.S. at 418.

b. *Reasonableness of Secretary’s Interpretation*

Given my conclusion that the phrase “immediately after installation” is ambiguous as applied to the installation of a grounding rod on a power generator, I must decide whether the Secretary’s interpretation of the provision is reasonable. The Secretary’s interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function.” *Gen. Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citing *Rollins Env’tl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir.1991)). Moreover, a policy favoring deference is particularly important where, as here, a technically complex statutory scheme is backed by an even more complex and comprehensive set of regulations. *Id.* Under such circumstances, “the arguments for deference to administrative expertise are at their strongest.” *Gen. Electric Co.*, 53 F.3d at 1327 (citing *Psychiatric Inst. of Washington, D.C. v. Schweiker*, 669 F.2d 812, 813–14 (D.C. Cir.1981)); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865 (1984) (finding that the Administrator’s interpretation represented a reasonable accommodation of manifestly competing interests and was entitled to deference because the regulatory scheme was technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involved reconciling conflicting policies.).

The Secretary interprets “immediately after installation” in section 56.12028 to mean immediately after the installation of the *equipment* that needs to be grounded. (Sec’y Post-Trial Br. at 8.) This interpretation focuses on the purpose of the regulation, which is to ensure that regular testing prevents fatalities and other injuries. *See* IV MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 21, at 44 (2003) (“PPM”) (“The intent of this standard is to ensure that continuity and resistance tests of grounding systems are conducted on a specific schedule. [N]umerous fatalities and injuries have occurred due to high resistance or lack of continuity in the *equipment* grounding systems. These accidents could have been prevented by proper testing and maintenance of grounding systems.”) (emphasis added); *see also* 30 C.F.R. § 56.1 (“This part 56 sets forth mandatory safety and health standards for each surface metal or nonmetal mine, including open pit mines, subject to the Federal Mine Safety and Health Act of 1977. The purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents.”). Testing “will alert the operator if a problem exists in the grounding system, which may not allow the circuit protective devices to quickly operate when faults

occur.” IV MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 21, at 44 (2003). The Secretary’s interpretation does not deviate significantly from the language of the regulation. Furthermore, this interpretation is consistent with the purpose of the regulation reflected in MSHA’s PPM for 30 C.F.R. § 56.12028. As I noted, the preservation of safety is at the core of the regulation’s purpose. Testing the grounding system immediately upon installation of the equipment provides greater miner safety because it ensures the grounding rod and other elements of the grounding system are employed and tested. This provides the intended protection, especially if the generator is later energized. In contrast, allowing the generator to be installed without immediately testing the grounding system, as RECON suggests, provides less safety for miners from accidental electrocution. Thus, the Secretary’s interpretation serves a permissible regulatory function. Accordingly, I conclude that the Secretary’s interpretation is reasonable and, thus, entitled to deference.

c. *Violation*

Respondent admits that it did not perform continuity and resistance testing on the power generator. (Resp’t Reply to Sec’y Post-Trial Br. at 2.) Therefore, I conclude that RECON violated 30 C.F.R. § 56.12028.

d. *S&S*

RECON’s violation of 30 C.F.R. § 56.12028 establishes the first element for an S&S violation under the *Mathies* test. The second element of the *Mathies* test asks whether the violation contributed to a discrete safety hazard. Here, Inspector Vidal testified that the power generator’s lack of a grounding rod exposed anyone who came into contact with the generator to approximately 240 volts of electricity (Tr. 23:24–24:4) and that miners could come in direct contact with the generator. (Tr. 24:21; 25–2.) Vidal has significant experience inspecting mines (Tr. 17:17–25), and I accord his experience great weight. Accordingly, I determine that the violation contributed to the discrete safety hazard of electric shock. The Secretary has therefore met his burden of proof on the second element of *Mathies*.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. Here, Inspector Vidal testified that 240-volt electrocution would likely be fatal. (Tr. 25:14–17.) Given Vidal’s credible testimony, I determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur. Thus, the Secretary has satisfied *Mathies*’ third and fourth elements.

Based on my above determinations, I conclude that RECON violated section 56.12028, that the violation was S&S, and that it was the result of RECON’s moderate negligence.

3. Citation No. 6453945 – The Gang Box

Section 56.12004 requires operators to protect electrical conductors that are exposed to mechanical damage.⁴ 30 C.F.R. § 56.12004. An operator violates section 56.12004 when exposed cable or wiring that is capable of carrying an electrical current, thus creating a shock hazard, lacks an outer protective jacket or structure of some sort. *See Northshore Mining Co.*, 35 FMSHRC 1889, 1893 (June 2013) (ALJ); *Baker Rock Crushing Co.*, 32 FMSHRC 968, 977 (Aug. 2010) (ALJ).

a. *Additional Findings of Fact*

Inspector Vidal issued Citation No. 6453945 because 13 damaged electrical extension cords with compromised outer protective coverings and exposed bare wiring were left in a gang box and available for use by miners. Specifically, Vidal testified that an unidentified employee told him that the gang box was unlocked and accessible by any miner. (Tr. 43:22–44:9.) Inspector Vidal also stated that two of the cords had completely exposed bare wiring, potentially exposing miners to 110 volts of electricity. (Tr. 49:6–12.) He indicated that the injuries resulting from 110-volt electrocution could range from a fatality to lost work days and restricted duty. (Tr. 49:18–22.)

Respondent does not dispute the condition of the cords; indeed, RECON’s Cost Controls Manager, Benjamin Allen, admitted that at least some of the contents of the box were intended for use by miners (Tr. 112:21–113:1), and that the cords inside the box were unsuitable for use. (Tr. 116:4–8.) Instead, RECON alleges that the gang box was locked and, thus, the cords were unavailable for use. (Resp’t Reply to Sec’y Post-Trial Br. at 3.) Specifically, Allen testified that the box was usually locked and was only unlocked for the inspection. (Tr. 113:3–114:3.) Allen also stated that there was only one key to the gang box and it was kept in a separate office. (Tr. 114:4–5.) Finally, Allen testified that equipment from the gang box had to be distributed to the miners by a supervisor per RECON’s safety manual, which they provided as evidence. (Tr. 114:20–24; 115:14–16; Ex. R–2.)

I do not find Allen’s testimony regarding the locked gang box persuasive for three reasons. First, operators are not given advance notice of MSHA inspections; it is unlikely that the box was unlocked in anticipation of Inspector Vidal’s visit. Second, Respondent presented no evidence at the hearing indicating that Vidal “ordered all locked receptacles on site to be opened for his inspection,” as it alleges in its reply brief (Resp’t Reply to Sec’y Post-Trial Br. at 3.) Finally, Allen is RECON’s Cost Controls Manager. (Tr. 110:21–22.) Allen did not explain how his duties as a cost control manager provided a basis for explaining the actual day-to-day operations of the rank-and-file miner. On the other hand, an actual miner told Inspector

⁴ Section 56.12004 provides: “Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected.” 30 C.F.R. § 56.12004.

Vidal that the gang box was openly accessible by miners and that miners could use the equipment within as needed. (Tr. 42:15–24.) Therefore, I find that the gang box was unlocked and the items inside, including the extension cords, were accessible by any miner.

Inspector Vidal observed that 11 of the 13 extension cords had missing or damaged outer protective jackets (Tr. 47:16–19) and the remaining two were so damaged that bare wiring was visible. (Tr. 46:10–11.) Moreover, Vidal explained that, even with the bare wiring exposed, the extension cords were still capable of carrying a current. (Tr. 47:5–8.) Based on the evidence before me, I find that the 13 damaged extension cords were still functional and capable of carrying an electrical current.

b. *Violation*

Respondent does not dispute that the outer protective jackets of the extension cords were damaged thus exposing the bare wiring. Given my finding that the cords were available for use, I conclude that RECON violated 30 C.F.R. § 56.12004 because the extension cords in the gang box were capable of carrying an electrical current and left with damaged or missing protective coverings.

c. *S&S*

RECON's violation of section 56.12004 establishes the first element for an S&S violation under the *Mathies* test. As for the second *Mathies* element, Inspector Vidal credibly testified that the bare wiring on the extension cords exposed the miners to a safety hazard of 110-volt electric shock. (Tr. 46:7–11; 49:4–17.) As I have noted, I accord great weight Vidal's testimony based on his significant experience as an inspector. I therefore determine that the violation contributed to a discrete safety hazard of 110-volt electric shock. Thus, the Secretary has met his burden of proof on *Mathies*' second element.

Regarding the third and fourth elements of *Mathies*, Inspector Vidal credibly testified that the result of 110-volt electric shock would likely range from lost workdays to death. (Tr. 49:18–22.) I find his testimony regarding the electric shock hazard posed by the damaged extension cords credible and persuasive. Therefore, I determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, and thus has satisfied the third and fourth elements of *Mathies*.

d. *Negligence*

Vidal designated RECON's negligence regarding this violation as "moderate" because the company is responsible for ensuring that any equipment that it brings on-site for use is checked daily. (Tr. 50:4–6.) Allen testified that, at some point, the gang box and access to the sole key was restricted. (Tr. 114:1–6.) Although RECON's written safety policy was not followed here, I note that RECON's safety manual requires that equipment such as the extension cords in the gang box be issued from a designated tool room attendant or supervisor. (Tr. 115:10–16;

Ex. R-2.) That policy somewhat mitigates RECON's negligence in this case. Thus, I agree with Inspector Vidal's determination that Respondent's negligence is properly designated as moderate.

Based on the above determinations, I conclude that RECON violated § 56.12004, that the violation was S&S, and that it was the result of RECON's moderate negligence.

4. Citation No. 6453946 –The Ground Prongs

Inspector Vidal issued Citation No. 6453946 because five cords in the same gang box had damaged or missing ground prongs. Moreover, a GFCI which is used to prevent electrocution was also damaged.

a. *Evidentiary Weight of The 2008 National Electrical Code*

At trial, and without prior notice to the Secretary, Respondent introduced evidence regarding the 2008 version of the National Electrical Code (“the Code”)—a 600-page document. (Tr. 121:25–122:1.) Respondent admitted that it did not prepare this aspect of the hearing until a day prior. (Tr. 122:25–123:3.) RECON's Corporate Health and Safety and Environmental Manager, Gregory Howearth, testified that some unidentified “MSHA documents” referenced the code. (Tr. 121:25–122:1.) Respondent contends that it is not a hazard to use GFCIs in conjunction with extension cords. (Resp't Reply to Sec'y Post-Trial Br. at 3.) Further, Respondent claims that the Code supports its position. *Id.*

Respondent's eleventh hour introduction of the Code left the Secretary unable to adequately cross-examine Howearth on the document. At the hearing I had no reason to believe Respondent's action was anything more than a mere oversight, so I admitted the Code into evidence. (Tr. 123:22–24.) Regardless, I do not find Respondent's position on the Code persuasive. Respondent never identified the MSHA documents that purportedly reference the Code either at the hearing or in its post-hearing brief, and neither did Respondent establish their significance. Indeed, a miner using a damaged GFCI with a cord that has no grounding would be exposed to the hazard of electrocution. Therefore, I conclude that Howearth's testimony regarding the 2008 version of the National Electrical Code is irrelevant to 30 C.F.R. § 56.12025.

b. *Violation*

Section 56.12025 states that “[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection.” 30 C.F.R. § 56.12025. As I found above, the damaged extension cords in the gang box were capable of carrying an electrical current and left unprotected and accessible by miners. Therefore, I conclude that RECON violated 30 C.F.R. § 56.12025.

c. *S&S*

Respondent's violation of 30 C.F.R. § 56.12025 establishes the first element of the *Mathies* test. As for the second element, Vidal credibly testified that the use of an extension

cord without a ground prong exposed miners to the safety hazard of electric shock. (Tr. 54:8–15.) In concluding that leaving extension cords with damaged or missing ground prongs available to miners constituted a violation, I have determined that a reasonably prudent person would recognize that allowing miners to use such damaged cords constituted a defect in safety. Likewise, I determine that the violation contributed to a discrete safety hazard of electric shock. Therefore, the Secretary has met his burden of proof on *Mathies*' second element.

The third and fourth elements of *Mathies* ask whether the safety hazard is reasonably likely to contribute to a reasonably serious injury. The Secretary claims that injuries in this case are reasonably likely to result in lost workdays or restricted duty. (Ex. G–11.) Noting that these cords would likely carry 110 volts of electricity, Vidal described the potential injuries as a burn hazard, and heart defibrillation that could put a miner in the hospital. (Tr. 57:4–13.) Vidal determined this would reasonably likely result in lost workdays or restricted duty. As I noted, Inspector Vidal has significant experience inspecting mines. (Tr. 17:17–25.) Accordingly, given Vidal's significant experience as an inspector, I give his testimony great weight and determine that the Secretary has satisfied his burden of proving that reasonably serious injuries were reasonably likely to occur, and has thus satisfied *Mathies*' third and fourth elements.

d. *Negligence*

Vidal designated RECON's negligence regarding this violation as "moderate" due to the company's obligation to ensure that any equipment it brings on-site for use is checked daily. (Tr. 50:4–6.) Allen testified that he believed access to the gang box was restricted at some point. (Tr. 114:1–6.) Moreover, RECON, through its safety manual, had contemplated procedures to monitor distribution of the equipment. (Tr. 115:10–16; Ex. R–2.) I find these factors to be somewhat mitigating and, thus, I agree with Vidal's determination that Respondent's negligence is properly designated as moderate.

B. Citation No. 6454808 – Workplace Examination Violation

1. Parties' Arguments

The Secretary argues that the text of Inspector Griffith's citation itself, as well as his notes, establish a facial violation of 30 C.F.R. § 56.18002(a). (Sec'y Post-Trial Br. at 19.) Specifically, the Secretary points out that Citation No. 6454808 and Griffith's notes mention that the alleged failure to perform and document a workplace examination contributed to the issuance of three S&S violations during the same inspection. (*Id.*) Although counsel for the Secretary acknowledges that the Secretary has the burden of proof, counsel nevertheless highlights Respondent's failure to introduce any evidence regarding this citation. (*Id.*)

In contrast, Respondent argues that the Secretary has failed to meet his burden of proof regarding this citation. (Resp't Reply to Sec'y Post-Trial Br. at 4.) Respondent further argues that RECON has no obligation to present evidence given its position that the Secretary failed to meet his burden of proof. (*Id.*)

2. Analysis and Conclusions of Law

To establish the violation alleged in Citation No. 6454808, the Secretary must meet his burden of proof, which is by a preponderance of the evidence. To meet his burden of proof, the Secretary must demonstrate that “the existence of a fact is more probable than its non-existence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted). Put simply, “the evidence must be sufficient to convince the trier of fact that the proposition asserted is more likely true than not true.” *Keystone Coal Mining Corp.*, 16 FMSHRC 857,896 (1994) (ALJ). Here, the Secretary presented only copies of Inspector Griffith’s citation and notes. Yet, in his prehearing report, the Secretary stated that he would call Inspector Griffith to testify regarding this citation. (Sec’y Preh’g Statement at 8.) Thereafter, at the hearing, the Secretary indicated that a MSHA field office supervisor was supposed to testify regarding Citation No. 654808 but fell ill. (Tr. 14:14–17.) The Secretary could have asked for a continuance or, at a minimum, asked that the record be left open to introduce later deposition testimony from the then-ill MSHA supervisor. The Secretary pursued none of these options.

Instead, the Secretary chose to move forward with the hearing and circumvent the deficiencies in his presentation by attempting to introduce Inspector Griffith’s citation under the business records exception to hearsay evidence through the testimony of Inspector Vidal, who could provide no information on Citation No. 6454808 itself. (Tr. 14:12–20.) The Secretary’s attempt to use the business records exception is a red herring. It is a basic principle of administrative law that hearsay is admissible in federal and state administrative hearings. See *Richardson v. Perales*, 402 U.S. 389 (1971). Moreover, Commission Procedural Rule 63(a) specifically permits hearsay evidence in Commission proceedings. 29 C.F.R. § 2700.63(a).

I understand why the Secretary wants to introduce the citation into evidence under the business records exception to hearsay evidence, as I may then conclude that the text contained in the citation is somehow more reliable and should be taken at face value. However, Inspector Vidal did not issue Citation No. 6454808, did not speak to Inspector Griffith about this citation, and was not at Drake Quarry on the date the citation was issued. Moreover, it was not his job to be the custodian of records. The Secretary’s attempt to introduce the citation as a business record is unconvincing and inapposite. Nevertheless, the Commission’s Procedural Rules allow for the introduction of hearsay evidence, and I duly admitted the citation and notes at the hearing. Their admission, however, does not determine the weight I give such evidence.

Indeed, the Secretary hopes to buttress his case by using the business records exception to the hearsay rule. Yet, in the end, it is still hearsay. With no foundation for the documents and no testimony to support the allegations and determinations contained in Citation No. 654808, I am left with little more than bald allegations to consider. In fact, I know nothing about the inspector who issued this citation or his qualifications, and nothing was admitted at hearing as evidence, such as an affidavit or deposition testimony, regarding Inspector Griffith or the issuance of this citation. As the Secretary well knows, MSHA vacates citations from time to time based on its view that the inspector erred in issuing a citation or in finding a violation, and Commission Judges have done the same. Without testimony from an inspector or witness who can substantiate the claims made in this citation, I have no way of determining the veracity of the

charges contained in the citation. Thus, I am precluded from making any credibility determinations.

In my view, what the Secretary asks me to do here offends the basic tenets of due process. Moreover, it offends basic concepts of fairness, inasmuch as the operator cannot cross-examine a sheet of paper. The Secretary's attempt to find fault with Respondent's refusal to put on a case against this citation is also dubious. It is a failed attempt to draw attention away from the deficiencies in the Secretary's own case. All the Secretary has here is hearsay evidence, which I do not credit given the circumstances described and which I determine is insufficient to carry the Secretary's burden of proof. Consequently, I vacate Citation No. 654808.

VI. CIVIL PENALTIES

Under section 110(i) of the Mine Act, the Administrative Law Judge 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).

Prior to the violations at issue, RECON has had no recorded history of violations. (Ex. G-1.) Of the five citations before me, I affirmed all but Citation No. 6454808. The Secretary has proposed a penalty of \$2,272.00 for the remaining four citations. Nothing in the record suggests that this penalty is inappropriate for the size of RECON's business or that it would infringe on RECON's ability to remain in business. Moreover, after these citations were issued, nothing suggests that RECON failed to make a good faith effort to achieve rapid compliance with the safety standards. RECON was moderately negligent in all four violations, and each affirmed violation exposed miners to a reasonable risk of fatal injuries. In considering all of the facts and circumstances of this matter, I hereby assess a civil penalty of \$2,272.00.

VII. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 6453940, 6453941, 6453945, and 6453946 are **AFFIRMED**. It is further **ORDERED** that Citation No. 6454808 is **VACATED**.

WHEREFORE, Respondent is **ORDERED** to pay a penalty of \$2,272.00 within 40 days of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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/bm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 Pennsylvania Ave, N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

August 29, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. CENT 2011-1129-M
	:	A.C. No. 23-02237-262205-01
	:	
v.	:	Docket No. CENT 2011-1130-M
	:	A.C. No. 23-02237-262205-02
	:	
UEHLIN QUARRY,	:	Docket No. CENT 2011-1131-M
Respondent.	:	A.C. No. 23-02237-262205-03
	:	
	:	Docket No. CENT 2012-0307-M
	:	A.C. No. 23-02237-276686
	:	
	:	Mine: Uehlin Underground

DECISION

Appearances: Amanda K. Slater, Office of the Solicitor, U.S. Department of Labor, Denver, CO, for Petitioner;

Stephen Uehlin and John Uehlin (unrepresented), for Respondent.

Before: L. Zane Gill, U.S. Administrative Law Judge

These cases arise from a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Uehlin Quarry at its stationary rock crushing plant near Amazonia, MO, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act” or “Act”) They comprise eight violations (six citations and two orders) distributed among the four captioned dockets, and the Secretary proposed a total penalty of \$12,269.00. The parties presented testimony and documentary evidence at a hearing held in Kansas City, MO, commencing on December 11, 2012.

Procedural History

On oral motion made at the hearing, and with the consent of the respondents, Docket CENT 2012-0307, consisting of Citation No. 8619342, was consolidated for hearing with the other dockets listed above. (Tr. 7:11-8:1) Docket CENT 2011-1129 consists of Citation No.

8619348, CENT 2011-1130 covers Citation Nos. 8619345 and 8619343, and CENT 2011-1131 comprises Citation Nos. 8619344, 8619346, and 8619347.

Stipulations

Uehlin Quarry, (“Uehlin Quarry” or “Uehlin”) operates a stationary surface rock crushing facility (the “quarry”) near Amazonia, MO. (Tr. 28:22-29:3) The quarry is subject to regular inspections by the Secretary’s Mine Safety and Health Administration (“MSHA”) pursuant to section 103(a) of the Act and spot inspections, 30 U.S.C. § 813(a). Uehlin Quarry is the operator of the quarry (Response to Request for Admission, No. 8), the quarry’s operations affect interstate commerce (Response to Request for Admission, No. 9), and it is subject to the jurisdiction of the Mine Act. (Tr. 8:1-9:1; Response to Request for Admission, No. 6) The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Mine Act. (Uehlin Quarry’s Responses to the Secretary’s First Interrogatories, Response to Request for Admission, No. 7) Uehlin Quarry, is a small, family owned, managed, and operated enterprise.

Introduction

On June 9, 2011, Ronald C. Buckler (“Buckler” or “victim”), a truck driver¹ working on one of Uehlin’s rock crushers, was grievously injured when the heavy steel pry rod he was using to dislodge rocks jammed inside the feeder port to the crusher’s impeller unit was thrown back at him, causing severe lacerations to the right side of his neck, fracturing his cervical spine (Ex. S-2), and resulting in permanent paralysis. (Ex. S-24; Tr. 36: 24-37:14)

Uehlin did not contact MSHA within 15 minutes. John Uehlin decided that it was more important to attend to the victim’s care and to assure that emergency responders could quickly be directed to the quarry site than to task anyone doing one of those two things to make the call to MSHA. (Tr. 188:17-21; 219:3-17)

The Citations and Orders

Inspector Dale Coleman (“Inspector Coleman” or “Coleman”) is an MSHA Health and Safety Inspector based in the Rolla North, Missouri field office. (Tr. 25:9-12) He was assigned to travel to the scene of the accident to conduct an investigation. Some of the citations and orders were issued as part of his investigation into the accident and injury to the victim and the rest were issued for alleged violations observed during the course of the accident investigation – the “spot” investigation. (Tr. 67:21-69:2)

¹ A truck driver is considered a “miner” for purposes of this decision. 30 CFR §48.22(a)(1) See, *Sec of Labor (MSHA) v. Lehigh Southwest Cement*, 2011 WL 7463296 (FMSHRC) (Dec. 2011) (ALJ Paez).

- **Order No. 8619341** (Ex. S-1, the “103k order” or “k order”) was issued under the authority of Section 103(k) of the Mine Act to preserve the accident scene to facilitate investigation of the accident.² (Tr. 50:18-51:8)
- **Citation No. 8619342** (Ex. S-3; Docket CENT 2012-0307) alleges a 104(d)(1) violation of 30 CFR § 57.14105, which regulates procedures during repairs or maintenance and requires that before any repair or maintenance is done on machinery or equipment, the equipment must be powered off and blocked against hazardous motion. (Tr. 68:11-69:2) This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, significant and substantial (“S&S”), arising from high negligence, and constituting an unwarrantable failure to comply with a mandatory health or safety standard (“unwarrantable failure”).
- **Citation No. 8619343** (Ex. S-4; Docket CENT 2011-1130) alleges a violation of 30 CFR § 57.15005, which requires that safety belts and lines be worn where there is a fall danger. (Tr. 114:6-115:6) This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, S&S, arising from high negligence, and constituting an unwarrantable failure.
- **Citation No. 8619344** (Ex. S-6; Docket CENT 2011-1131) alleges a violation of 30 CFR § 57.14107(a), which requires that moving machine parts such as gears, sprockets, chains, pulleys, etc., be guarded to prevent contact. (Tr. 124:25-125:13) This citation is characterized as reasonably likely to result in permanent disability, potentially affecting a single miner, S&S, and arising from high negligence.
- **Order No. 8619345** (Ex. S-9; Docket CENT 2011-1130) alleges a 104(d)(1) violation of 30 CFR § 57.11012, which requires railings, barriers, or covers to protect any opening near a travelway through which a person or material could fall. (Tr. 131:22-132:6) This order is characterized as reasonably likely to be permanently disabling, potentially affecting a single miner, S&S, arising from high negligence, and constituting an unwarrantable failure.
- **Citation No. 8619346** (Ex. S-11; Docket CENT 2011-1131) alleges a violation of 30 CFR § 57.12016, which requires that powered equipment be powered off and locked and tagged out before any mechanical work is done on it. (Tr. 140:8-25) This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, S&S, and arising from high negligence.
- **Citation No. 8619347** (Ex. S-13; Docket CENT 2011-1131) alleges a violation of 30 CFR § 48.29, which requires that a mine operator keep a copy of form 5000-23 for each miner on file for examination, showing that the miner has received MSHA training. (Tr. 148:20-149:3) This citation is characterized as having no likelihood of causing injury³, but arising from high negligence.
- **Citation No. 8619348** (Ex. S-14; Docket CENT 2011-1129) alleges a violation of 30 CFR § 50.10(b) which requires that a mine operator notify MSHA within 15 minutes of an injury at a mine site which has a reasonable potential to cause death. (Tr. 153:4-10)

² The 103k order does not give rise to a penalty or other enforcement consequences.

³ Coleman described this citation a “paperwork violation.” (Tr. 156:6-8)

This citation is also characterized as having no likelihood of causing injury (“paperwork violation”), but arising from high negligence.

Summary of Events

On June 10, 2011, John Uehlin – co-owner,⁴ operator, and manager of Uehlin quarry (Tr. 36:7-10; Response to Request for Admission, No. 11.3) – and three miners,⁵ including Buckler, were working to clear rock jams in the vibrating hopper that feeds one of the rock crushers on the Uehlin quarry site. (Tr. 40:22-41:4; 159:23-160:3; Response to Request for Admission, No. 11.4) At various times, John Uehlin⁶ and the miners stood inside the slant-walled hopper as they worked with pry bars and other tools to free up rocks that got hung up at the opening from the hopper into the crusher impeller. (Tr. 21:4-9; 197:22-198:1; 211:24-212:9) The hopper dumped rock into the impeller unit that fed it into the crusher itself, located some 12 feet away. (Tr. 23:17-24:1) The vibrator unit at the bottom of the feeder hopper was turned off, but the crusher and the impeller were left running. (Tr. 20:10-14; 55:24-56:13; 57:17-20; 204:3-21)⁷ The impeller is the part that feeds rock into the crusher breaker bars where it is crushed. It spins at 500 rpm. (Tr. 56:19-57:10)

A waist-high support or barrier beam stretched across the nine foot width of the hopper (Tr. 58:11-15), a few feet away from the impeller intake opening. Its purpose was to keep miners working in the hopper from falling toward the crusher intake. (Tr. 212:13-24) The men stood behind the beam and leaned against it as they worked with their pry bars and other tools to free up the rock that periodically hung up in the impeller intake opening. (Tr. 40:22-41; 213:1-5)⁸

⁴ Steve Uehlin was on site but not at the immediate scene of the accident when it happened. (Tr. 45:12-20)

⁵ Mike Raines, a truck driver, was standing next to Buckler in the primary crusher hopper. (Tr. 55:8-5)

⁶ When the accident occurred, John Uehlin was standing on a catwalk above the feeder hopper. (Tr. 198:3-20; 213:6-15)

⁷ The impeller was left running as the miners cleared the jam, according to Mike Raines, because if they shut it off it might choke the crusher itself and it would not start. (Tr. 61:25-62:6) A curtain of heavy chain hung at the entry to the crusher intake intended to keep rocks from being flung out of the crusher impeller. (Tr. 207:16-208:9) It is not certain whether the chains were in place on the day of the accident or had been thrown up on the intake and out of the way. (Tr. 167:13-168:6; 208:10-17)

⁸ It is disputed whether one or more of the miners were standing on the cross beam as they worked with pry bars to clear the rock jam in the crusher impeller. In light of the totality of the evidence, it is of little additional import whether they were or not. (Tr. 66:8-10; 108:20-109:5; 109:20-110:22; 112:2-24; 205:5-22)

At approximately noon on June 10, 2011, Buckler was nearly killed when the eight foot long steel pry bar he was using to dislodge jammed rocks (Tr. 41:11-17; 58:16-60:8) either came in contact with the running impeller unit or was propelled back by a rock that had been thrown out of the impeller. (Ex. S-19, p.3; Tr. 42:6-24; 46:21-47:4; 168:21-169:7) The bar hit Buckler on the right side of his neck and caused the injuries summarized above.

The men on the scene recognized that Buckler was not conscious or breathing and started administering CPR and first aid. (Ex. S-24, p. 3; Tr. 36:24-37:14; 47:5-13; 103:11-24) Buckler revived to the point where they could tell that he was unable to move or speak. (Tr. 98:15-16) They were able to communicate with him by asking questions to which he responded by blinking his eyes. (Tr. 36:24-37:14)

Casey Uehlin, John Uehlin's daughter and scale house employee (Tr. 46:6-8; 218:20-22), called 911. (Tr. 218:9-16) She did not know that she had to call MSHA within 15 minutes. (Tr. 220:12-18) There were emergency procedures posted in the scale house, but Casey did not know about them. (Tr. 219:22-220:4) There was nothing posted in the scale house about the 15 minute rule. (Tr. 220:6-11) John Uehlin was aware that someone was obligated to call the accident in to MSHA within 15 minutes, but he made the deliberate decision not to make the call immediately in order to focus all resources on caring for Buckler until the emergency responders arrived and to make sure that they did not get lost on the way to the scene. (Tr. 219:3-17) Stephen Uehlin directed the EMT's from the highway to the accident scene. (Tr. 105:19-106:2) Casey stayed in the scale house to handle the phones during the response to the accident. (Tr. 218:23-219:1) There was no one else, management or other, who was not in some way either attending directly to Buckler or directing traffic or manning the phones.

The accident report later filed by John Uehlin shows the time of the accident as 12:00 pm. (Ex. S-23) The EMT report estimates the time of accident as 12:15 pm and shows that the 911 call was received at 12:19 pm. The ambulance arrived at the scene at 12:31 pm. (Ex. S-24; Tr. 96:11-22) Buckler was put on a stretcher at 12:55 pm. (Tr. 113:7-13) Stephen Uehlin called MSHA to report the accident at 12:58 pm. (Ex. S-15; Tr. 155:23-156:8; 217:24-218:8) Buckler was loaded onto a life-flight helicopter at 1:05 pm. (Tr. 104:7-105:10)

Inspector Coleman was assigned to investigate the accident. (Tr. 25:3-15; 30:16-23) It was his first accident investigation. (Tr. 169:23-25) He arrived at the scene on June 10, 2011, the day after the accident. (Tr. 34:9-17) He viewed the scene and took evidence photos. (Tr. 31:25-32:18; 38:12-18; 44:12-45:8) No one was available for interviews, so Coleman returned to the quarry on June 14, 2011, to interview witnesses, including Matt Foster and Mike Raines. (Tr. 54:12-55:7)

Analysis

John and Stephen Uehlin's defense is based on the following beliefs and facts:⁹

- Uehlin Quarry is a small, family-owned, -managed, and -operated business with only a few employees. (Tr. 221:13-222:1; 227:18-228:3)
- The quarry operated only part of the year. It was on "intermittent" status with MSHA at the time of this incident and was inspected only twice a year. (Tr. 29:6-13)
- The Uehlin brothers operated the quarry in a manner they believed to be consistent with the way other quarries in their area were operated. (Tr. 20:19-21:1; 23:19-21; 210:9-25)
- The Uehlin brothers worked side-by-side with the miners and did not expect them to do anything they would not do themselves or in a manner they were not comfortable doing themselves. (Tr. 21:23-24; 198:3-8; 199:25-200:14; 212:5-9)
- The Uehlin brothers had operated their quarry for many years essentially the same way it was being operated on the day of the accident and never had a serious accident. (Tr. 21:2-4; 85:14-18; 191:5-12; 199:23-200:14)
- The Uehlin brothers were co-owners and managers of the Uehlin quarry. Both men supervised miners. (Tr. 221:13-222:2)
- Because the operation was so small, management always knew where everyone was and what they were doing. (Tr. 229:4-11)
- It was common practice for miners to stand in the hopper as they worked to free up rocks jammed in the impeller input. (Tr. 198:21-199:22)
- The Uehlins did not consider using a pry bar to free up rock jams in the impeller intake to be an unsafe practice. (Response to Request for Admission, No. 11.8)
- The miners had been trained to hold the pry bar away from their body as they worked to free up rock jams in the hopper. (Tr. 57:21-25) According to John Uehlin, if Buckler had been standing in the right place and using the pry bar as instructed, the bar would have flown harmlessly past him.
- Just before the accident, Uehlin reminded Buckler to put his safety glasses on and stand to the side as he used his pry bar. (Tr. 21:11-22)
- The Uehlins concede that it was a horrible accident, but maintain it was not their fault. (Tr. 23:17-19)
- Considering the circumstances, John Uehlin decided not to immediately call MSHA to report the accident. He felt it more important to attend to the victim's needs. (Tr. 22:11-23:3; 219:3-17)
- Stephen Uehlin got a recording when he first called the MSHA hotline. He left a message and got a return call from Robert Silkey. (Tr. 228:18-21; 230:4-20)
- The Uehlin brothers stopped mining activities at this location because, after heavy rainfall and flooding, the railroad company removed the track crossing used to access the quarry site, cutting off access to the quarry. The loss of revenue from the quarry and the

⁹ The Uehlin brothers were not represented at the hearing. They were put under oath at the beginning of the hearing and advised that by doing so, the court could treat anything they said, be it while questioning witnesses, making objections or arguments, or giving direct testimony, as competent testimony for evidentiary purposes. (Tr. 19:20-20:7)

dispute with the railroad over the crossing depleted their financial resources. (Tr. 201:15-202:13) Their finances have been impacted by the costs of civil litigation related to this accident. (Tr. 200:19-201:2)

- The Uehlin brothers claim that the penalties proposed in this case will affect their ability to remain in business; however they also claim to be insolvent already. (Response to Request for Admission, 3.10; Ex. S-29)

Common Legal Standards

Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, whether the operator was negligent. 30 U.S.C. § 820(i). Each mandatory standard carries an accompanying duty of care to avoid violations of the standard. An operator's failure to satisfy the appropriate duty can lead to a finding of negligence. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. *Southern Ohio Coal Co.*, 4 FMSHRC at 1463-64. *See also Nacco Mining Co.*, 3 FMSHRC at 848, 850-51 (Apr. 1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation), *cited in A. H. Smith Stone Company*, 5 FMSHRC 13, (Jan. 1983).

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices." *Id.* Reckless negligence is present when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." *Id.* High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is found when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is most often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987). The seriousness of a violation can be evaluated by comparing the violated standard and the operator's conduct with respect to that standard in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990)

(ALJ). The Commission has recognized that the determination of the likelihood of injury should be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986).

However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The gravity analysis can include the likelihood of an injury, but should focus more on the potential severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with “significant and substantial,” which is only relevant in the context of enhanced enforcement under Section 104(d). *See, Quinland Coals Inc.*, 9 FMSHRC 1614, 1622 n. 1 (Sept. 1987).

Enhanced Enforcement - Significant and Substantial and Unwarrantable Failure

It is clear in the Mine Act that because negligence and gravity, which are clearly delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and more, when talking about S&S and unwarrantable failure. The Secretary must prove negligence and gravity for all citations and orders. In order to invoke the enhanced enforcement provisions in Section 104(d), he must also prove that the circumstances of the violation satisfy both the S&S and unwarrantable failure standards. If the Secretary fails to prove both, there can be no enhanced enforcement. Thus, the Secretary has to prove four distinct elements when the enhancement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) “significant and substantial;” and (4) “unwarrantable failure.”

Significant and Substantial

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("Commission") explained:

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

Id. at 3-4.

In *U.S. Steel Mining Co.*, 7 FMSHRC 1125 (Aug. 1985), the Commission held:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." [. . .] We have emphasized that,

in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial."

Id. at 1129 (emphasis in original) (citations omitted).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *See Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42 (D.C. Cir. 1999)

Unwarrantable Failure

The term "unwarrantable failure" comes from section 104(d) of the Act and, taken together with "significant and substantial," creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that the essence of unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure has been paraphrased as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). *See also Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). In *Gatliff Coal Company*, 14 FMSHRC 1982 (Dec. 1993), the Commission drew a clear contrast between negligence and unwarrantable failure, noting that the difference is not merely semantic. Consistent with the discussion of enhanced enforcement above, the Commission stated that an unwarrantable failure may trigger the "increasingly severe enforcement sanctions of section 104(d) [whereas] [n]egligence [. . .] is one of the criteria that the Secretary and the Commission must consider in proposing and assessing [. . .] [all] civil penalt[ies]." Further, "[h]ighly negligent conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence." *Id.* At 1988-89.

