

March 2013

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Review was granted in the following case during the month of March 2013:

Secretary of Labor, MSHA v. Mize Granite Quarries, Inc., et al., Docket Nos. SE 2009-401-M, et al. (Judge Rae, February 1, 2013)

Review was denied in the following case during the month of March 2013:

Secretary of Labor, MSHA v. Black Beauty Coal Company, Docket No. LAKE 2008-477. (Judge Miller, February 1, 2013)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 5, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-1136
v.	:	A.C. No. 15-02709-285951
	:	
HIGHLAND MINING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 7, 2012, the Commission received from Highland Mining Company, LLC (“Highland”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

MSHA's record indicates that the proposed assessment was delivered on April 19, 2012, and became a final order of the Commission on May 21, 2012. Highland asserts that its safety manager asked its new compliance specialist to deliver the form to its legal counsel for contest, but the specialist missed the deadline. The specialist discovered the delinquency on June 6, 2012, and emailed the form to Highland's counsel that afternoon. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Highland's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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March 20, 2013

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

v.

WOLF RUN MINING COMPANY

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Docket No. WEVA 2008-1265

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”), Administrative Law Judge David Barbour concluded that the Secretary of Labor may not permissibly consider an operator’s past violation history in determining whether a violation resulted from a “repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard,” so as to warrant the designation of a flagrant violation within the meaning of section 110(b)(2) of the Act, 30 U.S.C. § 820(b)(2).¹ 34 FMSHRC 337, 345-46 (Jan. 2012) (ALJ). By subsequent order, the Judge certified his ruling for interlocutory review. We granted interlocutory review on the issue of whether the Judge correctly construed the “repeated failure” language of section 110(b)(2) of the Mine Act. For the reasons that follow, we conclude that the Judge erred.

¹ Section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(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. 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.

I.

Factual and Procedural Background

A. The Mine Safety and Health Administration's Implementation of the "Flagrant" Penalty Assessment Provision

The "flagrant" penalty assessment provision of section 110(b)(2) of the Mine Act (*see supra* note 1) was added by section 8(a) of the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act"). Section 8(b) of the MINER Act required the Secretary to promulgate rules to implement the provision. Pub. L. No. 109-236, § 8, 120 Stat. 493 (2006).

On March 22, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") published a final rule revising its penalty regulations and "implement[ing] the civil penalty provisions of the [MINER Act]." 72 Fed. Reg. 13592. The regulation relating to flagrant violations, 30 C.F.R. § 100.5(e), simply reiterated the language of section 110(b)(2) of the Mine Act.

In addition, MSHA issued Procedure Instruction Letter ("PIL") No. I06-III-04, which set forth "Procedures for Evaluating Flagrant Violations."² With respect to "repeated failure" flagrant violations, the PIL provided the following criteria:

1. Citation or order is evaluated as significant and substantial,
2. Injury or illness is evaluated as at least permanently disabling,
3. Type of action is evaluated as an unwarrantable failure, and
4. At least two prior "unwarrantable failure" violations of the same safety or health standard have been cited within the past 15 months.

On April 19, 2011, MSHA issued a press release entitled, "MSHA inspectors armed with new online tool to detect flagrant violations." Release No. 11-568-NAT; 34 FMSHRC at 340 n.3. In the press release, MSHA announced that its Inspectors' Portable Application for Laptops was equipped with "an online tool to alert federal inspectors that certain violations will be reviewed for special assessment as flagrant violations." Release No. 11-568-NAT. The press release sets forth the same criteria that had been included in the prior Procedure Instruction Letters. *See id.*

² These procedures became effective on October 26, 2006, expired on May 31, 2008, and were later re-issued as PIL No. I08-III-02, which expired on March 31, 2010. *See* S. Mot. for Summ. Dec. at 9 n.3.

B. Factual Background

Wolf Run operates the Sentinel Mine, an underground coal mine in Barbour County, West Virginia. 34 FMSHRC at 337. On November 14, 2007, MSHA Inspector Jeffrey Maxwell issued Order No. 6605922, pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging a violation of 30 C.F.R. § 75.400.³ *Id.*; S. Opening Br. at 1-2. The order further alleged that the violation was significant and substantial (“S&S”) and resulted from Wolf Run’s unwarrantable failure to comply with the standard.⁴ Additionally, the violation was designated as a flagrant violation under the “repeated failure” provision of section 110(b)(2) of the Act.

In recommending that Order No. 6605922 be assessed as flagrant, MSHA Inspector Maxwell stated that he followed the criteria in the PIL. Ex. B (Maxwell Dep.) at pp. 72-73 to WR Mot. for Partial Summ. Dec. The “flagrant” designation was based on Wolf Run’s history of previous violations during the preceding 11 months, in particular, the 29 citations and orders for violations of section 75.400. S. Opening Br. at 2. Two of those orders (Order Nos. 7101469 and 7101438, issued on July 19 and 25, 2007, respectively) were S&S and unwarrantable. *Id.* at 2-3. The Secretary proposed a penalty of \$142,900 for the November 14, 2007, violation. *Id.* at 2.

Wolf Run contested the proposed penalty, and the case was assigned to Judge Barbour. On March 11, 2011, the parties advised the Judge that the sole issue between them was whether Order No. 6605922 was properly assessed as “flagrant” within the meaning of section 110(b)(2) of the Mine Act. 34 FMSHRC at 339. The parties filed cross-motions for partial summary decision with the Judge.

C. Judge’s Orders

On January 20, 2012, Judge Barbour denied the parties’ cross motions for partial summary decision. *Id.* at 346. Preliminarily, the Judge affirmed the allegations of violation, S&S, and unwarrantable failure, based upon the parties’ stipulations. *Id.* at 343-44. However, he rejected both parties’ interpretation of the statutory language.⁵ *Id.* at 345. The Judge found

³ 30 C.F.R. § 75.400 provides in part that, “[c]oal dust, . . . loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate”

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

⁵ Wolf Run had argued, and continues to contend, that the statutory provision with
(continued...)

that the term “repeated failure” in section 110(b)(2) refers to “‘*current* repeated conduct evidenced by a failure to eliminate the hazard posed by the discrete violation alleged to be flagrant, rather than [by] a past history of violations.’” *Id.* at 345, quoting *Conshor Mining, LLC*, 33 FMSHRC 2917, 2928 (Nov. 2011) (ALJ) (emphasis added).⁶ The Judge concluded that in

⁵(...continued)

respect to repeated flagrant violations meant the failure to correct a previously cited condition which was also the condition currently at issue. WR Opening Br. at 10; Oral Arg. Tr. at 31-32. For purposes of this appeal, Wolf Run also argues that a “known violation” could include a situation where the violation was known to the operator (as by its recordation in the mine examination books) although not cited by MSHA. WR Resp. Br. at 9.

The Secretary’s interpretation has changed several times during the course of this litigation. Initially, the Secretary based his interpretation on an application of the factors in the PIL. S. Mot. For Consolidation and Stay of Hr’g at 3-4.

However, while still before the Judge, the Secretary broadened the proposed standard to include previous non-S&S and non-unwarrantable failure violations, and also seemingly narrowed the standard to require that at least some of the previous violations be “substantially similar.” In his Memorandum in Support of Cross-Motion for Partial Summary Decision, the Secretary stated that the PIL did not set the criteria for a flagrant violation. S. Mem. at 9, n.4. Rather, a flagrant designation was within the “discretion” of the Administrator for Coal Mine Health and Safety and the Administrator for Metal and Nonmetal Safety and Health. *Id.* at 10. The Secretary argued that the present violation should be assessed as flagrant because of the two previous unwarrantable failure orders as well as the history of section 75.400 violations in the previous 15-month period. *Id.* at 14-15. More specifically, the Secretary stated that, “[g]iven the substantial similarity between the violation detailed in Order No. 6605922 and the violations of Section 75.400 in the prior 15 months (including the 104(d) orders issued in July 2007), Respondent’s failure to comply with Section 75.400 was unquestionably a ‘repeated failure.’” *Id.* at 15.

His interpretation before the Commission has evolved again. Before us, the Secretary maintains that, “[t]o the extent that the Secretary relied below on the ‘substantial similarity’ of the previous violations to the violation alleged to be flagrant, the Secretary disavows any suggestion that any such requirement is contained in Section 110(b)(2).” S. Opening Br. at 17 n.11. He states that where section 110(b)(2)’s other criteria are satisfied, a “‘repeated failure’ is established where the operator either: (i) failed more than once to make reasonable efforts to eliminate the violation alleged to be flagrant; or (ii) failed to make reasonable efforts to eliminate at least one previous violation prior to failing to make reasonable efforts to eliminate the violation alleged to be flagrant.” *Id.* at 12.

⁶ Following the Judge’s decision in *Conshor Mining*, the Commission granted the
(continued...)

order to support a designation of flagrant, the Secretary must establish that: (1) the cited violation of section 75.400 could reasonably have been expected to cause death or serious bodily harm; and that (2) Wolf Run repeatedly failed to make reasonable efforts to eliminate the accumulated combustible material cited in Order No. 6605922. *Id.* at 345-46. Although the operator conceded the first element, the Judge found that the record could not presently answer whether Wolf Run repeatedly failed to eliminate the cited violation. *Id.* at 346. Accordingly, the Judge set the matter for hearing and directed the parties to provide evidence or stipulations regarding four of the civil penalty criteria (history of previous violations, size, effect of penalty for operator to continue in business, and good faith abatement). *Id.* at 346.

By subsequent order dated March 6, 2012, the Judge certified his ruling for interlocutory review. The Commission granted interlocutory review and stated that the issue on review is “whether the judge correctly construed the ‘repeated failure’ language of section 110(b)(2) of the Mine Act.” Unpublished Order dated Mar. 27, 2012, at 2. The Commission suspended the hearing set by the Judge, received briefs from the parties, and heard oral argument.

II.

Disposition

We begin our analysis with the language of section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2) (emphasis added), which, as stated previously, provides:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000. For purposes of the preceding sentence, the term “*flagrant*” with respect to a violation *means* a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43;

⁶(...continued)

Secretary’s petition for interlocutory review pursuant to Rule 76(a), 29 C.F.R. § 2700.76(a). *Conshor Mining*, 34 FMSHRC 349, 350 (Feb. 2012). However, the Secretary subsequently informed the Commission that he no longer was seeking to assess the violations in question as “flagrant,” and the Commission dismissed the appeal as moot. *Conshor Mining*, 34 FMSHRC 571, 571-72 (Mar. 2012).

accord *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency’s interpretation of the statute may not be applied “to alter the clearly expressed intent of Congress.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). In ascertaining the plain meaning of the statutory language and Congress’ intention regarding a specific question at issue, we employ the “traditional tools of statutory construction,” including an examination of the statute’s text, legislative history, and structure, as well as its purpose. *Id.*; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Emp’t Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989); *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

We conclude that the plain language of section 110(b)(2) does not support the Judge’s ruling that past violative conduct may not be considered in determining whether a cited condition represents a “repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard. . . .”⁷ 30 U.S.C. § 820(b)(2). Turning first to the statutory language itself, it is difficult to conceive how one determines whether certain conduct represents “repeated” behavior of any sort without considering whether there have been prior instances of similar behavior. One might reasonably argue about the number of prior violations that should be necessary, or how similar those prior violations should be before conduct is appropriately considered a “repeated failure” under 110(b)(2), but an interpretation that precludes consideration of *any* prior violations runs counter to the natural meaning of the language.⁸

Not only is the Judge’s conclusion contrary to the plain meaning of the term “repeated failure,”⁹ it runs counter to the rest of the Act’s graduated enforcement scheme. In determining

⁷ Because we find the language of section 110(b)(2) plain as it relates to the question on interlocutory review, we need not reach the operator’s notice argument. *See, e.g., Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1172 (Sept. 2010) (“Because the language is plain, it is unnecessary to evaluate the question of whether the standard provides fair notice of its requirements.”).

⁸ The Senate Report on the MINER Act is not particularly enlightening, as it merely repeats the statutory language at issue without further discussion. S. Rep. No. 109-365, at 14 (2006).

⁹ Commissioner Nakamura does not agree that the textual language “repeated failure to make reasonable efforts to eliminate a known violation” is susceptible to only one interpretation. Indeed, two Commission Judges have concluded that the term “repeated failure” refers to “current repeated conduct evidenced by a failure to eliminate the hazard posed by the discrete violation alleged to be flagrant, rather than [by] a past history of violations.” *See Wolf Run Mining Co.*, 34 FMSHRC at 345. However, Commissioner Nakamura notes that in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325, 1330-31 (2011), the Supreme Court, in interpreting statutory language in the Fair Labor Standards Act, 29 U.S.C.

§ 201 et seq., held that “the language of the provision, considered in isolation, may be open to competing interpretations. But considering the provision in conjunction with the purpose and

(continued...)

whether a violation was caused by an “unwarrantable failure to comply” within the meaning of section 104(d) of the Act, the Secretary routinely considers an operator’s past violative conduct. The Commission has agreed that this is an appropriate factor to take into account when determining whether an operator should be subjected to the more stringent enforcement that can result from the unwarrantable failure designation. *See, e.g., IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009). It would be inconsistent with the Act’s graduated enforcement scheme to allow consideration of an operator’s past violative conduct for an unwarrantable failure determination but to prohibit consideration of an operator’s past violative conduct in the assessment of a potentially higher flagrant “repeated failure” penalty.

Another factor that undermines the Judge’s and (Wolf Run’s)¹⁰ crabbed construction of section 110(b)(2) is that, in many situations, it would render the provision mere surplusage. Under their view, a flagrant designation based on “repeated failure” would be confined to those instances in which an operator repeatedly failed to eliminate the cited condition at issue. However, if this interpretation were adopted, section 110(b)(2) would be effectively indistinguishable from the failure to abate provisions of section 104(b) of the Mine Act. It would also be duplicative of (and under some circumstances, inconsistent with) section 110(b)(1), which sets forth the penalty to be assessed when an operator fails to correct a violation for which it has been cited.¹¹ In that case, MSHA is permitted to assess a penalty of not more than \$7,500 for each day the violation is not corrected, with no upper limit.¹² It is difficult to believe that Congress, having apparently determined that additional enforcement tools were needed in the wake of the Sago disaster,¹³ provided a sanction that applied, for the most part, to a situation addressed by an existing provision.

⁹(...continued)

context leads us to conclude that only one interpretation is permissible.” Similarly, Commissioner Nakamura concludes that the Mine Act’s “repeated failure” language is susceptible to only one interpretation *in light of its purpose and context*.

¹⁰ Wolf Run agrees with the Judge’s interpretation that the “repeated failure” prong of section 110(b)(2) may not be based on past violations.

¹¹ Section 110(b)(1) states that “[a]ny operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than \$5,000 (currently \$7,500) for each day during which such failure or violation continues.” 30 U.S.C. § 820(b)(1).

¹² By contrast, the flagrant violation penalty is capped at \$242,000. 77 Fed. Reg. 76,408 (Dec. 28, 2012).

¹³ The MINER Act was passed shortly after mine disasters that occurred at the Sago Mine, Alma Mine and Darby Mine. S. Rep. No. 109-365 at 2 (2006).

Furthermore, if, consistent with the Judge's interpretation, the "repeated failure" language of section 110(b)(2) were confined to the "repeated failure to eliminate" the *cited* condition, this might result in the elimination of any meaningful distinction between a "reckless" and a "repeated" flagrant violation, as a repeated failure to make reasonable efforts to eliminate a single known and dangerous violation will often be considered reckless.¹⁴ We do not believe that Congress intended the repeated failure flagrant provisions in section 110(b)(2) to be mere surplusage. *Cf. Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 826 (Apr. 1981).

For these reasons, we conclude that the Secretary may permissibly consider an operator's past violation history in determining that a violation should be assessed as a "repeated failure" flagrant violation within the meaning of section 110(b)(2) of the Act, and that the Judge's contrary interpretation is erroneous.¹⁵ We do not resolve which prior violations are relevant to the assessment of a "repeated failure" violation at this interlocutory stage in these proceedings.

¹⁴ Wolf Run suggests that a "repeated failure" determination would also apply to a situation whereby the inspector comes upon a violative condition which had been repeatedly noted in the operator's examination books. While such violation might well be considered "flagrant" under either the "reckless failure" or "repeated failure" criteria of section 110(b)(2), we decline to limit the application of the repeated failure prong to what we would hope and expect to be rare occurrences.

¹⁵ In reaching our conclusion, our consideration is constrained by the narrow question on review, as set forth in our order granting interlocutory review: "whether the judge correctly construed the 'repeated failure' language of section 110(b)(2) of the Mine Act." We intimate no view on the reasonableness of the broad interpretation advanced by the Secretary's appellate counsel before us. *See supra* note 5.

III.

Conclusion

For the foregoing reasons, we conclude that the Judge erred in his interpretation of section 110(b)(2) and remand these proceedings to the Judge. On remand, the Judge shall set the matter for hearing and, consistent with this decision, determine whether the violation alleged in Order No. 6605922 was properly assessed as flagrant. The Judge shall require the parties to submit other pleadings and evidence as he deems appropriate.

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

/s/Michael G. Young

Michael G. Young, Commissioner

/s/ Patrick K. Nakamura

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

March 27, 2013

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

v.

DICKENSON-RUSSELL COAL
COMPANY, LLC

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Docket No. VA 2012-397

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. On February 21, 2013, Administrative Law Judge Thomas P. McCarthy issued an Order Rejecting Amended Settlement Motion and Order for Certification of Interlocutory Review. Unpublished Order at 8 (Feb. 21, 2013). The proposed settlement at issue involved Citation No. 8190957. *Id.* at 1.

On March 4, 2013, the Commission issued an order pursuant to Commission Procedural Rule 76(a), 29 C.F.R. § 2700.76(a), directing interlocutory review on the question of whether the Secretary of Labor can remove a “significant and substantial” designation from a citation without leave of the Commission in settlement of a proposed assessment of civil penalty that has been contested. The Commission further ordered briefing by the parties.

On March 11, 2013, Dickenson-Russell Coal Company, LLC (“Dickenson-Russell”) filed with the Commission a Notice of Withdrawal of Contest. In the notice, Dickenson-Russell states that it has paid the civil penalty associated with Citation No. 8190957, and that it withdraws its notice of contest of the citation.

Commission Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the Judge’s 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).

Upon consideration of the matter, we have determined that, given the operator's payment of penalty and its filing of a notice of withdrawal of its contest, the criteria for interlocutory review are no longer satisfied. We hereby vacate our order directing interlocutory review and remand the case to Judge McCarthy for further proceedings under the Mine Act, including a determination of whether this proceeding is moot.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 1, 2013

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2011-108-DM
o/b/o DOUGLAS PILON,	:	N.C. MD-10-03
Complainant	:	
	:	
v.	:	
	:	
ISP MINERALS, INC.,	:	Mine: Kremlin Plant
Respondent.	:	Mine ID 47-00148

DECISION

Appearances: Travis W. Gosselin, Office of the Solicitor, Chicago, Illinois, on behalf of the Secretary of Labor;
Gregory P. Seibold, Seibold Law Firm, Iron Mountain, Michigan, on behalf of Douglas A. Pilon;
Brent I. Clark and Meagan Noel Newman, Seyfarth Shaw LLP, Chicago, Illinois, on behalf of Respondent;
Thomas A. McKinney, Castronovo & McKinney, LLC, Morristown, New Jersey, on behalf of International Specialty Products and ISP Minerals, Inc.

Before: Judge Rae

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, on behalf of Douglas A. Pilon, against ISP Minerals, Inc., 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”).¹ The parties presented testimony and documentary evidence at a hearing in Green Bay, Wisconsin. The parties filed post-hearing briefs. For the reasons set forth below, I conclude that Douglas A. Pilon engaged in activity protected by the Mine Act, and that his protected activity motivated ISP Minerals, Inc. to terminate his employment.

¹ Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

A. Background

Respondent ISP Minerals, Inc. (“ISP”) operates the Kremlin Plant in Pembine, Wisconsin. ISP hired Douglas A. Pilon, as a kiln operator in 2004. Mr. Pilon worked at the mine until his termination from the company on March 15, 2010, following a suspension on March 2, 2010. Mr. Pilon filed a complaint of discrimination with MSHA on May 10, 2010, which was the subject of a temporary reinstatement request. Ex. S-1.² On July 2, 2010, I ordered that Pilon be temporarily reinstated to his position as a kiln operator at the Kremlin Plant, in Docket LAKE 2010-766-D. By settlement agreement between the parties, Pilon is currently economically reinstated at ISP.

The Secretary of Labor (“Secretary”) filed the discrimination complaint in this matter on November 9, 2011. In addition to a finding that ISP unlawfully discriminated against Pilon for engaging in protected actions under the Mine Act, the Secretary also seeks orders requiring permanent reinstatement, full compensation for lost wages plus interest, full compensation for additional medical coverage expenses incurred, compensation for pain, suffering and emotional distress, that Pilon’s personnel file be purged of any disciplinary action taken against him, that ISP post a notice stating that it will not violate Section 105(c) of the Mine Act and any and all additional relief to which the Secretary and Pilon may be entitled. The Secretary further seeks an order assessing a civil penalty against ISP for violating Section 105(c)(1) of the Mine Act, with the penalty proposal based upon the six criteria contained in Section 110(i) of the Mine Act.

The parties have agreed to the following stipulations:

1. Respondent is an operator as defined in Section 3(d) of the Mine Act, 30 U.S.C. §§ 801 *et seq.*
2. Operations of ISP Minerals at the Kremlin Plant mine in Pembine, Wisconsin, are subject to the jurisdiction of the Mine Act.
3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to Sections 105 and 133 of the Mine Act.
4. Prior to his termination by Respondent ISP Minerals, Complainant Douglas A. Pilon, was a “miner” as defined in Section 3(g) of the Mine Act.

² The following abbreviations are used in this decision: Ex. S- # = Secretary’s exhibit; Ex. R- # = Respondent’s exhibit; Tr.# = transcript of the hearing; Temp. Rein. Tr. # = transcript of the temporary reinstatement hearing; ISP Brief = Respondent’s post-hearing brief; Sec’y Brief = Secretary’s post-hearing brief.

5. Douglas A. Pilon reported that on February 25, 2010, he had been exposed to aluminum chloride vapor and signed an ISP accident/incident report dated February 26, 2010, regarding this alleged exposure.
6. On March 2, 2010, ISP Minerals suspended Douglas A. Pilon from work.
7. On March 15, 2010, ISP Minerals terminated Douglas A. Pilon's employment.
8. ISP issued a Warning Notice to Douglas A. Pilon regarding performing walk around inspections on September 26, 2008.
9. ISP retrained Douglas A. Pilon on the walkbehind machine on April 1, 2006.
10. ISP retrained Douglas A. Pilon regarding workplace inspections on September 26, 2008.
11. ISP retrained Douglas A. Pilon regarding cleaning baghouse number 4 on January 28, 2009.
12. ISP issued a Disciplinary Document to Douglas A. Pilon on January 28, 2009.
13. ISP issued a 5-day suspension to Douglas A. Pilon on August 28, 2009.
14. ISP issued an Employee Retraining Document to Douglas A. Pilon on August 31, 2009. (Court Ex. A).

B. Findings of Fact³

ISP terminated Pilon on March 15, 2010, following a suspension on March 2, 2010. The basis for his termination is set forth in a letter signed by Mark Coombs, Site Manager. The letter appears in the record as Ex. S-17 and states:

On March 2, 2010 you were suspended from work without pay pending the Company's investigation of your unacceptable job performance and conduct during your scheduled shift on March 2, 2010.

The following is a summary of the company's findings during its investigation:

- Previously you received a 5 day disciplinary suspension for plant rules violations on 8/29/09 for violation of:
 - Loafing, leaving the department where assigned without permission or visiting with other employees during work hours. Sleeping on the job. Inefficiency or negligence in performance of duties. Willful insubordination, including refusal or failure to perform work assigned or to follow instructions.

³ The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving conflicts of testimony, I have taken into consideration the interests of the witnesses, corroboration or lack thereof, and consistencies or inconsistencies, in each witness's testimony and among the testimony of the witnesses. In evaluating the testimony of each witness, I have also relied on his or her demeanor. Any failure to provide detail on 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).

- In the Company's Disciplinary Suspension letter to you dated August 28, 2009, you were given notice that you would be subject to termination for future violation of work rules 16, 18, 19, and 20.
- On March 2, 2010 when directed by your supervisor to perform your required job task of cleaning out the 2nd coat cooler system, you were dishonest in replying "they were already done", and after being directed a second time you failed to follow your supervisor's directions and perform your assigned tasks. **(Plant Rule 17. Willful damage or neglect of machinery, tools, equipment, materials, or any other ISP property. 19. Inefficiency or negligence in performance of duties. 20. Willful insubordination, including refusal to follow lawful instruction from your supervisor.)**
- During the investigation it also came to light that you failed to properly perform a clean out on 2/22/10 causing excessive waste. **(Plant Rule 17. Willful damage or neglect of machinery, tools, equipment, materials, or any other ISP property. 19. Inefficiency or negligence in performance of duties.)**
- On 3/2/10, you were also observed loafing in the panel room while not on a scheduled break time. **(Plant Rule 16. Loafing, leaving the department where assigned without permission or visiting with other employees during working hours. 19. Inefficiency or negligence in performance of duties.)**

This combination and continuing pattern of behaviors and actions are totally inappropriate and unacceptable. Regretfully, your employment relationship with ISP Minerals, Inc., Pembine, WI is terminated effective today **3/15/10**.

Ex. S-17.

Douglas A. Pilon began working for ISP, at the Kremlin Plant, in 2004. Tr. 30. ISP is a mine that manufactures roofing granules for asphalt shingles, by crushing rock into granules and then baking paint onto the rock granules. Temp. Rein. Tr. 12-13; Tr. 31. Pilon was employed as a kiln operator on the second shift, work which entails greasing and maintaining machinery, "rapping out" coolers and aerators, and monitoring and maintaining the kiln temperatures. Temp. Rein. Tr. 12; Tr. 31. He worked approximately 48 hours per week, with eight of those hours being overtime. Tr. 33. The work process begins with lighting and pre-heating the kilns and aerators. Once the kilns are lit, spray paint is applied to the rock granules in the mixer. It then goes down a chute into the aerator then up the belts into the kilns, the temperature of which is controlled by the kiln operator from a remote location. From the kilns the rock travels down an elevator into the coolers where the chief operator adds water, aluminum chloride and other chemicals depending upon the color run. The rock then goes to the oiler who coats the rock with oil for color consistency; and finally, it is processed for loading and shipment. Tr. 60-63. As the color is changed, the mixers and coolers are "rapped out" or banged with a ball-peen hammer to remove old color remaining on the walls of the cooler. The kiln operator is responsible for

rapping out the aerators and coolers and for ensuring that the kiln temperatures are properly maintained throughout the coloring process. Tr. 68.

Members of management at the time the events discussed herein were Mark Coombs⁴, Site Supervisor; Tyler Hill⁵, Coloring and Shipping Supervisor; Clarence Schlais, Treatment

⁴ At the time of trial, Coombs was no longer employed by ISP. He appeared as a witness.

⁵ At the time of trial, Hill was no longer employed by ISP and did not appear at trial based upon my granting the Secretary's motion for sanctions. Respondent was directed by my Prehearing Order and Notice of Hearing order to provide counsel and the court a list of their witnesses with a summary of expected testimony 20 days prior to hearing. The deadline for filing this report was July 20, 2011. The Secretary had propounded written interrogatories in December 2010 in which she requested the contact information for Tyler Hill. Hill had testified at the temporary reinstatement hearing in this matter but had left ISP by December 2010. Respondent answered discovery stating that they were unaware of Hill's contact information. In supplemental responses, the Respondent again stated they had no knowledge of Hill's contact information. They did not file any additional supplemental answers prior to trial. On July 20, 2011, the last day for filing their prehearing report, Respondent listed Hill as their witness including his full contact information. The discovery cutoff had expired by this time and trial was just days away. The Secretary filed a motion for sanctions due to their inability to depose Hill, who Pilon named as the discriminator in his complaint. A response in opposition was filed by ISP and a telephone conference was held on August 5, 2011 so both parties could present further argument. The Respondent's defense was that they just learned of Hill's contact information two days before the discovery cutoff. During the telephone conference, the attorney for the Respondent stated that they had Hill's personal cell phone number since May 2011 but did not provide it to the Secretary because discovery is designed to be answered by the client. Information in the hands of the client's counsel, on the other hand, need not be provided in response to discovery. They cite no authority for this position and I found it lacked merit. After deliberation and careful consideration of the facts and potential remedies, I found substantial harm and prejudice to the Secretary and granted the Secretary's request to exclude Hill as a witness.

At the conclusion of the hearing, Respondent made a proffer of evidence on the record as to Tyler Hill's expected testimony had he appeared at trial. This proffer appears in the record starting at page 805. Essentially, counsel stated that Hill would have testified at trial on the merits to the same facts he testified to at the temporary reinstatement hearing. He would have verified the truth of his prior testimony, his written statement to Investigator Hautamaki, the various emails he authored, his notes and other written materials attributed to him. He would have testified that his and Coombs' determination to fire Pilon had no relationship to any protected activity. Hill's testimony from the prior hearing is of record as Exhibit B and is referred to throughout this decision. All of Hill's written materials and his statement to Hautamaki are also exhibits in this record. Coombs testified at length regarding Hill's conversations with him, Pilon and other ISP personnel. I have considered all of this evidence in
(continued...)

Plant Foreman; Dan Gadzalinski, Fill-in Supervisor; and, Mark Hammill, Milling and Crushing Supervisor/Foreman.

The events at issue leading up to Pilon's termination took place between February 3, 2009 and March 15, 2010. The protected activity upon which Pilon filed his discrimination complaint stems from an event that took place on February 25, 2010 which he claims was the last of several safety and accident complaints that had earned him the reputation as a complainer.

On February 25, 2010, Pilon was walking on a catwalk to obtain kiln and cooler samples and as he passed the #6 cooler he inhaled a small breath of aluminum chloride, a chemical that is commonly used at the mine as a drying agent. Tr. 40-41; Ex. S-2. As he had been exposed to aluminum chloride in the past, Pilon recognized the vapor from the smell and taste and a feeling of a lack of oxygen. Tr. 41-42. In 2006 or 2007, Pilon inhaled aluminum chloride, which resulted in vomiting, fever, difficulty breathing and three months' time off of work on workmen's compensation, until he was medically cleared to return. Tr. 43. Following his February 25, 2010 exposure, Pilon reported the incident to his foreman, Lee Schlais. Tr. 44, 184. The next day, Schlais completed an "Accident/Incident Investigation Report," without Pilon's input. He was only instructed to sign it on Friday, February 26, 2010. Tr. 44; Ex. S-2; Ex. R- 29. The accident report form indicates that the cause of the escaped gas was that a slide had been lowered to keep the fan from pulling too much amperage. As a corrective action, Pilon was instructed not to go near the discharge end of the cooler when in operation, especially while chloride products are running, and to wear a respirator. Ex. S-2. Pilon testified that he was upset by this directive because the miners had been told the collection process did not expose them to unsafe conditions and the use of respirators was not necessary. Tr. 44. He was concerned, he said, for the safety of other employees who were not given this information or the same directive. Tr. 45.

Schlais testified that when Pilon reported the inhalation to him, he asked Pilon if he felt any ill effects. Pilon said he did not but Schlais said it should be written up for their protection. Tr. 523. Schlais recalled adjusting some of the gates that changed the draft from the coolers as a result of this incident. Tr. 524. He then sent the report to the office where it was reviewed by management. He did not recall speaking with Hill or Coombs about the incident. Tr. 527. He confirmed that Tyler Hill's signature appears on the report. Tr. 530; Ex. R-29. Schlais testified that Pilon was a whiner and a complainer who raised safety issues more than others but they were legitimate concerns that he raised. Tr. 550-51.

⁵(...continued)

making my decision and have given it the same weight I have given to the testimony of the live witnesses. The presence of Hill at trial would not have altered my decision.

The Secretary's position is that Pilon was known to management as a complainer who made repeated safety reports and was the subject of several accident reports.⁶ As a result of this last safety report in February 2010, Pilon was wrongfully discharged. *Sec'y Brief*.

The Respondent alleges that Pilon was terminated based upon a series of documented violations of company policy and rules including insubordination, sleeping on the job, loafing and neglect or damage of machinery or other ISP property (waste). His misdeeds were reduced to writing in a discharge memorandum, dated March 15, 2010, which was presented to him following a five-day suspension by Coombs and Hill. *ISP Brief*.

Following his termination, the Secretary of Labor filed a wrongful discrimination action on Pilon's behalf whilst Pilon filed a discrimination complaint with MSHA dated May 10, 2010. The complaint was investigated by MSHA investigator Field until he became too ill to proceed at which time the investigation was turned over to MSHA investigator James Hautamaki.⁷

⁶ Respondent objected to the Secretary including other safety/accident reports made by Pilon as protected activity based upon a lack of notice. The Respondent was on notice, however, that Pilon had the reputation of being a "whiner and complainer" that made repeated safety complaints and had several workmen's compensation claims filed on his behalf as a result of accidents at work that he reported to Respondent's management personnel. Additionally, Pilon's complaint clearly states the reason for his discharge was that he filled out an accident report on February 25, 2010 for inhaling aluminum chloride "again." The complaint goes on to cite untimely filing of an accident report, the accident related to his back injury from cleaning snow and several other incidents as the basis of his discrimination complaint. Ex. S-1. Furthermore, Respondent's Site Manager Coombs initiated an email to upper management suggesting the termination of Pilon many months prior to his actual termination based upon Pilon's "history of worker's compensation" complaints which are generated after a filing of an accident report. Ex. R-24. They feared reprisal which could clearly be interpreted as fearing a discrimination complaint or another safety complaint. Moreover, the subject of the prior accident reports was discussed with ISP management during interviews with MSHA investigators Field and Hautakmaki in March 2010. Counsel for ISP was present by telephone during these interviews. *See Exs. R-34, 35, 36.* I find lack of notice is not an issue.

⁷ At the hearing, Hautakmaki testified that he has worked for MSHA for 17 years in capacities as a mine inspector, accident investigator, and special investigator. Tr. 293-295. He explained that Field interviewed Pilon, Hill, and Coombs and that he reviewed those interviews and Pilon's discrimination complaint when he took over the investigation. Tr. 299.

A. February 3, 2009 Events –Back Injury Accident Report/Drug Test

The Secretary's Case

Pilon testified that on this day there was a safety meeting at the company that day, which required the workers to “bump up a job,” in order to fill the roles of employees attending the meeting. Tr. 49. This required him to work as the screen operator. *Id.* Pilon explained that this involves climbing up on a catwalk to clean shaker screens that become plugged up. *Id.* He testified that because he is rather short he was standing on his tiptoes scraping the screens when he felt a twinge in his back. Tr. 49-50. He told his co-worker, Kyle Anderson, that he thought he sprained his back scraping the screens. Tr. 50-51. Pilon testified that during the remainder of the shift he was able to bend, work, and lift. *Id.* He explained that because he didn't feel as though he was injured, he didn't report it as a work injury while on shift. *Id.*

Pilon testified that later that evening, about five hours after he got home from work, his back began tightening up and he couldn't get out of bed. Tr. 50. He called ISP at 1am and told them that he injured his back at work and it was getting worse. *Id.* He was told to call back in the morning and report this to his foreman. *Id.* Pilon stated that he called back the next morning and reported the back injury to Mike Hammill, his on-shift supervisor, and believed that Hammill completed an accident report based on his phone call. Tr. 50-51. He testified that he did not report the back strain to Hammill when it happened because he did not see him. Tr. 51. He stated that his signature is not on the Accident/Incident Investigation Report because he couldn't get out of bed the day that it was completed. Tr. 51; Ex. S-4. He testified that he was never given the report when he returned to work. Tr. 52. On cross-examination, Pilon explained that he told Kyle Anderson that he pulled his back muscle because his foreman and chief operator were not around and he wanted to let someone know. Tr. 206. He testified that he was taught that company policy was to report injuries and near-misses for injuries to management. Tr. 207. He stated that he does not recall whether he ran into Hammill before the end of his shift that day and that he didn't report the pulled muscle to any supervisor before he left work. Tr. 209.

Pilon testified that Sue Courter in Human Resources phoned him at home the day after the incident and asked him if he wanted them to bring him to the hospital, and that he replied in the affirmative. Tr. 52. She advised him that she would try to get him an appointment with the company doctor but never came to get him, even though he told her the condition he was in. *Id.* He testified that he returned to work about two weeks after the back strain. *Id.* Upon returning from work, he was informed that he had to take a mandatory drug test. On the day Courter was taking him to the doctor to get a drug test, he was brushing snow off of the company car and twisted his back again. Tr. 53. He stated that he told her about this right as it happened and that she told him not to worry and that they would write that up after returning from the doctor. *Id.* He stated that they did write up this injury incident. Tr. 53; Ex. S- 3.

Pilon testified that he was aware that reporting an accident at work would require him to take a drug test. Tr. 269. He failed this drug test because it detected a prescription painkiller in

his blood. Tr. 212. His girlfriend had given him some pills for his back that he assumed were non-prescription pills and he took them. *Id.* He said that he took the painkillers that his girlfriend gave him at about 7:30 am. *Id.* He explained that he recalled the pills she gave him were red pills and thought that they were Advil because he does not have any prescription medication in the house. Tr. 270. He testified that he never took an illicit drug prior to work and had no idea that he took the prescription drug until he was told that he didn't pass the drug test. Tr. 278-279. He was disciplined for this incident. *Id.* The disciplinary report is dated February 18, 2009 and appears in the record at Ex. R- 22. The report advised him that he must submit to another drug screen and have a negative result before he can return to work and that a future violation will result in severe disciplinary action up to and including discharge. Ex. R-22.

On re-direct, Pilon testified that if Sue Courter had taken him to the hospital, he never would have taken the prescription drug because he would have been at the hospital and not at home for his girlfriend to have given him the drug. Tr. 279. When he signed the disciplinary report, he did not intend to indicate that he agreed with the assertions made in the document. Tr. 280.

The Operator's Case

Mike Hammill, the milling and crushing foreman at ISP, filled out the February 3, 2009 incident report as Pilon's supervisor. Tr. 673. He testified that Pilon was working under him as screen man and he filled out the report without speaking to Pilon. Tr. 676. He testified that Pilon did not report a back injury to him that day. Tr. 678. He testified that employees are required to let their supervisor know about an injury or near miss and that the supervisor completes the accident/incident report with them. Tr. 678. Hammill stated that no one at ISP management discouraged him from completing a report. Tr. 679. He testified that Hill took the rules very seriously and was a black and white thinker. Tr. 680. He said that he himself received a five-day suspension for not wearing fall protection and that no one contacted him during the investigation. Tr. 681. Hammill testified that Pilon was an average worker and he never had to discipline him. Tr. 687. He said that when Pilon was his screen man, he was doing what he asked him to do and that he doesn't have a negative opinion of Pilon. *Id.* Hammill testified that Pilon's back injury could have occurred after he spoke with him during the shift on February 3rd. Tr. 692.

The accident report has a notation on the bottom that it "was not timely reported & will be denied worker's comp." Ex. S-4.

Coombs testified that he met with Pilon and union committee members about the failure to timely report the back injury, positive drug test results, and discipline and that they had occurred before he (Coombs) was employed with ISP. Tr. 560. They requested that the report be pulled from Pilon's record. Coombs stated that after he investigated the matter, he found that the worker's compensation insurance company made the determination that the injury did not occur at work. Tr. 561. Coombs admitted that he was informed the claim was not denied because it did not occur at work, but because it was due to a pre-existing condition. Tr. 641. Because the injury was determined to be non-work related, Coombs was willing to pull the

record from Pilon's file, hold it in a separate file for one year, and then permanently remove it from his personnel record as long as Pilon did not untimely file an accident report or fail a drug test for one year. Tr. 562. He testified that he removed the report and could not explain why the document was submitted as evidence of discipline for the March 2, 2010 events when it wasn't supposed to be in the file. Tr. 631.

B. August 21, 2009 Events – Loafing and Sleeping on the Job

On August 24, 2009, Pilon received a five day suspension for failing to follow the company's standards for duration and location of break periods, for failing to follow supervisor's instructions to resume work following an extended break, sleeping in the panel room, and failing to perform all work assigned. Ex. R- 27. In addition, the disciplinary suspension letter informed Pilon that he was suspended on August 17, 2009 for violations during his shift on August 21, 2009. The suspension letter dated August 21, 2009 further states that Pilon violated the following plant rules:

- 16) Loafing, leaving the department where assigned without permission or visiting other employees during working hours.
- 18) Sleeping on the job.
- 19) Inefficiency or negligence in performance of duties.
- 20) Willful insubordination, including refusal or failure to perform work assigned or to follow instructions.

Ex. R-27.

The Secretary's Case

In relation to the August 21, 2009 events, Pilon testified that on that evening, he was in the mixer/paint shack and that they were having bead problems, which causes the paint charts to drop. Tr. 94. He explained that alarms were going off every three to five minutes and when they go off for more than 30 seconds to a minute, he has to see how far the paint chart drops. Tr. 94-95, 227. Pilon stated that Tyler Hill walked into the mixer room and asked him what was going on. Pilon replied "nothing" and Hill asked if he was sleeping because he looked startled when he entered the room. Pilon denied that he was sleeping and Hill said he really could not tell if Pilon was sleeping or not because he could not see through the glass. Tr. 95, 228. Pilon explained that because people clean the glass with rock dust it is difficult to see through it. *Id.*

Pilon testified that he wasn't loafing and that he understood "loafing" to mean not doing one's job and being in a different part of the plant. Tr. 98. He stated that he would usually tell his foreman where he was going if he had to be somewhere else, such as taking bags out, which was also part of his job. *Id.* Pilon testified that he was not disciplined for being in another part of the plant or visiting other employees during working hours. Tr. 99. He said that he did not understand what the letter meant by "negligence in performing duties" or "willful insubordination" and that he was not accused of those things in August 2009. Tr. 99-100.

Pilon testified that Hill was “riding his case for years.” He would tell Pilon to go out to the baghouse or sweep an area when his foreman wanted him to remain in the panel room so they could locate him. Hill did not want him in the panel room and it would put Pilon at odds with his foreman’s directions. Tr. 120. Pilon was disciplined because Hill walked into the lunchroom one day when Pilon was five minutes into a 20-minute lunch break. Hill told him to clean an area when he was done with his break. He said he would. Hill came back a few minutes later and asked Pilon why he was not back at his job and Pilon told him he had just started his break when Hill came in the first time. Tr. 121, 230-31. He was still only 15 minutes into his break when Hill came in the second time. When he was asked the second time to go clean, he did not protest. Tr. 230-32. He stated that he was not loafing or sleeping on the job as he had been accused by Hill. Tr. 122. Kiln operators have to take breaks when they can because they are moving around on a regular basis throughout the shift, monitoring things. Tr. 270-271.

Pilon testified that he was called into the plant for a meeting to discuss the results of the investigation. Tr. 222. Also present at the meeting were the union representative, Coombs and Hill. *Id.* Pilon stated that he was given the opportunity to present his side of the events but there were some things that were not addressed. *Id.* Pilon explained that he wanted to bring the paint chart from the mixer area into the meeting to prove his version of the events and that “nobody is sleeping up there.” Tr. 225. He said that he asked the union to get the chart, that the union representative asked the company for it, and it had mysteriously disappeared and was not present at the meeting. *Id.* He was not aware that he could have filed a grievance with the union about these events and blames the union for not advising him that he could have done so. Tr. 234. Pilon testified that he received retraining on starting his shift on time, taking one ten minute break and one thirty minute lunch, not leaving the department without supervisor approval, working diligently throughout the shift, monitoring the equipment and other areas, housekeeping, and following all ISP work rules, safety rules, and lawful instructions from supervisors. Tr. 235-236; Ex. R-28. Pilon testified that no one from the company contacted him for his side of the story between August 17th and August 28th when he received the suspension letter. Tr. 281.

The Operator’s Case

Mark Coombs testified that Hill called him at home on August 21, 2009 and was told that Pilon was caught sleeping in a control room and took an extended break after ISP had conducted training about the appropriate place to take breaks. Tr. 563; Ex. R-23. He stated that this was truly unacceptable behavior. *Id.* Coombs asked Hill to investigate and document these events. Hill emailed him this information the next day. Tr. 564; Ex. R-23. He testified that there had recently been a training session about not taking breaks in the panel room. Tr. 566. Coombs also stated that Pilon was in the lunchroom with Dan Moyer, that after the ten-minute break, Hill told them to get back to work. Tr. 569; Ex. R-23. He said that Moyer went back to work but Pilon asked why he had to go back and resisted Hill’s instructions. *Id.* He testified that Hill found Pilon in the mixer operator’s booth, which was not his functional area, watched him through the window for 15-20 seconds, and startled Pilon upright when he came into the room, which indicated to Hill that Pilon was asleep. Tr. 570. He stated that Hill saw Pilon with his

feet kicked out. *Id.* Coombs testified that Hill complained that there was always a lot of clean-up to do. Tr. 571.

Coombs testified that he found the behavior unacceptable, particularly the sleeping in the panel room, from a safety point of view. Tr. 573. Coombs stated that the safety concerns might be materials overflowing with people in the plant or a gas explosion or emergency where they might not be able to locate Pilon because he wasn't in a location he was expected to be. Tr. 573. Coombs testified that after reviewing his notes he believed they should proceed with termination. Tr. 575. He stated that he based this recommendation on a safety point of view, customer quality, plant housekeeping, and the morale of other employees. Tr. 576. Coombs stated that sleeping during his shift after the rules had been reviewed the prior week in training was insubordination in his view. Tr. 576-577. Coombs forwarded an email sent to him by Hill addressed to Justin Dunlap and Richard McNew, HR manager and corporate HR manager for ISP on August 22, 2009. Tr. 575; Ex. R-24. He advised them that Pilon had exhibited a blatant disregard for meeting expectations and that "suspension in [his] view may only put [them] at risk for retaliation by way of another WC claim of which he has a history." Ex. R-23.

With his email proposing termination of Pilon for poor work performance, Hill included his incident report which stated that on August 21, he saw Pilon and two others eating lunch in the break room and told them they should check in after lunch. Later he saw Pilon taking another break and about ten minutes into the break, he told Pilon "we should probably get moving, there is a lot of work to do." He spoke with him again a few minutes later and told him it was "probably time to get going." Hill told him there was cleanup work to do and he sent Pilon to vacuum. With regard to the sleeping in the mixer booth, Hill stated that he saw Pilon for a few seconds and thought his eyes were closed. When he entered the room, Pilon acted startled but denied he had been sleeping. He stated that he was cooling off. Hill told him cooling off was "ok." Hill stated that it was his "impression" Pilon was sleeping from what he observed. Ex. S-23.

Coombs testified that after Pilon was suspended, they set up a meeting with him and the union committee to give Pilon a chance to respond. Tr. 580. He testified that before this meeting occurred, they had reached a consensus to give Pilon a fair and final letter and a disciplinary suspension versus termination. He testified that at the meeting, they presented the results of their investigation and recommended course of action and then Pilon and the union provided information. Tr. 584; Ex. R-26. Coombs said that Pilon never denied anything at the meeting. Tr. 584. Coombs testified that the August 28, 2009 disciplinary letter to Pilon was finalized following the meeting with Pilon and the union. Tr. 588. He testified that after he completed the letter and he and Hill signed it, they returned to the meeting and read the document to Pilon. Tr. 589. The document, entitled "Disciplinary Suspension- Plant Rules Violations," given to Pilon stated that if he engaged in the same activities again, he would be subject to termination. Ex. R-27. Coombs stated that he believed that Pilon was subject to termination if he did not comply with the rules set forth in the August 28 letter. Tr. 591.

C. Events of February 22, 2010 –Waste of Materials

The termination letter references a single incident of causing excessive waste and violation of plant rule 17—willful damage or neglect of machinery, tools, equipment, material, or any other ISP property and plant rule 19—inefficiency and negligence in performance of duties. This incident arose as a result of Gadzalinski telling Hill on the night of March 2nd that he should look into waste on this date that could be attributed to Pilon. Tr.714.

The Secretary's Case

Pilon testified that he does not know what incident this refers to, as he didn't recall performing a clean out on that date. Tr. 105. No one had ever mentioned an issue of waste with him on that date. He testified that it could be referring to an excessive clean out and it was a day that he changed shifts with someone else named Lisa Riley. *Id.* He testified that he was not on that shift. Tr. 105-106. The Oiler Daily Waste Report reveals that 36 tons of waste was generated on this date and the reason given was “no paint raw.” Ex. S-12. Pilon testified that he is not involved in the paint process. Tr. 125. Pilon testified that, to his knowledge, tonnage loss on start-up was never blamed on a miner before. Tr. 285.

On cross-examination, Pilon testified that when he got to work, he looked for Lisa Riley and could not find her. Tr. 262. He stated that Hill then told him to get down to his work area and start cleaning but he was not even supposed to be punched in for another half hour and that he was just there to relieve his partner early. *Id.*

The Operator's Case

As set forth in greater detail below, Gadzalinski testified that on the night of March 2, 2010, while testing rock samples in the lab, Tyler Hill entered the lab. Gadzalinski told Hill about the events of the 2nd and told Hill to check on the waste reported on February 22, 2010 because he felt Pilon was to blame for it. Tr. 714. When confronted with the Oiler Daily Waste Report for that day, Gadzalinski confirmed that the cause of the waste was recorded by the oiler as “raw paint” and not a bad startup. Tr. 749-50; Ex. R-12.

Coombs testified that he would not have fired Pilon for this alone. Tr. 604.

D. Events of March 2, 2010 –Failure to Rap Out, Loafing and Waste of Materials

On Tuesday, March 2, 2010, Pilon was suspended without pay pending an investigation for “unacceptable job performance and conduct during [his] scheduled shift” (insubordination, loafing and neglect of duties and neglect or destruction of ISP property). The events of March 2 coupled with the other incidents set forth above led to his termination on March 15, 2010, when he was presented with the termination letter set forth above. Ex. S-17.

The Secretary's Case

Pilon worked the second shift. When he arrived at work on March 2, 2010, the earlier shift had already begun the color-change process, which is unusual. Tr. 60. New colors are not normally started up in the middle of a shift; about 98% of the time they are started at the beginning of a new shift. It is rare that two people on different shifts perform the startup process. Tr. 60, 64. Before beginning his shift, Pilon met with Ann Davis, the kiln operator he was relieving, for a status update. Tr. 60. She told him that it had been the worst day she had in 17 years at the plant, that they had problems all day with wet product and plugged chutes. Tr. 60, 282. When Pilon began his shift, he was of the understanding from speaking with Davis that she had already rapped out the mixers and aerator and thrown in the rock for the second coat. He did not know how much product Davis had put in the kilns on the second coat which was problematical because he did not know when it would come out of the kiln. It usually takes about 15 minutes for the rock to go through the kilns. Tr. 60-61, 66-67.

Pilon had been in the panel room for what he estimated to be about five minutes when Dan Gadzalinski, the fill-in supervisor, asked him to rap out. Because the rock takes about 15 minutes to come out of the kiln, Pilon thought the rock was just going into the kilns. He thought Gadzalinski had been talking about the aerator when he told Pilon to rap out which Davis had said she already rapped out. He told Gadzalinski that Davis had done it already. Tr. 66-67, 100. Mastie, the chief operator, then informed him that the product was just starting to come out of the kiln at which time he left the panel room and rapped out the coolers. Tr. 67. He explained that after rapping out the coolers, he went to the panel room to ensure the kiln temperatures were coming up. Tr. 68. Pilon testified that when he left the panel room to adjust the kiln temperature, he was told by the oiler, Eric Forstrom, that there was contamination and to rap out a second time with a sledgehammer, which he did. He then turned up the kiln temperature and returned to the panel room to monitor the temperature increase. There are no gauges or numbers to check the temperature which is adjusted by inserting a screw driver into the main gas valve and turning it. It may require a quarter of a turn or several depending upon how much gas is needed to heat the product. Depending upon the color, the temperature may need to be adjusted by as little as three degrees. Tr. 69-70. Pilon stated that normally he only needs to rap out once but on this day the color was bad; there were chunks coming out of the coolers so he rapped the second time. He was of the understanding that they were also rapped once by Gadzalinski. Tr. 70-71. He said that Forstrom told him that they had had a bad startup that day. There are times when they will shut the process down and re-start but they didn't choose to do that on this day. Tr. 71- 72. Pilon stated that he did not refuse to rap out that day and actually rapped out twice. The bad start up that Davis had complained about was what caused the problem which was out of his control. Tr. 72, 102.

Pilon testified that when Tyler Hill suspended him that day he did not tell him the duration of his suspension but Hill told him he would get back to him the next day. Tr. 75. He said that he never heard from Hill until he was called in for his March 15, 2010 termination. Tr. 76. Pilon said that he was not told how many tons of waste ISP attributed to him but that he did not know of anyone that was suspended, disciplined, or terminated for waste created during a

start-up. Tr. 83-91. He estimated that average waste during a start-up would be about 12 to 15 tons. Tr. 76. The Oiler's Daily Waste Report, which appears in the record at Ex. S-5, reveals that on March 2, the waste attributed to the start-up was 15 tons and the waste attributed to the coolers being insufficiently cleaned was 24 tons. Pilon surmised that the part of the letter referring to "willful damage or neglect of machinery, tools, equipment, materials, or any other ISP property" is referring to the rock they threw out and that there was no damage to any machinery or tools and there was no equipment damage. Tr. 103.