The Commission has examined various factors to assist in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition, *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quin/and Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992), and the operator's knowledge of the existence of the dangerous condition. e.g., *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to

take adequate precautionary measures support unwarrantable determination); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). What is apparent from the foregoing list of factors is that they are fact-specific examples of conduct and circumstances tending to show unwarrantable failure as *something more* than ordinary negligence and that they are suggestions only and are not intended to be an exhaustive or exclusive catalog. The essential aspect of the unwarrantable failure analysis is, and always has been, whether there is aggravated conduct constituting more than ordinary negligence. Any analysis of unwarrantable failure must identify the evidence or factors that prove aggravated conduct and discuss them thoroughly. *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1350-51 (Dec 2009).

A judge must identify and discuss the factors considered in his unwarrantable failure analysis and should further discuss how and why the traditional list of factors discussed above either do or do not bear on the analysis. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"). The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted.

The traditional factors used to determine unwarrantable failure do not lend themselves well to the facts of this case. For instance, most of them include a temporal element. The extent of a violative condition can be seen as an expression of how long a condition has existed as well as how widespread it is. The former formulation duplicates or supplements the inquiry into how long a violative condition has existed, which is often formulated as a separate factor. Whether an operator has been actually or constructively placed on notice that a violating condition or practice exists or that it should be more diligent in its compliance is also largely an expression of how long the violation has existed. Finally, the operator's effort to abate a violating condition is most meaningful in light of how long the condition has existed. Unfortunately, these time-based factors are of little analytical assistance in a situation such as this where the order arises from an act occurring out by or in the direct presence of an owner/manager of the mine.

Another complication arises from the overlap between the high-degree-of-danger element of the traditional unwarrantable failure test and the negligence and gravity elements of the basic, underlying violation. They can both be proved by facts showing the relative seriousness and likelihood of an injury causing event. The distinguishing element is the weight given in the analysis.

If I were to consider only, or primarily, the traditional elements of the unwarrantable failure test set out in *IO Coal Company*, for instance, I might be steered toward the conclusion that because this was an isolated, *ad hoc* event, noteworthy primarily because of the potential severity of consequences from a highly likely event, factors that have been given decisive weight in my analysis of negligence, gravity, and S&S, it should not be considered an unwarrantable failure to comply with the relevant safety standard. This would result in a distorted treatment of

this important element of the violation, and points out the need to focus more on the elemental definition of “unwarrantable failure” than on the traditional factors discussed above.

However, the Commission has provided guidance for a case which does not lend itself to a traditional factor-dependent analysis. *Sec’y of Labor v. Midwest Material Co.*, involved a foreman’s actions in an isolated, *ad hoc* event involving a high degree of danger which resulted in the death of a miner. 19 FMSHRC 30 (Jan. 1997), 1997 WL 24292. The death occurred because a foreman was derelict in his supervision of the installation of an extension to a crane boom. Because the miner performed this operation incorrectly due, at least in part, to the foreman’s negligence, a section of the boom collapsed on the miner, killing him. In rejecting the Judge’s conclusion that the violation did not stem from the operator’s unwarrantable failure to comply with the cited safety standard, the Commission stated: “[t]he [J]udge’s reliance on the relatively brief duration of the violative conduct was misplaced, in view of the high degree of danger posed by the hazardous condition and its obvious nature. Given the extreme hazard created by [the foreman’s] negligent conduct, that misconduct is readily distinguishable from other types of violations [...] where the degree of danger and the operator’s responsibility for learning of and addressing the hazard may increase gradually over time.” *Id.* at 36. The Commission’s analysis demonstrates that what is important in making an unwarrantable failure determination is ultimately whether there is evidence of aggravated conduct constituting more than ordinary negligence, irrespective of how closely the traditional factor-based test tracks the facts of the case. In fact, a single factor, even one that is not typically encountered, may lead to the conclusion that a violation resulted from the operator’s unwarrantable failure.

Capitol Cement Corp., 21 FMSHRC 883 (Aug. 1999) is also particularly instructive. There, a shift supervisor’s failure to de-energize the rail of a crane and to wear a safety belt were deemed aggravated conduct. The Commission observed that both violations were obvious and dangerous. Further, the supervisor knew the consequence of his failure to de-energize and that not wearing a safety belt was dangerous. The Commission noted that “a high standard of care was required of [the] shift supervisor.” *Id.* at 894. It then added, “Managers and supervisors in high positions must set an example for all supervisory and nonsupervisory miners working under their direction. Such responsibility not only affirms management’s commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care.” *Id.* at 893 (citing *Wilmot Mining*, 9 FMSHRC 684, 688) (Apr. 1987). The Commission also noted that the supervisor “had been entrusted with augmented safety responsibility and was obligated to act as a role model for [his] subordinate, who was watching him.” *Id.*¹⁰

Penalty

Commission administrative law judges assess civil penalties *de novo* for violations of the Mine Act. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act

¹⁰ This discussion of a foreman’s heightened duty of care *vis-a-vis* a subordinate miner is borrowed liberally from Judge Moran’s excellent summary in *Stillhouse Mining*, 33 FMSHRC 864, 865-866 (April 2011).

delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires the Commission [ALJ] to consider six statutory penalty criteria in assessing civil monetary penalties:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Judge's Authority To Increase Penalty

The Commission has explained that “[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.” *Secretary of Labor v. Mechanicsville Concrete, Inc. t/a Materials Delivery*, 18 FMSHRC 877, 879 (1996) (citing *FMC Corporation v. Sec’y of Labor, et al UMWA*, 5 FMSHRC 292, 294). The judge is not bound by the Secretary’s assessment of the degree of negligence. Modifying a negligence determination is authorized by the Mine Act. *Sec’y of Labor (MSHA) v. Spartan Mining Company, Inc.*, 2008 WL 4287784 (F.M.S.H.R.C.) at 22. (August 28, 2008)

Operator's Ability to Continue in Business

The burden is on the company to prove that the assessed penalties would adversely affect its continuation. “The presumption that unless the company proves otherwise the penalties are assumed to have no adverse effect is one of the oldest in mine safety law. When a civil penalty petition is filed and Commission jurisdiction attaches, it becomes the duty of the judge to assess the penalties *de novo* based on the statutory penalty criteria.” *Georges Collieries v. MSHA*, 24 FMSHRC 572, 576 (2002) (citations omitted.) The impact of the proposed penalties on the company’s ability to continue in business is based on the evidence of record, and the ultimate amounts assessed by the judge reflect the exercise of his discretion bound by all of the statutory penalty criteria. If an adverse effect is demonstrated, a reduction in the penalty may be warranted. However, “the penalties may not be eliminated [. . .], because the Mine Act requires that a penalty be assessed for each violation.” *Spurlock Mining Company Inc., v. Sec’y of Labor (MSHA)*, 16 FMSHRC 697, 699 (Apr. 1994), citing 30 U.S.C. § 820(a); *Tazco, Inc.*, 3 FMSHRC 1895, 1897, (1981).

Discussion

In this case, John Uehlin made a conscious and considered decision to lead his miners as they thrust metal pry bars and sledge hammers into the intake area of the energized and active crusher impeller unit to clear a rock jam. The risk of a miner getting seriously hurt under these conditions was obvious, extreme, and easily avoidable. The fact that John Uehlin, an owner and manager of the company, encouraged his miners to expose themselves to such a risk is remiss, notwithstanding the misplaced bravado of his claim that he would not expect or allow any of them to do anything he was not willing to do himself. The fact that he was on the scene and allowed work to be done in the manner that led to these events is disturbing. The fact that he prompted the victim to put on his hard hat and safety glasses shows that he was aware of some level of risk, but the parallel fact that he encouraged the men to work in such a life-threatening and obviously risk-fraught manner is dissonant. The Uehlins' justifications and excuses listed above are a thin film laid over a convincing body of evidence of intentional failure to comply with the standards discussed in this decision.

Order No. 8619341

Inspector Coleman issued Order No. 8619341 on June 10, 2011, as a 103(k) order to preserve the scene of the accident. (Tr.50:10-16; Ex. S-1) It is a procedural rather than enforcement order and does not implicate a civil penalty. It was terminated at the conclusion of Coleman's accident investigation. (Tr. 51:23-52:2)

Citation No. 8619342

Citation No. 8619342 (Ex. S-3; Docket CENT 2012-0307) issued on June 14, 2011, is the crux of the enforcement action arising directly from the events that caused Buckler's injuries. The violation alleged in this citation contributed directly to the accident and arose from the primary accident investigation. (Tr. 68:11-69:2) It alleges a 104(d)(1) violation of 30 CFR § 57.14105, which regulates procedures during repairs or maintenance and requires that before any repair or maintenance is done on machinery or equipment, the equipment must be powered off and blocked against hazardous motion. (Tr. 68:11-69:2) Inspector Coleman characterized this citation as reasonably likely to be fatal, potentially affecting a single miner, significant and substantial ("S&S"), arising from high negligence, and constituting an unwarrantable failure to comply with a mandatory health or safety standard.

The Violation

Inspector Coleman concluded that Buckler was injured because the machinery he and the other miners were working on at the time of the accident was not locked or tagged out of operation. (Tr. 71:2-15; 72:11-13; 143:8-144:14; Ex. S-12) Coleman considered the miners' attempts to free the rock jam in the crusher impeller as repair work as defined in 30 CFR § 57.14105. (Tr. 72:2-7) He stated that it is a matter of common sense that using a pry bar to clear rock jams while the impeller is operating is obviously dangerous. (Tr. 85:19-86:18) Coleman concluded that if the crusher impeller had been locked out, the accident would not have happened. (Tr. 62:7-24; 74:12-23; 88:6-16; 169:8-11) In order to lock out the crusher impeller,

it would be necessary to shut off the diesel engine powering the impeller. (Tr. 71:16-72:1) Simply shutting the door over the shut-off switch is not enough. Someone could still open it and turn the circuit on. (Tr. 144: 20-145: 3)

The Uehlins do not dispute that the crusher impeller was operating and was not locked or tagged out. (Tr. 22:8-11) However, Stephen Uehlin stated during his cross examination of Inspector Coleman that he felt that clearing rock jams by opening the side access door on the impeller unit would be dangerous because rocks behind the door might fall out. (Tr. 175:25-176:5; 209:242-210:8) Coleman did not agree that clearing rock jams by opening the side access door would be more dangerous. (Tr. 175:25-176:11; 176:13-177:9) It would be necessary to shut off the impeller unit in order to open the side access door. If the impeller had been turned off, there would have been no accident. (Tr. 72:14-73:7; 208:18-209:20) Coleman found “high” negligence with this violation because John Uehlin was in the immediate vicinity and was personally involved in the work to clear the rock jam. (Tr. 146:12-16) In Coleman’s opinion, an injury resulting from this violation would likely be fatal because it would have drawn a miner into the crusher. (Tr. 146:8-11)

The Uehlins contended that if Buckler had held his pry bar off to one side, as he had been trained to do, the bar would have most likely missed him. (Tr. 57:21-25) However, Coleman believed that since there were men standing on either side of Buckler, and since there was no way to predict what trajectory the bar would follow, it was highly likely that someone would be injured. (Tr. 58:1-10; 168:7-20) Coleman disagreed that holding the pry bar off to one side was a safe way to free up rock jams while the impeller is working. To the contrary, he concluded that not only was it an ineffective half measure, it also tended to show that the Uehlins were clearly aware of danger involved in using a pry bar in this manner. (Tr. 75:9-14) Nonetheless, he considered the fact that the Uehlins had trained their miners to use a pry bar in this manner as a measure of mitigation against a conclusion that they were indifferent to the degree of danger their miners faced using pry bars in this way. (Tr. 75:4-8)

Coleman interviewed the miners working along with Buckler, plant operator Matt Foster (Tr. 62:25-63:3), Roger Lewendowski, the front end loader operator (Tr. 63:17-64:17), and Mike Raines. (Tr. 48:25-49:7; 55:8-15; 159:23-160:3) Lewendowski had gone to get a sledge hammer to use with a pry bar to force the jammed rocks into the crusher impeller and was the only one who actually saw the accident happen. (Tr. 43:25-64:8; 49:12-23; 63:25-64:8; 202:21-203:10) Foster was standing behind Buckler in the feeder hopper when the accident happened. (Tr. 63:13-16) Lewendowski was the only miner on the scene who had been told to lock out the equipment and to be careful. (Tr. 64:22-65:2; 146:17-20) He had received a 40-hour new miner training. (Tr. 64:22-65:2) The other miners did not mention receiving any sort of safety training other than standing off to the side of their pry bar. (Tr. 65:3-13) John Uehlin was aware of the standard requiring equipment to be powered off before repairs or maintenance were done. (Tr. 225:24-227:5) Coleman felt that management had an obligation to train miners appropriately and failure to do so is an element of unwarrantable failure. (Tr. 147:11-14)

From the foregoing, I conclude that the events associated with the crusher impeller accident made out a violation of 30 C.F.R. § 57.14105. There is no question that the impeller unit was not powered off nor was it blocked against hazardous motion as the miners attempted to

service the unit by removing the rock jam. These events made it more than reasonably likely that a fatality would result. John Uehlin and three miners were affected by the negligence of these events.

Negligence

Given the indifference shown by John Uehlin to the safety of his miners and the salutary safety purpose behind this standard, I conclude that this violation is the result of reckless negligence. John Uehlin displayed conduct devoid of any meaningful degree of care. I disagree with Inspector Coleman's leniency in treating the fact that the miners had been trained to hold their pry bars off to one side as a point of mitigation. Given the high likelihood of a grievous injury and the clearly speculative hope that holding a pry bar off to one side would avoid an accident, I cannot agree that it should be given weight as evidence of a realistic concern on the Uehlins' part about their miners' safety as they performed this a hazardous task. The combination of obvious and extreme danger with such close direction and involvement by a key management person can only be taken as evidence of objective indifference vis-à-vis the miners' safety.

Gravity

The hazard associated with the events in this case is palpable and real. Using a steel pry bar to dislodge jammed rock in an operating crusher intake unit causes anyone hearing about it to cringe at the thought of what could happen if the bar came in contact with the rapidly and forcefully moving crusher intake unit. This is underscored by the fact that the intake opening is draped with lengths of heavy chain to form a protective but movable barrier to lessen the likelihood that rock coming into contact with the impeller unit will be thrown back at anyone close enough to be hit. (Tr. 40:8-15) The effect of the hazard is unfortunately all too evident in this case – it is precisely what happened to Buckler, and could have been worse. I disagree with Inspector Coleman's assessment that this violation was only reasonably likely to occur given that an accident happened. I conclude that the gravity assessment should be modified from reasonably likely to “occurred,” and be determined to affect a single miner.

Significant & Substantial

These events clearly arose from an S&S violation of the standard. The underlying mandatory safety standard was violated. Using steel pry bars to dislodge jammed rocks in the intake of a powered and active impeller unit contributed directly to the discrete and obvious hazard that something forced into the impeller would be thrust back out with great force.¹¹ The likelihood that this hazard would result in an injury is unfortunately beyond debate here. The

¹¹ Exhibit S-34 is an MSHA Fatalgram describing a death caused by events essentially identical with those of this case. Uehlin argued that they were not aware of the potential warning that such communications provide because they did not have an internet connection and were not able to receive them. The obvious danger involved in the practice that caused Buckler's injury does not require that the Fatalgram to be known to the Uehlins. The existence and availability of the Fatalgram merely underscore the obviousness. (Tr. 76:5-23)

injury resulted exactly as any prudent person would anticipate. The reality of the injury to Buckler and its severity establish the reasonable likelihood of it being serious in nature. The *National Gypsum* test for an S&S violation is satisfied in full.

Unwarrantable Failure

The events summarized above constituted an unwarrantable failure to abide by the requirements of the standard in question. The following factors convince me that the actions in question here resulted from aggravated conduct by intention, indifference, and recklessness: (1) John Uehlin purposefully decided to ignore the very specific mandate in 30 C.F.R. § 57.14105 which requires that repairs or maintenance on mine machinery only be done after the power is cut off and the machinery is blocked against hazardous motion; (2) He was derelict in his duty as a foreman to model safe practices and to teach by example the importance and prudence of complying with safety standards;¹² and, (3) the hazard created by attempting to remove a rock jam while the crusher impeller is in operation was obvious and grave. The first is an example of behavior that illustrates Uehlin's personal willingness to sacrifice safety to expediency. The second shows his indifference or recklessness towards his responsibility to look out for the safety of his crew. The third speaks to his poor judgement. All of these factors are consistent with the Commission's decision in *Midwest Material Company, supra*, and the cases cited in it.

Penalty

The allegations in the Secretary's petition regarding the 30 CFR § 100.3 penalty factors were not factually contested by the company at the hearing. (Petition, Exhibit A) The Uehlins did state that their quarry had been closed because the railroad had blocked their access by removing a track crossing after a significant rainfall and flooding and that their mining revenues had been reduced by the costs associated with their defense of legal actions related to the access closure and civil litigation arising from Buckler's injuries. Beyond that, the Uehlins presented no substantive evidence to support the assertion that their ability to continue mining operations would be impacted by the penalty imposed in this case. With nothing more than the summary allegations regarding the impact of a penalty on Uehlin's ability to continue in business, I am constrained from making a penalty adjustment in their favor.

I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this

¹² A key aspect of that case was the fact that the violation occurred "in the presence of a foreman, who under Commission precedent, is held [to] a high standard of care." *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987). The Commission noted that a section foreman is "held to a 'demanding standard of care in safety matters,'" and that there is a "heightened standard of care required of the section foreman and mine superintendent." *Id.* (citing *Wilmington Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995)).

company. After considering all of the penalty criteria, I assess a penalty of \$14,743.00 for this citation.

Citation No. 8619343

Citation No. 8619343 (Ex. S-4; Docket CENT 2011-1130) alleges a violation of 30 CFR § 57.15005, which requires that safety belts and lines be worn where there is a fall danger. (Tr. 114:6-115:6) This citation is characterized as reasonably likely to be fatal, potentially affecting a single miner, S&S, arising from high negligence, and constituting an unwarrantable failure. It was issued on June 15, 2011, as part of the spot inspection. It was not a direct cause of the accident. (Tr. 114:23-115:6)

The Violation

Inspector Coleman wrote this citation because the standard requires the use of some form of fall protection when there is a fall danger. (Tr. 115:25-116:14) Incident to his investigation of the Buckler accident, Coleman concluded that none of the miners working in the primary crusher vibrating hopper with Buckler at the time of the accident was wearing fall protection, and that there was a fall hazard at the time of the accident. (Tr. 116:15-117) A photo of the hopper taken by Coleman shows where John Uehlin and the other miners were standing at the time of the accident. (Tr. 118:11-17; Ex. S-5) Coleman concluded that it was only about two feet from where the miners were standing to the edge of the hopper, and that it was about 15 feet from the hopper edge to the ground. (Tr. 118:18-119:4; 179:12-15; Ex. S-4) Although there were wing walls on the hopper, they did not extend to where the miners were standing. (Tr. 119:18-120:8; Ex.S-19, pages 4-6)

Stephen Uehlin testified that safety harnesses were available for the miners, but it was left up to them to decide when to wear them. Further, management felt that with the six foot high side walls on the hopper it would be impossible for a miner to fall out. (Tr. 177:10-20; 179:16-180:1; Response to Request for Admission, No. 3.11; Ex. S-29) No one was wearing a fall harness at the time of the accident. (Tr. 214:11-18) In his response to the Secretary's Requests for Admission,¹³ Stephen Uehlin admitted that on June 9, 2011, three miners were working on the vibrating feeder without using any safety belt or line (Response to Request for Admission, No. 11.3; Ex. S-29); that the miners were standing on top of approximately 18 inches of rock in the vibrating feeder hopper (Response to Request for Admission, No. 11.2; Ex. S-29); that the distance from the top of the hopper to the ground was approximately 15 feet 4 inches (Response to Request for Admission, No. 11.6; Ex. S-29); and, that if a violation were found to have occurred as alleged in

¹³ Commission Rule 58(b), 29 C.F.R. § 2700.58(b), states: Any party, without leave of the Judge, may serve on another party a written request for admissions. A party served with a request for admissions shall respond to each request separately and fully in writing within 25 days of service, unless the party making the request agrees to a longer time. The Judge may order a shorter or longer time period for responding. A party objecting to a request for admissions shall state the basis for the objection in its response. ***Any matter admitted under this rule is conclusively established for the purpose of the pending proceeding*** unless the Judge, on motion, permits withdrawal or amendment of the admission. (Emphasis added.)

Citation No. 8619343, the violation would be significant and substantial. (Response to Request for Admission, No. 11.7; Ex. S-29)

Coleman concluded that the wing walls at the places where the miners had been standing were not high enough to protect against falling out of the hopper to the ground 15 feet below. (Tr. 120:23-121:12; 178:22-179:10) There was also a gap in the wing walls large enough for a miner to fall through. (Tr. 120:9-14; 180:15-181:2; Ex. S-19)

Coleman characterized Citation No. 8619343 as significant and substantial (“S&S”) because he felt it was reasonably likely to result in an accident that would entail lost workdays or restricted duty. He concluded that it was foreseeable that someone could trip and fall over the side of the hopper. (Tr. 121:13-22) He classified the violation as potentially fatal because of the 15 foot drop from the hopper edge to the ground below. (Tr. 122:13-16) He characterized the violation as involving high negligence because John Uehlin, an owner and manager of the company, was working in the immediate vicinity of the other miners and allowed them to work in the presence of the fall hazard. (Tr. 122:20-24) Finally, Coleman concluded that three persons were subjected to the fall hazard. (Tr. 122:17-19)

In support of his allegation that this citation arose from an unwarrantable failure to comply with the relevant standard, Coleman testified that he considered the lack of fall protection obvious and dangerous, that the hazard had existed for an extended time based on comments from the Uehlins that the workers at their quarry had never used fall protection under such circumstances (Tr. 122:25-123:3), and that John Uehlin was aware of the hazard by virtue of the fact that he was working alongside the other miners. (Tr. 123:4-19)

I find that the feeder hopper is an area where miners are required to use fall protection. There was a reasonable potential that someone working there could topple over the edge and fall 15 feet to the ground. There was a section of the hopper wall that was lower than the rest, which increased the risk of a fall to the ground. The miners working in the hopper on June 9, 2011, were not wearing any type of fall protection. I conclude that this constitutes a violation of 30 CFR § 57.15005.

Negligence

I find that John Uehlin was working with and supervising the other miners at the time of this violation. I concur with Inspector Coleman that this supports a conclusion that this violation was the result of high negligence. There were no mitigating factors.

Gravity

For the reasons stated by Inspector Coleman in his testimony, summarized above, and supported by Exhibit S-4, I conclude that it was reasonably likely that a miner could suffer a fatal injury as a result of a fall from the vibrating hopper.

Significant & Substantial

This violation is appropriately characterized as S&S. The S&S nature of the violation is deemed conclusively established by the answer to the Secretary's Request for Admission, No. 11.7; Ex. S-29. Independently, the underlying mandatory safety standard was violated. The failure to require the use of suitable fall protection in this setting reasonably contributes to the hazard that a miner might fall out of the feeder hopper. The likelihood that this hazard would result in an injury is also reasonably certain, as is the likelihood that the resulting injury would be serious in nature. As above, the *National Gypsum* test for an S&S violation is satisfied in full in this instance.

Unwarrantable Failure

Stephen Uehlin testified that they had fall protection harnesses on site, and their practice was to leave it up to the individual miner whether to use fall protection. The availability of fall protection harnesses for the miners is not enough. Management was indifferent to their obligation to take effective and reasonable steps to require that their miners use fall protection. The use of fall protection is the subject matter of a mandatory safety standard; it is not optional. The Uehlins' casual attitude about this vital safety issue is consistent with the recklessness evident in the Buckler accident scenario. Management's permissive stance regarding the use of fall protection is corrosive in the work place. It leads to dangerous complacency among the miners who should have been trained and instructed as a matter of company policy to wear fall protection at all times when working in the hopper.

The events summarized above constituted an unwarrantable failure to abide by the requirements of the standard in question. The following factors convince me that the actions in question here resulted from aggravated conduct by intention, indifference, and recklessness: (1) The lack of fall protection was obvious and dangerous; (2) The hazard existed for an extended time; (3) The hazard resulted from a longstanding practice condoned by management; and (4) John Uehlin was aware of the hazard. These factors are consistent with the Commission's decision in *Midwest Material Company, supra*, and the cases cited in it.

Penalty

I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of \$2,000.00 for this citation, as proposed by the Secretary.

Citation No. 8619344

Citation No. 8619344 (Ex. S-6; Docket CENT 2011-1131) alleges a violation of 30 CFR § 57.14107(a), which requires that moving machine parts such as gears, sprockets, chains, pulleys,

etc., be guarded to prevent contact. (Tr. 124:25-125:13) This citation is characterized as “reasonably likely” to result in permanent disability, potentially affecting a single miner, S&S, and arising from “high” negligence.

The Violation

Citation No. 8619344 was written on June 14, 2011 (Tr. 123:24-124:4), as part of the spot inspection. (Tr. 124:5-7) It alleges failure to guard the tail pulley on the half- inch conveyer. (Tr. 125:4-13) The cited standard requires guarding on moving machine parts such as head and tail pulleys, takeup pulleys, shafts, and similar machinery. (Tr. 124:25-125:13) Coleman noted a missing tail pulley guard and material buildup around the guard area showing in his opinion that it had been removed for some time. (Ex. S-7; Tr. 126: 25-127:5) Coleman found that miners had been in the area close to the missing guard from the evidence of spillage in that area. (Tr. 126:8-16; 128:11-12) Without the guard, there is a danger that the tail pulley will grab a miner and pull him into it. (Tr. 127:6-13; 128:2-10) Coleman concluded that this violation arose from high negligence because a manager was aware of it, the material build up showed that it had existed for a long time, and the guard had been removed and left in the area, indicating that it could have been easily fixed. The mine had been cited for this type of violation before. (Tr. 129:9-22; 130:20-23; Ex. S-8) Coleman characterized this violation as S&S because he concluded that it was reasonably likely that the missing guard would cause an accident with lost work days. He concluded that there was a foreseeable potential of someone being in the area and getting caught in the pulley. (Tr. 128:13-22) He was also aware of accidents involving pulleys that caused permanent disability and dismemberment. (Tr. 128:23-129:8)

The Uehlings argued that the crusher was not operating the day of the accident. (Tr. 181:13-182:22) Coleman testified that even though the crusher was not operating, it could still have been turned on because it was not locked or tagged out. (Tr. 182:14-22) John Uehlin was aware of the safety standard requiring machine guards. (Tr. 225:24-226:3) However, the Uehlings countered that there were only three miners working the day of the accident, and all of them were aware that the crusher unit was switched off. No one would have turned the crusher on as a matter of common sense. (Tr. 182:24-183:3) Coleman concluded that because the crusher had not been locked or tagged out of service, it was thus available for use – the key to the violation in his mind. (Tr. 183:9-11)

I find that the guard covering the access port to the tail pulley for the half-inch conveyor belt had been removed, placed off to the side of the tail pulley, and not replaced. (Ex. S-7, p.1) The condition described by Coleman in his citation documentation (Ex. S-6, p.5) had existed long enough for spillage material to accumulate in the area of the tail pulley and for someone to have removed some of it prior to the inspection. I find that the missing guard created an entanglement hazard. Management was aware of the missing guard. The guard could have been easily reattached; it was found close to the tail pulley. The quarry had been cited for this type of violation less than three months before this citation. (Ex. S-8) From this I conclude that 30 CFR § 57.14107(a) was violated.

Negligence

I concur with Coleman's negligence assessment. This violation resulted from high negligence. The quarry manager was aware that the guard had been removed. Material build up shows that the condition existed for a long time. The guard was removed and left in the area. It could have been easily replaced. The mine had been cited for this type of violation before. There were no mitigating factors.

Gravity

For the reasons stated by Inspector Coleman in his testimony and supported by Exhibit S-6, I conclude that it was reasonably likely that a miner could suffer a permanently disabling injury as a result of an entanglement in the tail pulley mechanism. I credit Coleman's testimony about his observation that spillage material had accumulated to a depth of approximately two inches and that miners were expected to access the area for clean up periodically. (Ex. S-6, p.5) I also concur with his finding that the missing guard posed a danger of entanglement in moving machine parts. *Id.*

Significant & Substantial

This violation is appropriately characterized as S&S. The S&S nature of the violation is deemed conclusively established by the answer to the Secretary's Request for Admission, No. 11(d); Exhibit S-30. Independently, the underlying mandatory safety standard was violated. The failure to replace the tail pulley guard reasonably contributes to the hazard that a miner might become entangled in moving machine parts. The likelihood that this hazard would result in an injury is also reasonably certain, as is the likelihood that the resulting injury would be serious in nature. As above, the *National Gypsum* test for an S&S violation is satisfied in full in this instance.

Penalty

I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of \$362.00 for this citation, as proposed by the Secretary.

Order 8619345

Order No. 8619345 (Ex. S-9; Docket CENT 2011-1130) was issued in response to an unprotected opening along a travelway. (Tr. 131:22-25) It arose from the spot inspection and alleges a Section 104(d)(1) violation of 30 CFR § 57.11012, which requires railings, barriers, or covers to protect any opening near a travelway through which a person or material could fall. (Tr. 131:22-132:6; 132:15-17) It is characterized as "reasonably likely" to be permanently disabling,

potentially affecting a single miner, S&S, arising from “high” negligence, and constituting an unwarrantable failure.

The Violation

Coleman observed a three foot by seven foot opening along the catwalk directly above the crusher and conveyor belt with no railing, barrier, or cover. (Tr. 133:19-134:1; 137:19-24; Ex. S-10) He concluded that miners would have to step over the opening to get to the other side of the work area. (Tr. 135:18-136:16) Coleman estimated that the travelway involved in this citation was used about one time per month. (Tr. 136:17-19) The travelway was adjacent to the unguarded opening. The opening was large enough that men or materials could fall through it. (Tr. 136:25-137:9) Miners had stepped over the opening from the drive unit side to get to the catwalk above the crusher. The distance from the travelway to impact on the conveyor belt is approximately three feet – from the travelway to the crusher approximately eight feet. (Ex. S-9) Coleman refused to use the ladder where it was located to climb on the machinery. He made them move the ladder because he did not want to climb up on the machinery in a manner that he felt was unsafe. (Tr. 183:12-184:1) Coleman assessed that the unguarded opening created a hazard of a broken leg or possible dismemberment. (Tr. 138:15-21) He believed that if the crusher and conveyer had been in operation, a miner could get entangled. (Tr. 137:10-18) Coleman felt that there was a foreseeable potential that someone would fall through the opening. (Tr. 138:6-10) In his opinion, it would have been practical to install a guarding device to protect the opening. (Tr. 137:25-138:5) Because supervisors used the travelway, Coleman assessed the negligence as “high.” (Tr. 138:22-25; Ex. S-9) He found nothing to mitigate the level of negligence. (Tr. 139:1-3) Coleman classified the violation as an unwarrantable failure because supervisors were aware of the condition, they took no action to fix it, it was obvious, it was very dangerous, management knew that miners used this area, management used the area themselves, and there had never been any protection in place. (Tr. 139:4-25)

The Uehlings admit the existence of the unprotected opening and its proximity to a travelway. (Response to Request for Admission, No. 12.2, Ex. S-29) They stated that no one traveled the area because they always went up on the machinery from the other side, and they only did that once a month to change the oil. (Tr. 183:12-184:1) When the miners went up on the catwalk, it was always at the end of the day when everything was already shut down. (Tr. 195:5-20) However, Coleman testified that John Uehlin told him that they always climbed up the ladder on the unprotected side to access the upper travelway (Tr. 184:2-7) whenever there was a rock jam. (Tr. 184:8-11) The Uehlings also denied any responsibility for this violation because the equipment came from the manufacturer without a railing on the catwalk. (Tr. 195:21-25)

I find that Coleman’s description of the violating conditions and his conclusion as to the existence of a hazard that violates the standard deserve full credit. There was an unprotected opening along a travelway large enough for a person or material to fall through. The opening created the hazard that a person or an object might fall several feet and cause an injury on impact. The Uehlings’ arguments do not change my conclusion. Coleman factored into his assessment an appropriate balance between accessing the area from the back side to tend to infrequent service requirements and periodically accessing this area from the front side to clear rock jams.

Uehlin's argument that the equipment came from the manufacturer in this condition is of no import in my analysis. The standard requires the mine operator to provide appropriate rails, barriers, and covers, irrespective of the condition of the equipment when it was acquired by the operator. See, *Walsenburg Sand & Gravel Company*, 11 FMSHRC 2233 (November 1989) cited in *Riverton Corporation*, 16 FMSHRC 2082, 2095 (1994).

I conclude that this makes out a violation of 30 CFR § 57.11012. The unprotected opening created a foreseeable potential that a person or material could fall through the opening and suffer significant injury, particularly if the crusher were in operation at the time.

Negligence

The citation is characterized as "reasonably likely" to be permanently disabling, potentially affecting a single miner, S&S, arising from "high" negligence, and constituting an unwarrantable failure. I concur with Coleman's negligence assessment. This violation resulted from high negligence. The quarry manager was aware that the unprotected opening existed. It would have been easy to install a suitable rail or cover. The condition existed for a long time. There were no mitigating factors.

Gravity

For the reasons stated by Inspector Coleman in his testimony and supported by Ex. S-9 and S-10, I conclude that it was reasonably likely that a miner could suffer a permanently disabling injury as a result of a fall through the unprotected opening or being struck by an object falling through the opening. I credit Coleman's testimony about the frequency of and reasons for miners being in this area and the fact that they were known to step over the opening to access the catwalk above the crusher conveyor belt. (Ex. S-9, p.3; Ex. S-10) I also concur with his finding that the missing guard posed a danger of entanglement in moving machine parts. *Id.*

Significant & Substantial

This violation is appropriately charged as S&S. The S&S nature of the violation is deemed conclusively established by admission in Uehlin's answer to the Secretary's Request for Admission, No. 12.7. (Ex. S-29, p.8) Independently, the underlying mandatory safety standard was violated. Uehlin admits that the opening was above, below, or near a travelway¹⁴ (Response to Request for Admission, No. 12.2), that the opening was approximately three feet by seven feet in size (Response to Request for Admission, No. 12.3), that the opening created a three foot fall hazard onto the primary crusher conveyor on one side (Response to Request for Admission, No. 12.4), that the opening created an eight foot fall hazard to the ground on the west end of the catwalk (Response to Request for Admission, No. 12.5), that there were no warning signals posted or installed in the cited area. (Admission No. 12.6), and that on the date of the citation, John Uehlin, co-owner, was aware of the cited condition. (Admission No. 12.8)

¹⁴ Uehlin qualifies its admission by claiming that the travelway was unused. I find that the travelway was used enough to contribute to the hazard underlying the violation.

The failure to maintain a suitable rail or cover at the opening reasonably contributes to the hazard that a miner might be injured by falling through the opening or being struck by something falling through the opening from above. The likelihood that this hazard would result in an injury is reasonably certain given the frequency of miners being in this area and the potential fall heights, as is the likelihood that the resulting injury would be serious in nature. As above, the *National Gypsum* test for an S&S violation is satisfied in full in this instance.

Unwarrantable Failure

Uehlin defends the lack of protection for the opening by claiming that its miners had been warned not to go around the area in question. (Response to Request for Admission, No. 12.9) Assuming this is true, it is simply not appropriate for a mine operator to attempt to shift its strict liability compliance obligations to its employees by claiming that they had been warned. The duty of compliance cannot be delegated or shifted in this manner. Regardless of whether miners have been verbally warned against an apparent hazard, the operator still has the statutory duty to eliminate the hazard. See *Sec'y of Labor, Mine Safety & Health Admin. (MSHA)*, 6 FMSHRC 1871, 1878 (Aug. 29, 1984) and cases cited therein (Commissioner Lawson dissenting). Once again, management was indifferent to their obligation to take effective and reasonable steps to protect against this hazard.

The events summarized above constituted an unwarrantable failure to abide by the requirements of the standard in question. The following factors convince me that the actions in question here resulted from aggravated conduct by intention, indifference, and recklessness: (1) The lack of railing, barriers, or covers to protect the opening was obvious and dangerous; (2) The hazard existed for an extended time; (3) The hazard resulted from a longstanding practice condoned by management; and (4) John Uehlin was aware of the hazard. These factors are consistent with the Commissions decision in *Midwest Material Company, supra*, and the cases cited in it.

Penalty

I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of \$2,000.00 for this citation, as proposed by the Secretary.

Citation No. 8619346

Citation No. 8619346 (Ex. S-11; Docket CENT 2011-1131) alleges a violation of 30 CFR § 57.12016, which requires that powered equipment be powered off and locked and tagged out before any mechanical work is done on it. (Tr. 140:8-25) This citation is characterized as "reasonably likely" to be fatal, potentially affecting a single miner, S&S, and arising from "high" negligence.