Pilon testified that the reference to loafing must mean when he was in the panel room after raising the kiln temperature. After Forstrom told him to rap out with the hammer, he adjusted the number one kiln and went to the panel room to watch his temperatures come up. Once the gas valve is adjusted, it takes about 15 minutes for the change to register in the panel room. Tr. 106. He stated that he had been in the panel room approximately three minutes before Hill came in and asked what he was doing. Tr. 108. He told Hill that the temperatures on the two, three and four kilns were perfect but he had to wait for the one kiln to come up by 30 degrees. Tr. 107. Pilon testified that one cannot read the kiln gauges from the chair in the panel room where he was sitting but he had checked them just before Hill entered. Tr. 255-58.

Hautamaki testified that Field's statement, based on his interview with Hill, revealed that Hill and Coombs made the decision to terminate Pilon, that the basis for the termination was for excessive waste and Pilon's insubordinate refusal to rap out the kilns on March 2. Tr. 302. He stated that the refusal to rap out the kilns was conveyed to Hill by Dan Gadzalinski, the fill-in foreman. Hill said that he caught Pilon loafing. Tr. 303-304. Hill told Hautamaki that he went to the control room and saw Pilon in there with his head down and legs kicked out. Tr. 304.

Hautakmaki testified that Coombs informed him that he made the final decision to terminate Pilon. Tr. 305. He testified that Coombs also told Field that there was excessive waste during the start-up on March 2nd and mentioned the sleeping and loafing incidents. Tr. 306.

Hautamaki interviewed Gadzalinski who stated that the chief operator told Pilon to rap out the kilns, that Pilon said that it had already been done by the previous shift kiln operator, and that when Gadzalinski told Pilon to rap out he did not know if Pilon did it or not. Tr. 309. He testified that Gadzalinski rapped out himself a second time and that the color was still bad, and that when Pilon rapped out a third time, the color became good. Tr. 309-310. Hautamaki testified that Gadzalinski said that he did not have problems with Pilon that Pilon did what he was supposed to do and came to work on time. Tr. 310. He said that Gadzalinski told him that Pilon complained about safety issues more than others. *Id.* He testified that Gadzalinski told him that there were several employees disciplined for loafing; one was fired for sleeping on the job. Tr. 378; Ex. R-37. Hautimaki testified that Gadzalinski gave him the name of an employee that was disciplined for insubordination and one for sleeping but he did not speak to those persons. Tr. 379-80.

The Operator's Case

Coombs testified that on March 2, 2010, he was told by Hill that Gadzalinski, the supervisor working with Pilon, was frustrated because he asked him a couple of times to rap out the coolers. Tr. 592. He said that Gadzalinski was upset because Pilon indicated that he had done it and Gadzalinski knew he had not and had done it himself. *Id.* He testified that Hill also told him that he found Pilon loafing in the panel room later that night. Tr. 593. Coombs testified that Pilon violated Plant Rule #17- neglecting machinery - by not properly performing his clean-up. Tr. 615. He stated that he did not speak with Gadzalinski or Mastie about the insubordination incident but that he obtained all of the information regarding the events that night from Hill. Tr. 625. He then stated that he spoke to Dan Gadzalinski but not during the investigation into the events; it was after he had already decided to terminate Pilon. Tr. 664. He also obtained Ann Davis' statement that it was the worst start-up in a long time after he decided to terminate Pilon. Tr. 666; Ex. R-5.

Coombs considered Pilon's actions to be a clear violation of the rules and Pilon was then sent home pending an investigation. Tr. 594. He then instructed Hill to conduct a thorough investigation. He admitted that Hill did not speak with Pilon again after the 2nd until he was fired on the 15th.

Gadzalinski testified that he began his shift on March 2, 2010 at 2:40 p.m., twenty minutes before the start of the second shift. He was briefed by the outgoing supervisor who informed him that the mixers had just been started up and nothing was coming out of the kilns. Tr. 702-704. Gadzalinski was in the panel room during this pre-shift period as was Pilon, who he recalls seeing there about twenty minutes before 3pm. Tr. 752, 758. Upon further questioning, Gadzalinski could not recall close to the top of the hour it was when this event took place. It may have been ten minutes before three. Tr. 705. He stated that it takes about 20 minutes for the rock to go through the kilns. Tr. 752. Sometime before 3:00 p.m., he heard "Bubba" Mastie announce that the rock was coming out of the kiln but he could have said it was in the kiln instead. Tr. 705, 739. Mastie then said "the rock is coming out of the kiln" and told Pilon to rap out. Pilon responded by saying "Ann did it" at which time Gadzalinski told Pilon to rap out and Pilon responded again by saying Ann did it. Gadzalinski told Pilon a second time to go rap out and Pilon left the panel room and went down to rap out. Tr. 706-707. At the same time, Gadzalinski left the panel room and went to adjust the temperature. Tr. 707-708. This exchange took place during the pre-shift period and happened in about sixty seconds. Tr. 758, 725-26.

After adjusting the temperature, Gadzalinski stated that he then returned to the panel room and spoke with Eric Forstrom, the oiler, who informed him the product was bad and Gadzalinski then took a sledgehammer and rapped out. He stated that Forstrom told him that Pilon may not have rapped out. Gadzalinski testified that he personally rapped out twice. Tr. 708-709. He believes at this time he stated out loud, "Pilon lied to me." Tr. 710. Gadzalinski then took a sample of the rock out of the aerator and took it to the lab to test its moisture content. Hill walked in while he was doing this and Gadzalinski testified to his conversation with Hill:

I told him I needed to talk to him about waste, because my waste was quite high. I told Tyler Hill that I don't believe Doug rapped out, that I had excessive waste, and I also told Tyler at that time I believe he lied to me. I told him I didn't believe he rapped out and that's the reason we had as much waste as we did. I also told him that it would be good to possibly check up on the run on February 22nd, because I also had a large waste at that time. I believe it was like 36 or 37 tons waste. [I] believed it was Doug's fault...[He] needed to look into it. Because I -- Mr. Hill has been--was breathing down on all of us supervisors for the waste. We needed to reduce our waste. And that's one of the main reasons why I reported to him.

Tr. 713-714.

Gadzalinski went on to say had it not been for the waste, he would not have even reported Pilon's conduct to Hill. He only did so because it was an issue of waste and he had been talked to by Hill before about reducing waste. Tr. 716. Gadzalinski stated that Hill did not seem agitated when he was told about the waste incident. Tr. 746. Gadzalinski confirmed that he had disciplinary authority over the employees while acting as a fill-in supervisor but stated that he felt uneasy using it. Tr. 718-19. He testified that he never spoke with Coombs about the events on March 2, only Tyler Hill. Tr. 736.

Gadzalinski testified that he was unaware of Pilon's accident report for inhalation of aluminum chloride on February 26, 2010. Tr. 720. He further stated the he believed employees under Coombs' management were encouraged to raise accident and safety complaints. Tr. 717. He was disciplined himself at one time but neither Hill nor Coombs were involved. It was handled at the supervisor- employee level. Tr.760.

On cross-examination, Gadzalinski confirmed that he spoke with Investigator Hautakmaki about the March 2 incident and the investigator took notes. However, Gadzalinski could not recall having actually been shown the report of interview although it indicates he refused to sign it. He claimed this lack of memory was because it had occurred one and one half years earlier. Tr. 720-722. He did admit that it was possible he was shown the statement. Tr. 722; Ex. R-37. Gadzalinski also testified that he did not recall making the statement on page three of the report of his interview that says "I do not know anything about the February 22, 2010 incident." He did confirm that he spoke to Hill prior to his interview with Hautamaki. Tr. 723; Ex. R-37. He then said he did recall that he told Hill to look into it. Tr. 742. He testified that his recollection of events would have been clearer when he spoke to the investigator than it was a trial. Tr. 743. He confirmed the statement says that he thought Pilon was caught sleeping on that date and he did recall making that statement to Hautamaki. Tr. 743.

Gadzalinski denied that the prior shift supervisor told him of any problems from the first shift on March 2. He assumed that Davis and Pilon did do a turn-over briefing as part of their normal procedure. Tr. 724-25. He confirmed, looking at Coombs' notes that it stated that Ann Davis had said it had been a bad day. Tr. 737; Ex. R-5. He testified that Pilon could not have thought Davis had rapped out the mixer or the aerator because the mixer does that job, not the kiln operator. Tr. 730. Although, he admitted there were several breaks in procedure that day including starting the new color at the end of the off-going shift. Tr. 730-32. Gadzalinski

confirmed that there are times when the color goes into the kiln more wet than desired which makes it more difficult to dry in the kiln. Tr. 761-62. The material that gets rapped out of the cooler by the kiln operator is a mixture of water and rock that has been reduced to the size of dust which sticks to the sides of the equipment. The chief operator is the one responsible for adding the water. If he has added too much water, the rock is still wet as it comes out of the cooler and it will stick and remain in the cooler. Tr. 765. It also gets mixed with chloride for certain colors which also sticks with the water and dust to the sides of the cooler. Tr. 768. When the dust mixture sticks, it can stick enough to require a sledgehammer to get it off. Tr. 765-66.

He testified that Mastie told Pilon twice that the rock was coming out of the kilns. Pilon said Ann has rapped out and then Gadzalinski told Pilon to rap out once and Pilon left. This exchange among the three of them took about “a minute.” Tr. 725-26. Later Gadzalinski admitted that his statement to MSHA says he told Pilon to rap out three times but that he meant between he and Mastie Pilon was told three times. Tr. 733. Gadzalinski testified that sometime after Pilon left the panel room after being told to rap out, Gadzalinski saw the color was still bad and he took a sledge hammer and rapped out again. This did not correct the color so he did it a second time. Pilon was not with him on either occasion and he stated that Pilon did not rap out again after he did. He affirmed, however, in his statement, he said he did not know if Pilon rapped out again after he did. Tr. 727-728; Ex. R-37. He then testified that because it has been a year and one half ago, he could not recall if he actually rapped out twice or if he rapped out three times or Forstrom rapped out as well. He could not be sure. Tr. 729. Later he testified that his statement to MSHA said he was not sure if Pilon rapped out after he told him to do so. He would not know if Pilon did or not because he left the panel room to adjust the preheat temperatures in another area of the plant. Tr. 733-34. He then confirmed that his statement says after he went down to rap out once, Pilon went down and rapped out again for a third time, twice in all that Pilon rapped out. Tr. 734; Ex. R-37. Again, he said he must have told the investigator this but he does not recall doing so. Tr. 735.

When cross-examined about the waste on February 22, 2010, Gadzalinski testified that he recalled the color run that day was either 720 or 760, a very light color. He confirmed that the Oiler Daily Waste Report for that day indicates that the color was 760 and the waste was 36 tons. The reason for the waste was documented as “no paint raw” not a bad startup. Gadzalinski stated he recalled the paint problem but did not recall that was the reason. Tr. 749; Ex. R-12. He did confirm the report is made simultaneously with the color run by the oiler. Tr. 749-50.

E. March 15 Termination

Coombs testified that the four bullet points in the termination letter were the bases for terminating Pilon. Tr. 623. He testified that he did not speak with Gadzalinski or Mastie about the alleged March 2 insubordination incident and that he got the information from Tyler Hill. Tr. 625. Coombs testified that Pilon was not involved in the termination investigation, other than he believed Hill talked to him while he was still at the plant on March 2. Tr. 657. He did not speak to Gadzalinski until after he made the decision to fire Pilon. Tr. 664. He also did not

obtain Ann Davis' statement about the bad startup until after he made his decision. Tr. 666; Ex. R-5.

As a result of the March 2, 2010 incident, Coombs testified that Hill sent an email to Richard McNew in Human Resources, copied to him, on March 9, 2010. Tr. 658. This email contained information that stated the cost of waste attributable to Pilon for colors numbered 801 at 24 tons and 720 at 37 tons. Ex. R-32. In reviewing the oiler's waste reports for March 2, 2010, there was no run of color number 720, he admitted. Tr. 660-61; Ex. S-6. The email also contained an attachment of an example of another employee's Last Chance Agreement. Ex. S-32. Coombs confirmed that the attachment was to serve as an example of such an agreement but he could not say what it was for. He stated that Pilon's disciplinary letter in February 2009 was such an agreement although it was not signed by Pilon and was called a fair and final letter. *Id.*

Coombs testified that accident and incident reports are generated from employee verbal reports. Tr. 633. Coombs stated that he recalled that Pilon's worker's compensation claim was denied not because it was not work-related but because it was a result of degenerative disc disease. Tr. 641. Coombs explained that what he meant in the email in August to McNew about the worker's compensation claim is that Pilon had indicated that he was injured at work and he was not and he was afraid a similar situation could resurface. Tr. 608. Coombs denied that when he wrote, "A suspension in my view may only put us at risk for retaliation by way of another WC claim of which he has a history" in his August 22nd email that he was concerned that Pilon would file another worker's compensation claim. Tr. 642-650. Coombs admitted that a reasonable person reading his email could conclude that he was concerned that not firing Pilon could open ISP up to a worker's compensation claim by Pilon and, because accident/incident reports are filled out for worker's compensation claims, not firing Pilon raises the possibility that he would file another accident/incident report in the future. Tr. 652-54. He testified that when he terminated Pilon on March 15, he was aware of the February 26 accident/incident aluminum chloride report. Tr. 655.

Coombs said as soon as he received Hill's investigative notes, he immediately concluded that Pilon should be terminated for the same type of conduct that Pilon had engaged in back in February 2009. The fair and final letter to Pilon had outlined what ISP's expectations were of him. Coombs testified that he followed proper procedure in notifying the union when he called the meeting on March 15, thirteen days after he decided to terminate Pilon. Tr. 595-97. He stated that the delay in meeting with Pilon for termination was to make sure senior management was going to be available. When he met with Pilon and the union on March 15 he reviewed the information and findings with them. Tr. 598. He then conferred with Hill and senior management regarding Pilon's response to the charges and found no extenuating circumstances to stop the termination. He then finalized the letter, reconvened the meeting, reviewed the letter with Pilon, and terminated him. Tr. 602-03.

Coombs testified he would not have fired Pilon for the excessive waste on February 22 alone. Tr. 604. Coombs stated that in his opinion, workplace safety was important to Tyler Hill and he shared the belief in holding people accountable for their actions. Tr. 605. He testified that Hill had high integrity and was willing to hold people accountable for their actions. Tr. 606.

Coombs said that Pilon was the only kiln operator subject to a fair and final chance letter. Tr. 610. Coombs testified that he signed the accident investigation report pertaining to the inhalation of aluminum chloride on the February 25 on March 8 and he did not take it into consideration in firing Pilon because he had already made up his mind to fire him based on Hill's investigation. Tr. 612.

Hill testified at the temporary reinstatement hearing that as a result of his investigation into the events of March 2, 2010, he concluded that Pilon lied to his supervisor and had not rapped out the coolers. He was also loafing in the panel room on an extra break while one of the kilns was out of specification. When he and Pilon checked the temperature gauge, it appeared to Hill that an additional adjustment was needed and he told Pilon to go do it which he did. Based upon the severity of Pilon's disciplinary "history," Hill determined that Pilon should be sent home pending an investigation. Temp. Rein. Tr. 64-66. During the investigation Hill learned of the February 22 alleged waste which together with the events of March 2 became the sole basis for his determination that Pilon should be terminated. Temp. Rein. Tr. 68.

II. ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Prima Facie Case

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" by recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination [that] they might suffer as a result of their participation." S. Rep. No. 95-181 at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

In order to establish a prima facie case of discrimination under section 105(c)(1) of the Mine Act, a miner alleging discrimination must show: 1) that he engaged in protected activity; and 2) that the adverse action he complains of was motivated at least partially by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). In determining whether a mine operator's adverse action was motivated by protected activity, a judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Factors to be considered in assessing whether a prima facie case exists include: 1) the operator's knowledge of the protected activity; 2) hostility or "animus" towards the protected activity; 3) coincidence in time between the protected activity and adverse action; and 4) disparate treatment of the complainant. *Chacon*, 3 FMSHRC 2508 (Nov. 1981).

A mine 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987). The Commission has also held that judges may conclude that [such] justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. *Chacon*, 3 FMSHRC at 2516.

1. Protected Activity

A miner engages in protected activity when making a complaint under or relating to the Act. 30 U.S.C. §815(c). The Act provides that no miner shall be discriminated against when making a complaint of a danger or safety or health violation. The Secretary's position is that Pilon made repeated reports of safety issues at ISP which earned him the reputation as a whiner and complainer. He filled out numerous written complaints on "blue cards" which he submitted to his supervisors. Tr. 36, 55, 58-59. In addition, he filed several accident reports as a result of inhalation of aluminum chloride in 2006 or 2007, a back injury from standing on a catwalk to clean overhead screens, a back injury clearing snow and another inhalation of aluminum chloride in February 2010, shortly before his termination. Tr. 49-50, 53 and 40-42. All of these reports of safety issues and injuries are protected activity, the February 2010 incident being the one that sealed his fate at ISP.

While ISP acknowledges that Pilon's complaint of inhalation of aluminum chloride in 2006 or 2007 would be protected activity it asserts that Pilon's report of exposure on February 25, 2010 is not because Pilon's belief that the exposure posed a safety concern was not objectively reasonable. ISP asserts that because Pilon did not suffer any ill effects from the February 25, 2010 inhalation and that the box checked on the Accident/Incident Report next to "potential consequences" is marked "none," it was not reasonable for him to conclude that this incident constituted an actual safety hazard. ISP also submits that Pilon's belief is not reasonable because after the earlier incident, he accompanied Tyler Hill on an investigation and air monitoring process and was aware that the vapor posed no hazard according the laboratory results. *ISP Brief at 18*.

I disagree. Following his previous exposure in 2006 or 2007, Pilon experienced breathing difficulties and missed three months of work. The fact that Pilon did not introduce medical testimony that this earlier exposure actually caused his breathing difficulties, as ISP suggests, is irrelevant because Pilon had a reasonable belief that it did cause his breathing problems. He was awarded worker's compensation and not allowed to return to work until the physician cleared him. Having already suffered the ill effects from his prior exposure, Pilon was more likely to not only recognize the vapor but to be concerned about it. Acknowledging that he did not suffer ill effects from the February 25, 2010 exposure is not sufficient evidence that Pilon did not reasonably believe that the aluminum chloride exposure was a safety hazard. Pilon did

not fill out the incident report form nor did he have any input as to how it was filled out. Schlais testified he told Pilon he would fill one out to protect both of them. The only notations on the form that were Pilon's were his signature and the date. Tr. 44. Therefore ISP's argument that Pilon did not have a reasonable belief that the event was a safety issue based upon the information appearing on the incident report is misguided. As Pilon testified, he was extremely disturbed by Schlais' comments that he should stay away from the discharge end of the kilns while it was in operation and to wear a respirator. He stated the miners were told the air was perfectly safe to breathe and to work in without respirators and he was concerned that other miners would not be given the same restrictions and information that a health and safety issue existed while working near the kilns. Tr. 44-45.

The argument that Hill had tested the air and found it to be safe is also not supported by the evidence. Although Pilon was with Hill at one point when he tested for gas leaks with a monitor, Pilon testified that he was not aware that the resultant aluminum chloride testing was within acceptable limits. Tr. 191. As Pilon stated, "I don't know that the company did any testing. I was out of work for three months. I don't know what they did after I had left." Tr. 191. In addition, even if I were to assume that Pilon knew that the test results posed no hazard, it still does not demonstrate that Pilon's belief was unreasonable. When presented with the test results during redirect, Pilon stated that the negative monitor results taken around the time of his earlier exposure could have been negative because the mine might have been "running a different type of rock" the day of the testing, resulting in a process that doesn't generate aluminum chloride. As Schlais indicated on the incident report form, a respirator should be worn when a color is being run that uses aluminum chloride. Schlais also testified that the vents on the kiln had been changed to reduce the amperage being drawn. As a result of Pilon's complaint, Schlais redirected the vents to draw the escaping vapor way from the discharge end of the kiln. Obviously, these adjustments directly affected the gas being discharged from the kilns and could have been made at any time before or after Hill's testing. Therefore, what Hill found on one day of testing is irrelevant to what occurred on February 25, 2010 or in 2006/2007. Tr. 276.

Finally, ISP argues that because Lee Schlais did not consider the incident to be serious and that Dan Gadzalinski testified that he had never heard of anyone other than Pilon raise concerns about aluminum chloride, it was not objectively reasonable for Pilon to believe the incident posed a safety hazard. This argument is erroneous. Neither Schlais nor Gadzalinski experienced the after-effects of aluminum chloride exposure. Pilon did and was made seriously ill by it. The fact that he was out on compensation for three months as a result leads to the conclusion that it was determined to be a work related incident. The Respondent offered no evidence to rebut this assertion. In fact, ISP's witness Matt Wimmer, Pilon's supervisor at the time of the incident, testified that he recalled certain details about the resultant accident report. Tr. 456, 469, 473. It appears that the accident was documented, the injury was found to be serious and work-related and it in fact occurred. There can be no doubt Pilon's belief that his inhalation of aluminum chloride on February 25, 2010 posed a safety hazard was reasonable both subjectively and objectively.

Given the above, I find that Pilon's February 26, 2010 accident/incident report is protected activity under the Mine Act. I further find that his reported 2006/2007 inhalation of aluminum chloride and his reported back injuries in February 2009 were protected activity as well. I find credible Schlais' and Gadzalinski's testimony that he made many other safety and health complaints and that they were usually legitimate claims but became known as a whiner to management. Tr.545-56, 551,310; Ex. S-37.

2. Adverse Action

Having found that Pilon engaged in protected activity, I must next determine whether Pilon was subjected to adverse action that was motivated at least partially by that activity. In so doing, I look to evidence of motive – knowledge, animus, coincidence in time and disparate treatment. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

Knowledge

In Pilon's case, there is direct evidence that ISP had knowledge of his protected activity. Coombs testified that although he was not with the company when Pilon reported his back injuries and took the drug test in February 2009, he became involved when he met with Pilon and the union representatives following his suspension and reinstatement when he was asked to remove the document from his personnel file. Tr. 560-62. Coombs was well aware of the accident report and safety complaint made by Pilon on February 25, 2010 as well, although he stated that it had nothing to do with his decision to fire Pilon. Tr. 655. Consequently, it is clear that ISP management was aware of Pilon's protected activity before he was suspended and terminated.

Hill was directly involved in the suspension of Pilon in 2009 and 2010 and his termination as a result of alleged performance issues. Hill's signature appears on the accident report from the February 25, 2010 filed by Pilon. Tr. 530.

Testimony from several witnesses established that when an employee filled out a blue card reporting a safety or health concern, the company procedure was for these reports to be sent to management. Management was aware of the numerous ones Pilon filed to the point he was known to "hourly and salary (management) as a whiner and complainer" and someone to watch out for. Tr. 545-47, 550, 310.⁸

⁸ "If a supervisor has knowledge of an employee's protected activities, harbors animus towards that activity, and influences or participates in a decision that adversely affects the employee, the courts have imputed that knowledge and animus to the employer." *Sec'y of Labor ex rel. Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 358 (Apr. 2002).

Hostility

The record contains evidence of animus or hostility towards safety concerns in general as well as towards Pilon in particular, notwithstanding ISP's repeated claims and witness testimony that it took safety seriously. ISP presented evidence through Coombs that it took safety seriously in several ways, for example by requiring employees to submit safety concerns on special "blue card" forms, reporting not just accidents but "near-misses," and holding "tool box talks." In addition, the testimony and statements given to MSHA are consistent that Hill was serious in requiring miners to report safety concerns. Indeed, there was repeated testimony from ISP witnesses that miners were required to report safety issues, and that they would also be disciplined by Hill for not doing so. At first blush, all of these things suggest that ISP was open to safety concerns from employees. However, there is also strong evidence that ISP simultaneously adopted a "kill the messenger" approach to safety reports and focused on Pilon in particular.

Ernest Vivio, Jr. was the vice president and chief steward for the union until 2009. His job was to process grievances filed by the miners. Tr. 784. He filed 10 to 15 grievances against Tyler Hill for discipline issued by him. Tr. 785. Vivio and the rest of the grievance committee thought that the severity of the punishment issued by Hill was in excess. Hill was black and white in his thinking. Tr. 796. Hill was aggressive. Tr. 797. In response to my question, "Was there any sort of atmosphere that you feel he created among the workforce with his attitude?" Vivio responded, "Oh, yes. He – a lot of people were on edge. A lot of people were unsure as to what was right and what was wrong in a safety situation." Tr. 798.

Ann Davis was interviewed by MSHA during the investigation of Pilon's complaint. Davis told Hautamaki, "People [employees] at the mine are afraid to report accident [sic] and near misses. If a person reported some near misses or accidents, management would go to this person and tell them that they were a high risk for an accident and put their name on a list of persons that were high risk employees." She went on to say that, "Doug was a whiner because if there was a safety problem or something didn't get fixed, he would constantly bring it to management's attention. That is why management didn't like him." She went on to say, "Several times there would be 5 or 6 employees sitting in the control panel room and the supervisor would come in and walk by all of us to Doug and tell just him to go to work somewhere...It was easy to see Tyler Hill had it in for Doug. Doug was told to shovel an elevator that had such a large leak that no one person could keep up with the spillage." Ex. R-40.

Eric Forstrom, the oiler on Pilon's shift, made a statement to Hautamaki in which he stated he never knew Doug to refuse to do any work. He did not take longer breaks than anyone else. He would tell management at morning startup meetings or during the shift about things that needed repair. "Tyler Hill rode Doug pretty hard. Worse than any other employee. [Sic] Tyler Hill was constantly riding Doug about clean up [sic] work and the length of his breaks. Doug was not taking longer breaks than anyone else." Ex. R-41.

Although Lee Schlais told Hautamaki that he knew of no one that was afraid to report safety concerns, I give his statement less credence than that of Davis, Vivio and Forstrom because Schlais is a supervisor and Davis and Vivio are not management employees. I also take into consideration his statement that Pilon did raise far more complaints than any other employee and heard several people including salary (management) referred to him as a whiner. He did not think of Pilon as a whiner just someone who was concerned about safety. Ex. R-36.

Roger Faucett, union president, told Hautamaki that he didn't know if Hill had it in for Pilon but between his back injury and his complaints, it was too much. Doug complained about safety and he had heard people refer to Doug as a complainer but that may have been started so that "they would not look bad and to make someone else look bad." Ex. R-39.

It is clear to me from these statements that Hill and Coombs created an atmosphere where the fear and intimidation of reporting safety issues was palpable. Miners were aware they would be known as "high risk" employees for making a report. People were on edge and didn't know what the right thing to do was in a safety situation. Had Coombs' and Hill's assertions that they encouraged miners to bring up safety issues been sincere, "bad" would hardly be a word a miner would use in describing how they would be perceived by doing so. A person such as Pilon who did report more safety issues than others would not have been described in pejorative terms such as "whiner" or "complainer" but would be appreciated for his concern. Instead, as is clear from the evidence that Pilon did gain the reputation of being a whiner and complainer even though his complaints were legitimate in the words of his supervisor Schlais. It was obvious to his co-workers that he was not liked and treated differently by Hill as a result.

Gadzalinski did not consider the alleged infractions by Pilon on March 2, 2010 serious enough to warrant involvement of upper management except for the fact that Hill had been breathing down on him for waste. He further stated that Hill did not seem agitated by Gadzalinski's report. Tr. 716. Coombs immediately sought termination of Pilon, however, without speaking to Gadzalinski, Mastie or Davis first. Tr. 625, 664, 666. Gadzalinski testified that he told Hill about the excess waste created on February 22 the night of March 2. However, Hill testified at the temporary reinstatement that he learned of it during his investigation after the events of March 2. Temp. Rein. Tr. 68. Hill sent an email to HR on March 9 stating Pilon was responsible for \$4,502 worth of waste for 37 tons of color 720 on March 2. Ex. R-32. The oiler reports for March 2, however, document that color 720 was not run on March 2. Ex. R-30. Both Hill and Coombs worked in concert for 13 days to arrange Pilon's termination before giving him the opportunity to respond or involve the union. Tr. 595-97. I find the haste with which they generated inaccurate information, neglected to verify any of the information provided by Hill to Coombs from the persons who were involved with the events of March 2 and immediately determined firing Pilon was the appropriate course of action is indicative of the animus they felt towards him. It does not appear that the alleged misconduct by Pilon was at the heart of their decision to terminate him on the spot for events his supervisor did not find particularly serious.

It is also evident that management was hostile towards worker's compensation claims from Pilon. In the August 22, 2009 email from Hill via Coombs to ISP's HR managers Coombs expressed concern that Pilon would file another claim should they not terminate him as "he has a

history” of doing so. Ex. R- 23. While this email is related to Pilon’s August 2009 suspension and was drafted prior to his February 26th safety report, it demonstrates that mine management was already concentrating on Pilon and actively seeking to terminate him.

I find sufficient evidence of record to establish hostility towards Pilon for his vocal nature in reporting safety issues and accidents over the course of his employment at ISP which came to a head in the February 2009 to March 2010 time frame. ⁹

Coincidence in Time

There is close temporal proximity between Pilon’s protected activity and his suspension and termination. Pilon reported the aluminum chloride inhalation to his immediate supervisor, Lee Schlais, on February 25, 2010 and Schlais completed the accident/incident report the next day. Tr. 44; Ex. R- 29. February 26, 2010 was a Friday. On Tuesday, March 2, 2010, two business days after submitting the report, Pilon was suspended without pay. Clearly, these events occurred in very close proximity of time to one another.

ISP submits that Pilon’s prior report of aluminum chloride exposure negates any inference of motivation for termination based on temporal proximity. *ISP Brief at 25.*¹⁰ In support, ISP cites a Seventh Circuit case, in which the court found that because other similar complaints had occurred previously, suspicious timing alone was insufficient to prove discrimination. *Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668 (Jan. 13, 2011). This case, however, is not analogous.

In *Leitgen*, the plaintiff physician had complained for years to hospital management that the hospital’s compensation scheme unlawfully underpaid physicians based on gender. *Id.* The court found that relevant decision makers knew of her belief that the compensation system was discriminatory long before they terminated her. *Leitgen at 676.* Pilon’s prior reported exposure was a single event that occurred three years earlier and a second time in February 2010. Unlike the plaintiff in *Leiken*, he was not continually reporting aluminum chloride exposure or even raising concerns about aluminum chloride exposure between 2006/2007 and 2010.

ISP also argues that because Pilon’s prior gradual discipline began before the protected activity, an inference of causation drawn exclusively from the timing of the protected activity

⁹ Respondent alleged that it learned after Pilon’s termination that Pilon made threats to a supervisor and a restraining order was obtained. Hautamaki testified that he interviewed the three persons who allegedly heard the threats. They informed Hautamaki that they did not perceive any threats being made. Additionally, he found no supporting evidence of a restraining order being sought or issued. Tr. 325-26. I find this is additional evidence of animus and a pretext on the part of ISP to justify an otherwise unjustifiable act of discrimination.

¹⁰ ISP filed a Motion *In Limine* prior to hearing to preclude me from drawing an adverse inference based upon temporal proximity of the protected activity and the adverse action. I denied that motion citing the Commission’s decisions in *Driessen, supra*; and *Pasula, supra*.

cannot stand. *ISP Brief at 26*. This argument has no merit. First, I've previously found that both the knowledge and hostility elements of circumstantial indicia are met; therefore, an inference of motive will not be drawn exclusively from the timing alone.

In addition, while Pilon may have been disciplined in the past at ISP, the infractions were minor and he was never put on notice that his job was in jeopardy when they occurred.¹¹ Indeed, the only time that Pilon was put on notice that his job was in jeopardy was in August of 2009, when he was suspended for five days. He was told that if he failed another drug test or made an untimely accident report he could lose his job. Tr. 591, Ex. R-27. However, the record reveals that between August of 2009 and March of 2010, Pilon worked in excess of six months without any discipline, and did not file any untimely accident or incident reports. During that interval, the only incident that ISP attempted to attribute to Pilon was on February 22, which involved excess waste. ISP never addressed the February 22 incident with Pilon at the time it occurred and it is clear that this incident was not the fault of Pilon's but due to no paint being applied to the rock which cannot be attributed to him. Consequently, I find a coincidence in time between the protected activity and the adverse action to be indicative of ISP's improper motive to fire Pilon.

Disparate Treatment

Hautamaki testified that he reviewed the plant rules during the investigation. Tr. 374. He also tried to establish whether other employees had been disciplined for the same conduct. Tr. 377. However, he had difficulty getting information from the company and he felt he had been stonewalled in his efforts. Tr. 398. He asked for discipline records that had to deal with waste material and was not provided with any. Tr. 405. Hautamaki testified that he reviewed ISP's oiler waste reports and found waste amounts ranging from 19-67 tons and testified that his investigation revealed that no one but Pilon was ever disciplined for waste during a start-up. Tr. 311-317; Ex. S-6-16.

In addition to revealing the 36 tons of waste, Gadzalinski and Hill attempted to blame Pilon for February 22, 2010, the Oiler's Waste reports show large amounts of waste on other occasions. Ex. S-6-16. The reports reflect that color 801 in particular created waste in the double digits on all but one occasion when it was run; the amount blamed on Pilon on March 2 was not the highest. The reports also reflect that on March 20, 2010, five days after Pilon was fired, 67 tons of rock was wasted. Similarly, on May 17, 2010, 62 tons was thrown out. On all of the reports, "startup" appears to be the predominant reason for waste. It is apparent that a fairly large amount of waste is part and parcel of the changing and starting up of the coloring

¹¹ Statements by ISP supervisors were conflicting with respect to whether the actions cited by Respondent as prior discipline were actually disciplinary or simply examples of "retraining" or events that did not warrant further action. Exs. R-36, R-13, R-20, Tr. 425, 543, 549. Because both Hill and Coombs stated that none of the prior incidents were considered in their decision to fire Pilon, I find that they do not negate the proximity of time between the protected activity and the adverse action. I also do not find them relevant to the Respondent's affirmative defense.

process. As Gadzalinski testified, it only takes a few minutes to make 20 tons of waste. Tr. 758. If the Chief Operator has put too much water on the rock, it gets mixed with the color and rock particles that stick to the sides of the coolers and causes waste. Tr. 765.

Hautamaki interviewed Roger Faucett, the union president for 20 years at ISP. The interview was reduced to a written statement signed by Faucett. Ex. R-39. He stated that approximately a week after Pilon was terminated the kiln operator had to waste 90 or 94 tons on startup. There was no disciplinary action as a result. He also said that Hill and Gadzalinski worked together one weekend and ran bad color all day and had to throw away an entire day's production. Neither of them received any disciplinary action for that. He had never heard of anyone being disciplined for wasting material during startup. Ex. R-39.

During the investigation, Hautamaki also interviewed Eric Forstrom the results of which were reduced to a signed written statement. Ex. R-41. Forstrom is an oiler who worked with Pilon. As the oiler, he would be the person to see if the color was good or bad and if it was bad, to throw the valve and waste it. On the day Pilon was sent home, Forstrom said they had to rap out three times and waste 30 tons of material. The following week approximately 90 tons was wasted. He did not receive any disciplinary action as a result nor was he talked to about it. He worked with Pilon about half the time and never knew Pilon to refuse to do any work. He never saw Pilon take more breaks than anyone else or longer ones. He had heard Pilon make safety complaints to management at morning meetings. Hill constantly rode him harder than anyone else about the length of his breaks and cleaning. Ex. R-41.

Ann Davis also signed a written statement after her interview with Hautamaki. Ex. R-40. She was the day shift kiln operator who worked on the opposite shift as Pilon on March 2, 2010. She described that day as very bad; she cleaned plugged chutes all day. Davis said that Pilon made a lot of safety complaints and management did not like him as a result. There were times when she and her coworkers would be sitting in the panel room on break and Hill would direct Pilon back to work while he said nothing to the others. She never saw Pilon take more breaks or longer ones than anyone else. She felt "it was easy to see that the company especially Tyler Hill had it in for Doug." He was the only person she has known to be disciplined for wasting material at startup. Ex. R-40.

Hautamaki interviewed Richard Vivio, an oiler on another shift. He testified that Vivio told him that no one had ever been disciplined for bad startups, and that people did not want to report accidents because they were afraid that they would be put on a list. Tr. 323-324.

Hautamaki also interviewed Ernest Vivio, a former union steward at the plant. Tr. 324. He stated that Ernest Vivio told him that Pilon made a lot of complaints and was a complainer and a whiner. *Id.* Vivio testified that he was disciplined as well by Tyler Hill. He was attempting to fix an electrical cord that was located on a bumper where a truck backed in. He was sitting on the bumper with one leg hanging off and he had not locked out or tagged out the electrical hopper. He was given a three day suspension. Tr. 793.

Richard Heigl, a machinist at ISP and a union safety committee member, testified that he can't remember anyone that Hill suspended for a safety violation or loafing. He recalled one employee, Dave Mason, being sent home for insubordination for being "way out of bounds as far as yelling and screaming." Tr. 495. He recalled that Mason was screaming at either Tyler Hill or Matt Wimmer and there were several incidents like that but he couldn't recall how long his suspension was. Tr. 502. Heigl stated that someone besides Pilon received discipline for sleeping on the job but he could not recall who it was but it resulted in time off. Tr. 476-78; 495-96. He was not aware of anyone being treated differently for raising safety concerns. Tr. 497. He testified that a Jim Holgrin and a Randy Wallis received a three-day suspension for putting a pry bar through a guard and for not having a lock on a piece of energized equipment. The violation could have resulted in a broken nose. Tr. 498.

Pilon testified that he only knows of one other miner, Bill Counter, who had received a second chance agreement. Tr. 265. He knew of no one who had been disciplined for waste.

Schlais testified that he was suspended without pay for five days for opening an energized electrical panel box. As he stated, he could have been killed by doing so. Tr. 533. He also stated that Pilon received more violations in one day on August 17, 2009 than anyone else ever had. Tr. 544, Ex. S-36. Pilon worked for him during this time frame but Schlais was not involved in the disciplinary action against Pilon. Tr. 544. He also told the investigator that Pilon reported more safety violations than anyone else and he heard salary (management) and hourly refer to him as a whiner. Tr. 545-46. Ex. R-36.

Gadzalinski did not know of any employees disciplined for visiting other employees or inefficiency or negligence; however, he did know of several employees disciplined for loafing and knew of two employees disciplined for sleeping. Ex. R-37. Gadzalinski also knew of one employee who was disciplined for insubordination. Ex. R-37. When Gadzalinski was disciplined, it was handled at the supervisory level which Gadzalinski said is where he would have handled Pilon's actions on March 2, 2010 had it not been for Hill breathing down his neck to blame him for waste. Tr. 716-19.

Ryan Milligan, was an oiler at ISP in 2009-2010. Tr. 770. Although he testified that Pilon worked at his own pace, was not quick and may have taken longer breaks, he clarified his position and testified that he could not say Pilon did anything any other miners did not do. Tr. 777. Milligan testified that he was suspended for five days but it was only after a three day suspension and two written warnings according to written policy for being late on ten occasions. Tr. 779-82.

Mike Hammill, a rock lab technician, testified that he was disciplined for climbing to the top shelf to inventory items located there. Hill walked in and discovered Hammill "in the air on a shelf without fall protection on." Tr. 681. He was not terminated for this violation of the rules but received a five day suspension. *Id.* He could not recall anyone disciplined for neglect of machinery but had a vague recollection of someone disciplined for sleeping on the job. Tr. 685. He never had any disciplinary problems with Pilon. Tr. 688.

Assuming I was to find the evidence Pilon has committed the infractions alleged by ISP, I find the record is replete with evidence of disparate treatment. First, there is no evidence in the record that any employee was ever disciplined for waste of product, neglect of equipment, or visiting other employees or taking longer breaks (loafing). Secondly, although some other employees received a disciplinary suspension, their infractions were for opening live electrical boxes or repairing live electrical equipment, working at elevation without fall protection and inserting a pry bar bypassing a guard without locking/tagging out equipment. Each of these infractions could have led to very serious bodily injury as well as a reportable injury in violation of a mandatory standard subject to imposition of penalties on ISP. Notably, however, not one of the employees who committed these infractions was terminated despite Coombs' and Hill's assertions of zero tolerance for any violations and like treatment for all. Milligan received a five day suspension for tardiness on ten occasions according to a written graduated disciplinary protocol. There is evidence of only unsubstantiated rumors and unidentified employees who had been termination for sleeping on the job or insubordination. No evidence was presented that named such an individual, stated a date or year it occurred, presented the surrounding facts or produced proof of the discipline taken against the individual for such infractions. Hautamaki testified that he was stonewalled by ISP when he requested the disciplinary records from ISP to investigate the issue.

The Commission has indicated that knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case." *Chacon*, 3 FMSHRC at 2510. I previously found that ISP management knew of Pilon's protected activity when it suspended and terminated him. In addition, I further found evidence of hostility. I found a substantial coincidence in time between Pilon's protected activity and the adverse action and, finally, that Pilon experienced disparate treatment prior to his suspension and termination.

An operator may rebut a prima facie case of prohibited discrimination by showing either that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. *See Robinette*, 3 FMSHRC at 818 n. 20. In evaluating the evidence, I found that Pilon engaged in protected activity when he reported the aluminum chloride incident and I found ISP's arguments to the contrary unpersuasive. In addition, I find that the evidence strongly indicates the adverse action was motivated, at the very least in part, by the protected activity.

In light of the findings I have made above, specifically, that Pilon engaged in protected activity, that ISP took adverse action against him, and that the adverse action was motivated at least in part by Pilon's protected activities, I conclude that the Secretary has met her burden of establishing a prima facie case of unlawful discrimination under the Mine Act and the Respondent has failed to rebut it.

III. ISP'S AFFIRMATIVE DEFENSE

If the mine operator cannot rebut the prima facie case, 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. *Pasula 2* FMSHRC at

2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Commission has explained that an affirmative defense should not be “examined superficially or be approved automatically once offered.” *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must “determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

The Commission has held that “pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). However, the Commission has also held that “our judges should not substitute for the operator’s business judgment our views of “good” business practice.” *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981)

In *Jayson Turner v. National Cement Co. of California*, 33 FMSHRC 1059 (May 2011), the Commission listed ways in which the complainant may show that the operator’s affirmative defense is not credible. First, the complainant may establish that the operator’s proffered reasons have no basis in fact, *i.e.* are factually false. Second, the complainant may show that the proffered reasons did not actually motivate the discharge, *i.e.* the complainant admits the factual basis underlying the employer’s proffered reasons, and that such conduct could motivate dismissal, but attacks the credibility of the proffered reasons indirectly by showing circumstance which tend to prove that an illegal motivation was more likely than the legitimate business reasons proffered by the employer. Third, the complainant may show that the employer’s proffered reasons were insufficient to motivate termination *i.e.* other employees were not terminated even though they engaged in substantially similar conduct which was the basis of the complainant’s termination. The first and third approaches directly attack the credibility of the employer’s proffered motivation, while the second approach indirectly attacks the credibility of the employer’s proffered motivation. *Id.*

Pilon and ISP’s witnesses testified at length regarding the events leading up to Pilon’s termination. In addition, Hill, Pilon’s immediate supervisor, testified at the temporary reinstatement hearing that the termination letter accurately and truthfully reflects all of the reasons why Pilon was terminated. Temp. Rein. Tr. 72-7. In addition, Coombs, author of the termination letter, testified at the temporary reinstatement hearing that he considered only Pilon’s failure to timely report an accident and subsequent failure of a drug screening on February 3, 2009 and the events of August 2009 and March 2, 2010, in his termination decision. Temp. Rein. Tr. 72-73. However, at the hearing on the merits of the case, ISP introduced evidence of several other incidents that took place prior to the February 3, 2009 accident report and drug-screening incident. The prior events raised by ISP concerned Pilon failing a written driving test in 2006, not completing adequate inspections in April 2005 and 2006, not properly cleaning a cone in January 2009, and a few instances of retraining during the years prior to February 2009.

These events are remote in time and were not sufficiently important for management to put Pilon on notice that his job was in jeopardy when they occurred. More significantly, both Hill and Coombs confirmed that these events were not part of their decision to terminate Pilon in March 2010. I do not find they were part of a graduated disciplinary program at ISP. I confine my consideration of Pilon's termination and ISP's allegations of non-discriminatory justification to those incidents set forth in Secretary's Exhibit 17 and the February 3, 2010 failure to timely report an accident and drug screening incident that Coombs testified that he also considered. Temp. Rein. Tr. 72.

Coombs testified that the reported back injury was deemed by the workmen's compensation insurance company to be non-work related. At a meeting with Pilon and the union concerning these events, he agreed to remove the records from Pilon's file for one year and if Pilon did not make an untimely accident report or fail a drug screen, he would remove them from Pilon's file permanently. Tr. 561. Pilon was not cited for either again. Coombs testified that the documents were not in Pilon's file. Tr. 628, 631. Coombs was unable to explain why these documents were submitted to him by Tyler Hill as evidence of a discipline in connection with the March 2 investigation. Tr. 631; Ex. R-31. Given that Coombs testified that he removed these records from Pilon's personnel file, they should not have been submitted to him by Hill or considered by Coombs in his termination decision. Consequently, I find that there is no basis for Pilon's termination based upon this incident.

Coombs' March 2010 termination letter advises Pilon that when he was directed by his supervisor to clean out the second coat cooler system, he was dishonest in replying it had already been done and after being directed a second time he failed to follow his supervisor's instructions and perform his assigned tasks. Ex. S-17. The letter states that these events violated Plant Rules 17, 19, and 20; specifically, "willful damage or neglect of machinery, tools, equipment, materials, or any other ISP property; inefficiency or negligence in performance of duties; and willful insubordination, including refusal to follow lawful instruction from your supervisor."

Coombs confirmed at hearing that his only knowledge of the events came from what Hill reported to him. Although he testified that he believed he spoke to Gadzalinski at some point in time after he made the decision to fire Pilon, Gadzalinski testified that he never spoke with Coombs about the events. Likewise, Coombs did not obtain Davis' statement corroborating Pilon's account of the problems encountered during the startup and that she had told Pilon she rapped out until he had finalized his decision. He did not speak with Mastie who could give a direct account of the events. Nor did he speak to Forstrom, the oiler, who was also present on March 2, who told Hautamaki that they had to rap out three times that night and that he had never heard Pilon refuse to do any work. Ex. R-41.

I find Coombs did as little to confirm the accuracy of the events of March 2 as possible. His reliance on Hill's report of second hand information was unfair at best and more likely deliberate. The allegations raised by Hill were used as a pretext to effectuate the termination they had been seeking to achieve since February 2009. Coombs is an unreliable witness.

There are several versions of the sequence of events on the evening of March 2 2010 given by Gadzalinski. He made several conflicting statements at hearing from those he made when interviewed by Hautamaki. In his statement to Hautamaki, he said he heard Mastie¹² tell Pilon to rap out the chutes and coolers. Pilon responded that it had been done. Gadzalinski then told him to do it and Pilon left the room to do so. The color was still bad so Gadzalinski rapped out. When it was still bad, he told Pilon to do it a second time which he apparently did. He said “we” had to rap out three times. He then told Hill that Pilon refused to rap out. He also told Hautamaki that he knew nothing of the waste report on February 22, 2010. Based upon a question asked by Respondent’s counsel at this interview, he stated that he would have reported Pilon’s actions regardless of the waste issue because it was insubordinate behavior. Ex. R-37.

In stark contrast to his statement to Hautamaki, Gadzalinski testified at trial that he met with the off-going foreman who did not inform him of any problems encountered on the day shift. Tr. 724. He testified that Mastie told Pilon twice that the rock was coming out of the kiln and to rap out the cooler. Then he said Mastie could have said the rock was going into the kiln the first time and coming out of the kiln the second time. Tr. 705, 739. He then said, for the first time, that he (Gadzalinski) told Pilon to rap out twice rather than once and the first time Pilon again responded by saying that Ann Davis had done it already. The second time, Pilon went to rap out. Tr. 706-707. Later he stated that he told Pilon once to rap out and Pilon left the room to do so. He then testified the he didn’t think Pilon did rap out because he didn’t hear it. Tr. 725-26, 728, 733. Gadzalinski then said that he rapped out twice and Pilon did so once, not twice, before Gadzalinski rapped out. Tr.708-09, 727-28. Gadzalinski testified that he could not recall telling Hautamaki that he knew nothing about the February 22 incident. Despite Gadzalinski’s claims that Pilon lied to him and refused to do his job, Gadzalinski testified that he would not have reported Pilon’s actions to management except for the fact that Hill had been “breathing down” on him for the amount of waste although he told Hautamaki based upon counsel’s question that he would have reported Pilon regardless of the waste issue. Tr. 716. Gadzalinski confirmed that he had disciplinary authority over the employees at the time. Tr. 718-19.

I find Gadzalinski is not a credible witness. As the supervisor on the second shift, I find it unlikely that Gadzalinski was not briefed on the difficulties experienced on the earlier shift, especially as it was unusual that the first shift performed the startup. Moreover, given Gadzalinski’s concern about waste, it is surprising that he would not have recalled the wet product and plugged chutes that plagued the earlier shift, since these things can also cause waste, which he also testified to at the hearing. Tr. 763-764. More importantly, however, is the readily apparent motive Gadzalinski had in shifting the blame for the waste on March 2, 2010 and February 22, 2010 to someone else. In an atmosphere created by Hill where people were afraid to report their concerns and with Hill breathing down on the supervisors specifically for the amount of waste being created, it stands to reason he would blame someone else for the 23 tons created on the 2nd. Pilon testified that when the start-up is very bad, the foreman will often stop the process and start over. Gadzalinski apparently did not make the decision to do that and had a large amount of waste on his shift as a result. Tr. 71-72. Giving it a moment’s thought, it made

¹² Mastie was not called as a witness at trial. Forstrom was also not called although both of them were involved in the events in the panel room.

sense to tell Hill while he was reporting the waste that night to look into the February 22 waste reports as well where 36 tons of waste was created on his shift which he told Hill was Pilon's fault. Unfortunately, Gadzalinski did not recall the oiler's report listed the cause of waste on the 22nd as raw paint which could not be attributed to Pilon or any kiln operator. I also take into consideration the many versions of the events of March 2 given by Gadzalinski and his feeble explanation for them as a lapse in memory and the events having taken place a long time ago as evidence of his lack of credibility.

According to Gadzalinski, Hill's information regarding what occurred in the control room came from one conversation with him in the lab on the night of March 2. It was also during this conversation that Gadzalinski told Hill to look into the waste on February 22, 2010. Hill testified that he obtained this information from Gadzalinski during his "investigation" into the events of that evening. He stated that during his "investigation" he found Pilon taking a break in the panel room and found one kiln to be out of specification. Tr. 64-65. He testified that he further "investigated" the matter after he sent Pilon home. Tr. 67. Gadzalinski and Pilon both testified that Hill did not contact them from during this subsequent "investigation." Schlais, Pilon's usual foreman was also not involved in the discipline process against Pilon for this incident. There is likewise no evidence that Hill spoke with Mastie, Forstrom, Davis or anyone else.

It appears Hill's "investigation" between March 2 and 15 consisted of sending emails to HR containing inaccurate information regarding the cost of waste attributable to Pilon and working in concert with Coombs to effectuate their plan to rid themselves of a complainer.

At the hearing, Pilon explained that when he arrived at work that day, the earlier shift had already begun the startup process. Tr. 60. He met with Ann Davis, the kiln operator on the prior shift, who informed him that they'd had numerous problems with wet product that day and that the chutes had been plugged repeatedly. Tr. 60-61. Pilon said that when his supervisor, Dan Gadzalinski asked him to "rap out", he believed that Gadzalinski was referring to the mixers and aerators, which Davis had already done, so he told Gadzalinski that she had already rapped out. Tr. 67. During this time, the chief operator, John Mastie informed him that the rock was just starting to come out of the kiln so he went and rapped out the coolers. *Id.* Pilon said that he was subsequently told by Forstrom that there was contamination and to rap out with a sledgehammer this time, which he did so. Tr. 67. Forstrom's statement does not contradict this. Ex. R-41.

I find Pilon had reason to be confused as to where the product was in the process based upon the unusual startup as well as from what Davis had told him. Gadzalinski admitted that it was possible that the first time Mastie made a statement about the rock, he could have said it was going into the kilns and the second time he said it was coming out. In any event, it appeared that Pilon had a genuine misunderstanding as to what was meant when he was told to rap out. He understood Ann Davis to have told him she already rapped out which Pilon reasonably thought meant the coolers. He did not, by anyone's account, except in one of Gadzalinski's many versions of the facts, refuse to rap out. Once he understood that the rock was coming out of the kilns, he responded and left the control room and went to rap out. In fact, because the color was wet, which was caused by the chief operator, Pilon rapped out twice.

Consequently, I find that ISP's justifications for termination based on Pilon's violation of Plant Rules 17, 19, and 20 in relation to the startup and rapping out process on March 2, 2010, have no basis in fact.

In addition to suspending and terminating Pilon for the above, ISP claims that it also cited Pilon for loafing in the panel room while not on a scheduled break, which was a violation of Plant Rules 16 and 19. Ex.S-17. According to Pilon, he was in the panel room waiting for his temperatures to come up after re-rapping the coolers with the sledgehammer. Tr. 106. He explained that he had been in the panel room anywhere from three to five minutes when Hill walked in and asked what he was doing. Tr. 255, 257. He explained that he had just adjusted the number one kiln and that it needed to come up 30 degrees. He explained that the number one kiln does not have a temperature gauge, that it must be adjusted with a screwdriver, and that it can take up to 15 minutes for the temperature to regulate. Tr. 107-108.

At the temporary reinstatement hearing and in his statement to Hautamaki, Hill maintained that his impression when he entered the panel room was that Pilon was loafing because he was 20 feet from the kiln-monitoring read out, which is very small and impossible to monitor from where he was seated, and that Pilon was in a relaxed position with his hard hat off. Hill said that the readout indicated to him that it needed adjustment and he told Pilon to go do it. Temp. Rein. Tr. 65-66; Ex. R-35.

The fact that, as Pilon testified, he was sitting in a chair away from the gauges in a relaxed position does not necessarily, by itself, mean that he was loafing. He had just adjusted the temperatures which take approximately 15 minutes for the adjustment to register. In addition, given that the kiln must be adjusted with a screwdriver and does not have a temperature gauge, it is plausible that Pilon would have to adjust it by past knowledge of the length of time that it takes for the temperature to respond and at times requires more than one adjustment. Tr. 69-70. I find that it is reasonable that a person would sit down to wait for the temperature change rather than stand up, given that there was a chair in that room and presumably for that purpose. Pilon also testified that he recited the temperatures for the other kilns to Hill and that Hill "went down and looked. He knew exactly that I was telling the truth." Tr. 107.

Hill's testimony does not invalidate Pilon's. I also find that it is possible that when Hill checked the gauge, the temperature for Kiln #1 was low. The temperature of the kilns drops when the rock comes out of it. They require periodic adjustment to bring it into specification with some colors requiring less than three degrees variance. Tr. 69-70. It can take up to 15 minutes for an adjustment to register on the gauges. Because the kiln did not have a temperature gauge and was set by feel and experience, it could easily require more than one adjustment to achieve the desired result. There were four kilns in operation. Pilon testified that the other kilns were already at the correct temperature and informed Hill what the reading was for each of them. In his testimony and statement, Hill did not address the other kiln temperatures.

Pilon's testimony was straightforward, earnest, and sincere. In addition, Pilon's account contained specificity pertaining to the temperatures on the other coolers and in his recount of the conversation with Hill, lending to his credibility. By contrast, Hill's account was very general.

Given his contentious working relationship with Pilon, I find that Hill was either more than willing to jump to the conclusion that Pilon was loafing, notwithstanding Pilon's reasonable explanations to him, or more likely he adjusted his version of the facts to support his preconceived plan to terminate Pilon. I also consider the email from Hill on March 9, 2010 to the Human Resources department in which he cited the cost for 37 tons of waste created by Pilon on March 2 for color number 720 which was not run on that date in support of my finding Hill created "facts" to support an agenda and that he is not credible. Exs. R-32 and S-5.

Taken as a whole, I find that ISP's justifications for suspending and terminating Pilon based on the March 2, 2010 incidents are not credible. The facts are conflicting and appear to have been manipulated and raised as a pretext to justify a discriminatory motive to terminate him. There is insufficient evidence to find that he refused to rap out or was loafing causing waste, neglect of equipment, inefficiency or negligence in performance of duties or insubordination. The allegations have no basis in fact.

ISP's second justification for terminating Pilon was for causing excessive waste on February 22, 2010 by failing to perform a proper clean out. I previously found that the record reflects that no other employees at ISP have ever been disciplined for waste. In addition, Pilon himself was not notified of this incident until he received the termination letter the following month because it did not come to light until ISP conducted their investigation into the March 2, 2010 suspension and termination. Moreover, Mark Coombs testified that the events of February 22 came to light by another employee and when Hill investigated, he found that there was some excessive waste. Tr. 598. Coombs also testified that he spoke to Gadzalinski after he had decided to terminate Pilon. Tr. 664. Gadzalinski testified that he told Hill about the February 22 waste issue on March 2. Tr. 712. Gadzalinski testified that he never spoke to Coombs at all. Tr. 737. In addition, Gadzalinski told Hautamaki during the investigation that he didn't know anything about the February 22nd incident. Ex. R-37.

The testimony demonstrates serious inconsistencies between Coombs' and Gadzalinski's testimony. These discrepancies demonstrate faulty memories at best, or deliberate cover-up at worst. Consequently, I find that neither witness is credible. In addition to the inconsistent and conflicting testimony, the Oiler Waste Report for February 22, 2010 reveals that the basis for the waste that day was due to "no paint, raw", not to a bad startup. Ex. S-12. This would not be attributable to Pilon.

I find that ISP's proffered reason has no basis in fact. It is clear that ISP has never disciplined an employee for waste. It could not have been Pilon's fault on this occasion and Coombs testified that he would not have terminated Pilon for waste alone, yet it appears in the termination letter as a basis for his termination. This duplicity can only be explained by the desire to use the incident as a pretext to terminate Pilon. I find it has no basis in fact. I also find that employer's reasons were insufficient to motivate termination.

ISP's cites the August 2009 suspension letter and the events leading to its issuance as another basis for Pilon's termination. There are several important discrepancies in the sequence of events as set forth by Coombs. Pilon was issued what Coombs referred to as the "fair and

final letter” on August 28, which states that he **was suspended** on the **17th for infractions he committed on the 21st**. (Emphasis added.) Ex. S-27. August 17, 2009 was a Monday. The notes from the meeting which took place on August 28th indicated his infractions occurred on **Friday, August 21st**. Ex. R-26. The suspension letter of March 28 states that the infractions **will result** in a five-day suspension. (Emphasis added.) According to Coombs, he had already been suspended on Friday, August 21. Tr. 579. Therefore, his suspension should have been completed by Friday, March 28th the day the meeting with the union occurred; however, the March 28th suspension letter indicates that the suspension had not yet taken place. Coombs’ email to Human Resources dated Saturday, August 22, 2009 indicates that Hill recommended sending Pilon home on suspension as of Monday morning August 24th with the goal being termination. Ex. S-23. On Monday, Hill sent another email confirming that Pilon was suspended that morning. Ex. R-25. The return email from human resources advised to confer before meeting with the union “as required.” *Id.* According to Coombs, the point of the meeting with the union on the 28th was to make sure Pilon had an opportunity to explain his side **before** they imposed the punishment they had already decided upon on Saturday morning, August 22. Tr. 580-584. Had Pilon been suspended on August 24 as Hill stated in his email, he would have reported back to work on August 31. Had he been suspended on Friday, August 28 after the union meeting as the suspension letter indicates, he would have reported back to work on Monday, September 7. However, he was presented with a retraining letter upon his return to work on August 31 which proves that he was suspended on Monday, August 24, 2009. Ex. R-28.

Piecing these events together, Pilon was suspended on August 24-four days before he was given an opportunity to present his side of the story and meet with the union representatives. The careless manner in which these documents were prepared indicates how little the rights of a miner mean to this corporation and how badly they wanted to be rid of Pilon. The haste in which Pilon was disciplined before he had an opportunity to defend against the allegations or consult with his union representative, exemplifies the animosity harbored against Pilon by management. While he was told on August 17th not to report to work pending an investigation, there clearly was no investigation made. The meeting with the union to provide Pilon an opportunity to defend himself was a sham. Moreover, the fact that Coombs’s email to the ISP HR managers stated that only termination would deprive Pilon of the opportunity to file another worker’s compensation claim “of which he has a history” makes clear the motivation behind the attempt to terminate him was his workmen’s compensation claim predicated upon a report of unsafe conditions, and not the alleged performance issues. Ex. R-23.

Given that Pilon had already been disciplined for the August 2009 conduct and that I previously found that ISP's other justifications fail, it is not necessary for me to determine the credibility of the August 2009 events.¹³ There is ample evidence as to Pilon's alleged sleeping in the mixer shack that Hill could not see through the window as it was covered with rock dust although Hill stated that he watched Pilon through the window for several seconds. Tr. 95, 228, 570. Hill could only say in his incident report that he had the impression Pilon was sleeping. However, when Pilon said he was hot, Hill responded by saying it was okay to cool off there. Ex S-23. With regard to his taking a longer break and not returning to work, Hill's incident report states that he told Pilon to check in after his break was over and he should "probably get moving" because there was work to do. Ex. S-23. Pilon, on the other hand credibly testified that he had just begun his break when Hill first addressed him. Hill returned just a few minutes later while still on break and told him to go clean up. He did so. Tr. 121, 230-32. Pilon's statement that this was an example of how Hill was unfairly riding him and assigning more clean-up to him was supported by Davis' statement to Hautamaki as well as Forstrom's. Both said Pilon was ridden harder by Hill, told to do more cleaning up and singled out for taking breaks. Exs. R-40, 41. It was echoed by the testimony of Respondent's witness Milligan who admitted on cross-examination that he had no basis to think Pilon took longer breaks than anyone else. Tr. 777.

In summary, I find that the Respondent has not established its affirmative defense of showing termination was not motivated by Pilon's protected activity.

What has been established is that Pilon was someone who did his work as ordered. He was also someone who raised more safety and health complaints than anyone else and gained a bad reputation as a result although his complaints were viewed by others as legitimate. This in turn led to his being treated disparately and ultimately terminated to eliminate the likelihood of his filing another worker's compensation and an accident report stemming from health and safety issues in the workplace.

¹³ As is evident from the March 15, 2010 termination letter and Combs' testimony, ISP's alleged grounds for terminating Pilon were cumulative, rather than independent considerations. When the reasons proffered by the operator are cumulative and the judge disbelieves one of the reasons, the judge cannot hold that the other reasons are sufficient by themselves to support the adverse action. *Sec'y of Labor on behalf of Pendley v. Highland Mining Company*, 2012 WL 4026647 (Aug. 2012).

As previously discussed, I found that the March 2 and February 22 justifications were not credible. I further found that Coombs should never have considered the February 3, 2009 failure to timely report an injury and drug testing results because by his own testimony, these records were not part of Pilon's personnel file. Consequently, even if I were to credit ISP's justification for the August 2009 suspension, under *Highland Mining*, I find that ISP's justification in its entirety is not credible and that ISP has failed to prove an affirmative defense.

I find that Pilon has successfully made out a prima facie case of discrimination under § 105(c)(3) of the Mine Act. I also find that ISP has failed to either rebut Pilon's prima facie case, or establish any affirmative defense to his discrimination claim. Therefore, Pilon is entitled to relief.

IV. **ORDER**

I hereby order that Pilon's Complaint of Discrimination under section 105(c) of the Mine Act is **GRANTED**.

The Secretary has requested a civil penalty against ISP. Accordingly, the Secretary is **ORDERED** to address the civil penalty criteria set forth in section 110(i) of the Mine Act within 15 days of this **ORDER**. The Respondent shall provide its response thereto 30 days from the date of this **ORDER**.

I shall retain jurisdiction over this matter for purpose of assessing the amount of the civil penalty.

DAMAGES

Pursuant to the statutory relief provided at 30 C.F.R. § 815(c), Pilon is entitled to "rehiring or reinstatement" to his former position of kiln operator at ISP's Kremlin Plant.

OTHER DAMAGES

§ 105 (c)(3) provides that when a discrimination complainant's claim is granted, the Administrative Law Judge may grant "such relief as it deems appropriate."

Given the above findings that Pilon was discharged for unlawful discriminatory reasons, ISP is ordered to expunge and/or purge any negative personnel file references regarding Pilon's discrimination complaint. ISP is further ordered to post a notice at the Kremlin Plant Mine that it will not violate § 105(c)(1) of the Act.

BACK PAY AND INTEREST

Pursuant to § 105(c)(3), I find that as further relief Pilon is entitled to "back pay and interest" including overtime pay, since his suspension on March 2, 2010 and discharge on March 15, 2010. I further find that ISP is entitled to deduct Pilon's interim net wages received during his period of temporary reinstatement from the gross pay that Pilon would have otherwise received from ISP.

The parties did not reach the issue of the actual gross amount that ISP would have received from ISP since March 2, 2010. While an Administrative Law Judge has broad discretion in fashioning an appropriate remedy so as to make the discriminatee "whole," the record is insufficient as to the issue of Pilon's outstanding gross pay since March 2, 2010. I will

maintain jurisdiction of this matter for the purpose of establishing the actual amount of monetary damages, including back pay and interest, for which ISP is now liable. With reference to back pay and interest, ISP is entitled to deduct the actual net interim earnings received by ISP from other employers, if any, since March 2, 2010. With reference to other specific relief, Pilon is also entitled to all costs and expenses (including attorney's fees) that he has reasonably incurred. He shall also be fully compensated for medical coverage expenses, if any, that would otherwise have been covered through his employment at ISP had he not been terminated.

If the parties cannot reach an agreement as to such, I shall hold further proceedings, including an evidentiary hearing, if necessary, to determine an appropriate remedial amount.

Counsels are **ORDERED** to confer and submit within 30 days of the date of this decision a proposed settlement order containing the specific actions and monetary amounts that ISP will undertake to carry out the remedies and relief set out above. If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages and relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case the parties should so state.

I will retain jurisdiction in this matter until the specific remedies Mr. Pilon is entitled to are resolved and finalized. Accordingly, this decision will not become final until an order granting specific relief and awarding monetary damages and a civil penalty has been entered.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710**

March 7, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2011-332
Petitioner	:	A.C. No. 15-17720-238479
	:	
	:	Docket No. KENT 2011-443
	:	A.C. No. 15-17720-241377
	:	
TRC MINING CORP.,	:	Mine: Mine #2
Respondent	:	

DECISION

Appearances: Alisha I. Wyatt-Bullman, U.S. Department of Labor, Nashville,
Tennessee, on behalf of the Secretary of Labor
David Baird, Baird & Baird, Pikeville, Kentucky, on behalf of TRC Mining Corp.

Before: Judge Zielinski

These cases are before me upon Petitions for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petitions allege that TRC Mining Corporation is liable for a total of thirty violations of the Secretary's Safety and Health Standards for Underground Coal Mines,¹ and propose the imposition of penalties in the amount of \$71,825.00. Twenty six of the violations were settled, and a decision approving the partial settlement was entered on March 4, 2013. Remaining at issue are four violations for which the Secretary has proposed penalties in the amount of \$41,688.00. A hearing was held in Pikeville, Kentucky, and both parties filed post-hearing briefs. For the reasons that follow, I find that TRC committed the violations and impose civil penalties in the total amount of \$14,500.00, for the contested violations.

¹ 30 C.F.R. Part 75.

Findings of Fact - Conclusions of Law

At all times relevant to this proceeding, TRC operated Mine No. 2, located in Letcher County, Kentucky. TRC Mine Number 2 was a conventional coal mine, operating in a relatively low seam. Mining height along the belt line was approximately four feet. Tr. 19, 98, 144.² During the time that the violations were issued, the mine used a cut and blast mining process. Miners would drill holes into the coal face, which would then be undercut with a cutting machine. Explosives would be placed into the holes, and inert clay packing would be tamped in to contain the explosion. After blasting, scoops would load the coal onto the belt for transport out of the mine. Tr. 68.

The violations at issue were served by MSHA inspectors from September 21 through November 1, 2010, and the penalties assessed were timely contested by Respondent.

Docket No. KENT 2011-332

Citation No. 8249770

Citation No. 8249770 was issued by MSHA inspector James Adams³ at 1:30 p.m. on September 21, 2010, pursuant to section 104(d)(1) of the Mine Act. It alleges a violation of 30 C.F.R. § 75.400 which states, “[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.” The violation was described in the “Condition and Practice” section of the citation as follows:

The operator has allowed combustible materials in the form of loose coal, coal dust, and coal float dust to accumulate in the Co. #1 conveyor belt entry from approximately three break inby S.S. 1561. The accumulations range in depth from a thin layer to approximately three inches, being black in color, very dry and easily suspended into the atmosphere. A battery charging station with multiple energized electrical components (480 VAC) is located in the adjacent entry.

Nine Miners were working in the 003 section.

² Most citations are to the condensed transcript. It should be noted that there is a discrepancy of one or two pages between the numbering in the official transcript and the condensed transcript.

³ Adams has been a coal mine inspector at MSHA since 2006. Tr. 12, 16. He entered the coal mining industry in 1975, and was responsible for a number of tasks at various companies throughout the years. Tr. 13-14. He was an inspector of mines for the state of Kentucky for three years before joining MSHA, and holds a variety of certificates and licenses related to coal mining and training. Tr. 16, 18.

This standard has been cited 57 times at this mine in the last two years.

This violation is an unwarrantable failure of the belt examiner (Carvin Collins) to comply with a mandatory standard.⁴

Ex. G-1.

Adams determined that the violation was reasonably likely to cause injury that could be expected to result in lost workdays or restricted duty, that it was significant and substantial, that nine people were affected, that the operator's negligence was high, and that the violation was the result of TRC's unwarrantable failure to comply with the standard. A civil penalty in the amount of \$16,867.00 was assessed for the violation.

The Violation

Adams sole reason for being at the mine on September 21, 2010, was to terminate a rock dust citation. He informed the belt foreman, Carvin Collins, that he only wanted to see the area for which the citation had been issued. Tr. 23-24. The first shift had been working for approximately six hours when Adams arrived at the mine. Tr. 22-23. When Collins took Adams to the area of the #5 conveyor belt, Adams observed dry, black float coal dust, and coal dust. Tr. 24-25. The accumulations of coal dust were approximately 1/4-3/8 of an inch thick, and loose coal accumulations were about 2-3 inches deep. Tr. 25. The conditions in that area of the mine were dry, and the accumulations were spread across about six breaks, approximately 500 feet. Tr. 20, 25, 33; Ex. G-5. No clean-up crew was present in the area and there was no evidence that cleaning had occurred. Tr. 39.

Adams believed that the accumulations could have led to an explosion because multiple ignition sources were present. Tr. 26-27. Only one potential ignition source was noted in the body of the citation, a battery charging station in an adjacent entry approximately 80 feet from the belt entry. Tr. 50, 52. However, he recorded in his notes, and testified, that two other potential ignition sources were present, the head drive for the #6 belt, which had several electrical components, and a bottom belt roller turning in dry coal. Tr. 26-27; Ex. G-5.

While Adams could not relate the regulatory definition of coal dust and coal float dust, he had many years of experience in coal mines and carried a copy of the regulations with him to inspections. Tr. 78. The federal regulations define coal dust and coal float dust based on its ability to pass through different sized sieves.⁵ Tr. 46-47. Adams had been issued sieves as an inspector but he did not use them, and he could not specify the size of the dust particles he observed. Tr. 47-48. One of the tests that Adams uses to determine if a substance is float coal

⁴ Punctuation and other errors have been corrected in documents prepared in the field.

⁵ Coal dust consists of particles of coal that can pass through a No. 20 sieve. Float coal dust consists of particles of coal that can pass through a No. 200 sieve. Loose coal means coal fragments larger in size than coal dust. 30 C.F.R. § 75.400-1.

dust is to blow on it to see if it becomes suspended. When he blew on the dust in TRC's mine, it became suspended. Tr. 79.

Respondent allowed coal dust, and loose coal to accumulate up to measurements of 3/8 of an inch and 3 inches respectively, facts that are essentially not disputed by TRC. There was no clean-up crew present during Adams' inspection and there was no evidence that any kind of clean-up had previously taken place. In addition, there were nine miners working in the 003 section. I find that Respondent violated the standard.

Significant & Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*⁶ framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

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

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

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).

....
....

⁶ *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

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

The fact of the violation has been established. It contributed to a discrete safety hazard, the possibility of combustion, a fire or explosion, of the accumulations around the #5 belt. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury causing event and whether it was reasonably likely that an injury would be of a reasonably serious nature.

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a ‘confluence of factors’ was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990) (‘*UP&L*’); *Texasgulf*, 10 FMSHRC at 500-03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997).

Here, the accumulations were reasonably extensive. While they were not massive in volume, they consisted of float coal dust and loose coal that extended for several hundred feet along the belt line. There is no evidence of the presence of methane, either in the belt entry, or elsewhere in the mine such that it could have affected the accumulations, most notably by generating an explosion that could have put the float coal dust into suspension and propagated a

more extensive and violent explosion.⁷ However, there was at least one potential ignition source that could have started a fire in the accumulations.

Adams determined that an injury was reasonably likely to occur because there were multiple ignition sources present near or within the accumulations, and the coal dust was very volatile and combustible. Tr. 33. He identified the ignition sources as a battery charging station, the head drive for the #6 belt, and a belt roller turning in dry coal.

The battery charging station was in an adjacent entry, 80 feet away from the belt entry. While the accumulations extended into the connecting crosscut, they did not reach the charging station. Tr. 27, 50. There was no coal dust on top of the charging station, and Adams did not look into it to see if there were accumulations inside the charger. Tr. 57, 71-72. A scoop was parked next to the station, and its battery was being charged. Adams posited that if a battery arced, it could cause an ignition. However, there were no accumulations in the area, and Adams did not see any evidence of arcing. Tr. 53-54. The battery charging station was on a ground fault system and would have been de-energized if there was a fault. Tr. 57, 233. Robert Caudill, the section foreman, testified that the area around the charger had been sprayed with fireproof material, there was a fire extinguisher on the charger, and he did not think there was any condition present that would have caused arcing. Tr. 233-34. I find that the battery charging station was not an ignition source for the accumulations.

Nor did the head drive for the #6 belt, which was three to four breaks away, present an ignition source. It had multiple electrical components that Adams described as potential ignition sources, such as a belt starter box and a belt feed-through box. Tr. 26-28. However, the accumulations did not extend to the head drive, and Adams did not go all the way to the head drive to observe the conditions at that location. Tr. 27. Adams theory, like that for the charging station, was that the head drive could ignite some other combustible material, resulting in a chain reaction that could involve the cited accumulations.⁸ Tr. 71-72.

⁷ The Secretary maintains that the mine had a history of methane liberation. While that statement is correct, it is misleading. Anthony Lucas, an MSHA inspector who participated in a saturation inspection on November 1, 2010, had worked at the mine around 2003-2005. At that time, the mine was on spot inspections because it liberated significant quantities of methane. Tr. 143-44. However, mining at the time was considerably deeper than in 2010, and in a completely different area. The mine was not subject to spot inspections in 2010, and checks for methane were negative. Tr. 170-71. Lucas stated that mining could encounter a pocket of methane, but there is no indication that that was a realistic possibility, and no evidence of accidents or ignitions at the mine.

⁸ There was a reducer fitting on a nearby fire valve that made it incompatible with a fire hose. The fitting could usually be removed with a small turn, but Adams was unable to loosen it with his hand. Tr. 65-66. Again, this condition was not in the area of the accumulations, and had little, if anything, to do with the likelihood of an injury producing event resulting from the hazard contributed to by the accumulations.

There was, however, a bottom belt roller turning in the accumulations. Adams did not touch the roller or the coal it was turning in, because the belt was running. Tr. 56. He was unable to state whether heat was being generated by the roller, and did not have a heat-sensing device. Tr. 56. Nevertheless, the roller spinning in the accumulations, particularly the dry float coal dust, could produce an ignition, especially under continued mining conditions.

A fire burning in the accumulations would produce flames, smoke, and noxious gases. While the products of combustion would most likely have been transported out of the mine by the air flow in the belt entry, miners called upon to fight the fire could suffer smoke inhalation or other injuries of a reasonably serious nature. There was a fire extinguisher nearby, and the belt was equipped with a carbon monoxide sensing system that would have provided a warning if there was a fire and would have shut the belt down. Tr. 60-61. However, such safety features do not establish that a violation is not S&S. See *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133 (7th Cir. 1995); *Amax Coal Co.*, 19 FMSHRC 846, 849 (May 1997).

Adams believed an injury would result in lost workdays or restricted duty, and recorded his assessment in his notes and on the citation. Ex. G-1, G-5 at 8. However, at the hearing he testified that he could or should have marked it as fatal because in the event of an explosion there was a “good possibility” that the nine miners working at the face would have been affected. Tr. 36. His conclusion was based on his awareness of the Upper Big Branch mine disaster, where an explosion of coal dust suspended by a methane explosion resulted in fatalities to miners two miles from the initial incident.⁹ Tr. 34. Adams posited that an explosion could suspend the float coal dust and affect the nine miners working in the 003 section. Tr. 34-36.

Adams initial assessment of possible injuries was more accurate. There is no evidence of the presence of methane in TRC’s mine, and Adams was not aware of any ignitions or fires at the mine. Tr. 81. Consequently, there was no realistic possibility of an explosion that could have suspended the dust, or affected the miners at the face. Nor was the extent of the dust remotely comparable to the conditions that led to the Upper Big Branch disaster.¹⁰

⁹ Adams did not explain how the disaster at the Upper Big Branch Mine related to the conditions at issue. He had not participated in the investigation of that incident, and acknowledged that the Upper Big Branch mine was an “entirely different type of mine.” Tr. 60.

¹⁰ According to the Executive Summary of MSHA’s lengthy report of the investigation of the Upper Big Branch incident, loose coal, coal dust and float coal dust had been allowed to accumulate for days, weeks and months, and were abundant in all areas of the mine. The incident began with a small methane ignition at the face of the longwall, which caused a second ignition of methane that accumulated because of a roof fall that interfered with ventilation. That explosion suspended the extensive coal dust accumulations and propagated an extensive coal dust explosion. The Executive Summary is available on the MSHA web site, along with the full investigative report and other pertinent materials (<http://www.msha.gov/Fatals/2010/UBB/ExecutiveSummary.pdf>).

I find that an ignition of the accumulations could have caused a fire and that a lost work days injury was reasonably likely to result to one miner. The violation was S&S.

Unwarrantable Failure- Negligence

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); see also *Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of an unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) [need to check on the appeal that was docketed in the 4th Cir on 2/21,2001]. . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary argues that the violation was the result of TRC's unwarrantable failure because the condition was obvious and extensive, it existed for at least one to two shifts, it posed a high degree of danger to miners, Respondent had been put on notice that greater efforts were needed for compliance, no action was being taken to correct the

problem, and the belt in the area was running. Respondent argues that its conduct did not rise to the level of unwarrantable failure because it was making substantial efforts to comply with the accumulations standard.

Obviousness – Length of time

The accumulations existed in the belt entry for a distance of approximately 400 feet.¹¹ They were black in color, which immediately attracted Adams' attention. Tr. 32-33. He concluded that they were obvious, and had existed for at least one shift, if not two. Tr. 31. I find that the violative condition was obvious.¹²

Adams concluded that the accumulations had existed for at least one shift, and most likely longer. His determination was based upon the extensiveness and appearance of the accumulations. As noted below, I have found that the accumulations existed during the previous shift, such that they should have been observed during two required examinations.

Operator's knowledge of the violation

Based on the extent of the accumulation, it was Adams' opinion that the accumulation had been ongoing for one, if not two, shifts. Tr. 31. Because the area should have been examined pre-shift and on-shift, there would have been at least two opportunities for an examiner to have found the conditions. Tr. 31-32. Collins told Adams that he had been in the area to conduct the preshift examination for the day shift. Tr. 32-33. He should have observed the obvious accumulations, and, judging from his reaction when questioned by Adams, he was aware of them. Tr. 33. I find that TRC had, or should have had, knowledge of the violative condition.

Operator placed on notice that greater efforts at compliance were necessary

Violations of the accumulations standard had been cited 57 times in the last two years at the mine. In June 2010, Adams discussed with management officials of TRC its numerous section 75.400 violations and put Respondent on notice that a higher degree of enforcement for such violations would be taken in the future. Tr. 68-69. TRC had been put on notice that greater efforts were needed to comply with the accumulations standard.

¹¹ Adams drew a line around the area on a map of the mine. The area extended approximately two inches on the map, which, according to the map's scale represented 200 feet. Tr. 29; Ex. G-8.

¹² Respondent argues that accumulations over only 400 feet of the belt should not be characterized as obvious when taking into consideration that the entire length of the belt was 8,000 feet. Resp. Br. at 5. This argument hardly merits a reply, since the entire length of the belt is required to be examined.

Extent of the violation

The extensiveness factor involves consideration of the scope or magnitude of a violation, not an additional consideration of dangerousness or obviousness. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). The accumulation of coal dust was approximately 1/4-3/8 of an inch thick, and loose coal accumulations were about 2-3 inches deep. Tr. 25. They were spread across six breaks, approximately 400 feet. The violation was moderately extensive.

Degree of danger

The violation did not present a high degree of danger to miners. Adams' explosion scenario, resulting in fatalities to the entire mining crew, was not reasonable. The single potential ignition source was reasonably likely to result in a fire, with a lost work days injury reasonably likely to occur to one miner.

Operator's efforts in abating the violation

The focus of the abatement effort factor is on compliance efforts made prior to the issuance of the violation, generally a measure of an operator's response to violative conditions that were known or should have been known to it. While the parties stipulated that TRC exhibited good faith in timely abating the violations, post-citation efforts are not relevant to the determination of whether the operator engaged in aggravated conduct in allowing a violative condition to occur. *Enlow Fork*, 19FMSHRC at 17. As noted above, TRC, through its agent Collins, had knowledge of the violative condition. It had taken no steps to address it.

TRC argues that the Secretary's violations history report, typically referred to as an "R-17," shows that it had made substantial efforts to comply with section 75.400 after Adams' June 2010 warning, noting that it shows 19 accumulations violations from January through June, but none for the balance of the report, i.e., from July 1 through September 20, 2010. It also notes that Robert Caudill, its section foreman, testified that TRC does its best to clean up in the working section and along the belts. Tr. 237.

Caudill's testimony did not include a description of any effort to place greater emphasis on clean-up efforts as a result of Adams' warning. The R-17 also can present a misleading picture, because it includes only citations or orders that became final during the subject period, which in this case ended on September 20, 2010. Violations that were issued in the period of claimed enhanced effort, from zero to ninety days before the report's closing date, would almost certainly not have become final within that time, even if TRC had not contested any assessed penalties. Consequently, the R-17 report is a most unreliable source to prove whether violations were issued less than three months before its closure date. TRC's attempt to demonstrate pre-citation abatement efforts is unavailing.

The most telling evidence of TRC's lack of abatement efforts is the fact that, despite being on notice that greater compliance efforts were necessary, and direct knowledge of the violative condition, it took no steps to address the accumulations.

Conclusion

TRC had been put on notice that greater efforts were necessary to comply with the accumulations standard. It had knowledge of the violative conditions, prior to the inspection, and took no steps to abate them. It failed in its attempt to demonstrate abatement efforts in response to warnings from Adams. The violative condition was obvious, and had existed for nearly two shifts. While the violation was not particularly extensive and did not present a high degree of danger to miners, I find that it was the result of TRC's unwarrantable failure to comply with the standard.

Order No. 8249774

Order No. 8249774 was issued by Adams at 4:00 p.m. on September 21, 2010, pursuant to section 104(d)(1) of the Mine Act. It alleges a violation of 30 C.F.R. § 75.362(b) which states, "[d]uring 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." The violation was described in the "Condition and Practice" section of the order as follows:

The operator failed to conduct and record an adequate examination of hazards found along the Co. #5 and #1 conveyor belts. Reference citation #8249770, #8249771, #8249772, and #8249773.

Due to the fact that the belt examiner was in this area and the obviousness of the hazards cited, this constitutes more than ordinary neglect by the operator. This is an unwarrantable failure of the belt examiner (Carvin Collins) to comply with a mandatory standard.

These hazards are obvious to the most casual observer.

Ex. G-2.

Adams determined that the violation was reasonably likely to cause injury that could be expected to result in lost workdays or restricted duty, that it was significant and substantial, that nine persons were affected,¹³ and that the operator's negligence was high. Adams issued the order pursuant to section 104(d) because he determined that the operator's negligence rose to the level of unwarrantable failure. A civil penalty in the amount of \$6,115.00 was assessed for the violation.

The Violation

When Adams returned to the surface of the mine after issuing Citation No. 8249770, he checked the belt exam book and found that no hazards had been recorded for the number five and number one conveyor belts from September 15 to September 21, 2010. He believed that the conditions that were the subjects of the referenced citations should have been found by the examiner and noted in the examination book. Tr. 41. Collins had acknowledged doing the examination at the start of the day shift, which was both a preshift and onshift examination, and should have encompassed all areas of the belt, i.e., the locations where the referenced citations had been issued. Tr. 74-76.

Section 75.362(b) is part of the preshift and onshift examination requirements, and specifically applies to entries where belt conveyors are operated. While it addresses onshift examinations, it provides that the onshift examination can be conducted at the same time as the preshift examination, if it is done during the time that the preshift examination must be done, i.e., within three hours before the oncoming shift. The Commission has held that the preshift standard requires a preshift examiner to find and record a hazardous condition in a preshift examination book. *See RAG Cumberland Res.*, 26 FMSHRC 639, 651, 653 (Aug. 2004); *Enlow Fork*, 19 FMSHRC at 14. Section 75.362(b) imposes a virtually identical requirement.

The accumulations that were the subject of Citation No. 8249770, constituted a hazardous condition, and the violation was found to be significant and substantial, i.e., the hazard contributed to by the violation was reasonably likely to result in a reasonably serious injury. Two of the three other citations referenced in the order had been determined to be significant and substantial. Ex. G-5. Hazards contributed to by the accumulations, and the other violations, should have been identified and recorded in the examination book.

I find that the standard was violated.

Significant & Substantial

The failure to record the hazards in the examination book had the effect of perpetuating them, because oncoming foremen and higher level managers were not alerted to their presence

¹³ Adams inadvertently noted that one person was affected when he wrote the order. He amended the order two days later to change the number of persons affected to nine. Tr. 76-77; Ex. G-2.

and would not have taken action to address them. Consequently, miners working on oncoming shifts were exposed to the hazards. Tr. 42. Adams' testimony regarding the nature of injuries likely to be suffered and the number of persons affected paralleled that of the accumulations violation. He believed that an explosion propagated by the float coal dust could have resulted in fatal injuries to the nine-member crew working at the face. However, he recorded in the order that the injury reasonably expected would have resulted in lost work days. For the reasons discussed with respect to the accumulations violation, I find that the hazard contributed to by this violation, which was a perpetuation of the hazard contributed to by the accumulations violation, combined with the hazards contributed to by the other violations referenced in the order, was reasonably likely to result in an injury resulting in lost work days to one person.

I find that the violation was S&S.

Unwarrantable Failure - Negligence

Adams determined that TRC's negligence was high because the accumulation conditions were obvious, Collins had done an examination in the area and should have observed them, and the hazard was not recorded in the examination book. Tr. 44. Adams also believed that the other violations referenced in the order had existed when the onshift/preshift examination was conducted and should have been observed and recorded in the book. Tr. 74-76; Ex. G-5. He found no mitigating factors. Tr. 45.

As presented at the hearing, this violation closely parallels the accumulations violation, and there is a tendency to follow the reasoning of that violation as to the special findings. However, the examination violation is separate and distinct from the accumulations violation, which affects the unwarrantable failure analysis. While TRC had been put on notice of a need for greater efforts to comply with the accumulations standard, there is no such evidence as to the examination standard. Collins' knew that he had not reported the accumulations violation following his examination, and made no effort to correct that omission prior to its being cited as a violation. However, those considerations are the essence of the examination violation itself, as is the fact that the failure to record the conditions was obvious. The violation had not existed for an appreciable length of time. As noted above, the accumulation violation was not particularly extensive and did not present a high degree of danger to miners. The potential hazards associated with the other violations, could justify finding this violation more extensive. However, aside from Adams' notes of his inspection, and some brief testimony, there is little evidence upon which to base such a finding. In any event, the Secretary's case on this issue was largely premised upon the failure to record the accumulations violation, and finding the examination violation slightly more extensive would not alter the unwarrantable analysis.

Considering all of the factors, many of which are difficult to apply due to the nature of the violation, I find that it was the not result of TRC's unwarrantable failure to comply with the standard. Rather, Collins failure to record the accumulations hazard in the examination book was a serious violation, that rose to the level of high negligence. As an examiner, he was TRC's agent, and his negligence is attributable to TRC.

Docket No. KENT 2011-443

Citation No. 8250750

Citation No. 8250750 was issued by MSHA inspector David Hardin¹⁴ at 10:30 a.m. on November 1, 2010, pursuant to section 104(a) of the Mine Act. It alleges a violation of 30 C.F.R. § 75.1403 which states, “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.”¹⁵ The violation was described in the “Condition and Practice” section of the citation as follows:

The operator has failed to maintain the sanding devices provided on the battery rail runner type mantrip in good working condition. When checked, the sanding devices failed to work and took sixty minutes to repair.

Standard 75.1403 was cited 20 times in two years at mine 1517720 (20 to the operator, 0 to a contractor).

Ex. G-3.

Hardin determined that the violation was reasonably likely to cause injury that could be expected to result in lost workdays or restricted duty, that it was significant and substantial, that ten people were affected, and that the operator’s negligence was high. A civil penalty in the amount of \$12,248.00 was assessed for the violation.

The Violation

Hardin was at TRC’s Mine No. 2 on November 1, 2010, to participate in a “saturation” inspection, wherein a group of inspectors simultaneously inspect most or all areas of a mine. Tr. 90. He was assigned to inspect the conveyor belts. Tr. 91. Hardin, and some of his colleagues assigned to underground areas of the mine, decided to take a track-mounted mantrip

¹⁴ Hardin became an underground coal mine inspector in 2007, and was trained as an accident investigator. Tr. 84, 87-88. He started working in the coal mining industry in 1989, where he cleaned belts and head drives, and operated equipment, including track-mounted mantrips equipped with sanders. Tr. 85-86.

¹⁵ There is a specific criterion for the issuance of safeguards requiring that track-mounted self-propelled personnel carriers transporting more than five men be equipped with “properly installed and well maintained sanding devices.” 30 C.F.R. § 75.1403-6(b)(3). However, MSHA inspectors had been instructed to note the general safeguard regulation, section 75.1403, as the provision violated, most likely because of litigation involving the status of safeguards. Tr. 112, 119; *See Wolf Run Mining Co.*, 32 FMSHRC1228 (Oct. 2010), *aff’d*. 659 F3d 1197 (D.C.Cir. 2011).

into the mine. Tr. 92. The mantrip could transport eight passengers quickly from the portal to the end of the 4,400-foot rail line. Absent a mantrip, or a wheeled “buggy” ride, one would have to either “duck walk” or crawl that distance, because mine height along the belt line was approximately four feet. Tr. 97. Aside from a turn at the portal, the rail line was straight, but hilly, with slopes both up and down that Hardin described as “steep.” Tr. 94, 98-99. The mine was damp along the track, and water collected in dips and low spots, mostly along the #1 belt near the portal. Tr. 94, 98-99. Anthony Lucas, an MSHA inspector, rode the entire length of the track on a mantrip and described the track as wet, hilly, and not very well maintained. Tr. 148. He could feel the track swaying slightly as he rode. Tr. 174.

The mine had two track-mounted mantrips, both of which were used to transport day-shift mining crews into the mine. Tr. 195. Mantrips are equipped with a service brake and a parking brake. Because wet conditions on the rails can significantly reduce friction between the steel surfaces, each mantrip was also equipped with four sanders, one for each wheel, to provide added traction. A sander consists of a square receptacle that tapers down to a tip. A metal rod extends down, through the receptacle into an orifice at the tip. When the rod is lifted out of the orifice by the operator’s pressing down on a handle, sand is allowed to run out of the receptacle, through a rubber “boot” attached to the bottom of the sander, and is deposited on the metal rail in front of the mantrip’s wheel. The sand increases the friction between the steel wheel and the rail, thereby greatly enhancing the mantrip’s ability to stop and to climb grades in wet conditions.

There is no mandatory safety standard or regulation that requires that mantrips be equipped with sanders. However, pursuant to section 314(b) of the Act, and the Secretary’s regulations, authorized representatives of the Secretary may issue safeguards to address hazards related to the transportation of men and materials at a particular mine. 30 C.F.R. § 75.1403. The mine operator is obligated to comply with a safeguard, violations of which may subject it to citations or orders issued pursuant to section 104 of the Act. *Cyprus Cumberland Res. Corp*, 19 FMSHRC 1781 (Nov. 1997). Safeguard No. 4009405 had been issued at the mine on July 14, 1997. Tr. 116. It requires that track-mounted mantrips be equipped with operable sanders.

Hardin was familiar with the safeguard, a copy of which was retained in MSHA’s mine file. Tr. 115. Respondent argues that the Secretary did not introduce a copy of the safeguard into evidence, and that it “may have been issued due to circumstances specific to active areas in the mine at that time which are now sealed.” Rsp. Br. at 9. Respondent cited no authority for what appears to be an argument that the safeguard was no longer validly based upon specific conditions at the mine. The Secretary has the burden of establishing the validity of a safeguard, which includes proof of specific mine conditions creating a transportation hazard addressed by the safeguard. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 13-14 (Jan. 1992). The conditions described by Hardin and others, a rail line running through hilly wet conditions with steep slopes, provided ample evidence of specific conditions establishing the continued validity of the safeguard. Respondent offered no evidence that the safeguard was not, or was no longer, based upon specific conditions in its mine.

Pursuant to the inspectors' request, a mantrip was brought out of the mine. Hardin inspected the mantrip before riding it into the mine. The parking and service brakes were in good working order. However, all four sanders were inoperable. Tr. 94. When the levers controlling the sanders were activated, retracting the rods, no sand came out. Hardin's initial impression was that the sanders had simply run out of sand. However, there was sand in the receptacles and it was determined that they were clogged with wet sand and mud. Tr. 100, 136. When the mantrip travels through wet conditions, water and/or mud can get into the rubber boots on the sander, causing sand to clump, blocking it from falling onto the track. Tr. 198-99. Simple clogs can be dislodged fairly easily, e.g., by pushing something like a welding rod down through the reservoir and forcing the wet sand out, or by using a rod to dislodge wet sand from the boot. Tr. 103-04. More severe clogs, where the sand in the receptacle has become wet, require removal of the sand, drying of the receptacle, and refilling it with dry sand. Tr. 200.

The inoperable sanders were severely clogged, necessitating removal of the wet sand, drying the receptacle, and refilling it with dry sand. Consequently, Hardin issued the subject citation, charging TRC with violating the safeguard. It took about an hour to make the sanders functional, at which time the citation was terminated.¹⁶

Clayton Ramey, a superintendent and one of the owners of the mine, testified that only one of the sanders was inoperable, and that Carver Collins, the foreman who brought the mantrip to the surface, determined that the sander was not functioning properly and took the mantrip out of service. Tr. 204-05. Ramey stated that he was present when the sanders were tested, and that he and two other employees worked to repair the sander. Tr. 206, 217. However, Ramey also complained that when the inspectors arrived he had to sit in the office, was not allowed to talk on the phone, and that Collins came to the office and told him that the mantrip had been taken out of service because of at least one inoperable sander. Tr. 216. Hardin testified that two men repaired the sanders, neither of whom was Ramey. Tr. 130-31. I find that Ramey may have been present when the sanders were tested after having been repaired, but that he was not present when the sanders were initially checked, and that all four were inoperable when checked by Hardin. I find that the standard was violated.

Significant & Substantial

The fact of the violation has been established. It contributed to a discrete hazard, a limited ability to slow or stop the mantrip in wet conditions increasing the potential for a collision with a miner or a derailment. An injury resulting from such an event would most likely be reasonably serious. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury causing event.

¹⁶ Waiting an hour to enter the mine apparently frustrated the inspectors, some of whom entered the mine without waiting for a ride. Tr. 111-12. Clayton Ramey, a superintendent, testified that when he went over to the rail shed to help repair the sanders, he questioned why a citation was being issued because the mantrip was not being used, to which an inspector replied that he was "stalling" the inspection. Tr. 218.

Hardin believed that the inability to effectively slow or stop the mantrip because of the inoperable sanders made it reasonably likely that the mantrip would strike a miner working along the belts, or that the mantrip would derail and strike a rib or the belt.¹⁷ Tr. 105. No seatbelts were provided on the man trip, increasing the possibility of injury in the event of a derailment. Tr. 106. Hardin was aware of accidents occurring because of faulty sanders, including an incident where a mantrip could not slow for a curve and crashed into a coal rib, sending several men to the hospital. Tr. 103.

The track extended approximately 4,400 feet into the mine. While the overall elevation change over that distance was only 35 feet, it was “hilly” or “rolly” and had significant dips with uphill and downhill grades. Tr. 146, 208-09. It was also wet, and water and mud tended to collect in the dips. From just inside the portal, the track ran straight, right alongside the belts. Tr. 105-06, 147. Hardin had checked TRC’s belt book, which showed that men were working on the belts that day. Tr. 106.

I find that the probability of a derailment was negligible, because the track was straight, except for one S-curve at the portal. The curve would have been encountered as a mantrip first entered the mine, prior to traveling through the wet hilly areas of the track. A mantrip exiting the mine would, presumably, be traveling on a generally rising, or flat, slope and would be unlikely to be traveling at a speed that would threaten its ability to remain on the track.

However, miners working along the belts would have been exposed to the hazard, as the mantrip traveled those hilly and wet areas. Hardin believed that the sanders had been inoperable for at least one shift, and had been inoperable when the mantrip was used to transport miners on the day shift into the mine around 6:30 that morning, and when the mantrip was brought out of the mine to transport the inspectors. Tr. 101, 106. Hardin’s determination was based solely on the amount of time it took to unclog the sanders, i.e., the severity of the clogs. Tr. 101, 106, 133.

Clyde Gibson, who was responsible for maintaining the mantrips and sanders, worked an extended second shift, from 6:00 p.m. to 6:00 a.m. When the mantrips transported the second shift crews out of the mine at 11:30 p.m., he examined the mantrips, including the sanders and made sure they were operational before moving the mantrips into the covered rail shed. Tr. 191, 200. He was sure that the sanders were functional when the mantrip was placed in the shed on Friday night, and would have remained functional when it was used that Monday morning,

¹⁷ Ramey maintained that sanders were not used to slow or stop the mantrips, rather they were needed to climb grades. Tr. 211, 214. He opined that sanders wouldn’t “do any good” for stopping, because the sand would be behind the wheels. Tr. 211. However, he eventually conceded that he could not recall exactly where the sanders discharged sand. Tr. 220-21. Gibson also stated that sanders were used to provide traction when climbing a grade. Tr. 186. Mantrips have no front or back end. The operator sits in the middle, facing sideways, turning his head to face one way when traveling into the mine, and turning in the opposite direction when traveling out. Tr.190, 221. The two sanders on the leading end of the mantrip provide additional traction, discharging sand onto the rails immediately in front of the leading wheels. The sand would enhance traction for both climbing and descending a grade.

November 1, to transport the first shift miners into the mine. Tr. 192-93. Ramey testified that it was TRC's policy to check the sanders every time the mantrips came to the surface, and that the sanders would be made operable before the mantrips were taken back underground. Tr. 204, 207.

Gibson estimated that a more serious clog occurred approximately once per week, but, that a mantrip might be used by the belt boss to check the belts and could make several trips per day through water/mud which would increase the likelihood of a clog. Tr. 201-02. Hardin conceded that a sander could become "simply clogged" on a single trip into or out of the mine. Tr. 125.

While it is possible that the sanders had been inoperable before work began that day, Hardin's opinion, based solely on the amount of time it took to clean the sanders, is insufficient to justify such a finding. Hardin apparently did not consider that the belt boss may have used the mantrip after the crew had been taken in, and made additional trips through water and mud. However, Hardin's opinion that the four sanders did not get severely clogged solely during the trip to the surface, strikes me as reasonable. I find that the operability of most of the sanders was substantially impaired by the time the mantrip reached the end of the track when it was used to transport miners at the beginning of the first shift, or shortly thereafter, i.e., approximately 7:00 a.m., and that they were inoperable during the trip out of the mine to get the inspectors at approximately 10:00 a.m., and during any travel in the intervening period.

Considering the fact that there were miners assigned to work on the belts, and that the hilly, wet track ran alongside the belts, I find that an injury causing event was reasonably likely to occur, and that the violation was S&S.

Negligence

Hardin recorded TRC's negligence as "moderate" in his handwritten notes made during the inspection, and underlined the word. Ex. G-7. However, in typing the citation, he indicated the negligence level was high. He explained that the "moderate" notation was a "typo" and that his assessment of negligence was high "from the start." Tr. 123. As reflected in his notes, his assessment of high negligence was based upon the length of time it took to repair the sanders and the obviousness of the condition. Ex. G-7. He believed that the condition should have been discovered and remedied during a pre-operational check of the mantrip before it was used to transport the first shift miners, or during a pre-operational check before it was brought out of the mine.

Hardin had been told that all the section men took the same ride into the mine, and concluded that the foreman rode on the mantrip along with the crew. Tr. 107, 124. He had determined that the sanders had been inoperable prior to the crew being transported into the mine that morning, and that their failure to discharge sand should have been obvious during a pre-operational check at that time, or before the mantrip was brought out, and he concluded that a TRC agent knew or should have known that the sanders were clogged.

I have found, however, that the operability of the sanders was not significantly impaired when the mantrip departed the surface at the beginning of the work day. It is also unclear whether an agent of TRC's would have been in a position to have observed a problem with the sanders. While a foreman rode into the mine with the crew, he may not have ridden in that mantrip, and there is no indication that that mantrip had any difficulty traversing the hilly track on its way into the mine, on the way out to get the inspectors, or at any time when it may have been used by the belt boss.

Hardin had determined that ten men were affected by the violation, because that was a typical mining crew, and he had been told that the entire crew took the same ride into the mine. However, the capacity of the cited mantrip was eight miners, plus an operator. The second mantrip owned by TRC was at the end of the track when Hardin went into the mine, indicating that both mantrips had been used to transport the foreman and crew for the first shift into the mine. Tr. 124, 195. Consequently, the number of miners affected had to be lower than ten. Since the possibility of a derailment was found to be remote, I find that one miner, a miner working along the belt line, would have been affected by the violation.

I find that TRC's negligence with respect to this violation was moderate.¹⁸

Citation No. 8250709

Citation No. 8250709 was issued by MSHA inspector Anthony Lucas¹⁹ at 12:50 p.m. on November 1, 2010, pursuant to section 104(a) of the Mine Act. It alleges a violation of the accumulations standard, 30 C.F.R. § 75.400. The violation was described in the "Condition and Practice" section of the citation as follows:

Accumulations of combustible material in the form of loose coal, crushed coal fines, coal dust, and float coal dust, black in color, have been allowed to accumulate on the active 003 section beginning two cross cuts outby the section power center and continuing inby the last open cross cut where coal is being

¹⁸ As noted in the citation, violations of the general safeguard regulation, section 75.1403, had been issued 20 times in the past two years. However, that regulation would typically have been cited for violations of any number of safeguards that had been issued at the mine. The violation history report introduced by the Secretary shows only one violation issued under section 75.1403(6)(b)(3), the specific criterion for sanders on mantrips, for which a \$100 penalty was paid. Ex. G-9.

¹⁹ Lucas became a coal mine inspector for MSHA in 2006. Tr. 138. He received a Bachelors degree in Law Enforcement from Eastern Kentucky University and has experience working in underground coal mines as a belt shoveler, maintenance foreman, and electrician. Tr. 138-39. He previously worked at Mine Number 2 before TRC became the operator, but did not work in the same area that he inspected. Tr. 141, 168.

mined and transported. The accumulations range from thin to 4 inches in depth and are black in color.

Ex. G-4.

Lucas determined that the violation was reasonably likely to cause injury that could be expected to result in lost workdays or restricted duty, that it was significant and substantial, that 12 persons were affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$6,458.00 was assessed for this violation.

The Violation

Lucas participated in the November 1 saturation inspection. He and another inspector were assigned to the 003 working section. They took the mantrip into the mine, and then boarded a rubber tired vehicle to ride to the face. As he entered the working section, he noticed accumulations of coal and black coal dust. Tr. 149. Lucas performed an imminent danger run in the last open crosscut from entry #6 to entry #8, while his colleague traveled entries #1 through #5, and they met to discuss their findings. Tr. 149, 178-79.

There were accumulations of loose coal ranging from 1 to 3 or 4 inches in depth throughout the section.²⁰ Tr. 158, 168. The area near the face of the mine was very dry and there was no standing water or dampness. Tr. 154, 165. Lucas highlighted the area of the loose coal accumulations on a map of the mine. Tr. 151-51; Ex. G-8. The area encompassed all eight entries from the face to four crosscuts outby, approximately 300 by 400 feet. Lucas did not travel all of the entries and crosscuts in the highlighted area. Tr. 178-79. He went to the "top" of the entries, presumably in the last open crosscut, and looked into them while they were illuminated with his cap light. He observed that dust was raised by scoops traveling over the loose coal, which was transported outby by ventilation air currents. Tr. 155. Outby the feeder, he observed a thin layer of float coal dust that extended another two crosscuts outby. Tr. 152-54. He did not sample or test the dust to determine if it met the regulatory definition. However, he had conducted rock dust surveys, and was confident from his experience that the dust was float coal dust. Tr. 159, 167-70. Lucas was "shocked" that the mine had gotten that far behind on cleaning. Tr. 183.