Inspector Coleman wrote this citation because the vibrating feeder hopper the miners had been standing and working in was not locked or tagged out. (Tr. 140:8-14) The vibrating feeder shakes rock down into the crusher. It is separate from the crusher. (Tr. 140:19-25) It was de-energized, but not locked or tagged out while the miners were working in it. (Tr. 143:8-144:14) The switch for the vibrating hopper was located in a structure a short distance from the feeder. The switch was not locked, and no warnings were posted. (Tr. 145:4-20)

Although the vibrating hopper was de-energized, Coleman concluded there was a foreseeable potential it could be turned on while miners were working in it. (Tr. 146:3-7) As a result, he classified this violation as S&S.

Uehlin argued that the switch circuits were in fact locked because their switch was located in a building whose door was latched but not locked. (Response to Request for Admission, No. 12(d); Ex. S-30, p.7) Coleman could not refute this assertion. (Tr. 184:12-1855) Coleman did not consider a danger sign on the switch shed a suitable means of locking and tagging out. He wanted to see a lock or tag on the switch circuit itself. (Tr. 185:11-186:4) Uehlin also argued that all three of its miner employees knew where the switch to the vibrating hopper was located and knew that it was powered off at the time because they were all working inside the hopper. (Response to Request for Admission, No. 12(g); Ex. S-30, p.7)

The Violation

30 CFR § 57.12016 requires that electrically powered equipment be deenergized before mechanical work is done on it. The thrust of the standard is the requirement that power switches be locked out or other measures taken to prevent the equipment from being inadvertently energized. In addition, the standard requires that suitable warning notices be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices are to be removed only by the persons who installed them or by authorized personnel. This is a triple-safe protection regimen. Although it does allow for some interpretation as to what “other measures” are sufficient to provide the protection contemplated by the standard, there is nothing in the standard that allows for a decrease in the multi-leveled protections called for. Although Uehlin argues that the power switch for the vibrating crusher feeder was in a separate shed structure that could be locked, but was not (Response to Request for Admission, No. 12(d)), and all three of its miner employees knew where the switch was and would know at all times where their colleagues were, and would have been savvy enough not to turn the switch back on without first checking to make sure that no one was working on the deenergized equipment, there was no warning sign on the switch box or the structure in which it was located. (Response to Request for Admission, No. 12(e)) This is not enough to maintain the multi-level protection required by the standard. Certainly, these half measures are not adequate “other measures” which would satisfy the protective intent of the standard. They are excuses for full compliance that tend to weaken the protection miners are given in the standard. Anything that tends to weaken those protections violates the standard.

Accordingly, I find that 30 CFR § 57.12016 was violated by the facts listed above and relied on by Coleman when he wrote the citation. Uehlin and his miners were doing mechanical work in the vibrating hopper. (Tr. 143:14-21; Response to Request for Admission, No. 12(c)) The

hopper is appropriately considered electrical equipment. (Response to Request for Admission, No. 12(b)) The fail-safe, multi-level protections of the standard were weakened by the fact that the equipment was not properly locked or tagged out. These facts create the hazard and increase the likelihood that a miner could inadvertently reenergize the equipment and cause injury to a fellow miner. It is not enough to assume that miners' common sense will protect them. It is not enough to assume that miners will always know where their colleagues are and what they are doing at all times, even when working above ground on equipment such as this. It is exactly for failures of common sense and the lack of due and ordinary caution that mining standards contain multiple and redundant layers of protection.

Negligence

I concur with Coleman's assignment of high negligence. The quarry manager was working alongside the other miners in the vibrating hopper. Even construing the evidence of actual knowledge in his favor, he should have done something to determine whether the power switch was properly locked or tagged out. In addition, I deem him aware that there was an increased risk that the power switch could be turned on because he knew that the switch was in an unlocked structure and that there was nothing present that could serve as an appropriate danger tag.

There were no mitigating factors. The fact that the power switch was in a separate structure and that there was a lock on the door that could have been used to completely lock out the power switch do not amount to mitigation. Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner.

Gravity

Inspector Coleman considered the possibility that one of the three miners working in the vibrating hopper could have left the others, gone to the power switch location, and re-engaged the power to the crusher hopper. He based his assessment of "reasonable likelihood" on this. (Ex. S-11, p. 4) I find that this is a reasonable position to take.

For the reasons stated by Coleman in his testimony and supported by Exhibit S-11, p. 4, I conclude that it was reasonably likely that as many as three miners could suffer a fatal injury as a result of the vibrating crusher hopper being inadvertently powered on.

Significant & Substantial

This violation is appropriately charged as S&S. The S&S nature of the violation is deemed conclusively established by admission in Uehlin's answer to the Secretary's Request for Admission, No. 12(f). (Ex. S-30, p.7) Independently, the underlying mandatory safety standard was violated. There was a substantial hazard that the equipment would be re-energized while miners were working on it. There were no warning signs or tags to give a person a visual clue that men could be working on the equipment. John Uehlin should have known that the equipment was not locked or tagged out.

The likelihood that this hazard would result in an injury is reasonably certain given the fact that miners were actively working in the vibrator hopper, using heavy metal tools in close proximity to the same moving parts that caused the injury to Buckler. Simple reference to the facts of the Buckler injury scenario shows the clear likelihood that any resulting injury would be serious in nature. The *National Gypsum* test for an S&S violation is satisfied in full.

Unwarrantable Failure

This citation does not allege an unwarrantable failure on the part of the operator. Coleman commented that he might have classified it as such, but he gave Uehlin the benefit of the doubt on the issue of whether management (John Uehlin) had actual knowledge that the vibrating hopper was not locked and tagged out. (Tr. 146:21-147:10) I see no reason to change that assessment.

Penalty

As above, I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of \$807.00 for this citation, as proposed by the Secretary.

Citation No. 8619347

Citation No. 8619347 (Exhibit S-13: Docket CENT 2011-1131) alleges a violation of 30 CFR § 48.29, which requires that a mine operator keep a copy of form 5000-23 for each miner on file for examination, showing that the miner has received MSHA training (Tr. 148:20-149:3), and that the mine operator maintain training records for each miner on mine premises for two years. (Tr. 150:9-151:16)

This citation is considered a paperwork violation; it does not implicate any degree of gravity (Tr. 152:6-8); it is characterized as having no likelihood of causing injury (Ex. S-13); it alleges no lost work days (Tr. 152:9-16); but, it arises from "high" negligence (Ex. S-13, p. 5). The citation alleges that Uehlin failed to maintain training records for Ronald Buckler. (Tr. 148:25-149:3) During the aftermath of the Buckler injury, MSHA asked Uehlin to produce the training records for Buckler. As of the time of the hearing, Uehlin had not done so. (Tr. 151:18-152:5)

Coleman testified that he asked to see the records for Buckler's initial miner training. (Tr. 186:5-18) When Uehlin could not produce them, Coleman cited Uehlin for not having the initial training records, not the annual updates.¹⁵ (Tr. 186:19-187:1) Coleman testified that he may have

¹⁵ On cross examination, John Uehlin raised the possibility that Coleman had asked to see
(continued...)

seen the records for the annual refresher training, but that is not what he wanted to see. (Tr. 187:11-14) The SOL asked for the training records in discovery. (Tr. 216:10-12) Uehlin never provided them. (Tr. 214:20-215:15; 216:18-217:19) Stephen Uehlin claimed to have the relevant training records in his hearing testimony and in the answer to the Secretary's Requests for Admissions (Ex. S-30, Response to Request for Admission, No. 13(a)), but claimed not to have understood what Inspector Coleman was asking for. (Tr. 205:23-206:16)¹⁶

The Violation

Uehlin was required to keep copies of Buckler's initial training records so as to make them available to MSHA on request. Despite being asked several times to produce them and claiming all along that they would have been provided if only the request had been clearer, Uehlin never produced them – even at the hearing. This is a violation of the standard.

Negligence

I concur with Inspector Coleman's assessment of high negligence for this violation. John Uehlin claimed to be aware that the quarry was required to keep initial training records on hand for MSHA inspection. I have discounted his excuse about not understanding that Coleman was asking for records of Buckler's initial miner training and not the records of annual refresher training. There is, therefore, nothing that would mitigate against the finding of high negligence.

Gravity

Since this is a paperwork violation, Coleman assessed it as having no likelihood of contributing to an injury and classified the violation as involving no lost work days.

Significant & Substantial

Inspector Coleman did not allege that this paperwork violation was a significant and substantial violation of the standard. There is no basis to second guess his assessment.

¹⁵(...continued)

the records of Buckler's annual eight-hour refresher training instead of the initial new miner training. (Tr. 184:14-187:1)

¹⁶ I give no credibility to John Uehlin's claim that he had never understood that MSHA wanted to see the Buckler training records, and that was the reason the records were never produced. Uehlin was presumed to know of their obligation to maintain those records in accordance with the standard. The claim that they never understood that MSHA wanted to see the records is patently incredible.

Penalty

As above, I accept the Secretary's allegations regarding the operator's size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of \$100.00 for this citation.

Citation No. 8619348

Citation No. 8619348 (Ex. S-14; Docket CENT 2011-1129) alleges a violation of 30 CFR § 50.10(b) which requires that a mine operator notify MSHA within 15 minutes of an injury at a mine site which has a reasonable potential to cause death. (Tr. 153:4-154:5) This citation is also characterized as having no likelihood of causing injury ("paperwork violation") (Tr. 158:10-14), but arising from "high" negligence. One of the rationales underlying this requirement is to allow MSHA to immediately issue a "j" order which requires that the accident scene be preserved in the state it was in at the time of the accident. (Tr. 154:6-15)

John Uehlin filled out the MSHA standard accident report form, 7000-1 (Ex. S-23) on July 7, 2011. It shows the time of accident as 12:00 pm. (Tr. 154:23-155:13)¹⁷ Steve Uehlin made the first call to MSHA at 12:55 pm, some 55 minutes after the accident. (Tr. 155:23-156:2; 187:15-188:5) Uehlin was aware of the 15 minute rule, but their first priority was to make sure that they had people stationed at each intersection going into the quarry so that the ambulance would not get lost on the way. (Tr. 219:3-17) John Uehlin affirmatively gave the order not to call the accident into MSHA within 15 minutes. (Tr. 219:19-20) Coleman classified the violation as arising from "high" negligence because the operator was aware that it was obligated to call the accident into MSHA within 15 minutes and failed to do so. (Tr. 158:18-22)

The Violation

John Uehlin admits that the initial call to MSHA's hotline was delayed so as to focus all of Uehlin's resources on attending to Buckler's needs and to facilitate his evacuation. (Tr. 219:3-20) This is a technical violation of the standard.

Negligence

Coleman assessed the negligence level in this instance as high because Uehlin management was aware of the 15-minute rule. (Ex. S-14, p.2) However, he did not factor any mitigation into his negligence assessment. As I review these facts, I am convinced that the decision to delay notifying MSHA of the event for a little more than an hour is properly seen as a

¹⁷ Exhibit S-15, the MSHA escalation report, shows the time of accident as 11:45 am central time. It also shows that Steve Uehlin first notified MSHA of the accident at 12:58 pm central time. The time discrepancies are of no import. (Tr.157:12-158:2)

mitigating circumstance that was motivated by the demands of the emergency and represents a balanced and prudent judgment call. As a result, I conclude that the negligence assessment for this violation must be adjusted to “low negligence” as contemplated by Table X of 30 C.F.R. § 100.3(2)(d).

Gravity

Since this is a paperwork violation, Coleman assessed it as having no likelihood of contributing to an injury and classified the violation as involving no lost work days. I concur.

Significant & Substantial

Inspector Coleman did not allege that this paperwork violation was a significant and substantial violation of the standard. There is no basis to adjust his assessment.

Penalty

As above, I accept the Secretary’s allegations regarding the operator’s size. I have considered the history or past violations at this mine summarized in Exhibits S-31 and S-41, including the citation for the standard discussed above. I have made findings and conclusions regarding the negligence and gravity associated with this citation. I am aware that the company stopped mining at this location and that the Uehlin brothers claim that they could declare bankruptcy for this company. After considering all of the penalty criteria, I assess a penalty of \$112.00 for this citation.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(I), I assess the penalties listed for the citation heard and the settled citations listed above for a total penalty of \$20,124.00. Uehlin Quarry is hereby ORDERED to pay the Secretary of Labor the sum of \$20,124.00 within 30 days of the date of this decision.

/s/ L. Zane Gill

L. Zane Gill

Administrative Law Judge

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Stephen Uehlin, 15478 County Road 409, Amazonia, MO 64421

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY HEALTH AND REVIEW COMMISSION

Office of the Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2500

August 5, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-0025
Petitioner,	:	A.C. No. 46-09136-281297 A
	:	
v.	:	
	:	
SCOTT CARPENTER,	:	
Respondent.	:	Mine: Broad Run Mine

ORDER DENYING MOTION TO DISMISS

INTRODUCTION

This case is before me upon a petition for assessment of a civil penalty under Section 110(c) of the Federal Mine Safety and Health Act of 1977. The Respondent has moved to dismiss this matter, or in the alternative, dismiss all civil monetary penalties due to the Secretary's failure to issue a proposed assessment within a reasonable time. Resp. Br., 1. The Secretary opposes the Respondent's motion, asserting that the assessment was filed within a reasonable timeframe, the Commission lacks authority to dismiss the action due to delay alone, and that the Respondent has failed to demonstrate actual prejudice. Sec'y Br., 1. As the Respondent has failed to show that the Secretary failed to comply with a jurisdictional time limit, delayed its prosecution due to caprice or malice, or provide evidence of significant material prejudice, the Respondent's Motion to Dismiss is **DENIED**.

BACKGROUND

The Respondent, Scott Carpenter, worked as a section foreman at the Big River Mining, LLC Broad Run Mine located in Mason County, West Virginia from February 2010 to April 2010. Resp. Br, 1. On March 26, 2010 MSHA conducted an impact inspection of the Broad Run Mine, issuing a total of 16 citations and orders. *Id.* MSHA served Order No. 8023819 to Mr. Carpenter as the section foreman, alleging that ventilation controls were damaged on the section and stating that "the section foreman is aware of these listed conditions." Resp Br.: Ex. 2. Big River Mining abated Citation No. 8023819 that same day, four hours after the issuance of the violation. *Id.* The Broad Run Mine was idled in April of 2010 and Mr. Carpenter subsequently gained employment with another mining company. Resp. Br.: Ex. 3, 2; Resp. Mot. to Reopen: Ex. 2,1. Big River Mining did not contest Order No. 8023819, and the violation became a final Order of the Commission on June 11, 2010, which Big River paid in full.¹

¹ <http://www.msha.gov/> MINE ID# 46-09136 Violation History.

On August 2, 2010, Mr. Carpenter was interviewed by an MSHA Special Investigator in regards to the March 26, 2010 inspection at the Broad Run mine. Resp. Br., 2. Mr. Carpenter was not represented by counsel during the interview. Resp. Br., 2. The Special Investigator prepared a statement based on this interview which Mr. Carpenter apparently declined to sign. Resp. Mot. to Reopen: Ex. 2, 7. The statement form did not specify the purposes of the interview. The prepared statement referenced the specific circumstances of Citation No. 8023819, but also described the Broad Run mine dispatcher providing advance notice of MSHA inspections and the failure of upper management to staff work crews with sufficient numbers of experienced miners. Resp. Mot. to Reopen: Ex. 2, 3-7. At the beginning of the statement form, Mr. Carpenter listed an address of 101 Dyer Road and indicated that he had begun working with Mammoth Coal at the Alloy Powellton Mine in May 2010. Resp. Mot. to Reopen: Ex. 2, 1.

On August 9, 2010 Mr. Carpenter moved from the address he had listed during the Special Investigation interview. Resp. Br.: Ex 1, 1. Mr. Carpenter subsequently obtained legal counsel through Nicholas Preservati of Preservati Law Offices, PLLC. Resp. Br., 2. On August 27, 2010, the District 3 Special Investigation unit forwarded the case to MSHA's Technical Compliance and Investigation Office "TCIO". Sec'y Response, 1-2. On Oct 11, 2010, Mr. Preservati advised the Special Investigator in writing that he represented Mr. Carpenter and requested that the Special Investigator direct all correspondence through counsel. Resp. Mot. to Reopen: Ex. 3, 1.

On January 3, 2011, the Secretary sent a written notice to the idled Broad Run Mine office address, stating that MSHA was proposing to assess civil penalties against Mr. Carpenter individually on the basis of a special investigation. Sec'y Supp. Response: Ex. 1; Resp. Br.: Ex. 3, 2. Mr. Carpenter no longer worked at the Broad Run mine at that date and asserts that he never received this preliminary notice. Resp. Br., 2; Resp. Response, 2. On February 7, 2011, MSHA held an in-house conference regarding this case, which Mr. Carpenter was not involved or notified of. Sec'y Supp. Response, 2. Eleven months later, on December 19, 2011, TCIO closed the investigation with a final decision to forward the case to the Assessment Office for the proposal of a civil penalty. Sec'y Response, 2.

On February 23, 2012 MSHA delivered a notice of proposed assessment to Mr. Carpenter's former address at 101 Dyer Road.² Resp. Mot. To Reopen: Ex. 6. Mr. Carpenter asserts that he never received the proposed assessment and as Mr. Carpenter did not file a notice of contest, the assessment became a final order of the Commission on March 26, 2012. Resp. Br., 2. On September 4, 2012, the Department of Treasury issued a statement to Mr. Carpenter's previous address at 101 Dyer Road, notifying him that he was delinquent on payment of the civil penalty. *Id.* Mr. Carpenter asserts that the delinquency notice was not forwarded to him until September 22, 2012. *Id.* On October 3, 2012, Mr. Carpenter filed a motion to reopen with the Commission pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure. Resp. Mot. to Reopen. Big River Mining dismantled the Broad Run Mine main

² The February 21 Notice of Assessment was delivered to 101 Dyer Road on February 23, 2012 and signed for by a J. Carpenter. Despite the shared last name, based on the Respondent's affidavit and forthright handling of this matter, the Court does not doubt Mr. Scott Carpenter's assertion that he did not receive the February 21 Notice of Assessment.

office in early 2013, moving some shift inspection records to Beckley, WV while disposing of others. Resp. Br.: Ex. 3, 2.

The Commission granted the Respondent's Motion to Reopen on May 31, 2013 and directed the Secretary to file a petition for assessment with the Commission within 45 days. *Scott Carpenter*, 35 FMSHRC 1295, (May 2013). The Secretary complied with this order, filing a petition on July 11, 2012. Sec'y Br., 3. On August 22, 2013 the Respondent filed a Motion to Dismiss, stating that the Secretary failed to file the original proposed assessment within a reasonable time after the issuance of the March 26, 2010 citation and that the delay had prejudiced his defense. Resp. Br., 1. The Secretary opposed the motion, stating that the assessment was filed within a reasonable timeframe, the Commission lacked authority to dismiss the action due to delay alone, and that the Respondent had failed to demonstrate actual prejudice.³ Sec'y Br., 1. The Respondent filed a reply brief on September 3, 2013. Resp. Reply Br.

On June 9, 2014, the Chief Administrative Law Judge assigned this matter for this court's consideration. After reviewing the parties' motions, I issued an Order Requesting Additional Information on June 30, 2014. The parties complied with this request and a subsequent request issued to the Secretary for clarification. Sec'y Response; Resp. Response; Sec'y Supp. Response.

ANALYSIS

1. *The Secretary did not notify the Respondent of the Proposed Assessment within a reasonable timeframe.*

Section 110 (c) of the Mine Act imposes civil liability upon agents of the operator who knowingly authorize, order, or carry out violations of the Mine Act. 30 USC 820(c). Section 105(a) of the Mine Act states that the Secretary "shall, within a reasonable time after the termination of such inspection or investigation notify the operator by certified mail of the civil penalty proposed to be assessed under section 110 (a)." 30 USC 815(a). Commission ALJs have consistently held that the Section 105(a) "reasonable time" requirement applies to both 110(a) and 110(c) actions. *Steven Adkins*, 35 FMSHRC 1481, 1482 (May 2013)(ALJ Manning).

The Commission has not yet addressed the precise question of how the Section 105 (a) "reasonable time" requirement applies to Section 110(c) actions. *Adam Whitt et al*, 2013 WL

³ The Secretary argues that *Brock v. Pierce County*, 476 U.S. 253, 260 (May 1996), *Tazco, Inc.*, 3 FMSHRC 1895, 1896-97 (1981), and other appellate level cases preclude dismissal of proposed civil penalties based on delay alone. Sec'y Br., 4-9. The Commission has recently rejected similar arguments and maintained the "adequate cause" analytical framework set for in *Salt Lake*, 3 FMSHRC 1714 (July 1981) regarding prosecutorial delays. *Long Branch*, 34 FMSHRC 1984, 1989-90 (Aug. 2012). Similarly, the Commission has reiterated its authority, when appropriate, to vacate civil penalty assessments due to unjustifiable delays in notice of assessments. *Sedgman*. 28 FMSHRC 322, 338 (June 2006). Based on these Commission decisions, I will not address or rely upon the Secretary's arguments that the Commission is wholly prohibited from vacating a civil penalty due to delay.

6792640, *3 (November 2013)(ALJ Andrews). However, the Commission has stated that the Section 105(a) “reasonable time” mandate,

...does not impose a jurisdictional limitations period, but rather turns on whether the delay is reasonable under the circumstances of each case, as the Commission examines whether adequate cause existed for the Secretary's delay in proposing a penalty and considers whether the delay prejudiced the operator. *Salt Lake County Rd. Dep't*, 3 FMSHRC 1714, 1716-17 (July 1981); *Medicine Bow Coal Co.*, 4 FMSHRC 882, 885 (May 1982); *Steele Branch Mining*, 18 FMSHRC 6, 13-14 (Jan. 1996); *Black Butte Coal Co.*, 25 FMSHRC 457, 459-61 (Aug. 2003).

Sedgman et al, 28 FMSHRC 322, 338 (June 2006).

For 110 (c) actions, the Secretary does maintain internal guidelines that call for MSHA to forward a final decision to the Office of Assessments within 7 months after the issuance of the underlying violation. MSHA Special Investigation Procedures, Handbook Number PH 05-1-4, 4-4 (Aug. 2005). Additionally, the MSHA Program Policy Manual states that Section 110 (c) penalty assessments will normally be issued within 18 months from the date of issuance of the subject citation or order. MSHA Program Policy Manual, Vol. I, p. 42 (Aug. 2007).⁴ Indeed, ALJs have previously found that notice of assessments for 110 (c) actions served more than 18 months past the issuance of the citation failed to comply with the Section 105(a) “reasonable time” requirement and warranted dismissal. *Doyal Morgan et al*, 20 FMSHRC 38, 42 (January 1998) (ALJ Merlin); *Ernie Brock*, 4 FMSHRC 201, 202 (February 1982)(ALJ Koutras).

However, these internal guidelines do not impose a jurisdictional time limit upon the Secretary, and Notice of Assessments served outside the 18 month guideline are not *per se* unreasonably late. *Adam Whitt et al*, 2013 WL 6792640, *3. Section 110 (c) investigations that involve serious accidents or complicated technical issues may require investigation and review longer than 18 months and still comply with the Section 105(a) “reasonable time” requirement. *Doyal Morgan et al*, 20 FMSHRC 42 (holding that delay in instant case warranted dismissal but stating that complicated investigations may warrant lengthier review prior to notice of assessment). Additionally, even in simple cases where the official notice of assessment is served outside the 18 month guideline, a prompt preliminary notice of proposed civil penalties assessment provides the agent with adequate notice of pending civil penalties. *Stephen Reasor*, 34 FMSHRC 920, 923-24 (April 2012) (ALJ Moran).

The Secretary did not provide the agent with prompt preliminary notice of proposed penalties in this case. Although the Secretary did direct a preliminary notice to the idled Broad Run mine office on January 3, 2012, it did so after the Respondent had notified MSHA that he no longer worked there and requested all correspondence to be directed through counsel. Sec’y

⁴ According to MSHA’s website, this internal guidance is still in effect. See <http://www.msha.gov/REGS/COMPLIAN/PPM/PMVOL1D.HTM>

Supp. Response, 1-2; Resp. Mot. to Reopen: Ex. 2, 1; Ex. 3, 1. As such, it is unremarkable that Mr. Carpenter did not receive this notice. Resp. Response, 1-2.

As MSHA District 3 had forwarded the case to TCIO by August 27, 2010, it appears the substantive District 3 investigation of this case proceeded at a commendable pace ahead of MSHA's internal guidelines. Sec'y Response, 1, 2; MSHA Special Investigation Procedures, Handbook Number PH 05-1-4, 4-4. However, following a district level conference on February 7, 2011, over ten months passed without any apparent action before TCIO sent the case to the Office of Assessment on December 19, 2012. *Id.*

The Secretary then served the official notice of proposed assessment on February 23, 2014, nearly 23 months after the underlying citation was issued. Sec'y Br., 2. As Mr. Carpenter no longer resided at the address served, and the Secretary failed to contact counsel as requested, the subsequent default order and delinquency notice did not reach Mr. Carpenter until nearly 30 months after the underlying citation was issued. Resp. Br., 9. As such, the notice of assessment was served well in excess of the "normal" 18 month timeframe set forth in the Secretary's Program Policy Manual. MSHA Program Policy Manual, Vol. I, p. 42 (Aug. 2007). Commission record indicates that non-attainment of MSHA's Section 110 (c) investigation guidelines goals has not been rare in recent years. *Adam Whitt et al*, 2013 WL 6792640 (Nov 2013) (ALJ Andrews); *Dino Trujillo*, 2013 WL 3152298 (May 2013); *Christopher Brinson et al*, 35 FMSHRC 1463 (May 2013) (ALJ Tureck); *Steve Adkins*, 35 FMSHRC 1481(May 2013) (ALJ Manning); *Stephen Reasor*, 34 FMSHRC 920 (April 2012) (ALJ Moran); *See Also* Department of Labor, OIG Report, *MSHA Can Improve Its Section 110 Special Investigations Process*,5-6 (finding that MSHA met its investigative timeframes in only 30 percent of the cases studied for Federal Years 2010-2012) ("OIG Section 110 Report").⁵

Nevertheless, the Secretary argues that its internal guidelines are not relevant and that this court is required to calculate any findings of delay from the December 19, 2012 date on which TCIO forwarded the case to the Office of Assessments. Sec'y Br., 14; Sec'y Response, 3 (citing *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (holding that delay in notice of assessment for 110(a) action arising from a serious accident must be calculated from the issuance of the accident report rather than the issuance of the underlying order)(*"Twentymile"*)). I concur that *Twentymile* instructs the Commission to calculate delay from the conclusion of the 110(c) investigation and give some degree of deference to the Secretary's determination of the conclusion of the 110(c) investigation. *Adam Whitt et al*, 2013 WL 6792640, * 3.

However, the Secretary's contention that the 110 (c) "investigation" included the lengthy period of administrative inaction from February 7, 2011 to December 19, 2011 is unreasonable. In making this finding, I respectfully depart from several of my colleagues' findings that 110 (c) investigations are not concluded until MSHA forwards the case to the Office of Assessments. *Christopher Brinson et al*, 35 FMSHRC 1463, 1467 (May 2013) (ALJ Tureck) (citing *Twentymile* and finding that the Commission "must give deference" to the

⁵ Report No. 05-13-008-06-001 <http://www.oig.dol.gov/public/reports/oa/2013/05-13-008-06-001.pdf>.

Secretary's determination of the end of the 110 (c) investigation.); *see also Adam Whitt et al*, 2013 WL 6792640, * 3.

In *Twentymile*, the court noted both the date that the accident report was issued and the later date that MSHA forwarded the matter to the Office of Assessments. *Twentymile*, 411 F.3d at 258. The court did defer to the Secretary's stance that the investigation concluded with the issuance of accident report, but in no way indicated MSHA's later decision to forward the case to the Office of Assessments was considered part of the accident investigation. *Id.* at 261. Thus, the August 27, 2010 District 3 report to TCIO stands as the closest analogy to the accident report relied upon by the *Twentymile* court as the termination of the investigation. *Id.* Additionally, the misaddressed January 3, 2011 preliminary notice indicated that MSHA considered the investigation complete at that point, as it stated MSHA intended to assess civil penalties against Mr. Carpenter on the basis of its special investigation. Sec'y Supp. Response: Ex.1,1. Granting the Secretary further deference, I find that the February 7, 2011 internal review could be considered part of the 110(c) investigation. However, past this point, the Secretary has not shown that any "investigative" or "review" efforts occurred between February 7, 2011 and December 19, 2011.

Thus, for purposes of determining whether the Secretary delayed the Notice of Assessment for this case, I find that MSHA's investigation into this matter concluded on February 7, 2011, the last date on which the Secretary claimed substantive review occurred. Additionally, the Secretary's failure to address the notice of assessment to counsel as requested prevented the Respondent from receiving the Notice of Assessment until September 22, 2012. Thus, I find that the Notice of Assessment was delayed by 19 months.⁶ A 19 month delay does not comport with the Section 105(a)" reasonable time" requirement without an inquiry into possible justifications for the delay. *Webster County Coal*, 34 FMSHRC 1946, 1950-51 (Aug. 2012) (holding that 18 month petition filing delay constituted an "error" that required the Secretary to produce evidence of adequate cause).

2. *The record presents non-frivolous reasons that explain the Secretary's delay.*

Having found that the Secretary delayed the notice of assessment, this court is required to determine if there is "adequate cause" to explain the delay. *Sedgman et al*, 28 FMSHRC 338. After reviewing this case, it appears that the primary reason that it took nearly two and a half years for the preliminary and official notice of assessment to reach Mr. Carpenter is that the Secretary failed to heed Mr. Carpenter's written request on October 11, 2010 to direct all correspondence through counsel. Resp. Br, 2; Resp. Mot to Re-open: Ex. 3, 1. The Secretary has not explained why two months after receiving Mr. Carpenter's letter, and four months after being notified that Mr. Carpenter no longer worked at the Broad Run mine, it directed the preliminary notice of proposed assessment to the idled Broad Run mine office. Resp. Mot. to Re-open: Ex. 2,1 - Ex. 3, 1. Similarly, the Secretary has not explained why it directed the notice

⁶ Even using the February 21, 2012 issuance of the Notice of Assessment as the end measuring point, I would have found a delay of over 12 months and required the Secretary to provide adequate cause for the delay.

of assessment to Mr. Carpenter's former personal address over 18 months after receiving Mr. Carpenter's request to direct all correspondence through counsel.

However, as the Secretary directed the preliminary notice of assessment to the mine office at which the underlying alleged violation occurred, it appears that the Secretary was likely following standard procedure rather than acting out of any malice. Sec'y Supp. Response, Ex. 1. Likewise, it does not appear that MSHA, in directing the official notice of assessment to the personal address Mr. Carpenter initially provided to the Special Investigator, was acting out of mere caprice or bad faith. Resp. Mot. to Reopen: Ex. 3,1. Additionally, as the official notice of assessment was signed for and accepted at that address, the Secretary had reason to believe that Mr. Carpenter had received the final notice of assessment in February of 2012. Resp. Mot. To Reopen: Ex. 6. As such, non-frivolous reasons explain the Secretary's failure to direct the preliminary and final notice of assessment to Mr. Carpenter's counsel as requested. In making such a finding, I follow the Commission's acceptance of similar administrative mishaps. *Webster County Coal*, 34 FMSHRC 1950-51 (excusing 18 month delay in filing numerous penalty petitions caused by a clerical error); *Salt Lake*, 3 FMSHRC 1717 (stating that "the Secretary is engaged in voluminous national litigation and mistakes can happen").

As discussed above, the secondary cause of the delay was the ten plus month gap between the last apparent substantive review of this matter and the final decision by TCIO to forward the case to the Office of Assessments. Sec'y Response, 2. The Commission has found similar delays in the prosecution of a case excusable when explained by an increase in MSHA's caseload at the national level. *Rhone Poulenc of Wyoming Co.*, 15 FMSHRC 2089 (Oct. 1993) aff'd 57 F. 3d 982 (10th Cir. 1995); *Long Branch Energy*, 34 FMSHRC 1984, 1993-94 (August 2012). TCIO was responsible for this matter during a timeframe of increased enforcement actions under the MINER Act. Sec'y Resp., 2.; *Long Branch Energy*, 34 FMSHRC 1993-94.

Additionally, I take judicial notice that TCIO was responsible for overseeing the investigation into the April 5, 2010 Upper Big Branch explosion which occurred only two weeks after the underlying citation at issue. OIG Section 110 Report, 3 (stating that "...during FYs 2010 through 2012, MSHA enforcement personnel were involved in the investigation of the Upper Big Branch mine explosion and the concurrent internal review."); see *Union Oil*, 11 FMSHRC 289, 300 n. 8 (March 1989) (holding that judicial notice can be taken of extra record information that is commonly known and can safely be assumed to be true). Thus, I find that MSHA's increased caseload and investigative duties during the relevant time period provide non-frivolous justifications for the ten month delay between the conclusion of MSHA's investigation and the decision to forward the case to the Office of Assessment.

Therefore, I find that non-frivolous reasons excuse the Secretary's delay in notifying Mr. Carpenter of the proposed assessment.

3. *The Respondent did not suffer material prejudice from the Secretary's delay.*

Although non-frivolous reasons explain the Secretary's delay in serving the Respondent with a Notice of Assessment, this court must still determine if that delay nevertheless materially prejudiced the Respondent's defense. *Long Branch Energy*, 34 FMSHRC 1991.

The Respondent received actual notice of the proposed assessment and resulting default order on September 22, 2012. Resp. Br., 2. At this point, the Broad Run main office still maintained pre-shift inspection records at the mine site. Resp. Br.: Ex. 3, 2. After receiving the default order, the Respondent acted correctly in moving to reopen the matter with the Commission, but apparently failed to investigate the records available at the mine at that time. Thus, the Secretary's mistake in addressing the notice of assessment did not prevent the Respondent from inspecting the Broad Run mine records before they were moved and/ or discarded in early 2013. *Id.* Additionally, Big River Mining idled the Broad Run mine almost immediately after the March 2010 inspection and laid off the majority of the workforce, including Mr. Carpenter, in April of 2010. Resp. Br.: Ex. 3, 2. As this layoff predated even the misaddressed January 3, 2011 preliminary notice by over six months, any difficulty involved in locating potential witnesses no longer working for Big River cannot be attributed to the Secretary's address errors or delayed Notice of Assessment.

Furthermore, although the Broad Run Mine main office was disassembled in early 2013, it appears that a substantial amount of records were retained and moved to Beckley, West Virginia. Resp. Br.: Ex. 3, 2. As Respondent has not yet made thorough discovery efforts regarding remaining pre-shift inspections, the Respondent may well locate records pertaining to the March 26, 2010 inspection. The Respondent states that he no longer remembers the names of many of the miners on his section at the time of the inspection. Resp. Br.: Ex. 1, 2. However, the Respondent did identify Jonathon Hooper as a crew member on the section during the March 26 inspection. *Id.* As this matter concerns straightforward allegations of ventilation control deficiencies, it appears that Mr. Carpenter would be able to present a sufficient defense based upon his own and Mr. Hooper's testimony. For all these reasons, I conclude that the Respondent has not shown that the Secretary's delay materially prejudiced his defense. *Long Branch Energy*, 34 FMSHRC 1992-93 (stating that dismissal due to prejudice is only appropriate when the operator has shown specific evidence of "substantial" prejudice).

Thus, although the Secretary failed to successfully notify the Respondent of the proposed assessment within a reasonable time frame, that delay is explained by non-frivolous reasons, and the Respondent has not produced persuasive evidence of material prejudice.

ORDER

For the reasons detailed above, the Respondent's Motion to Dismiss these proceedings and assessed civil penalties is **DENIED**. Due to the longstanding history of this case, the parties are hereby **ORDERED** to conduct discovery efforts into this matter on an expedited basis. The parties shall provide a detailed update to the Court regarding status of discovery efforts and prospects of settlement no later than Friday, September 12, 2014.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 6, 2014

POCAHONTAS COAL COMPANY, LLC,	:	CONTEST PROCEEDING
Petitioner,	:	
	:	Docket No. WEVA 2014-569-R
v.	:	Written Notice No. 7219153; 10/24/2013
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine ID: 46-08878
Respondent.	:	Mine: Affinity Mine

ORDER OF DISMISSAL

This case is before me on a Notice of Contest filed by Pocahontas Coal Company pursuant to Section 105(d) of the Federal Mine Safety and Health. This contest is directed not at a particular citation or order but, rather, at a written notice of pattern of violations issued by MSHA pursuant to Section 104(e). On March 3, 2014 the Secretary filed a motion to dismiss for lack of jurisdiction. Pocahontas raises a number of arguments in its notice of contest, however, for reasons that follow, I find that the Commission is without jurisdiction to consider these arguments in the context of this proceeding and, accordingly, I **DISMISS** this case.