Robert Caudill,²¹ the foreman in charge of the working section, explained the mining process being used. Three holes were drilled into the upper part of the face, after which a cutting machine would make a cut along the bottom of the seam. Explosives would be placed into the

²⁰ Lucas testified that the accumulations were up to 4 inches deep. However, he had recorded in his notes that they were up to 3 inches deep. Ex. G-6 at 11.

²¹ Robert Caudill has been a certified underground coal miner for 21 to 22 years and has been a certified mine foreman since 2005. He has worked mostly in conventional mines. Tr. 227-28.

holes, and clay “dummies” would be tamped into the holes to confine the blast. The area would be cleared, and the explosives would be ignited with a battery-powered detonator. Four scoops operated at the mine in 2010. They removed the loose coal from the blasted entry and transported it to the belt feeder.²² The drillers/blasters would move to the next entry and prepare it for blasting. The entries were blasted, in order, from #1 to #4, and then from #8 to #5. While mining continued on one side of the section, one or two scoops would return to the other side to scrape up spillage from the loading process. One miner, a “shoveler,” cleaned up spillage that the scoops could not get, and also applied rock dust to the ribs by hand. Tr. 230-32. When a crosscut was completed across the section, rock dust would be applied that evening with a mechanical rock duster mounted on a scoop. Tr. 232. A crosscut was completed approximately every two to five days. Tr. 245.

Caudill explained that the process of undercutting the coal left a series of steps in the mine floor, four to five inches high. Tr. 229, 242-46. The rough surface produced considerable spillage of coal from the scoops. Lucas agreed that some spillage would be expected because of the mining process. Tr. 177. He confirmed that rock dust had been sparingly applied on the roof and ribs, but that there was a “blanket” of float coal dust over the rock dust outby the feeder. Tr. 158-59.

Caudill believed that the cited accumulations may have been cleaned up with the scoops, and he did not recall having to clean five breaks back from the face. Tr. 235. However, the citation was issued at 12:50 p.m., not long before the end of his shift at 2:00 p.m. He believed that he left on time, may have taken Lucas out of the mine, and admittedly was not present for the majority of the clean-up. Tr. 274.

I accept the description of the conditions related by Lucas. Although he did not observe the entire highlighted area, he personally crawled through significant quantities of loose coal in virtually all of the entries, and observed the inadequately applied rock dust inby the feeder. If the scoop-mounted rock duster had actually been used as each crosscut was mined through from entry #1 to entry #8, the conditions observed by Lucas would not have existed.

I find that there were accumulations present throughout the section, in violation of the standard.

Significant & Substantial

The fact of the violation has been established. It contributed to a discrete safety hazard, the possibility of combustion, a fire or explosion. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury causing event and whether it was reasonably likely that an injury would be of a reasonably serious nature.

²² The “feeder” consisted only of a metal chute that fed the coal onto the belt. It was not a mechanized feeder. Tr. 237.

Lucas testified that injuries were reasonably likely to occur because of the amount of accumulations and the presence of three ignition sources, the blasting of coal, electrical equipment in the area, and the battery and wires used to ignite the explosives. Tr. 161-62. However, only the detonation of explosives was identified as an ignition source in his notes. Tr. 173; Ex. G-6. The low voltage battery used to ignite the explosives, and the wires lying in the accumulations, are permissible equipment and did not present a viable ignition source. Tr. 175. Lucas did not check the battery, and had no reason to believe that it was defective. Tr. 175. He did not check any of the electrical equipment, and did not know if coal dust had infiltrated it. Tr. 160, 175. He also confirmed that the tamping of dummies into an explosive hole would confine the explosion to the hole, and that there would not be any flame released unless there was methane present. Tr. 173-75. As noted previously, the mine was no longer on spot inspections for liberating substantial quantities of methane, and Lucas found no methane in the area. The blasting itself would have most likely created some quantity of suspended coal particles and dust. Yet, it obviously did not pose a significant threat of a wider ignition. The float coal dust was outby the large area where the loose coal was found, and was several breaks away from the faces. Lucas was present while blasting was taking place, but did not relate that it caused dust to be suspended or threatened an ignition.²³ Tr. 174.

I find that blasting was unlikely to ignite the loose coal accumulations in the entries, or the float coal dust outby. Because none of the ignition sources identified by Lucas presented a reasonable likelihood of an ignition of the accumulations, I find that the hazard contributed to was unlikely to result in an injury causing event, and the violation was not S&S. The violation was unlikely to result in a lost work days injury to one miner.²⁴

Negligence

Lucas marked the negligence level as moderate because of the period of time that the accumulations were present. Tr. 164. He believed that the conditions had existed since the

²³ Lucas did see dust created or raised by scoops traveling through accumulations and carried by ventilation air currents. Tr. 154.

²⁴ Lucas, like Adams, testified that, if he were citing the condition at the time of the hearing he would have determined that it would have resulted in fatal injuries to all miners working on the section, because if you have “a dust explosion such as we’ve had in the past, they’re fatal.” Tr. 162. This was an apparent reference to the Upper Big Branch mine disaster, which Adams explained was the basis of his reassessment. Neither inspector made any serious attempt to relate the conditions cited to conditions at the Upper Big Branch mine. It appears that their reasoning was that miners have been killed in a dust explosion, therefore, the presence of float coal dust means that fatalities are reasonably likely to occur. Information readily available regarding the Upper Big Branch incident establishes that there were a number of extremely serious violations of safety standards that combined to produce that catastrophe. While fatalities related to the conditions cited here might not have been completely outside the realm of possibility, absent some more cogent explanation of causation, I could not find that they were more than a theoretical possibility, much less reasonably likely.

second shift on the previous Thursday, and probably started on the first shift. Tr. 157-58. Consequently, they should have been observed during five preshift and onshift examinations that should have been conducted up to the time he cited them near the end of the first shift on Monday. *Id.* Examiners would have had to crawl through the area and could not have overlooked the loose coal. Given the circumstances, if Lucas was going to issue the same citation at the time of the hearing, he would have marked the negligence as high. Tr. 164-65.

I find that the accumulations were obvious, had existed for at least two shifts, and should have been noted and corrected by the examiners. Consequently, TRC had knowledge of the violation, and its negligence was high.

The Appropriate Civil Penalties

As the Commission recently reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties . . . we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”). While there is no presumption of validity given to the Secretary’s proposed assessments, we have repeatedly held that substantial deviations from the Secretary’s proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g.*, *Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that TRC abated the violations timely and in good faith. Stipulated Facts. TRC did not argue that the proposed penalties would affect its ability to remain in business, and therefore, I find that they would not. The parties did not stipulate to the size of TRC as an operator. However, forms reflecting calculations of penalty assessments, filed with the petitions, indicate that TRC is a small to medium operator, and I so find. Overall, these factors are slightly mitigating.

History of Violations

TRC's history of violations is reflected in a report generated from MSHA's database, the "R-17." Ex. G-9. The report lists violations issued at the No. 2 mine and reflects that 316 violations became final between September 2008 and September 2010. I accept the figures reflected in the report as accurate. However, the overall violation history set forth in the exhibit is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green*, 22 FMSHRC at 623-24.

Some qualitative violations' history information can be found on the forms reflecting calculations of the proposed assessments. The Secretary's Part 100 regulations for regular penalty assessments take into account two aspects of an operator's violation history, the "total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period." 30 C.F.R. § 100.3(c). Only violations that have become final are used in the calculations. For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. The assessment forms for the four litigated violations reflect an assessment of 12 points for overall violation history and 0 to 15 points for repeat violations.

I find that TRC's overall history of violations, as relevant to these violations, was moderate, and should be considered a neutral factor in the penalty assessment process.

Docket No. KENT 2011-332

Citation No. 8249770 is affirmed as an S&S and unwarrantable failure violation. However, the number of miners affected was found to be one, rather than nine. A regularly assessed civil penalty in the amount of \$16,867.00 was proposed for this violation. Adjusting the assessment to reflect the lower number of affected miners would have resulted in an assessment in the range of \$5,100.00 under the Secretary's Part 100 regulations. Considering the factors itemized in section 110(i), I impose a penalty of \$6,000.00 for this violation.

Order No. 8249774 is affirmed as an S&S violation. However, while TRC's negligence was found to be high, the violation was not the result of TRC's unwarrantable failure. In addition, the number of miners affected was found to be one, rather than nine. A regularly

assessed civil penalty in the amount of \$6,115.00 was proposed for this violation. Adjusting the assessment to reflect the lower number of affected miners would have resulted in an assessment in the range of \$1,660.00 under the Secretary's Part 100 regulations . Considering the factors itemized in section 110(i), I impose a penalty of \$2,000.00 for this violation.

Docket No. KENT 2011-443

Citation No. 8250750 is affirmed as an S&S violation. However, the violation was not the result of TRC's high negligence, rather, its negligence was moderate. In addition, the number of miners affected was found to be one, rather than ten. A civil penalty in the amount of \$12,248.00 was proposed for this violation. Adjusting the assessment to reflect the lower level of negligence and the lower number of affected miners would have resulted in an assessment in the range of \$1,000.00 under the Secretary's Part 100 regulations . Considering the factors itemized in section 110(i), I impose a penalty of \$1,500.00 for this violation.

Citation No. 8250709 is affirmed as a violation. However, the violation was found to be the result of TRC's high, rather than moderate, negligence. In addition, the number of miners affected was found to be one, rather than twelve, an injury was found to be unlikely and the violation was not S&S. A civil penalty in the amount of \$6,458.00 was proposed for this violation. Adjusting the assessment to reflect the higher level of negligence, the lower number of affected miners, and the lower likelihood of injury would have resulted in an assessment in the range of \$4,500.00 under the Secretary's Part 100 regulations. Considering the factors itemized in section 110(i), I impose a penalty of \$5,000.00 for this violation.

ORDER

Citation Nos. 8249770, 8250750 and 8250709 are **AFFIRMED, as modified**. Order No. 8249774 is modified to a citation issued pursuant to section 104(a) of the Act, and is **AFFIRMED as modified**.

Respondent, TRC Mining Corporation, is ordered to pay civil penalties in the amount of \$14,500.00. within 45 days of this order.²⁵

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

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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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 11, 2013

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Docket No. KENT 2012-549
Petitioner, : A.C. No. 15-18734-278743 D671
: :
: Docket No. KENT 2012-674
: A.C. No. 15-18734-281221 D671
: :
J AND H ENTERPRISES, LLC, :
Respondent. : Mine: Mine #1

DECISION

Appearances: Ryan Pardue, Office of the Solicitor, U.S. Dept. of Labor, Denver, CO, for
Petitioner;
Jamie Fannon, J and H Enterprises, LLC, pro se for Respondent.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against J and H Enterprises, LLC (“J and H”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”).

These dockets contain a total of six 104(a) citations. The total originally proposed penalty for these citations was \$85,431.00. Respondent has agreed to accept Citation Nos. 8348703 and 8348723 as issued and pay the originally proposed penalties. (Tr. 24-26). Four citations remain for decision, all of which involve the alleged failure of J and H to keep haul trucks in a safe operating condition. The parties presented testimony and documentary evidence at a hearing held on February 13, 2013 in Lexington, Kentucky.

At hearing the evidence demonstrated that J and H Enterprises, LLC works as a contractor at Powell Mountain #1 Mine, as well as at other mines. J and H owns a number of trucks used to haul coal from the mine site to the wash plant. (Tr. 7). I find that J and H is a mine as defined by the Act, and the Commission has jurisdiction in this matter. The Powell Mountain #1 Mine is an underground coal mine located in Harlan County, Kentucky and the J and H office is within two miles of the mine. (Tr. 100). J and H currently has 15 trucks that it operates at three separate mines, however, at the time of the inspections, it had 22 trucks operating at various mines, all hauling coal. (Tr. 106).

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

At hearing, J and H agreed that two of the six violations were valid as issued and, on the record, I indicated that those citations were affirmed as written with the penalties as originally proposed by the Secretary. The remaining four citations were issued pursuant to Section 77.404(a) of the Secretary's regulations, which requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." 30 C.F.R. § 77.404(a).

Inspector Otis Carroll has been a mine inspector for two and one-half years and has approximately fifteen years of mining experience. (Tr. 23). Carroll conducted inspections at the Powell Mountain, Darby #1 mine in December 2011 and January 2012. During each of the inspections, Carroll flagged down the haul trucks operated by J and H to conduct an inspection. In each instance, as described below, he found a problem with the braking system along with other defects in the equipment. For reasons set forth below, I find that, based on Carroll's testimony, the Secretary has established each of the remaining alleged violations of the mandatory standard.

Carroll also designated the four citations that remain at issue as significant and substantial. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

With regard to the S&S designation, the four citations that remain at issue have a number of factors in common. Each violation is related to a defect in the braking system on large tandem haul trucks that routinely carry 40 tons of coal. The trucks travel from the pit, where they are loaded, to the dump, a distance of nine miles on winding, gravel roads with a very steep grade. (Tr. 99). The haul roads have traffic daily and, while in the pit area, the trucks pull up to the

loader and may encounter foot traffic. (Tr. 64). The haul trucks travel at speeds of at least 30 to 35 miles per hour. (Tr. 97). Carroll explained that the loss of any braking ability will reduce not only the steering control, but also the ability to stop the truck. (Tr. 39-40). The inability to adequately steer or stop the truck will result in the truck hitting a person, hitting another truck, or hitting the bank and flipping over. (Tr. 39). In each case, the incident is likely to lead to a fatal injury.

Carroll issued a number of the violations as having occurred as a result of high negligence. The Secretary's regulations state that an operator is highly negligent when it "knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30. C.F.R. §100.3(d) Table X.

Prior to the first of Carroll's two inspections, J and H had been issued one citation for a violation of Section 77.404(a) at this mine and eleven such citations at others mines during the fifteen months preceding the violations discussed herein. (Tr. 16); Sec'y Exs. 14, 15 and 16. The mine also received a number of citations for violations of Section 77.1605¹ prior to the date of these citations. The penalties in this case are significantly higher than those of earlier citations, due in part to the prior history and the negligence attributed to the citations at issue in this case.

J and H was represented by one of its two owners, Jamie Fannon. Fannon explained that he has a shop where the trucks are located, maintained and repaired in Harlan County, Kentucky. He defends each citation in general by stating that the gravity is not as serious as alleged since he has installed additional safety devices, specifically to aid in braking, on each of his trucks. (Tr. 115-116). He further alleges that he is a small operator and his only mining activity is the operation of haul trucks on this property as well as others. Given that it is his only activity, the only citations he receives are for truck defects and, therefore, the history will naturally show a number of violations of the same standard. (Tr. 113). Fannon explained that paying such high penalties will cause him undue hardship. His trucks have worked 34,000 hours without a lost time injury. (Tr. 114). J and H has had no workers compensation claims, no fatalities and no accident with an injury. (Tr. 114).

Fallon testified that his trucks are newer, in good shape and kept in good condition. (Tr. 115). The trucks are returned to the shop at night and he hires as many mechanics as he needs to repair and maintain the trucks. (Tr. 83). If a defect is found with a truck, it is repaired immediately. He further stated that most of the conditions found by Carroll were defects that could have developed in a short time while the truck was being driven, and would have developed without the knowledge of the driver. (Tr. 82). Fannon stated that the citation he received for more than \$42,000, Citation No. 8348705, is more than he can afford. (Tr. 116). J and H routinely has a gross income of \$3.3 million, but the net income and amount he earns with his brother, who is his partner, is \$90,000. (Tr. 118-119). Given the nature of the coal industry, he has reduced the number of employees from 44 to 23 since 2010, and sold 7 of the haul trucks in June, thereby leaving J and H with 15 trucks. (Tr. 120-121).

¹ Section 77.1605 addresses specific safety issues with loading and haulage equipment.

Fannon explained that maintenance and repair of the haul trucks is completed daily. (Tr. 83). The drivers notify the mechanics if they find any mechanical defects and, based upon that information, a list is prepared and the mechanics work from the list. According to Fannon, the mechanics immediately repair any defect that they are told about during the work shift. In addition, the drivers conduct a preshift examination at the beginning of the shift. After J and H received the citations in December, Fannon instituted a program whereby the drivers and mechanics have regular meetings. (Tr. 88). He is making a greater effort since December to improve the truck maintenance and he continues to remind his drivers how important it is to maintain the trucks and fill out the reports as instructed.

i. Citation No. 8348703

Citation No. 8348703 was issued on December 13, 2011 as non-S&S, with moderate negligence. At hearing, Respondent admitted this violation and agreed to pay the originally proposed penalty. (Tr. 24-26). A penalty of \$334.00 is assessed.

ii. Citation No. 8348704

Citation No. 8348704 was issued on December 13, 2011. Carroll determined that a fatal injury was reasonably likely to occur, that the violation was S&S, that one person was affected, and that the violation was the result of J and H's high negligence. The Secretary has proposed a penalty of \$18,271.00.

Carroll explained that, upon arriving at the mine, he began to flag over the haul trucks to the side of the road near the pit. (Tr. 30). The trucks were in the process of hauling coal from the pit to the dump, but were empty at the time they were inspected. The trucks are each 40 ton, some of them tandem trucks. This particular citation was issued for the 40 ton white Mack truck and a defect with its air brakes, the primary brakes on the vehicle. Carroll explained that, as he pulled the truck over, he could hear an air leak and saw the pressure gauge dropping. (Tr. 29-32). In addition, after lifting the hood, he observed a leak in the power steering fluid. (Tr. 29).

The haul trucks use an air braking system as the primary means of bringing the 40 ton truck to a stop. (Tr. 33-34). In addition to the air brakes, the haul trucks are equipped with an engine brake, which is designed to slow the trucks on the steep grades with the assistance of the air brakes. (Tr. 36). The trucks are loaded with 40 tons of coal when traveling in at least one direction. (Tr. 37). If leaks occur in any part of the braking system, the air begins to bleed off and can result in a problem stopping and steering the truck. (Tr. 34). The trucks travel back and forth to the pit during the shift on several miles of winding, gravel road with traffic in both directions. (Tr. 34-35). The road has a 19% grade and winter driving conditions are unpredictable. (Tr. 34-35, 48-49). In Carroll's estimation, the leak in the brakes that resulted in the loss of air pressure would create a hazardous condition for the driver. A braking system defect of this nature would mean that the driver would be slow to stop, or unable to stop, and consequently result in hitting another truck, hitting a pedestrian, running into the loader or other equipment, or hitting the embankment and turning the truck over. (Tr. 38, 39).

The brakes must have adequate air to operate in the manner in which they are designed. When the brakes do not have adequate air pressure, they do not function properly or as a driver would expect them to. Carroll is aware of fatal injuries caused by brakes losing their air pressure and specifically recalls one accident in which the brakes locked up as a result of loss of air pressure and the resulting accident killed the driver. (Tr. 40-41). Carroll felt that the condition of the brakes as he observed them was reasonably likely to result in an accident, which in turn would result in an injury that is likely to be serious. (Tr. 41-42). Although Carroll is not familiar with the maintenance program at the mine, he believes it is not effective and that defects are left undiscovered.

Carroll explained that this vehicle had a second defect; the power steering fluid was leaking. The driver of the truck told Carroll that they were putting in a gallon of steering fluid each week. (Tr. 43). Carroll understood that to mean that the driver was aware of the leak. Given the size of the leak, it is likely that the driver could lose the use of the power steering, making the large truck difficult to maneuver. (Tr. 43). These two factors, the air leak and the power steering leak, when considered together, make it even more likely that a serious accident would occur. (Tr. 44)

I have already found that a violation of the standard existed. I further find that the defects cited, the brake air pressure and the leaking steering fluid, will lead to an accident, which in turn will result in a serious or even fatal injury. Accordingly, I agree that the violation is significant and substantial.

Carroll determined that this violation was the result of high negligence based upon the facts that he learned from the driver. Carroll did not see the condition listed on the pre-operation inspection and did not know how long the condition had existed. (Tr. 46). Carroll did learn that the operator had been putting excessive brake fluid in the truck each week. (Tr. 45). Those actions indicated to Carroll that the mine knew there was a leak and failed to repair it in a timely fashion. The fact that the mine was putting fluid into the steering unit can be some indication that it knew there must be a defect which needs repair, but I do not find it persuasive in this case. Instead, I find that the violation was the result of moderate negligence. Given the lower negligence, I assess a penalty of \$9,000.00 for this violation.

iii. Citation 8348705

Citation No. 8348705 was also issued on December 13, 2011. Carroll determined that a fatal injury was highly likely to occur, that the violation was S&S, that two persons were affected, and that the violation was the result of J and H's high negligence. The Secretary has proposed a penalty of \$42,944.00.

This violation involves an inoperable parking brake on the red Mack tandem coal truck. Carroll pulled over this haul truck as he did the others and asked to see the pre-operation book. (Tr. 58-59). Carroll observed that the notes indicated that there was a problem with the parking brake. (Tr. 59). He asked the driver to move the truck to the pit area where it could be tested on a grade of approximately 6% to 7%, just enough to test the parking brake. (Tr. 62). The grade in the pit was not as steep as the haul road, but was sufficient to determine if the parking brake

would hold the truck. The driver told Carroll that the parking brake worked to hold the truck in the pit until he started to load the truck. (Tr. 59-60). Carroll asked the driver to set the park brake, remain in the truck ready to apply the air brake, and then asked the loader to begin to load coal. (Tr. 60). With the second dip of coal, the truck started to roll backwards, indicating that the parking brake would not hold the haul truck in place. (Tr. 60). In addition to the problem with the parking brake, Carroll observed that the backup alarm on this vehicle did not work when the truck was placed in reverse and backed up to be loaded. (Tr. 60-61, 64).

Carroll testified that the inoperable parking brake had been recorded in the pre-op book for a couple of weeks. (Tr. 61-62). The two buckets that had been loaded during the testing were minimal when compared to the capacity of the loaded truck. (Tr. 63). There is foot traffic in the area, which may include the loader operator or others walking through the pit. (Tr. 64). While no any other haul trucks are in the pit while one is being loaded, Carroll determined that the condition was highly likely to result in an accident based upon the condition of the parking brake, along with a non-functioning back up alarm. (Tr. 64-65). It is reasonable that miners would walk behind the truck and, with an inoperable parking brake, the truck would roll back. (Tr. 65). Given the lack of a backup alarm, there would be no warning to any person on foot or in a vehicle that the truck was prepared to back up. Carroll explained that a driver, or someone else who is hit, will be injured and likely killed. (Tr. 66). Carroll determined that the negligence was high because the inoperable parking brake had been recorded in the book for several weeks prior to the inspection and no repair was undertaken. (Tr. 67).

Fannon agreed that the backup alarm was a problem, but testified that the defective parking brake would hold if going forward, as opposed to going backward, and, therefore, it was not a serious violation. (Tr. 68-69). The mine had worked on this truck for several days and found a problem caused by accumulated mud, which was repaired. (Tr. 69). Fannon agreed that allowing the brake to exist in an inoperable condition for two weeks was not acceptable. (Tr. 69).

This violation is slightly different than the remaining three since it involves a parking brake that was defective as opposed to the primary air brake system. However, it is, like the other brake violations, a significant and substantial violation. The lack of a parking brake while the truck is backed into the pit and being loaded will cause the truck to roll unexpectedly, and it is likely to hit the loader as the truck is being loaded or someone on foot in the area. In addition, the backup alarm was inoperable, so there would be no alarm in the event the truck moved back, thereby adding to the likelihood of an accident. An accident would lead to a fatal injury.

In this instance I agree that the high negligence designation is appropriate given that the condition had been listed in the book for several weeks and had not been repaired. However, given the size of this operator and his ability to continue in business, I assess a reduced penalty of \$15,000.00.

iv. Citation 8348722

Citation No. 8348722 was issued on January 10, 2012. Carroll determined that a fatal injury was reasonably likely to occur, that the violation was S&S, that one person was affected,

and that the violation was the result of J and H's moderate negligence. The Secretary has proposed a penalty of \$5,503.00. In this instance the haul truck had an air leak in the braking system. Carroll observed the air gauge dropping at a significant rate and he could clearly hear the leak before the hood of the truck was raised. (Tr. 75-78).

I have found that the Secretary has demonstrated a violation as alleged and, based upon the factors listed above that are common to this citation, including the traffic on the haul roads, the steep grades, the gravel roads that the trucks travel, and the fact that the trucks travel speeds of up to 35 miles per hour, I find that the violation, i.e., the lack of adequate brakes, will result in an accident, which in turn will result in a fatal injury. The violation, including the S&S nature, is affirmed as issued. I assess the penalty proposed by the Secretary of \$5,503.00.

v. Citation 8348723

Citation No. 8348723 was issued on January 10, 2012 as non-S&S, with moderate negligence. At hearing, Respondent admitted this violation and agreed to pay the originally proposed penalty. (Tr. 89-90). A penalty of \$108.00 is assessed.

vi. Citation 8348725

Citation No. 8348725 was issued on January 10, 2012. Carroll determined that a fatal injury was reasonably likely to occur, that the violation was S&S, that one person was affected, and that the violation was the result of J and H's high negligence. The Secretary has proposed a penalty of \$18,271.00. In this instance, Carroll observed the pressure on the air brakes dropping after pulling over the haul truck for inspection.

Carroll observed the air brake pressure drop 40 pounds in 4 minutes; an amount he considers significant. (Tr. 90-91). There was obviously an air leak which affected the ability of the brakes to function. Like the earlier violations, Carroll found the loss of brake pressure to be a serious violation. In addition to the brake pressure, Carroll found that the rim on the outside tire was slipping, and that the tire was in danger of coming off. (Tr. 91). The marks on the rim indicated to Carroll that the rims had been slipping for some time and led him to mark this citation as "high" negligence. (Tr. 93). He opined that only the "spiders" were holding this outside tire in place and, once that tire slips off, there is nothing to hold the inside tire in place. (Tr. 91-94).

I have found a violation of the mandatory standard and credit Carroll's testimony that the loss of brake air pressure is likely to lead to an accident given the road conditions and the grades. The accident in turn will lead to a serious or even fatal injury. In addition to the brake problem, the slipping rim adds to the seriousness of the violation and the likelihood of a serious injury. Hence, I find the violation to be S&S. I do not agree however, that the negligence has been shown to be high. There is no mention in the pre-operation book of either the brake condition or the slipping rim. (Tr. 96, 103). While Carroll believes the rim was a problem for some time given the marks he observed, Fannon disagrees. Fannon has four mechanics who work on the haul trucks and he sends them to the scales daily to do a walk around of each truck. He explained that this slipping wheel could not have been in place for very long. (Tr. 105-106).

Given the conflicting testimony, I find that the citation is more appropriately designated as moderate negligence. Accordingly, I assess a penalty of \$9,000.00

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 delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, “in assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

[1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator’s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

I have addressed the penalty for each citation above and I have relied upon the history of previous violations as shown in the Secretary’s exhibits. The history shows that there have been other violations of this standard by the operator, but given that the only mining activity is hauling coal, it is not unusual to see the violation of the same standard each time the trucks are inspected. This is a small operator, with 15 trucks hauling coal, and a total net income of \$90,000 per year. The total assessed penalty of over \$80,000.00 would make it difficult for this small operator to continue in business. The gravity and negligence associated with each violation are discussed above, and I have modified some of the negligence designations from high to moderate, resulting in a lower penalty than proposed by the Secretary. The operator has demonstrated good faith in abating the violation after it was cited. I therefore assess the following penalties:

Citation No.	Assessed Penalty
8348703	\$334.00
8348704	\$9,000.00
8348705	\$15,000.00
8348722	\$5,503.00
8348723	\$108.00
<u>8348725</u>	<u>\$9,000.00</u>
TOTAL	\$38,945.00

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. 820(i), I assess the penalties listed above for a total penalty of \$38,945.00 for the citations and orders decided after hearing and those at hearing that Respondent agreed to accept as issued. J and H Enterprises, LLC is hereby **ORDERED** to pay the Secretary of Labor the sum of \$38,945.00 within 30 days of the date of this decision.

/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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March 19, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2009-9
Petitioner,	:	A.C. No. 36-08645-163318
	:	
	:	
v.	:	Mine: Geronimo
	:	Mine ID: 36-08645
	:	
ROXCOAL, INC.,	:	
Respondent.	:	

DECISION

Before: Judge Barbour

The primary issue in this civil penalty proceeding is whether a violation of mandatory safety standard 30 CFR § 75.512^[1] is “flagrant” within the meaning of section 110(b)(2) of the Federal Mine Safety and Health Act of 1977. (“Mine Act” or “Act”)² The Secretary seeks the assessment of a civil penalty of \$150,200 for the alleged violation.

¹ Mandatory safety standard section 75.512 states in pertinent part:

All electric equipment shall be frequently examined, tested and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected.

² Section 110(b)(2) of the Mine Act states:

Violations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed a civil penalty of not more than \$220,000. For the purposes of the preceding sentence, the term “flagrant”

(...continued)

The essential facts are not disputed. On November 9, 2007 an inspector from the Mine Safety and Health Administration (“MSHA”) visited the Geronimo Mine of Roxcoal, Inc. (“Rox”) as part of the agency’s investigation of an electrical accident. The accident, which occurred October 30, 2007, seriously injured and disabled one of Rox’s miners. During the course of the investigation the inspector found that a safety switch for a high voltage switch house had been purposefully disabled when it was taped in the “on” position. This meant that mine personnel ordered to conduct electrical repair work inside the switch house could not turn off the power by opening the safety switch prior to beginning work. As a result, they worked in the immediate vicinity of live terminals carrying 7,200 volts of electricity. The inspector found that the condition violated section 75.512, that the violation was a significant and substantial contribution to a mine safety hazard (“S&S violation”) and that the violation was caused by mine management’s unwarrantable failure.³ Citation No. 7035275. The violation was corrected within an hour when the “switch . . . [was successfully] enabled and tested.” *Id.*

In proposing a civil penalty, the Secretary found that the violation “was considered to be flagrant.” Petition for Assessment of Civil Penalty, Exhibit A, Narrative Findings. The Secretary further found that Rox exhibited “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory . . . safety standard that substantially and proximately caused . . . serious bodily injury.” *Id.* The “flagrant” nature of the violation meant

²(...continued)

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).

³ The inspector concluded that “a [c]ertified person knew of [the taped switch] . . . and condoned the practice of working in close proximity [to] live energized high voltage.” Citation No. 7035275 at 2.

that it was specially assessed pursuant to 30 C.F.R. § 100.5(e).⁴ Rox answered the Secretary's civil penalty petition by asserting that it failed to state a claim upon which a penalty could be assessed and that the proposed assessment of \$150,200 was "not based upon proper legal and factual findings." Rox Answer.

The case was assigned to Commission Administrative Law Judge Gary Melick, who stayed it pending the parties' determination whether they could reach a settlement. Prehearing and Stay Order (October 28, 2009). After the case was assigned to Judge Melick, it was effectively consolidated with Docket No. PENN 2009-51, another case arising out of the October 30, 2007 accident, but one that did not involve an alleged "flagrant" violation. In addition to finding the safety switch disabled, the inspector found that telephone wires were installed to bypass high voltage fuses in the switch house. Therefore, in Docket No. PENN 2009-51, the Secretary sought a civil penalty of \$60,000 for a violation of 30 CFR § 75.518, a mandatory safety standard requiring, "Automatic circuit-breaking devices or fuses of the correct type and capacity [to] be installed so as to protect all electric equipment and circuits against short circuit and overloads." The parties agreed to submit both cases (Docket No. PENN 2009-09 and Docket No. PENN 2009-51) for summary decision based on stipulations and briefs.

In the meantime, Commission Administrative Law Judge Alan Paez issued *Stillhouse Mining, LLC.*, 33 FMSHRC 778 (March 2011) in which he discussed at length the criteria and evidence necessary to determine whether a violation is "flagrant" under the Mine Act. The company appealed Judge Paez's decision and the Commission granted review. Judge Melick then split PENN 2009-09 from PENN 2009-51. Judge Melick continued the stay in

⁴ Section 100.5(e) states:

Violations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed a civil penalty of not more than \$[242,000]. For purposes of this section, a flagrant 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 C.F.R. § 100.5(e)

In January, 2013, pursuant to the Inflation Adjustment Act, MSHA increased the maximum penalty that could be assessed under section 110(b)(2) to \$242,000.

PENN 2009-09 pending the Commission’s decision in *Stillhouse*. Stay Order (May 6, 2011).⁵ It was Judge Melick’s hope that in ruling on Judge Paez’s case the Commission would delineate the criteria and evidence necessary to determine whether a violation is “flagrant” within the meaning of the Act. However, the company withdrew its appeal, and the Commission vacated its order granting review. 34 FMSHRC 1249 (June 6, 2012). This opened the door for a ruling on the parties’ motions for summary decision in Docket No. PENN 2009-09.⁶ But, Judge Melick retired before he could lift the stay and rule on the motions. The case was then reassigned to the Court. Because there is no longer a reason to delay, the stay entered by Judge Melick in Docket No. PENN 2009-09 **IS LIFTED**, and the Court enters the instant decision.

THE MOTIONS AND THE PARTIES’ ARGUMENTS

ROX

In its motion Rox notes that it promptly abated Citation No. 7035275 by enabling and testing the lid switch. Rox Mot. 1. According to Rox, to be assessed a civil penalty for a flagrant violation, an operator must have “recklessly or repeatedly failed to correct the violation for which the citation has been issued.”*Id.* 2. Rox states, “At no time did [Rox] fail to correct any alleged violation, including the violation described in Citation No. 7035275.” *Id.* Therefore, the Court should “dismiss [both] the ‘flagrant’ designation and [the] ‘flagrant’ assessment of Citation No. 7035275.” *Id.*

In a memorandum supporting the motion Rox amplifies its position. Rox points out that the taping of the safety switch to render it inoperable was done by the mine’s then chief electrician, Donald Sarver. Rox Mem. 1. Citing the stipulations, Rox states that Sarver taped the switch “closed” because he “believed that the lid switch was faulty.” *Id.* Rox asserts that all citations for violations that were issued to Rox before Citation No. 7035275 were promptly abated and that Rox promptly corrected the violation of section 75.512 cited in Citation No. 7035275. *Id.* 2. Therefore, “Citation No. 7035275 was issued to [Rox] as a flagrant violation despite the fact that there was *no* prior uncorrected violation for which a citation had been issued.” *Id.* 5.

⁵ A short time later, Judge Melick issued a summary decision in Docket No. PENN 2009-51, finding that Rox violated section 75.518. Judge Melick assessed the company a civil penalty of \$50,000 for the violation. *Roxcoal, Inc.*, May 17, 2011 (*unpublished*).

⁶ Rox styled its motion as one for “partial” summary decision because initially the company challenged only the citation’s “flagrant” designation and the “flagrant” assessment. Rox Mot. 2. However, because the company and the Secretary filed stipulations that allow all aspects of PENN 2009-9 to be decided, Rox’s motion for partial summary decision will be treated by the Court as a motion for summary decision, and the Court will decide all issues in the case.

Rox maintains that the question of whether the violation of section 75.512 cited in Citation No.7035275 is “flagrant” does not involve a “complicated issue of statutory construction, but, rather, is a case of reading and applying the . . . plain meaning of the words Congress used” in section 110(b)(2). Rox Mem. 5. In the company’s view, under such a reading, flagrant penalties “may only be assessed for ‘violations under this section,’ that is [s]ection 104(b) [,] upon the ‘reckless or repeated failure’ of an operator ‘to make reasonable efforts’ to correct a violation for which a citation has been issued within the period permitted for its correction.” *Id.* 6 (*emphasis deleted*). Rox points out that the first sentence of section 110(b)(1) prescribes a specific penalty (*i.e.*, a daily penalty) for “any operator who fails to correct a violation for which a citation has been issued under section 104(a)” within the period permitted for its correction.⁷ *Id.* Section 110(b)(2) then addresses “violations under this section,” which Rox maintains means violations referred to in the immediately preceding section, that is, violations for which a citation has been issued which an operator has recklessly or repeatedly failed to make a reasonable effort to correct. *Id.* 6-7. Rox states that by placing the “flagrant” language in section 110(b), “Congress was enhancing the civil penalty section of the Act by giving the Secretary the opportunity to assess higher penalties against those ‘bad actor’ operators who receive citations and recklessly and repeatedly fail to make reasonable efforts to correct and eliminate violations for which those citations were issued.” *Id.* 7. In Rox’s view this is the “most natural reading of the words of the statute.” *Id.* 8. As a result, “a violation cannot be deemed flagrant until a citation has been issued and the operator has failed, either recklessly or repeatedly, to make reasonable efforts to eliminate the violation for which the citation was issued.” *Id.* Since Rox promptly worked to correct the violation of Section 75.512 so that the citation was terminated within an hour of its issuance, Rox did not recklessly or repeatedly fail to correct the cited violation, and it is wrong to assess the violation as flagrant. *Id.* 8. Rox further maintains that the legislative history gives no indication that the intent of section 110(b)(2) is different than the “plain meaning” that Rox advocates. *Id.* 12. The company makes other arguments in support of its claim (*see Id.* 10-16), but, its primary contention is that the statutory language is clear and that a flagrant violation only occurs when an operator recklessly and/or repeatedly fails to abate a cited violation.

Rox adds that should it be determined that Rox flagrantly violated section 75.512, the record supports lowering the proposed penalty. According to the company, many things mitigate Rox’s negligence. Rox had a responsible training program, the mine had a good electrical compliance record, there was a lack of forewarning of Donald Sarver’s misconduct, Rox had a

⁷ Section 110(b)(1) of the Act states in part:
Any operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than \$7,500 for each day during which such failure or violation continues.

30 U.S.C. § 820 (b)(1)

safety incentive program and a penalty/disciplinary program for unsafe conduct, and Rox disciplined those responsible for violations, including in this case Sarver and another miner. Rox Resp. 1.

THE SECRETARY

In his cross motion the Secretary asserts that Citation No. 7035275 was properly issued for an S&S violation of section 75.512, that the cited condition resulted from Rox's reckless disregard and unwarrantable failure to comply with the cited standard and that the citation was properly assessed as "flagrant." Sec's Mot. 1. The Secretary states that Rox admits that on October 27, 2007 its then chief electrician and agent, Donald Sarver, taped down the safety lid switch for the switch house, an act that rendered the switch ineffective. Sec's Mem. 4. Rox also admits the condition violated section 75.512 and that the violation was highly likely to result in a permanently disabling injury to one person. *Id.* He notes that Rox agrees that the condition was the result of Rox's unwarrantable failure to comply with the Act and he asserts that Rox's contention that Sarver's negligence in taping the safety switch shut does not rise to the level of "reckless disregard" is simply wrong. Rather, "Sarver's negligence" . . . "clearly show[s] reckless disregard." *Id.* The Secretary points out that reckless disregard can involve a situation where a chief electrician knows that a circuit designed to prevent electrocution has been "intentionally defeated" yet allows the condition to continue. Sec. Mem. 5, *citing Karst Robbins Coal Co.*, 10 FMSHRC 1837 1838 (November 1979). He argues that Sarver deliberately taped down the safety lid switch, that the switch would have interrupted power to the switch house if the safety lid were opened, that Sarver knew or should have known the protective purpose of the safety switch and that he directed miners to work on the high voltage switch house knowing that the safety lid switch was taped down. According to the Secretary, Sarver's intentional act constitutes a "reckless disregard for the safety of miners at the Geronimo Mine." *Id.* 5.

The Secretary further argues that Sarver's negligence is imputable to Rox. Sec. Mem. 6-7, *citing Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,194 (February 1991) (negligent actions of foreman/supervisor/manager may be imputed to the operator.) Moreover, in the Secretary's view the defense recognized by the Commission in *Nacco Mining Co.*, 3 FMSHRC 848 (April 1981) (agent's violative conduct exposing only himself to hazard not attributable to operator) does not apply to Rox because the company admits that the acts described in Citation No. 7035275 resulted from the unwarrantable actions of Sarver (*see* Stip. 33) and the Commission has stated it will not allow the *Nacco* defense where a "supervisor's conduct results in an unwarrantable failure . . . regardless of whether that conduct exposes other miners to risk." Sec. Mem. 7, *quoting Capitol Cement Corp.*, 21 FMSHRC 883, 894-895 (August 1999); *aff'd* 229 F.3d 1141 (4th Cir. 2000) (*unpublished*). Moreover, Rox is not entitled to the *Nacco* defense in any event because Sarver's conduct exposed other miners to risk and led to one miner being severely injured. Sec. Mem 7-8. Therefore, Sarver's willful disregard of the Act is imputable to Rox. *Id.* 8.

The Secretary states that when enacting the law regarding "flagrant" violations, "Congress recognized that more significant penalties are required for operators who know of a condition that violates a mandatory standard and is reasonably expected to cause death or serious

injury, yet recklessly fail to make reasonable efforts to eliminate that violation.” Sec. Mem. 8. According to the Secretary, the “key issue is whether . . . Sarver’s actions . . . at the high voltage switch house constituted a reckless failure to make reasonable efforts to eliminate a known violation of the Mine Act.” *Id.* The Secretary points out that “only the first prong of the statutory definition of “flagrant” – i.e., a reckless failure to make reasonable effort to eliminate a known violation – remains contested.” *Id.* 9. The Secretary asserts that no interpretation of the term “flagrant violation” is required because Sarver’s “conduct . . . is so plainly reckless.” *Id.* Knowingly exposing miners to potentially lethal electrical power “constitutes the essence of reckless disregard” and “[b]y assigning miners to work on the equipment after disabling a critical safety feature, Satver recklessly failed to make reasonable effort to eliminate a known violation, and his failure may be imputed to [Rox].” *Id.* 9-10.

The Secretary also argues that under the “general body of [negligence] law” Saver’s conduct was “flagrant.” After quoting from the Restatement of Torts, the Secretary states:

Sarver . . . exhibited reckless misconduct[.] Given his training and experience, he knew or should have known that disabling the safety lid switch would create unsafe conditions. In addition, he directed individuals to work on the high voltage switch house knowing that the safety features were disabled. He therefore knew of facts that created a high degree of risk to another worker, and he acted with indifference to that risk. He knew that the potential for serious bodily injury or death was great, and indeed, bodily harm to another miner resulted. [Rox] has shown reckless failure to comply with the . . . Act.

Sec. Mem. 12.

THE FLAGRANT VIOLATION

It bears repeating that section 110(b)(2) sets the parameters for concluding whether a violation is flagrant when it provides that:

[T]he 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).

As noted above, Judge Paez in *Stillhouse* analyzed the meaning of section 110(b)(2) within the context of the Act. His decision was detailed, thorough and persuasive, and the Court sees no reason to depart from his conclusions. Judge Paez observed that there are four elements that comprise a flagrant violation:

- (1) Reckless or repeated failure to make reasonable efforts to eliminate
- (2) A known violation of a mandatory health or safety standard
- (3)(a) That substantially and proximately caused or
- (3)(b) Reasonably could have been expected to cause
- (4) Death or serious bodily injury.

33 FMSHRC at 802.

In the case at bar Rox contends and the Secretary does not dispute that the admitted violation of section 75.512 was an isolated incident, as opposed to a repeated occurrence of similar past conduct. Rox Mot. 8-10. The parties also agree that the violation resulted in serious bodily injury to a miner (Stip. 16), and it is obvious to the Court that the violation could easily have resulted in death.⁸ With no allegation of a repeated violation, with agreement that the violation caused a serious bodily injury and with it obvious to the Court that the violation reasonably could have been expected to cause serious injury or death, the issue before the Court is whether Rox committed a “reckless failure to make reasonable efforts to eliminate a known violation of a mandatory . . . safety standard.” 30 U.S.C. § 20(b)(2).

The Court agrees with Judge Paez that “[b]ased on the common meaning of the word . . . an operator is ‘reckless’ for the purposes of a flagrant violation when it consciously or deliberately disregards an unjustifiable risk of harm arising from its failure to make reasonable efforts to eliminate a known violation of a mandatory . . . safety standard.” 33 FMSHRC at 803. It further agrees that the risk of harm is “unjustifiable” if “the burdens of ameliorating the risk are so slight relative to the risk that the operator’s failure to take precautions demonstrates indifference to the risk.” *Id.* 803-804.

⁸ Indeed, the injured miner, Chad Burket, was very lucky he was not killed. Rox’s somewhat rosy description of the accident – (that Burket “received an electrical shock, causing him . . . two small wounds and [to] be taken to the hospital and to be off work for several weeks” Rox Mem. Supp. Opp. 2) – does not mask the fact that Burket was shocked while working immediately adjacent to live circuits carrying 7,2000 volts of electricity. Stip 11.

**ROX'S FAILURE TO MAKE REASONABLE EFFORTS TO ELIMINATE
A KNOWN VIOLATION**

As Judge Paez noted, “If an operator had a legal duty to take certain steps to eliminate the known violation, then the next step in establishing a flagrant violation is to show that the operator’s failure to eliminate the known violation was reckless.” 33 FMSHRC at 805. Applying the reasonably prudent person test – a test frequently used when interpreting the Mine Act – the question for Judge Paez became “whether, in light of the facts and circumstances surrounding the operator’s conduct, a reasonably prudent person would have recognized a legal duty to take certain actions to eliminate a known violation.” 33 FMSHRC at 805 (*quoting Phelps Dodge Tyrone, Inc*, 30 FMSHRC 646, 656 (August 2008)). Judge Paez ultimately concluded, again, the Court believes correctly:

Based on the . . . plain meaning of [section 110(b)(2),] a ‘reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory . . . safety standard’ occurs when, in light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory . . . safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury.

33 FMSHRC at 805.

In applying this standard the Court comes to the conclusion that the subject violation is quintessentially flagrant. The parties explain that sometime before October 27, 2007 power was lost to the high voltage switch house. Rox’s agent, Donald Sarver, investigated and found that fuses in the switch house were blown. Because no power at the switch house meant no power to the mining section, Sarver wanted to quickly restore power to the switch house. However, he could not locate replacement fuses. He therefore bypassed the nonworking fuses with telephone wire. Stip. 7. The parties further agree that Sarver then taped down the high voltage side door panel lid switch. Stips 10, 11, 35. Sarver’s purposeful act allowed miners to take off the side panel cover of the high voltage switch house without eliminating the power. Miners who did so were exposed to live terminals of 7,200 volts. *Id.* 11. The condition existed for at least two production shifts (*Id.* 9) and when, on October 29, he obtained replacement fuses, Sarver instructed David Roles and Roles’s helper, Burket, to remove the telephone wire Sarver previously installed and to put in the new fuses. *Id.* 12. Sarver gave the work assignment knowing that the safety lid switch was taped down. *Id.* After all, he was the person who taped it. *Id.* 10. Pursuant to Sarver’s instructions, on the midnight shift of October 30, 2007 Roles opened the circuit thinking power was thereby removed to the load side of the switch house. *Id.* 13. In the meantime Burket removed the side panel of the switch house and began to work on the load side, the side where Roles thought that he had removed the power. Burket accessed the

compartment while the safety lid switch was taped down. In so doing he worked sixteen inches from the live terminals. *Id.* 14. Not surprisingly, during the course of working at the switch house Burket was severely shocked. *Id.* 15.

Sarver's conduct can only be described as "reckless." He was the company's chief electrician. Stip. 20. He received electrical training, electrical refresher training and even additional training provided by the company that focused on the hazards of electrical burns and shock. Stips. 23, 24. It is reasonable to assume that Sarver was fully aware that his action in taping down the safety switch and thus making it impossible to remove power on the load side of the switch house could be expected to cause a miner working at the switch house to be killed or severely injured by "live" current. None the less, despite this knowledge, Sarver knowingly assigned Roles and Burket to the dangerous task. Stip 13. Thus, Sarver who created the violation, who knew of the risk of harm to others from what he had done, deliberately disregarded the risk and purposefully ordered miners (Roles and Burket) into a situation where serious injury or death was reasonably likely. By any measure, Sarver was "reckless."

SARVER'S FAILURE TO MAKE REASONABLE EFFORTS TO ELIMINATE THE VIOLATION

Moreover, Sarver, after creating the violation, failed to do anything to undo that which he had done or to ameliorate the hazard he created. As Judge Paez noted, an operator commits a "failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard when, in light of all the facts and circumstances, it does not take the steps a reasonably prudent person would have taken to correct the violation." 33 FMSHRC at 805. Donald Sarver as Rox's agent acted or failed to act for Rox. Stip. 4, 5. As found above, he purposefully created the violation by taping down the lid switch (Stip 10) and directing Roles and Burket to install new fuses in the switch house. *Id.* 12. The Court assumes that Sarver knew or had reason to know that to accomplish the task the miners might well be exposed to live terminals of 7,200 volts. Stip 14. This is more than a reasonable assumption given Sarver's purposeful disabling of the lid switch, his knowledge of electricity and the task Sarver knowingly assigned to the miners after he disabled the switch. Despite the impending danger, Sarver, and therefore Rox, did nothing. Sarver did not return the switch to a functioning state prior to assigning the miners their task, he did not assign another miner to correct the condition, he did not tell Roles and Burket what he had done, and he did not otherwise warn them of the danger. He did not act as a reasonably prudent person would. He did not act as even a minimally prudent person would. He did not act at all. In other words, Sarver, and through him, Rox, deliberately disregarded a reasonably likely risk of serious injury or death created by a condition that Sarver, and therefore Rox, brought about. If the violation caused by Sarver when he purposefully disabled the safety switch and sent miners to work in the immediate vicinity of the resulting hazard is not "flagrant," the Court does not know what is.

ROX'S FAILURE TO ABATE ARGUMENT

Rox's argument that by locating the "flagrant" provision in section 110(b) Congress intended the provision only to apply to previously cited, unabated violations is one plausible way

to read section 110(b), but ultimately not the most persuasive way. Judge Paez considered the same question. He found that the plain text of section 110(b)(2) in which the adjective “known” is the only modifier of the noun “violation” does not require that the allegedly flagrant violation be previously cited by MSHA, that it is enough if an agent of the company “knew or had reason to know” of the alleged violation. 33 FMSHRC at 806-807. Further, he stated, “Given that Congress expressly omitted the requirement that section 110(b) involve a cited violation, the known violation at issue in a flagrant case need not have been previously cited by MSHA at the time the operator recklessly failed to eliminate it.” 33 FMSHRC at 807. Judge Paez observed that while section 110(b)(1) of the Act specifically applies to “a violation for which a citation has been issued . . . within the period permitted for its correction” (30 U.S.C. §820(b)(1), the phrase is not included in section 110(b)(2). In Judge Paez’s view, “A court should presume that when Congress includes specific language in one section of a statute but not in another section, it meant to do so.” 33 FMSHRC at 807 (*quoting Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)). Therefore, because unlike section 110(b)(1), section 110(b)(2) does not refer to a prior cited violation, a violation need not have been previously cited for a violation to be flagrant. 33 FMSHRC at 807.

The Court agrees. Like Judge Paez, the Court is not persuaded by Rox’s argument that the words “violations under this section” in section 110(b)(2) refer only to previously issued violations that the operator “recklessly” or “repeatedly” failed to make “reasonable efforts” to abate. Rox Mem. 6-7 (*quoting* 30 U.S.C. §820(b)(2)). The Court concludes that the words “violations under this section” logically can be interpreted in different ways, the reference to violations issued which an operator has recklessly or repeatedly failed to make a reasonable effort to correct being but one. The phrase equally can refer, as stated in section 110(a)(1), to any violation “for which a citation has been issued under section 104(a).” 30 U.S.C. §820(a)(1). And indeed, when the purpose of the “flagrant” provision is considered – to “increase the maximum penalty for flagrant violations of mine safety regulations” (Presidential Statement on Signing the Mine Improvement and New Emergency Response Act of 2006, 2006 U.S.C.C.A.N. S27 (June 15, 2006)) – interpreting section 110(b)(2) to apply to the violation of “any mandatory health or safety standard” or of the Act (30 U.S.C. § 814(a)) effectuates the purpose more completely than restricting section 110(b)(2) to situations in which an operator has recklessly or repeatedly failed to correct a previously cited violation.⁹

Having rejected Rox’s argument that because the “flagrant” provision is placed in section 110(b) Congress meant to penalize only the “bad actor” operators who receive citations and recklessly or repeatedly fail to make reasonable efforts to correct and eliminate the violations for which those citations were issued” (Rox Mem.7), the Court concludes, as stated above, that the stipulated facts easily fit within the language of the “flagrant” provision, and the Court finds that

⁹ The Court is mindful that because section 110(b)(2) plausibly can be read in different ways, accepting the Secretary’s reasonable interpretation of section 110(b)(2) as a “permissible construction of the statute” is a legally legitimate result. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837(1984); *see too Auer v. Robbins*, 519 U.S. 452, 457 (1997); *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

Sarver recklessly failed to make reasonable efforts to eliminate a known violation that substantially and proximately caused and reasonably could have been expected to cause a serious injury. 30 U.S.C. § 820(b)(2). For this reason the Court finds that the violation of section 75.512 cited in Citation No. 7035275 was “flagrant” within the meaning of section 110(b)(2) of the Act.

THE CIVIL PENALTY

In arriving at his \$150,200 penalty proposal, the Secretary finds that the violation was “serious” and that it was caused by the company’s “reckless disregard.” Petition for Assessment of Civil Penalty, Exhibit A, Narrative Findings for a Special Assessment. When discussing the company’s liability for the penalty the Secretary makes much of the fact that Rox is not entitled to a *Nacco* type defense (Sec Mem. 5-8 (*referencing Nacco Mining Co.*, 3 FMSHRC 848 (April 1981); *Capitol Cement Corp.*, 21 FMSHRC 883, 8940895 (Aug. 1999), *aff’d*, 229 F.3d 1141 (4th Cir. 2000) (*unpublished*))[¹⁰], and while the Court agrees with the Secretary that under *Nacco* and its progeny Rox cannot be relieved of liability for the results of Sarver’s conduct, the Court views the application of *Nacco* as inapposite to the assessment of a civil penalty for the flagrant violation. Rox in fact acknowledges that it is not seeking a traditional *Nacco* defense.

Rox states:

[Rox] is not asserting that . . . Sarver’s conduct is not imputable to [Rox.] [Rox] is not asserting the ‘*Nacco*’ defense. . . . [Rox] believes that mitigating circumstances exist which should cause [the Court] to not paint [Rox] with exactly the same brush as . . . Sarver but rather, considering the mitigating circumstances[,] . . . [the judge should] reduce the [penalty] against [Rox].

Rox Mem. Supp. Opp. 11.

Here, Rox and the Court are in accord. When assessing a civil penalty, the Act requires the Court, *inter alia*, “to consider whether the operator was negligent.” 30 U.S.C. §820(i). This means that the Court must consider all relevant facts and circumstances including those that mitigate the operator’s negligence. *See Excel Mining, LLC v. Dept. of Labor, et al. Consolidation Coal Co.* 22 FMSHRC 340, 353 (Mar. 2000), No. 12-1138, slip op. 3 (D.C. Cir.

¹⁰ As the Court previously noted, in *Nacco* the Commission held that the negligent conduct of a supervisor will not be imputed to an operator if: (1) the operator has taken reasonable steps to avoid the particular class of accident involved in the violation; and (2) the supervisor’s erring conduct is unforeseeable and exposes only himself to risk. 3 FMSHRC at 851. The Commission later ruled out the *Nacco* defense in instances where the supervisor’s conduct results in an unwarrantable violation under section 104(d) of the Act (30 U.S.C. §814(d)) regardless of whether the conduct exposes other miners to risk. See Sec. Mem.7-8 (*referencing Capitol Cement*, 21 FMSHRC at 894-895).

March 15, 2013). Thus, the Court must take account not only of the imputed actions of the operator's agent but also those actions of the company that bear on the company's duty of care. The stipulated facts and Rox's unrefuted assertions indicate that the company was in fact "blind sided" by Sarver's conduct. Rox Resp., 11. They also indicate that the company did much that was right to meet the obligations imposed on it by the Act. It provided all training required by MSHA. Stip. 23. It provided additional training beyond that required, including training on the hazards of electrical shock. Stip. 24. It conducted weekly and monthly safety meetings. Stips. 26, 27. It instituted a safety incentive program at all of its mines with the goal of totally preventing lost time accidents.¹¹ Stip. 46. It implemented a safety policy in 2006 that delineated certain unsafe acts which included a penalty/disciplinary structure for miners whose actions were deemed unsafe. Stip. 47. Between May 20, 2005 and the accident to Burket on October 29, 2007, only five S&S electrical violations were issued by MSHA at the Geronimo mine and none involved performing electrical work with equipment energized, the situation that led to Burket's injury. Stip. 50. In fact, in the two years before Citation 7035275 was issued no violations of section 75.512 were cited at the Geronimo Mine. Stip. 51. In addition to these factors, there is no indication that Sarver was improperly credentialed (*see* Stip 4) and there is every indication that Rox justifiably believed Sarver was "a competent and conscientious electrician" worthy of the trust Rox and Rox's miners placed in him. *See* Stip. 20. The Court concludes that these factors clearly mitigate the company's negligence, as does the fact that Sarver's conduct was idiosyncratic, unpredictable, and contrary to Rox's policies. They will be considered when assessing an appropriate civil penalty.¹² *See generally Western Fuels-Utah, Inc.*, FMSHRC 256-260-261 (Mar.1988).

CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The parties stipulated that in 2006, Rox received 41 citations for violations of the Mine Act and between January 1, 2007 to October 30, 2007, Rox received 80 citations. Stip. 43. As previously noted, in the two years prior to the accident it received no citations for violations of section 75.512. Stip. 51. Overall, and especially in view of the Secretary's determination that Rox's history merited two penalty points when the Secretary computed the special assessment in this case (*see* Special Assessment Narrative Form.), the Court concludes the company has a small history of previous violations.

¹¹ The miners at the Geronimo Mine met the goal for at least 15 months before the accident that injured Burket. Stip. 46.

¹² The Court also recognizes that the company discharged Sarver and disciplined Roles thereby putting its agents on notice of its "zero tolerance" policy for similar misconduct. Stips. 48, 49.

SIZE OF BUSINESS

The parties agreed that in 2006, Rox produced 271,454 tons of coal and in the following year production increased to 292,352 tons. Stip. 44. Given the fact that the Secretary assigned 10 penalty points to the operator based on its production (*see* Special Assessment Narrative Form), the Court concludes that Rox is one of the larger of the country's medium sized operators.

NEGLIGENCE

As stated earlier, in evaluating the operator's negligence for the purpose of assessing a civil penalty, the Court has taken into account not only the imputed actions of the operator's agent, but also the actions of the company bearing on its duty of care. In recognizing that the company's efforts to meet its obligations under the Act constitute mitigating circumstances that should be taken into account in determining the civil penalty, the Court acknowledges the realities of human conduct. Despite proper training and reasonable precautions, an operator's agent may intentionally, unexpectedly and negligently put himself and others at risk by violating the most elementary safety standards. When as here, the record reveals that the operator has taken all reasonable measures to prevent that conduct and has no forewarning it may occur, it does not further the purpose of the Act to assess the operator a penalty near the maximum the law allows.

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated that the proposed penalty will not affect Rox's ability to continue in business. Stip. 45.

THE GRAVITY OF THE VIOLATION

The violation, which lead to Burket's injury which easily could have killed him and injured others, was extremely serious.

GOOD FAITH ABATEMENT

Rox abated the violation within an hour. Citation No. 7035275. The Secretary recognized that the company acted in good faith and reduced the proposed assessment accordingly. *See* Special Assessment Narrative Form. The Court likewise recognizes the good faith of Rox in attempting to achieve rapid compliance.

CIVIL PENALTY ASSESSMENT AND ORDER

In view of its findings related to the statutory civil penalty criteria, and giving weight to the mitigating circumstances discussed above, the Court assesses Rox a civil penalty of \$110,000.00 for the violation of section 75.512 set forth in Citation No. 7035275.

Within 40 days of the date of this decision Rox **IS ORDERED** to pay a civil penalty of \$110,000 for the violation.¹³ Upon payment of the penalty, this proceeding is **DISMISSED**.

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

Distribution: (Certified Mail)

Linda M. Henry, Esq., U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106

Vincent J. Barbera, Esq.; Melanie R. Barbera, Esq., Barbera, Clapper, Beener, Rullo & Melvin, LLP, 146 West Main St., Post Office Box 775, Somerset, PA 15501-0775

/db

¹³ 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. Rox should include on the check the docket number and the assessment control number noted in the caption on the first page of this decision.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 21, 2013

VIRGINIA DRILLING, COMPANY, LLC,	:	CONTEST PROCEEDING
Contestant,	:	
	:	
	:	Docket No. WEVA 2013-37-R
v.	:	Citation No. 7163903; 10/02/2012
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Mine: MT-13/500
ADMINISTRATION (MSHA),	:	Mine ID: 46-09185 F279
Respondent,	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-284
Petitioner,	:	A.C. No. 46-09185-307106 F279
	:	
v.	:	
	:	
VIRGINIA DRILLING COMPANY, LLC,	:	Mine: MT-13/500
Respondent.	:	

DECISION

Appearances: Todd C. Meyer, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, KY for Respondent

Benjamin D. Chaykin, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA for the Secretary

Before: Judge Steele

STATEMENT OF THE CASE

This civil penalty proceeding is conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the "Mine Act" or "Act"). This matter concerns Citation No. 7163903. This citation was issued under Section 104(a) of the Act and was served on Virginia Drilling Company, LLC ("Respondent") for failure to comply with 30 C.F.R. § 77.1702(j). The Secretary seeks civil penalties in the amount of \$8,893.00. A hearing was held in Williamson, WV on January 8, 2012 where the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs.

LAWS AND REGULATIONS

The citation involved in this matter, Citation No. 7163903, was issued under Section 104(a) of the Federal Mine Safety & Health Act of 1977. That provision provides the following:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 814(a).

The Citation deals with an alleged violation of 30 C.F.R. § 77.1302(j) (titled “Vehicles used to transport explosives.”). That section provides the following:

When vehicles containing explosives or detonators are parked, the brakes shall be set, the motive power shut off, and the vehicles shall be blocked securely against rolling.

30 C.F.R. § 77.1302(j).

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

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

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

The S&S nature of a violation and the *gravity* of a violation are not synonymous. 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) *emphasis added*. The only mention of the term “gravity” in the Mine Act is contained in Section 110(i), which states that in determining the appropriateness of a penalty, the Secretary must consider, among other things, “the gravity of the violation.” 30 U.S.C. § 820. The Secretary promulgated a three-factor inquiry to determine the gravity of a citation for purposes of determining the penalty. Those factors are:

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

30 C.F.R. § 100.3(e).

Finally, pertinent regulations and well-settled Commission precedent elucidate the standard for negligence under the Act. Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, an operator exhibits reckless disregard where it displays “conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d). Mitigating circumstances may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

VIOLATION

1. Citation No. 7163903

On October 2, 2012 at 9:20 a.m., Inspector Tyrone L. Stepp (“Stepp”) issued to Respondent Citation No. 7163903. Stepp found:

The red Mack prill truck (SL-144) was parked. Explosive and prill on the truck.
Driver was approximately 175 feet away from the truck. Truck not attended.
Engine running. Not blocked against rolling. Transmission in neutral.

Petition of the Secretary of Labor for Assessment of Civil Penalty at 10. Stepp noted that the risk of injury or illness for this violation was “Reasonably Likely,” “Fatal,” “S&S” and would affect one person. *Id.* He further marked that Respondent exhibited “Moderate” negligence with respect to this violation. *Id.* Respondent took action to terminate the condition on the same date at 10:00 a.m. Under “Action to Terminate” Stepp noted:

Engine was shut down. Transmission was put in gear. Park brake was set.
Truck was blocked against movement. Discussions were held with the driver.

Id.

STIPULATIONS

The parties have stipulated to the following:

1. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Federal Mine Safety and Health Act of 1977 (“the Act”).
2. Virginia Drilling is an “operator” as defined in Section 3(d) of the Act at the coal mine where the citations at issue in this proceeding were issued.
3. The products of the mine at which the citation at issue in this proceeding was issued entered commerce, or the operation or products therefore affected commerce, within the meaning and scope of Section 4 of the Act.
4. The maximum penalty which could be assessed for this citation pursuant to 30 U.S.C. § 820(a) will not affect the ability of Virginia Drilling to remain in business.

SUMMARY OF THE TESTIMONY

1. Testimony of Jimmy Paige Anderson (“Anderson”)

A. Anderson’s Testimony Regarding His Background

On October 2, 2012 Anderson was employed by Respondent as a blaster. Tr. 29. He is a certified blaster in Kentucky, Virginia, and West Virginia and has CDL Class-B in West Virginia. Tr. 261.¹ He had worked for Respondent for 10 years. Tr. 261.

B. Anderson’s Testimony Regarding His Activities Before the Citation

On the day of the citation, Anderson was blasting at MT-13/500 Mine. Tr. 29. He was working with Joey Mahon (“Mahon”). Tr. 29. Both he and Mahon were supervising that day, but neither is management. Tr. 30. He was working on the bench. Tr. 32. He thinks there was a spoil pile but no highwall. Tr. 32. There was no drop-off, only a level bench. Tr. 32, 33.

Anderson operated the red Mack Company truck No. SL-144 and he conducted the pre-operation examination. Tr. 30, 31. The red Mack SL truck was made in 1994 or 1996. Tr. 267. It takes two people to pre-shift the truck because one person must check the lights in the back and the tie rods. Tr. 31. As part of the pre-shift, Anderson performed a stress test on the parking brake. Tr. 31. To do this, he put the truck on a grade and tested the brake to see how much it held. Tr. 31. He pulled the maxi and put it in gear and it did not move. Tr. 31. This is

¹ CDL Stands for “Commercial Driver’s License” and Class-B means he is permitted to drive 10-wheelers but not 18-wheelers, which are reserved for those with Class-A licensure. Tr. 262.

done every morning. Tr. 31. To park the truck, Anderson put it in a lower gear and pulled the maxi. Tr. 32. Respondent's Exhibit 14 is the pre-shift for covers shifts from August 7, 2012 through November. Tr. 267.² It shows no hazardous conditions in the pre-op examination. Tr. 267.

C. Anderson's Testimony Regarding the Explosives

Anderson believes he was using 30-MS20s and CD 5.5 (a one-third pound booster) as a detonator. Tr. 33. Surface delays for the detonators are attached later. Tr. 34. They used "30-foot CDs, 50 and 42." Tr. 34. According to Anderson, "[i]t'd be 42 milliseconds and 17 milliseconds." Tr. 34. At the time, the surface detonators were in a day box. Tr. 35. A day box is used to carry explosives with detonators in one box and caps in another. Tr. 35. The primers and caps were outside of the day boxes, stored in a cardboard box on the bumper. Tr. 37, 38.

D. Anderson's Testimony Regarding the Citation

At one point, Anderson headed to the truck to get some boosters and Stepp approached him and told him that he did not "chock" the wheels. Tr. 33, 264, 265.³ At the hearing, Anderson could not initially recall if Stepp told him he was going to issue a citation. Tr. 33. Later, he said that Stepp had told him he would write one. Tr. 264, 265. He was present when the citation was written. Tr. 262.

At the hearing, Mahon drew a diagram (R-15) showing where Anderson was standing when Stepp arrived. (*see* summary of Mahon's testimony *infra*). That diagram was accurate. Tr. 266. When Stepp arrived, he had been away from the truck for five or ten minutes. Tr. 266, 267. He never got any further from the truck than the "X" on the diagram. Tr. 267.

Anderson disputed that the truck was parked. Tr. 265. However, if it was parked, Anderson believes the tires were blocked. The grade in the area was such that it blocked the front tires of the powder truck from moving. Tr. 262, 263. The way it was sitting, it could not roll away. Tr. 265. On cross examination, Anderson admitted that he did not show Stepp where the tires were blocked because he thought the truck was in use. Tr. 265. He did not talk to Stepp about the truck being in use because Stepp was walking away. Tr. 265.

In addition to the grade, Anderson pulled the maxi-brake when he got out of the truck because that is what he had learned for the CDL test. Tr. 263, 264. The maxi was engaged and the tires were up against the grade so the truck could not move. Tr. 264. On cross examination, Anderson admitted he did not take any photographs because he did not have a camera. Tr. 265. Further, Donnell Miller ("Miller") did not ask him to take notes about the truck. Tr. 266.

² Respondent exhibits will hereinafter be referred to as "R" followed by the number.

³ A "chock" is "[a] block or wedge placed under something else, such as a wheel, to keep it from moving." THE AMERICAN HERITAGE DICTIONARY (5th Ed. 2011).

2. Testimony of Anthony Kidd (“Kidd”)

A. Kidd’s Testimony Regarding His Background

Kidd is the safety director for Respondent and Austin Sales and has been for six years. Tr. 40, 269. Respondent and Austin Sales are sister companies with one buying the explosives and the other using them. Tr. 40. The companies are owned by Vetco holdings. Tr. 40.

Kidd has been in the mining industry since 1975. Tr. 269. He is a Class-A CDL driver with a Hazmat endorsement through OSHA. Tr. 273. He has been through OSHA training, DOT training, drug testing, and brake testing. Tr. 273. He has been to Bendex Class to learn to adjust brakes and has done accident investigations. Tr. 273. His duties include ensuring that employees are safe and that the company follows all standards for the ATF, Department of Transportation, MSHA, and the States of West Virginia and Kentucky. Tr. 41. He is also responsible for ensuring the corporation is protected from liability for safety issues. Tr. 41. Kidd has no hiring authority, but he can terminate an employee who knowingly violates the Mine Act or a regulation. Tr. 41, 42. He is also responsible for training. Tr. 41. If Kidd sees a new type of hazard then he will convene training for that hazard. Tr. 44.

B. Kidd’s Testimony Regarding Chocking Tires, Brakes, and the Bench

With respect to chocking tires, the only guidelines Respondent uses for training are the standards. Tr. 46. Once a truck has left the bench and blasting area to park, the tires are chocked. Tr. 46.⁴ When on the bench or in the blasting area, Respondent does not train employees to chock the tires. Tr. 46.

In addition to chocking, trucks are prevented from moving by brakes. On an ANFO truck there are three braking systems. Tr. 62, 63. The first are retardant brakes used when a truck is going down a steep incline, to prevent overheating. Tr. 63. The second type is air-released, spring-inclined, and these are fail-safe. Tr. 63. These brakes cannot fail if properly maintained and adjusted. Tr. 63. Once a maxi-brake is set the truck cannot roll. Tr. 63. If a brake was set and someone tried to tow the truck, the bumper would come off before the truck moved. Tr. 63. The only legal requirement for the brakes is that they be properly maintained and adjusted. Tr. 62. No one ever stated the brakes here were improperly maintained. Tr. 62. Further, one video titled “Brakes, Grades and Runaways,” and produced by MSHA with John Robowski and Ray McKinney calls the maxi-brakes on this truck “fail safe” brakes. Tr. 61, 62.

Kidd is not aware of any accidents caused by runaway trucks owned by Respondent or Austin Powder. Tr. 64. He knows there has not been for the last six years and has never seen a record of any earlier accidents. Tr. 64. Respondent has been in business for 18 years. Tr. 64.

⁴ The blasting area is a restricted area that no one may enter, including the blaster and helper. Tr. 46. According to MSHA standards, the blast area is determined by the blaster. Tr. 46. The truck remains in that blast area. Tr. 46. The blast area might force miners to stand 200 feet from the truck while the truck’s tires are un-chocked. Tr. 46, 47.

C. Kidd's Testimony Regarding the Austin Sales Citation and 30 C.F.R. §77.1302(j)

Kidd is familiar with an earlier citation issued to Austin Sales in Kentucky on August 23, 2012 (Government Exhibit 1) for similar circumstances under the same subsection. Tr. 49, 55.⁵ The Austin Sales citation was for failure to chock the tires when there were no employees in the cab. Tr. 50, 55. Kidd learned of the citation the day it was issued. Tr. 55, 56. He attended a conference on that citation before October 2, 2012. Tr. 50. But Kidd is not aware that at least one Authorized Representative felt that "park" applied when a truck was on the bench. Tr. 50.

G-2 is a letter dated August 28, 2012 prepared by Kidd's secretary requesting a conference on the Austin Sales citation. Tr. 56, 57. Kidd's letter states, "At the time that the violation was written, there were two men who were working approximately 80 feet from the truck, they were working on loading shots, the truck's gears were placed in park, however, it was not blocked from rolling shut off because to load the shot, it is required that the engine still to be running for them operate." Tr. 57. There was a mistake in that letter; the truck was not in park. Tr. 57. At the conference, Kidd discussed the citation with MSHA to get clarification on enforcement of the standard. Tr. 277, 278. Austin Sales put on evidence and explained how the truck shoots 200 holes and how miners would be required to get out 22 times and chock the tires. Tr. 278. Kidd said that this could result in back injuries. Tr. 278. Further, he noted that shutting off the engine would mean the truck could not be used. Tr. 278. This would put the company out of business. Tr. 279. The District 6 Representative said that they could chock the wheels but leave the engine on. Tr. 50, 51, 59, 60, 278, 279, 280. Kidd did not believe that it was possible to follow only part of the standard and MSHA did not explain how it was legal. Tr. 53, 60, 279. Further, Kidd noted the standard does not say to chock the tires, it says to block against rolling and the maxi-brake blocks against rolling. Tr. 280, 281, 282, 283. No changes were made to the Austin Sales docket at the conference. Tr. 54. Kidd believes MSHA changed its interpretation of the standard between the Austin Sale Citation and this Citation, making it is hard to know what MSHA requires. Tr. 59. Kidd was not aware that MSHA was going to be applying this standard in this way. Tr. 60. District 12, the district dealing with the instant citation, did not offer a conference. Tr. 53, 282.

On cross examination, Kidd admitted he did not apply to the District Manager for District 6 or 12 to get a variance from Section 77.1302(j) to permit Respondent to use the maxi-brake alone in place of tire chocks. Tr. 281, 282, 283. He did not believe that it was necessary; he believed Austin Sales was already in compliance. Tr. 282. Before the Austin Sales citation, the only citation under 30 C.F.R. §77.1302(j) that Kidd recalled involved a truck left in a parking area overnight, not on the bench.⁶ Tr. 64, 65. The company did not contest that penalty. Tr. 64, 65. When in the parking area, the truck's wheels are chocked, the transmission is put in gear, the steering wheel is hobbled and the doors are locked. Tr. 66. Wheels will then either be chocked or placed so they are backed into a parking ditch. Tr. 66.

⁵ Government exhibits will hereinafter be referred to as "G" followed by the number.

⁶ A parking area is a secured spot determined by the blaster and cordoned off from unauthorized entry. Tr. 65. There are different areas for different kinds of equipment. Tr. 65. This truck would be a shot loader. Tr. 65.

D. Kidd's Testimony Regarding Inspections

Respondent does not own any mine sites or receive quarterly inspections. Tr. 283, 284. However, it is inspected often because of the number of jobs sites it maintains in West Virginia, Kentucky, and Tennessee. Tr. 284. It is inspected each time an inspector goes on an EO3 inspection. Tr. 284. These inspections can last several weeks. Tr. 284. Even if Respondent is not present at the time of an EO1, inspectors will sometimes, but not always, ask to see equipment. Tr. 284, 285.

3. Testimony of Tyrone L. Stepp

A. Stepp's Testimony Regarding His Background

Stepp graduated from high school in 1968 and attended college for three years. Tr. 68. He has worked at a surface mine, in construction, at highwall mines, and at Island Creek for about five years in the industrial engineering department. Tr. 68, 69. He has run heavy equipment, helped load shot, and spent time on probably every piece of construction or heavy equipment at a mine. Tr. 68, 69. He worked with heavy equipment for about ten years. Tr. 69. He also operated truck, loaders, dozers, and road graders. Tr. 69. On cross examination, Stepp stated that he is not a certified blaster in West Virginia and never has been. Tr. 109, 110. However, he took some classes on explosives at the Academy. Tr. 110. He also worked on powder crew, probably in 1982. Tr. 110. He did not work for a blasting company, he work for a coal company. Tr. 110

Stepp is currently employed by MSHA as a surface inspector specialist at the Logan Field office. Tr. 69, 70. He has worked there since 1982. Tr. 70. When he started, he took the basic courses and since then has received many surface classes and ventilations classes. Tr. 71. He also briefly apprenticed under an Authorized Representative. Tr. 71. Stepp receives a week or two of update training every other year. Tr. 70. For 15 years he inspected underground and surface mine, but for the last 15 he has only inspected surface mines. Tr. 70. As a surface mine inspector his duties include checking equipment and records for all shifts and checking the shooting, contracting, and coal hauling. Tr. 71.

B. Stepp's Testimony Regarding His Inspection

Stepp conducted an EO1 inspection of MT-13/500 Mine on October 2, 2012. Tr. 72. MT-13/500 Mine is operated by Consol, and Jason Sullivan ("Sullivan") is the mine foreman. Tr. 75, 76. To prepare for the inspection he reviewed the mine map, the plans (including ground control plans), and the citations issued during the last inspection. Tr. 72. He also reviewed the pre-shift/on-shift book. Tr. 76. Stepp had been to MT-13/500 mine a few times before and he is generally familiar with the mine site. Tr. 77. It is a typical surface mine, with highwalls, drill benches, rock truck grades, valley fills, and rock pits. Tr. 77. They haul rock out with loaders and trucks on the high wall. Tr. 77. A surface mine changes constantly with new coal pits and drill benches every day. Tr. 77. MT-13/500 is a medium size mine. Tr. 77.

According to his notes, he arrived at the mine around 7:30. Tr. 72, 73. When he arrived he met with Sullivan. Tr. 76. The inspection started with an imminent danger run, as is required before other inspections can occur. Tr. 76, 83. He began his run at the active pits, starting at the

No. 1 Coalburg Pit. Tr. 78. That is where he wrote the citation at issue. Tr. 78. When they pulled up around 9:20 a.m., he saw several drilled holes in the bench. Tr. 81, 86. There were two employees present. Tr. 78. He saw a prill truck idling and un-chocked. Tr. 78. When he first went to the truck, Stepp did not check to see if the brake was set, but he made a mental note and asked later. Tr. 82. The two men were around 175 feet away, parallel to the truck. Tr. 78, 79, 113. They were parallel to the driver's side of the truck. Tr. 113, 114. Stepp spoke to the driver and learned the truck was loaded with primers and caps. Tr. 79. He told the driver this was a violation for failure to chock the tires. Tr. 79. The manufacturer's chocks were on the truck and the driver chocked the tires, put the truck in gear, and turned the engine off. Tr. 79, 80. It takes about eight to ten minutes to chock the tires and meet the other requirements. Tr. 131. Stepp did not know the trucker but he told him he worked for Respondent. Tr. 80. The trucker did not say much about the citation. Tr. 81. There was a drop-off in the area, may be four or six feet down. Tr. 81, 82. However, Stepp admitted on cross examination that the men were not working on top of a highwall. Tr. 123

Stepp made notes regarding the identification number of the truck.⁷ Stepp made his notes contemporaneously. Tr. 86, 124. He tries to be accurate and get the points in taking notes. Tr. 124, 125. On page 6 of his notes, Stepp noted "Red Mack Prill" and then, "TRF SL-144." Tr. 85.⁸ He noted "parked, engine running, neutral, not chocked, not attended." Tr. 85. The notes also say "200 feet from truck" but he changed it to 175 feet when he was writing the citation because the notes were an estimate. Tr. 86, 125. It could have been shorter or longer. Tr. 125.

Stepp did not inspect the truck at issue and is not sure if he checked the pre-operational examination conducted on the truck that day, though it would have been easy to do so. Tr. 111. Stepp asked the employees about the truck. Tr. 111. If something was wrong, Stepp would have issued a violation. Tr. 111. Stepp did not inspect the brakes. Tr. 112. He is not aware of the PSI that the maxi-brake puts on each wheel, but he does not check brakes that way, he runs a functional check. Tr. 117. At the time of the examination, the maxi-brake had to be set. Tr. 112. He assumed the brake was set, he did not check, but he could have. Tr. 112, 115, 117. He is not even sure if the maxi-brakes were any good. Tr. 116. He did not check because his primary focus was the imminent danger run. Tr. 112, 131. He does not deviate from his imminent danger run because it could save someone's life and he did not consider this to be a life-threatening situation. Tr. 116, 117. As a result, he did not issue an imminent danger. Tr. 131. Stepp did not see the truck move any time before writing this citation. Tr. 115. It is possible that the truck could move with the maxi-brake engaged. Tr. 116.

When he arrived, Respondent's employees were not in the process of loading, because the truck was parked. Tr. 86. When loading, the truck is out between the holes, the booms are out, and there is a man in the cab loading the hole. Tr. 86, 87, 126. The driver will load, pull forward,

⁷ The record was held open to allow redacted inspectors notes (G-3) to be entered into evidence. Tr. 109.

⁸ Prill is a form of ammonium nitrate and fuel oil. Tr. 93 (Lobb Speaking). Drillers will drill a hole and put in a primer cap and then bring in the prill truck and fill the hole with prill. Tr. 92.

load more, and work in the loading cycle. Tr. 87. At this time, the power cannot be shut off because without power, you cannot pump. Tr. 125. It is possible to shut off the motive power when the workers are using the auger to load the powder into the hole, but it slows the process down. Tr. 126. Here, the truck was sitting a few feet off of the drill pattern parked and inactive. Tr. 87, 113. Stepp believes the whole truck was off the drill pattern. Tr. 113. Stepp is not sure how long the drill pattern was, but he thinks it was 175 to 200 feet. Tr. 114. Stepp would have no basis to dispute that the drill pattern was 135 feet, he did not measure it, he just estimated. Tr. 114, 115.

The area where the truck was sitting was uneven. Tr. 87. It was level with the road, but not perfectly level like a pool table. Tr. 118. There may have been spots where, if the brake released, the truck would not roll, but 95 to 98% of benches will allow a truck to roll if the brake is released. Tr. 87, 118, 119. A half a percent grade on a bench will allow a truck to roll, however he has no studies to confirm this fact. Tr. 119. Stepp does not recall if the bench inclined up towards the road after the shot area. Tr. 119, 120. Stepp cannot dispute that the tires were blocked from rolling by the grade of the ground. Tr. 122.

Stepp does not recall seeing a pick-up truck or another drill truck out on the bench. Tr. 113, 114. Stepp is not sure if Respondent's employees were on the pattern, what they were doing, or how far away they were. Tr. 115. They were in the back by the holes at the far end. Tr. 115. Stepp does not recall if there was a drill on the bench, in the shot area, when he arrived on the section. Tr. 117. He does not think that any of the shots were loaded at the time arrived. Tr. 117, 118. He did not walk over the whole shot or look in every hole. Tr. 118.

Stepp assumed the Respondent's employees were going to load the holes that had been drilled and that they would be doing that the entire shift. Tr. 88. However, they work on other areas as well. Tr. 89. The other kinds of areas that he would expect loading and blasting to occur at this mine includes other benches with perhaps a five-percent grade. Tr. 89.

C. Stepp's Testimony Regarding His Activity After the Issuance of the Citation

After issuing the citation, Stepp was finished with the imminent danger run, but still had several more things to do on the EO1. Tr. 95. At some point that day he met with Respondent's Foreman, Miller. Tr. 95, 98. Stepp told him he issued two citations. Tr. 96. Miller said that the employees had been trained and knew better. Tr. 96. With respect to the chocking citation, Miller said "my people know better, my people have been trained, there's no reason for it." Tr. 96. It took Stepp two more days to finish the inspection. Tr. 97. He spoke with Miller again about these citations. Tr. 97. He learned that Miller was considering giving the employees a three-day suspension with intent to discharge, but Respondent decided against it. Tr. 97.

D. Stepp's Testimony Regarding Enforcement of 30 C.F.R. § 77.1302(j)

Stepp has written citations for failure to chock tires when powder was being loaded in the past. Tr. 126, 127. Chocking tires is not necessary; it is possible to leave a man in the truck cab. Tr. 127. Stepp's definition of "park" does not include situations where a man is inside the cab. Tr. 128. It is only parked if he is outside of the cab. Tr. 128. He has almost definitely written a

citation for this before, but he cannot point to a specific instance. Tr. 127. He does not recall if he wrote a citation for this violation to Respondent in the past. Tr. 128, 129.

E. Stepp's Testimony Regarding the Validity of the Citation

The standard at issue, 30 CFR 77.1302 is titled "Vehicles used to transport explosives." Tr. 99. Subsection (j) states, "When vehicles containing explosives or detonators are parked, the brakes shall be set, the motive power shut off and the vehicles shall be blocked securely against rolling." Tr. 99. The Mack truck, Company No. SL-144 Stepp observed on MT-13/500 Mine on October 2, 2012 was a vehicle and it contained explosives. Tr. 99. He knows it contained explosives because the driver told him it was loaded with prill and had primers and caps. Tr. 100. The truck was parked when Stepp saw it and no one was in the cab or around the vehicle. Tr. 100. The closest people were the two blasters and they were 175 feet from the truck. Tr. 100. The motive power of the truck was not shut off. Tr. 100. The wheels were not chocked and Stepp did not see any ground features that would prevent the truck from moving. Tr. 101. Respondent violated 77.1302(j). Tr. 101.

F. Stepp's Testimony Regarding Gravity and S&S

Stepp believes this violation was S&S. Tr. 102. It contributed to a potential hazard. Tr. 102. Specifically, if the truck started rolling it could strike people or other equipment, or it could roll off the highwall. Tr. 102. If it rolled off the highwall it could cause an explosion or strike a person or piece of equipment. Tr. 102. The foreman or blaster could be exposed. Tr. 102, 103, 104. The types of injuries Stepp would be concerned about would depend on the direction that the truck rolled. Tr. 105. If it rolled slowly back and hit a truck it could do some damage. Tr. 105. If it hit a person going slowly it could cause some injury. Tr. 106. However, if the truck was rolling down a four-percent grade it could hurt someone in a truck or, if a person was on foot, break their legs or back. Tr. 107, 131, 132. Stepp is not aware of any fatal accidents caused by inadequately secured vehicles. Tr. 107.

4. Testimony of Thomas Lobb

A. Lobb's Testimony Regarding His Background and Preparation

Lobb is a senior physical scientist for explosives and blasting for MSHA Technical Support. Tr. 135. He has held that position for at least five years. Tr. 136. Lobb holds a master's degree in occupational safety and occupational health. Tr. 136. He has 45 years of experience in blasting. Tr. 136. He started out in underground coal mines then moved to surface mines, cleaning blasting, construction blasting for underground mines and other kinds of specialty blasting. Tr. 137, 172. Lobb was a maintenance foreman at Island Creek, both surface and underground. Tr. 172. He has been certified as a blaster and as an electrician in the past. Tr. 137. He is also a certified mine foreman in underground coal mines in West Virginia and Ohio and a certified surface mine foreman in West Virginia. Tr. 137.

On cross examination, Lobb admitted he is probably not a certified blaster now, because while he teaches classes he never submits paperwork. Tr. 170, 171. He was a certified blaster in West Virginia, but he cannot recall his number. Tr. 171. He may have been certified in 1970,

1975, or 1978. Tr. 173. In that year, the West Virginia Department of Mines in fact certified blasters. Tr. 173. His certification number is "00-something or other." Tr. 173. He does not know for sure if it is active or inactive, he has not been to refresher courses. Tr. 173, 174. He does not believe it is active. Tr. 174. He does not have the same certification as the miners here, but he is certified. Tr. 174. He has a receipt from where he got it. Tr. 174. Further, he was head blaster in charge on a crew when he worked for T&J Coal Company, Dunbar Coal Company, Consol No. 3 Mine, No. 2 Mine, T&J Hillside Mine, and Presley Energy. Tr. 172, 173. Lobb also admitted that when he was a maintenance foreman he did not deal with ANFO trucks. Tr. 172. The last time Lobb worked on a surface mine doing blasting was in the early 1990s. Tr. 174, 175. He has worked for MSHA since that time, starting in 1997. Tr. 175.

Lobb's duties as a physical scientist in tech support include releasing technical information to the industry and to the government, including OSHA and MSHA. Tr. 138. He peer reviews articles and presents for societies such as the International Society of Explosives Engineers and the Society of Mining Engineers. Tr. 138. He also teaches and performs accident investigations. Tr. 138. He has served as an expert witness dozens of times in the past. Tr. 138.

Lobb was asked to evaluate whether Respondent's failure to chock the wheels of an explosive truck on October 2, 2012 at MT-13/500 Mine contributed to a hazard. Tr. 136. He reviewed the citations, the inspector's notes, and the photos while preparing to testify. Tr. 139. The photos were produced by the operator. Tr. 139, 140. Those photos purported to show the truck involved in this citation. Tr. 140. He also reviewed the blasting log. Tr. 140. He heard the testimony of Stepp, Kidd, and Anderson. Tr. 140. Lobb determined that the failure to chock the wheels contributed to four potential hazards. Tr. 140, 141.

On cross examination, Lobb admitted he was not present at the mine at the time of the citation and has no first-hand knowledge of where the people were or where the trucks were. Tr. 175. He does not know the grade of the bench. Tr. 175, 176. Further, Lobb did not interview witnesses, as that is not his role. Tr. 176. He does not think it is important to interview the workers to find out what was going on at the bench. Tr. 176, 177. He does not believe it would help to relay the conditions that day, but he does care about the conditions at the mine. Tr. 177.

B. Lobb's Testimony Regarding Brakes and Rolling

Lobb has mechanical experience with the braking systems of large vehicles, like the truck at issue here. Tr. 141, 142. Lobb was a maintenance foreman for three or four years. Tr. 144, 145. His duties included managing braking systems. Tr. 145. He had experience with parking brakes, emergency brakes, and maxi-brakes. Tr. 146. He worked with maxi-brakes on underground and surface mining equipment (which is standard-apply brake). Tr. 144. These brakes are designed to have an override so that the brake can be released if a tow is necessary. Tr. 144. Further, the brake drums can be decisive in how maxi-brakes perform. Tr. 144. If maxi-brakes were fail-safe, MSHA would not need six engineers that investigate truck accidents caused by trucks going around curves. Tr. 144. There are lots of failures with brakes and scrutiny is important because of the nature of the park brake. Tr. 144.

Beyond brakes, Lobb discussed other issues related to rolling. When a truck is loaded with explosives, the majority of the weight is on the back axle, but as the auger unloads the

material in the truck, the weight shifts. Tr. 145. If a higher percentage of the remaining residual weight is in the front axle versus the back axle, it can cause the truck to roll. Tr. 145. The way the truck rolls depends on weight and mechanical engineers can do a vector summation to determine if there is sufficient force to allow a truck to drift or not drift. Tr. 145, 146. Another issue that occurs often with surface trucks, including explosive bulk trucks, is that when they return from the bench after loading the shot they sometimes come back with a thousand pounds of mud accumulated on the frame of the truck. Tr. 146. Also, about a year and a half ago, a blaster was killed in West Virginia when his truck did not fully go into park and it drifted down the hill and it crushed him against the drill bench. Tr. 146. This also created the danger of a truck pinning a person against equipment in the area. Tr. 152, 153. Even at five miles per hour, that is a little over 7 feet per second. Tr. 154, 155. Finally, the fact that the engine was running slightly increased in the possibility of a hazard because of the vibrations. Tr. 167. If the truck does move it can potentially shift into a lower gear. Tr. 167. If the engine is off, it typically does not shift to a lower gear. Tr. 167.

C. Lobb's Testimony Regarding the Kinds of Explosives Used

At a construction or mine blasting site there are three types of explosives. Tr. 161. 99% of explosives are blasting agents, called prill or ANFO.⁹ Tr. 161. Next there is the initiation system, or blasting caps, also known as detonators. Tr. 162. Finally, there is dynamite or a booster that the detonator is set in and this causes the prill to explode.¹⁰ Tr. 162. Detonators are susceptible to be initiated by outside sources. Tr. 162. The boosters are less susceptible, but the base burden of the detonator can cause the booster to explode. Tr. 162. Prill is very unsusceptible to detonations. Tr. 161, 162. But when the booster explodes, it can cause prill to explode. Tr. 162. As a result, all explosives must be stored separately. Tr. 163.

D. Lobb's Testimony Regarding the Hazards Cause by Explosives

Heat, impact, and pressure can cause explosions. Tr. 155. The main hazard in this case would be running over the exposed surface explosives or primers. Tr. 141, 147, 163, 164. Lobb heard Stepp's testimony about the blasting holes and the location of the truck and the employees. Tr. 147. He has also seen the blasting log that was referenced earlier that illustrates the pattern of the blasting area and the types of explosives to be used. Tr. 147. This was a non-electric type of detonation. Tr. 148. In a non-electric, or shock-tube detonations, the tubes are susceptible to "snap-and-shoot." Tr. 148. This occurs when there is sufficient stretching of the tube that can cause it to break and then recoil. Tr. 148. This causes a shock wave to go through the aluminum

⁹ There are several different types of prill, or ammonium nitrate, and they are named based on the way they are constructed. Tr. 185. Regular flake-type ammonium nitrate would be fertilizer. Tr. 185. When they drop ammonia gas out of the pallets, they produce explosive in little round balls, called prill. Tr. 185. There is also liquid ammonium nitrate that is used as an oxidizer. Tr. 185. Prill has pores in it that allow it to absorb fuel oil and that makes it a blasting agent. Tr. 185. Prill are just little round things, that ammonium nitrate is poured into. Tr. 185.

¹⁰ Once the detonator and the booster are put together they are called a primer and they are put in the hole. Tr. 163.

dust in the tube and this in turn causes the detonator to fire. Tr. 148. Here, if the truck moved and it was hooked onto the tubing it could have caused a snap-and-shoot. Tr. 148. Further, every pound of explosive is equal to 76 million horsepower and the blast holes have 15 or 16 pounds of explosives. Tr. 164. That could throw deadly rocks. Tr. 164. Therefore, once the process of loading has begun and there are exposed explosives, someone needs to be sure that they are not run over. Tr. 164, 165. This sort of event caused a serious injury in West Virginia a few years ago. Tr. 141. On cross examination Lobb admitted that the truck involved in that incident was a pick-up truck. Tr. 178. He is not sure of the exact location; he has reviewed thousands of reports. Tr. 178. But he can remember one from another. Tr. 178.

In addition to snap-and-shoot, the Bureau of Mines has shown that as little as 15 pounds of pressure can make the detonator go off. Tr. 149. Since the truck weighs 50 to 60,000 pounds, there would be sufficient energy to cause a detonation if it were moving or fell from a highwall. Tr. 149, 156. If a detonator went off under those circumstances, the detonator itself could cause injuries. Tr. 149. Lobb has seen pictures of people with their jaws blown off or hands blown off. Tr. 140, 150. But if the detonator is near the boosters, there have been fatal accidents and people can be blown into multiple pieces. Tr. 150. Fatal injuries have occurred with 1 pound boosters, these were 1/3 pound boosters, but that is still enough to kill. Tr. 150. Also, the truck could fall off the highwall, although that might not have been a danger here. Tr. 150. If the truck fell, it could crush the day box and cause a detonation. Tr. 150, 151. However, it is not certain that an explosion would occur. Tr. 155. Lobb has also investigated accidents where rocks hit a detonator causing a detonation that in turn set off the boosters killing a person. Tr. 156. Another danger would occur if the detonator wire came out of the shock tube about half an inch, this could cause a detonation. Tr. 141, 149.

Finally, the battery cables are exposed; if the truck fell on a sharp object, a fire could occur. Tr. 151. The detonators will go off at 500 degrees and fuel reaches 1,200 degrees. Tr. 151. The battery cables are covered with a two-type copper wiring for insulation, if those two wires meet with the positive wire, if the battery is pinched against the front of the truck, it can cause a fire. Tr. 156. Since the fuel tanks are close to the battery wire, there is a potential that the battery fire can cause the fuel tanks to catch fire. Tr. 156, 157. Additionally, if the truck rolls away it is possible for it to be involved in a collision and catch fire, though this is not a high probability event. Tr. 156. Lots of miners are lost to fuel fires even on new dozers and the truck in the picture appeared to be older with parts subject to fatigue. Tr. 157. If such a fire occurred, it could ignite detonators or the prill. Tr. 157. The type of day box that Lobb saw did not afford a lot of fire protection and he did not see any ATF labeling. Tr. 157. He did not see the truck, but it must be stenciled on the side of the box under the sealing. Tr. 157, 158.

E. Lobb's Testimony Regarding Confidence in the Hazards

Lobb is confident that failure to block the wheels of this truck contributed to multiple potential hazards because of his years of doing MSHA blasting accident statistics and presenting them to groups. Tr. 169. He also investigates equipment accidents and has access to a database of them. Tr. 169. That database does not include the types of trucks involved, so he does not know the total number of accidents. Tr. 169. On cross examination, Lobb admitted that while he has investigated accidents, he does not remember exact locations or details. Tr. 180, 181. But there is no doubt in his mind that there were important safety reasons to require the wheels be

chocked in this case. Tr. 169, 170. Most operators have a system that allows them to chock the wheels in two or three seconds, it is surprising that this was even an issue here. Tr. 170.

Lobb mentioned four categories of hazards associated with the truck sitting off of the blast pattern. Tr. 178. On cross examination, Lobb admitted that all of the scenarios that he discussed deal with situations where the truck starts to move. Tr. 178, 179. Without the truck moving, these events probably could not occur. Tr. 179. However, he still believes there was a potential for an accident here. Tr. 179. Lobb does not know if the brakes worked at all or worked perfectly. Tr. 179. He does not know if the wheel was sitting in a depression and is not sure if that has anything to do with this case. Tr. 180. That may not prevent rolling. Tr. 180.

F. Lobb's Testimony Regarding the Blast Site

Lobb noted that the International Society of Explosives Engineers and the Mine Dictionary parts 56 and 57 define the blasting site as those places with loaded blast holes, plus fifty feet. Tr. 153. The blast area encompasses places where debris and fly rock may land and it can be much larger, up to 18,000 feet. Tr. 153. A truck does not need its wheels chocked in the blasting area. Tr. 154. If a truck is in a designated parking ditch in the magazine area and shut off, then it is "fair game." Tr. 154. If it is out of the magazine area, it is in use and if no one is in the driver's seat, it is parked. Tr. 154.

G. Lobb's Testimony Regarding the Photographs

Lobb reviewed several pictures. He noticed that the battery box was within inches of the fuel tank. Tr. 158, 159. This increases the chances of fire because the battery can generate a lot of heat if short circuited and the battery is unprotected in this area. Tr. 159. The photograph (G-6) shows workers doing their jobs, but also shows that they are not attending the truck. Tr. 160. If the truck were to start to move it could go into the blast pattern and pull out detonators or cause a shock-tube type detonation. Tr. 160. On cross examination, Lobb admitted that he is not sure that no one was in the truck at the time G-6 was taken. Tr. 181, 182.

H. Lobb's Testimony Regarding Parking

The reason the tires must be chocked when the truck is parked, but not when someone is inside is because a person in the cab can do whatever is necessary if the brakes fail, including sound sounding the horn or stopping the truck. Tr. 168. This is the only place Lobb has seen where it is not standard practice to chock the wheels. Tr. 165.

I. Lobb's Testimony Regarding MSHA's Oversight of Trucks

MSHA does not approve trucks for use on the bench; the operator approves them. Tr. 182, 183, 184. MSHA can only certify equipment as permissible. Tr. 182, 183. MSHA inspects lots of equipment. Tr. 183. There are regulations that govern how the powder is carried on the truck and what the hopper should look like. Tr. 183. The DOT has requirements for the trucks, the ATF handles storing explosives, and MSHA deals with the safety of explosives. Tr. 183. The ATF does not deal with the safety of explosives. Tr. 183. There are certain requirements for an explosives truck. Tr. 183. Lobb does not know if it is a violation for the

truck to be out on the bench, he is not an AR. Tr. 184. He has never gone to the Academy. Tr. 184.

5. Kidd's Rebuttal Testimony

A. Kidd's Testimony Regarding Maxi-Brakes

Lobb's testimony that vibrations from the truck could disengage the maxi-brake is "rubbish." Tr. 270. The brakes are sealed with dust covers and mud flaps to prevent anything from getting inside. Tr. 270. If a truck vibrated enough to disengage the brake it would set off the detonators. Tr. 270. Further, this truck has six brakes and the four in the back are what MSHA calls fail-safe brakes. Tr. 271. This means they work two ways; they are spring applied and they are released. Tr. 271. Once the spring is applied, each one distributes 2,000 pounds per square inch on each individual wheel. Tr. 271.

B. Kidd's Testimony Regarding DOT Regulations and the Truck

Thirty CFR title 48, section 17 says to follow DOT regulations 300 or 399. Tr. 271. These are the standards used for the transportation of gasoline in residential areas and apply to trucks that weigh 80,000 pounds, while the truck here weighs only 20,000 pounds. Tr. 272. Also, the truck is designed with crash-rating in mind. Tr. 273. Everything on the truck has been crash-tested. Tr. 273. If the battery box and fuel tank raised the issues Lobb described, Federal Motor Carriers would not allow the truck on the road. Tr. 273, 274. Also, the effect of a crash on the battery is known. Tr. 274. Kidd disagrees with Lobb on this point based on his experience and training. Tr. 274.

C. Kidd's Testimony Regarding Accident History

Kidd investigated §77.1302(j) through the MSHA Helpline. Tr. 274. It lists each standard and then the number of accidents and fatalities associated with it. Tr. 274, 275. According to the Helpline, based on data gathered from 7001's, accident investigations, Westlaw, and elsewhere, there have been zero fatal accidents associated with § 77.1302(j). Tr. 275. Lobb said that the 7001 could have listed an accident in a different kind of truck and would not come under explosive, but that is not true. Tr. 275. The 7001 lists the manufacturer, the piece of equipment, the type of equipment, and how long it has been operated; it is a complete record. Tr. 275. According to this, there has been no §77.1302(j) violations resulting in a single accident. Tr. 275.

Lobb was not a blaster and Kidd does not know if he holds a CDL or has ever driven a truck. Tr. 275, 276. Lobb also stated that he investigated hundreds of fatalities, but those accidents are listed by case number. Tr. 276. The one incident Lobb recalled involved an Austin Powder case at Frasier Creek Mining in Kentucky where a blasting foreman pulled down on a bench in a pick-up truck, got out, and did not put the truck in park. Tr. 276. The foreman was talking to the drill operator and the truck struck and killed them both. Tr. 276. It was not a blaster truck and not being used for blasting, it was a different situation. Tr. 276.

6. Lobb's Surrebuttal Testimony

A. Lobb's Testimony Regarding Outside Influences on the Brakes

Respondent is confused with respect to the effects of vibration. Tr. 287, 288. There are three different systems on the truck that are designed to slow it down. Tr. 288. Respondent characterized the augers in the truck as the brake, and they are not the brake. Tr. 288. When Lobb talked about vibrations he was talking about the parking brake, not the maxi-brakes. Tr. 288. The maxi-brake is an air-operated brake and if there are vibrations dirt can get into the system and the valves can be blocked or partially blocked. Tr. 288. The brake in the cam is set with the service brake, if that brake is out of adjustment the maxi-brake will not work as designed. Tr. 288. Lots of trucks crash even when they have a maxi-brake. Tr. 288.

B. Lobb's Testimony Regarding Accident Investigation

With respect to the number of accidents and how accidents are classified resulting from explosions and mechanical issues, under 30 CFR Section 50.20, there is a listing of accident, injury, and illness forms to be filled out for MSHA. Tr. 288, 289. The forms are filled out exclusively by operators and then entered into a database by MSHA. Tr. 289. There are no other database studies or forms provided by the 7001 forms that go into the database. Tr. 289. For example, the fatal accident investigated in 1997 was classified by the operator as a methane explosion and so that is how it is listed on the MSHA database. Tr. 289. Personally, Lobb has not investigated hundreds of fatalities, but he has reviewed hundreds in preparation for his statistics. Tr. 290.

7. Testimony of Donnell Miller

A. Miller's Testimony Regarding his Background

Miller has been employed by Respondent for eleven years. Tr. 189, 190. In that time he has been lead blaster and site manager. Tr. 190. He has been in the blasting industry for roughly 19 years. Tr. 190. Miller is a certified blaster in West Virginia, Kentucky, Virginia, and Tennessee (although he has never blasted in Tennessee). Tr. 192. To become a certified blaster he worked under a certified blaster for a year and learned the trade. Tr. 192. Then he filed an application for a blaster license, took a written test and, in West Virginia, a practical exam. Tr. 192, 193. On the test he needed to know the basic MSHA, ATF, and DOT regulations and the safety hazards that cause explosive detonations. Tr. 193.

His duties include checking the drill bench to determine if the holes are wet and how many there are. Tr. 191. He does this even though he is not a certified foreman. Tr. 191. While his crew is doing pre-operational checks, he gets information together and relays it to the people at the magazine so they know what to bring to the shot. Tr. 191. He works a shift from 6:00 a.m. to around 5:00 p.m. Tr. 191. At the time of the hearing he was working a Wiley Creek job (MT-13/500) and a new job at Twin Branch. Tr. 191, 192. At MT-13/500, the job was to drill blast-holes and then charge the detonation shots for Consol Energy. Tr. 190. It is a small mine, because they do approximately 450-500,000 yards per month. Tr. 190, 191. The part of the mine he worked on October 12, 2012 is still open. Tr. 192.

B. Miller's Testimony Regarding the Lay-Out of the Bench

The layout of this area is as follows: the area that the coal had been extracted from and the binary shot were gone. Tr. 201. The road came down with a gradual turn to the left then turned back into the pit. Tr. 201. The road dropped down a little bit on the side and then turned because it had spoil in front. Tr. 201. There was a gradual grade toward the shot rock or spoil behind it, creating a small V-area. Tr. 201. This is typical. Tr. 201. This was in the front area of the shot and the road comes down onto the bench at the row that goes off at 126 milliseconds or 252 milliseconds. Tr. 202. Unlike G-6, on the day of the citation they were loading in a direction perpendicular to the highwall, with the highwall on the left. Tr. 205. They always move front to back with shots, never right to left. Tr. 205. The grade in the picture is somewhat similar to the elevation at the time of the citation, but it is not exactly the same. Tr. 205.