On October 24, 2014 MSHA issued Written Notice No. 7219153 in which it notified Pocahontas that an alleged pattern of violations existed at Pocahontas’ Affinity Mine. The written notice included two groups of citations and orders which the Secretary had deemed “illustrative of this pattern of violations.” On November 26, 2013, Pocahontas Coal filed a notice of contest pursuant to Section 105(d) of the Act to contest the issuance of Section 104(e)(1) Written Notice Number 7219153. Pocahontas Notice of Contest 1. On May 20, 2014, a decision dismissing that contest was issued in docket WEVA 2014-202-R. That order is currently on appeal to the Commission. Next, Pocahontas filed this notice of contest, to the same written notice of pattern of violation, but in this case the notice of contest was purportedly filed pursuant to 105(b)(2) of the Act, seeking temporary relief of the order. Pocahontas Notice of Contest 2. The arguments raised in this second notice of contest are identical to those raised in WEVA 2014-202-R and therefore, I restate my decision in the earlier contest case and dismiss this case for similar reasons.

The question of whether the Commission has jurisdiction to hear a contest of a 104(e) written notice of pattern of violations has not been addressed by the Commission. However, two Commission judges have reached conflicting results on the question of jurisdiction to hear a contest to a written notice of pattern of violations. In *Bledsoe Coal*, Unpublished Order dated Nov. 11, 2011, Judge William Moran found that the Commission did have jurisdiction to hear a contest of a written notice of pattern of violations. Recently, in *Brody Mining, LLC*, 36 FMSHRC ___, slip op. at 4, Docket No. WEVA 2014-81-R (Jan. 30, 2014), Chief

Administrative Law Judge Robert Lesnick found that the Commission was without jurisdiction to adjudicate the mine operator's contest of the written notice of pattern of violations by itself.

The passage of the Federal Mine Safety and Health Act of 1977 introduced the pattern of violations provision. The provision was designed "to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations." S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 620 (1978). The provision grants the Secretary enforcement authority against mine operators that have a "pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health and safety hazards[.]" 30 U.S.C. § 814(e)(1). The Secretary is charged with providing the mine operator with "*written notice* that such a pattern exists." *Id.* (emphasis added). The provision then grants the Secretary authority to issue withdrawal orders, in a sequence which "parallels the . . . unwarrantable failure sequence[.]" for significant and substantial violations issued in the 90 days subsequent to the issuance of the written notice. *See Id.* at (e)(1)-(3); S. Rep. No. 95-181, at 33 (1977), *reprinted in* Legis. Hist. at 621. The mine operator remains subject to the Secretary's 104(e) withdrawal order power until such time that an inspection of the "entire mine" reveals no S&S violations. 30 U.S.C. § 814(e)(3).

The Mine Act does not define the term "pattern of violations" and, instead, instructs the Secretary to "make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health of safety standards exists." 30 U.S.C. § 814(e)(4). Accordingly, the Secretary has promulgated rules establishing those criteria. *See* 30.C.F.R. § 104.2. Most recently, the Secretary, after determining that the previous version of the rules implementing the pattern of violations provision did not adequately achieve the intent of the Mine Act, promulgated new rules under part 104 of her regulations designed to simplify the existing POV criteria, improve the consistency in applying the POV criteria to mine operators, and increase the efficiency and effectiveness in issuance of a POV notice. *Pattern of Violations; Final Rule*, 78 Fed. Reg. 5056 (Jan. 23 2013).

In *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989) the Commission stated that it "is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers." Given that the Commission is "an administrative agency created by statute, it cannot exceed the jurisdictional authority granted by Congress." *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860 (Aug. 2012) (citing *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (Sept. 1988)). Here, to allow a mine operator to file a notice of contest to a document that is a notice, as opposed to a citation, order or other enforcement document, would be to step outside the powers allowed by Congress. A review of the Mine Act reveals no statutory authority for the Commission to hear a contest to a notice of pattern of violations in the context of a dedicated proceeding. Further, the legislative history, the Secretary's regulations, Commission case law, and the Commission's Procedural Rules do not reveal any language which could be interpreted to grant the Commission jurisdiction to hear a contest of a written notice of pattern of violations.

In addition, the Mine Act and legislative history make clear that written notices are distinct from citations and orders. The Commission has stated that “in considering the meaning of the Mine Act, we must ‘give effect to the unambiguously expressed intent of Congress.’” *Revelation Energy*, 35 FMSHRC 3333, 3337 (Nov. 2013) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Here, the distinction between a 104(e) written notice and an order issued subsequent to that notice is clear. The language of the Act makes clear that the written notice is a separate document which must be issued prior to any order issued pursuant to section 104(e). Even if one could read some ambiguity into the language of the Act, Congress clearly intended to distinguish between written notices issued pursuant to section 104(e), which are meant to “indicate to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards,” and orders issued after the operator has been “advised” of the existence of the pattern via the written notice. S. Rep. No. 95-181, at 32 (1977), reprinted in *Legis. Hist.* at 620.

Contestant is not without remedy on the issue and may properly challenge the notice of pattern of violations in the context of a contest to an order issued under section 104(e) following the issuance of the written notice of pattern of violations.¹ The Secretary, in his answer to Pocahontas’ notice of contest, stated that, while there is “no statutory right to independently contest” the written notice, he “acknowledges that the validity of Notice No. 7219153 is at issue in the Contest Proceedings docketed at WEVA 2014-390-R, 391-R, 392-R, 393-R, 394-R, 395-R, 396-R, 397-R and 398-R” and, “[a]s a component of these Contest Proceedings, the Secretary does not oppose the Commission’s review of the validity of Notice No. 7219153. The Secretary will address issues pertaining to the scope of this review in his answers to the 104(e) order notices of contest.” Sec’y Answer n. 2.

Section 105(d) provides mine operators with the right to contest the issuance or modification of citations and orders. 30 U.S.C. § 815(d). The section then charges the Commission with affording an opportunity for a hearing and then issuing an order granting appropriate relief. “Section 105(d)’s unambiguous[] . . . broad grant of . . . authority to direct ‘other appropriate relief’” allows the Commission to address a notice of pattern of violations in the context of a contest to an order issued under section 104(e) following the issuance of the written notice of pattern of violations. *See North American Drillers, LLC*, 34 FMSHRC 352, 356 (Feb. 2012). There are presently a number of 104(e) orders before me that are related to the notice of pattern of violations and, when those cases are heard, I will hear the arguments regarding the validity of the notice of pattern of violations issued to this mine.

¹ In a somewhat analogous situation, the Commission has acknowledged a mine operator’s right to contest the validity of a safeguard in the context of a contest to a citation issued pursuant to a violation of the underlying safeguard. *See e.g., Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992). Commission judges have declined to review the validity of an underlying safeguard, which is issued via a “notice to provide safeguard,” prior to the issuance of a citation for a violation of the underlying safeguard. *Beckley Coal Mining Co.*, 9 FMSHRC 1454 (Aug. 1987) (ALJ); *Colorado Westmoreland, Inc.*, 10 FMSHRC 1236 (Sep. 1988) (ALJ); *Jim Walters Resources, Inc.*, Unpublished Order of Dismissal, Docket No. SE 96-118-R, (Apr. 1996) (ALJ).

In this case, Pocahontas relies upon section 105(b)(2) of the Mine Act as a basis for contesting the NPOV prior to adjudicating the 104(e) citations that have been issued as a result of the NPOV. Pocahontas asserts that this contest was filed raising the same arguments as the earlier notice of contest, but under a separate section of the Act in order to preserve its right to request temporary relief. Pocahontas indicates that it filed this contest to protect itself in the event the Commission finds no jurisdiction under Section 105(d) and that Pocahontas does not intend this challenge to be its primary means of challenging the NPOV. Pocahontas further claims that it is not seeking the temporary relief afforded by section 105(b)(2) of the Act but it is seeking permanent relief as set forth in its first notice of contest to the NPOV. Even if Pocahontas were seeking temporary relief, it does not meet the criteria for such relief.

Section 105(b)(2) of the Mine Act (the “Act”), 30 U.S.C. § 815(b)(2), sets forth the conditions upon which temporary relief may properly be granted. In pertinent part, Section 105(b)(2) grants the applicant a right to seek temporary, immediate relief from any *order or from any order issued under section 104* with the exception of citations issued under section 104(a) or (f). The Court of Appeals, in applying this section of the Act to a 103(k) order determined that the provision applies to any order, not just those issued pursuant to section 104. *Performance Coal*, 642 F.3d 234 (D.C. Cir 2011). However, the section has not been applied to any enforcement document that is not an order or citation. Here, the mine was not issued an order but instead was issued a written notice. As discussed above, the written notice differs from other enforcement actions, and particularly orders and citations issued pursuant to the Act.

Pocahontas argues that it is entitled to relief under 105(b) (2) because the Secretary noted that right in the federal register. I agree that the Secretary did refer to a mine’s right to seek temporary relief, but only after a 104(e) citation has been issued. The Secretary, in discussing the NPOV in the federal register noted that a mine may contest a violation issued pursuant to section 104(e) and the underlying NPOV once a citation or order has issued related to the NPOV. The Secretary did not concede that the notice of pattern alone is subject to temporary relief. 78 Fed. Reg. 5056, 5066 (Jan. 23, 2013).

Finally, Pocahontas argues that fundamental principles of due process are violated if it is not able to contest the written notice in its own proceeding and, instead, must wait until a 104(e) withdrawal order is issued and contested. Pocahontas Resp. 15-16. Specifically, Pocahontas asserts that the mere issuance of a notice of pattern of violations causes the operator to “suffer[] tangible consequences flowing from that designation alone[,]” and that absent a “prompt post-designation review[,]” it is deprived of a significant property interest in violation of Constitutional due process requirements. *Id.* at 16, 19. Pocahontas cites to the standard language about due process and argues that the mine is deprived of a property interest prior to a hearing and that deprivation is not outweighed by a need of the government. I disagree. Here, the Secretary’s need to assure a safe and healthy working environment for miners at a mine that is alleged to have a history of serious violations, outweighs the need of the mine to be heard immediately. Additionally, the mine has another immediate remedy, that of immediately contesting any order issues after the notice of pattern of violations and have that order heard while raising all of the issues associated with the underlying notice. The Secretary has frequently worked with an operator to issue an order immediately when there is a dispute over a roof control or ventilation plan so that the matter may be heard expeditiously.

Due process claims require the Commission to consider three factors when a deprivation to a property interest occurs: (1) "the private interest that will be affected by the official action;" (2) the risk of an "erroneous deprivation of such interest through the procedures used" and the value of additional or substitute procedural safeguards; and 3) the Government's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Due process, as described by the Court in *Mathews*, is "not a technical conception with a fixed content unrelated to time, place, and circumstances," and further, "is flexible and calls for such procedural protections as the particular situation demands." *Id.* (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972))

Pocahontas states that "once a POV notice is issued, an inspector's suspicion of an S&S violation goes from being a mere allegation that may be challenged before an ALJ (with due process protections) to being an automatic withdrawal order that could take months-or years-for the operator to challenge." Pocahontas Resp. 16. Further, it asserts that the issuance of a notice triggers "enhanced SEC reporting requirements[,]” which in turn can have "obvious, adverse consequences on an operator's business". *Id.* at 19.

I find Pocahontas' due process argument to be without merit. Pocahontas initially sought to expedite both this proceeding and the contest proceedings for the 104(e) orders that followed the issuance of the notice of pattern of violations. In response to that request, I set the cases for hearing. However, subsequently the parties moved for stays of the 104(e) cases, and, with regard to the instant matter of the written notice, Pocahontas asserted that "[b]efore determining whether the pattern of violations rule was validly applied to Pocahontas in WEVA 2014-202-R, the Commission will need to issue its decision in Brody Mining, LLC, to inform the Secretary and the regulated community as to the extent the rule may be used in future enforcement proceedings." Pocahontas Motion to Stay Further Adjudication of Enforcement Action 7276509, dated January 31, 2014. Given the obvious conflict between Pocahontas' two positions; proceed expeditiously versus wait for the Commission to rule in another similar matter, I reject its argument that dismissal of this matter will amount to a violation of its right to due process. Further, if Pocahontas had wished to proceed expeditiously on its challenge to the notice of pattern of violations, it could have selected one of the multiple 104(e) orders to advance to hearing in a more expeditious manner.

This docket contains no citations or orders, and rather only the notice of pattern of violations that was issued to the mine, prior to the issuances of any 104(e) citation or order. Therefore, the above captioned contest proceeding is **DISMISSED**.

/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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August 7, 2014

POCAHONTAS COAL COMPANY, INC., : CONTEST PROCEEDINGS
Contestant, :
 :
 : Docket No. WEVA 2014-390-R
 : Order No. 9002712; 12/09/2013
 :
 : Docket No. WEVA 2014-391-R
 : Order No. 9002713; 12/09/2013
 :
 : Docket No. WEVA 2014-392-R
 : Order No. 9002714; 12/09/2013
 :
 : Docket No. WEVA 2014-393-R
 : Order No. 9002715; 12/09/2013
 :
 : Docket No. WEVA 2014-394-R
 : Order No. 9002716; 12/10/2013
 :
 : Docket No. WEVA 2014-395-R
 : Order No. 3576153; 12/19/2013
v. :
 :
 : Docket No. WEVA 2014-396-R
 : Order No. 9002720; 12/22/2013
 :
 : Docket No. WEVA 2014-397-R
 : Order No. 9002721; 12/22/2013
 :
 : Docket No. WEVA 2014-398-R
 : Order No. 9002725; 12/30/2013
 :
 :
SECRETARY OF LABOR :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent. : Mine ID: 46-08878
 : Mine: Affinity Mine
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ORDER GRANTING IN PART AND DENYING IN PART SECRETARY'S MOTION TO LIMIT DISCOVERY

Before: Judge Miller

This case is before me upon notices of contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On July 17, 2014, the Secretary filed a motion to limit discovery as a result of receiving a list of 11 potential areas of inquiry for the depositions of Kevin Stricklin and David Mandeville from Contestant.¹ In his motion, the Secretary argues that Contestant's proposed depositions exceed the scope of discovery and seek irrelevant information, that Contestant improperly seeks to discover privileged information, and that Stricklin and Mandeville should be protected from depositions due to their status as high-ranking government officials. Contestant has filed a response in opposition. For the reasons set forth below, I GRANT IN PART and DENY IN PART the Secretary's motion.

Scope of Discovery

The Secretary argues that the issue to be decided by the Commission in these cases is whether the citations and orders listed in the Notice of Pattern of Violations (NPOV) establish a pattern and argues that the scope of discovery should be limited to matters pertaining to the specific facts and circumstances of the citations and orders listed in the NPOV. Sec'y Mot. at 13. The Secretary also maintains that the 28 violations identified in the NPOV that are final fall outside the scope of discovery. *Id.* n.6. However, the Secretary also states that "factual issues relevant to the validity of the NPOV are clearly within the scope of discovery." Sec'y Mot. at 2. Finally, the Secretary argues that the factual inquiries submitted by Contestant sought through the depositions of Strickland and Mandeville seeks information about MSHA's internal deliberations and decision-making process as to the NPOV issued to the mine.

¹ The list of potential areas given to the Secretary on May 19, 2014 are as follows:

1. Factual inquiry relating to screening criteria data and POV Written Notices.
2. Factual inquiry relating to identifying enforcement actions in POV Written Notices.
3. Factual inquiry relating to mitigating circumstances.
4. Factual inquiry relating to development and approval of Corrective Action Plans.
5. Factual inquiry relating to citations/orders in a POV Written Notice and Corrective Action Plans.
6. Factual inquiry into MSHA's POV Mitigating Circumstances Determination Form.
7. Factual inquiry into identifying a Pattern of Violations.
8. Factual inquiry into the use of other enforcement options for POV determinations.
9. Factual inquiry regarding pre March 25, 2013 citations/orders and POV screening criteria data.
10. Factual inquiry relating to POV Panels.
11. Factual inquiry into MSHA's regulatory economic analysis.

Pocahontas agrees that the issue in these cases is whether the underlying NPOV was properly issued to Pocahontas and argues that discovery in this matter should be broader than the Secretary asserts and should include inquiries into each of the 11 subject areas listed in its response to the Secretary. The mine states that the list of inquiries is not exhaustive and frames the list in general terms. Contestant particularly argues that it should be able to inquire into the mitigating factors that were or were not considered by the Secretary to determine that this mine should be placed on the pattern of violations.

Commission Procedural Rule 56(b) states that “[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.” A judge may “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).

The citations that Pocahontas contested were issued pursuant to sections 104(e)(1) and (2) of the Mine Act. Under section 104(e)(1), [i]f an operator has a pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine safety and health hazards, he shall be given written notice that such pattern exists.” 30 C.F.R. § 104(e)(1). MSHA posted screening criteria that it uses to perform the pattern of violation review. 30 C.F.R. § 104.2(b). Once a mine meets the requirements of the initial screening criteria, MSHA uses eight different pattern criteria in order to determine if the mine actually has a pattern of S&S violations.² § 104.2(a).

The Secretary issued a NPOV to Contestant based on a number of S&S citations, some of which are still pending before the Commission. On May 20, 2014, I dismissed Pocahontas’ contest of the written notice, WEVA 2014-202, finding that the Commission did not have jurisdiction to adjudicate a contest of a written notice without an accompanying 104(e) citation.

² The pattern criteria includes:

- (1) Citations for S&S violations;
- (2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
- (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
- (4) Imminent danger orders under section 107(a) of the Mine Act;
- (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
- (6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
- (7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
- (8) Mitigating circumstances.

30 C.F.R. § 104.2(a).

Pocahontas contests the above listed citations and orders issued under sections 104(e)(1) and (2) in addition to the validity of the NPOV and these two areas are now subject of discovery here. Both parties assert and I agree that the inquiry here is into the NPOV that was issued to Pocahontas; the inquiry, therefore, is not a broad, general inquiry, but is limited to the cases related to this specific POV that have been filed and remain active.

As the Secretary stated, the facts related to the pending citations and orders listed in the NPOV are relevant and discoverable. However, facts relating to the 28 citations and orders listed in the NPOV that are final, for the purposes of discovery, are only relevant and discoverable insofar as they relate to MSHA's determination that they are part of a pattern of violations.

Contestant provided a list of the 11 potential areas of inquiry for depositions which are set forth in the Secretary's motion and Contestant's response; I find that facts related to the majority of these areas as they pertain directly to Pocahontas, are relevant and within the scope of discovery. In most instances, however, the factual inquiries must be made in the context of these cases and not general inquiries, particularly about other mines that may or may not have been considered for the NPOV. I do not know what Pocahontas seeks with number 8 on the list of inquiries, which is "factual inquiry into the use of other enforcement options for POV determinations." To the extent MSHA engaged in some other enforcement option for this mine, the facts may be relevant, but I see no other inquiry that would relate to this request that is relevant to these cases. In addition, a number of the inquiries, while couched in terms of "factual" don't appear to be designed for inquiry into facts. For example, the economic analysis used by MSHA is a matter of public record and was provided to Contestant. Factual inquiry into the economic impact on this mine made when the NPOV was issued is relevant, but any other inquiry is not.

Two of the arguments Contestant made are that MSHA's issuance of the NPOV to this mine was arbitrary and capricious and that it did not follow its own rules during its decision-making process. In order to determine this, the Court must know which facts MSHA considered when making its decision and the listed areas will provide this information.³ Facts related to these areas may also prove useful if the court must determine *de novo* whether a pattern of violations exists.

The Secretary also brought to the Court's attention that notices of deposition served by the Contestant included WEVA 2014-202-R, which was previously dismissed and WEVA 2014-569-R, which is similarly situated to WEVA 2014-202-R because it is also a written notice. I find that the Commission does not have jurisdiction to adjudicate these types of cases. Therefore, these docket numbers shall be stricken from the notices of deposition served on the Secretary as they are outside the scope of discovery.

³ Pocahontas' assertion in its response that the POV panel only discussed three potential mitigating circumstances when it provided numerous mitigating circumstances is precisely the reason why the information it intends to seek in depositions is relevant and discoverable. Cont. Resp. at 23-24.

Privileged Information

The Secretary maintains, based on the list of potential areas of inquiry it submitted to him on May 19, 2014, that Pocahontas seeks information about the internal thoughts, processes, and opinions of those who participated in the POV review process. While the Secretary cites deliberative process cases related to the production of documents and the Freedom of Information Act's (FOIA) Exemption 5,⁴ the case law can easily be applied to producing deliberative process information orally. To qualify under Exemption 5,

a document must satisfy two conditions: its source must be a government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds the document. This Court's prior Exemption 5 cases have addressed the second condition, and have dealt with the incorporation of civil discovery privileges. So far as they matter here, those privileges include the privilege for attorney work product and the so-called "deliberative process" privilege, which covers documents reflecting advisory opinions, recommendations, and deliberations that are part of a process by which Government decisions and policies are formulated.

Dep't of Interior v. Klamath Water Users Protective Assn, 532 U.S. 1, 2 (2001) (citing *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150 (1975)); *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (June 1992). The purpose of the privilege is to "prevent injury to the quality of agency decisions" and to protect "open and frank discussion among those who make [decisions] within the government." *Sears*, 421 U.S. at 150; *Klamath*, 532 U.S. at 2-3.

As is evident from the list provided by Pocahontas and its response in opposition, it appears to seek only factual information related to the 11 areas. Cont. Resp. at 22. The Secretary has provided no evidence that suggests Pocahontas intends to ask questions related to the deliberation process. "The fact that objections may be raised to specific questions in a deposition does not provide a sufficient basis to bar the deposition[s] altogether." *Rail Link, Inc.*, 20 FMSHRC 181, 182 (Jan. 1998) (ALJ). The Secretary concedes that the facts available to him regarding the citations and orders stated in the NPOV are not privileged. Sec'y Mot. at 18. I also find that other *facts* related to the above listed areas of inquiry are not privileged. However, I agree with the Secretary that internal deliberations leading up to the decision to issue the NPOV, including the weight given to the different pattern criteria, and thoughts and opinions of the agency's employees are privileged.⁵ I further agree that many of Pocahontas' arguments in challenging the NPOV are legal arguments that relate to the promulgation of the POV rule and

⁴ Exemption 5 of FOIA states, "[t]his section does not apply to matters that are-- . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2000).

⁵ I decline to develop a system for dealing with the assertion of the deliberative process privilege during depositions as Contestant suggests. Cont. Resp. 27-28. I presume that Counsel for Pocahontas is aware of the case law regarding inquiries related to the deliberative process and expect them to consider that during the depositions.

therefore any inquiry into the rule in general that relates to agency policy, rule-making, or constitutional challenges would not be factual and would be subject to privilege. I assume, given the status of the POV cases pending before the Commission and the Sixth Circuit, that these issues have been discovered, argued, and briefed and that any arguments made in this case would follow those made in the earlier cases. Therefore, as the parties agree, the issues here focus on the application of the rule to Pocahontas and not the promulgation of the rule itself.

Protection from Depositions

The Secretary argues that Kevin Stricklin, the Administrator of Coal Mine Safety and Health, and David Mandeville, MSHA's District 4 Manager, should be protected from participating in depositions due to their status as high-ranking government officials.⁶ He states that the time required "preparing for and defending" Stricklin and Mandeville would lead to a "significant withdrawal of much-needed attention to their administrative and supervisory functions." Sec'y Mot. at 20.

The Commission has held that "high-level executive department officials may not be required to give oral testimony by deposition or at trial except in extraordinary circumstances." *Respirable Dust*, 14 FMSHRC at 241; *Simplex Time Recorder Co.*, 766 F.2d 575, 586 (D.C. Cir. 1985). "Extraordinary circumstances may be established where the executive sought to be deposed has relevant information not available from any other source[,]" but "where the agency has or is willing to respond by . . . making lower-level officials available for deposition, there is no justification for requiring the testimony of an agency head or high level agency official. *Respirable Dust*, 14 FMSHRC at 241, 242; *Sweeny v. Bond*, 669 F.2d 542, 546 (8th Cir.), *cert. denied*, 459 U.S. 878 (1982).

The Secretary states that Stricklin and Mandeville were not the issuing inspectors for the citations and orders identified in the NPOV and have no first-hand knowledge of the conditions cited. He offered to provide the issuing inspectors of the eight remaining NPOV S&S violations for depositions. Sec'y Mot. at 21. Given that the issues in this case go beyond the fact of the citations and the information provided by the issuing inspectors, I find this argument is without merit. Someone with MSHA who has knowledge of the facts that caused this mine to receive an NPOV should be available to the mine for discovery purposes.

With regard to the request to depose Stricklin, Commission precedent has alluded to the fact that the Administrator of Coal Mine Safety and Health is a high-level government official and requiring his attendance at a deposition would disrupt the government's function. *Respirable Dust*, 14 FMSHRC at 243 (denying a motion for a protective order of the former Administrator of Coal Mine Safety and Health because he was retired at the time of the motion and no disruption of government functions would occur). Stricklin is responsible for the oversight of thousands of underground and surface coal mines across the country. Allowing his deposition to

⁶ The Secretary also raised objections to notices of depositions for Douglas Parker, Stephen Weatherford, Jay Mattos, and David Morris for the same reasons. Sec'y Mot. at 2. However, the Secretary noted that the earlier deposition notices have become moot and therefore I will not rule on them until it becomes a relevant matter.

be taken would remove him from important official tasks. In addition, the Secretary states that he has no first-hand knowledge of the NPOV citations and orders and the Secretary provided a number of documents related to the POV review process for this mine. While the Secretary did not specifically address Stricklin's knowledge of the decision to issue the NPOV to Pocahontas, the Contestant did not provide any information that suggests he is the only one with this knowledge.⁷ Therefore, I find that Stricklin is a high-ranking agency official and should be protected from depositions in these cases.

Mandeville, the MSHA district manager for the district in which the Pocahontas mines are located, is not in a position to be considered a high-ranking official privileged to protection from a deposition.⁸ See *Rail Link, Inc.*, 20 FMSHRC 181, 182 (denying the Secretary's motion for a protective order for depositions of an MSHA District Manager and an Assistant District Manager because "they are not the type of high level officials that require such protection"); *Jim Walter Resources*, 26 FMSHRC 317 (2004) (ALJ) (denying the Secretary's motion for a protective order from depositions for the Assistant Administrator of Coal Mine Safety and Health and the MSHA District 11 Manager, stating, "they are not the type of 'top government officials' to whom the protection is usually extended"). Moreover, as the mine is in Mandeville's District and Mandeville supervises the inspectors that wrote the citations that remain for adjudication, he may have relevant information pertaining to the citations and orders. He could also have information related to the decision to issue an NPOV to Pocahontas as the Secretary states that "the Administrator directed district 4 to obtain any mitigating circumstances from Pocahontas." Sec'y Mot. at 22; Cont. Resp. at 19; See, e.g., *Buck Creek Coal*, 17 FMSHRC 845 (1995) (ALJ) (allowing the depositions of 19 people, including managers from district offices, and stating that the "fact that these individuals are managers does not mean that they do not have knowledge of the facts underlying these cases or information that might lead to the discovery of admissible evidence"). In addition, the Secretary did not provide any persuasive arguments that the proposed deposition would be oppressive or subject Mandeville or MSHA to undue burden or expense.

WHEREFORE, the Secretary's motion to limit discovery is **GRANTED IN PART** and **DENIED IN PART**.

⁷ Pocahontas states, "both Stricklin and Mandeville have knowledge of the relevant facts regarding the issuance of the POV notice." Cont. Resp. at 19. It later asserts that it is "entitled to ask the only parties with first-hand knowledge of the facts that permitted MSHA to issue this enforcement action." Cont. Resp. at 25. This assertion indicates that Stricklin is not the only one with first-hand knowledge – that Mandeville has first-hand knowledge also. In addition, the POV panel was the entity that was responsible for submitting the recommendation to Stricklin and may therefore be more appropriate parties with knowledge of what was and was not considered. *Id.*

⁸ The court in *Simplex* identified several "top government officials" that other courts refused to allow examination of, including the Governor of Missouri, an Administrator of a government agency, parole board members, and the Comptroller of the Currency. *Simplex Time Recorder Co.*, 766 F.2d at 586-87. An MSHA District Manager, though having an important position within the agency, falls short in magnitude to the examples above.

It is **ORDERED** that the 28 final citations and orders listed in the NPOV are only relevant and discoverable insofar as they relate to MSHA's determination that they are part of a pattern of violations.

It is **ORDERED** that WEVA 2014-202-R and WEVA 2014-569-R be stricken from the notices of deposition that the Contestant provided to the Secretary.

It is **ORDERED** that the factual information sought in the May 19, 2014 list of possible areas of inquiry, if relevant, is discoverable with the limitations listed above, but that any information related to the internal deliberative process of deciding to issue the NPOV is not.

The Secretary's request to protect David Mandeville from depositions in the above cases is **DENIED**.

It is **ORDERED** that Kevin Stricklin be protected from deposition in the above cases.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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ownership, management, and conducted interrelated operations. *See Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1317 (Dec. 1999). The record indicates that Quality and CDG are owned by Dave Beck and share the same address and equipment. Tr. I: 172, 202-03; Ex. P-45. Therefore, I find that the entities constitute a unitary operator, and the Secretary's Motion is **GRANTED**. Accordingly, all references to "Quality" or "Quality Materials" refer to Respondents, collectively.

For the reasons set forth below, I **AFFIRM** the citations and orders, as issued, and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. The orders and citations issued in these matters were issued on the dates indicated on each.
2. The inspector whose signature appears in block 22 of the orders and citations at issue was acting in his official capacity as an authorized representative of the Secretary of Labor.
3. The proposed penalties for each order and citation are listed on the Exhibit A for each of the petitions.
4. The Secretary incorporates by reference all of Respondents' admissions in written discovery.
5. Respondents demonstrated good faith in abating the violations.
6. The exhibits to be offered by the parties are authentic.
7. Should the Court determine that MSHA had jurisdiction to issue the citations and orders, Quality agrees to waive its right to present evidence for Citation Nos. 7999983, 7999984 and 7999985, knowing that it will fully accept these citations, as written, and the penalties as assessed by MSHA.

Tr. I: 10-11.

II. Factual Background

On December 29, 2008, MSHA special investigator Randy Horn and MSHA investigator trainee Timothy Pickett were assigned to inspect a portable crushing mine site in the San Bernardino area. Tr. I: 19-20, 22, 72.¹ Horn and Pickett drove to that mine site, passing the Rancho Plant along the way but, upon arrival, discovered that the mine was abandoned. Tr. I:

¹ Pickett was retired from MSHA at the time of the hearing. Tr. I: 69.

22. Horn turned his vehicle around and, as he was advising his supervisor by telephone that the mine was abandoned, he could see two miners several hundred yards away standing on top of a cone crusher, 12 to 14 feet in air. Tr. I: 23, 79. Horn saw that neither miner was wearing fall protection, and that one was not wearing a hard hat and safety glasses. Tr. I: 79, 134, 137. Believing the miners to be in danger, Horn drove onto the Rancho Plant site and proceeded toward the cone crusher. Tr. I: 23. As Horn and Pickett pulled up to the crusher and exited their vehicle, Michael Medcraft and John Holmes descended from the crusher, and Medcraft approached Horn. After a discussion with Medcraft, Horn issued citations and orders to Quality for Medcraft's and Holmes' failure to wear fall protection, and Medcraft's failure to wear a hard hat and safety glasses, while operating the crusher. Tr. I: 78-79, 131, 137; Ex. P-1, P-4, P-6. Horn proceeded to inspect the crusher and, observing that the tail pulley was unguarded, issued an order to Quality for lack of guarding. Tr. I: 141; Ex. P-8. He also issued citations to Quality for failure to notify MSHA prior to resuming operations following a plant shutdown, an inoperative emergency brake on a front-end-loader, and an unexamined fire extinguisher in the storage trailer.²

On January 12, 2009, Horn returned to the Rancho Plant to terminate the citation for the inoperative emergency brake on the front-end-loader. Tr. I: 154. Once again, he observed the crusher's tail pulley unguarded, and issued another order to Quality for failure to guard the equipment. Tr. I: 154-55; Ex. P-19.

III. Findings of Fact and Conclusions of Law

A. Jurisdiction

Quality contests MSHA's jurisdiction over the Rancho Plant during the December 29, December 30, and January 12, 2009 inspections. It argues that the crusher was being operated to compact a wall comprised of previously processed material, which is outside of MSHA's jurisdiction. The Secretary argues a contrary position, that MSHA had enforcement authority because, at the time of the inspections, Quality was crushing native material extracted from the earth and, therefore, milling, as defined in section 3(h)(1) of the Act and the Mine Safety and Health Administration - Occupational Safety and Health Administration Interagency Agreement ("Interagency Agreement"). 30 U.S.C. § 802(h)(1); *Interagency Agreement*, 44 Fed. Reg. 22,827 (April 17, 1979).

Horn testified that he observed rocks, gravel and sand, native material that had not been previously processed or used by industry, on the crusher belt and ground around the crusher. Tr. I: 25-26. He stated that his initial observation of the native material being dumped into the crusher was from a vantage point several benches down, and that his observation was confirmed when he arrived on the scene and saw the material in the machine and on the ground. Tr. I: 65-66. He opined that native material, which is often round and in smaller fragments, is visually distinguishable from larger, square concrete or cobblestone, with angled faces and jagged edges mixed with more powder and dust. Tr. I: 37, 53, 65. Viewing photographs of

² The citation for the unexamined fire extinguisher was issued on December 30, 2008.

spillage from the crusher at hearing, he testified that the photographs showed native rock and no concrete or cobblestone. Tr. I: 30-31, 34; Ex. P-10B, P-21B. Pickett corroborated Horn's testimony, opining that round virgin material was being fed into the crusher, and that he did not observe anything resembling concrete or cobblestone. Tr. I: 73-75.

David Beck, owner of Quality Materials, opined that the company was under MSHA's jurisdiction until August 27, 2008, the date it notified MSHA that the mine was temporarily closed. Tr. I: 172, 175, 176; Ex. R-16. According to Beck, in December 2008, Beck's friend, Jerry Martin, had asked him as a favor to compact a cobblestone and concrete wall, so that he could spread the material over his property. Tr. I: 177-79. Beck opined that the rock that Horn had identified as native material being crushed by Quality was, in actuality, product left over from a previous crushing operation on the same site. Tr. I: 182. Beck admitted, however, that he was not present at the Rancho Plant on December 29, and that he was on-site January 12 only during the later part of the day. Tr. I: 188.

Jerry Martin, a self-employed construction worker, and admitted friend of Beck's, similar to Beck's account, testified that he had asked Quality to crush a wall made of rocks, cement, and mortar so that he could spread the material over his driveway. Tr. II: 6-8, 11-12. By his account, the wall had been built previously into a structure on his property, and he had removed it using his backhoe and hauled it to the Rancho Plant in his dump truck. Tr. II: 8-9. Martin testified that he did not pay Quality or Beck for this work, but that he had been a customer of CDG Materials from 2004 to 2008. Tr. II: 10-11; Ex. P-43. Loader operator Michael Medcraft, and operations manager Tim Becker corroborated Martin's testimony, that Quality was re-crushing material that Martin had dropped off, and that Quality was not extracting or crushing any raw material. Tr. II: 13-15, 23-24.

The Act confers MSHA with jurisdiction over any coal or other mine, which is broadly defined. 30 U.S.C. § 803; *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 687 (Apr. 1994). Section (3)(h)(1) of the Act defines a "mine," in pertinent part, to include "structures, facilities, equipment, machines, tools, or other property . . . used in or to be used in, . . . the work of extracting . . . minerals . . . or . . . the milling of such minerals, or the work of preparing . . . minerals" 30 U.S.C. § 802(h)(1). Milling is defined in the Interagency Agreement as the "art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives." 44 Fed. Reg. at 22,827. "Milling" can consist of various processes including crushing, grinding, pulverizing and/or sizing. *Id.*

Quality admits that if it had been crushing extracted native material during the subject inspections, it would have been milling as defined by the Act, and MSHA would have had jurisdiction. Resp't Br. at 6-7. Likewise, the Secretary does not contend that MSHA had jurisdiction if Quality had been processing recycled material. Therefore, the question of jurisdiction is a factual one, i.e., whether Quality had been processing recycled or native material.

I credit Horn's and Pickett's testimony that virgin material is readily distinguishable from recycled material, and that they observed native material going through the crusher. Quality presented no physical or documentary evidence to support its contention that it was crushing

recycled material from a wall on Martin's property. Beck opined that evidence of recycled cobblestone and concrete would probably have been present around the crusher, mixed in with virgin rock. Tr. I: 186-87. However, neither Beck nor any other Quality witness identified any cobblestone or concrete in the photographs, and Beck only guessed that the concrete, which they had allegedly been crushing, was "probably" or "possibly" on top of virgin rock. Tr. I: 186-87; Ex. P-10A, P-10B. When examining the rock underneath the crusher, Beck testified that it did not look like the material that Quality had been crushing for Martin, and he identified it as product left over from a previous crushing operation that had taken place on the same site. Tr. I: 182; Ex. P-10A, P-10B. The absence of any identification of cobblestone or concrete, combined with Horn's and Pickett's observation of native material, demonstrate that Quality was engaged in milling raw material. Moreover, I note that neither Medcraft at the mine site, nor Quality's operations manager Tim Becker at their post-inspection conference, informed Horn of the alleged favor for Martin. Tr. I: 41, 94, II: 20. Finally, assuming that the job was actually for Martin, his status as a frequent customer, together with the inspectors' observations, make it highly likely that Quality was conducting business as usual, rather than doing Martin a favor; thus, his testimony in support of his friend, Beck, is unpersuasive. Tr. II: 6, 11-12; Ex. P-43. Therefore, I find that Quality was crushing native material, and was subject to MSHA's jurisdiction under sections 3(h)(1) and 4 of the Act.³

B. Citation No. 7999979

Inspector Horn issued 104(d)(1) Citation No. 7999979, alleging a "significant and substantial" violation of section 56.15005 that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Quality's "reckless disregard" and "unwarrantable failure" to comply with the standard.⁴ The "Condition or Practice" is described as follows:

The mine foreman and a miner were standing on the running cone crusher adjusting ring without fall protection. The adjusting ring is approximately 12 to 13 feet above the ground level. The ground was covered with rocks of various sizes up to 12" in diameter. The foreman stated that they were watching the cone crusher feed belt, which was in full operation, because they were having a tracking problem. A fall from the elevated cone crusher to the rock covered ground below could result in fatal injuries. The foreman, Michael Medcraft, engaged in aggravated conduct constituting more than ordinary negligence in that

³ Pursuant to my finding of MSHA jurisdiction, Quality withdraws contest of Citation Nos. 7999983, 7999984 and 7999985, and agrees to pay-in-full the \$100.00 penalty proposed by the Secretary for each violation. Resp't Br. at 4; Tr. I: 10-11. I note that the Petition filed for docket WEST 2009-558-M contains a mathematical error in calculating the penalty for Citation No. 7999984; the correct amount is \$100.00, rather than \$112.00.

⁴ 30 C.F.R. § 56.15005 provides that: "Safety belts and lines shall be worn when persons work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

he was standing on the elevated cone crusher adjusting ring without fall protection and that he allowed another miner to perform the same task without fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-1. The citation was terminated after Medcraft and Holmes climbed down from the cone crusher.

1. Fact of Violation

In order to establish a violation of one of his mandatory safety standards, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152) (Nov. 1989)).

The Secretary argues that if a miner were to fall from the crusher, the distance to the ground is 12 to 14 feet, unbroken by any platforms or handrails. Respondent argues that since a miner falling from the cone crusher would land on a platform two feet below rather than fall to the ground, the miners were not in danger.

Horn testified that he saw Medcraft and Holmes standing on the adjusting ring approximately 12 to 14 feet in air, with the crusher operating and vibrating. Tr. I: 79. He explained that as the crusher vibrates, it spews material and dust and, if the material were to contact a miner, it could cause the miner to fall to the ground, which was covered with rock and debris. Tr. I: 79-80. On cross-examination, Horn opined that if a miner were to fall from the ring, his body would be much longer than the width of the lower platform and, thus, he would fall clear of the platform to the ground. Tr. I: 114-15. According to Horn, in order to land on the platform, a miner would have to fall straight down, which is unlikely, given that a fall from the crusher would be backwards. Tr. I: 114-15.

Beck testified that if a miner were to fall from the ten-inch-wide adjusting ring, he would fall just 21 inches to the lower platform that extends 36 inches from the side of the crusher. Tr. II: 50, 52-53, 59-60.

I credit Horn’s testimony that a fall from the crusher was a distance of 12 to 14 feet, rather than the two feet suggested by Quality. If a miner, standing on the ring’s ten-inch-wide step, were hit by rocks or debris spit from the crusher, the miner would likely lose balance and fall backwards, rather than slip down to the lower platform in a controlled fashion. Medcraft admitted that he was not wearing fall protection on the day of the inspection. Tr. II: 101. Therefore, I find that the Secretary has proven a violation of section 56.15005.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is “significant and substantial” (“S&S”) under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory

safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also* *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of violation has been established, and miners exposed to the vibrating crusher and flying debris were subjected to the hazard of falling 12 to 14 feet to the ground. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

Horn testified that it was reasonably likely that the vibrating crusher spewing rocks, dust, and other material would cause a miner to lose balance and fall 12 to 14 feet to the ground, which would likely result in a fatality. Tr. I: 79-85. He opined that none of the guardrails on the crusher would prevent a fatal fall. Tr. II: 110-11. Likewise, Pickett noted that the crusher was processing material when Medcraft and Holmes were standing on the adjusting ring. Tr. I: 73. On the contrary, Medcraft testified that the cone crusher was not running when he and Holmes were standing on the adjusting ring, and that the guardrail around the edge of the platform would save him if he were to fall. Tr. II: 102-110; Ex. P-3; P-51.

The Commission has held that, to satisfy the third element of the *Mathies* test, the Secretary must prove that the hazard contributed to by the violation will be reasonably likely to cause a serious injury. I credit Horn's and Pickett's testimony that the crusher was operating when Medcraft and Holmes were standing on the adjusting ring. As Horn noted, the guardrails were adequate to protect miners standing on the platform, but would not have prevented a fall from the top of the equipment. Tr. II: 76-77. I find that failing to utilize fall protection when standing on the adjusting ring of the vibrating cone crusher, suspended 12 to 14 feet in air, was reasonably likely to lead to a fatal fall. Therefore, I conclude that the violation was S&S.

3. Negligence and 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 such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also* *Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of

time that the violation has existed, the operator's efforts in eliminating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See Consolidation Coal Co.*, 22 FMSHRC 328, 331 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). The Commission has also considered whether the violative condition is obvious or poses a high degree of danger. *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Construction, Inc.*, 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984)). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consol*, 22 FMSHRC at 353).

The parties' arguments on the issue of unwarrantable failure focus on whether Medcraft was an agent of the operator, whose negligence is imputable to Quality. The Secretary argues that, regardless of his job title or salary, Medcraft was an agent because he represented to MSHA that he was in-charge of the mine site, and directed the mine's workforce. Sec'y Br. at 15-18. Quality makes a counter argument that Medcraft was not an agent, but a rank-and-file miner, whose negligence is not imputable to Quality. Resp't Br. at 11-15. It also points out that the violation was very brief, that it did not pose a high degree of danger, and that it had not been placed on notice that greater efforts at compliance were necessary. Resp't Br. at 16.

Horn testified that after Medcraft and Holmes had come down from the crusher, Medcraft introduced himself and, in response to Horn's inquiry as to who was in-charge, responded "I am." Tr. I: 92. Subsequently, Medcraft accompanied Horn on his inspection, and discussed the citations with him; Horn did not have any discussions with any other miners on-site. Tr. I: 92-93. During the inspection, Medcraft directed the other miners to shut down the crusher in order to retrieve and install a guard for the tail pulley, and he supervised installation of the guard. Tr. I: 94. Horn stated that "by all natural appearances, he directed what they did." Tr. I: 94. According to Horn, Medcraft never told him that he was not in-charge and did not object, either on December 29 or January 12, when Horn issued citations and orders to him, designating him as foreman. Tr. I: 93. He also noted that when he discussed the violations with Tim Becker, Becker did not object to referencing Medcraft as foreman. Tr. I: 94. Horn opined that Medcraft, as the person in-charge of the operation, disregarded basic industry safety standards by standing on the adjusting ring without fall protection, a hard hat or safety glasses, and that this conduct conveyed to other miners that Quality was indifferent to these basic safety practices. Tr. I: 91, 99. Horn also discovered a harness stored in a garage on the Rancho Plant site approximately a quarter-mile away from the crusher. Tr. I: 106. Pickett testified similarly, that Medcraft was the first miner to make contact with Horn when they arrived at the crusher, and that he interacted the most with Horn. Tr. I: 130.

Beck testified that Medcraft was not a foreman, and could not hire, fire, discipline, direct or supervise employees. Tr. II: 27. According to Beck, all three miners on-site that day, Tyler Becker, Medcraft and Holmes, held the title of machine loader operator, were hourly employees paid approximately \$15.00 per hour, and had the same duties. Tr. II: 30, 45-46; Exs. R-9, R-11. Tim Becker testified to the same effect. Tr. II: 80.

Medcraft agreed with his superiors' characterization of his authority, and stated that Beck and Tim Becker were always in-charge, even if neither was physically present at the Plant. Tr. II: 85-86. According to him, if a question or problem arose, he, Tyler Becker or Holmes, would call Beck or Tim Becker, who were always available by phone. Tr. II: 85. Medcraft denied telling Horn that he was in-charge, and stated that he spoke to Horn because he was acquainted with him from a prior inspection; he added that any of the three miners on-site could have done so. Tr. II: 86-87. According to Medcraft, he was merely relaying instructions from Horn to the other employees when he told them to install the guard. Tr. II: 88-89. He also stated that he was trained to use fall protection whenever a fall looks plausible or likely. Tr. II: 95-96; Ex. R-9.

Section 3(e) of the Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of the miners in a . . . mine." 30 U.S.C. § 802(e). The Commission has recognized that the negligence of an operator's "agent" is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Nelson Quarries, Inc.*, 31 FMSHRC 318, 328 (Mar. 2009) (citations omitted). In contrast, the negligence of a rank-and-file miner is not imputable to the operator for those purposes. *Id.* In considering whether an employee is an operator's agent, the Commission has relied upon the miner's function and whether it was crucial to the mine's operation and involved a level of responsibility normally delegated to management personnel, rather than the miner's job title or qualifications. *Id.* The Commission considers factors such as the ability to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine. *Id.*

In *Nelson*, the Commission affirmed the judge's finding that the employees acted as agents, with negligence imputable to the operator when, after the inspectors requested to speak to the miners in-charge, they held themselves out as representatives of the operator and accompanied the inspectors on inspection; also, they directed the workforce, assigning tasks to other miners. *Id.* at 329. The Commission also agreed with the judge's conclusion that the fact that ultimate decision-making authority rested with higher-level personnel did not negate the fact that the subject employees were given responsibilities normally delegated to managers. *Id.* at 331.

I credit Horn's testimony that Medcraft identified himself as in-charge of the mine site and, his behavior, accompanying Horn on his inspection and directing the miners to shut down the crusher and install the guard, demonstrated the type of managerial control that the Commission has found indicative of agency. Despite Medcraft's testimony that either Beck or Tim Becker was in-charge, although off-site, Medcraft neither immediately called his superiors when MSHA arrived on-site nor objected when Horn served him, as foreman, with citations and orders. Similarly, Tim Becker, when reviewing the violations, did not object to Medcraft having been served as foreman, which is also noted numerous times in the "Condition or Practice" section of the citations and orders. Therefore, I find that Medcraft was acting as an agent of Quality, and that his negligence is imputable to the operator.

Moreover, I find no factors mitigating against a finding of unwarrantable failure. Medcraft's decision to disregard safety training and work on the operating crusher without a harness demonstrated indifference to the danger posed by a potential 12 to 14 foot fall. Given the vibrating crusher's suspension, that rocks and debris were flying, and that the miners were standing on ten-inch-wide steps, the need for fall protection was obvious. Therefore, I find that the Secretary has met his burden of establishing that Quality displayed a reckless disregard of the standard, and aggravated conduct that constitutes unwarrantable failure.

C. Order No. 7999980

Inspector Horn issued 104(d)(1) Order No. 7999980, alleging a "significant and substantial" violation of section 56.15002 that was "reasonably likely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Quality's "reckless disregard" and "unwarrantable failure" to comply with the standard.⁵

The "Condition or Practice" is described as follows:

The mine foreman was not wearing a hard hat while working up on the cone crusher. The cone crusher was in full operation along with the crusher feed belt and a Caterpillar 908G front-end loader was dumping material into the plant feed hopper approximately 15 feet away from where the foreman was standing. The foreman was working with two other miners at the time of this violation. Material being processed by the operational cone crusher plant could bounce/fly up and hit the foreman causing serious injuries and/or causing the foreman to fall from the cone crusher plant. Foreman Medcraft engaged in aggravated conduct constituting more than ordinary negligence in that he was not wearing basic safety gear, a hard hat, while working on the operating cone crusher in the presence of two other miners. This violation is an unwarrantable failure to comply with a mandatory safety standard.

Ex. P-4. The citation was terminated after Medcraft donned his hard hat as he climbed down from the crusher.

1. Fact of Violation and Significant and Substantial

Quality has conceded the violation and the S&S designation, but contests the negligence and unwarrantable failure allegations. Resp't Br. at 17.

2. Negligence and Unwarrantable Failure

Horn testified that a hard hat was required when working on top of the operating crusher, because rocks and debris are frequently ejected, which could strike a miner in the head.

⁵ 30 C.F.R. § 56.15002 provides that: "All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard."

Tr. I: 131-32. This was especially necessary for Medcraft, according to Horn, since he was standing immediately adjacent to the area where rocks and debris were being ejected. Tr. I: 132. A miner hit in the head with a projectile rock could suffer a concussion. Tr. I: 132. Horn opined that Medcraft's decision to ignore his personal protective equipment training showed complete disregard for the safety standard and his own safety, and set an example for other miners to act similarly, in a cavalier manner. Tr. I: 134-36. Medcraft admitted that he was provided with a hard hat that he was not wearing, and acknowledged that Quality has a policy requiring its use. Tr. II: 96-97, 101.

Medcraft had been trained to wear a hard hat when necessary, and had taken the hat with him onto the crusher. Ex. P-4; Tr. I: 135-36. Simply put, he chose not to wear it. Given the constant spew of rocks and debris, the conditions on the crusher posed a high degree of danger. I credit Horn's testimony that failure to follow this basic safety requirement set an example of non-compliance for other miners, thereby undermining the training that Quality provided. Therefore, having determined Medcraft to have been acting as Quality's agent, I find that the Secretary has met his burden of establishing that Quality displayed a reckless disregard of the standard, and aggravated conduct that constitutes unwarrantable failure.

D. Order No. 7999981

Inspector Horn issued 104(d)(1) Order No. 7999981, alleging a "significant and substantial" violation of section 56.15004 that was "reasonably likely" to cause an injury that could reasonably be expected to be "permanently disabling," and was caused by Quality's "reckless disregard" and "unwarrantable failure" to comply with the standard.⁶ The "Condition or Practice" is described as follows:

The mine foreman was not wearing safety glasses while working up on the cone crusher. The cone crusher was in full operation along with the crusher feed belt and a Caterpillar 908G front-end loader was dumping material into the plant feed hopper approximately 15 feet away from where the foreman was standing. The foreman was working with two other miners at the time of this violation. Material being processed by the operational cone crusher plant could bounce/fly up and hit the foreman in the eye causing serious injuries. Foreman Medcraft engaged in aggravated conduct constituting more than ordinary negligence in that he was not wearing basic safety gear, safety glasses, while working on the operating cone crusher in the presence of two other miners. This violation is an unwarrantable failure to comply with a mandatory safety standard.

Ex. P-6. The citation was terminated after Medcraft put on his safety glasses.

⁶ 30 C.F.R. § 56.15004 provides that: "All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes."

1. Fact of Violation and Significant and Substantial

Quality has conceded the violation and the S&S designation, but contests the negligence and unwarrantable failure allegations. Resp't Br. at 17.

2. Negligence and Unwarrantable Failure

Horn testified that Medcraft was not wearing safety glasses when he was standing on the adjusting ring but, unlike his hard hat, Medcraft did not have his safety glasses with him on the crusher and had to obtain them from another location. Tr. I: 137-38. Given the crusher's constant spitting of rocks and other flying debris, the likelihood of a miner sustaining permanently disabling injuries as a result of being struck in the eyes was high. Tr. I: 137-38. Again, Horn opined that Medcraft had been trained to wear safety glasses, but that his blatant disregard of this basic safety standard set a negative example for other miners. Tr. I: 138-140.

Medcraft acknowledged that he was not wearing his Quality-provided safety glasses while on the crusher. Tr. II: 96-97, 101. I find that Medcraft was acting as Quality's agent, that his willful failure to wear protective eyewear while situated on the operating crusher demonstrated a reckless disregard for the standard, and that the Secretary has met his burden of establishing that the violation was the result of Quality's unwarrantable failure.

E. Order No. 7999982

Inspector Horn issued 104(d)(1) Order No. 7999982, alleging a "significant and substantial" violation of section 56.14107(a) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Quality's "high" negligence and "unwarrantable failure" to comply with the standard.⁷ The "Condition or Practice" is described as follows:

The tail pulley for the cone crusher feed belt was not guarded. The belt was mounted approximately 5 feet above the ground and was easily accessible. The mine foreman stated that the guard had been damaged and removed while a new guard was being fabricated. The plant has operated without the tail pulley guard for two days. Contact with the unguarded tail pulley could result in entanglement causing serious life-threatening injuries. Foreman Medcraft engaged in aggravated conduct constituting more than ordinary negligence in that he continued to operate the crusher plant without the tail pulley guard. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-8. The citation was terminated after a guard was installed on the tail pulley.

⁷ 30 C.F.R. § 56.14107(a) provides that: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

1. Fact of Violation

The Secretary argues that the crusher was being operated with an unguarded tail pulley at a height of 5 ½ feet above ground, in violation of the standard. Sec’y Br. at 24-26. Quality argues that the standard does not require that the tail pulley be guarded because, when the crusher is operating, the tail pulley is seven feet above ground.⁸

Horn estimated the unguarded tail pulley to be situated 5 ½ feet above ground, and asserted that the height remained constant, i.e., that Quality never lowered the tail pulley to install the guard during the December 29 inspection. Tr. I: 141-42, II: 114-18; Ex. P-10B. In rebuttal to Quality’s assertion that the crusher can only operate with both legs fully extended, Horn opined that crusher legs are usually adjusted to different heights in order to balance the machines on uneven ground. Tr. II: 116-17.

Beck testified that the crusher operates in either transport or operational mode. Tr. II: 33. To change from transport to operational mode, the hydraulic legs are extended, raising the height of the crusher. Tr. II: 34. He opined that when Quality was installing the guard, the legs were not extended and the crusher was not in operational mode. Tr. II: 34-35; Ex. P-10B. When the crusher is in operational mode, the tail pulley is seven feet seven inches above ground, which is, according to him, the only functional height. Tr. II: 36-37; Ex. R-13. Medcraft agreed with Beck, opining that the crusher cannot operate without its legs fully extended. Tr. II: 93-94. He also testified that after Horn informed them of the guarding violation, the miners retracted the legs and lowered the tail pulley so that they could install the guard. Tr. II: 91-92; Ex. P-10B.

I fully credit Horn’s testimony that the crusher remained at the same height throughout his inspection. Quality provided no technical data to support its assertion that the crusher can only operate with both legs fully extended and the tail pulley at a height of seven feet seven inches. If, as Horn asserted, the crusher was not operating on level ground, a design requiring both legs extended to the same maximum height would render the machine unstable. Therefore, I find that the crusher was operating at a lower height, estimated at 5 ½ feet. In drawing this conclusion, I have considered Beck’s and Medcraft’s lack of credibility on the jurisdiction and agency issues. Accordingly, I find that the Secretary has proven that Quality violated section 56.14107(a), by failing to provide a guard for the cone crusher’s tail pulley.

2. Significant and Substantial

The fact of violation has been established, and miners were subjected to entanglement in the conveyor belt or the tail pulley, itself. The focus of the S&S analysis in this instance is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

⁸ 30 C.F.R. § 56.14107(b) provides that: “Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.”

Horn testified that a miner would be reasonably likely to have his clothing caught on a metal clip in the conveyor belt and become trapped or pulled into the pulley, causing fatal injuries. Tr. I: 144. To support his conclusion, Horn referenced a fatality in which a miner was killed when he became entangled in a conveyor belt underneath the frame of a screening unit. Tr. I: 144-45; Ex. P-50 at 2-5. I find that the hazard of entanglement in the conveyor belt is reasonably likely to lead to disfigurement and fatal injuries; therefore, the violation was S&S.

3. Negligence and Unwarrantable Failure

Horn testified that Medcraft told him that the tail pulley had been unguarded for two days. Tr. I: 146; Ex. P-8. He also stated that when he advised Medcraft that he was shutting down the crusher, Medcraft changed his story that the guard was damaged and in need of repair, and quickly produced and installed a guard. Tr. I: 145-46. Horn opined that the violation constituted an unwarrantable failure, given that the condition was in plain view and fully known by Medcraft, and had existed for two days. Tr. I: 148-49.

I find, based on Horn's credible testimony, that the condition had existed for two days, and that Quality was fully aware that the guard was not in place. Furthermore, I am persuaded that Medcraft knew that a replacement guard was readily available but, nevertheless, permitted operation of the crusher with its tail pulley unguarded until Horn cited the condition. Therefore, I find no mitigating factors, that Quality's negligence was high, and that the violation was the result of Quality's unwarrantable failure.

F. Order No. 7999993

On January 12, 2009, Inspector Horn returned to the Rancho Plant and issued 104(d)(2) Order No. 7999993, alleging a "significant and substantial" violation of section 56.14107(a) that was "reasonably likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Quality's "reckless disregard" and "unwarrantable failure" to comply with the standard. The "Condition or Practice" is described as follows:

The tail pulley for the Extec cone crusher unit was not guarded. The missing tail pulley guard was found laying on the ground, one bench above and approximately 300 yards to the northwest of the current cone crusher position. The unguarded tail pulley was 6 feet above the ground and easily accessible. Contact with the unguarded tail pulley could result in entanglement causing life threatening injuries. This same guard was cited on 12/29/2008, 104(d)(1) Order 7999982. The order was abated when the factory OEM tail pulley guard was installed. Foreman Medcraft engaged in aggravated conduct constituting more than ordinary negligence in that he allowed the cone crusher plant to operate without the tail pulley guard being installed and that this very same tail pulley guard was cited two weeks ago. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-19. The order was terminated when a guard was installed.

1. Fact of Violation and Significant and Substantial

Horn testified that during the post-inspection conference with Tim Becker following his December 29 inspection, he related the details of a fatal accident that he had investigated, in which a miner working on a crusher with an unguarded tail pulley became entangled in the pulley and killed. Tr. I: 110-12. He warned Becker that unless Quality took its obligation to guard the tail pulley seriously, Tyler Becker, his son, could, likewise, be pulled into the crusher and killed. Tr. I: 111. Nonetheless, when he arrived on-site for the January 12 inspection, he found the crusher operating in a different location, with its tail pulley, again, unguarded. Tr. I: 154. Horn observed that the guard was laying on the ground in the location where the crusher had been operating on December 29. Tr. I: 112, 154-55; Ex. P-21A, P-21B. Quality's argument, the same as proffered respecting the December 29 guarding violation, is, for the reasons previously articulated, without merit. Therefore, I find that the Secretary has proven that Quality, again, violated section 56.14107(a) and, applying the same rationale as discussed regarding the previous guarding violation, that the violation was S&S.

2. Negligence and Unwarrantable Failure

Horn's contemporaneous inspection notes state that the "foreman states he understands about guards . . . MSHA just showed up at wrong time." Ex. P-20; Tr. I: 157-58. Horn testified that, given that the same guard had been cited two weeks earlier, there was no excuse for running the crusher without it. Tr. I: 159. Given the prior violation and Horn's subsequent discussion with Quality's management about the extreme danger of operating the crusher with an unguarded tail pulley, I find that Quality's conduct was willful and in reckless disregard of the safety standard, and that the violation demonstrated a serious lack of reasonable care that constitutes an unwarrantable failure.

IV. Penalties

While the Secretary has proposed a total civil penalty of \$47,700.00 for the violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). *Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Quality is a small operator with an overall history of violations that is not an aggravating factor in assessing appropriate penalties. I also find that Quality demonstrated good faith in achieving rapid compliance after notice of the violations. Stip. 5.

Quality argues for reduction in penalties based on its ability to continue in business. In support of this argument, Quality has submitted federal tax returns from 2007 to 2010 for David Beck, sole proprietor of Quality Materials; for CDG Materials, Incorporated; and for SBB Enterprises, Incorporated, another corporation owned by Beck. Resp't Br., Ex. A. Quality also

claims that CDG filed for bankruptcy protection in February 2012. Resp't Br. at 21.⁹ Quality argues that due to personal income losses for Beck from 2008 to 2010, corporate losses for CDG Materials in 2008 and 2009, and corporate losses for SBB Enterprises from 2007 to 2010, the proposed civil penalties will affect Beck's ability to meet his financial obligations which, considering that Quality is a sole proprietorship, is the proper focus in determining the appropriate civil penalty. *See Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1765 (Aug. 2012); *Wayne Steen*, 20 FMSHRC 381 (Apr. 1998).

The Commission has held that the mine operator has the burden of proving that the proposed penalty will affect its ability to continue in business. *Sellersburg*, 5 FMSHRC at 294. Despite the Secretary's requests, Quality failed to produce critical information about Beck's financial condition including living expenses, net worth, bank account balances and other asset-related information. Sec'y Br., Ex. A. The federal tax returns that Quality did produce are unaudited which, as other judges have found, are insufficient support for an inability-to-pay defense. *Apex Quarry*, 33 FMSHRC 3158, 3162-63 (Dec. 2011) (ALJ) (citing *Johnco Materials, Inc.*, 33 FMSHRC 1431, 1433-34 (Jun. 2011) (ALJ)). Without adequate documentation of Beck's financial status, the effect of the proposed penalties on his ability to meet his financial obligations cannot be determined. Quality did produce sufficient information on CDG Materials' financial condition for the Secretary to determine that CDG has a 76 percent probability of being able to pay the proposed penalties. Sec'y Br., Ex. A at 3-4. Therefore, I find that the proposed civil penalties will not affect Quality's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violations and Quality's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 7999979

It has been established that this S&S violation of section 56.15005 was reasonably likely to result in an injury that could reasonably be expected to be fatal, that Quality displayed a reckless disregard of the standard, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of \$13,600.00, as proposed by the Secretary, is appropriate.

B. Order No. 7999980

It has been established that this S&S violation of section 56.15002 was reasonably likely to result in an injury that could reasonably be expected to result in permanently disabling injuries, that Quality displayed a reckless disregard of the standard, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of \$9,100.00, as proposed by the Secretary, is appropriate.

⁹ Quality's Post-hearing Brief cites to "Financial Exhibit B" as evidence of this filing, but no such documentation was filed.

C. Order No. 7999981

It has been established that this S&S violation of section 56.15004 was reasonably likely to result in an injury that could reasonably be expected to result in permanently disabling injuries, that Quality displayed a reckless disregard of the standard, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of \$9,100.00, as proposed by the Secretary, is appropriate.

D. Order No. 7999982

It has been established that this S&S violation of section 56.14107(a) was reasonably likely to result in an injury that could reasonably be expected to be fatal, that Quality was highly negligent, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of \$2,000.00, as proposed by the Secretary, is appropriate.

E. Order No. 7999993

It has been established that this S&S violation of section 56.14107(a) was reasonably likely to result in an injury that could reasonably be expected to be fatal, that Quality displayed a reckless disregard of the standard, that the violation was the result of unwarrantable failure, and that it was timely abated. Therefore, I find that a penalty of \$13,600.00, as proposed by the Secretary, is appropriate.

ORDER

ACCORDINGLY, Citation Nos. 7999979, 7999983, 7999984 and 7999985 and Order Nos. 7999980, 7999981, 7999982 and 7999993 are **AFFIRMED**, as issued, and it is **ORDERED** that Quality Materials and CDG Materials, Incorporated, **PAY** a civil penalty of \$47,700.00 within 30 days of the date of this Decision.¹⁰ **ACCORDINGLY**, these cases are **DISMISSED**.

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

¹⁰ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket numbers and A.C. numbers.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 20, 2014

REUBEN SHEMWELL,
Complainant
v.
ARMSTRONG COAL CO., INC.,
Respondent
REUBEN SHEMWELL & ANTHONY
YOUNG,
Complainants
v.
ARMSTRONG COAL CO., INC.,
Respondent
ANTHONY YOUNG,
Complainant
v.
ARMSTRONG COAL CO., INC.,
Respondent
DISCRIMINATION PROCEEDINGS
Docket No. KENT 2014-0297-D
Docket No. KENT 2014-0327-D
Docket No. KENT 2014-0521-D
Docket No. KENT 2014-0323-D
Docket No. KENT 2014-0324-D
Docket No. KENT 2014-0325-D
Docket No. KENT 2014-0326-D
Docket No. KENT 2014-0389-D
Docket No. KENT 2014-0390-D

ORDER GRANTING MOTION TO CONSOLIDATE
ORDER DENYING ARMSTRONG'S MOTION FOR JUDGMENT ON THE
PLEADINGS

Before: Judge McCarthy

These cases are before me based upon discrimination complaints filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act or Mine Act). 30 U.S.C. § 815(c). Three motions are currently pending in the above-captioned dockets. On June 30, 2014, Respondent filed a Motion for Judgment on the Pleadings for Failure to State a Claim Upon Which Relief Can Be Granted in Docket No. KENT 2014-0297. On July 5, 2014, Complainant Reuben Shemwell filed a Motion in Opposition. Complainants Shemwell and Anthony Young also filed two Motions to Consolidate on July 5, 2014, seeking to consolidate

Docket No. KENT 2014-0323 with Docket No. KENT 2014-0324, and Docket No. KENT 2014-0325 with Docket No. KENT 2014-0326.

Given the likelihood that these cases will involve similar or overlapping issues, witnesses, and evidence, I find that consolidation of all of the above-captioned cases would further the interests of judicial economy and efficiency. Commission Rule 12 states that “[t]he Commission and its judges may at any time, upon their own motion or a party’s motion, order the consolidation of proceedings that involve similar issues.” 29 C.F.R. § 2700.12. The Commission has held that “[a] determination to consolidate lies in the sound discretion of the trial judge.” *Pennsylvania Electric Company*, 12 FMSHRC 1562, 1565 (Aug. 1990).

Upon consideration of the grounds proffered in the Motions to Consolidate and in the interest of judicial economy and efficiency in resolving all the dockets, it is **ORDERED** that the above-captioned dockets be **CONSOLIDATED**.

For the reasons set forth below, I **DENY** the Respondent’s Motion to Dismiss.

I. Procedural Background

Complainant Reuben Shemwell is a welder for Respondent Armstrong Coal Company. Shemwell was discharged from his job in September 2011 for allegedly making safety complaints and engaging in two safety-related work refusals. On January 23, 2012, Shemwell filed his first discrimination complaint with the Mine Safety and Health Administration (MSHA) against Armstrong Coal. *See Sec’y of Labor ex rel. Shemwell v. Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.*, 38 FMSHRC 1865 (June 2013) (ALJ). After MSHA investigated and declined to prosecute in July 2012, Shemwell filed an action on his own behalf with the Commission under 105(c)(3). *See Sec’y of Labor ex rel. Shemwell v. Armstrong Coal Co. Inc. & Armstrong Fabricators, Inc.*, 35 FMSHRC 248 (Jan. 2013) (ALJ).

On August 22, 2013, Armstrong filed suit against Shemwell in Kentucky state court for “wrongful use of civil proceedings,” alleging that Shemwell knew that he had not been discharged for safety-related conduct when he filed his 105(c)(3) action. Shemwell then filed a retaliation complaint with MSHA under 105(c)(2), alleging that the state suit court was an unlawful attempt to stifle the filing of safety complaints in contravention of section 105(c) and the Mine Act. In January 2013, after further investigation, the Secretary of Labor filed a Complaint of Discrimination on Shemwell’s behalf. *See Shemwell*, 38 FMSHRC at 1866–67.

While Shemwell's 105(c)(3) action was still pending, the Secretary prevailed in the retaliation suit before the Commission. Armstrong and Shemwell then entered into a confidential settlement agreement for both cases, resulting in Shemwell's return to work as a welder on August 9, 2013. Compl. ¶ 11–12.¹

II. Factual Background

The instant proceeding arises from events that took place after Shemwell's return to work on August 9, 2013.

On August 8, 2013, the day before Shemwell returned to work, Shemwell alleges that Matt Dunlap, the welding supervisor, held a meeting with other welders and instructed them to keep notes on Shemwell's statements and actions because Shemwell would be keeping notes on them. For example, Dunlap allegedly told the welders to take notes if Shemwell was one minute late for work, or if he got on a ladder without using a safety harness. *Id.* at ¶ 12. In its Answer, Armstrong admits that Dunlap informed other welders that Shemwell would be working with them, but denies that Dunlap specified when Shemwell would return to work or that Dunlap informed the miners that Shemwell would take notes on them and that they should take notes on him. Answer ¶ 14.

During the week of August 12, 2013, Shemwell alleges that he asked his foreman, Lee Winton, for welding sleeves and a welding jacket, and that he received them a few days later. Compl. ¶ 13. Armstrong admits that Shemwell asked for such personal protective equipment. Answer ¶ 15.

On August 20, 2013, Shemwell allegedly told Dunlap that he wanted the material safety data sheets (MSDS) for both stainless steel wire and 58GV wire because he was concerned about the health effects of working with the wire. According to Shemwell's Complaint, Dunlap was visibly upset and only gave Shemwell an MSDS for the stainless steel wire. *Id.* at ¶ 14–15.

¹ Before its determination not to proceed on the merits of Shemwell's original 105(c)(2) complaint, MSHA filed an Application for Temporary Reinstatement seeking to reinstate Shemwell to his job pending a final order on the complaint. *See* 30 U.S.C. § 815(c)(2). Upon finding that Shemwell's complaint was not frivolously brought, Administrative Law Judge Jerold Feldman ordered Armstrong to temporarily reinstate Shemwell. *See Sec'y of Labor ex rel. Reuben Shemwell v. Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.*, 34 FMSRHC 1464 (Jan. 2013) (ALJ), *aff'd*, 34 FMSRHC 1580 (2013). Thereafter, Armstrong and Shemwell executed an "Agreement Regarding Economic Reinstatement," whereby Shemwell was paid full wages and benefits, but agreed to stay off Armstrong's property. *Sec'y of Labor ex rel. Reuben Shemwell v. Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.*, 34 FMSRHC 2009 (Aug. 2012) (ALJ). After the Secretary's successful suit on Shemwell's behalf regarding his 105(c)(2) retaliation case, Judge Feldman dissolved the order approving the temporary economic reinstatement. *Sec'y of Labor ex rel. Reuben Shemwell v. Armstrong Coal Co., Inc. & Armstrong Fabricators, Inc.*, KENT 2012-0655-D (Sept. 2012) (ALJ), unpublished Order dated Sept. 12, 2012.

Armstrong denies that Dunlap was upset, and asserts that Shemwell only requested the MSDS for the stainless steel wire. Answer ¶ 16–17. Shemwell alleges that he received a box of regular wire the next day and read the enclosed MSDS. He then called Dunlap. When Dunlap arrived at his work site, Shemwell told him about the MSDS requirements for the regular wire. Dunlap allegedly dismissed Shemwell’s concerns and stated that welders would “die early anyway” because of “all of the shit” they breathe while they weld. Dunlap used his own father-in-law as an example of a welder “dying early” from “all the shit that they breathed.” Dunlap said his father-in-law had been a welder and had died in his early 50s. Shemwell replied that he just wanted to know what he was dealing with when he welded. Compl. ¶ 16–17. Armstrong argues that Dunlap’s remarks about dying early because of “all the shit they breathe” were in reference to Shemwell’s smoking habit, and that Dunlap offered his father-in-law’s death as an example of dying early because his father-in-law had died from smoking. Answer ¶ 18–19.

On August 22, 2013, safety director Richard Hicks, safety representative Matt McGehee, and Dunlap met Shemwell at his work station. Dunlap allegedly told Shemwell that MSHA Inspector Wendell Crick thought that Armstrong was providing all required personal protective equipment. Dunlap allegedly also told Shemwell that the “court order” said that Shemwell would be welding, and that if Shemwell refused to weld, Armstrong would have nothing for Shemwell to do. During the same conversation, Hicks allegedly asked Shemwell whether he had chosen welding as a career. When Shemwell replied in the affirmative, Hicks allegedly said, “You may want to think about another career.” Compl. ¶ 18–20. Armstrong admits that Hicks asked Shemwell whether he had chosen welding as a career, but denies that Hicks made the alleged threat that Shemwell ought to think about another career. Answer ¶ 20.

On August 23, 2013, Shemwell filed a section 105(c)(2) Discrimination Complaint with MSHA. Compl. ¶ 2. On February 26, 2014, after MSHA declined to prosecute the complaint, Shemwell filed the instant action under section 105(c)(3). In essence, Shemwell alleges three instances of interference under section 105(c)(1): 1) on August 8, 2013, Dunlap attempted to ostracize Shemwell from his fellow welders and build a disciplinary record against him; 2) on August 20, 2013, Dunlap allegedly expressed the futility of inquiring about safety data involving welding wire because welders would “die early anyway” because of “all the shit they breathe;” and 3) on August 22, 2013, Hicks and Dunlap implicitly threatened Shemwell with job loss if he continued to pursue safety concerns. Compl. ¶ 21–23. Armstrong denies that its conduct violated the Mine Act, denies that Shemwell suffered any adverse action motivated in any part by protected activity, and argues that any adverse action that Shemwell did suffer was based solely on his unprotected activity. Answer ¶ 27–31.