C. Miller's Testimony Regarding Loading Shot

To load the shot, the crew backs the truck up to within 30 feet of the highwall, but no closer, to allow the boom to move. Tr. 202, 203. They then load two rows of production holes. Tr. 203. They swing the boom back and forth, filling holes on each side. Tr. 203. The crew will then put the booster and the detonator together and lower them into the hole. Tr. 204. They usually put them on their side so that the cord will come back up out of the hole. Tr. 204. Then they will charge with ANFO and cover it with drill cuttings. Tr. 204. When they are augering the powder, the truck must be on. Tr. 204, 205. The detonator used that day was a non-electric shock tube detonator with a 500 millisecond down hole blast and a one-third pound cast booster that would be initiated by surface caps. Tr. 217. Detonations are initiated with a snap gun and a shot-shell primer loaded into the end of it. Tr. 217. The shot tube is inserted into the snap gun, pulled back, and released to detonate. Tr. 217

D. Miller's Testimony Regarding the Blasting Log

The blasting log (R-1) lists the permittee's information, who the blasting is for, GPS location, and protected structures. Tr. 195. Protected structures are inhabited, or possibly inhabited, structures. Tr. 195. The closest one in this case was a gas well. Tr. 195. It looks like the gas well was 1,450 feet east from this area. Tr. 196. The log asks for information on weather conditions, the type of material being blasted, and provisions made for protection. Tr. 196. The weather was partly cloudy, 72 degrees with a north/northeast wind at zero to three miles per hour. Tr. 196. They were blasting shale from the Rider Seam down into the No. 1 Seam. Tr. 196. The blast information includes the blasting agent used, the density of that product, and the high explosives, in this case its Pentex 5.5 and one-third pound caps and boosters. Tr. 196. The density, 1.5, is the weight of the primers. Tr. 197. The information also includes the depth of the holes, here four and a half feet deep and six foot of coal. Tr. 197. The burden and spacing was 15 by 15 and the powder column was eight inches. Tr. 197. That works out to 18.16 pounds per foot. Tr. 197. This corresponds to how many holes are on the pattern, in this case 199. Tr. 197. The diameter was seven and seven-eighths. Tr. 197.

The second page of the log contains the delay pattern; the bottom left of the sketch starts at zero and is the initiation row. Tr. 198. There is a 42-millisecond delay between each shooting

row. Tr. 198. The 17s pointing in the eastern direction mean that there are two holes initiated together with each surface connection, so there are two holes at 17, two at 34, and so on. Tr. 198. Each down hole detonating has an MS500 delay. Tr. 199. This is a CTD surface connector that snaps down on the V-tube that actually gives the firing time on the surface. Tr. 199. The blasting pattern is 135 feet by 285 feet. Tr. 199. The blank area on top of the sketch is the bench and it has arrows showing where protected structures are located and north. Tr. 199. Behind this shot in the bench is a spoil, a previous production shot down from the Rider Seam. Tr. 199, 200. There was 20 feet of bench behind that. Tr. 200. This area is the pit. Tr. 200.¹¹

E. Miller's Testimony Regarding His Actions on October 2, 2012.

On October 2, 2012 Miller was working for Respondent at MT-13/500 and arrived around 5:50 a.m. Tr. 193. Once he arrived, he went to the bench that had been drilled the night before and made a hole count, checked the hole and bench conditions, checked how much was going to be loaded, and checked to see if the holes were wet (most were). Tr. 193. The bench he checked is the one at issue. Tr. 193, 194. This area is referred to as the Coalburg No. 1 Seam. Tr. 194. The loading crew was Mahon and Anderson, and there were other crews on the bench above. Tr. 194. On the day of the citation, the crew did not do any drilling because that was completed the night before. Tr. 197, 198. At the time, Respondent ran two shifts. Tr. 198.

They began loading at around 7:30 or 8:00. Tr. 207. When Miller arrived at the bench, the powder truck was sitting outside the bench area. Tr. 207. Miller does not know the age of the red Mack truck. Tr. 232. It is older than five year and probably around 10. Tr. 232. It was chocked and the motor was cut off and in gear with maxi-brake set. Tr. 207. Miller guarded the truck while other workers got another load of wet bags in a pickup. Tr. 207. Miller came out of the pit when they returned. Tr. 208. Anderson backed the truck into the entrance of the shot. Tr. 208. Miller passed Stepp and Sullivan on his way out as he was going to another bench. Tr. 208. He last saw the truck in front of the pit between several rows of holes, near where the road went into the pit. Tr. 208. Anderson was still in the truck when Miller left, so he does not know if the tires were chocked. Tr. 208.

Miller went to a bench in an area above the pit and was not present when the citation was issued. Tr. 208, 209, 231. On the upper bench, they drilled a hundred foot breakdown wall. Tr. 231. The bench is naturally bermed at least three feet high all the way around the bench area and it is fairly level. Tr. 231. There is a steep road leading up to it. Tr. 231. On the right side of the berm there was a hundred foot drop off. Tr. 231, 232. After drilling was completed, Respondent was going to use an ANFO truck to load the holes. Tr. 232.

Miller learned about the citation when Stepp and Sullivan went to the upper bench and informed him. Tr. 209. Miller does not remember if Stepp told him what the citations were for, but he thinks he said the trucks were unattended and not chocked. Tr. 209, 210. There was also

¹¹ "Bench" and "Coal Pit" are field terms. Tr. 200. The only difference between them is that the bench needs to be removed, and the pit actually contains coal. Tr. 200. There was no split face highwall here; there was highwall on the right, spoil to the left, shot behind it, and an open face to the front, a very short face. Tr. 200, 201.

another citation. Tr. 209. Miller told Stepp that the miners were trained and they had done something illegal, that was bad. Tr. 209. But he was not sure of the violation because he had not spoken to the employees. Tr. 209, 210. Miller heard the testimony that he said that his men knew better. Tr. 210. But that was taken out of context; he meant that if they were doing something illegal then they knew better. Tr. 210. After he heard what happened, he did not believe there was a violation. Tr. 210. Miller talked to Stepp about what would happen if the violation was sustainable, but he cannot say whether he said the men would be fired. Tr. 210, 211.

F. Miller's Testimony Regarding Brakes

Miller is familiar with the brakes on this truck. Tr. 213. His driver told him the brakes were set on this truck at the time of the citation. Tr. 213. There are four spring-loaded maxi-brakes on the rear tandems that will hold 20,000 PSI when set. Tr. 213, 214. So to have a runaway, all four brakes would have to fail. Tr. 214. Miller also is familiar with pre-shifting for the brakes. Tr. 214. To pre-shift the brakes, they take the truck to a small hill near the magazine site and stop the truck on the hill and apply the brake. Tr. 214. They then put the truck in fourth gear and let out the clutch to see if it will pull through the brakes. Tr. 214. If it does, the brakes are adjusted by a mechanic. Tr. 214. It takes two people to pre-shift the truck every time. Tr. 214, 215. The pre-shift was completed that day and it was put into the book, no defects were noted. Tr. 215. There is no way the truck could have moved on this particular day. Tr. 215. Further, if there is ever a situation where there is a very steep grade and Miller feels that it would not be safe to leave the truck, he will leave a driver in the cab of truck and cut the tires to the inside bank. Tr. 215, 216. This is something he would have to do under the Mine Act. Tr. 216. In Miller's opinion, this was not a situation where that would be necessary. Tr. 216.

G. Miller's Testimony Regarding 30 C.F.R. 77.1302(j)

Miller does not agree that this was a violation of 1302(j) because he did not consider the truck to be unattended. Tr. 212. The situation was similar to what Stepp testified to, but Miller might dispute the distance of people from the truck. Tr. 212. Anderson was probably only 60 to 75 feet from the truck, but Miller was not there to see. Tr. 216. Anderson was moving toward the truck, backing up a little further on the shot to where he could access his caps and boosters more easily. Tr. 216, 217. This situation is common procedure; he has never had an inspector to issue citations on the bench while they were loading or heard of it happening. Tr. 212, 213, 230. He does not know if they changed the citation or just changed the interpretation. Tr. 213. He has never been involved with a runaway ANFRO truck caused by failure to chock tires. Tr. 213. Mahon and Anderson were not disciplined for this because it was not a violation. Tr. 230.

H. Miller's Testimony Regarding the Photographs

Respondent brought several pictures of ANFO trucks and benches. Miller did not take the photographs and he does not recall when they were taken. Tr. 230, 231. They were taken by Kidd. Tr. 231. Miller reviewed R-2. Tr. 218. It showed Anderson loading primed holes with ANFO from the truck. Tr. 218. There was an operator, James Pennington ("Pennington"), running the boom from the controls of the truck and Miller is in the photo watching the high wall. Tr. 218, 224.

Miller reviewed R-3, showing Anderson checking to see if holes were wet. Tr. 218. It also showed drills and the bulk truck. Tr. 218. The bulk truck is backed in on the drill pattern, getting ready to start loading the shot. Tr. 224, 225. There are two drills drilling holes on the right. Tr. 225. Mahon is to the left of the truck kicking some drill cuts into the holes. Tr. 225.

Miller reviewed R-4, showing a side view of the truck with Mahon in the foreground. Tr. 223. It shows flags that indicate cracks and voids. Tr. 223.

Miller reviewed R-5, showing a hole that was ready to be charged with ANFO with residue where they started the auger. Tr. 222. The person in the photo has his tape ready to bring the ANFO blasting agent up in the hole. Tr. 222. Mahon is in the right hand side of the photo, Miller is in the center and there is an auger coming down between them. Tr. 222, 223.

Miller reviewed R-6, showing Anderson crouched over putting a cap and booster together to drop into the hole to load it. Tr. 222.

Miller reviewed R-7, showing Anderson wearing a yellow jacket and tying a knot on his tape where he wants to stop the powder from coming out of the hole. Tr. 221. This was a wet hole. Tr. 221. Miller and Mahon are standing nearby and Pennington is operating the controls of the truck. Tr. 221, 222, 226. Mahon is extending a hole that is already loaded. Tr. 226. Extending means shovel in the drill cuts on top. Tr. 226. It means cutting. Tr. 226.

Miller reviewed R-8, showing a bench area being loaded and there are some wet holes transported by pickup. Tr. 218, 219. Those are loaded first. Tr. 219. This is typical of what shot looks like before the holes are loaded. Tr. 219. The photo is somewhat representative of what the area looked like on the day of the citation. Tr. 219. The flags in the pictures are drill flags that show where a particular hole hit coal. Tr. 219. It allows them to know the drill went to low, because they do not blast into the seam. Tr. 219, 220.

Miller reviewed R-9, showing the shot with two drills on the right. Tr. 223. Anderson is walking along the shot, kicking in the holes. Tr. 227.

Miller reviewed R-10, showing a bulk truck backing in. Tr. 220. The drill is in the middle of the picture, pulling the highwall out and the bulk truck is behind that, ready to start loading the holes. Tr. 220. The truck is off to the left side. Tr. 220. These are 12 to 14 foot bore holes. Tr. 220, 221.

Miller reviewed R-11, showing the back of the ANFO truck. Tr. 221. On the left side the road that comes into the bench and almost depicts the grade of coming down hill into the bench in the case at issue. Tr. 228. However, the road that day was narrower than the one in this picture. Tr. 228.

Miller reviewed R-12, showing the shot loader, SL-144. Tr. 228. It looks like the driver is pulling up to load holes. Tr. 228.

Miller reviewed R-13, showing the parking area where the trucks are parked at the end of the day. Tr. 229. It depicts shot loader SL-198 sitting in the parking lot with the wheels chocked. Tr. 229. The steering wheel is chained, the transmission is in gear, and the maxi-brake is set, although these things are not visible in the photo. Tr. 229. In addition, to these precautions all products must be in the day box, the motor must be off, and the doors must be locked. Tr. 229.

One picture shows an ANFRO distribution truck with three day boxes on it, and one on the passenger side. Tr. 206.¹² There are three separate bins in the box for carrying ANFO. Tr. 206. This particular truck unloads from front to back. Tr. 206. The picture shows that a serial number of SL-144, this is the exact truck that was cited. Tr. 206. The back of the truck shows the bumper area and it is about six and a half feet wide. Tr. 206, 207. There is a control panel on the back axle and this is where the operator of the boom is positioned. Tr. 207.

Testimony of Joey Mahon

A. Mahon's Testimony Regarding His Background

Mahon is employed by Respondent as a certified blaster, and was employed by Respondent in October 2012. Tr. 233. He heard Miller testify about the requirements for becoming a blaster. Tr. 234. Before getting a blaster's license he worked on the powder crew for three years instead of one like Miller. Tr. 234. He has been with Respondent his entire blasting career, around seven years. Tr. 234. Besides being a certified blaster he has a West Virginia surface card and a Class-A CDL driver's license. Tr. 234, 235. That license allows him to drive a tractor trailer or 10-wheeler. Tr. 235. He also has a tanker endorsement. Tr. 235. A CDL is not required to drive a powder truck on a strip job, but a CDL and a Hazmat endorsement, are required for driving on hardtop. Tr. 235. Mahon does not have a Hazmat endorsement. Tr. 235.

B. Mahon's Testimony Regarding Pre-Shifting the SL-144 Truck

The red Mack truck is roughly from the 90s. Tr. 255. Mahon helped Anderson with the pre-shift of the SL-144 truck (R-14). Tr. 237, 238, 239. To pre-shift, Anderson got into the truck and checked the lights including the high beams, low beams, left turn signal, and right turn signal. Tr. 238. Mahon went to the back of the truck to check the park light, the reverse lights, backups on, break lights, and signal lights. Tr. 238. The report shows that everything checked out and nothing was observed at the time of the inspection. Tr. 239. They checked the brakes on a downhill grade. Tr. 239, 240. They pull down a little grade, set the brakes, and put the truck in low gear, then ease out on the clutch to make sure the truck will not pull through the brakes. Tr. 240. If it pulls through the brakes, it has to be put back in the parking lot, tagged out, and not used until a mechanic comes. Tr. 240. The downhill grade is just off the parking lot. Tr. 240. The parking area pretty much does not change. Tr. 240.

¹² It is unclear from the testimony which pictures are being referred to at Tr. 206 and 207.

C. Mahon's Testimony Regarding His Actions on October 2, 2012

On October 2, 2012 Mahon was loading the bank at Coalburg 1 Seam at Wiley Creek (MT-13/500). Tr. 235, 236. That mine is operated by Consol and it is small. Tr. 236. On that day, he was working dayshift which starts at 6:00 a.m. but does not have a quitting time. Tr. 236. They stop when the shot has been fired, everything is put away, and the truck is locked up. Tr. 236. That is usually 4:30 or 5:00 but they have to stay until it is done. Tr. 236, 237.

When Mahon arrived that day he gave the drillers a ride to the drills and then he went back to Anderson to do the pre-shift. Tr. 237. They waited at the head of the hollow to see what they needed for the shot to be loaded. Tr. 237. This was in the area called Coalburg. Tr. 237. They did not drill shots that day; that had been completed the previous night. Tr. 237. Then they conducted the pre-shift. Tr. 237. The entire length of the shot from front to back was 135 feet. Tr. 244. There were a total of 199 drill holes and the truck was on the shot. Tr. 247.

Anderson drove the truck to the location and parked it. Tr. 253. Mahon arrived separately in his pick-up but at the same time as Anderson. Tr. 253. He pulled the powder truck off the bench, locked it down, and Miller guarded the area while Anderson and Mahon went to get more wet bags from the wet bag trailer.¹³ Tr. 253, 254. "Locked down" means the little chocks were down, the truck was in gear and the motor was off. Tr. 258. When the truck was locked down, it was off the shot area. Tr. 258. When they returned, he dropped Anderson off at the powder truck and then backed his truck back up onto the shot. Tr. 254. Anderson moved the truck back down on the bench. Tr. 254. Then he got out of the truck to lay out the holes and the boosters. Tr. 254. Mahon could not see the side of the truck to know whether the tires were chocked. Tr. 254. It could not have been more than five minutes after Anderson got out of the truck that Sullivan and Stepp arrived. Tr. 254, 255. Mahon could not see Stepp when he motioned to Anderson. Tr. 255.

When Stepp arrived, Mahon was on the back of the shot in his pick-up. Tr. 242. He had his pick-up because he hauled down some wet back for wet holes. Tr. 242. The holes are fifteen feet apart, so Mahon calculated that his truck was 75 feet from the powder truck. Tr. 244, 245. Pre-shifting the pick-up is the same as pre-shifting the powder truck. Tr. 242. Mahon pointed out where the powder truck was sitting on the diagram (R-15). Tr. 242, 243. The powder truck was on the pattern. Tr. 243. The front tires of the powder truck were a spot where there was a little V in the terrain where the road and the bench met. Tr. 246. It was the whole length of the road and prevented the truck from rolling forward. Tr. 246. Mahon put a PT where the powder truck was located and a JA where Anderson was located. Tr. 244, 252. Anderson was at that location, making his way back to get caps and primers when he encountered the inspector. Tr. 252. That activity put him where the notation was made, not at the rear perimeter of the shot pattern. Tr. 252. He had placed caps and boosters and then headed back to the truck. Tr. 252. That "X" shows the farthest point he had been from the truck. Tr. 253.

¹³ Wet bags are 40-pound six-and-a-half-by-40 bag of emulsion. Tr. 247, 248. They are used for loading wet holes. Tr. 248. Wet holes are ones that have water in them. Tr. 248. ANFO cannot go into a wet hole because its low density causes it to float. Tr. 248.

Stepp was headed towards the powder truck. Tr. 245. Mahon put his initials where he was located. Tr. 246. Mahon spoke with Stepp when he walked by Mahon's truck. Tr. 247. Stepp did not make any comments about the truck. Tr. 247. Mahon did not ask Stepp about his truck. Tr. 248. Mahon's tires were not chocked and Stepp did not write a citation. Tr. 248. Stepp walked by when he and Sullivan were going to the back of the shot to check the spoil pile behind Mahon's truck. Tr. 251. Miller was not present when Stepp was on the site. Tr. 252. On cross examination, Mahon admitted he did not write any notes on the citation at issue here and was not asked to by Miller or Kidd. Tr. 250, 251. All of the testimony is based on memory. Tr. 251.

Mahon is not aware of any other citations for failure to chock tires on the bench. Tr. 248. However, it does not take any more than two or three minutes to chock the tires. Tr. 257. To do it, they usually scotch both back axles on one side of the truck. Tr. 257. But, on an average shot, they would have to put "them" (presumably chocks) down ten times at least. Tr. 257.

D. Mahon's Testimony Regarding Loading Shot

Mahon heard the testimony on the process of loading shots and moving around on the bench and he agrees that this was how Respondent handled the task. Tr. 241. With respect to chocking tires, the truck moves around so much and the workers are bending over so much to pick up caps and boosters that are laid out in the prime hole that it is just a few more seconds of time consumed. Tr. 241. If an area is muddy, and Mahon has worked in areas with mud up to his knees, once the chocks are set it mud they vacuum seal and it can take a lot of energy to pull them out. Tr. 241. It is possible to strain or pull a muscle. Tr. 241, 242. Further, Mahon agrees with all of the testimony on record that the motive power must be running to load the shots with the truck. Tr. 249. In Mahon's opinion the truck could not roll were it was sitting because it had a natural scotch under the front tires, meaning the ground was laid out with the front tires sitting against it. Tr. 249. Further the maxi-brake was set. Tr. 249.

E. Mahon's Testimony Regarding the Maxi-Brake

Mahon is familiar with maxi-brakes, they are spring-loaded and once the air is taken off of the brakes, the spring engage to set the maxi. Tr. 249, 250. The maxi must be physically engaged by pulling a power valve on the dashboard of the truck. Tr. 250. To release the brake, the valve must be pushed in. Tr. 250. The maxi-brake only affects the two back axles. Tr. 251. Mahon knows the maxi-brake system had a canister replaced, but he does not remember when. Tr. 255, 256. This was a two-stage canister and it affects one brake on an axle. Tr. 256.

CONTENTIONS OF THE PARTIES

The Secretary contends that Citation No. 7163903 was validly issued, that the violation was reasonably likely to cause a fatal injury to one person, that Respondent was at least moderately negligent, and that the proposed civil penalty is appropriate. The Secretary argues that the citation is valid because Respondent's employees parked a truck with loaded explosives and detonators, failed to turn off the truck's motive power, and failed to block the wheels securely against motion. (*Secretary's Post-Hearing Brief* at 10). The Secretary argues that the violation was S&S because it contributed to a discrete safety hazard (unattended movement by an explosive

truck), the hazard contributed to had a reasonable likelihood of resulting in a serious accident (a collision or explosion), causing fatal injuries (crushing or trauma/burn injuries) to at least one person under continued normal mining conditions. *Id.* at 11-12. The Secretary argues that the Respondent's actions were at least moderately negligent because Kidd was aware of the Secretary's interpretation of 77.1302(j). *Id.* at 16-17. Finally, the Secretary argues that the penalty is appropriate in light of MSHA's point system and the goal of deterrence. *Id.* at 17-18.

Respondent contends that Citation No. 7163903 was not validly issued, that the violation was not likely to cause a fatal injury to anyone, that it did not exhibit negligence, and that the proposed penalty is inappropriate. Respondent argues that the citation was not valid because the standard at issue deals with transportation and the truck was not "transporting," it was at the bench. (*Respondent's Post-Hearing Brief* at 9). Further, the truck was not parked. *Id.* at 11. Respondent argues the Secretary's interpretation is not reasonable because it would render Respondent unable to remain in business. *Id.* at 13. Also, Respondent did not have fair notice of that interpretation. *Id.* at 14-16. Respondent also argues that this violation was not S&S because the citation was not valid; the truck could not move, so there was no safety hazard; and even if the truck moved it would not strike anyone or cause an injury. *Id.* at 16-19. Finally, Respondent argues that it was not negligent (or exhibited low negligence) because it had no prior notice of the Secretary's interpretation and believed their training was adequate. *Id.* at 21.

FINDINGS AND CONCLUSIONS

1. Validity

Citation No. 7163903 was issued for an alleged violation of 30 C.F.R. §77.1702(j). The standard applies when (1) there is a vehicle containing explosives and detonators; and (2) that vehicle is parked. If both of those conditions are met, a violation occurs unless all of the following actions are taken: (a) the brakes are set; (b) the motive power is shut off; and (c) the vehicle is securely blocked against rolling. In this case, Respondent does not contest the Secretary's claim that the truck contained explosives and detonators. Similarly, Respondent does not contest the Secretary's assertion that the motive power was not shut off. As a result, the only issue that remains for determining the validity of the citation is whether the truck was parked.¹⁴

The parties agree on the relevant facts regarding the position of the truck and the location of workers. The truck was sitting on or near the edge of the drill pattern with the brakes set and the motive power running. Tr. 78-79, 87,100, 112-113, 243, 263-264, 293. Two of Respondent's employees were in the area. Tr. 78-79, 242. Neither was in the cab but instead

¹⁴ The Secretary does not contest that the brakes were set. (*Secretary's Post-Hearing Brief* at 10). The parties disagree as to whether the truck was "blocked securely against rolling." However, since the motive power was not shut-off, it is not necessary to reach that issue in determining whether the citation was valid.

were between 65 and 175 feet from the truck. Tr. 100, 113, 216, 244-245.¹⁵ The only issue is whether this constitutes “parking,” for the purposes of 77.1702(j).

“Park” is not a defined term in the Mine Act or in Title 30 of the Regulations. According to the Commission, “[i]n the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed.” *Island Creek Coal Company*, 20 FMSHRC 14, 19 (Jan. 1998) citing *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff’d*, [111 F.3d 963 \(D.C. Cir. 1997\)](#). Further, “[w]here the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results.” *Id.* at 18 citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); and *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Fortunately, the parties agree that “park” is an unambiguous term and encourage the application of its “ordinary-meaning.” (see *Secretary’s Post-Hearing Brief* at 10-11 and *Respondent’s Post-Hearing Brief* at 11-12). Unfortunately, they disagree about what actually constitutes that unambiguous definition. The Secretary cites The American Heritage Dictionary for the definition “[t]o put or leave (a vehicle) for a time in a certain location...” and argues that this definition applies to the truck in question. (*Secretary’s Post-Hearing Brief* at 11). Specifically, the Secretary argues that under this definition the truck was parked when the employees left the cab to walk onto the drill bench. *Id.* Respondent cites to both the Oxford Dictionary (“bring (a vehicle that one is driving) to a halt and leave it temporarily”) and the Merriam-Webster Dictionary (“to leave temporarily on a public way or in a parking lot or garage” and “to place, settle, or establish especially for a considerable time.”) to argue that the truck was not parked. (*Respondent’s Post-Hearing Brief* at 11). Specifically, Respondent argues that the truck was not parked because the employees had not “left” it, but instead frequently returned to the truck to retrieve supplies. *Id.* Also, Respondent claims employees would later be moving the truck in a stop-and-go fashion to fill the shot holes. *Id.*

“Where dictionary definitions must be relied upon to establish the meaning of a term, and those definitions show that a term as it is used in a regulation is open to alternative interpretations, the Commission has found the term to be ambiguous.” *Wolf Run Mining Company*, 32 FMSHRC 1669, 1680 (Dec. 2010) citing *Island Creek Coal Co.*, *supra*. Given the alternative dictionary definitions provided by the parties, I find that the term “park” is ambiguous. “If... a standard is ambiguous, courts have deferred to the Secretary’s reasonable interpretation of the regulation.” *Island Creek Coal* at 18 citing *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990); and *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). The Commission’s review of a Secretary’s interpretation is similar to the approach used by the courts. *Id.* at 19 citing *Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v.*

¹⁵ The Secretary argues that the miners were 175 feet away and Respondent argues they were only around 60-75 feet. I do not believe this is a material difference, as the material issue is whether a truck is “parked” when no one is in the cab. Therefore, it does not matter if a person is 60 feet or 175 feet from the cab, the issue remains the same.

Cannelton Indus., Inc., 867 F.2d 1432, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992). Therefore, I must accept the Secretary's definition if it is reasonable.

An interpretation is reasonable when it is logically consistent with the language of the regulation and it serves a permissible regulatory function. *Id.* at 18-19 *citing General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). The Secretary's interpretation (a truck is "parked" when no one is in the cab) is logically consistent with the language of the regulation. The Secretary's definition does not subvert the purpose of the standard or create an absurd result in light of the language of the standard. Further, it serves a permissible regulatory purpose, namely protecting miner safety, by ensuring that a person is in the cab and in control of the truck if unsecured. Therefore, I find that the Secretary's interpretation of the 30 C.F.R. §77.1302(j) is reasonable.

Respondent argues that the Secretary's interpretation of the standard is unreasonable. First, Respondent argues that it cannot simultaneously shut down the engine and run the auger, therefore it claims the Secretary's interpretation asks it to choose between complying with the regulations or maintaining its operation, because it cannot do both. (*Respondent's Post-Hearing Brief* at 13). However, Respondent cites no authority for the proposition that a definition offered by the Secretary is *per se* unreasonable because it would prevent an operator from using its equipment. An interpretation is not unreasonable simply because it places a burden, even an extreme burden, on an operator.¹⁶ Respondent's claim regarding the difficulty it would face in complying with the standard as interpreted by the Secretary does not address whether the definition is logically consistent with the standard or serves a permissible regulatory function. Therefore, it is irrelevant to the issue of whether the interpretation is reasonable.¹⁷

The argument that the Secretary has been inconsistent in the application of this standard is more substantial. It is possible for the Secretary to be so inconsistent with his use of a standard that his interpretation must be considered unreasonable. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 515 (1994) (holding that an agency interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view. Also holding that the party claiming an inconsistency exists bears the burden of proving that fact by "persuasive evidence"); *see also Knife River Corporation*, 34 FMSHRC 1109, 1127 (May 2012) (ALJ McCarthy). However, I do not believe that is the case

¹⁶ An interpretation of reasonableness can include analysis of the overall statutory scheme and the purpose of the Act as a whole. *See Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996). While there is some concern in the Mine Act regarding the ability of the operator to stay in business, that concern is relatively minor compared to the primary goal of protecting miners. In short, if an operator's method of business is patently unsafe, the Commission does not have to protect that business at the expense of miner safety.

¹⁷ Further, Respondent argues too forcefully about the burdens it faces based on this interpretation of "parked." Respondent can continue to drill and blast while complying with the regulations by simply ensuring that someone is in the cab of the truck unless the engine is off, the brakes engaged, and the tires are blocked from movement. Miller even testified that in areas with a steep grade he already ensures that a miner is sitting in the cab. Tr. 215, 216

here. Stepp testified that he has always applied the standard in this manner. Tr. 126-128. The fact that Respondent had not been cited in the past does not mean that the Secretary is inconsistent; it could simply mean that this was the first time an inspector noticed Respondent's violation. Further, any confusion regarding the interpretation that occurred at the Austin Sales conference resulted from miscommunication rather than inconsistency on the part of the Secretary. No evidence was presented that showed any actual enforcement efforts made by the Secretary using a different interpretation of the standard occurred. Therefore, I do not believe that the Secretary's interpretation is unreasonable as a result of inconsistency.

As the Secretary's interpretation was reasonable, I find that the truck was parked. Because it has already been established that the truck contained explosives and detonator, the standard applies here. Finally, because the motive power was not switched off, I find that the citation is valid.

However, while citation is valid, the Secretary will be unable levy a fine unless Respondent received "fair notice" of the interpretation. *Id.* at 24. *citing Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995) and *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir 1986). Fair notice does not mean "actual notice," instead "the Commission uses an objective test, i.e., 'whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.'" *Id. quoting Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). In applying the reasonably prudent person standard, the Commission takes into account a variety of factors, "including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with 'ascertainable certainty' of its interpretation of the standard in question." *Alan Lee Good*, 23 FMSHRC, 995, 105 (Sept. 2001) *citing Island Creek Coal Co.*, 20 FMSHRC at 24-25; *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *Ideal Cement Co.*, 12 FMSHRC at 2416; *U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1141, 1142 (Sept. 1988); and *Al. By-Prods. Corp.*, 4 FMSHRC 2128, 2131-32 (Dec. 1982). Finally, the Commission has looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. *Island Creek Coal Co.*, 20 FMSHRC at 24-25; *BHP Minerals*, 18 FMSHRC at 1345, *citing U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

Respondent argues that it did not receive "fair notice" because it had never been cited, or heard of others being cited, for this condition and had not received any other form of actual notice. (*Respondent's Post-Hearing Brief* at 14-16). Respondent also asserts that MSHA confused the matter at the conference concerning the Austin Sales citation when it claimed Respondent could comply with parts of the standard. (*Id.* at 16). With respect to prior notice through citations, I recognize that Austin Sales, a company with the same parent corporation as Respondent, was cited for the same condition. (G-1; G-2; Tr. 50-56). Kidd acts as safety director for both companies. Tr. 40, 269. A reasonably prudent person familiar with the mining industry would have recognized that this citation signaled MSHA's enforcement posture with respect to 77.1302(j). Further, even if MSHA provided confusing information regarding how to comply with the regulation, Respondent could not have reasonably believed it was permissible to continue to operate as though the Austin Sales citation had never been issued. Perhaps more importantly, the standard has been consistently applied in this manner. As noted *supra*, Stepp testified that the standard he has always been applied in this manner. Tr. 126-128. Stepp was positive that he had

cited other operators for this same condition. Because the interpretation of §77.15029(j) was widely applied in the mining industry, a reasonably prudent person familiar with the mining industry would know the requirement. Respondent was given “fair notice” that its actions would not comply with 77.1302(j) and chose to ignore that notice. Therefore, a penalty is appropriate.

2. S&S

Stepp marked the violation cited in Citation No. 7163903 as S&S. In order to establish that a violation is S&S, 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., supra.

As previously shown, the citation is valid, meaning there is an underlying violation of the mandatory safety standard. The Secretary states that the violation in this case met the second factor of *Mathies* because it contributed to a safety hazard. According to the Secretary, that hazard was an unattended, rolling explosives truck, with miners in the area. (*Secretary’s Post-Hearing Brief* at 13). The Secretary claims that the truck could strike a miner, causing an injury. *Id.* Further, the truck could roll over the explosives causing a detonation. *Id.*

However, I find that under the circumstances present here, the violation did not contribute to a safety hazard. Simply put, a runaway truck was very unlikely in this situation for several reasons. First, there is the terrain; Respondent’s witnesses testified that the bench here was very level. Tr. 32-33, 231. Even Stepp admitted that the area was level with the road (although he said the truck could still roll). Tr. 118. In addition, the front tires of the truck were sitting in a depression. All of Respondent’s witnesses described the depression as a spot where the front of the shot and the access road sloped together to form a “v.” Tr. 201, 246, 262-263, 265. It would not be possible for the truck to roll out of that depression.¹⁸ The Secretary disagreed that the tires sat in a depression, but could not refute Respondent’s evidence.¹⁹

In addition to the terrain, Respondent has established that the fail-safe maxi-brakes were set at the time of the citation. See Citation No. 7163903 at *Petition of the Secretary of Labor for Assessment of Civil Penalty* at 10; see also Tr. 32, 213. The brakes provided 2,000 pounds per square inch of resistance. Tr. 271. The brakes on the cited truck had been examined by Anderson and Mahon on the morning of the citation and they confirmed at the hearing that the brakes were functioning properly. R-14; Tr. 30-31, 237-239, 267. Kidd testified that if someone

¹⁸ Incidentally, this means that the tires were “blocked” for the purposes of 77.1302(j).

¹⁹ The Secretary’s only eyewitness stated that he had no basis to dispute the assertion that the tires were in a depression. Tr. 122.

were to try to tow this truck while the brakes were set, the bumper would come off before the truck moved. Tr. 62.²⁰

Finally, past evidence and experience suggests that this condition was not a safety hazard. Respondent has been in business for 18 years and has no history of runaway trucks. Tr. 64, 213. In fact, Stepp stated he had never heard of a fatal accident involving a vehicle with unchocked tires. Tr. 107. He stated that the area around the truck that presented no hazard of the truck rolling out of control. Tr. 102-103. He also stated that the truck was not in a position or condition to be a threat to life. Tr. 117. Taking all of these factors together, I find that this violation did not contribute to a safety hazard. Only some sort of completely unforeseeable and unprecedented catastrophic event could cause the truck to roll away in this situation. If such an event were to occur, the fact that the motive power was on, and §77.1302(j) was violated, would not contribute to that safety hazard. Therefore, this violation was not S&S.

However, in finding this particular circumstance not to be S&S, I do not intend to make a wider ruling than necessary. It is entirely possible, perhaps probable, that a §77.1203(j) violation on a blasting pattern could contribute to a safety hazard and could be S&S. Perhaps even at this mine and in this situation if the brakes had not been set, the terrain had not been smooth, the tires not placed in a depression, or the truck had been near a highwall then this may have contributed to a hazard. However, I do not believe that this particular violation would cause the truck to move and therefore there was no hazard.

2. Gravity

For the same reasons I found that the violation did not contribute to a safety hazard, I find that the event against which the standard is directed would be very unlikely to occur. The truck was on a flat surface, the tires were placed in a depression, and the fail-safe maxi-brakes were set. Therefore, the truck would not roll away. If the event were to occur, the Secretary argues that at least one miner would suffer a fatal injury. However, Stepp testified to the types of injuries he would expect would be broken feet, broken legs, and, at worst, a broken back. Tr. 106-107. Further, he only expected those sorts of serious injuries on a four-percent grade; a grade the Secretary has not established existed here. Tr. 106-107. At a lesser grade and slower speed, Stepp stated “there is not going to be much damage.” Tr. 106, 107. Further, Stepp stated he is not aware of any fatal accidents caused by inadequately secured vehicles. Tr. 107.²¹ Lobb stated

²⁰ There is evidence that the Government places great reliance on these fail-safe maxi brakes. Anderson testified that the Department of Transportation requires the fail-safe maxi brakes to be engaged when the driver is out of the truck. Tr. 263-264. In addition, Kidd recalled an MSHA training video calling the brakes “fool-proof” Tr. 61-62

²¹ Stepp checked the box on the citation for “fatal.” However, I find that his testimony at hearing effectively discounted any chance for a fatal injury.

that, under certain circumstances, this condition could lead to a fatal accident.²² However, I credit the testimony of Stepp, an Authorized Representative who actually witnessed the conditions cited, over Lobb's testimony. Further, Respondent's witnesses dispute the possibility of any accident. Tr. 64, 213, 275. Therefore, it would be unreasonable to find that a fatal injury could result from this violation. At worst, if a truck were to roll it could strike one miner and cause permanently disabling injuries.

3. Negligence

Citation No. 7163903 is marked for moderate negligence. As previously stated, moderate negligence exists where the operator knew or should have known of the violative condition or practices, but there are mitigating circumstances. 30 C.F.R. § 100.3(d). Low negligence is differentiated from moderate negligence by the fact that there are considerable mitigating circumstances. *Id.* The Secretary argues that this violation showed at least moderate negligence because Kidd was informed of the Secretary's interpretation of the standard, but did not take action to ensure that Respondent complied. (*Secretary's Post-Hearing Brief* at 16). However, as a whole, the mitigating factors in this case are considerable. Those factors include the fact that Respondent had not been cited for this condition in the past. While it is true that its sister company, Austin Sales, had been cited for this condition in the past, the evidence suggest that MSHA did an inadequate job of explaining to Respondent what actions needed to be to ensure compliance, causing a miscommunication. Further, Respondent took several precautions to ensure that, even if it did not comply with 30 C.F.R. § 77.1302(j), the danger associated with that standard (a rolling truck) could not occur. These precautions included setting the fail-safe brakes and parking the truck in a depression. As a result, I find that Respondent exhibited only low negligence.

4. Penalty

Under the assessment regulations described in 30 CFR §100, the Secretary proposed a penalty of \$8,893.00 for Citation No. 7163903. While the Secretary's proposal was duly considered, under 30 U.S.C. §820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will now evaluate each of those factors in turn with respect to proposed penalty to Citation No. 7163903:

(1) The Operator's history of previous violations – Respondent was cited twice under Section 77.1302(j) in the 15 months preceding this violation. (G-4, pp. 3, 59). However, as discussed earlier Respondent had not been cited for the standard while on the bench, although Austin Sales was cited once.

²² The possible scenarios involving fatal injuries cited by Lobb include explosions caused by running over the exposed surface explosives or primers. Tr. 141, 147, 163, 164. He stated this sort of event caused a serious injury a few years ago, although he admitted that the accident involved a pick-up instead of an explosives truck. Tr. 141, 178. Another scenario cited by Lobb would be if the truck fell on the detonators. Tr. 149, 156. Still another scenario involves the detonator wires moving half an inch out of the shock tube and triggering an explosion. Tr. 141, 149. Finally, Lobb testified that the battery wiring or a collision could cause a fire. Tr. 151, 156. However, he admitted this was not a high probability event. Tr. 156.

(2) The appropriateness of the penalty compared to the size of the Operator's business – Respondent operates in several states and posts 369,759 hours of operations annually. As a result, it is a relatively large contractor.

(3) Whether the Operator was negligent – As previously shown, the operator was exhibited low negligence

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

(5) The gravity of the violation – As previously shown, this violation is unlikely to cause an injury, but if it did it could result in permanently disabling injuries to one person.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was rapidly abated in good faith.

As I have decided to modify the negligence of this citation from "Moderate" to "Low," and the gravity from "Reasonably Likely" and "S&S" to "Unlikely" and "Non-S&S." I believe that it is necessary to also reduce the proposed penalty. Considering all of the factors listed above, Respondent is ordered to pay \$403.00 with respect to this citation.

Order

Respondent, Virginia Drilling Company, LLC, is hereby ORDERED to pay the Secretary of Labor the sum of \$403.00 within 30 days of the date of this decision.²³

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

²³ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

March 21, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2009-237-M
Petitioner	:	A.C. No. 30-00930-195466
v.	:	
	:	
E. TETZ & SONS, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	Docket No. YORK 2010-342-M
MINE SAFETY AND HEALTH	:	A.C. No. 30-00930-230641
ADMINISTRATION (MSHA),	:	
Petitioner	:	
v.	:	
	:	
GARY TETZ, JR.,	:	Mine: Slate Hill Sand and Gravel
Employed by E. TETZ & SONS, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT AFTER HEARING

Appearances: Terrence Duncan, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, on behalf of the Petitioner;
Tina M. Stanczewski, Esq., Law Office of Adele Abrams, P.C., Beltsville, Maryland, on behalf of the Respondent.

Before: Judge Feldman

This proceeding is before me upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”) against E. Tetz & Sons, Inc. (“Tetz & Sons”). 30 U.S.C. §815(d). Also before me in this proceeding is a related petition for assessment of civil penalty, filed pursuant to section 110(c) of the Act, which seeks to impose personal liability against Gary Tetz, Jr. 30 U.S.C. § 820(c).

A hearing on these matters was held on February 5 and February 6, 2013, in Middletown, New York. The parties subsequently informed me that a resolution has been reached through negotiation. The Secretary has filed a settlement motion for Docket No. YORK 2009-237M that concerns the mine operator. The parties have also filed a joint settlement motion for Docket No. YORK 2010-342M concerning the civil liability of Gary Tetz, Jr.

Docket No. YORK 2009-237M

Docket No. YORK 2009-237M involves one 104(d)(1) citation and one 104(d)(1) order issued against E. Tetz & Sons Inc. (“Tetz & Sons”) on July 1, 2009. Both allege that the cited violative conditions were attributable to an unwarrantable failure. Citation No. 6534197 alleges that the rear service brakes on a loader were not maintained in functional condition in violation of 30 C.F.R. § 56.14101(a)(3). Specifically, Citation No. 6534197 states:

A brake line was damaged rendering the rear brakes inoperable. The condition has existed and been reported for at least two shifts. The loader is used throughout the mine site and travels grades and loads trucks. Foreman, Gary Tetz [Jr.], had stated to [the] MSHA inspector that he had taken the loader out of service for the braking problem. Later the loader was observed [by the issuing mine inspector to be] back in service and loading trucks. Foreman, Tetz, engaged in aggravated conduct constituting more than ordinary negligence by placing the loader back into service knowing the brake system defect existed. This violation is an unwarrantable failure to comply with a mandatory standard.

Order No. 6534198 alleges that the parking brakes on the same loader did not hold when tested on a grade in violation of 30 C.F.R. § 56.14101(a)(2). Although the order alleged an unwarrantable failure, the cited condition was designated as non-significant and substantial (non-S&S), because, as noted at hearing, the loader is routinely parked on level ground.

As the parking brake violation cited in Order No. 6534198 was not likely to result in serious injury, the evidence does not support a finding that the negligence attributable to Tetz & Sons rises to the level of an unwarrantable failure. Consequently, the Secretary has agreed to modify 104(d) Order No. 6534198 to a 104(a) citation. The unwarrantable failure designation for Citation No. 6534197 remains unchanged. The Respondent has agreed to pay the proposed \$5,100.00 civil penalty in satisfaction of the two citations at issue.

Docket No. YORK 2010-342M

Docket No. YORK 2010-342M involves a petition for assessment of civil penalty filed pursuant to section 110(c) of the Mine Act. The petition seeks to impose personal liability for the alleged violative condition in Citation No. 6534197 against Gary Tetz, Jr., mine foreman for Tetz & Sons’ Slate Hill Sand and Gravel operation. Section 110(c) states:

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

30 U.S.C. § 820(c). An individual is subject to personal liability under section 110(c) if 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.” *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).

The Secretary asserts that Gary Tetz, Jr. is personally liable for the condition alleged in Citation No. 6534197 because he placed the loader back in service despite having led the MSHA inspector to believe that it had been taken out of service due to defective brakes. Tetz has agreed to accept the citation as issued, and pay the proposed \$2,300.00 civil penalty.

I have considered the representations and documentation submitted in this matter, and I conclude that the proffered settlements are appropriate under the criteria set forth in sections 110(i) and 110(c) of the Act. **WHEREFORE**, the motions to approve settlement **ARE GRANTED**.

Pursuant to the parties’ agreements, E. Tetz & Sons, Inc. **IS ORDERED** to pay the \$5,100.00 civil penalty in satisfaction of the two citations at issue in Docket No. YORK 2009-237M.

IT IS FURTHER ORDERED that Gary Tetz, Jr. shall pay a \$2,300.00 civil penalty, based upon his personal liability under section 110(c) of the Act, in satisfaction of Citation No. 6534197.

IT IS FURTHER ORDERED that payment shall be made within 30 days of the date of this Order.¹ Upon receipt of timely payment, the captioned civil penalty proceedings **ARE DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

¹ 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. Please include the Docket No. and A.C. No. noted in the above caption on the check.

Distribution:

Terrence Duncan, Esq., U.S. Department of Labor, Office of the Solicitor, 201 Varick Street,
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/tmw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

March 25, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 2012-78-M
Petitioner,	:	A.C. No. 14-01556-269335
	:	
v.	:	
	:	
HUNT MARTIN MATERIALS, LLC,	:	
Respondent.	:	Mine: Sunflower Quarry

DECISION

Appearances: Letha Miller, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;
Scott Wircenske, Safety Director, Martin Marietta Materials, Lenexa, Kansas, for the Respondent.

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Hunt Martin Materials, LLC, at the Sunflower Quarry mine (the “mine”) hereinafter referred to as Respondent, pursuant to section 104(d) (1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Act” or “Mine Act”).¹ On December 7, 2011, Respondent requested that the citation be vacated, the absence of which necessitated a hearing pursuant to 29 C.F.R. § 2700.45(c). A hearing was conducted on November 14, 2012, in Topeka, Kansas. The record closed after the conclusion of oral closing statements from both parties.

¹ Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

II. ISSUES FOR ADJUDICATION

Did Respondent violate 30 CFR Section 56.15005, which requires use of fall protection equipment when miners, in this instance, engaged in blasting activities on a highwall? Were the negligence, gravity and penalty determinations appropriately assessed in the citation that was issued? Respondent asserts no fall protection was required due to the distance the miners were working from the edge of the highwall thus there was no violation and even if fall protection was required the violation should not have been assessed as significant and substantial and an unwarrantable failure.

III. FINDINGS OF FACT

A. Stipulations

Pursuant to the Secretary's November 1, 2012, Prehearing Report the parties jointly stipulated to the following facts:

Hunt Martin Materials, LLC, is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d). At all times relevant to these proceedings the Respondent was engaged in limestone mining operations at the Sunflower Quarry (Mine ID number 14-01556) in Desoto, Kansas. The Respondent's operations affect interstate commerce. As such, Respondent is subject to the jurisdiction of the Mine Act, and the presiding Administrative Law Judge has the authority to hear and issue a decision regarding this case. The parties stipulated to the authenticity of their respective exhibits but not to the relevance or truth of the matters asserted therein. The individual whose signature appears in Block 22 of the citation at issue, Bryce Hopp, is an authorized representative of the U.S. Secretary of Labor, assigned to MSHA's Topeka, Kansas Field Office at the time of the inspection at issue. He was acting in an official capacity when the citation at issue was issued. The citation was properly served upon Respondent as required by the Mine Act. The citation at issue may be admitted into evidence for the purpose of establishing its issuance, but not for the truthfulness or relevancy of any statements asserted therein. The proposed penalties will not affect Respondent's ability to remain in business. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuance at the mine for fifteen months prior to the date of the citation and may be admitted into evidence without objection by Respondent. The Respondent demonstrated good faith in abating the violation.

B. Factual Background and Testimony

This case involves a single citation of an unwarrantable failure to wear fall protection issued by MSHA inspector Bryce Hopp on July 14, 2010. At the time the citation was issued, Hopp was assigned to the Topeka, Kansas MSHA office and had worked for MSHA for approximately two and one half years. He grew up in a family that owned a limestone quarry business, completed high school and worked for twelve years as a blaster before becoming an MSHA inspector. Tr. 28-30.

On July 14, 2010, Hopp, along with his supervisor Joseph Steichen, conducted an inspection of the Sunflower Quarry. Steichen had worked for MSHA since 1997, and was a field office supervisor in the Topeka, Kansas office at the time of the inspection at issue. Tr. 163. Prior to MSHA, Steichen had worked for a mining corporation in South Dakota for 27 years. Tr. 165. Steichen accompanied Hopp because he was performing a routine review of Hopp's inspection as part of a performance review process. Tr. 35, 165.

Upon arriving at the blasting site located on top of an approximately 26-28 foot highwall, Hopp observed that some of the twelve bore holes drilled for blasting purposes were within two feet of the edge of the highwall. Tr. 38-39; Gov't Exhibits (hereinafter GE) 1 & 2. He also noticed that the front row of holes closest to the edge of the highwall had been loaded with explosive materials that had not yet been wired together. Tr. 38.

Hopp took the following general field notes contemporaneously during the inspection of the blasting site: Fall protection not being used while loading shot. GE 3. He described the conditions in greater detail on a Citation/Order Documentation Form (MSHA Form 4000-490) as follows:

28 foot highwall 12 holes along edge. Multiple shots per week, retractable lanyards + body harness available for use. Buck Crumley stated he knew of other quarry who had been cited for this same violation, also stated a discussion was had with John Kennison – Blaster Leadman if they should be using fall protection around ledge. Mr. Crumley had 2 retractable lanyards on site. Some of the 12 holes along edge were within 2 feet of dropoff.

GE 2. Supervisor Steichen testified that he initialed the citation at issue, as well as Hopp's inspection and close out notes. Tr. 166. He felt that Hopp's inspection and decision to issue the citation was congruent with MSHA policy and procedures, and that he would not have written the citation any differently. *Id.* Steichen also took general field notes of his own while at the blast site, which state:

1000 hours. 2 Blasters loading holes on a 28' highwall – 1st row of holes are between about 2'-3' from highwall. W/o being tied out to anything no safety harness.

GE 4. He also testified that both he and Inspector Hopp discussed the need for fall protection during the inspection at the blasting site on the highwall. Tr. 170. He recalled that both Foreman Buck Crumley and Blaster-in-Charge John Kennison stated they were aware of another company that had been cited the previous week for a similar violation. Tr. 168-69. Hopp's testimony, Steichen's testimony as well as notes on the Citation/Order Documentation Form all confirm that Hopp discussed with Kennison and Crumley the need for fall protection during the inspection of the blasting site. Tr. 48, 85-86, 92, 168-170; GE 2. Hopp further noted the presence of potential tripping hazards around the blast holes in the form of drill filings and blasting paraphernalia. Tr. 52.

Respondent denies that any of the blast holes were as close as two to three feet from the edge of the highwall, and rather maintains that all of the holes were at least seven feet from the edge. *See* Respondent's Letter Contesting Citation (December 7, 2011); Tr. 205. Both Blaster-in-Charge Kennison and Foreman Crumley were present during the inspection of the blasting area. Kennison testified that the first row of holes were seven feet back from the edge of the highwall, and that he always loads the holes with shot from behind the first row, which meant that he was about nine feet from the edge of the highwall when loading the holes. Tr. 204-206. Pictures of the condition were not taken due to MSHA's policy not to do so when explosives are present. Tr. 74-76; GE 8. No measurements were taken because according to both Hopp and Steichen, there was no dispute presented at the time of inspection regarding the distance of the front row of blast holes to the highwall edge. Tr. 80-81. The citation was read out-loud during the inspection close-out and the only question asked by Crumley concerned the standard being cited, and not the distance from the highwall that was recorded. Tr. 71, 154. Respondent presented evidence that there was no record of the verbal discussion and issuance of the citation in Hopp's field notes. Tr. 87; GE 4. However, Hopp's notes on the Citation/Order Documentation Form did detail the violation itself, and Hopp testified that he had verbally issued a citation. Tr. 86-87; GE 2.

After observing the blast site Steichen asked Foreman Crumley if the mine had fall protection equipment available. Tr. 169-170. Crumley immediately obtained the equipment, which was donned by Kennison, at which point blasting work resumed. Tr. 230. Hopp terminated the citation based on Kennison donning fall protection equipment, as confirmed by the notes on the citation. GE 1. Kennison and Crumley disputed the claim that any discussion was had about a violation at the time of inspection, and testified that the mine's understanding was that the fall protection was merely requested by MSHA to ensure both its availability and that the blasters were knowledgeable as to its proper use. Tr. 229-30. However, Hopp testified that he would not have written about termination of the violation without having spoken to the mine representatives about it, as it is standard practice to have those discussions before terminating the citation. Tr. 156. The citation was terminated quickly, as "further training on the use of retractable lanyard and body harness was given and put in use." Tr. 138. Once instructed to do so, the mine operator immediately located and hooked up fall protection before continuing with operations. Tr. 230.

Hopp testified that the conditions on the highwall were such that he felt fall protection was required to prevent the likelihood of serious injury. In particular, he stated that the top of the highwall was likely to be windy, and that there were several wires that would be tripping hazards. Tr. 54, 68. Hopp also stated that he saw "clutter" or "rubble" on the top of the highwall that could have constituted a tripping hazard, such as drill tailings, packaging, and cuttings. Further, the holes themselves presented a tripping hazard. Tr. 68.

Inspector Hopp testified that he had observed the blast and felt that it was a fairly normal blast, without any excessive flyrock.² Tr. 127-29. Respondent used this fact along with information from a flyrock chart by the Bureau of Mines to assert that, had the holes truly been as close to the edge of the highwall as the inspector suggested, the flyrock in this case would have been in excess of 1,000 feet. Tr. 129-30. Respondent then presented a letter by a consultant, Phil Porter of Buckley Power, which confirmed this conclusion. Tr. 133-35. However, Hopp countered this conclusion by stating that, according to his understanding of flyrock, there were a number of variables in play, other than the distance of specific holes from the edge of the highwall, that were not accounted for by Mr. Porter. Tr. 135.