III. Principles of Law

A. Standard of Review for Judgment on the Pleadings

Federal Rule of Procedure 12(c) allows parties to move for a judgment on the pleadings “after the pleadings have closed—but early enough that it will not delay trial.” Fed. R. Civ. P. 12(c). In practical terms, a “rule 12(c) motion for judgment on the pleadings for failure to state a claim upon which relief can be granted is nearly identical to that employed under a Rule 12(b)(6) motion to dismiss.” *Kottmeyer v. Maas*, 463 F.3d 684 (2006) (citations omitted). A motion to dismiss under Rule 12(b)(6) challenges the formal sufficiency of the

complaint. The moving party must show there is no legal authority to grant relief, even assuming that all the facts alleged in the complaint, and the inferences drawn from them, are true. *Sec'y of Labor, ex rel. Steven Feagins v. Denver Coal Co.*, 23 FMSHRC 47, 48 (Jan. 2001) (ALJ) (citing Fed. R. Civ. P. 12(b)(6); *Haines v. Kerner*, 404 U.S. 519 (1972)). Conversely, “the plaintiff[] must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Jackson v. Sedgwick Claims Mgmt. Servs.*, 731 F.3d 556, 562 (6th Cir. 2013) (en banc) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In evaluating Armstrong’s motion to dismiss, the undersigned “must [therefore] construe the complaint in the light most favorable to the [complainant], accept its allegations as true, and draw all reasonable inferences in favor of the [complainant].” *Jackson*, 731 F.3d at 562 (citing *Directtv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). In the context of discrimination cases, courts have recognized that a complainant need not establish a prima facie case in order to overcome a motion to dismiss. Therefore, a complaint “need not present detailed factual allegations, [but only] allege sufficient factual content from which a court, informed by its judicial experience and common sense, could draw the reasonable inference” that the complainant was discriminated against. *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012) (citing *Iqbal*, 556 U.S. at 508).

B. Commission Interference Precedent

Section 105(c)(1) of the Act provides that

[n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or *otherwise interfere with* the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

29 U.S.C. § 815(c)(1) (emphasis added). The Commission has acknowledged that “Congress viewed the free exercise of miners’ rights as essential to the achievement of safe and healthful mines.” *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (1982) (citing *Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786 (1980)). Section 105(c) “encourages miner participation in the enforcement of the Mine Act by protecting them against not only the common forms of discrimination, such as discharge, suspension, demotion . . . but also against the more *subtle forms of interference, such as promises of benefit or threats of reprisal.*” *Id.* (citing S. Rep. 91-191, 95th Cong., 1st Sess. 36 (1977) reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)) (emphasis added). Such practices instill in the minds of miners the fear of reprisal or discrimination, and may not only chill the exercise of protected rights by miners directly affected, but also cause other miners, who wish to avoid similar

treatment, to refrain from asserting their rights. This collides with the goal of encouraging miner participation in enforcement of the Mine Act. *Id.* at 1778–79.

The Commission has long-recognized that an operator’s interference with statutory rights violates section 105(c)(1). *See, e.g., Moses*, 4 FMSHRC 1475 (1982). The *Moses* test, reaffirmed in *Sec’y of Labor ex rel. Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (2005), has its genesis in section (8)(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1), which makes it unlawful for an employer to “interfere with, restrain, or coerce” an employee in the exercise of statutory rights. *Gray*, 27 FMSHRC at 10. Interference may come in many forms, including, but not limited to, surveillance, interrogation, coercion, harassment, threats of reprisal, promises of benefit, and statements of futility.² Whether interference has occurred is generally evaluated by examining the operator’s statements to determine whether they have a reasonable tendency to interfere with the free exercise of statutory rights, regardless of motive or whether the interference succeeded or failed. *Gray*, 27 FMSHRC at 10 (citing *American Freightways Co.*, 124 NLRB 146, 147 (1957)). Applying this test, the Commission has emphasized that “in determining whether a statement is an impermissible threat . . . language used by the parties . . . must not be isolated nor analyzed in a vacuum, but must be considered in light of the circumstances existing when such language was spoken.” *Gray*, 27 FMSHRC at 7 (citing *TRW v. NLRB*, 654 F.2d 307, 313 (5th Cir. 1981)). In other words, the judge must consider the “totality of circumstances.” *See Gray* 27 FMSHRC at 9-10; *Moses*, 4 FMSHRC at 1478 n. 8.

IV. Analysis

Dunlap’s August 8, 2014 attempt to ostracize Shemwell from the other welders and to “build a record” against him by instructing the other welders to take notes on his workplace actions can be construed as creating an impression of surveillance due to Shemwell’s prior protected activity. Dunlap’s statement, conveyed to other miners and communicated back to Shemwell, could have a reasonable tendency to interfere with the miners’ right to pursue safety and health complaints. Dunlap’s instruction to take notes on Shemwell’s actions may be construed, in context, as essentially an order to surveil and “bird-dog” him, arguably because of his prior protected activity. In fact, in Docket Nos. KENT 2014-0324 and KENT 2014-0325, Shemwell and Young allege that Respondent hired a consultant named David Stacer to do just that. Although Dunlap’s instructions might have been motivated by a legitimate concern with Shemwell’s work performance, Shemwell argues that he has no history of any punctuality problems or non-compliance with safety standards. Furthermore, even if motive were relevant, Shemwell has a colorable claim of disparate treatment.

² *See, e.g., Johnnie’s Poultry Co.*, 146 NLRB 700, 775 (1964) (coercive interrogations violate the NLRA); *N.L.R.B. v. Intertherm, Inc.*, 596 F.2d 267, 274–275 (1979) (surveillance and coercive interrogation violate the NLRA); *N.L.R.B. v. St. Francis Healthcare Centre*, 212 F.3d 945 (6th Cir. 2000) (coercive statements that union membership is futile violate the NLRA); *Sec’y of Labor ex rel. Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 7 (2005) (threats of reprisal violate the Mine Act); *Ivy Steel & Wire, Inc.*, 346 NLRB 404 (2006) (unlawful surveillance of union activities violates the NLRA).

Dunlap's August 20, 2013 statement to Shemwell that welders "die early anyway" because of "all the shit that they breathe" could have a reasonable tendency to interfere with Shemwell's statutory rights because it arguably conveys the impression that it was futile for Shemwell to raise safety-related complaints about the welding process. The statement came shortly after Shemwell expressed concerns about the stainless steel and 58GV wire and asked for the material data safety sheets. From Shemwell's perspective, the statement could reasonably be interpreted to mean that Armstrong was not taking his safety complaints seriously and that Shemwell's future exercise of protected rights would have no effect on reducing potentially harmful health and safety hazards for the welders.

Similarly, Hicks' August 22, 2013 statement to Shemwell that he may want to think about another career could have a reasonable tendency to interfere with Shemwell's exercise of statutory rights because it could be construed as an indirect threat of discharge for engaging in prior protected activity. In fact, Shemwell had recently expressed safety concerns regarding the appropriate personal protective equipment and the material safety data sheet for stainless steel and 58GV wire. It can be reasonably inferred that the purpose of the subsequent visit to Shemwell's work station by safety director Hicks, safety representative McGehee, and Dunlap was to send an implicit message to Shemwell that they did not appreciate his recent continuation of protected activity. From Shemwell's point of view, Dunlap's statement to the effect that if "Shemwell did not want to weld, Armstrong would have nothing for him to do," could be construed as a threat that Armstrong would terminate Shemwell's employment if he expressed any more welding-related safety concerns.

V. Order

The facts pled by Shemwell in his complaint are sufficient to support the inference that Armstrong interfered with the exercise of statutory rights by miners under section 105(c)(1) of the Mine Act. Accordingly, Respondent's Motion for Judgment on the Pleadings is **DENIED**.

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

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August 21, 2014

WHITE OAK RESOURCES, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. LAKE 2014-650-R
v.	:	Order No. 8450348; 07/24/2014
	:	
SECRETARY OF LABOR	:	Docket No. LAKE 2014-651-R
MINE SAFETY AND HEALTH	:	Order No. 8450350; 07/24/2014
ADMINISTRATION (MSHA),	:	
Petitioner	:	White Oak Mine No. 1
	:	Mine ID 11-03203

ORDER DENYING CONTESTANT’S MOTION FOR EXPEDITED HEARING
AND
ORDER STAYING CONTEST PROCEEDINGS

These proceedings are before me upon the Notice of Contest filed by White Oak Resources, LLC (“White Oak” or “Contestant”) on August 6, 2014, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. White Oak contests the validity of Order Nos. 8450348 and 8450350, issued pursuant to section 104(d)(1) of the Mine Act.¹ 30 U.S.C. § 814(d)(1). On the same day, counsel for White Oak also filed a Motion for Expedition of Proceedings. (Contestant Mot. at 1.) Chief Administrative Law Judge Robert J. Lesnick assigned this case to me on August 8, 2014. Counsel for the Secretary filed a timely Response in Opposition to Contestant’s Motion to Expedite on August 15, 2014.²

I. Motion for Expedited Hearing

In its Notice of Contest, White Oak asserted that at the time these orders were issued, the mine was in compliance with the approved roof control plan in all construction areas, and thus

¹ Contestant filed a Notice of Contest on August 6, 2014 (hereinafter referenced as “Contest Notice”), and a Motion for Expedition of Proceedings also dated August 6, 2014 (“Contestant Mot.”). The Secretary made only one filing on August 15, 2014, a Response in Opposition to Expedited Hearing (“Sec’y Resp.”).

² Counsel for White Oak subsequently filed a Reply to the Secretary’s Response in Opposition. Commission Procedural Rule 10, 29 C.F.R. § 2700.10, which governs the filing of motions before Commission Judges, allows for a statement in opposition to a written motion; however, it does not provide for a reply. White Oak did not seek leave from the Court to file its reply, and I see no reason to grant it *sua sponte*. Nevertheless, I note that the additional information in White Oak’s Reply would not affect my decision.

the orders were “clearly erroneous and must be vacated,” as their issuance was “arbitrary, capricious and [] not in accordance with law.” (Contest Notice at 2.) White Oak claimed it similarly “excavated 16 such areas as those cited in the [o]rders, in compliance with the construction provisions of the approved roof control plan” since June 2013, and that MSHA inspectors previously found no violations.

White Oak attached to its Notice of Contest copies of both orders as a single exhibit. (Contest Notice, Ex. 1 at 1–6.) Order No. 8450348, dated July 24, 2014, alleges a violation of 30 C.F.R. § 75.220(a)(1), which requires mine operators to develop and follow an approved roof control plan.³ As noted in the body of the order, MSHA Inspector Glenn Fishback observed that Contestant’s mining height exceeded seven feet in the 1 North Main return construction entry #1 between crosscuts 21 and 23 and that no rib bolts were present. The order further alleges that White Oak’s construction violated its approved roof control plan, which requires the operator to install rib support in areas developed after April 15, 2014, where the mining height exceeds seven feet. Finally, the order alleges that the violation affected two people, that it was reasonably likely to cause injury or illness, and that any injury or illness would result in lost workdays or restricted duty. (Contest Notice, Ex. 1 at 1–4.)

Order No. 8450350, also dated July 24, 2014, alleges a violation of 30 C.F.R. § 75.360(a)(1), which requires mine operators to conduct a preshift examination prior to the start of any eight-hour work interval.⁴ Inspector Fishback found no record of a preshift examination at the 1 North Main “over-cast construction site” prior to a scheduled work shift on July 24. (Contest Notice, Ex. 1 at 5.) The order alleges that the violation affected two people, that it was highly likely to cause injury or illness, and that any injury or illness would have resulted in lost workdays or restricted duty. (Contest Notice, Ex. 1 at 5–6.)

Now, in a sparse, two-page motion devoid of any citation to law, Contestant requests a hearing on an expedited basis, seeking a decision on whether the construction procedures being performed at White Oak Mine No. 1 violate the mine’s approved roof control plan. (Contestant Mot. at 1.) In support of its motion for an expedited hearing, Contestant parrots its Notice of Contest and alleges the Secretary’s two orders do not have any basis in fact or law. (Contestant Mot. at 1.) Contestant again claims it has similarly excavated 16 other areas since June 2013 in accordance with the mine’s approved roof control plan without incident. (*Id.*) According to

³ Section 75.220(a)(1) provides that “[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.” 30 C.F.R. § 75.220(a)(1).

⁴ Section 75.360(a)(1) provides that “[e]xcept as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval” 30 C.F.R. § 75.360(a)(1).

White Oak, Order No. 8450348 calls into question whether Contestant's ongoing excavation complies with the mine's current roof control plan. (*Id.*) Contestant fears that delaying the ultimate determination on both orders' legitimacy would potentially expose White Oak to numerous similar violations, as well as higher penalties for pattern of violations determinations and flagrant violations. (*Id.* at 2.)

The Secretary responds that Contestant has made no showing that justifies adjudicating these orders on an expedited basis under Commission Procedural Rule 52, 29 C.F.R. § 2700.52. (Sec'y Resp. at 1.) The Secretary maintains that under Commission case law White Oak has failed to meet its burden and that the orders were issued for "standard violations of a roof control plan and do not merit special consideration or treatment at an expedited hearing." (*Id.* at 1–2.) The Secretary emphasizes that the orders in dispute relate to the application of a new roof control plan put in place in April 2014. (*Id.* at 1.) Importantly, the Secretary points out that White Oak does not allege that coal production has been stopped by the issuance of either order. (*Id.*)

Commission Procedural Rule 52 sets forth the procedures for requesting and scheduling an expedited proceeding, but it does not address the standards under which such a request is to be evaluated. 29 C.F.R. § 2700.52. In *Wyoming Fuel Company*, the Commission held that consideration of an expedited hearing request remains within the discretion of the Judge. Further, the Commission indicated that the Act neither mandates immediate hearings in all circumstances, nor requires that a party's motion to expedite proceedings be granted on the terms sought; rather, a hearing must be held "within a period of time reasonable under the circumstances of each case." 14 FMSHRC 1282, 1287 (Aug. 1992). Commission Judges have held that for an operator to be entitled to such consideration it must show: (1) extraordinary or unique circumstances (2) resulting in continuing harm or hardship. *See Sw. Portland Cement Co.*, 16 FMSHRC 2187, 2187 (Oct. 1994) (ALJ).

Here, Contestant's argument boils down to a fear that future MSHA enforcement of the standard, as the inspector applied it in this case, will expose Contestant to a parade of horrors including a series of heightened penalties. White Oak's predicament might qualify as a continuing harm or hardship if it could show MSHA's current enforcement of the roof control plan left the mine shuttered or paralyzed. Contestant falls short of this bar. Indeed, the two orders are not alleged to have affected production in any way, and White Oak abated them by complying with the approved plan, which led to the orders being terminated on July 31, 2014. (Contest Notice, Ex. 1 at 4.) Although White Oak asserts the orders in dispute expose it to possible flagrant violations or pattern of violations determinations under § 110(b)(2) or § 104(e) of the Mine Act, Contestant offers no information to substantiate these concerns. (Contestant Mot. at 2.) Lacking any further details of White Oak's predicament, I am left to hypothesize at the scope and magnitude of harm that Contestant could face. No matter how creative, such hypotheticals are insufficient to carry White Oak's burden of demonstrating continuing harm. Consequently, I determine that any continuing harm or hardship is uncertain and tenuous at best.

White Oak also has not explained why its burden of compliance with the roof control plan ranks as extraordinary among its industry peers. Merely claiming an extraordinary burden does not elucidate how such a unique burden would befall Contestant but not its competitors. Every day operators face possible citations and orders that might impede continued operations. The mere potential for future citations or orders—even those whose enforcement would make

future operations uneconomical or impossible—is not unique to Contestant. *Cf. Consolidation Coal Co.*, 16 FMSHRC 495, 496 (Feb. 1994) (ALJ) (“While I am certain the contestant finds little comfort in the fact that thousands of [section 104(d)] orders are issued each year, it is nonetheless not alone in its alleged predicament. Consequently, there are no special circumstances justifying an expedited hearing.”). White Oak’s circumstances are far from extraordinary.

White Oak will have its day in court; it simply has not shown the need for an expedited hearing. Upon my review of the pleadings, I determine that Contestant has not met its burden of showing extraordinary or unique circumstances resulting in continuing harm or hardship. Therefore, Contestant’s Motion for Expedition of Proceedings is hereby **DENIED**.

II. Stay of Contest Proceedings

Contest proceedings before Commission Judges are typically stayed until the filing of their companion penalty proceedings, at which time the contest and penalty cases are consolidated for hearing and decision. *See Marfolk Coal Co.*, 29 FMSHRC 626 (Aug. 2007). This is an efficient procedure, which conserves judicial resources by not necessitating the holding of two separate hearings in the contest and penalty proceedings. *See* Commission Procedural Rules 12 and 55, 29 C.F.R. §§ 2700.12, 2700.55.

Here, I determine it is proper to stay these contest proceedings until the filing of the companion penalty case for the reasons stated above. Therefore, it is hereby **ORDERED** that these contest proceedings are **STAYED** until the Secretary files a petition for the assessment of civil penalty and White Oak files an answer. Discovery, if the parties so desire, may take place during the stay. The parties are further **ORDERED** to notify my office when they file their respective pleadings (petition and answer) in the penalty proceeding, so I may then consolidate the contest and penalty cases for hearing and disposition.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

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August 22, 2014

SECRETARY OF LABOR, (MSHA), on behalf of Cheryl Garcia, Complainant,	:	DISCRIMINATION PROCEEDING
	:	
	:	Docket No. WEST 2014-789-DM
	:	MSHA Case No.: WE MD 14-16
	:	
v.	:	
	:	
VERIS GOLD U.S.A., INC., Respondent.	:	Jerritt Canyon Mill Mine
	:	Mine ID: 26-01621
	:	
	:	

ORDER DENYING THE COMPLAINANT'S MOTION FOR RECONSIDERATION

This motion is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). On July 16, 2014, I granted the Complainant's Application for Temporary Reinstatement but denied the Secretary's request to order economic reinstatement without the agreement of the Respondent. *Sec'y of Labor o/b/o Cheryl Garcia v. Veris Gold, Inc.*, 2014 WL 3725868, *11-12 (July 2014)(ALJ) ("July 16 Order"). On August 4, 2014, the Secretary subsequently filed a Discrimination Complaint on behalf of Ms. Garcia with the Commission. Cheryl Garcia Discrimination Complaint. On August 15, 2014, the Secretary filed a Motion for Reconsideration of the July 16 Order and again sought the temporary economic reinstatement of the Complainant over the Respondent's objections. Sec'y Mot., 1, 8. For the reasons that follow, the Secretary's Motion to Reconsider is **DENIED**.

JURISDICTION

Pursuant to the Commission's procedural regulations, this court retained jurisdiction over the temporary reinstatement proceeding after the issuance of the July 16 Order. 29 CFR § 2700.45(e) 4. However, if a party seeks review of the temporary reinstatement order itself, Commission rules direct the party to file a Petition for Review of Temporary Reinstatement Order with the Commission within five business days after receipt of the order. 29 CFR § 2700.45(f). Instructions regarding these specific procedures for review were distributed to parties with the July 16 Order. Thirty days after the distribution of the July 16 Order, the Secretary submitted a "Motion for Reconsideration of Decision & Order Denying Temporary Economic Reinstatement for Cheryl Garcia and Supporting Brief" to this court. The Secretary did not specify the procedural basis for the "Motion for Reconsideration" before proceeding to the merits of the Complainant's argument. Sec'y Mot., 1. Given the date and title of the Secretary's Motion, I find that the "Motion for Reconsideration" would ordinarily be improperly filed and time barred by 29 CFR § 2700.45(f).

However, the Secretary does allege that changes in Respondent's management personnel after the July 16 Order should move this court to order economic reinstatement on the basis of potential increased hostility at the mine. Sec'y Mot., 6. As such, I have evaluated the Secretary's argument as a Motion for Modification of the July 16 Temporary Reinstatement Order on the basis of changed circumstances rather than a reconsideration of the findings of the July 16 Order.

THE SECRETARY'S MOTION

The Secretary states that a Commission ALJ has previously ordered temporary economic reinstatement over the objection of a complainant miner when the Court could "reasonably infer" that physical reinstatement would result in workplace disruption. Sec'y Mot, 2; *Sec'y of Labor o/b/o Thurman Wayne Pruitt v. Grand Eagle Mining, Inc.*, 33 FMSHRC 1738, 1739 (July 28, 2011) (ALJ Melick). The Secretary argues from this holding that it is similarly appropriate to order economic reinstatement over the objections of the Respondent when there is evidence that the miner would suffer "intolerable harassment" in returning to work. Sec'y Mot., 3. The Secretary argues that courts outside the Commission have "overwhelmingly concluded" that situations of evident antagonism in the workplace render physical reinstatement a meaningless remedy and require front pay as the most appropriate solution. Sec'y Mot., 3 n.1(citing *Lewis v. Fed Prison Indus.* 953 F.2d 1277(11th Cir. 1992); *Prudential Federal Sav. and Loan Ass'n*, 763 F. 2d 1166, 1172-73 (10th Cir. 1985)).

The Secretary goes on to detail Ms. Garcia's allegations of instances of rude and harassing statements made by then Assistant Mill Manager Chris Jones to Ms. Garcia. Sec'y Mot., 4. The Secretary argues that as the Respondent allegedly failed to adequately respond to Ms. Garcia's complaints regarding Chris Jones, Ms. Garcia was "constructively discharged" and forced to resign to avoid continued hostility. Sec'y Mot., 5 (citing *Sec'y of Labor o/b/o Lonnie Bowling et al*, 21 FMSHRC 265, 278 (Mar. 1999)).

The Secretary additionally states that Chris Jones has recently been promoted to Mill Manager at the Jerritt Canyon Mine and that her former supervisor Jim Johnston has left the mine. Sec'y Mot., 6. The Secretary submitted affidavits from Ms. Garcia and the Secretary's counsel of record, Ms. Seema Patel, stating that Ms. Garcia suffered increased anxiety and fluctuating blood sugar levels when considering the Respondent's offer of physical reinstatement to her previous position. Garcia Aff. 2-3; Patel Aff. 2-3. The Secretary contends that Ms. Garcia's anxiety regarding potential harassment, particularly from the recently promoted Chris Jones, prevented her from returning to her previous position on a full time basis. Sec'y Mot., 7. The Secretary finally argues that the parties' inability to agree to a physical reinstatement plan and Ms. Garcia's anxiety regarding the Respondent's proposed work plan should motivate this court to order temporary economic reinstatement over the objections of the Respondent. *Id.* at 7-8.

ANALYSIS

Section 105(c)2 of the Mine Act mandates that the Commission shall, after finding that miner's discrimination complaint is non-frivolous, "order the immediate reinstatement of the

minder pending final order on the complaint.” 30 USC 815 (c)2. The Commission has stated that “The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits.” *Sec’y of Labor v. North Fork Coal*, 33 FMSHRC 589,592 (Mar. 2011). As such, Commission ordered temporary economic reinstatement is not a remedy provided for or anticipated by the Mine Act.

Indeed, as noted within the July 16 Order, a Commission ALJ has previously held that “parties have no right to require or impose on each other, nor does the Court have authority to impose, economic reinstatement terms that have not been negotiated and agreed to.” *Sec’y of Labor o/b/o Kenneth Wilder v. Bledsoe Coal*, 33 FMSHRC 2031, 2032 (August 2011) (ALJ Gill) (citing *Sec’y of Labor v. North Fork Coal Corporation*, 33 FMSHRC 92). Similarly, it appears that the Commission has only ruled on the enforceability of economic reinstatement when all parties, including the respondent, have voluntarily agreed to the economic reinstatement and then subsequently sought modification or tolling. See *Sec’y o/b/o Gatlan v Ken American Res.*, 21 FMSHRC 1050, 1051 (remanding tolling effect of company -wide layoffs on preliminary economic reinstatement agreement to ALJ); *Sec’y of Labor v. North Fork Coal*, 33 FMSHRC 590-91 (ruling on requested modifications to voluntary temporary economic reinstatement plan).

However, at the request of the operator, an ALJ has ordered economic reinstatement over the objections of the complainant miner and the Secretary. *Wayne Pruitt*, 33 FMSHRC 1738-39. In concluding that returning the miner to work would result in safety risks, Judge Melick noted that the miner had conceded at the temporary reinstatement hearing that he had previously backed a front end loader into a tail roller and caused \$30,000.00 in damages. *Id.* at 1738. As such, although specific evidence regarding workplace disruption had not been presented at the temporary reinstatement hearing, the judge was able to conclude from the corroborating testimony of both parties that the miner presented a documented safety risk to himself and others. *Id.* In this case, the Respondent has not conceded any of Ms. Garcia’s discrimination allegations and has submitted an affidavit stating that Respondent’s management investigated Ms. Garcia’s allegations regarding Chris Jones and found them meritless. Ward Declaration, 3.

Nevertheless, the Secretary states that “Section 105(c) 2 of the Mine Act grants the Commission broad authority in discrimination proceedings ‘to take such affirmative action to abate the violation as the Commission deems appropriate including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.” *Sec’y Mot. 2-3; Wayne Pruitt*, 33 FMSHRC 1739; 30 USC 815(c) 2. However, after reviewing the entirety of Section 105(c) 2, this court is confident the expansive range of remedies listed above applies only to a decision on the merits of a discrimination complaint itself, and is not customarily available within the temporary reinstatement proceedings:

... Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, *and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.* If upon such investigation, the Secretary determines that

the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. *The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. ...*

30 USC 815 (c) 2 (emphasis added).

Given the differing scopes of relief provided for within Section 105 (c) 2 , the language quoted by the Secretary applies only after the Commission has provided an “opportunity for a hearing”, found that a “person commit(ed) a violation of this subsection” and issued an order “based upon findings of fact.”¹ 30 USC 815(c)2. Indeed, the Commission has held that retroactive relief such as backpay and interest listed by the statute as possible remedies after the finding of “a violation” are not available at the temporary reinstatement stage. *Sec’y of Labor v. North Fork Coal*, 33 FMSHRC 592 (“The issue of backpay usually does not arise (during temporary reinstatement) since the miner is not compensated for the earlier period of time between termination and the judge’s order temporarily reinstating him or her”). Thus, as this court has not yet made the findings of fact necessary to order the expansive relief possible after a hearing on the merits, the “immediate reinstatement of the miner” to her former position remains the sole remedy directly provided for by the Mine Act at this stage. 30 USC 815(c)2.

In *Pruitt*, Judge Melick justified the decision to order temporary economic reinstatement over the miner’s objections by finding that, “providing a miner with economic reinstatement by paying full salary and benefits fulfils the policy justifications of the Act by protecting the miners’ financial well-being while he awaits trial on the merits.” *Wayne Pruitt*, 33 FMSHRC 1739. However, an order of economic reinstatement without the operator’s consent would deprive the Respondent of the labor it generally receives during temporary physical reinstatement. *See Sec’y of Labor v. North Fork Coal*, 33 FMSHRC 592-93 (“The temporary reinstatement provisions contemplate that the miner will provide the operator labor in return for wages and benefits”).

Indeed, the Secretary has not presented, nor has this court identified, a single Commission case in which the operator was ordered to provide temporary economic reinstatement over its objections. As such, I find this court could only issue such an order when

¹ Section 105(c)3 of the Mine Act provides that a complainant miner may proceed on her own behalf even after the Secretary has determined that a violation has not occurred and provides for the same hearing opportunity and potential remedies as set forth in Section 105(c)2. 30 USC 815 (c)2-3.

presented with a clear showing of extreme circumstances that would render temporary physical reinstatement an objectively meaningless remedy. Sec’y Mot., 3.

Thus far, the Secretary has not presented any independent corroborating evidence of Ms. Garcia’s allegations of workplace hostility and personal anxiety. The submitted affidavits of Ms. Garcia and her counsel are not supplemented by documentary evidence or third party affidavits.² The Respondent submitted multiple affidavits prior to the July 16 Order that rebutted Ms. Garcia’s allegations of discrimination and workplace hostility. Ward Declaration, 3; Culver Declaration, 3-4. During a conference call concerning this motion, Respondent’s counsel stated that they disputed Ms. Garcia’s harassment allegations but reiterated that they were confident Ms. Garcia could return to work at the mine in a productive fashion. Commission precedent precludes this court from making credibility determinations or detailed findings of fact during the temporary reinstatement proceedings. *Secy of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). Thus, given the underlying dispute of fact regarding the mine’s workplace environment, it would be inappropriate at this point to rule that Ms. Garcia is likely to face hostility at the Respondent’s mine if she returned to her previous position. In addition to findings regarding the occurrence of workplace harassment, this court would be required to determine whether or not that alleged hostility was likely to cause the anxiety alleged by Ms. Garcia and whether or not that anxiety was significant enough to prevent Ms. Garcia from returning to work. It would again be inappropriate to make these sorts of fact and credibility dependent determinations on the basis of the Complainant’s self-supporting affidavits. Indeed, any attempt to make a detailed finding of fact at this preliminary stage could prejudice either or both of the parties’ positions at the merits proceedings.

The Secretary’s argument that courts outside the Commission have awarded front pay in lieu of actual reinstatement ignores the procedural stance of the cited cases. *Lewis v. Fed Ped Prison Indus.* 953 F. 2d at 1280-81 (awarding front pay in constructive discharge case after a hearing on the merits that included testimony from corroborating doctor); *Prudential Federal Sav. And Loan Ass’n*, 763 F. 2d at 1172-73 (awarding front pay after a jury trial when respondent directed explicit hostility towards the plaintiff during the trial). Only after full hearings on the merits did these courts determine that the plaintiffs had successfully met the evidentiary standard necessary to demonstrate constructive discharge and award front pay *Id.* As such, the Complainant’s request for an administrative order of economic reinstatement *prior* to a hearing on the merits lacks authoritative support.³

² In noting the lack of independent corroboration for Ms. Garcia’s allegations, I am not suggesting that independent documentation would be likely to alter my ruling in this matter. Indeed as stated above, a fact finding inquiry during the temporary reinstatement proceeding would normally be improper. I have noted the lack of independent corroboration only to detail this court’s inability to make the findings necessary to impose economic reinstatement upon the Respondent.

³ The *Lewis* court itself indicated that, even after a hearing on the merits, the judicial or administrative award of front pay was highly discretionary, “Front pay remains a special remedy, warranted only by egregious circumstances. Although we have listed several factors that may prompt our resort to this sort of relief, we emphasize that in many cases the remedy of reinstatement will continue to suffice despite the presence of any one of these factors...Not every claim, however legitimate, will produce circumstances which so clearly mandate the remedy of front pay.” *Lewis v. Fed Ped Prison Indus.* 953 F. 2d 1281.

Finally, the Secretary has not produced evidence that the Respondent acted in bad faith regarding the proposed physical reinstatement plan. The Respondent made Ms. Garcia an initial offer of full time reinstatement to her previous position as an Industrial Hygienist with full benefits on July 22, 2014. Garcia Aff., 2. Ms. Garcia did not accept this offer and requested that she be allowed to work part-time weekend shifts on a 4-week trial basis while she continued to work at her current job. *Id.* at 3. The Respondent rejected Ms. Garcia's counter-offer and insisted that she return to work on a full time basis by Aug 4, 2014. *Id.* at 4. By offering to reinstate Ms. Garcia to her previous full-time position with benefits the Respondent clearly attempted to comply with this court's July 16 Order. During a teleconference, Respondent's counsel explained that although the Respondent was willing to reinstate Ms. Garcia to her previous position in order to comply with the July 16 Order, it did not have the financial ability to create a separate part-time position in order to satisfy Ms. Garcia's counteroffer. I find the Respondent's explanation of their position reasonable and absent of any apparent malice towards Ms. Garcia. Section 105(c) 2 of the Mine Act clearly empowers the Commission to reinstate a miner to her previous position after finding that her discrimination complaint is non-frivolous. However, this court is unaware of any authority that requires an operator to agree to, or the Commission to impose, temporary reinstatement terms that differ significantly from the work agreement in place prior to the discrimination claim.

ORDER

For the reasons stated above, the Secretary's Motion to Reconsider is **DENIED**. The parties are directed to conduct good faith negotiations on the standing temporary reinstatement order in conjunction with settlement efforts on the associated merits proceedings. The parties shall provide a status update on these matters to this court no later than September 24, 2014.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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August 22, 2014

MARSHALL J. JUSTICE,	:	DISCRIMINATION PROCEEDING:
Complainant,	:	
	:	
v.	:	Docket No. WEVA 2014-559
	:	MSHA Case No. PINE-CD 2014-01
	:	
	:	
GATEWAY EAGLE COAL CO.,	:	Mine: Farley Eagle Mine
Respondent.	:	Mine ID: 46-01537
	:	
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CORRECTED ORDER REQUIRING THE SECRETARY
TO PRODUCE DOCUMENTS FOR
***In Camera* REVIEW**
AND
CORRECTED ORDER DEFERRING RULING ON
COMPLAINANT’S MOTION TO
ENFORCE SUBPOENA

In this proceeding, the Complainant, Marshall Justice (“Justice”), contends that he was discriminated against by Gateway Eagle Coal Co. (“Gateway”) in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §815(c) (“Mine Act” or “Act”). Justice claims that he engaged in numerous instances of protected activity and that Gateway’s officials responded in hostile ways, ones that would dissuade a reasonable worker from exercising his or her rights under the Mine Act, including changing his shift to less desirable hours.¹

Justice filed his initial discrimination complaint with the Department of Labor’s Mine Safety and Health Administration (“MSHA”), and MSHA investigated. When MSHA declined to proceed before the Commission on Justice’s behalf (30 U.S.C. §815(c)(2)), Justice filed his own complaint with the Commission under section 105(c)(3). 30 U.S.C. §815(c)(3). Gateway

¹ The outlines of Justice’s case are discernable, but the exact nature of Justice’s asserted protected activities and the adverse actions he allegedly suffered are not clear to the undersigned. In a separate order issued today, Justice is directed to submit a chronological list of his asserted protected activities and of the adverse actions he suffered as a result of the activities.

answered. It denied discrimination occurred, and the matter was assigned to the undersigned.² The parties initiated extensive discovery, and as part of his discovery efforts, Justice subpoenaed Carolyn James, the Assistant Director of MSHA's Technical Compliance and Investigation Office. The subpoena directed Ms. James to appear to testify at the September 3 hearing and prior to that to be deposed at a place and time, "[t]o be determined for the convenience of the parties and deponent." Subpoena, *Marshall Justice v. Gateway Eagle Coal Co.*, WEVA 2014-559 (July 11, 2014). Ms. James also was directed to bring with her the complete MSHA file of the Secretary's investigation of Justice's initial complaint.

On July 21, the subpoena was served on Ms. James by Justice's counsel via the U.S. Postal Service. *Id.* The Secretary responded to the subpoena by denying the requests. He explained his position by stating that he was not a party to the case and that the Secretary's policy prevented Ms. James from testifying or being deposed and prevented the investigation file from being turned over without the approval of the Deputy Solicitor of Labor. *See Sec's Op. To Complainant's Mot. To Enforce Subpoena*, Exh. B. (Letter of Katherine E. Bissell, Deputy Solicitor for Regional Operations, U.S. Department of Labor, Esq. (August 12, 2014)). The Secretary noted that Justice earlier had obtained a redacted copy of the investigation file via a Freedom of Information Act ("FOIA") request.³ *Id.* 1. In declining to produce the file, the Secretary raised numerous objections, including the Privacy Act, 5 U.S.C. § 552(a), the deliberative process privilege, the attorney work-product privilege, and the informant privilege. *Id.* 3-4. The Secretary concluded: "[I]n light of the above circumstances, and in accordance with DOL's authority to regulate the provision of records and testimony under 29 C.F.R. § 2.21 *et seq.* . . . DOL does not authorize the release of an unredacted copy of the MSHA investigation file." *Id.* 4.

After receiving the Secretary's response, Counsel for Justice filed a motion to enforce the subpoena. Counsel for the Secretary opposes the motion, again stating that the Secretary is unable to comply due to the decision of the Deputy Solicitor that Ms. James not be deposed or testify and that the investigative file not be produced. Counsel notes that pursuant to his FOIA request, counsel for Justice already has in his possession a copy, albeit redacted, of the file. Counsel states that the Secretary's reason for non-compliance is that:

Under DOL regulations at 29 C.F.R. §2.20 - 2.25, the production of MSHA personnel and documents in response to third-party subpoenas is prohibited unless approved by the Deputy Solicitor of Labor. On August 12, 2014, [the] Deputy Solicitor for

² Once assigned, case was scheduled to be heard on July 29, 2014, but at the request of the parties, the case was continued to September 3, 2014.

³ A facsimile of the redacted copy is in the official case file. By the undersigned's count, it consists of 113 pages, 50 of which are significantly or totally redacted.

Regional Operations . . . responded to the Complainant's subpoena, denying such approval. (Exhibit B.)

WHEREFORE, for the reasons stated above and as set forth in Exhibit B, the Secretary lacks authority to produce the requested . . . witness and documents and requests this Court to deny Complainant's Motion to Enforce Subpoena and to not issue a directive to enforce the subpoena in federal district court.

Sec. Of Labor's Opposition to Complainant's Mot. To Enforce Subpoena 2.

In an attempt to informally resolve the dispute and find a way forward, on August 15, the undersigned convened a conference telephone call with counsels.⁴ In the call, counsel for Justice stated that he no longer requests that Ms. James be deposed or testify, but his request that the investigation file be produced remained extant. Counsel for the Secretary responded that without authorization of the Deputy Assistant Secretary of Labor, the file can not be produced. Counsel noted, as he had in his response to the motion to enforce the subpoena, that the Deputy Solicitor forbade its transmittal. Counsel also noted that in her letter denying authority to produce the investigation file, the Deputy Solicitor invoked several privileges that in her view prohibited revelation of the file's contents.

The undersigned then suggested to counsels that if the proceeding had been one under section 105(c)(2) of the Act and the Secretary therefore had been a party, the matter most likely would have been resolved by submitting the disputed document for *in camera* review by the judge to weigh the information it contained against the relevance of the information and the Secretary's assertions of privilege. The undersigned asked counsels if they would agree to such a procedure to resolve the present dispute. Counsel for Justice stated he would. Counsel for the Secretary stated he would not, that given the determination of the Deputy Solicitor, he had no authority to do so. Moreover, he stated his belief that much of the information was privileged.

Having failed to informally resolve the matter, the undersigned advised counsels that he would consider the merits of Justice's motion to enforce the subpoena. The undersigned further stated that he would not continue the September 3 hearing because the matter was continued once before and because however he ruled, the discovery dispute might well take on a protracted life of its own. Rather, than close the record at the conclusion of the hearing, the undersigned stated he would likely leave it open until the dispute was finally decided. At that point, the undersigned, with the assistance of the parties, would determine what further action, if any, was needed.

⁴ Although not involved in the discovery dispute, counsel for Gateway was a party to the conversation.

RULING

The undersigned concludes that a ruling on Justice's motion to enforce the subpoena is premature, and it is deferred. Instead, and within one week of the date of this order, the undersigned will direct the Secretary to produce the investigative file as it pertains to the Memoranda of Interview of two MSHA inspectors, Steve Hall and Robert Puckett for the undersigned's *in camera* inspection. In conjunction with production of these parts of the file, the undersigned will request the Secretary to identify with specificity each privileged portion of the materials, state the privilege and explain why the privilege is applicable. The undersigned will determine whether the privilege is applicable and hence whether the identified part is "redactable" and will order the Secretary to send a redacted or partially redacted copy to counsel for Justice, or to send counsel a non-redacted copy if no privileges apply. The undersigned is sympathetic to the interests and concerns of both Justice and the Secretary and believes that this balanced approach to production as it pertains to what the undersigned perceives to be the present limited scope of the subpoena, is best suited to protect their interests and meet their concerns.⁵

It is important to realize that this is not a situation in which the complainant is asking the Secretary to produce "everything but the kitchen sink." The undersigned deems Justice to have considerably narrowed the scope of what he is seeking. As noted, when discussing the matter with counsels and the undersigned, counsel for Justice stated that he has dropped his request that Ms. James be deposed and testify. In addition, counsel pointed out that his primary interest in the investigative file is to obtain the Memoranda of Interview of Hall and Puckett.⁶ This

⁵ The undersigned again observes that this is an approach that has worked well in section 105(c)(2) cases.

⁶ In a July 21, 2014 e-mail to Ms James, which counsel states accompanied the subpoena, counsel explained:

I am especially interested in obtaining copies of the Memoranda of Interview . . . that were taken of MSHA Inspectors Steve Hall and Robert Puckett. These two inspectors were the only individuals, other than mine management, to observe certain acts of discrimination that are central to Mr. Justice's claims under Sec. 105(c)(3) of the Mine Act. As you may surmise, the factual information contained in the MOIs . . . taken shortly following the date of the discrimination . . . is unique and [of] central importance to Mr. Justice's case. There is no meaningful substitute for these MOIs, because even if Inspectors Hall and

(continued...)

effectual limitation of the subpoena request suggests to the undersigned that had the Secretary been at all receptive, the dispute might well have been resolved to the satisfaction of Justice with little inconvenience to the Secretary. However, the Secretary was not receptive. Rather than explore whether an accommodation could be reached, counsel cited his lack of authority to produce the documents, effectively closing off discussions.⁷

The first question before the undersigned is whether the investigative file, as it pertains to the MOIs of Hall and Puckett is discoverable? Surely, the answer is, “yes.” Under the Commission’s rules, discoverable material is “any relevant . . . matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.” 29 C.F.R. §2700.56(b). The MOIs of Hall and Puckett, who allegedly were present when Justice engaged in protected activity and when Gateway management officials allegedly responded to that activity, are relevant to Justice’s allegations of discrimination and/or are likely to lead to the discovery of material that is admissible evidence.

Commission Rule 56(b) excludes privileged matter from discovery. 29 C.,F.R. § 2700.56(b). Therefore, the second question is whether the requested material is protected from disclosure by one or more privileges? The undersigned cannot answer the question because rather than submit the materials for *in camera* review and then identify the privileges to which specific parts of the materials allegedly apply, the Secretary has chosen to respond with what is, in effect, a “my way or the highway” approach. Counsel for the Secretary maintains that he has no authority to produce the requested materials because the Deputy Solicitor has determined they may not be released. Without consciously trying to put too grand a gloss on it, it must be stated that the logical conclusion to draw from the Secretary’s position is no more and no less than that the government is the arbiter of its own actions. This is, to say the least, a concept that is antithetical to the very spirit of American jurisprudence. It also must be stated that it is untenable for a Commission judge to accept the position. To do so may leave a section 105(c)(3) complaint without effective recourse to information and evidence necessary to ensure a fair trial, and the primary duty of a Commission judge is to provide fairness to the fullest extent possible. Moreover, it is not only the Complainant who has a concern; so does the public. *In camera*

⁶(...continued)

Puckett were to testify at the hearing in this matter, their recollections could scarcely be expected to be as fresh as they were shortly following this event that occurred nearly a year ago.

E-mail, Samuel B. Petsonk, Esq. to Carolyn James (July 21, 2014).

⁷ This is not to say anything prevents counsels from resuming discussions to informally settle the dispute. Indeed, the undersigned encourages them to do so.

review furthers the public's interest in preventing the unwarranted retention of information by the government.⁸

The undersigned finds instructive and persuasive the observations of Commission Judge Richard Manning when confronted with a similar situation. Noting that the Secretary is “inexorably tied to the events leading up to . . . [the section 105(c)(3)] case” and that the documents sought were a “portion of the information gathered by the Secretary during [his] investigation of . . . [the] complaint,” Judge Manning observed, “The secretary is not a stranger to [the section 105(c)(3)] proceeding and [he] is not disinterested in the outcome of [the] case.” *Hazel Olson v. Triton Coal Company*, 25 FMSHRC 649, 654 (Oct. 2003). Judge Manning went on, “It is clear that Congress intended the Secretary to rigorously enforce section 105(c) of the Mine Act. . . . It is also clear that the Secretary, like all human institutions is not infallible. Although the Secretary has determined that [the operator] did not violate the anti-discrimination provisions of section 105(c), the Secretary should want to see justice done and should not deliberately obstruct [the complainant's] ability to pursue [his] case on [his] own behalf.” *Id.*

Like the complainant in the case before Judge Manning, Justice “believes that the information [he] has requested is crucial to [his] case.” 25 FMSHRC at 654. Like Judge Manning, the undersigned concludes that “it is not clear whether [the complainant] will be able to establish [his] case without the requested information.” *Id.*⁹ And like Judge Manning, the undersigned concludes *in camera* review is necessary and proper.

⁸ As Commission Judge William Moran recently observed, “[T]he trend that began in the late twentieth century [is] that more, not less, public information from government is the preferred practice.” *Bristol Coal Corp.*, 36 FMSHRC ____ (Aug. 15, 2014), slip op.1.

⁹ The undersigned also notes that in addition to rejecting the Secretary's arguments against *in camera* inspection, Judge Manning persuasively rejected the adequacy of a FOIA request as a substitute for production under the Mine Act. *Hazel Olson v. Triton Coal Co.*, 25 FMSHRC 649, 655 (Oct. 2003).

ORDER

Within 5 calendar days of the date of this order, the Secretary is **ORDERED TO PRODUCE** for the undersigned's *in camera* review copies of the complete MOIs of Inspectors Hall and Puckett and all related documents. The Secretary shall also submit a statement as to which privileges, if any, apply to the documents and shall specifically identify the parts of the documents to which the asserted privileges apply. A ruling on Justice's Motion To Enforce Subpoena is deferred until after the Secretary responds to this order.

The parties are advised that the hearing in this matter will go forward as previously scheduled on September 3, 2014 in Madison, West Virginia.

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

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August 25, 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2014-47-M
Petitioner	:	A.C. No. 23-00542-333827
	:	
v.	:	Docket No. CENT 2014-48-M
	:	A.C. No. 23-00542-333827
BEELMAN TRUCK CO.,	:	
Respondent	:	
	:	Mine: Mississippi Lime

ORDER ON RESPONDENT’S MOTION FOR SUMMARY DECISION

Before: Judge Moran

On July 2, 2014 Respondent Beelman Truck Co. (“Beelman” or “Respondent”) filed a motion for summary decision,¹ seeking dismissal of the two citations issued in connection with these dockets. For the reasons which follow, Respondent’s Motion is denied as premature.

Beelman Truck is a transportation company whose drivers haul coal, limestone and other bulk commodities. As self-described in its Memorandum in support of its motion, Beelman notes that “[o]ne of its clients [,] Mississippi Lime Company, (“Mississippi Lime”) [is] “a large underground limestone extraction and crushing operation in [Sainte] Genevieve, Missouri.” Beelman Memorandum at 1. Beelman admits that its employees “transport coal and other bulk commodities to [] locations at Mississippi Lime’s mine site [and that Beelman] also pick[s] up loads of finished limestone from Mississippi Lime to be delivered to offsite customers.” Although Respondent concedes that on occasion its drivers self-load limestone at the mine site, it paradoxically asserts that Beelman employees do not otherwise participate in the loading process and, describing themselves as “mere third party transporters[,]” it notes that they “do not directly partake in the mineral extraction process.” Beelman Memorandum at 2.

On August 30, 2013, a Beelman truck driver, Mr. Terry Hunt, apparently had a heart attack and died, in association with the task of delivering coal to the Mississippi Lime mine site. It is alleged that Mr. Hunt drove through a berm and crashed into a ditch. To the Court’s understanding, it is not definitively known whether the heart attack preceded or followed the

¹ A bevy of documents, both procedural and substantive, followed the initial motion. All submissions were reviewed and considered.

crash. Subsequent to that event, MSHA issued citations to Beelman, alleging violations of 30 C.F.R. §§50.10(a) and 50.12. The former alleges that Beelman failed to contact MSHA without delay and within 15 minutes of an accident at a mine and includes a proposed penalty assessment of \$5,000 (five thousand dollars), while the latter asserts that Beelman altered the accident scene before the MSHA accident investigation was completed, by removing the truck involved. That alleged violation has a \$100 (one hundred dollars) proposed assessment. Respondent contends that it is only a vendor, not an operator, under the Mine Act and also that since the truck driver died at a nearby hospital, not at the mine site itself, there was no reportable “accident” under 30 C.F.R. §50.2(h)(1) and (4). Beelman Memorandum at 2.

As will be set forth in more detail, Beelman contends that it is not an operator under the Mine Act and that, even if it is so considered to be one, it is not an operator under the 30 C.F.R. Part 50 definition of that term.²

Beelman’s Motion for Summary Judgment.

Beelman’s Motion acknowledges that for summary judgment to be granted, there must be no genuine issue of material fact and, if that hurdle is passed, the moving party must then show that it is entitled to summary decision as a matter of law. In support of the first obstacle, Beelman lists some 20 “facts”³ it describes as “undisputed material facts” related to: its relationship with Mississippi Lime; its activity while on Mississippi Lime’s property; and those facts related to Mr. Hunt’s heart attack while he was on Mississippi Lime’s property.⁴

Addressing its arguments that it is not an “operator” under the Mine Act, nor under Part 50, Beelman first contends that it was simply a “vendor completing a sale” and as such it does not fall within the definition of an operator under the Act. After noting that under section 802(d) of the Mine Act, an operator is defined as “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine,” it looks to *Northern Illinois Steel Supply Co.*, 294 F.3d 844, (7th Cir. 2002) as support for its contention. Beelman refers to the *Northern Illinois Steel* case because of its factual similarities to this matter and because the Seventh Circuit considered Northern Illinois’ activities to be *de minimus* and as such fell short of constituting services performed at a mine. Similarly, Beelman contends that its minimal activities at Mississippi Lime “do not rise to the level that could be construed as ‘services performed at a mine’” because it “strictly offers bulk commodity transportation services to and from Mississippi Lime’s [] mine site . . . [and

² Beelman also contends that as the truck driver, Mr. Hunt, died at a nearby hospital, not the mine and that as the cause of his death, a heart attack, is not an “illness” those are additional reasons to vacate the alleged reporting violation. Despite that contention, Beelman adds that the Court need only consider its claim that it is not an operator.

³ Beelman enumerates some 20 (twenty) “facts” which it identifies as uncontested. The Secretary begs to differ on the ground that discovery has not been completed and that, apart from that, some of its initial requests for information have not been supplied to it.

⁴ A twenty-first fact simply lists the two citations issued to Beelman.

therefore] does not participate directly in the mineral extraction process.” Beelman Memorandum at 8-9. Beelman does acknowledge that “[o]n occasion, Beelman drivers will travel to a predetermined pick up location at Mississippi Lime to pick up a load of finished limestone product. . . . [but] that Beelman drivers only travel to the designated location once requested to by Mississippi Lime [and that] [o]nce at the designated location, Mississippi Lime employees generally complete the entire loading process without the assistance of Beelman employees. [Thus Beelman argues that] unlike in Northern Illinois Steel Supply Co., Beelman drivers do not assist or otherwise facilitate Mississippi Lime employees [but it admits that] [o]n rare occasions (only when picking up Code-L and Hydrated Lime), estimated to be less than fifteen percent of the time, Beelman employees will utilize a self load out whereby they load their trucks by simply pushing a button on the self load out. [However, Beelman dismisses this activity, arguing that] “[u]sing the self load out feature . . . is no different than the NIC employees in Northern Illinois Steel helping the operator ‘rig’ the steel [and that] [i]f anything, merely pushing the self load out button is less of an activity.” Beelman Memorandum at 9. Regarding its reliance on the *Northern Illinois Steel Supply* decision, it is noted that Beelman is based out of Illinois and the Mississippi Lime operation in issue is in Missouri. The Seventh Circuit includes Illinois, but not Missouri.

Beelman anticipates a problem with its reliance upon the *Northern Illinois Steel Supply* citation, because it recognizes that two other federal circuit courts have rejected the interpretation of minimal independent contractor activity advanced by the Seventh Circuit. It attempts to distinguish those cases, *Otis Elevator Company v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990) and *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 (10th Cir. 1996), both of which it admits stand for the contention that “any independent contractors, including Beelman, are “operators” under the Mine Act.” Beelman Memorandum at 10. However, Beelman notes that those decisions were decided before the *Northern Illinois Steel Supply* decision and then suggests that, in any event, those cases suggest that “there may be a point at which an entity’s contacts with a mine would be so attenuated as to remove it from the jurisdiction of MSHA,” and therefore those Circuits did not reject a *de minimis* services defense to MSHA jurisdiction. Beelman Memorandum at 10.

Beelman then turns to its alternative contention that, even if it is an operator under the Mine Act definition, at section 802(d), it is not an operator under the narrower definition of the term, per 30 C.F.R. § 50.2(c)(2). In this regard it notes that under that regulatory provision, “Operator means [t]he person, partnership, association, or corporation or subsidiary of a corporation operating a metal or nonmetal mine, and owning the right to do so, and includes any agent thereof charged with responsibility for the operation of such mine.” *Id.* at 12. It also observes that the decision of another administrative law judge held that, although an independent contractor might meet the definition of an operator under the Mine Act, it was not an operator under Part 50’s use of that term. Beelman at 12-13, citing *Dickenson –Russell Coal Co., VA* 2009-393-R (Jan. 16, 2013) (ALJ Feldman) *affd.* *Dickenson –Russell Coal Co., LLC v. Secretary of Labor*, 747 F.3d 251 (4th Cir. 2014).

The Court first notes that decisions of other administrative law judges are of no precedential effect. Their impact is limited to the persuasive impact of their decisions, if any. Beyond that observation, the Court considers the *Dickenson –Russell Coal Co.* case to be an odd source for reliance, because the 4th Circuit affirmed that *every* operator subject to the reporting requirement had the duty to report a qualifying accident. There, it was in fact the independent contractor who reported the incident while the operator contended that action relieved it of its own duty to report it. The administrative law judge issued a summary decision, holding that the operator still had a duty to report. In its decision the 4th Circuit stated “As mandated by these regulations, *Each operator shall report each* accident, occupational injury, or occupational illness at the mine. . . . [and that] [a]ccordingly any person or entity qualifying as an ‘operator’ under this regulation was required to report within 10 days accidents or injuries occurring at the operator’s mine by filing an MSHA Form 7000–1. . . . The Part 50 regulations include their own definition of the term ‘operator’ that is identical to the statutory definition except that it does not expressly include ‘independent contractor’ within the meaning of ‘operator’ [but that despite this omission] [t]here may be multiple ‘operators’ engaged simultaneously at a single mine even though only one of them owns the mine. [citing] *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm’n*, 528 F.3d 310, 315 (4th Cir. 2008).⁵” 747 F.3d 251 at 254.

It is true that the administrative law judge held that Part 50 controlled the definition of an operator in the context of the litigation, but as the independent contractor *did in fact* report the injury and the issue was whether Dickenson had to report it as well, the judge, unnecessarily in this Court’s view, as it was not a required determination, held that the independent contractor’s reporting of the incident was “gratuitous.”⁶ *Id.* at *256. Thus, it should be emphasized that *Dickenson* was not about the independent contractor’s obligation to file a report, though the judge commented upon it anyway. Thus, the administrative law judge’s comments about the independent contractor were purely dicta.

Continuing with its argument that it is not an operator under the Part 50 definition of that term, Beelman notes that it does not own the right to operate the Ste. Genevieve mine site, has no corporate relationship to Mississippi Lime and, as it has stated several times in its submission, it is “simply an unaffiliated third party who exclusively provides bulk transportation services to and from the Ste. Genevieve mine site. *Id.* at 17. Referring again to the administrative law judge’s reasoning in *Dickenson –Russell Coal Co.*, Beelman adds that it was not an agent either,

⁵ The case was different in other respects as well. The independent contractor supplied miners to work at Dickenson. The employee, who was injured while employed by the independent contractor, was under the control of Dickenson.

⁶ The 4th Circuit noted that *Auer* deference, which is akin to *Chevron* deference, is due where an agency is interpreting its own regulation *and* the matter is ambiguous. *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), instead of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), which establishes the deferential framework for reviewing agency interpretations of statutes. Where the regulation is ambiguous, the Court noted that “the agency’s interpretation controls unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’” The Court in *Dickenson* added its “review of the agency’s interpretation in this context is therefore ‘highly deferential.’” 747 F.3d 251 at 257.

because it was not “ ‘operating controlling or supervising’ mining activities at the mine when its employee was injured.” *Id.* at 18.⁷

Finally, Beelman contends that even if it is determined to be an “operator” under the Mine Act or Part 50 definitions of that term, no “accident” occurred “because the official place of death was the emergency department of the Ste. Genevieve County Memorial Hospital, [and therefore] not [at] a mine site under MSHA jurisdiction.” It notes that the citation was based on “30 C.F.R. § 50.2(h)(1) which provides that a reportable accident occurs whenever there is ‘a death of an individual at a mine.’ . . . [and that] [i]t is undisputed that on September 12, 2013, Ste. Genevieve County Coroner Leo C. Basler, issued a letter stating that at 10:53 am on August 30, 2013, Mr. Hunt arrived by ambulance to the ER at Ste. Genevieve County Memorial Hospital [and that] . . . Mr. Basler’s letter further explicitly states that “**Mr. hunt was pronounced dead in the ER at 11:11 AM by Dr. Bruce Harrison**” and that the “[o]fficial place of death is **ER, Ste. Genevieve County Memorial Hospital, Aug. 30, 2013, at 11:11 AM.**” Beelman Memorandum at 20 (emphasis in original).

The Secretary’s Answer and Objection to Respondent’s Motion for Summary Decision. (“Secretary Opposition”)

Pursuant to 29 C.F.R. §2700.67(d), the Secretary filed its opposition to Beelman’s Motion. The Secretary’s primary response is that there are material facts in dispute and that discovery is not complete and that those reasons make the motion for summary judgment premature and therefore inappropriate. The Secretary then proceeds to identify a host of items, each identified as “undisputed” by Beelman but, for reasons identified in its Opposition, it contends are in dispute. Sec’s Opposition at 3-9, listing disputed items “a” through “u.” Most of these reasons rest upon discoverable information which the Secretary has not yet come into possession. Copies of agreement(s) between Beelman and Mississippi are needed and it is likely that depositions will be in order as well.

Addressing the legal arguments, the Secretary asserts that “Beelman is an Operator under Section 3(d) of the Mine Act because it is an independent contractor performing services at a mine site and that a heart attack is a reportable injury since it is a serious injury that could reasonably lead to death.” *Id.* at 9. The Secretary goes on to note that “Beelman is a bulk commodity transportation company . . . [with] duties [] to haul product in and out of Mississippi Lime’s mine site. Drivers drive trucks down a common access road. The inspector has observed Beelman employees perform duties associated with hauling. . . . These duties include hooking up hoses for pneumatic loading and using harnesses to access the top of their bulk tanker trucks to open and close the hatches. . . . Beelman has a steady line of trucks at the mine daily. . . . The truck traffic is nearly constant. . . . The quarry operator, Mississippi Lime, requires and

⁷ In support, Beelman points out that its “employees never operate, supervise, or take part in the mineral extraction process at Mississippi Lime; Beelman employees never repair or maintain equipment owned by Mississippi Lime; at no time do Beelman employees operate or use any Mississippi Lime equipment or machinery during the delivery and unloading of product; Beelman employees do not assist Mississippi Lime in the loading of product; and most importantly, once on Mississippi Lime property, Beelman employees, including Mr. Terry Hunt on the day of his heart attack, are/was under the complete control and supervision of Mississippi Lime personnel.” *Id.* at 19.

receives a high volume of coal from Beelman to manufacture its product, dry lime, for sale and distribution into the stream of commerce.” *Id.*

The Secretary maintains that Beelman certainly fits within the definition of an operator under the Mine Act, noting that the definition at section 3(d) includes “any independent contractor performing services or construction at such mine[.]” Noting the analytical steps to be applied in interpreting the provisions of the Mine Act, beginning with whether the intent is unambiguously expressed, then moving to deference to the Secretary’s reasonable interpretation if a provision is ambiguous, and finally that, as a remedial statute, it is to be liberally construed, the Secretary points out that “[b]ecause Beelman has over one hundred (100) trucks driving on the mine site and down common access roads on the mine site daily[,], both its drivers and Mississippi Lime’s miners at the mine site are exposed to safety hazards present at the mine site and created by Beelman’s activities at the mine site. One of Beelman’s many drivers, decedent Mr. Hunt, drove through a berm and crashed into a ditch. This type of safety hazard should be anticipated due to the sheer volume of Beelman trucks at the mine site on a daily basis.” Opposition at 10-11.⁸

The Secretary contends, citing cases such as “*Musser Engineering, Inc.* 32 FMSHRC 1257, 2010 WL 4563000, *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990), *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 999-1000 (10th Cir. 1996), *Northern Illinois Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844, 848-49 (7th Cir. 2002) that this activity far exceeds any *de minimus* characterization, and that Beelman’s activities are “integral” to the mine’s activity.⁹ It also notes that in *Bulk Transportation Services, Inc.*, “[a] coal hauling company was found to have a ‘presence’ at the mine that was not *de minimis* but rather was sufficient for MSHA jurisdiction, when “there is a constant flow of truck drivers in and out . . .,” and that they generally haul four to five days per week, [and that] Bulk agreed to transport approximately 30,000 tons of raw coal and 20,000 tons of clean coal per month, the Commission found Bulk, “was an independent contractor-operator... services in hauling coal were essential and closely related to the extraction process.” Sec. Opposition at 12.

The Secretary also references that the Tenth Circuit, speaking to the statutory provision, has held that “MSHA’s interpretation -- that independent contractor status is to be based not on the existence of a service contract or control [over mining-related operations], but on the

⁸ Without prejudging the issue, the Court would note that the facts in this case appear to be remarkably different from those addressed by this Court in “*Hanson Aggregates Midwest*, KENT 2012-1283-M (August 5, 2013) (ALJ Moran) (holding that a heart attack was an “illness” and not an “accident” and thus not a reportable event under 30 C.F.R. § 50.10(b)),” Beelman’s characterization of the holding, as cited in Beelman’s Memorandum at 2-3. The Court would comment that at least at this point in the uncompleted development of the facts, whether they are ultimately contested or not, there appears to have been an accident preceding the heart attack, a colorable distinction from *Hanson*.

⁹ The Secretary also identifies another factual dispute in that it asserts “the inspector has observed Beelman employees hooking up hoses for pneumatic loading and using harnesses to access the top of their bulk tanker trucks to open and close the hatches. (Secretary’s Exhibit 2) Both activities are integral parts of the mine’s activity of producing dry lime and then loading it into tanker trucks for distribution into the “stream of commerce[.]” Opposition at 11.

performance of significant services at the mine -- is a reasonable construction of the statute entitled to deference.” *Id.* at 12, citing *Joy Technologies*, 99 F.3d 991 at 998 (10th Cir. 1996).¹⁰

The Court, in noting the Secretary’s contentions, is not deciding these issues now, for the same reason that it is denying Beelman’s motion - it is premature to do so at this point.¹¹

Conclusion.¹²

On the basis of the preceding discussion, Respondent’s Motion for Summary Judgment is DENIED. The legal determinations cannot be reached until the factual issues have been resolved. One does not reach that second, legal determination, hurdle to summary judgment until the first hurdle, involving the facts, has been successfully surmounted. This decision does not foreclose a later examination in the context of a renewed motion for summary judgment, although it is possible, if the material facts are not in dispute, that the Court may then be dealing with cross-motions on the legal issues. The Secretary should immediately begin its discovery, if it has not already done so. The parties are directed to file a status report to the Court within 60 (sixty) days and to also submit that report to the Court’s email at: wmoran@fmsihrc.gov.

SO ORDERED.

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

¹⁰ The Secretary also contends that, even taking Beelman’s *de minimus* argument, its activities exceed such a test and therefor meet such a measure for it to qualify as an independent contractor.

¹¹ The Secretary briefly speaks to the issue of whether a heart attack is a reportable injury. See Opposition at 14-15. The Court has already made some preliminary observations on this issue, but again in the context of this Motion, it believes it would be premature to resolve this question.

¹² Subsequent to the motion and opposition, the Respondent filed a Reply, the Secretary filed a motion to strike that Reply, the Respondent filed “suggestions” in opposition to the Reply and the Secretary then filed a reply in opposition to Respondent’s Reply. Respondent’s Reply refers to Rule 56 of the Federal Rules of Civil Procedure and it contends that courts are not required to allow parties to conduct discovery. The Court, upon reviewing the submissions, as described above, certainly is of the view that the Secretary did more than provide “the slightest showing” to defeat the motion for summary judgment. The Court is also of the view that, absent some gross failure or delay, not present here, it would be inappropriate to curtail the search for the facts, where discovery is incomplete. Further, determinations in motions for summary judgment are within the Court’s informed discretion, which discretion the Court has exercised here. The Court has addressed the other contentions, essentially re-raised in Beelman’s Reply, and concluded that summary judgment is premature at this time. **In the future, the parties are directed to first seek the Court’s approval before filing replies.**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 25, 2014

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	Docket No. PENN 2011-262
Petitioner,	:	A.C. No. 36-05466-248226
	:	
v.	:	
	:	
EMERALD COAL RESOURCES LP,	:	
	:	
Respondent.	:	Mine: Emerald Mine No. 1

**ORDER GRANTING SECRETARY’S MOTION FOR SUMMARY DECISION
and ORDER TO PAY**

Before: Judge Harner

On November 15, 2013, the Secretary filed with the undersigned a Motion for Summary Decision and Determination of Penalty in PENN 2011-262. This docket includes one citation (No. 7021263), which was assessed as Significant and Substantial (“S&S”), moderate negligence, and 3 persons affected, with a civil penalty of \$1,026.00.¹ On December 2, 2013, the Respondent filed a Response to Secretary’s Motion for Summary Decision and Determination of Penalty. In its response, the Respondent asserted that the Secretary’s Motion should be denied as there exists a material dispute of fact, or in the alternative, granted to the Respondent. On December 17, 2013, the Secretary filed an Opposition to Cross Motion for Summary Decision. For the following reasons, I grant the Secretary’s Motion for Summary Decision.

¹ This case was assigned to me following Judge Gary Melick’s retirement from the Commission. Although this docket was originally designated by the Chief Administrative Law Judge as a Simplified Proceeding under 29 C.F.R. Part 2700, Subpart J, Judge Melick issued as order discontinuing Simplified Proceedings on August 25, 2011. On October 12, 2012, I issued an Order granting the Secretary’s Motion to amend the single citation in the docket from 30 C.F.R. §70.100(a) to 30 C.F.R. §70.101.

The Regulation

Section 70.101 Respirable dust standard when quartz is present.

When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with §70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10.

Example: The respirable dust associated with a mechanized mining unit or a designated area in a mine contains quartz in the amount of 20%. Therefore, the average concentration of respirable dust in the mine atmosphere associated with that mechanized mining unit or designated area shall be continuously maintained at or below 0.5 milligrams of respirable dust per cubic meter of air ($10/20=0.5$ mg/m³).

Undisputed Facts

Based on documents created by MSHA, depositions, as well as Respondent's responses to discovery, the following facts are undisputed.

- 1) Respondent is an "operator" as defined in §3(d) of the Act, 30 U.S.C. § 802(d), at the Mine at which the subject Citation was issued. *Exhibit 2.*
- 2) The operations of Respondent at the Mine at which the subject Citation was issued are subject to the jurisdiction of the Mine Act. *Id.*
- 3) This case is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to Sections 105 and 113 of the Act. *Id.*
- 4) The subject Citation was properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated therein as required by the Mine Act. *Id.*
- 5) The mine tonnage, controller tonnage, and violations per inspection days set forth in Exhibit A are true and accurate for the time period listed. *Exhibit 1.*
- 6) On June 24, 2010, MSHA took a respirable dust sample at the Mine on the designated area return side bolter C-4 section. When analyzed the sample contained 38% quartz. *Exhibit 3.*

- 7) Because the MSHA sample contained more than 5% quartz, in accordance with 30 C.F.R. § 70.101, MSHA was required to start the process of placing the Respondent on a reduced standard. *See* 30 C.F.R. § 70.101.
- 8) In accordance with 30 C.F.R. § 70.101 and the Handbook, Chapter 1 Respirable Dust, Section IV, M: Establishing a Reduced Respirable Dust Standard ("Section M") on July 29, 2010, MSHA notified Emerald of the June 24, 2010, sample results and its right to submit an optional sample for quartz analysis. *Exhibit 4; Exhibit 3.*
- 9) MSHA has followed the procedures laid out in Section M to establish a reduced standard as mandated by 30 C.F.R. § 70.101 since November 1985. *Declaration of Robert Thaxton, Exhibit 5.*
- 10) On August 10, 2010, Emerald took an optional sample for submission to MSHA in accordance with the provisions of Section M. The Optional sample contained 5% quartz. *Exhibit 3.*
- 11) As specified in Section M, if the percent of quartz found in the MSHA sample differs by 2 percent or less from that found in the operator's first optional sample, the two samples will be averaged to set the new reduced standard. However, if the samples differ by more than 2 percent, the operator is given the opportunity to take a second optional sample. The standard is then set based on the average of all three samples, or if no second optional sample is taken or the sample is voided, then the standard is set based on the sample with the highest concentration of quartz. *Handbook Section M(2)(b).*
- 12) As the August 10, 2010, sample was more than 2 percent different than MSHA's June 23, 2010, sample, the Respondent was given the opportunity to either have the reduced standard set based off of the sample with the highest concentration of quartz or take a second optional sample. *Exhibit 3.*
- 13) On August 30, 2010, Emerald took a second optional sample with a cassette number of 51067982 for submission to MSHA. On September 2, 2010, Emerald's August 30, 2010, second optional sample was analyzed by MSHA's lab and was voided as insufficient weight gain ("IWG"). *Exhibit 6.*
- 14) Emerald's August 30, 2010, sample was voided as IWG in accordance with MSHA policy contained in Section M because the sample had a total weight gain of less than .450 mg, and did not contain at least .025 mg of quartz. *Id.*
- 15) Emerald's Second Optional Sample had a weight gain of .345 mg and had a quartz content of .020 mg. *Id.*
- 16) When determining whether to use a sample in the standard setting process, MSHA uses samples that meet the NIOSH Part B Standard (alternatively referred to as the P7

standard); samples that do not meet this standard are voided because there is “no confidence” in the results of the sample. *Thaxton 39:1 - 41:8, Exhibit 8.*

- 17) When a sample complies with the NIOSH Part B Standard, there is a 95% level of confidence that the result of the analysis is within 25 percent of the true value of the sample. *Id.*
- 18) According to Mr. Thaxton and Mr. Fenlock, samples with a weight gain of less than .450 mg and containing less than .025 mg of quartz do not meet the NIOSH Part B standard. The Respondent's Expert, Mr. Hall, also stated that he believed samples containing .040 or .050 or below of quartz would not meet the NIOSH Part B standard. *Exhibit 8; Hall 144:4 - 144-13, Exhibit 9.*
- 19) Mr. Hall further stated that MSHA has a rational basis for excluding samples, like the Respondent's second optional sample, that had a weight gain of less than .45 mg and had less than .025 mg of quartz. *Hall 142:13 - 144-17, Exhibit 9.*
- 20) As the second optional sample was voided, in accordance with Section M, the reduced standard was set using the respirable dust sample with the highest concentration of quartz present, which in this case was MSHA's original sample. *Exhibit 10.*
- 21) On September 10, 2010, Emerald Mine No. 1 was placed on a reduced respirable dust standard of .3 mg/m³. *Exhibit 2.*
- 22) The .3 mg/m³ reduced standard was derived from the June 24, 2010, MSHA sample that contained 38 % quartz and in accordance with the procedures outlined in Section M. *Exhibit 10.*
- 23) Emerald's October-November 2010 bimonthly sampling of the designated area 9290 return side bolter resulted in a 0.268 mg/m³ concentration, which was compliant with the applicable 0.3 mg/m³ standard. *Exhibit 2.*
- 24) Respondent's December/January 2011 bimonthly sampling of the designated area 9290 return side bolter resulted in a 0.472 mg/m³ concentration, which exceeded the applicable 0.3 mg/m³ standard in effect. *RFA 7, Exhibit 2.*
- 25) All samples in this matter were analyzed using the IR quartz method of analysis. Mr. Hall agrees that this is an appropriate methodology to analyze quartz in respirable coal mine dust. *Hall 128:20 - 128:22, Exhibit 9.*
- 26) Mr. Hall has stated that "I have no reason to doubt their [the 5 samples making up the December/January bimonthly sampling] validity represented conditions that existed at that point in time." *Id. at 152:17 - 152:21.*

- 27) Mr. Hall stated, during his deposition, that the June 24, 2010, sample that contained 38% quartz was representative of the conditions in the mine at the time it was taken. *Id. at 110:8-110:13, 149:10 -149:13, 151:12-151:15.*
- 28) Respondent did not formally request a reevaluation of the designated area 9290's 0.3 mg/m³ standard any time between being placed on the reduced standard on September 10, 2010, and the issuance of the citation on January 18, 2011. *Exhibit 2.*
- 29) Based on the December/January bimonthly sampling results, the Respondent was issued Citation 7021263. *Exhibit 11.*
- 30) Citation 702163 was issued as an S&S, reasonably likely citation, with a reasonable likelihood of causing a permanently disabling injury and affecting 3 miners. *Id.*
- 31) The Respondent has not produced any evidence that the miners were not actually exposed to respirable dust in the environment.
- 32) Emerald's payment of the total proposed penalty of \$1,026.00 in this matter will not affect Respondent's ability to continue in business. *Exhibit 2.*

Summary Decision Standard

The Court may grant summary decision where the “entire record...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); *see also UMWA, Local 2368 v. Jim Walter Res., Inc.*, 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is “a fact that is significant or essential to the issue or matter at hand.” *Black's Law Dictionary* (9th ed. 2009, *fact*). “There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor.” *Greenberg v. Bellsouth Telecommunications, Inc.*, 498 F.3d 1258, 1263 (11th Cir. 2007) (citation omitted). The court must evaluate the evidence “in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn “from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.” *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party’s claims. *Celotex*, 477 U.S. at 323. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’ ” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

The Respondent argues that Summary decision should not be granted because there are material facts in dispute.² As examples, it takes issue with the Secretary's labeling of certain sample results that do not meet its standard as it having "no confidence" in the results, and with MSHA's assertion about why it has no confidence in certain results. *Resp. Brief*, note 2. However, these facts are immaterial to the present dispute. Furthermore, the Respondent argues that the Secretary's characterization of its rule as a "non-binding interpretative rule," could be characterized as a dispute of material fact that would preclude summary decision. *Id.* at 12. This issue is at the heart of the Respondent's arguments, and it is certainly material. However, it is not a question of fact, but rather one of law. Having found no material facts in dispute, I find that this case is appropriate for summary decision.