The Secretary called Tom Lobb, a senior physical scientist at MSHA, to rebut Respondent's assertions regarding flyrock. Tr. 256. Lobb's qualifications in the field of mining engineering and explosives in particular are extensive, and he is certified to train blasters. Tr. 257. In response to Respondent's theory of the case that a "normal" blast indicated there was no violation, he testified that it is impossible to determine how far flyrock will travel in blasting. He noted the fact that there are several other variables other than the distance of boreholes from the highwall face that come into play, including faults in strata, crooked blast holes, voids in the material, and varying hardness of different layers of rock. Tr. 258. Lobb examined the blast report, and noted that in most mines, the dimensions indicated on the blast report serve as more of a "blueprint," and that surface conditions at the time of the actual blast often result in actual burdens that vary significantly from the "design burden." Tr. 261. Upon examination of the flyrock charts submitted into evidence by Respondent, Lobb testified that the chart was an outdated document, produced by the Bureau of Mines years ago, that has no credence with modern explosives organizations. Tr. 269. He also pointed out several inconsistencies in the blast report submitted into evidence, including the lack of self-auto calibration on the seismograph. Tr. 269-70.

Hopp marked this citation as significant and substantial, and stated he felt it was reasonably likely that the hazard would cause serious injury. Tr. at 55, GE1. He focused on the small distance between the first row of holes and the highwall, and on the fact that a fall from 28 feet up would likely result in a fatality. He also noted there were tripping hazards around the blasting holes such as wires, drill filings and blasting paraphernalia. Tr. 52. With regard to his assessment that a fatality would likely result from a fall off the highwall he based this mostly on past MSHA fatal grams, several of which detail situations in which falls from even smaller heights have resulted in fatalities. Tr. at 55; GEs 9-21. The number of persons affected was noted as two (Blaster-in-Charge Kennison and a helper) and the negligence level was cited as high. Tr. 61, 49; GE 1. While unsure about the length of time the miners would have been exposed to the hazard he estimated it could have taken up to 30 minutes for them to load the holes. *Id.* He could not estimate how long it would have taken for the holes to be drilled which

² Flyrock is rock propelled from a blast area by the force of an explosion. U.S. Dep't. of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms*, 450 (1968), available at <http://www.edumine.com/xtoolkit/xmlwords/xmlwords.htm>.

was probably done the day before because shot was being loaded in the morning. *Id.* He designated a high level of negligence because a prior discussion had been held regarding whether fall protection was needed indicating to Hopp that Foreman Crumley was aware that there might be a need for it and had discussed it with Blaster-in-Charge Kennison. Tr. 62. Hopp further testified that the hazardous condition was open and obvious. *Id.* Inspector Hopp also marked this violation as an unwarrantable failure to comply because the hazard was reasonably likely to be fatal and that management or an agent of the company was aware that the condition existed. *Id.* There was also publicly available information on MSHA's website concerning the dangers of conducting mining activities without fall protection, as well as information on the appropriate way to set up such protection. Tr. 59. In Hopp's opinion there was an extreme hazard because had they witnessed the shot being loaded that close to the edge of the highwall without fall protection in use they would have issued an imminent danger order on the spot. Tr. 63.

IV. APPLICABLE LAW AND ANALYSIS OF EVIDENCE

A. 30 C.F.R. Section 56.15005 Fall Protection Standard

This citation was written for a violation of 30 C.F.R. § 56.15005, which states that “[s]afety belts and lines shall be worn when persons work where there is a danger of falling.” Specifically, MSHA policy is to generally follow the guidelines of the Occupational Health and Safety Administration (OSHA) fall protection standard, which states that fall protection in the form of guardrails, safety net systems, or personal fall arrest systems should be used when an employee is walking or working on an edge which is six feet or more above a lower level. U.S. Department of Labor Program Policy Letter P12-IV-01, June 21, 2012, Respondent's Exhibit L (hereinafter RE). FMSHRC has specifically found that a danger of falling exists when “an informed reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines.” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

The safety belt and lines standard is one of 13 priority standards listed by MSHA in its “Rules to Live By” initiative implemented to improve the prevention of fatalities in mining. GE 5; Tr. 64. Falling from a highwall was the single most common safety violation found in mining deaths between 1990 and 1998 contributing to 37 fatalities. GE 6, p. 3; Tr. 65-66. MSHA has determined that the fall hazard zone by which fall protection should be donned is six feet or less from the edge of a highwall with a stable crest and six feet or less behind unstable ground or footing. *Id.* p. 8; Tr. 66-67.

Inspector Hopp explained that section 56.15005 is a performance standard. While there is not a specific distance cited in the standard itself where fall protection must be worn when working on a highwall each case is to be judge separately:

You look for many different things when you are out there, when you are evaluating. The big thing in this was two feet away from an edge that had a steep drop-off. You are also looking at the unevenness of a ledge. Not all limestone edges are flat. Most of them have cracks. They're not like driving down a road. So you are going to have uneven

surface. You're also going to have the filings from the drill. You'll have piles of that around. . . . Also being there was shot loaded, you're going to have explosives products laid out. You might also have stemming rock of a larger size up there to put in the holes as well.

Tr. 40-41. Here, Hopp testified there was "rubble" in the form of drill tailings, shot wire, tools, equipment, and explosives packaging all present on the highwall. Tr. 68. The highwall in this instance was 25 to 28 feet high. Tr. 39, 169. It is undisputed that workers were not wearing any form of fall protection while loading the boreholes with explosives. The main point of contention at hearing was the distance of the first line of boreholes, and therefore, the workers, from the edge of the highwall. As noted above, Hopp and Steichen observed that some of the first line of boreholes were two to three feet from the edge, while Respondent's Blaster-in-Charge Kennison contends that they were seven feet from the edge. Tr. 38-39, 167, 204-206.

At hearing, Respondent attacked the sufficiency of the evidence that the Secretary presented to support the citation. In particular, Respondent took issue with the lack of notes that were taken while the inspectors were actually on the highwall, particularly with respect to the sparse record as to the actual communications that occurred between mine management and Inspector Hopp. Tr. 25-26, 85-90. They also took issue with the fact that no pictures or measurements were taken. *Id.* at 25. While more notes and certainly measurements in lieu of pictures (given the acknowledged safety concerns with taking photos) taken in the midst of the inspection would have been helpful and in fact maybe dispositive of the parties contentions, I find the inspector's statements regarding the pace at which they were conducting the inspection, as well as their thorough notes describing the nature of the mine, to be credible and adequate given the circumstances. Specifically, Inspector Hopp testified that, "if there's no disagreement, to speed up the inspection, you move along." Tr. 98. He established that one of the reasons inspections must move quickly is that the presence of inspectors could serve as a "heads-up" to the rest of the mine, which might allow them the opportunity to hide dangerous violations. Tr. 144. His cumulative notes along with those of his supervisor Steichen contained enough information to prove a violation, and I find his reasons for not taking more notes convincing. GEs 2, 3 & 4. Likewise, I credit the testimony of Hopp and Steichen regarding discussions they had with Kennison and Crumley during the inspection. Tr. 48-50, 170. While both Kennison and Crumley deny that Hopp and Steichen pointed out the distance of the boreholes from the highwall crest while they were at the blasting site I find Hopp and Steichen's testimony to be more credible because it is supported by Hopp's notes on the Citation/Order Documentation form and Steichen's field notes. Tr. 208-209, 231-232; GEs 2 & 4. Furthermore, Kennison admitted he didn't know what Hopp and Steichen observed because he was on a time schedule, he was busy loading shot and he did not recall some of the things that were discussed. Tr. 207-208. Accordingly, I conclude it was not necessary to take measurements because neither the Blaster-in-Charge Kennison nor Foreman Crumley disagreed with Hopp and Steichen regarding the distance between some of the bore holes and the highwall crest at the time of the inspection.

Specifically, with respect to the parties' factual dispute regarding the actual distance between the edge of the highwall and the first set of boreholes, I again find Inspector Hopp's and Supervisor Steichen's recollection of the events to be more credible, given that their

contemporaneous general field notes and Hopp's notes on the citation/order documentation form confirm their testimony. Tr. 208-209, 231-232; GEs 2, 3 & 4. In addition, I credit Hopp's testimony that "clutter" was also present on the highwall from the shot loading activities. Finally, although no one had any specific recollection of the ground conditions it stands to reason that the surface of the highwall would not have been perfectly smooth and thus some variance in this regard is to be expected. Thus, allowing for some margin of safety (given the risk associated with falling off a 28 foot highwall) even exactly seven feet from the edge of the highwall falls into an area in which mine management should have concluded that fall protection was needed. As evident from the testimony and the MSHA "Fall Prevention on Highwalls" power-point presentation admitted into evidence, the six feet guideline applies to stable crests and perfect conditions, which are rarely seen in real life. Respondent's management had to have known that at the very least workers were coming up close to that six-foot threshold. Respondents' after-the-fact assertion that workers were no closer than seven feet from the highwall edge just outside the fall hazard zone of a stable crest appears contrived and unworthy of belief. Even if Inspector Hopp's and Supervisor Steichen's two to three foot estimation of the distance from the edge of the highwall to the first set of bore holes is doubled to four to six feet on a stable crest or tripled to six to nine feet allowing for an unstable crest, fall protection would have been necessary. Simply put, given the conditions Respondent should have clearly recognized the hazard and required fall protection. Accordingly, I find the testimony of Inspector Hopp and Supervisor Steichen to be credible and will uphold the citation.

Additionally, Respondent argued through the use of Porter's interpretation of flyrock charts that any scenario with boreholes two to three feet from the edge of the highwall could not have produced a blast as "normal" as the one that occurred on the day of the inspection. I find that the vague sources Porter used, particularly when coupled with the fact that Porter was not available to testify, significantly reduce the weight Porter's conclusions can be given. The Secretary of Labor was convincing in her use of the expert testimony of Thomas Lobb to rebut Respondent's arguments. Lobb's examination of the blast report and flyrock charts submitted into evidence indicated that there are several variables and factors that play into how far flyrock travels after a blast, and that the chart used by Respondent could not support their conclusion that the holes must have been farther than six feet from the edge of the highwall. Tellingly, Lobb's testimony was not at all questioned, challenged or discredited by Respondent. Tr. 274. I find his testimony and evaluation of the evidence to be effective in rebutting Respondent's arguments.

In sum, I find the testimony of Inspector Hopp and Supervisor Steichen supported by their notes as well as the detailed description of the blasting process given by Lobb to be credible and that Respondent's employees failed to wear fall protection in an area where boreholes were closer than six feet from the edge of a highwall, in violation of 30 C.F.R. § 56.15005.

B. Significant and Substantial Designation

Inspector Hopp issued this citation as a "significant and substantial" (S&S) violation, which 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 S&S "if based upon the particular facts

surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In determining whether a violation is S&S, the Commission has identified four elements that the Secretary of Labor must prove:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I affirm the citation as written and hold that there was a violation of mandatory safety standard 30 C.F.R. § 56.15005, as fall protection was not worn in an instance where it should have been. This violation does contribute to a discrete safety hazard, that is, the danger of a miner working without fall protection falling over the edge of the highwall.

The third *Mathies* criterion, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury, has been clarified further by the Commission:

[T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d) (1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

U.S. Steel Mining Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985). In this case, the hazard contributed to, that is, the potential trip and fall scenario the inspectors were concerned about, would almost certainly result in a serious injury or even death. I have found that workers were approximately two to three feet (seven to nine feet if Respondent’s witnesses are to be believed) from the edge of a 28 foot highwall littered with “rubble” from blasting paraphernalia, tools and equipment and piles of drill tailings. Thirteen fatal grams submitted into evidence by the Secretary indicate that even falls from significantly shorter distances can result in death.

GEs 9-21. The fatal grams, and the designation of this particular standard as “the single most common safety violation found in mining deaths” all prove a reasonable likelihood that this injury would be very serious at best, and most likely fatal.

It should be noted that the significant and substantial evaluation is made in consideration of the length of time that the violative condition existed prior to the citation, and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. In this instance, the violative condition would most likely have existed beginning with the drilling of boreholes estimated to have occurred the day prior to the inspection through the blasting process, since Respondent failed to require the miners to wear fall protection. Tr 61-62. However, the only evidence presented regarding the length of time the violative condition existed was Inspector’s Hopp’s estimate that it could have taken up to 30 minutes on the day of inspection to load the front row of boreholes with shot. Tr 61-62. With regard to drilling the boreholes he stated he really didn’t know who or when they would have been drilled and did not provide an estimate of how long that process would have taken. *Id.* While somewhat unclear I find it reasonable to conclude that at a minimum the miners would have been exposed to the hazard for at least a total of 30 minutes. Accordingly, in light of all the evidence and the four *Mathies* factors, I uphold the significant and substantial designation on this citation.

C. Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when [t]he operator knew or should have known of the violation, condition or practice and there are no mitigating circumstances. *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011) (ALJ). Finally, the operator is guilty of reckless disregard where it “displayed conduct which exhibits the absence of the slightest degree of care.” *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.*

Here, Inspector Hopp determined the negligence level to be high because there had been discussion ahead of time between Foreman Crumley and Blaster-in-Charge Kennison that there might be a need for fall protection. Tr. 50, 62; GE 2. It should be noted that neither Crumley nor Kennison acknowledge in their testimony that they had discussed the necessity of fall protection immediately prior to the inspection. However, I credit the notes taken by Inspector Hopp in his citation/order documentation taken on the day of the inspection to confirm that said discussion did occur along with his testimony that there had been a meeting the morning of the

inspection where use of fall protection was discussed. GE 3; Tr. 50. As a foreman Crumley is a member of management, and Blaster-in-Charge Kennison testified he is in charge and thus, a member of management in the absence of Crumley. Tr. 219. Accordingly, there is no question that management through both Crumley and Kennison was aware or should have been aware that fall protection was needed. This is compounded by the fact that Foreman Crumley was aware at the time of inspection that another operator had been recently cited in the area for the same issue – failure to wear fall protection. GE 2; Tr. 168- 70. Finally, no evidence of mitigating circumstances was presented at hearing to merit reducing the level of negligence. Accordingly, I find that Inspector Hopp appropriately designated the violation at issue as an act of high negligence.

D. Unwarrantable Failure

This citation was issued as an “unwarrantable failure,” which has been defined by the Commission as “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). The Commission has stated that whether a citation is an “unwarrantable failure” is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator’s efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters, Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Judges must consider each of these factors in light of the evidence in order to reach a determination as to whether a citation is an unwarrantable failure.

Inspector Hopp testified he was unsure of the length of time the miners were exposed to the hazard on the day of inspection but estimated that it could have been a half an hour for loading shot. Tr. 61. The extensiveness factor involves consideration of the scope or magnitude of a violation, not an additional consideration of dangerousness or obviousness. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). I have already found that at least some of the boreholes were as close as two to three feet from the crest of the highwall. As to scope or magnitude I thus find that up to two miners were at a high risk of falling, albeit for a short period of time up to approximately 30 minutes. Between April 14, 2009 and July 13, 2010 Respondent had no other violations of 30 C.F.R. § 56.15005 and in fact had only been cited four times for non-S&S violations for a total amount of \$417.00 in assessed penalties thus there is no indicia Respondent’s violation history put them on prior notice that greater efforts to comply with the fall protection standard were necessary. GE 22. Both Inspector Hopp and MSHA Supervisor Steichen noted in their testimony that Respondent immediately abated the violative condition by donning fall protection in their presence thus terminating the citation. Tr. 70-71, 193- 94.

However, I find that the violation was open, obvious and as noted posed a high degree of danger even for a relatively short time. Hopp testified that the level of danger was so high that, had the inspectors arrived while shot was being loaded into the front holes, they would have issued an imminent danger order. Tr. 63. I also noted above that even in the event the miners were two to three times the distance farther back from the crest of the highwall than what both Hopp and Steichen credibly attested to, fall protection should have been worn while loading the first line of boreholes. Clearly, an informed reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines. *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Thirteen fatal grams convincingly demonstrate that a fall from a 28 foot highwall would have most likely resulted in death. A combination of safety information via wide circulation of fatal grams, MSHA's "Rules to Live By" and MSHA's fall prevention PowerPoint presentation were certainly available to the Respondent. As Hopp testified, fatal grams are available to the public, and fatalities are generally discussed with mine operators during MSHA inspections. This evidence shows that management officials should have been on notice that fall protection was needed to prevent fatalities while working under the cited conditions. In addition, Hopp and Steichen testified that they spoke with mine management about the need for fall protection, and Foreman Crumley appeared to be aware or at least recognized the need for it. Hopp also testified that Crumley knew of another quarry in which a similar citation had recently been issued, which again, indicates awareness of a potential hazard and the need for fall protection more generally. Tr. 121. There is no question that Respondent, through Crumley and Kennison (as the foreman in charge when Crumley was absent), was aware fall protection was necessary under these circumstances. Accordingly, I find their negligence in not using fall protection on the day of the citation to be an unwarrantable failure.

IV. PENALTY

Commission Administrative Law Judges (ALJs) have the authority to assess penalties under the Mine Act *de novo*, as stated in Section 110(i) of the Mine Act, which 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 Commission ALJs to consider the following six penalty criteria when assessing 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). 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, which is "bounded by proper consideration of the statutory

criteria and the deterrent purpose[s] . . . [of] the Act. *Id* at 294; *Cantera Green* 22 FMSHRC 616, 620 (May 2000).

Notably, the penalty for the citation at issue was specially assessed because of the fact that the fall protection standard was one of MSHA's "Rules to Live By," as noted by Inspector Hopp during his testimony. Tr. 73. MSHA's "Rules to Live By" identify 24 standards that are frequently cited in fatal accident investigations, and provide reference materials for operators to learn about these standards and how to stop common yet preventable fatalities. GE 5. Since operators have been put on notice and given resources about ways to prevent these specific types of accidents, higher penalties are generally assessed for citations in this category. Tr. 73.

As noted in the previous discussion regarding unwarrantable failure Respondent has been cited four times since April 14, 2009, for non-S&S violations none of which involve the fall protection standard cited in this case. GE 22. With regard to Respondent's size I find that the proposed penalty is appropriate given that Respondent has up to twelve miners employed at the subject Sunflower Quarry and operates several other mines in the area. Tr. 30, 32. Also noted above I have found Respondent to be highly negligent with regard to the subject citation. I accept the parties' stipulation that the proposed penalty will not affect Respondent's ability to remain in business. Finally, noted above I have found the gravity of the negligence to be reasonably likely and fatal, significant and substantial and an unwarrantable failure. I recognize and accept the parties' stipulation that Respondent demonstrated good faith in abating the violation.

Considering all of the circumstances I find that the proposed penalty of \$4,900.00 meets the deterrent purposes of the Mine Act and is therefore appropriate. The total penalty in this instance for violating the fall protection standard, 30 C.F.R. § 56.15005 shall be \$4,900.00.

V. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. 820(i), I assess the penalty listed above for a total penalty of \$4,900.00 for the citation decided after hearing. Hunt Martin Materials, Inc., is hereby **ORDERED TO PAY** The Secretary of Labor the sum of \$4,900.00 within 30 days from the date of this decision.³

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

Distribution:

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³ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Denver, CO 80202-2536
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March 26, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2011-835-M
Petitioner,	:	A.C. No. 39-00292-254729
	:	
v.	:	
	:	Concrete Materials Sand Plant
CONCRETE MATERIALS – DIV of	:	
SWEETMAN CONSTRUCTION CO.	:	
Respondent.	:	

Appearances: Alena E. Amundson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Godwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

DECISION

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Concrete Materials-Division of Sweetman Construction Company (“Concrete Materials” or “Respondent”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Sioux Falls, South Dakota. In lieu of filing post-hearing briefs, the parties presented oral argument at the hearing and submitted statements of relevant case law.

**I. DISCUSSION WITH FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Citation No. 6588806

On March 22, 2011, MSHA Inspector Alan Roberts issued Citation No. 6588806 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 56.1000. The citation alleges that the “mine operator sent in a notice of closure to the Rapid City MSHA Field Office on 11/20/2010 but the mine did not close.” (Ex. G-2). The citation went on by stating that the mine “has had maintenance and load-out activity throughout the winter as weather permitted.” *Id.* Inspector Roberts determined that an injury was unlikely, that the violation was not significant and substantial (“S&S”), that no miners would be affected, and that the violation was the result of high negligence on the part of the operator. The safety standard provides, in part,

“[w]hen any mine is closed, the person in charge shall notify the nearest district office . . . and indicate whether the closure is temporary or permanent.” The Secretary proposed a penalty of \$100.00 for this alleged violation.

a. Summary of Testimony

Inspector Alan Roberts conducted an E01 Inspection of all the active areas of the Concrete Materials Sand Plant in Yankton (the “Yankton Mine”) on March 22, 2011. (Tr. 17-18). Mine maintenance had occurred at the Yankton Mine prior to Roberts' inspection despite the fact that the operator had submitted a notice of closure. (Tr. 19). Inspector Roberts testified that he did not observe any miners perform maintenance; rather, miners told him that they had done so on previous days. (Tr. 99). He testified that he witnessed someone load a truck with a front-end loader across from the office. (Tr. 99, 102). Inspector Roberts testified that MSHA considered the activities that he observed to be mining. *Id.* Roberts testified that he issued Citation 6588806 to Concrete Materials for a violation of section 56.1000 due to failure to notify MSHA that the Yankton Mine was active. (Tr. 24).

Roberts testified that he determined that the violation was the result of Respondent's high negligence because Respondent has multiple mines and had opened and closed mines as required in the past. (Tr. 25). Roberts testified that he learned from interviews with miners and examination of records that the Yankton Mine had only closed for a few days during the winter for bad weather. (Tr. 26; Ex. G-5).

Andrew Haas, the Yankton Mine superintendent, testified that he accompanied Inspector Roberts during the March 22, 2011, inspection. (Tr. 111). Haas testified that Respondent sent a notice of closure to MSHA dated November 20, 2010 because it was ceasing production and did not produce between that time and March 22, 2011. (Tr. 112). He also testified that the sand plant and all of its components were locked-out and tagged-out for the entire time between November 20, 2010 and March 22, 2011. (Tr. 114). Haas did testify that Respondent often loaded material out of stockpiles into vehicles and performed various forms of maintenance at the mine between November 2010 and March 2011. (Tr. 115-16, 147-48).

Roger Danielson, the lead man at Yankton Mine, testified that no production occurred between November and the time of the inspection and that he locked out the power at the breaker box during that time period. (Tr. 153).

b. Discussion and Analysis

I find that Respondent violated section 56.1000 because it performed maintenance and loading while representing to MSHA that the Yankton Mine was closed. I credit the testimony of Inspector Roberts, Andrew Haas and Roger Danielson that Respondent performed maintenance at the mine between November 20, 2010 and March 22, 2011. I also credit the testimony of Inspector Roberts and Haas that vehicles of customers were loaded during the period that Yankton Mine was registered with MSHA as closed. The use of a front loader to load the vehicles of customers denotes an active mine. *See John Richards Construction*, 23 FMSHRC 1045, 1050 (Sept. 2001) (ALJ). Combined with the maintenance, loading the vehicles of

customers establishes that Concrete Materials should not have notified MSHA that the Yankton Mine was closed for the season. Allowing Yankton Mine to be listed as “closed” and not “active” endangers the health and safety of its miners.

I also find that Citation 6588806 resulted from the high negligence of Respondent. The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

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). Although this definition is not binding upon the Commission, it is useful in analyzing Respondent’s conduct in this case. Respondent should have known of the violation and it did not provide any mitigating factors to explain why it notified MSHA that it was closed for the season when it knew it would be performing maintenance and loading the trucks of its customers during the winter. Respondent’s high negligence led to the cited condition underlying the citation.

I **AFFIRM** Citation 6588806 as written by the inspector. A penalty of \$500.00 is appropriate for this violation because of the high negligence designation.

Citation No. 6588807

On March 22, 2011, Inspector Roberts issued Citation No. 6588807 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 56.12004. The citation alleges the following:

There is a 50’, 110 volt, yellow extension cord hanging on the wall in the tool shed that is damaged. The outer insulating jacket has been pulled out of the female plug, exposing the inner insulated conductors to mechanical damage. There is about 1/4” of outer jacket missing. The cord is used as needed for service work in and around the wash plant. This condition exposes miners to fatal electric shock hazards.

(Ex. G-14). Inspector Roberts determined that an injury was unlikely, that the violation was not S&S, that one miner would be affected, and that the violation was the result of Respondent’s moderate negligence. The safety standard provides, in part, “[e]lectrical conductors exposed to mechanical damage shall be protected.” The Secretary proposed a penalty of \$100.00 for this alleged violation.

a. Summary of Testimony

On March 22, 2011, Inspector Roberts issued Citation 6588807 as a violation of section 56.12004. (Tr. 44). The inspector testified that an extension cord in the tool room had exposed conductors that were not protected from mechanical damage because the outer insulation had pulled away from the plug, exposing miners to a shock hazard. (Tr. 44-46, 48; Ex. G-16). The inspector testified that although an injury was unlikely, the possibility of shock combined with the mine's wet conditions made an injury likely to be fatal to a miner if it occurred. (Tr. 46-47).

Inspector Roberts testified that the condition was obvious and that Respondent should have known of the violation. (Tr. 47). He issued the citation as a result of Respondent's moderate negligence because he did not believe that the condition existed for a long amount of time. *Id.* The inspector testified that a miner told him that the cord was used in the wash plant the day before his inspection. (Tr. 49; Ex. G-15).

Andrew Haas agreed that the insulation on the extension cord had pulled out about 1/4 inch, but said that the copper wire was covered. (Tr. 117). During the winter, no one used water in the plant and the area was not damp or wet. (Tr. 118). Haas did not believe that a person could be electrocuted by the cord. *Id.* Haas admitted that miners used the cord during the winter while the plant was "closed." (Tr. 149).

Roger Danielson testified that about 1/8 inch of insulation was exposed on the extension cord, but that there was no chance of a fatal injury as a result. (Tr. 155-56). He also testified that when the plant was not producing, the conditions were dry. (Tr. 156).

b. Discussion and Analysis

I find that Citation 6588807 was a violation of section 56.12004 because the extension cord was an electrical conductor that was not protected from mechanical damage adjacent to the female plug. The testimony of the witnesses and the photos show that the outer insulation of the cited extension cord did not cover the inner conductors. (Ex. G-16). The fact that the outer jacket on the electrical cord did not protect the inner conductors near the plug exposed the extension cord to further mechanical damage at that location, which is a violation of section 56.12004. All of the witnesses testified that the cord was routinely used. If the inner conductors suffered mechanical damage during use and the copper wires became exposed, the extension cord would pose a shock hazard to miners. It is well established that shock hazards can be fatal to miners regardless of the conditions and dampness of the mine. *See Carmeuse Lime and Stone*, 33 FMSHRC 1654, 1663 (July 2011) (ALJ); *Nelson Brothers Quarries*, 24 FMSHRC 167, 170 (Feb. 2002) (ALJ); *United Nuclear – Homestake Partners, Now Homestake Mining Company*, 3 FMSHRC 1552, 1559 (June 1981) (ALJ). Although the inspector determined that an injury was unlikely, it was still possible that a miner could have been injured and such an injury could have fatal consequences. *See Nelson Quarries, Inc.*, 30 FMSHRC 443, 446 (May 2008) (ALJ). I also find that the violation was the result of Respondent's moderate negligence because Respondent should have known of the violation. I **AFFIRM** Citation 6588807, as written by the inspector. A penalty of \$100.00 is appropriate for this violation.

Citation No. 6588808

On March 22, 2011, Inspector Roberts issued Citation No. 8588808 under section 104(a) of the Mine Act for an alleged violation of 30 C.F.R. § 56.14109(a). The citation alleges the following:

The emergency stop cord for the plant feed conveyor is not located where the conveyor could be deactivated if a miner fell into or onto the conveyor. At the tail end of the conveyor where the adjacent elevated walkway is accessed there is an opening of about 30' where a person could fall on or against the conveyor. There are a few rocks on the walkway. This condition exposes miners to entanglement and fall hazards.

(Ex. G-7). Inspector Roberts determined that a fatal accident was reasonably likely to occur, that the violation was S&S, that one person would be affected, and that the violation was the result of Respondent's low negligence. The safety standard provides, in part, "[u]nguarded conveyors next to the travelways shall be equipped with emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor." The Secretary proposed a penalty of \$127.00 for this alleged violation.

a. Summary of Testimony

Inspector Roberts issued Citation 6588808 on March 22, 2011, for a violation of section 56.14109(a). (Tr. 31). Inspector Roberts testified that an emergency stop cord was not located where it could be utilized if a miner fell onto or against the conveyor at the tail end because there was a gap of 30 inches in the stop cord. (Tr. 31-33; Ex. G-9). Inspector Roberts believed that the gap in the stop cord would not protect a falling miner and that there was slack in the stop cord that made it difficult to use. (Tr. 34, 105). The stop cord was tied off to the support structure at the tail end of the belt and that support structure was below the plane of the belt. (Tr. 106; Ex. G-9). Inspector Roberts also admitted that the regulation does not require that the cord cover the entirety of the conveyor. (Tr. 70-71).

Inspector Roberts determined that the violation was S&S. (Tr. 42). Based upon the wet conditions, the daily access by miners, and the amount of time that miners travel through the area, the inspector believed that an injury was reasonably likely to occur as a result of this violation. (Tr. 40, 43). Although the power was locked-out, the inspector believed that the equipment would have been energized and used in the condition that he found it in. (Tr. 43). Inspector Roberts also believed that an injury was likely to be fatal because a miner could become entangled in a moving belt. *Id.* The conveyor moved from the left to right, meaning that any miner who fell onto the conveyor through the gap in the stop cord would move toward the stop cord and not toward the tail pulley. (Tr. 90).

Although the violation was obvious to Inspector Roberts, he determined that the violation was the result of Respondent's low negligence because he believed that the hazard had existed during previous MSHA inspections but was not mentioned to Respondent. (Tr. 41). Although

the stop cord was not cited as a violation by any other inspector, Inspector Roberts believes that the cord had not always been in violation of section 56.14109(a). (Tr. 65-66; Ex. R-8). The inspector also testified that due to the size of this mine, it would be possible for other inspectors to overlook the violation. (Tr. 103).

Andrew Haas testified that based upon his conversations with other employees, he believed that the stop cord was in the same condition since 2000. (Tr. 119-20). He was sure that it had not changed since he began working for Respondent in 2007 and that other inspectors had seen it without citing it. *Id.* He also testified that the stop cord worked, that no one tried to use it during the inspection because the conveyor was locked-out, and that no one pushed or pulled on the cord during the inspection. (Tr. 122-23). Without the motor running, Haas testified that there would be no way to tell if the cord was working or not. (Tr. 125).

Haas also testified that he measured the opening to the conveyor and it was 24 inches wide and not 30. (Tr. 132; Ex. R-6). Haas thought it unlikely that a person could get onto the conveyor belt and he felt that it was impossible to do so without tripping the stop cord. (Tr. 134-35). He also testified that only one person would enter the area every two to three weeks to grease the fittings and that the conveyor would be locked and tagged-out when anyone greased them. (Tr. 142). There was no chance of injury. (Tr. 147).

Roger Danielson testified that he accompanied Inspector Roberts and Andrew Haas on the March 22, 2011, inspection. (Tr. 151-52). Danielson testified that he helped set-up the conveyor and the stop-cord in 2000; no changes were made to the conveyor or stop cord between the set-up and the time of the inspection. (Tr. 157-59). Danielson testified that between 2000 and March 2011 he accompanied inspectors during inspections and none ever cited or mentioned the stop cord. (Tr. 159-60). About once a month Danielson tested the stop cord to insure that it worked and also made sure that the cord was tight enough to easily activate. (Tr. 161, 164). Inspector Roberts did not test the effectiveness of the cord because there was no way to do so with the power off. (Tr. 165). Danielson also testified that if a person were to start falling toward the conveyor belt, he could easily use the cord to stop the conveyor. (Tr. 168-69).

Kevin Goembel, who has worked for Respondent since 1978 and is currently the safety director, testified that the stop cord had not changed since its construction in 2000. (Tr. 175-77). Goembel had accompanied inspectors who found no problems with and made no comments concerning the stop cord. (Tr. 176, 181). Goembel testified that anyone who fell against the conveyor could use the stop cord. (Tr. 178, 181). He also did not believe that a person could fall onto the conveyor without contacting the stop cord. (Tr. 181-82, 185). During production, no one would approach the stop cord unless the conveyor was locked out. (Tr. 183).

b. Discussion and Analysis

I find that Respondent did not violate section 56.14109(a) because a person falling on or near the conveyor could readily deactivate the conveyor by using the stop cord. The photographs are particularly instructive in this case. (Ex. G-9, R-6). The stop cord ran through eyelets supported at the top of metal posts. For most of its length, the stop cord fully complied with the safety standard. At the tail end of the conveyor belt, the stop cord was angled down at about a 45

degree angle and was attached to a support member that was below and parallel to the belt. The gap created was about 24 inches when measured between the guarding at the tail pulley and the point where the cord dips below the belt.

Section 56.14109(a) requires that a stop cord be located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor. In *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 235 (Feb. 1997), the Commission held that the Secretary's interpretation of the safety standard to require that stop cords be located above the conveyor so that a falling person's arm or body can hit the stop cord on the way down during the fall was consistent with the language of the standard. A falling miner should not have to consciously look for the cord; it should be located so that he can easily hit or grab it. Here the stop cord was suspended above the conveyor to make it easier to pull and I credit Danielson's testimony that the cord was tight enough to be easily activated. Although there was an area at the tail end of the conveyor where the cord dipped below the belt, the opening was small enough that a miner would either hit the stop cord during the fall or could easily grab it without having to think about it. MSHA's Program Policy Manual states that "MSHA expects that a miner would be able to readily reach the emergency stop device to activate it . . ." (Ex. G-11). The preponderance of the evidence establishes that the stop cord at the Yankton Mine could be easily reached by a falling or stumbling miner in an emergency situation. I credit Haas' testimony that the opening was 24 inches based upon the photograph that he took. (Ex. R-6). Even if the opening were 30 inches wide, it would still allow a person falling to utilize the stop cord. Indeed, it is extremely likely that a falling miner's body or arm would hit the stop cord without the miner having to grab it with his hand.

The fact that since the year 2000 numerous inspectors have observed but not cited or commented upon the set-up of this stop cord also supports the argument that the stop cord did not violate section 56.14109(a). I find that the cited stop cord did not pose a hazard to the health and safety of miners and Respondent did not violate section 56.14109(a). Consequently, Citation 6588808 is hereby **VACATED**.

II. ORDER

For the reasons set forth above, Citation No. 6588808 is hereby **VACATED** and Citation Nos. 6588807 and 6588806 are **AFFIRMED**. The Concrete Materials division of Sweetman Construction Co. is **ORDERED TO PAY** the Secretary of Labor the sum of \$600.00 within 30 days of the date of this decision.¹

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

¹ 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.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 28, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2012-397
Petitioner	:	A.C. No. 44-06864-286093-01
	:	
v.	:	
	:	
DICKENSON-RUSSELL COAL	:	Mine: Cherokee Mine
COMPANY, LLC,	:	
Respondent	:	

ORDER GRANTING MOTION TO WITHDRAW CONTEST
ORDER TO PAY

Before: Judge McCarthy

This case is before me upon a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On February 21, 2013, I issued an Order Rejecting Amended Settlement Motion and Order for Certification of Interlocutory Review. In this order, I certified two questions for interlocutory review by the Commission: (1) whether the Secretary can remove a significant and substantial designation without leave of the Commission in settlement of a proposed assessment of civil penalty that has been contested, and (2) whether the Mine Act authorizes Commission review of non-pecuniary settlement provisions. On March 4, 2013, the Commission granted review of the first issue and ordered that the parties file response briefs in thirty days.

On March 11, 2013, Respondent filed a Motion to Withdraw Contest of the single violation involved in this matter. In its motion, Dickenson-Russell states that it has paid the civil penalty associated with Citation No. 8190957, and that it withdraws its notice of contest of the citation. On March 27, 2013, the Commission issued an order vacating the order directing interlocutory review and remanded this case to the undersigned for further proceedings, including a determination of whether this proceeding is moot.

Upon review of the record and Respondent’s withdrawal of contest, I find that the current proceeding is moot.¹ Given Respondent’s withdrawal of contest, this matter reverts back to the *status quo ante* prior to said contest. Accordingly, the citation and proposed penalty of \$971.00

¹ I find no exceptions to the mootness doctrine at issue.

are affirmed as originally proposed in the Secretary's Petition for Assessment of Civil Penalty. Citation No 8190957 shall be recorded as "reasonably likely" to cause an injury or illness and that such injury would reasonably be expected to result in "lost workdays or restricted duty" to three miners. The violative condition remains classified as the result of "moderate" negligence, and the S&S designation remains intact.

Accordingly, the Motion to Withdraw Contest is **GRANTED** and the operator is **ORDERED** to pay \$971.00 within thirty days of the date of this decision, if Respondent has not done so already.²

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

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² Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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March 29, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2010-703
Petitioner,	:	A.C. No. 40-03333-215887-01
	:	
v.	:	
	:	
WILCOAL MINING, INC.,	:	Mine: Tri State One
Respondent.	:	

DECISION

Appearances: LaTonya Todd, Esq., Office of the Solicitor, Department of Labor, Nashville, Tennessee, for Petitioner.

C. Bishop Johnson, Esq., Cawood & Johnson, PLLC, Pineville, Kentucky, for Respondent.

Before: Judge Andrews

This case is before the court upon petition for assessment of a civil penalty filed by the Secretary of Labor (“the Secretary”) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 et seq. (the “Act”) charging Wilcoal Mining, Inc. (“Wilcoal” or “Respondent”) with a violation of 30 C.F.R. § 75.202(b) and seeking civil penalties in the Special Assessment amount of \$51,900.00. The citation is a Section 104(d)(1) action. Section 104(d)(1) of the Act provides, in pertinent part:

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

with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act...

30 U.S.C. § 814

The citation at issue is the result of an admitted violation of the following safety standard:

Protection from falls of roof, face and ribs.

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

(b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

30 C.F.R. § 75.202.

A hearing was held on September 28, 2012 in Manchester, Kentucky, at which testimony and documentary evidence was presented. After the hearing the parties submitted Post Hearing Briefs and Reply Briefs. The issue before the court is the appropriate penalty to be assessed for the violation.

PRELIMINARY MATTER

Motions to Amend

During the course of the hearing, Respondent moved to amend the citation to dismiss the designation as Significant and Substantial and, effectively in the alternative, to amend the citation to dismiss the classification as Unwarrantable Failure. Respondent cites to numerous cases in support of its proposition that, upon resting her case in chief, the Secretary had not produced sufficient evidence to allow for finding that either of these designations. These motions are denied. The questions of whether a violation is Significant and Substantial, as well as the result of an Unwarrantable Failure are matters for decision and will be discussed below.

JOINT STIPULATIONS

The parties agreed at the hearing to the following stipulations:

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The presiding Administrative Law Judge has authority to hear this case and to issue a decision.
3. Respondent operated Tri-State One Mine I.D. No. 40-03333 at the time of the cited condition at issue in this cause.
4. Tri-State One Mine I.D. No. 40-03333 has engaged in interstate commerce.

5. The Tri State One Mine I.D. No. 40-03333 produced 93,768 tons of coal in 2010 and worked 59,531 hours in 2010.
6. The citation was written by the inspector during an EO1 inspection.
7. Citation No. 8335429, identified as the Secretary's Exhibit 1, is complete, authentic and admissible.
8. The notes of the citing Inspector, James Lundy, identified as the Secretary's Exhibit 2, are complete, authentic and admissible.
9. Wilcoal Mining, Inc. stipulates to the fact of a violation of the regulation at issue, 30 C.F.R. § 75.202(b).
10. The violation cited in Citation No. 8335429 only affected a single individual. Tr. 9.

THE CITATION

On February 9, 2010 at 0845 hours MSHA Inspector James Lundy ("Inspector Lundy" or "Lundy") issued 104(d)(1) Citation No. 8335429 to Foreman Eli Wilson Jr. ("Foreman Wilson" or "Wilson") at Respondent's Tri-State One ("Tri-State") mine. Tri-State is an underground coal mine, which was also being inspected pursuant to an application for a thirty foot extended cut. Tr. 22.¹ The Condition or Practice was set forth as follows:

A centerline has been painted on the mine roof 48 inches beyond the last row of permanent roof supports in the number 1 entry. The last row of roof bolts measures 8 feet from the coal face. These measurements are obtained using a standard steel rule. A set of tracks (footprints) indicate also that a miner has gone beyond the last row of supports as these tracks are visible on the mine floor directly under the paint marked centerline on the roof. Historically advancing beyond roof supports has been a major cause of mine fatalities throughout the industry. A mine foreman has painted the centerline onto the roof. This action shows more than ordinary neglect and is an unwarrantable failure to comply with a mandatory safety standard. Ex. S-1.²

The gravity indicated by Inspector Lundy in his citation was Significant and Substantial ("S&S") with injury highly likely and such injury could reasonably be expected to be fatal. One person was affected, and the negligence was high. The violation was determined to be the result of an Unwarrantable Failure ("UWF").

A safety meeting was held with miners and foremen at which the hazards and legalities were discussed, and the citation was terminated at 0850 hours.

SUMMARY OF THE TESTIMONY

Testimony was taken from three individuals: Inspector Lundy, an inspector with the Mine Safety and Health Administration; Foreman Wilson, a day shift Mine Foreman with Wilcoal

¹ "Tr." is a reference to the hearing transcript.

² "Ex. S" refers to the Secretary's exhibits entered at hearing. Respondent did not offer any hearing exhibits.

Mining on the day of the violation, and Darrell Wagner, Sr. (“Superintendent Wagner” or “Wagner”), a Superintendent at Wilcoal Mining, who was not present at the time of the violation. Lonnie Mink (“Foreman Mink” or “Mink”), the Tri-State foreman alleged to have committed the violation at issue here, was unable to testify as he had passed away in the months prior to trial.

A. James Lundy

Inspector Lundy is a health specialist and accident investigator with the Mine Safety and Health Administration (“MSHA”). Tr. 18. Prior to working for MSHA, Lundy worked in the mining industry for more than twenty-two years. Tr. 20. During that time, he worked for fifteen years in a safety-related position. Tr. 20-21.

On February 9, 2010 Inspector Lundy arrived at the Tri-State Mine at 6:35 A.M. Tr. 22. He was at the mine to perform the health-related portion of an E01 inspection, specifically a dust inspection and a noise level survey. *Id.* The mine operator had applied for an “extended cut” also called an “extended deep cut.” Tr. 54. Such application requires an inspection of mine conditions, the mine’s roof control plan, and of the ventilation systems and plans in place in the mine. Tr. 54-55. Prior to going underground, Lundy inspected the mine’s safety inspection logs. Tr. 26. When he went underground, he was accompanied by Foreman Wilson, the Foreman on duty at the time. Tr. 25.

Upon reaching the area of the mine he was to inspect, Inspector Lundy quickly noticed several instances of “short bolting,” described as areas of the mine where the roof bolts did not reach to within four feet of the mine face, as prescribed by the mine’s roof control plan. Tr. 26, Ex. S-2. Lundy testified he observed that in three places – the No. 1, No. 4, and No. 5 entries – and that the roof bolting reached only to within eight feet, eight feet, and seven and a half feet from the face, respectively. *Id.* Lundy testified that he believed these sections were unbolted for about ten hours. Tr. 53. The violation was not noted in the pre-shift inspection report for the shift following when the roof bolting should have occurred. Tr. 53-54. Ultimately, Lundy issued a citation for these instances of short bolting, but these violations are not at issue in this case. Tr. 30.³ He testified that the two citations are “intertwined to a degree” *Id.*

When he made a closer inspection of the No. 1 entry, Inspector Lundy noticed that a centerline had been painted down a portion of the unbolted, unsupported roof. Tr. 31. The area at the No. 1 entry had been “dangered off” by the operator; red flags hung from the ceiling and were anchored on the roof bolts themselves. Tr. 44-45. Using a sturdy, steel tape measurer, Lundy determined that the centerline had been painted a total of four feet past the last set of roof bolts, and eight feet past the second to last set of roof bolts. Tr. 31, 40, Ex. S-3. This later fact was emphasized by Lundy when he testified that the mine’s roof control plan required that a person not go past the second set of roof bolts from the mine face, and that the roof control plan defines “unsupported roof” as any roof between the second set of roof bolts outby and the working surface. Tr. 40; Ex. S-4

³ Citation No. 8335433 was issued on February 9, 2010, for a violation of 30 C.F.R. § 75.220(a)(1), not 30 C.F.R. § 75.202(b). Ex. S-5.

During his testimony, Inspector Lundy explained what a centerline is and how it is treated in common mining practice, but he was unwilling to testify as to the personal practices of the individual responsible for the violation at issue in this case. Tr. 88-91, 69. A “centerline” is a line painted the length of a coal seam, which is used by the continuous miner operator to ensure that the machine does not move too far left or right, which could damage the coal pillars intentionally being left to prevent roof collapse. Tr. 88-91. The centerline is based on a surveyed line, made on the surface by engineers, that is translated into the underground mine workings. *Id.* These markings are then used to specify the location of two “site rods,” which a mine worker uses to determine where to paint the center line by standing in the mine entry, looking outby from the mine face, and shifting his position until the further of the two posts is obscured by the nearer post. *Id.* This tells the mine worker where to paint a centerline dot. *Id.* Once the dots have been painted, the mine worker will then connect these dots to make the centerline. *Id.* The continuous miner operator will align one side of the machine with the centerline and this will instruct his movements so that he does not accidentally impinge on the structural integrity of the coal pillars on either side of the mine entry. *Id.* Lundy testified that when painting a center line, it need not extend all the way to the mine face. Tr. 83-84.

In the No. 1 entry, Inspector Lundy noticed a set of footprints beneath the centerline, also extending under the unsupported roof. Tr. 31, Ex. S-3 There appeared to be a total of four or five footprints, which Lundy interpreted to mean that whoever had painted the centerline had been looking at the line, rather than at the area of bolted roof, had passed beyond the appropriate stopping point, and had turned and left the area prior to painting all the way to the working face. Tr. 44.

When asked whether he was able to immediately determine who had painted the centerline, Inspector Lundy testified that, by the end of the day, he had spoken with both Foreman Wilson, who denied painting the centerline, and Foreman Mink, who confessed to performing the painting. Tr. 41. Lundy elaborated that Mink told him he did not actually go beyond the last set of bolts; rather, he claimed to have painted the line by standing under supported roof, and then leaning out with his arm to paint the rest of the line, as completed. *Id.* Lundy also testified that Mink said he did not think that this was a “big deal.” *Id.* Lundy added he did not believe Mink’s statements with regard to how the centerline was painted, and pointed out what he believed to be two inconsistencies in the testimony: that “leaning out” does not explain the footprints in the dust, and that he was unaware of any industry practice that comported with the idea of “leaning out” to paint a centerline. Tr. 42-43.

Inspector Lundy has known Foreman Mink for thirty-five years or more, the two having worked together around 1978 or 1979. Tr. 46. Mr. Mink was an experienced miner even at that time. *Id.* Mink was trained in the roof control plan for the Tri-State mine, as is commensurate with his position as a foreman. Tr. 46-47. Also, as section foreman, Mink was responsible for the roof bolting instructions – including the instructions for entries No. 1, No. 4, and No. 5 – given to the roof bolting teams during the shift when the violation occurred. Tr. 47-48.

When Inspector Lundy issued his citation, he marked it as both S&S and UWF. At the time he issued the citation, Lundy was aware there had been past violations of roof and rib support. Tr. 57-58. His reasoning for finding that the violation was S&S was based on his

observation that an individual had been exposed to unsupported and unexamined roof, that if the violation had been allowed to continue, it would increase the risk of danger or harm, and that the most likely result of an accident under the violative conditions would be the death of the miner. Tr. 48, 51-52. Lundy said that he considered there to have been a high degree of negligence on the part of the operator because Foreman Mink was an agent of the operator (via his role as foreman), because Mink was responsible for setting all of the work directives in that section of the mine, and because Mink was responsible for “setting the tone” for operation in that section of the mine. Tr. 52-53. Lundy justified the Unwarrantable Failure designation, citing what he considered a “serious lack of reasonable care” by Mink in going under the unsupported section of roof. Tr. 55. Lundy also said he did not believe it was a mistake, claiming that if it had been a mistake, he would expect to have seen something written in the mine’s log, or a barrier placed in the mine to prevent that type of accident occurring again, or some other action that would have helped indicate that there was a safety issue. Tr. 56. Lundy did not have any insight into the actual occurrence of the violation, beyond what he was able to intuit from the available evidence, but during testimony he said “I feel like it was intentional.” *Id.*

When asked whether he believed that every violation of 30 C.F.R. 75.202(b) was S&S, Inspector Lundy replied that, in thirty years, he had never seen one that was not so designated. Tr. 84. When pressed, he added that he believed that all such violations should be considered S&S. *Id.*

B. Eli Wilson Jr.

Foreman Wilson accompanied Inspector Lundy on his inspection of the Tri-State Mine. Tr. 25, 99. Since December 2009, Wilson had been a day shift mine foreman at the Tri-State Mine. Tr. 97. As a foreman, his responsibilities included taking air readings, performing gas checks, directing for the cleaning and dusting of specific areas, instructing the continuous miner operator where to cut, and instructing the roof bolting team where to install roof bolts. Tr. 98. He was trained on the roof control plan in effect on the day that the violation occurred. Tr. 97. This training occurred approximately five months before the date of the citation Tr. 103. Wilson testified that employees are only trained in the roof control plan on their first day of employment, when there is a change to the roof control plan, and at the employee’s “annual refresher.” Tr. 104. He testified that, according to this roof control plan, no one is allowed to travel under unsupported roof. Tr. 97. Further, anyone traveling under unsupported roof is to be terminated. Tr. 99.

Upon Inspector Lundy’s discovery of the violative conditions, Foreman Wilson joined in the examination. Tr. 99-100. Wilson noted both a centerline and a footprint, but he could not testify to how many prints he saw beneath the unbolted section of roof. Tr. 100-102. Wilson testified that there were no notations in the pre-shift inspection reports relating to the unbolted roof conditions. Tr. 100. Wilson only learned of Foreman Mink’s involvement with the painting of the centerline upon leaving the mine for the day, when he was provided the information by Inspector Lundy. Tr. 102.

Foreman Wilson participated in the remediation of the violative condition. Tr. 102. He said he was unaware of any history of roof falls in this mine, and that previous test holes drilled

into the ceiling to test the stability of the overburden did not show any significant cracks Tr. 104, 107. He further testified that there does not have to be a history of roof falls in an area for a roof fall to occur in that area. Tr. 106. When asked whether visual inspection of the unsupported top was likely to reveal any helpful information, he offered that there may be some visible cracks, but unless there is a more comprehensive way of determining how the strata above the unsupported roof is composed, it is not possible to determine whether there is cracking above the roof. Tr. 105-106.

C. Darrell Wagner, Sr.

Superintendent Wagner was employed as a superintendent at Tri-State on the day of the violation, but he was not actually at work that day. Tr. 123-4. He has experience in the mining industry beginning in 1977 and continued to the day of his testimony. Tr. 116. During his testimony, Wagner offered an explanation of a foreman's daily duties in the Tri-State mine: the operations are described as a "cycle," with the movement of cutting and bolting teams moving in a continuous motion throughout the mine, with the former following the latter. Tr. 136-37. In that context, the mine foreman's responsibility is not to tell the bolting team where and how much to bolt, but to facilitate the safe flow of this "cycle." Tr. 137.

Based on his knowledge of the Tri-State Mine, Superintendent Wagner testified that during the normal course of operation in the mine, the final rows of roof bolts would have been installed as per the roof control plan prior to resuming continuous miner operation in the No. 1 entry. Tr. 118. Wagner said that he had not noticed any problems with the roof in the No. 1 entry, and neither was he aware of any problems with roof collapses in the mine previously. Tr. 119, 118. Wagner testified that the area probably had been "dangered off," but he did not immediately inspect the area after talking with Foreman Mink. He was also aware of situations where air-flow in a mine can cause the ribbons hanging from the roof to become loose and dislodge themselves. Tr. 130-31. Wagner expressed some confusion regarding the cutting of the No. 1 entry, explaining that he was not sure whether it was "short cut" or "short bolted." Tr. 138. He explained that when an area is "short cut," it is only cut eight feet, rather than the standard twenty, and shared his belief that this was done by foremen who are worried about making it appear as though they have accomplished more during their shift than has actually occurred. Tr. 138-39.

Superintendent Wagner testified that Foreman Mink admitted to making the center line, but not to going under unsupported roof, that Mink said he reached out to make the mark. Tr. 122, 130. Because the mine advances daily, and because he was not there on that day, Wagner did not inspect to see whether or not footprints were apparent on the floor beneath the centerline. Tr. 124. If there had been what Wagner considered to be definitive proof that the violation was an intentional act, beyond what was in Inspector Lundy's citation, he would have discharged Mink for working beneath very dangerous, unsupported roof. Tr. 125-26, 133. Wagner was clear in his testimony that he believed Mink's painting of the centerline was an accident because, he further speculated, had the act been intentional, the line would have run all the way to and down the face, rather than reaching an arbitrary point in the ceiling and ending there. Tr. 134, 140.