Analysis

1. The procedures contained in Section M of the Handbook constituted an interpretive rule

The Respondent makes two primary arguments for why summary decision should be granted in favor of Emerald. First, it argues that the procedures contained in Section M of the Handbook constitute an improperly promulgated legislative rule because there were no advance notice and public comment procedures. In the alternative, the Respondent argues that the procedures were unreasonable, and MSHA acted arbitrarily and capriciously in adopting a reduced dust standard. Each argument will be considered in turn.

The Administrative Procedures Act ("APA") requires that agencies must provide advance notice and solicit public comments for legislative rules, but not for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. §553(b)(3)(A). The distinction between legislative and interpretive rules is often unclear, having been described by various courts as "enshrouded in considerable smog," *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), "fuzzy," *American Hospital Association v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987); and appearing "rather metaphysical." *American Mining Congress v. MSHA*, 995 F.2d 1106, 1110 (D.C. Cir. 1993). Administrative law scholar, Robert A. Anthony, has noted that "the subject of nonlegislative rules breeds bewilderment and frustration." Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: *Lifting the Smog*, 8 Admin. L.J. Am. U. 1, 6 (1994). However, these nonlegislative rules are necessary for an agency to function. "An agency has, of course, the power, indeed the inescapable duty, to interpret its own legislative rules...just as it has the power and duty to interpret a statute that it enforces. *Hoctor v. U.S. Dept. of Agriculture*, 82 F.3d 165, 168 (7th Cir. 1996).

Legislative rules are those that "impose new duties upon the regulated party", while interpretative rules "seek only to interpret language already in properly issued regulations." *Chao v. Rothermel*, 327 F.3d 223, 227 (3rd Cir. 2003). "If the agency is not adding or amending language to the regulation, the rules are interpretive. Interpretive, or 'procedural,' rules do not themselves shift the rights or interests of the parties, although they may change the way in which

² Presumably, this is in the alternative to its argument that summary decision should be granted in favor of Emerald.

the parties present themselves to the agency.” *Id.* However, “a rule does not become a legislative rule because it effects some unanticipated change; otherwise only superfluous rules could qualify as interpretive rules. We do not think that interpretive rules must be so useless.” *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008) (citations omitted); see also *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (“While we have said that interpretive rules “cannot go beyond the text of a statute, *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308 (D.C.Cir.1991), we do not, of course, mean to imply that an interpretive statement may only paraphrase statutory or regulatory language. Indeed, a mere paraphrase would hardly be interpretive at all. Accordingly, an interpretive statement may ‘suppl[y] crisper and more detailed lines than the authority being interpreted’ without losing its exemption from notice and comment requirements under § 553.’ ”)

At issue here is whether Section M of the Handbook is a legislative or interpretive rule. The Respondent argues that the rule is legislative because MSHA used the procedures as a basis for determining that a violation existed. Further, the Respondent argues that the procedures in Section M established an enforceable standard that placed operators at risk for citations and civil penalties.

In *American Mining Congress v. MSHA*, 995 F.2d 1106 (D.C. Cir. 1993) (hereinafter referred to as “AMC”), the D.C. Circuit reconciled previous judicial analyses by laying out a four-part test to determine whether a rule was legislative or interpretive as follows:³

³ Courts have used several other tests to determine whether a rule is legislative or interpretive. For example, the original “legal effects” test asks whether the agency has used the nonlegislative rule to create a binding norm such that it limited its discretion in future adjudications when it promulgated the rule. *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974). The “substantial impact” test asked whether the rule had a substantial impact on the regulated parties. See e.g. *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478 (2nd Cir. 1972). Administrative law scholar Jacob E. Gersen has described the doctrine distinguishing between legislative and interpretive rule as an evolution with three distinct strains.

First, until approximately the late 1970s many courts distinguished legislative from nonlegislative rules by asking whether the rule would have a substantial impact on affected parties. The basic intuition was that procedural formality should be a prerequisite for rules with big impacts. Over time, a general, if not altogether clear, trend has emerged towards various versions of a legally binding test, in which a rule is deemed legislative if and only if it is legally binding. Some courts emphasize the intent of the agency to make the rule legally binding while others focus on the legally binding effect of the rule on regulated parties. Other courts have experimented with variants, for example, the “practically binding” test. Because an agency might pursue only enforcement actions alleging a violation of the given policy, private parties might rationally treat legally nonbinding documents as though they were binding. A third alternative defines the difference procedurally, simply defining legislative rules as those that result from notice and comment, rather than those that require notice and comment.

Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. Chi. L. Rev. 1705, 1712-13 (2007).

The AMC test will be applied herein because it addressed many of the previous tests in creating its four-part analysis:

(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

Id. at 1112. The court has since modified this test by finding that the second prong was unnecessary as it was little more than “a snippet of evidence of agency intent.” *Health Ins. Ass’n of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994). Applying the AMC test, it is clear that Section M was an interpretative rule that is excepted from the APA’s notice and comment requirements.

The first prong of the test requires the court to inquire whether in the absence of the rule at issue there would not be an adequate legislative basis for enforcement action to confer benefits or ensure performance of duties. Section 70.101 was promulgated in 1980, following notice and comment. Part 70 of the regulations requires the mine to have certified persons use certified devices in sampling respirable dust in the mine. 30 C.F.R. §70.1 *et seq.* The regulations require an operator to take respirable dust samples at various times and places throughout the mine, and to transmit those samples to MSHA. 30 C.F.R. §§ 70.201, 70.207, 70.208, 70.209, 70.210, and 70.220. When the respirable dust in the mine atmosphere of active workings contains more than 5% quartz, the operator is required to continuously maintain the average concentration of respirable dust in each shift at or below a reduced standard determined by MSHA. 30 C.F.R. § 70.101. The formula for determining the reduced standard is contained in the regulation. It requires MSHA to divide the percent of quartz into the number 10, and that figure, expressed in milligrams per cubic meter, is the reduced standard. *Id.* As an example, the regulation provides that if a mine contained quartz in the amount of 20%, then the reduced standard would be 0.5 mg/m³. *Id.*

Section M of the Handbook provides procedures for determining if, and by how much, the respirable dust levels in a mine exceed 5% quartz. However, just because there are technical procedures articulated in the Handbook, this does not necessitate that it be considered a legislative rule. *Hector v. U.S. Dept. of Agriculture*, 82 F.3d at 171 (“Especially in scientific and other technical areas, where quantitative criteria are common, a rule that translates a general norm into a number may be justifiable as interpretation.”) The regulations do not specify the precise procedures by which MSHA should determine when the respirable dust samples are to be considered in excess of 5% quartz. Therefore, Section M provides an optional procedure that is, in most respects, beneficial to the operator. According to the procedures in Section M, if a dust sample appears to exceed the 5% allowable limit, the mine operator may submit up to two additional option samples, within certain parameters, and have the reduced standard based on an average of these samples. If the operator chooses, it may simply ignore Section M and have its reduced standard based upon its initial sample that was in excess of 5% quartz. However, if an operator wishes to avail itself of Section M’s optional procedures, it can lead to a reduced standard that is higher, and therefore easier to meet, than what it would have been had it been based solely on the first sample.

The regulation provides the maximum allowable dust limits in the mine atmosphere (5%); it provides that a reduced maximum allowable dust limit will be imposed on a mine if it exceeds the 5% maximum; and it provides the formula for determining the reduced standard (10/x%). If Section M did not exist, the regulations would simply seem to require MSHA to base the reduced standard on the original samples transmitted by the operator, without allowing any subsequent optional sampling. Therefore, § 70.101 provides an adequate legislative basis for enforcement action to ensure the performance of duties. As in *AMC*, the regulations themselves contain all the necessary requirements, and “there is no legislative gap” that required the Handbook “as a predicate to enforcement action.” 995 F.2d at 1112.

In the seminal *AMC* case, the DC Circuit found that MSHA Public Policy Letters (PPLs) which stated that certain x-ray results need to be reported under Part 50 were interpretive rules. Part 50 required that whenever certain occupational injuries were “diagnosed”, the operator was required to report the diagnosis within 10 days. 995 F.2d at 1107. The PPLs stated that certain chest x-ray results constituted a diagnosis that the miner had silicosis or pneumoconiosis for the purposes of the Part 50 reporting requirements. *Id.* at 1108. Applying the first prong of the test articulated by the court, it found that the Part 50 regulations contained the requirements and the PPL merely interpreted one of these requirements. *Id.* at 1112.

Similarly in *Chao v. Rothermel*, the D.C. Circuit held that MSHA’s procedures for bi-monthly dust sampling contained in its handbook were not legislative. 327 F.3d 223 (D.C. Cir. 2003). The court stated:

The Handbook Guidelines do not alter the existing health standards, and they do not place additional burdens on mine operators to comply with those standards. Mine operators must comply with the Mine Act standards regardless of how the MSHA enforces them, or whether it performs respirable dust inspections. These Guidelines do not determine substantive rights, but merely outline a uniform plan for the MSHA inspectors around the country to effectively inspect mines.

Id. at 227.

Though the second prong in the *AMC* test is no longer necessary, it is worth noting that MSHA has not published Section M in the Code of Federal Regulations. The third and fourth prongs similarly point to the rule being interpretive. MSHA has not explicitly invoked its general legislative authority, and Section M does not amend any prior legislative rule. Therefore, I find that the procedures articulated in Section M are interpretive and do not constitute a legislative rule requiring notice and comment.

2. MSHA did not act unreasonably when it adopted the reduced standard

The Respondent argues that MSHA acted unreasonably when it adopted the reduced standard based on one dust sample. The Secretary’s interpretation of when to accept additional samples is owed deference and should be upheld if it is reasonable. *Energy W. Min. Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). This analysis requires the court to defer to the Secretary unless his analysis “is clearly erroneous.” *Id.* Consistent with the purposes of the

Mine Act, interpretations that further the Act's "safety promoting purposes" are preferred. *Secretary v. Walker Stone*, 156 F.3d 1076, 1082 (10th Cir. 1998).

As explained *supra*, Section 70.101 is silent on the issue of what samples the Secretary can review when determining whether the active workings contain more than 5% quartz.⁴ The regulation on its own appears to allow a single sample to be used in determining a reduced standard. Section M merely provides optional procedures for arriving at the reduced standard. As such, it is a reasonable interpretation of the regulation entitled to deference.

3. The Violation was Significant and Substantial

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

As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission has held that when the Secretary proves overexposure to respirable dust has occurred, it can be presumed that the violation is S&S. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986); *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986).⁵ This presumption is based upon the fact that the exposure levels set in the standards are "the maximum level allowed to achieve [Congress's] stated goal of preventing disabling respiratory disease." *Jim Walter Resources, Inc.*, 17 FMSHRC 1423, 1447 (August 1995) (quoting *U.S. Steel*). This presumption may be rebutted by the operator by establishing that miners were not exposed to the hazard posed by the excessive concentration of respirable dust through the use of personal protective equipment. *Consolidation Coal*, 8 FMSHRC at 899. Respondent has presented no such evidence here.

⁴ The Respondent's reliance on *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (Jan. 1994), is misplaced, as that case only addressed the issue of whether an MSHA spot inspection, where citations were based on a single sample, was valid. In this case, the issue is over the predicate sampling that led to the reduced sample, rather than the follow-up sampling that can lead to a citation.

⁵ The Respondent has conceded that Commission precedent establishes that a presumption of S&S exists where the Secretary has proven that an overexposure to respirable dust has occurred. See Resp. Brief, at note 8.

4. The violation was properly assessed as moderate negligence, with 3 persons affected

Moderate negligence is defined as “where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). In this instance, the Respondent was made aware of the dust issues through the imposition of the reduced standard. The Respondent subsequently submitted dust samples in excess of the reduced standard, which the Secretary alleges, and I find, to be moderate negligence because Respondent was obligated to be under a heightened state of awareness. Respondent has not presented any evidence to dispute this finding.

The Citation states that 3 persons were affected by the condition, and the Respondent has not presented any evidence to the contrary. During the course of a shift, virtually all shift members in a mechanized mining unit would likely be exposed to the face. Therefore, I find that at least 3 miners were exposed to this hazard.

5. The Secretary’s proposed penalty is appropriate

The Secretary’s proposed penalty in this matter is consistent with Section 110(i) of the Act.⁶ 30 U.S.C. § 820(i). This Court is guided in its final determinations by the polestar of the Section 110(i) penalty considerations:

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.

I have been further guided by Commission case law instructing how § 110(i) criteria should be evaluated. *Inter alia*, I note: the Commission’s holding in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) that all of the statutory criteria must be considered, but not necessarily assigned equal weight; and the Commission’s holding *Musser Engineering*, 32 FMSHRC at 1289 that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. The Commission has affirmed that its Judges 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 has 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.* 2; *see also Cantina Green*, 22 FMSHRC 616, 620-621 (May 2000). Having considered all of the above, I find the Secretary’s proposed penalty of \$1,026.00 to be appropriate.

⁶ The Secretary notes that his proposed penalty was determined by using the points table calculation contained in 30 C.F.R. § 100.3.

ORDER

The Secretary's Motion for Summary Decision is **GRANTED**, and Emerald Coal Resources, LP, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$1,026.00 within 30 days of the date of this Order.⁷

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

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⁷ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

August 25, 2014

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

AMENDED CERTIFICATION FOR INTERLOCUTORY REVIEW

Before: Judge Feldman

This matter concerns certification for interlocutory review, pursuant to Commission Rule 76(a)(1)(i), of an Order Requiring Secretary’s Pre-Hearing Statement (“Oak Grove Order”), 36 FMSHRC __, slip op. (June 12, 2014) (ALJ), in the above-captioned proceedings involving Oak Grove Resources, LLC. 29 C.F.R. § 2700.76(a)(1)(i). The Oak Grove Order concerns the long-standing and controlling question of law regarding the requisite evidentiary parameters for imposing enhanced civil penalties under the flagrant violation provisions of section 110(b)(2) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 (“Mine Act” or “the Act”).¹ 30 U.S.C. § 820(b)(2).

¹ Section 110(b)(2) provides:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000 [adjusted for inflation]. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard *that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

30 U.S.C. § 820(b)(2) (emphasis added).

The Oak Grove Order addresses an alleged flagrant violation of section 75.400² cited in 104(d)(2) Order No. 8520664 in Docket No. SE 2013-368. The cited condition concerns float coal dust on the roof, ribs, footwall, and belt structure, and hard packed coal fines in contact with moving belt rollers, in the Main North 3 belt entry. Order No. 8520664 does not identify any ignition sources, such as defective rollers or misaligned belts, in proximity to the cited accumulations. The Oak Grove Order is incorporated by reference. The Oak Grove Order noted that the Secretary has acknowledged that a violation that does not otherwise satisfy the gravity requirements in section 110(b)(2) cannot be elevated to a flagrant violation solely based on prior predicate violations.³ *Oak Grove Order*, 36 FMSHRC ___, slip op. at 5 (*citing Sec’y of Labor’s Resp. to Order Scheduling Briefing* at 5-6 (Apr. 22, 2014)).

With respect to gravity, in preparation for a hearing, to avoid unnecessary proof and to advance rulings on the admissibility of evidence, the Oak Grove Order required the Secretary to present a pre-hearing statement that was consistent with the flagrant provisions of section 110(b)(2). 29 C.F.R. § 2700.53(a)(1),(a)(2). Namely, the Oak Grove Order required the Secretary to explain why he believed the cited violative condition could not reasonably escape notice because it was conspicuously dangerous, and whether the cited condition could reasonably be expected to be the “substantial and proximate cause” of “death or serious bodily injury,” rather than a contributing cause of an injury of a reasonably serious nature. *Oak Grove Order*, 36 FMSHRC ___, slip op. at 13-14.

As noted, a flagrant violation is one “that substantially and *proximately caused*, or reasonably could have been expected to cause, *death or serious bodily injury*.” 30 U.S.C. § 820(b)(2) (emphasis added). In contrast, it is well-settled that a violation is significant and substantial (“S&S”) when there is a “reasonable likelihood that the hazard *contributed to* by the violation will result in an event in which there is an *injury [of a reasonably serious nature]*.” *U.S. Steele Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). Obviously, all violations properly designated as flagrant are S&S in nature. As flagrant violations are reserved for only the most serious conditions that *are both* obvious and extremely dangerous, clearly most violations designated as S&S cannot properly be designated as flagrant.

² 30 C.F.R § 75.400 provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel- powered and electric equipment therein.

³ Although the Secretary acknowledges that a violation, that does not otherwise satisfy the gravity requirements in section 110(b)(2), cannot be elevated to a flagrant violation solely based on prior predicate violations, the Commission has determined that a history of prior violations is a relevant consideration. *See Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013). Consequently, the Secretary relies on two violations in the present consolidated cases to serve as predicates for Order No. 8520664: namely, Order Nos. 4694424 in Docket No. SE 2013-399 and 8524255 in Docket No. SE 2013-301, with proposed penalties of \$32,800.00 and \$9,800.00, respectively. *Sec’y’s Pre-Hearing Statement* at 3-4 (Aug. 7, 2014). These proposed penalties are significantly less than the maximum civil penalty of \$70,000, adjusted for inflation, available under section 110(b)(1).

In response to the Oak Grove Order, the Secretary submitted his Pre-Hearing Statement on August 7, 2014. However, the Secretary's Pre-Hearing statement failed to differentiate the criteria for demonstrating a S&S violation from the evidentiary requirements necessary to support a section 110(b)(2) flagrant violation. The Secretary's Pre-Hearing Statement provided the following justification for his alleged flagrant designation:

Because the accumulations included float coal dust and coal dust, they constituted a significant and immediate source of fuel for a mine fire or an immediate source of fuel for a coal dust explosion. An operating conveyor belt system in an underground coal mine is an obvious and significant source of sparking and burning hazards because of the presence of the belt conveyor, belt rollers and other proximate sources of friction heat and ignition. In the present case, hard packed coal fines were in contact with moving rollers on the belt line in multiple locations along the belt entry. Given these ignition sources, it is reasonably expected that, as normal operations continued, serious and/or deadly injuries from burns and smoke inhalation would result from a fire or explosion. These injuries would be the proximate and direct result of the fire or explosion because the accumulations would be the necessary fuel source that, when combined with oxygen and an ignition source, would cause the fire or explosion. Because the accumulations existed over a number of shifts and were known to multiple agents of the operator, this violation standing alone constitutes a repeated flagrant violation.

Sec'y Pre-Hearing Statement at 2 (Aug. 7, 2014).

The Secretary's position is problematic in that it obfuscates rather than clarifies the controlling question of law in this matter. Section 75.400, which prohibits combustible coal dust accumulations, is the most frequently cited mandatory standard in underground coal mines.⁴

Furthermore, the terms "sources of ignition" and "potential sources of ignition" are not synonymous. It is the ignition, rather than the fuel, that is the proximate cause of a fire or explosion. Thus, the Oak Grove Order stands for the proposition that it is the presence of an ignition source that supports a reasonable expectation that death or serious bodily injury will occur. While presuming the presence of an ignition source based on a future malfunction that may occur during the course of continued mining operations may support an S&S designation, it is not an adequate basis for demonstrating a flagrant violation. To assume ignition sources, such as defective heat-producing rollers, misaligned friction-producing belts, or defective methane monitors that may proximately cause an explosion that can be propagated by the subject cited coal dust accumulations, would render the vast majority of section 75.400 violations as flagrant under section 110(b)(2).

⁴ For example, citations concerning section 75.400 violations constituted 10.47 percent of all citations issued in 2013, and currently constitute 10.61 percent of all citations issued in 2014. MSHA, Most Frequently Cited Standards, www.msha.gov/stats/top20viols/top20viols.asp (accessed June 12, 2014).

It is not uncommon for coal dust to accumulate on the mine floor along conveyors and in proximity to belt rollers. Significantly, although a portion of the subject coal dust accumulations was allegedly touching rollers, the Secretary does not allege any relevant defects in the rollers or belt alignment. Surely, the Secretary would be reticent to concede that accumulations in proximity to, or that are touching, properly-functioning rollers constitute per se flagrant violations. However, when reduced to its core, the Secretary, in essence, is masking a per se approach by utilizing a traditional *Mathies* S&S analysis that would permit the vast majority of unwarrantable section 75.400 violations to be designated as flagrant. For it is axiomatic that an S&S designation requires consideration of both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998). Indistinguishable from this traditional S&S analysis, the Secretary avers that to support a flagrant designation potential ignition sources should be viewed in the context of continued normal mining operations. *Sec'y Pre-Hearing Statement* at 2 (Aug. 7, 2014).

Commission Rule 76(a)(1)(i) provides that a Judge may certify, upon his own motion, that his interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(1)(i). The issue presented in the Oak Grove Order is whether the traditional S&S analysis under *Mathies* can be used to support a flagrant designation under section 110(b)(2), and, if not, what the proper analysis should be. Resolution of this issue will materially advance the final disposition of these proceedings, as well as other flagrant cases. Resolution of this long-standing unresolved question may result in the settlement of this case, as well as other cases that have been stayed pending a determination of the relevant evidentiary criteria for a flagrant designation.

In certifying this issue for interlocutory review, I am not alone in seeking clarity from the Commission on this issue. In this regard, both Judge Barbour and I have certified similar issues to the Commission that ultimately eluded Commission disposition because the Secretary withdrew the subject flagrant designations. *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013); *Conshor Mining, LLC*, 34 FMSHRC 571 (Mar. 2012). The Administrative Law Judge's collective need for Commission guidance on this issue is emphasized by Judge Zielinski's recent opinion in *American Coal Co.*, 36 FMSHRC 1311 (May 2014) (ALJ), which deleted flagrant designations alleged by the Secretary.⁵ In his opinion, Judge Zielinski thoughtfully summarized his consternation, as well as that of several other Judges, with the Secretary's unreasonable attempts to broaden the scope of the flagrant provisions of section 110(b)(2):

As noted in *Wolf Run*, section 110(b)(2) should be interpreted consistent with the Mine Act's graduated enforcement scheme. 35 FMSHRC at 541. The Commission held in *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Mine Act's enforcement scheme, provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." 9 FMSHRC at 2000 (quoting *Cement*

⁵ The Secretary filed Petition for Discretionary Review (PDR) of Judge Zielinski's *American Coal Co.* decision on June 17, 2014. However, the PDR was limited to Judge Zielinski's deletion of the unwarrantable failure designations concerning the subject violations. Thus, the Secretary has once again eluded Commission review of the criteria for a flagrant violation by declining to appeal Judge Zielinski's deletion of the subject flagrant designations.

Div. Nat'l. Gypsum Co., 3 FMSHRC 822, 828 (Apr. 1981). In *Stillhouse*, Judge Paez noted that “[i]n *Emory Mining*, the Commission interpreted the unwarrantable failure language of section 104(d) citations and orders in light of th[e graduated enforcement] scheme of escalating sanctions. Here, if a violation is determined to be flagrant, then the Commission is authorized to impose the highest amount of civil penalties available under the Mine Act, up to \$220,000 per violation.” 33 FMSHRC at 802.

The substantial civil penalties that can be imposed for flagrant violations are several rungs up the graduated enforcement ladder from even more serious violations charged under section 104(d). Accordingly, flagrant violations should denote conspicuously bad, offensive, or outrageous conduct. As Judge Paez noted in *Stillhouse*, “[t]he only thing that is apparent from the [limited] legislative history is that Congress and the President intended flagrant violations to target particularly severe violations of the mine safety and health regulations in order to promote regulatory compliance and miner safety.” 33 FMSHRC at 799. In that regard, I agree, in principle, with Judge Feldman's analysis in *Conshor Mining, LLC*, 33 FMSHRC 2917, (Nov. 2011), that a flagrant violation must be conspicuous and egregious, and the fact that Congress did not simply amend section 110(a) of the Act to raise the general statutory penalty ceiling evidences something considerably more than an intent to deter repeated unwarrantable failure violations.

The cases brought by the Secretary and that have been decided by ALJs thus far, at least under the “reckless” prong of the statute, have involved truly outrageous conduct. *Stillhouse* involved egregious conduct by several mine management personnel who ignored prior warnings from MSHA and deliberately violated the mine's approved ventilation plan on more than one occasion. Their actions created a serious risk of a mine disaster and threatened the lives of the entire mining crew, which was left underground to produce coal while the main mine fan was turned off, and then restarted. Three mine managers plead guilty to criminal felony charges for their conduct. In *Roxcoal, Inc.*, 35 FMSHRC 625 (Mar. 2013), a flagrant violation was affirmed under the “reckless” prong of the statute where an operator's chief electrician deliberately circumvented safety measures by taping down a switch that could deenergize power, and then assigned miners to work on the equipment in close proximity to 7,200 volts of electric power. He also failed to take any steps to eliminate the violation and the extremely hazardous condition. As a result, a miner suffered an injury resulting in permanent disability.

The Secretary's ventures into the “repeated failure” prong of the flagrant statute have often strayed from the egregious conduct principle and have met with less success. As noted above, the Secretary voluntarily withdrew the “repeated failure” flagrant allegations in *Wolf Run* and *Conshore Mining*. Alleged repeated failure flagrant violations were rejected in *Bowie Resources* and *Blue Diamond*. The “screening factors,” now broadened considerably by the Secretary's evolving interpretation of the statute, appear to sweep within their ambit a substantial

portion, if not a vast majority, of [S&S] violations cited under section 104(d) of the Act. The result is that substantial penalties have been assessed under section 110(b)(2) for violations that are very similar, if not identical, to violations for which penalties have been assessed under section 110(a)(1) that have not even reached the maximum amount allowed under that section.

The Secretary's lone success was the *American Coal* case, in which two repeated failure violations were held to be flagrant under a narrow reading of the statute. Order No. 7490584, charged an S&S and unwarrantable failure violation of the accumulations standard, 30 C.F.R. 75.400, that was found to have been the result of the operator's high negligence, and was reasonably likely to have resulted in lost work days or restricted duty injuries to more than 10 persons. The conditions were found to have existed for at least three shifts, and were known to the operator because they had been noted on reports of required examinations during those shifts, but had not been corrected. The operator's failure to eliminate the known violation during each of the three shifts was held to satisfy the repeated failure element, and the violation was found to be flagrant.

Order No. 7490599, also charged an S&S and unwarrantable violation of the accumulations standard. It was found to have been the result of the operator's moderate negligence, and was reasonably likely to have resulted in serious or fatal injuries to 6 persons. It was found that the accumulations likely "began building up about two shifts before the violation was cited" and the violation was found to have existed "for two shifts." 35 FMSHRC at 2236. The conditions had not been noted on reports of examinations. However, it was found that the operator knew or should have known of the violation because the conditions were obvious and should have been discovered during required examinations. Its failure to eliminate the violation during either of the two shifts was held to satisfy the repeated failure element.

While I agree with much of Judge McCarthy's analysis in *American Coal*, I am concerned that it could be read to include a large number of violations that were never intended to be addressed by the statute. Can constructive knowledge of a violation that existed for the better part of two shifts, resulting in a finding that the operator was moderately negligent, be squared with the concept that the statute was intended to address egregious conduct, or particularly severe violations? Are those valid conclusions regarding the intent of Congress? Similarly, can a violation that was reasonably expected to result in lost work days or restricted duty injuries, and that would not have passed the Secretary's screening device requirement for at least a permanently disabling injury, be said to be expected to result in death or serious bodily injury within the meaning of the statute? Hopefully, these and other questions will soon be answered by the Commission.

Even in the absence of a review of all reported decisions involving accumulations violations cited under section 104(d), I am confident that it would be difficult to identify more than a handful that did not involve an opinion by the issuing

inspector that the conditions had existed for two shifts or longer, and that injuries at least as severe as lost work days were reasonably expected.⁴¹ Could all such violations be classified as repeated failure flagrant violations, and assessed penalties nearly four times higher than the most serious non-flagrant violations?

American Coal Co., 36 FMSHRC at 1356-58.

ORDER

In view of the above, the June 12, 2014, Order Requiring Secretary's Pre-Hearing Statement setting forth the evidentiary criteria for a flagrant designation under section 110(b)(2) of the Act is certified for interlocutory review pursuant to Commission Rule 76(a)(1)(i).^{6 7}

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Electronic and Certified Mail)

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/acp

⁶ My certification for interlocutory review under Commission Rule 76(a)(1)(i) was held in abeyance to provide an opportunity for the Secretary to seek interlocutory review of the Oak Grove Order. After the Secretary was granted a 30-day extension to respond to the Oak Grove Order, the Secretary filed the required pre-hearing statement on August 7, 2014. My certification was further delayed by the parties' representation that they were engaging in settlement negotiations, which have not been fruitful.

⁷ The hearing in these matters, scheduled for September 16, 2014, has been stayed pending the disposition of this Certification for Interlocutory Review.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 27, 2014

MONA KERLOCK,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEST 2014-851-M
v.	:	RM-MD 14-10
	:	
ASARCO, LLC,	:	Ray Mine
Respondent	:	Mine ID: 02-00150

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

Before: Judge Miller

This case is before me on a Complaint of Discrimination brought by Mona Kerlock, on her own behalf, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the “Mine Act” or “Act”). The Respondent, Asarco, LLC, has filed a motion to dismiss for failure to state a claim. For reasons that follow, I **DENY** Respondent’s motion.

On March 31, 2014 Complainant, Mona Kerlock, filed a discrimination complaint with the Secretary of Labor, Mine Safety and Health Administration. MSHA investigated the complaint and, based upon its review of the information gathered, determined that there was not sufficient evidence to establish that a violation of section 105(c) occurred. Subsequently, on June 17, 2014, Complainant sent to the Commission a letter stylized as a “Request for Appeal” in which she sought to proceed pro se pursuant to section 105(c)(3) of the Act. On August 12, 2014 Respondent filed a motion to dismiss for Complainant’s failure to state a claim. Complainant did not file a response to the motion. As a result, and given that Kerlock is proceeding pro se, information found in the original complaint, and file in general, is relied upon as a part of the basis for this decision.

Asarco argues that this matter should be dismissed due to Complainant’s failure to state a claim of discrimination under section 105(c) of the Mine Act. Specifically, Asarco argues that Complainant failed to allege that she engaged in activity protected under the Act and also failed to allege that she suffered an adverse action as a result of protected activity. Asarco Mot. 1, 7.

Asarco asserts that Complainant did not allege, and did not engage, in protected activity since her complaints involved personal health issues, and not safety hazards specific to the mine. Since the Mine Act protects against hazards in the work environment controlled by the mine operator, and not against problems related to a particular miner, Complainant’s allegation of adverse treatment due to her illness falls outside of the scope of the Mine Act. *Id.* At 8. Next, Respondent contends that the other non-personal-health-related claims of protected

activity cannot be considered protected activity under the Act given that those actions were never brought to the attention of Asarco. *Id.* at 9.

Finally, Asarco argues that Complainant did not allege, and did not suffer, an adverse action given that Respondent's placing of Complainant on short term disability was not an adverse action, and was motivated solely by her doctor's notes and medical condition. *Id.* at 10-11. Based on Complainant's doctor's notes and medical condition, Respondent made a business decision in the interest of safety to place her on paid leave. Doing so prevented any risk of Complainant suffering a severe reaction while driving a haul truck, which would have endangered both Complainant and others. *Id.*

Respondent's motion to dismiss for failure to state a claim is treated as a motion for summary decision for purposes of this order. The Commission's procedural rules do not provide formal guidance on a motion to dismiss for failure to state a claim. However, Commission judges addressing similar motions have been guided by Federal Rules of Civil Procedure 12(b)(6) and 12(c) and treated those filings as motions for summary decision. *See e.g., Sec'y of Labor on behalf of Chaparro v. Comunidad Agricola Bianci, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ). I agree and address Respondent's motion to dismiss, first, as I would a motion for summary decision under Commission Procedural Rule 67.

Commission Procedural Rule 67 sets forth the grounds for granting summary decision and requires that it shall be granted only if the entire record shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67. The Commission has explained that summary decision is an extraordinary procedure, and, in reviewing the record, the judge should do so in the light most favorable to the non-moving party. *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994); *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007).

In order to establish a prima facie case of discrimination under section 105(c)(1), a complaining miner must show: (1) that they engaged in protected activity; and (2) that the adverse action they complain of was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). A material fact is one that is indispensable to the case, the absence of which would render the case unsupported. Black's Law Dictionary 881 (5th ed. 1979). Accordingly, facts addressing these two elements of a 105(c) claim are generally "material" for purposes of a summary decision analysis. In this case, after review of the entire record, I find that there are genuine issues as to material facts.

I find that Complainant has alleged facts which contradict those offered by Respondent, and support a finding that material facts are in dispute. Respondent asserts that Complainant did

not allege, and did not engage, in protected activity, nor did she suffer an adverse action. However, Complainant did allege that she, along with others at the mine, complained about dust in the area of 2 Shovel and 5A Dump, and that, subsequently, she was placed on medical leave, without full pay, and sent home despite her contention that she could have worked in other areas at the mine. Kerlock Request for Appeal 1, 3-5. While Respondent asserts that Kerlock's complaints involved personal health issues and not safety hazards specific to the mine, it acknowledges in its motion that driving the haul truck after being exposed to dust could create a hazard. Further, Respondents' argument regarding a lack of adverse action is premised more on its belief that any adverse action was motivated not by protected activity, but rather by other factors, namely doctor's notes and Complainant's medical condition. However, I find that Complainant has alleged facts that could support a viable claim that placing her on medical leave was motivated by her dust complaint. Accordingly, I find that material facts remain in dispute and the Respondent has not demonstrated that there are no facts which could support the claims of protected activity and adverse action.

I also find that the original complaint and subsequent Request for Appeal satisfy the minimal burden for pleadings in a 105(c) proceeding. *See Ribble v. T & M Dev. Co.*, 22 FMSHRC 593, 595 (May 2000). In order to satisfy the Commission's procedural rules, the discrimination complaint need only "include a short and plain statement of the facts, setting forth the alleged . . . discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42. As discussed above, I find that Complainant has alleged that she engaged in protected activity and suffered an adverse action. Further, I find that her pleadings clearly set forth the relief she is requesting. Kerlock Request for Appeal 4-5. Accordingly, I find that Complainant's pleadings satisfy the Commission's procedural rules. I note that the Commission has acknowledged that, given the difficulty with establishing whether adverse action is motivated by the protected activity, it would be inappropriate to require a pro se litigant to prove the motivation behind the alleged discrimination at such a preliminary stage of the proceeding when only a basic pleading pursuant to Commission Procedural Rule 42 is required. *Perry v. Phelps Dodge Morenci, Inc.*, 19 FMSHRC 1918, 1921 (Nov. 1996).

Finally, I find that Complainant's status as a pro se litigant affords her certain protections from Respondent's challenge to the adequacy of her pleadings. Commission judges have recognized that pro se litigants may not be equipped to make factual and legal determinations. *Fred Estada v. Freeport McMoRan Tyrone, Inc.*, 35 FMSHRC 2313, 2315-2316 (July 2013) (ALJ). The Commission has explained that, in pro se discrimination proceedings under section 105(c)(3) of the act, a complainant's pleadings should be held to a lower standard than those prepared by attorneys, and motions to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. *Perry v. Phelps Dodge Morenci, Inc.*, 19 FMSHRC 1918, 1920 (Nov. 1996); *see also Ribble v. T & M Dev. Co.*, 22 FMSHRC 593 (May 2000). Further, Congress has directed that section 105(c) be "construed expansively" so as to assure that miners not be inhibited from exercising rights under the Mine Act. S. Rep. No. 95-11, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978)). Given the leniency advocated by the Commission with regard to review of pro se complainants' pleadings, and Congress' direction that section 105(c) be construed expansively, I find that summary dismissal of this proceeding is inappropriate.

I find that, based on the record before me, a dispute of material fact exists. Further, I find that, while Complainant may have engaged in other protected activities, and suffered other adverse action, she need only allege one set of facts which support her claim, which she has done. Finally, I find that, given Complainant's status as a pro se litigant, it would be inappropriate to summarily dismiss this matter. Asarco's motion is therefore, **DENIED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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