During his testimony, Superintendent Wagner contradicted the opinion of Foreman Wilson with regard to the value of visual inspections; he testified that with knowledge of the history of a mine's roof, and a visual inspection for cracks, one can reasonably determine whether an unsupported roof is likely to be safe from roof falls. Tr. 126-127.

CONTENTIONS OF THE PARTIES

Respondent argues that the citation is valid and accurate only insofar as it relates to the fact of the violation. Respondent contends that the violation was not S&S, or, in the alternative, if the violation were found to be S&S, that it was not the result of an UWF. Moreover, Respondent asserts that the size of the penalty as issued is inappropriate, since it is the result of a Special Assessment pursuant to 30 C.F.R. § 100.5, a program which it alleges creates a violation of Respondent's right to Due Process and is a violation of the Eighth Amendment prohibition on Excessive Fines.

The Secretary maintains that the citation as issued is valid and accurate, that the violation was S&S, and was the result of an UWF to follow a mandatory safety standard. It is argued that this violation was intertwined with the citation issued for short bolting, and that the work beyond the last row of bolts was deliberate and intentional and demonstrates at the minimum a serious lack of reasonable care. Further, the Secretary contends that the size of the civil penalty is appropriate, in light of the gravity of the violation. The Secretary also contends that there is no violation of Due Process since there is notice by regulation of the potential for penalties to be assessed, and the fine in this case cannot be found excessive since it is less than the maximum established by law.

ANALYSIS AND CONCLUSIONS

The facts and even speculation provided through testimony at trial do reveal much about the ordinary operation of a mine with respect to the centerline and its function in longwall mine operations. Inspector Lundy testified about the process of painting a centerline. Survey stations that resemble car keys are driven into the mine roof along a surveyed line every 200 feet. Reflective sight rods hang from the survey station "keys". A Foreman looking outby down the entry aligns the rods until one vanishes and he paints a mark on the roof at that spot, indicating the center of the workplace. Tr. 42, 43, 89, 90. Superintendent Wagner also described the process of painting a centerline as looking at the sight rods, painting dots on the roof, connecting the dots, and repeating this sequence typically going all the way to the face and then painting down the face. Tr. 119, 120, 132, 136, 137.

Although Inspector Lundy testified that a centerline need not extend to the face, he also admitted that it had been his practice and was *common* practice to paint to the face. Tr. 69, 83-84. It is easily understood why a visible line to and down the face would be a particularly helpful guide to the continuous miner operator to ensure proper positioning of the machine for the next cut into the coal seam. This is because properly positioning the cut affects the amount of pillar that must be left for roof support in order to comply with the mine's plan. I find the Lundy's testimony that the centerline "need not" extend to the face too vague and unsupported to be

accorded significant probative value. It is more credible that the centerline should have and would have been painted to the face, and perhaps from roof down the face to the floor.

The approved roof control plan for Tri-State does show that roof bolts are to be installed every four feet down an entry with the last row four feet from the face. Ex. S-4, pp. 8, 9. Further, all persons must position themselves no closer than the second “full row” of installed roof bolts outby the face, or eight feet from the face. Ex. S-4, p. 7. At the time of the inspection, the row of bolts that should have been four feet from the face was missing. That the final row of bolts had not been placed after mining paused in entry number one, or other areas, does not establish that Foreman Mink knew of this violation of the mine’s roof control plan when painting the centerline. I reject the speculative opinion that the instant citation and roof bolting violation were “intertwined”.

Respondent, in its Post Hearing Brief, agrees that the footprints were left by Foreman Mink when he advanced beyond the last row of bolts while painting the centerline. Respondent’s Post Hearing Brief, P. 2. Both Inspector Lundy and Foreman Wilson observed the short bolting, the painted centerline, the footprints, and the danger flag at the last row of permanent supports. Tr. 31, 32, 44, 68, 100, 101. Lundy observed a toe print pointing outby, with the heel toward the face, but also saw prints with the toes going forward. Tr. 44, 66, 67. Based on the descriptions of how a centerline is painted, it would be reasonable to conclude a person would face in both directions while accomplishing this task by painting marks or dots while walking backwards and painting the connecting line walking forward. The more important question is whether Mink saw the flag and discovered the missing row of bolts *before* painting on the unsupported roof.

Because Foreman Mink was not available to provide testimony, nothing could be presented with respect to first-hand or personal knowledge of the circumstances surrounding his actions at the time he actually painted the centerline, including any awareness of short bolting. All witness testimony is limited to the discovery of the violation and hearsay about conversations with Mink. As near as can be gleaned from the testimony presented at trial, prior to his death Mink admitted to painting the centerline, but denied having walked beyond the last row of bolts to do so. Inspector Lundy testified that Mink admitted painting the center line but claimed he did not go beyond the last set of bolts; rather, he leaned out to paint the rest of the line. Tr. 41. Similarly, Superintendent Wagner testified that Mink told him that he painted the center line, though again stating that he reached out to paint the line and did not walk under the unsupported roof. Tr. 122, 130. Apparently, Mink also voiced his opinion that it was not a “big deal”. Tr. 41.

The “reaching out” excuse attributed to Foreman Mink is not supported on this record. Inspector Lundy pointed out that this would not be consistent with footprints directly under the centerline, eight feet past the second full row of bolts outby the face Tr. 40, 44. Also, he believed a roof height of seven feet would not allow leaning out at arm’s length from the last bolts to make a four foot line, and even in attempting this Mink would be looking inby towards the face, the wrong direction for alignment since the sight rods are located outby down the entry. Tr. 42-44. Further, Foreman Wilson essentially corroborated Lundy’s testimony, also noting a footprint, although not certain about the number present under the centerline. Tr. 100, 101. In addition to the stipulation of the fact of the violation, I specifically find that Foreman Mink, deceased at time of trial, violated 30 C.F.R. 75.202(b) by walking under unsupported roof

performing the work of painting a centerline in the number one entry of the Tri-State One coal mine.

The Secretary contends that the violation was deliberate or intentional. Respondent believes the act was accidental and not intentional. There were apparently no witnesses to the centerline painting. Inspector Lundy testified that the violation was intentional, opining that Foreman Mink knowingly went beyond the danger flag and the bolts but did not report the hazard or barricade the area. Tr. 56, 78. But Lundy also testified Mink stopped painting “when he found out that he had not exercised reasonable care in positioning himself.” Tr. 76. This testimony is found to be inconsistent, on the one hand suggesting knowledge of the circumstances *before* advancing to four feet from the face, and on the other hand suggesting discovery of his compromised position *after* walking under unsupported roof. Therefore, the opinion that Mink formulated intent to work under the unsupported roof is not credible. While it is true Mink had to go past the flag, this does not mean that he saw it, as he was most likely concentrating on marking a correct centerline. Similarly, he was most likely unaware of the missing row of bolts, until he advanced to that spot and discovered he was under unsupported roof.

When attempting to characterize the act leading to the citation at issue, I find the testimony of Superintendent Wagner to be more credible. Wagner noted that Foreman Mink stopped painting after four feet, opining that Mink had seen he was in by the last bolts and realized he had made a mistake. Tr. 133, 135, 137. Wagner believed it was an accident, because if deliberate Mink would have painted to and down the face. Tr. 134, 140. Although Inspector Lundy testified to his belief that the act was intentional, I note that if a centerline were painted into an unprotected area by a Foreman unconcerned with personal safety, it would make sense to do so only if painted all the way to the face as a proper guide to the continuous miner operator. Wagner also testified that this was a one time occurrence, not something that was practiced at the mine. Tr. 134, 135. There is nothing in the record establishing this type of violation as a regular or recurring practice at Tri-State. Accordingly, the better view is that Mink’s act, although a violation of the safety standard cited, was nevertheless an inadvertent or careless mistake.

A. Whether the violation was Significant and Substantial

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

Respondent contends that Inspector Lundy’s classification of the violation of 30 C.F.R. 75.202(b) as S&S should not be upheld because the Secretary has failed to show that the violation meets the third requirement of the “*Mathies* test.” The *Mathies* test requires that, in order to uphold a designation of a violation as S&S, the Secretary must show (1) the underlying violation of a mandatory health or 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 (Jan. 1984). The violation is conceded and the second element is met because there was a measure of danger contributed to when the Foreman walked beyond the last row of bolts and painted a centerline on unsupported roof. Respondent does agree that an injury due to roof collapse would be of a reasonably serious nature, and the fourth element is also met. Tr. 13.

Respondent's argument is that the Secretary failed to show the reasonable likelihood of an injury based on the hazard because there was no injury and no history of mine roof collapses in this mine. This approach misses the intention of the third *Mathies* element. "The 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.*, 32 FMSHRC 1257, 1281 (Oct. 2010). "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC 2351 (October 5, 2011). In this instance, the pertinent question is whether there is a reasonable likelihood that going under an unsupported and unexamined roof will result in injury. This is not a novel question. The fact of mine collapse related deaths is hardly speculative. The Commission has already found that, "Mine roofs are inherently dangerous and even good roof can fall without warning." *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984). In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." In this context, Superintendent Wagner testified that working under unsupported roof is unsafe. Tr. 125. Wilson testified that no one is allowed under unsupported roof. Tr. 97. Consequently, I find that there is a reasonable likelihood of injury inherent in traveling and/or working under unsupported roof regardless of a particular mine's history, and consequently conclude that the Secretary has met the burden of showing the designation of the violation as S&S survives the *Mathies* test.

Respondent further maintains that the Secretary is arguing in favor of a presumption that every instance of a violation of 30 C.F.R. § 75.202(b) is a Significant and Substantial violation. However, in her Reply Brief, the Secretary states that she "has presented no such argument," and "has made no such request at trial, nor ... raised this argument in her brief." Secretary's Reply Brief, p.1. Therefore, there is no need to discuss the question of presumptive S&S.

B. Whether the violation was the result of high negligence

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions of practices." *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.* Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* High negligence exists when "[t]he operator knew or should have known of the violative condition or practice,

and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ).

The conduct that led to the instant citation was committed by Foreman Mink, a supervisor, and while he did act alone the negligence is imputable to the operator for the purpose of penalty assessments and UWF determinations. *Nacco Mining Co.*, 3 FMSHRC 848 (Apr. 1981); *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991). Although the mistake of advancing under unsupported roof was a brief and careless act, this cannot be considered a mitigating factor in the determination of negligence. As a Foreman, Mink should have been aware of his surroundings, and should have known there were a danger flag and a missing row of bolts before he continued aligning and painting the centerline. It was incumbent upon him to make sure the task was performed correctly, and by his example the miners under his supervision would do the same. A Foreman must demonstrate safe working processes and procedures to the miners in his charge. Therefore, even if the action here was careless or inadvertent, the determination of high negligence must be sustained.

C. Whether the violation was the result of an Unwarrantable Failure

By its definition, an UWF suggests more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). UWF is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). The Commission has recognized that whether conduct is “aggravated” in the context of UWF is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) (“*Consol*”); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988).

The Commission has also 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 by the judge. *IO Coal Company*, 31 FMSHRC 1346, 1351 (Dec. 2009).

When addressing his reasons for designating the violation as UWF, Inspector Lundy couched much of his answer in his belief that there was a non-negligible degree of intentionality behind the act. However, in this case the only insight into intention must be based on evaluation of the available evidence. Lundy and Superintendent Wagner offer alternate interpretations of the footprints found in the mine. Lundy suggests that they are the result of an intentional act to travel into an unprotected area of the mine, while Superintendent Wagner suggests that there was some human error involved in the activity. I have already found the act was inadvertent or careless, but that such carelessness cannot be a mitigating factor in assigning the degree of negligence. In this context, I further find that the conduct was the result of a serious lack of reasonable care. Of course, whether the conduct was otherwise “aggravated” will hinge on weighing the six factors identified by the Commission and set forth above.

When Inspector Lundy testified that the violative condition existed for ten hours, he must have been referring to the presence of the paint or lack of bolts, rather than the amount of time Foreman Mink was under the unsupported roof. Tr. 87-88. The citation was for traveling or working under unsupported roof, not for paint on the roof, and it is unlikely that Mink was in the compromised position for more than a few seconds to perhaps a minute when he realized a row of bolts was missing. Hence, the length of time the violation existed was probably very brief.

The violative condition was not extensive, but it should be noted that while much has been said about Foreman Mink being four feet beyond the last row of bolts, the mine’s plan specifies, with exceptions not relevant here, that miners may not go beyond the next to last row or second row of bolts outby the face. Tr. 40, 41; Ex. S-4. Therefore the violation was actually to the extent of eight feet beyond where Mink should have stopped painting.

There was no need for the operator to have had prior notice that greater efforts were necessary to keep persons from working under unsupported roof. This is because the danger presented is so well and universally recognized in mining. A reasonably prudent person familiar with the mining industry and the protective purposes of 30 C.F.R. §75.202(b) would recognize and follow the specific prohibition in that safety standard. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); and *BHP Minerals International Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). In addition, traveling under unsupported roof into an unprotected portion of an underground mine entry is something that every miner should know not to do. It is something that all miners at Tri-State are told not to do on their first day. Procedures exist for ensuring that these areas are adequately marked, flagged, or “dangered off”.

In this case the violation was abated quickly, five minutes after the citation was issued and following a safety meeting with miners and foremen.

The centerline paint extending four feet beyond the last row of roof bolts together with visible footprints on the floor under that paint made the violation very obvious. And, the presence of any person under unsupported roof does pose a high degree of danger. Respondent makes much of the apparent lack of history of roof falls at this mine in an attempt to show there was no danger to Foreman Mink working under unbolted roof. But this history, even if correct is not persuasive and indeed, not even relevant. Supervisor Wagner testified that roof “could fall in and kill you.” Tr. 123,126. And Foreman Wilson agreed, testifying that roof falls can occur even

under supported roof. Tr. 106. Further, both testified that working under unsupported roof would call for immediate termination of employment of the offending miner, illustrating just how serious this conduct is regarded. Tr. 99, 123, 125. This testimony not only undermines the argument there was no danger, but also reveals recognition by the operator that such conduct cannot be tolerated. Clearly, the violation posed a high degree of danger.

There was knowledge of the existence of the violation, since Foreman Mink's conduct is imputed to the operator. It was reported that Mink believed painting beyond the last row of bolts was not a "big deal." Tr. 41.

The important factors in this analysis are the high degree of danger, the knowledge of the violation, and that no prior "fair notice" was required for this type of violation. Even if brief, not extensive, and abated in good faith, the UWF determination is supported. *Lion Mining Company*, 19 FMSHRC 1774 (Nov. 1997).

D. Penalty

The authority of Commission administrative law judges to assess civil penalties de novo for violations of the Act is well-established. Section 110(i) of the Act delegates to the Commission and its judges the power to assess all civil penalties provided in the Act. 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Consequently, when an operator notifies the Secretary it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. In assessing civil monetary penalties, the Commission [ALJ] shall consider the following statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the 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).

The penalty here was specially assessed at \$51,900.00. For the following reasons, I do not agree that a special assessment is warranted in this case. First, while the Secretary did present some history of roof support violations under 30 C.F.R. §75.202(a), there is no history of violations of §75.202(b), persons traveling or working under unsupported roof. The testimony to the effect that such conduct is not a regular practice or recurring event at the mine is, therefore, found credible. Further, there is the mine's clearly stated policy of zero tolerance for such conduct with immediate termination as the consequence for not following the universally recognized prohibition. In addition, I have found Foreman Mink's act was inadvertent or careless in nature, and there is no compelling evidence of the formulation of intent to ignore the rule. To the contrary, his statements, reported by others, appear defensive and calculated to avoid the consequence of termination. Since I do not agree with the special assessment, Respondent's Constitutional arguments will not be addressed.

After carefully considering all of the facts presented on this record, I have affirmed the citation as issued. However, I find the special assessment to be inappropriate. Upon weighing and balancing the penalty discussion above with the six statutory penalty criteria, I assess a civil penalty in the amount of \$9,000.00.

ORDER

For the reasons set forth above, the Citation No. 8335429 is **AFFIRMED**, as indicated, with reduction of the penalty. Wilcoal Mining, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$9,000.00 within 30 days of this decision.⁴

"lu"Kenneth R. Andrews
Administrative Law Judge

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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004
TELEPHONE: 202-434-9953 / FAX: 202-434-9949

March 12, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2013-32-M
Petitioner,	:	A.C. No. 41-00009-301873
	:	
	:	Mine: Fairland Plant & Quarries
v.	:	
	:	
	:	
CACTUS CANYON QUARRIES of	:	
TEXAS, INC.,	:	
Respondent.	:	

ORDER GRANTING MOTION TO DISCONTINUE
SIMPLIFIED PROCEEDINGS
NOTICE OF HEARING
RULES FOR HEARING
AND
ORDER DENYING ALL PENDING MOTIONS AND REQUESTS

The Court is in receipt of two motions, one objection and a disclosure, all of which are included in a single submission (“Mot.”) filed by Cactus Canyon Quarries of Texas, Inc. (“Cactus Canyon”). Mot. 1. The submission seeks a number of things, among which are requests to discontinue Simplified Proceedings, to compel full disclosure and to answer “quashed” discovery. In addition, in the submission Cactus Canyon objects to “deficiencies” in disclosures

the Secretary already has made. *Id.* In response the Secretary states that the company's claims are unfounded and that the Secretary is opposed to discontinuing Simplified Proceedings.¹ Ans. 1-2.

Before ruling on the company's motions and requests, it is helpful to review the nature of the case and the reason it was designated for Simplified Proceedings. The case is a civil penalty proceeding arising under sections 105 and 110 of the Mine Act. 30 U.S.C. §§815, 820. The Secretary petitions for the assessment of civil penalties of \$100 each for two alleged violations of mandatory safety standard 30 C.F.R. 56.14107(a), the standard requiring moving machine parts to be guarded.² The Secretary asserts that on August 8, 2012 at the company's Fairland Plant & Quarry, Mac Burris, an inspector for the Secretary's Mine Safety and Health Administration ("MSHA"), found that the primary belt self cleaning tail pulley was not guarded to protect belt cleaners and maintenance workers from the moving parts of the tail roller. Citation No. 8625213. She also asserts that the alleged violation was unlikely to permanently disable one miner, that the alleged violation was not a significant and substantial contribution to a mine safety hazard ("S&S violation") and that the alleged violation was due to the company's moderate negligence. The Secretary further charges that on the same day, the same inspector found that the secondary belt tail pulley was inadequately guarded in violation of section 56.14107(a). Citation No.8624214. When issuing the citation for the allegedly inadequate guard on the secondary belt tail pulley, Inspector Burris made findings essentially identical to those he made for Citation No. 8634213. The inspector kept notes regarding his observations. In addition, photographs of each alleged violative condition were taken.

The Secretary's proposed civil penalty of \$100 for each violation is the minimum penalty the Secretary can propose under the Secretary's penalty regulations. See 30 C.F.R. §§100.3(f); 100.3(g). The company answered the Secretary's penalty petition by challenging the application of the standard to the cited conditions and by contesting the accuracy of the calculations leading to the proposed penalties. The company also served discovery on the Secretary.

¹ The Secretary notes that the company did not confer with the Secretary's representative prior to filing the submission. Ans. 1. The Court, which has searched the company's submission in vain for a statement as to whether the Secretary objects to the company's motions, credits the Secretary's allegation. Counsel for Cactus Canyon and the representative of the Secretary are reminded that Commission Rule 10(d) requires that "[p]rior to filing any motion other than a dispositive motion, **the moving party shall confer or make reasonable efforts to confer with the other [party] and shall state in the motion if any other party opposes or does not oppose the motion.**" 29 C.F.R. §2700.10(d). Counsel and the representative are advised that future motions will not be accepted for filing and will be returned unless there is compliance with the rule.

² Section 56,14107(a) states:

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. 30 C.F.R. §56.14107(a).

After the company answered, the matter was assigned to the Court, and the Secretary's representative moved to designate the case for Simplified Proceedings pursuant to Commission Rule 101.³ 29 C.F.R. §2700.101. The company opposed the designation asserting the representative of the Secretary was trying to avoid discovery. The company also moved to compel the Secretary to answer its previously filed discover. The representative of the Secretary responded that he was not attempting to limit the company's ability to obtain information but that because the case "fit all the requirements of Simplified Proceedings" such a designation would "expedite the exchange of information and limit the scope of a hearing." Sec's Answer to Mot. 1. The Court agreed with the Secretary, and on January 8, 2013 the Court designated the case for Simplified Proceedings. Order 1. The Court directed counsel for Cactus Canyon and the representative of the Secretary to "exchange copies of all documentary information in their possession that support their claims." *Id.*, citing 29 C.F.R. §2700.105(a). The Court further advised the parties that given the fact it had designated the case as a Simplified Proceeding, "discovery other than the documents exchanged by the parties will not be allowed except on the Court's order." *Id.* 2.

On February 26, 2013 the Court received counsel for Cactus Canyon's submission, and on February 27 it received the representative of the Secretary's objections. On March 4, 2013, the Court received an additional filing from counsel for Cactus Canyon titled Response to Secretary's . . . Mis-Statements" in which counsel detailed "misleading statements" made by the representative of the Secretary and in which counsel renewed his motion for the Court to discontinue Simplified Proceedings and to order the representative to respond to Cactus Canyon's discovery. Resp 2.

RULING

It is clear to the Court that counsel's motion to discontinue Simplified Proceedings should be granted. The rules governing Simplified Proceedings were promulgated to help parties fully understand one another's litigation position so they could more easily settle their differences or, failing a settlement, so they could participate in a streamlined, inexpensive trial. For Simplified Proceedings to further these goals, the parties must be willing participants in the process. Where, as here, one party objects and seeks to go beyond the procedures contemplated by the rules – for example by insisting on more discovery than the rules provide – the likelihood of a speedy resolution of the case is diminished to the point where adherence to the rules becomes a hindrance rather than a benefit. For this reason, counsel for Cactus Canyon's motion **IS GRANTED** and Simplified Proceedings **ARE DISCONTINUED** .

The parties are advised that discontinuation of Simplified Proceedings does **NOT** mean that the case may proceed without limitations on trial preparations and on the trial itself. There may be past instances when in a case such as this, parties were allowed to proceed to hearing without such limitations, but at least as far as the Court is concerned, those days are over. The

³ The rule sets out the requirements which a Commission judge must consider when making a Simplified Proceedings designation.

fact is that not enough is involved in some cases to allow parties to fish for every piece of possible evidence no matter how tangential to the issues. Moreover, the Commission has recognized that the right to a due process hearing does not include the right to unrestricted discovery and testimony. Indeed, the Commission noted this when the Simplified Proceedings rules were promulgated. Rule 104(c) provides, “If Simplified Proceedings are discontinued, the Judge may issue such orders as are necessary for an orderly continuation under conventional rules.” And Rule 104(c) harkens back to Commission Rule 56 (29 C.F.R. §2700.56), which allows a judge on his own motion to “limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense.”

The Court again notes the minimal nature of this case – two alleged violations of a single standard bearing virtually identical findings and for which minimal penalties are proposed. It also notes that the issues are primarily factual – did the alleged violations exist and, if so, are the inspector’s gravity and negligence findings appropriate. The Court is hard pressed to imagine a case involving less complicated issues, unless it is a case in which one such violation is alleged. The Court further observes that because a settlement appears unlikely, a hearing may be necessary, but that the nature of the case warrants a streamlined and inexpensive hearing.

Therefore, the Court advises the parties that the case will be called for hearing on **April 30, 2013** in **Austin, Texas**, commencing at **8:30 a.m.** The following rules will apply: Each party will be allowed to present no more than two witnesses on direct examination, unless a party can show cause why more than two are required; each party will be allotted no more than three hours to offer the direct testimony of its witnesses, and each party will be allowed no more than 45 minutes to cross examine a witness; if a witness is called in rebuttal, the witness’s direct testimony will be limited to 20 minutes and cross examination of the witness will be limited to 10 minutes; neither parties may call an expert witness; no depositions or interrogatories are allowed without good cause shown, and outstanding requests for depositions need not be answered nor need presently served interrogatories be answered; by April 5, 2013 the parties shall exchange the names and titles of the witnesses they intend to call⁴] as well as all documentary evidence they intend to offer; by April 5, 2013 copies of witnesses names and copies of all documentary evidence the parties intend to offer shall also be provided to the Court; the failure to identify a witness to the opposing party and to the Court by April 5 (or by April 19 as applicable) and the failure to provide a copy of a document to the opposing party and to the Court by April 5, 2013 means that the proposed witness may not be allowed to testify and the subject document(s) may not be entered into evidence.

The specific hearing site will be provided to the parties at a later date. Any person planning on attending the hearing who requires special accessibility features and/or any auxiliary aids (such as sign language interpreters) must request such features and/ or aids sufficiently in advance of the hearing to allow accommodation, subject to the limitations set forth in 29 C.F.R. §§ 2706.150(a), 2706.160(d).

⁴ Except that if the representative of the Secretary intends to call a miner witness, the name and title of the witness need not be disclosed to counsel for Cactus Canyone until the close of business on Friday, April 19, 2013. 29 C.F.R. §2700.62.

Except for the counsel for Cactus Canyon's motion to discontinue Simplified Proceedings, all other pending motions and requests **ARE DENIED**.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

March 13, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-619
Petitioner	:	A.C. No. 15-02709-139142
	:	
v.	:	Docket No. KENT 2009-168
	:	A.C. No. 15-02709-165287
HIGHLAND MINING COMPANY,	:	
Respondent	:	Highland 9 Mine
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2009-811
ADMINISTRATION (MSHA),	:	A.C. No. 15-02709-177698-A
Petitioner	:	
	:	
v.	:	
MARK A. SHEFFIELD, employed by	:	
HIGHLAND MINING COMPANY,	:	Highland 9 Mine
Respondent	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2009-850
ADMINISTRATION (MSHA),	:	A.C. No. 15-02709-177718-A
Petitioner	:	
	:	
v.	:	Docket No. KENT 2009-851
	:	A.C. No. 15-18771-177738-A
STEVE BOCKHORN, employed by	:	
HIGHLAND MINING COMPANY,	:	
Respondent	:	Highland 9 Mine

ORDER DENYING MOTIONS FOR SUMMARY DECISION

Before: Judge Feldman

These matters are before me based on petitions for assessment of civil penalty filed pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977 (“the Act”). 30 U.S.C. § 815(d), § 820(c). The captioned proceedings are currently scheduled for hearing on **Tuesday, April 9, 2013**.

I. Statement of the Case

The Secretary of Labor (“the Secretary”) and Highland Mining Company (“Highland”) submitted joint motions for partial settlement of Docket Nos. KENT 2008-619 and 2009-168 on August 21, 2012. The two alleged violations remaining in dispute are Citation No. 6692995 in Docket No. KENT 2008-619, and Order No. 8489217 in Docket No. KENT 2009-168.

Citation No. 6692995, issued during an inspection on August 21, 2007, alleges that four cable bolts used to supplement roof control had been cut away with a compressed gas torch to allow passage of a Flexible Conveyor Train. The Secretary alleges that this condition violated section 75.202(a), which requires maintaining structural protection against roof falls, consistent with section 75.213(f), which prohibits removal of permanent roof support where there are indications of structural weakness. As a result of facts which came to light during a subsequent 110(c) investigation, Order No. 8489217 was issued on August 28, 2008. The order alleges that Highland violated section 75.213(c)(2) by not installing temporary supports prior to the removal of the four cable bolts.

Docket Nos. KENT 2009-850 and 2009-851 involve petitions for assessment of civil penalty issued pursuant to section 110(c) of the Act, seeking to impose personal liability for the two alleged violations above against Steve Bockhorn, shift mine foreman at Highland 9 Mine. In Docket No. KENT 2009-811, the Secretary seeks to impose personal liability for the two alleged violations against section foreman Mark Sheffield.

Section 110(c) states:

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

30 U.S.C. § 820(c). An individual is subject to personal liability under section 110(c) if 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.” *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).

These matters were previously stayed on February 10, 2011, pending the Commission’s decision in *Bill Simola*, 32 FMSHRC 539 (Mar. 2012), regarding the applicability of section 110(c) to agents of Limited Liability Corporations (“LLCs”). The Commission has now affirmed that agents of an LLC can be held personally liable for violations committed by the operator. *Id.*

Bockhorn, Sheffield and Highland have each filed a Motion for Summary Decision. Disposition by summary decision is appropriate provided (1) the entire record establishes that there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b). See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). Sheffield has also filed a Motion in Limine.

II. Motion for Summary Decision submitted by Bockhorn

On January 25, 2011, Bockhorn filed a Motion for Summary Decision on grounds that, as an agent of an LLC rather than of a corporate operator, he was not subject to personal liability under section 110(c). As noted above, the Commission has since determined that section 110(c) applies to agents of an LLC. *Simola*, 32 FMSHRC 539. Therefore, the motion must be denied.¹

III. Motion for Summary Decision submitted by Sheffield

In a Motion for Summary Decision filed on January 12, 2011, Sheffield asserts that the Secretary failed to meet her burden of proof regarding Sheffield's involvement in the cutting of the roof bolts, his knowledge of the alleged hazardous roof conditions underlying the section 110(c) charges, or his ability to act on his alleged knowledge of those conditions.

Liability under section 110(c) applies where an agent knowingly authorizes, orders or carries out a violation. 30 U.S.C. § 820(c). Sheffield contends that deposition testimony from the Secretary's two witnesses, the issuing inspector and special investigator, does not demonstrate that Sheffield authorized, ordered or carried out the cutting of the roof bolts, because it does not establish his direct involvement. *Sheffield Mot.*, at 7.

Liability can also be found where an individual in a position to protect employee health and safety fails to act on the basis of information that gives him knowledge or reason to know of a violative condition. *Kenny Richardson, supra*, 3 FMSHRC at 16. Section 75.213(f) prohibits removal of structural support where there are indications that the roof is structurally weak. Sheffield relies on the testimony of the special investigator to establish as undisputed Sheffield's lack of direct knowledge of any structural roof problems at the time the bolts were removed. *Sheffield Mot.*, at 8. Relying on deposition testimony from shift foreman Bockhorn, Sheffield also characterizes as undisputed the fact that Sheffield was not in a position to protect employee health and safety. He contends that Bockhorn made the decision to cut the bolts, and because Bockhorn was his immediate supervisor, Sheffield was not in a position to overrule that decision. *Sheffield Mot.*, at 9.

¹ This assertion is also raised by Sheffield, *Section III, infra.*, and is similarly rejected.

Deposition testimony alone, in the absence of direct and cross-examination at trial, does not resolve questions of disputed material facts. However, even if Sheffield's lack of direct involvement or actual knowledge is accepted, summary judgement is inappropriate. There remain material questions of fact concerning whether there was a structural weakness of which Sheffield, as shift foreman, should have had knowledge. As for Sheffield's ability to act on that information, the presence of an immediate supervisor does not automatically absolve other management personnel from their responsibility to act on information regarding potential hazards. Consequently, Sheffield's motion must be denied, as genuine issues of material fact regarding his potential failure to act remain unresolved.

IV. Motion for Summary Decision submitted by Highland

On February 23, 2011, Highland submitted a Motion for Summary Decision seeking to vacate Order No. 8489217. Highland contends that the order was not issued with reasonable promptness, as it was issued approximately one year after the alleged violative condition at issue. *Highland's Mot.*, at 2. Highland relies on section 104(a) of the Act, which provides:

If, upon inspection or investigation, the Secretary . . . believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. . . . The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

30 U.S.C. § 814(a). In a response filed on January 24, 2013, the Secretary asserts that the intervening section 110(c) investigation constitutes a legitimate reason for delay. *Sec' Resp. to Higland's Mot.*, at 15-16.

As a threshold matter, although citations should be issued in a timely manner, promptness in issuing a citation is not a jurisdictional prerequisite for enforcement. 30 U.S.C. § 814(a). *See also Sec'y v. Twenty Mile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005), *cited in Alex Energy Inc.*, 29 FMSHRC 1098 (Nov. 2007) (finding that processing guidelines are intended to "spur the Secretary to action" rather than function as a jurisdictional limit); *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd* 750 F.2d 1093 (D.C. Cir. 1984) (holding that filing periods are not considered jurisdictional).

Moreover, the Commission has recognized that an investigation subsequent to an inspection may justify a delay in issuing a citation. *See, e.g., Nacco Mining Co.*, 8 FMSHRC 59, 64 (Jan. 1986) (noting there may be times when a citation will be delayed because of a protracted accident investigation or for other legitimate reasons) (citing Senate Report No. 95-181, 95th

Cong., 1st Sess., 30).² Finally, the Secretary contends that even if the delay was unreasonable, Highland suffered no prejudice, because the issuance of related Citation No. 6692995 and Highland's early involvement in the section 110(c) investigation provided Highland with sufficient notice. *Sec's Resp.*, at 17-18.

Highland also contends that the order should be vacated because it was not based on the inspector's personal observations at the time of his inspection. Highland relies on deposition testimony that the inspector issued the order because he was instructed to do so by another party at MSHA after the section 110(c) investigation. *Highland's Mot. for Summary Decision*, at 5-6. However, the Commission has held that section 104(d) sanctions are not restricted to occasions where an inspector personally observes an existing violation. *See, e.g. Nacco Mining Co.*, 9 FMSHRC 1541 (Sept. 1987); *Emerald Mines Corp.*, 9 FMSHRC 1590, 1594 (Sept. 1987); *Southern Ohio Coal Co.*, 13 FMSHRC 912 (Jun. 1991). Rather, section 104(d) should be interpreted to allow an inspector to make a determination "based upon whatever process of discovery or examination may be appropriate." *Nacco*, 9 FMSHRC at 1550.³ Section 110(c) investigation findings provide an adequate basis for the issuance of citations and orders alleging violations of mandatory safety standards.

Accordingly, Highland's Motion for Summary Decision challenging the validity of Order No. 8489217, on grounds that it was not issued with reasonable promptness and was not based on the issuing inspector's personal observations, must be denied.

V. Motion in Limine submitted by Sheffield

On January 18, 2011, Sheffield submitted a Motion in Limine requesting that the court preclude from the pending section 110(c) matter any reference to Order No. 8489217. Sheffield relies in large part on the same contention put forward by Highland, that the order is invalid because it was not based on the issuing inspector's personal observations. *Mot. in Limine*, at 4. This contention fails for the same reasons discussed above. *See Nacco, supra*, 9 FMSHRC 1541.

Sheffield also argues that "the existence of [the] Order is irrelevant to the charges," because "it is undisputed that the Section 110(c) charges pending against the Respondents arise out of the Citation, not the Order." *Mot. in Limine*, at 4. However, as the Secretary's petition

² It is also worth noting that section 814(a) allows for the issuance of a citation "upon inspection *or investigation*" (emphasis added).

³ Highland relies on Judge Koutras' decision in *Pennsylvania Glass Sand Corp.*, 1 FMSHRC 1191 (1979) (ALJ), in which he rejected MSHA's position that a 104(a) citation may be issued based on the observations of a third party who did not personally observe the alleged condition. However, the decision lacks precedential value, and has been subsequently obviated and overruled by *Nacco, supra*, 9 FMSHRC 1541.

seeks to impose personal liability for Sheffield's alleged involvement in the condition cited in Order No. 8489217, it is difficult to view as undisputed Sheffield's claim that the conditions cited in the order did not give rise to the pending 110(c) charges.⁴ Consequently, the motion must be denied.

ORDER

For the reasons discussed above, the Motions for Summary Decision filed by the Respondents and the Motion in Limine filed by Sheffield **ARE DENIED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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⁴ Sheffield relies on various communications from the Secretary before and during the section 110(c) investigation which refer solely to Citation No. 6692995 as the basis for the investigation. *Sheffield's Reply in Support of Mot.*, at 2. However, because the order was issued as a result of the 110(c) investigation, it would have been impossible for the Secretary to have used it as a basis for the investigation. The sole fact that an order is the result of, rather than the basis for, an investigation into personal liability does not preclude an assessment of civil penalty.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

March 14, 2013

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2013-362-D
on behalf of REUBEN SHEMWELL,	:	MADI CD 2013-01
Complainant,	:	
	:	
v.	:	
	:	
ARMSTRONG COAL CO., INC. &	:	Parkway Mine Surface Facilities
ARMSTRONG FABRICATORS, INC.,	:	Mine ID 15-19356
Respondents	:	

ORDER ON POST-ORAL ARGUMENT BRIEFS

Before: Judge Feldman

By way of background, Reuben Shemwell’s employment as a welder was terminated on September 14, 2011, by the Respondents, Armstrong Coal Company and Armstrong Fabricators (collectively referred to as “Armstrong”). On January 23, 2012, Shemwell exercised his statutory right under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the “Act”), by filing a complaint with the Secretary of Labor (the “Secretary”), based on his allegation that his termination was motivated, at least in part, by safety related activities protected under section 105(c)(1) of the Act. 30 U.S.C. §815(c). Although not in issue in this case, Shemwell’s January 23, 2012, discrimination complaint is the basis for a 105(c)(3) discrimination proceeding in Docket No. KENT 2012-1497-D that is currently before this Commission, in which Shemwell is seeking to recover back-pay and the reinstatement of his employment.

Currently before me in captioned Docket No. KENT 2013-362-D is a discrimination complaint filed by the Secretary on behalf of Shemwell pursuant to section 105(c)(2) of the Act. The Secretary’s complaint concerns a civil tort action filed by Armstrong in the Commonwealth of Kentucky’s Muhlenberg Circuit Court. In the Kentucky civil action, Armstrong seeks to collect compensatory and punitive damages from Shemwell based on Armstrong’s complaint that Shemwell’s section 105(c) discrimination action before this Commission is a “Wrongful Use of Civil Proceedings.” (Tr. 139, 163-64)¹; *Circuit Court Complaint*, Case No. 12-CI-00397, at 7.



¹ All cites to transcript pages refer to the transcript of the Oral Argument for the captioned docket, held on February 27, 2013, at the Commission’s headquarters.

Despite a final decision by the Commission that Shemwell's January 23, 2012, complaint has not been frivolously brought, Armstrong's tort action is based on Armstrong's assertion that Shemwell did not believe he was the victim of discrimination when he filed his discrimination complaint with the Secretary. (Tr. 14, 32); 34 FMSHRC 1580 (July 2012) (ordering Shemwell's temporary reinstatement), *aff'g* 34 FMSHRC 1464 (June 2012) (ALJ); *see also Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) (citing S. Rep. No. 95-181, 95th Cong., 1st Sess. 13 (1977)) (holding that a discrimination complaint is not frivolously brought when it appears to have merit).

The Secretary asserts that Armstrong's civil suit constitutes a violation of section 105(c)(1). Section 105(c)(1) provides in pertinent part:

No person shall . . . in any manner discriminate against or otherwise interfere with the exercise of the statutory right of any miner . . . because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

Oral Argument was heard at the Commission's headquarters on February 27, 2013. At that time, Armstrong maintained that, if its civil suit is protected by the First Amendment, the civil suit cannot constitute a violation of section 105(c)(1) of the Mine Act. (Tr. 122). Specifically, Armstrong asserts a First Amendment right to bring a state court action, despite the Commission's holding that Shemwell's complaint was not frivolously brought, and regardless of the ultimate determination on the merits of the related section 105(c)(3) proceeding, unless it is determined that the state action is preempted, or that it is both baseless and retaliatory. (Tr. 13, 19, 133, 157). The parties should address the following matters in their briefs:

1. The parties should address whether Armstrong's civil suit is preempted by the Act. *See, e.g., English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990) (holding that state laws which obstruct Congressional objectives and purposes are preempted).
2. Assuming that Armstrong's civil action is not preempted by federal law, the parties should address whether the civil suit is baseless and retaliatory. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (June 2002) (holding that a state civil suit not otherwise preempted contravenes a federal statute where the civil suit is both objectively baseless and retaliatory).

3. During Oral Argument, Armstrong opined that “even a losing [state] lawsuit that is retaliatory in nature and violates a [federal] statute is protected under the First Amendment,” and that protection applies “even if [the state suit is] maliciously targeted to interfere with miners’ rights.” (Tr. 133, 153-54). Also at Oral Argument, reference was made to the fact that the civil suit was, in essence, a strategic lawsuit against public participation, commonly known as a SLAPP suit. (Tr. 176-177, 178-181).²

Generally speaking, a SLAPP suit is an invalid, abusive action based on spurious allegations, brought by a disproportionately well-financed plaintiff seeking to intimidate and dissuade citizens or classes of individuals from exercising their First Amendment or statutory rights to seek redress by petitioning federal agencies or by initiating court proceedings. A SLAPP suit seeks to burden defendants by the cost of a legal defense and the fear of civil liability, until they abandon their claims or cease to bring such claims.³ The parties should address in their briefs whether Armstrong’s Kentucky civil tort action constitutes a SLAPP lawsuit, and if so, whether that determination gives rise to enhanced penalties, as discussed in point four below.

² Although not included in the print transcript of the Oral Argument at page 181, because several participants were speaking simultaneously, the Secretary’s characterization of Armstrong’s civil suit as a SLAPP suit can be heard in the recording of the Oral Argument. The recording of the Oral Argument is divided into two parts. The SLAPP suit reference was made at 1:08:20 of part two of the recording.

³ *See generally* 61 Am. Jur. 2d Pleading § 435, which states:

The common features of SLAPP suits are their lack of merit and chilling the defendants’ valid exercise of free speech and the right to petition the government for a redress of grievances. The objective of [SLAPP suits] is not to win them, but to use litigation to intimidate opponents’ exercise of rights of petitioning and speech. The hallmark . . . is that the lawsuit is filed to obtain a financial advantage over one’s adversary by increasing litigation costs until the adversary’s case is weakened or abandoned.

(citations omitted). Although not currently prohibited by federal law or Kentucky state statute, SLAPP suits are generally considered contrary to the public interest due to their chilling effect on public participation. In this regard, anti-SLAPP statutes have been enacted in twenty-eight states and the District of Columbia. *See generally* Digital Media Law Project, State Law: SLAPPS, <http://www.dmlp.org/legal-guide/state-law-slapps> (last visited Mar. 5, 2013). In 2009, a federal anti-SLAPP bill was proposed, but was ultimately not adopted. H.R. 4364, 111th Cong. (2009).

4. The Secretary initially proposed a \$70,000.00 civil penalty, the maximum available under section 110(a)(1) of the Act, for Armstrong's alleged violation of section 105(c). At Oral Argument, the Secretary raised the question of whether the Commission has the authority to impose a civil penalty in excess of the \$70,000.00 maximum. (Tr. 177).

The only source of authority for exceeding the \$70,000.00 maximum is the enhanced civil penalty provision for flagrant violations in section 110(b)(2). Section 110(b)(2) defines a flagrant violation, in pertinent part, as "a reckless or repeated failure to make reasonable efforts to eliminate a known violation that . . . reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2). Accordingly, the parties' briefs should address whether Armstrong's prosecution of its civil suit, despite the Commission's "not frivolously brought" determination, constitutes a reckless and repeated failure to eliminate a known violation of section 105(c). In addition, the parties should address whether the civil suit causes a chilling effect on the willingness of miners to report hazardous conditions, and, whether such reluctance can reasonably be expected to cause death or serious bodily injury.

In addition to the above matters, the parties may present any other arguments deemed appropriate in support of their respective positions. As decided at Oral Argument, the parties shall file simultaneous briefs, not to exceed thirty pages, by **April 30, 2013**. Reply briefs, not to exceed eighteen pages, shall be filed by **May 14, 2013**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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March 21, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2012-1394
Petitioner	:	A.C. No. 46-09163-292401
	:	
v.	:	Docket No. WEVA 2012-1565
	:	A.C. No. 46-09163-295314
	:	
ELK RUN COAL COMPANY,	:	Docket No. WEVA 2012-1713
Respondent	:	A.C. No. 46-09163-298097
	:	
	:	Docket No. WEVA 2012-1809
	:	A.C. No. 46-09163-300802
	:	
	:	Mine: Roundbottom Powellton Deep

ORDER DENYING SECRETARY’S MOTION FOR CONTINUANCE

These cases are before me upon four Petitions for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On February 6, 2013, I issued a Notice of Hearing and Order to File Prehearing Report which set a hearing in the above-captioned matters for April 8, 2013 and continuing days thereafter, in Charleston, West Virginia.

On March 20, 2013, the Secretary filed a motion to continue the hearing of Docket Nos. WEVA 2012-1565, WEVA 2012-1713, and WEVA 2012-1809. The Secretary did not move to continue the hearing of Docket No. WEVA 2012-1394. Respondent appears to oppose the motion.¹

In support of the motion, the Secretary anticipates that the hearing will last more than two days given the number of citations involved. Further, the Secretary states that counsel will be involved in “office-closing related activities” during May 2013 in anticipation of the closing of the Arlington, Virginia MSHA Litigation Backlog Project on June 1, 2013. Given counsel’s involvement in such activities, the Secretary asserts that there will be insufficient time to complete briefing of the cases after hearing. The Secretary also represents that the parties have

¹ The Secretary’s motion states, “[t]he Secretary has reached out to counsel for the Respondent, who has stated that he does not necessarily see the need to reschedule the Hearing as to the Cases at this time.”

engaged in settlement discussions, but have had only limited success narrowing the issues for hearing.

Upon consideration of the Secretary's motion, I do not find that a continuance is warranted. The parties agreed to the hearing date during a conference call with the undersigned on February 6, 2013. This trial date provided the parties with approximately two months to continue settlement negotiations and conduct discovery in advance of the hearing. Insofar as the Secretary's decision to close the Arlington Backlog Office makes post-hearing briefing difficult, such an inconvenience is a self-imposed handicap. In exercising discretion to allocate funds in light of sequestration, the Secretary has decided that it could make cuts to personnel tasked with litigating under the Mine Act, even as the backlog continues. Without discounting or minimizing the personal toll such cuts have on the people tasked with enforcing the Mine Act, the downsizing of the Secretary's efforts to address the backlog does not justify the continuance of the April 8 hearing.

In addition, I do not find the Secretary's concerns regarding the length of the hearing to be persuasive. Although the parties estimated during the conference call that the hearing would likely last two days, the Notice of Hearing clearly states that the hearing will be held on "Monday, April 8, 2013, and *continuing dates after until completed.*" (emphasis added). This matter has been on the trial calendar for six weeks and continuance and subsequent reassignment will compound delay and inefficiency. Finally, I note that oral argument may be a viable alternative to post-hearing briefs with regard to certain violations.

In light of the foregoing, the Secretary's Motion for Continuance is **DENIED**. The hearing set for April 8, 2013 and subsequent dates thereafter until completed will proceed pursuant to the Notice of Hearing.

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

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March 22, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2008-1265
Petitioner,	:	A.C. No. 46-01968-151760
	:	
v.	:	Mine: Sentinel
	:	
WOLF RUN MINING CO.,	:	
Respondent.	:	

ORDER ON REMAND

In this civil penalty case arising under sections 105 and 110 (30 U.S.C. §§ 815, 820) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”) the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”) petitions for the assessment of a civil penalty of \$142,900 for an alleged violation of mandatory safety standard 30 C.F.R. §75.400.¹ The Secretary charges that the violation occurred on November 14, 2007 at the Sentinel Mine of Wolf Run Mining Co. (“Wolf Run”), an underground bituminous coal mine located in Barbour Country, West Virginia. The MSHA inspector found that the violation was a significant and substantial contribution to a mine safety hazard (“S&S” violation) and was the result of the company’s unwarrantable failure to comply with the standard. The inspector therefore cited the alleged violation in an order (Order No. 6605922) issued pursuant to section 104(d)(2) of the Act. 30 U.S.C. §814(d)(2).

When proposing a penalty for the alleged violation, the Secretary waived the regular assessment procedures and determined a special assessment was warranted. *See* Petition, Exhibit A, Narrative Findings for a Special Assessment. The Secretary stated, “The violation [is] considered to be flagrant; that is a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory . . . safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.” In answering the petition the company admitted the Commission’s jurisdiction but denied the violation and challenged the inspector’s S&S and unwarrantable findings.

After the case was assigned to the Court several procedural issues caused it to be stayed. However, on January 31, 2011 the stay was effectively dissolved and the matter was scheduled

¹ Hilda L. Solis resigned as Secretary of labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

for hearing. That hearing was canceled when the parties advised the Court that they agreed and could stipulate to all relevant matters except the Secretary's designation of the violation as "flagrant." Because the parties believed the "flagrant" issue was amenable to a decision based on cross motions for summary decision and briefs, the case was submitted to the Court on the basis of the parties motions and written arguments.

In ruling on the motions (34 FMSHRC 337 (Jan. 2012) (Ord. Denying Cross Mots. For Par'l Sum. Dec.)) the Court accepted the parties' stipulations that the alleged violation of section 75.400 occurred, that the violation was the result of Wolf Run's high negligence, and that the violation was reasonably likely to result in permanently disabling injuries to 10 miners.² 34 FMSHRC at 344. The Court found that the violation was in fact S&S and caused by the company's unwarrantable failure to comply. *Id.* However, the Court observed that all aspects of the civil penalty case were not resolved by the stipulations, that the parties needed to stipulate to or submit evidence on four remaining civil penalty criteria – Wolf Run's applicable history of previous violations, the size of the company's business, the effect of any penalty assessed on Wolf Run's ability to continue in business and the good faith of Wolf Run in attempting to rapidly abate the violation of section 75.400. *Id.*

With regard to the "flagrant" issue, the Court noted that the wording of section 110(b)(2) sets forth four elements that comprise a flagrant violation:

- (1) A reckless or repeated failure to make reasonable efforts to eliminate
- (2) A known violation of a mandatory health or safety standard
- (3)(a) That substantially or proximately caused or
(b) Reasonably could have been expected to cause
- (4) Death or serious bodily injury.

34 FMSHRC at 345 (*Citing Stillhouse Mining, LLC*, 33 FMSHRC 778 (March 2011)).

The Court then noted that there was no contention on the Secretary's part that the violation was due to Wolf Run's reckless conduct. Rather, the Secretary was charging that the violation was "flagrant" because Wolf Run exhibited "repeated failure[s] to eliminate known violations of section 75.400." 34 FMSHRC at 345. Because the Secretary considered violations of section 75.400 cited prior to the violation cited in Order No. 6605922 when it determined the violation was flagrant, the Court concluded the Secretary's interpretation of the term "repeated failure" as used in section 110(b)(2) (30 U.S.C. §820(b)(2)) did not comport with the Act. 34

² The Court interpreted the latter stipulation to establish that the gravity of the violation was serious. 34 FMSHRC at 344

FMSHRC at 345. To prove the violation the Court concluded the Secretary had to show that Wolf Run repeatedly failed to eliminate the violation of section 75.400 charged in the order and that Wolf Run could rebut the “flagrant” allegation by establishing that although its efforts proved unsuccessful, they were reasonable. 34 FMSHRC at 346. The Court further held that the Secretary had to show that the violation was “known” to Wolf Run and that it reasonably could have been expected to cause death or serious injury to one or more of Wolf Run’s miners. 34 FMSHRC at 347. The Court scheduled a hearing in Charleston, West Virginia to consider these issues. 34 FMSHRC at 346.

After the order was issued, the parties requested the Court certify its ruling to the Commission for review, which the Court did. Cert. of Ord. (March 6, 2012). The Commission, after entertaining the parties’ briefs and hearing oral argument, reversed the Court. In its decision, the Commission concluded that “the plain language of section 110(b)(2) does not support the [Court’s] ruling that past violative conduct may not be considered in determining whether the cited condition represents a ‘repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard.’” 35 FMSHRC ___, slip op. 6. The Commission concluded that, “It would be inconsistent with the Act’s graduated enforcement scheme to allow consideration of an operator’s past violative conduct for an unwarrantable failure determination but to prohibit consideration of an operator’s past violative conduct in the assessment of a potentially higher flagrant ‘repeated failure’ penalty” *Id.* at 7. Therefore, the Commission held that the Secretary “may permissibly consider an operator’s past violation history in determining that a violation should be assessed as a ‘repeated failure’ flagrant violation within the meaning of section 110(b)(2) of the Act.” 35 FMSHRC ___, slip op. 8. It added, “We do not resolve which prior violations are relevant to the assessment of a ‘repeated failure’ violation at this . . . stage in these proceedings.” *Id.* The Commission remanded the case and directed the court to “set the matter for hearing and . . . determine whether the violation alleged in Order No. 6605922 was properly assessed as flagrant.” *Id.*

DIRECTIVE TO THE PARTIES

The Court concludes that before it can comply with the Commission’s order to schedule the matter for hearing so as to determine whether the violation of section 75.400 was properly assessed as flagrant, the Court requires additional information from the Secretary. As the Commission notes, the Secretary’s position “has changed several times during the course of [the] litigation.” 35 FMSHRC ___, slip op. 4 n. 5. At this point it is not clear to the Court, and the Court assumes to the company, the basis upon which the Secretary is asserting the violation cited in Order No. 6605922 is “flagrant” within the meaning of the Act.

Therefore, within 20 days of the date of this order, the Secretary is **DIRECTED** to submit a statement to the Court that succinctly states and specifically explains:

- (1) Her interpretation of the phrase, “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);

(2) Whether her interpretation requires notice and comment rulemaking and if not why;

(3) Why the violation of section 75.400 cited in Order No. 6605922 meets her interpretation of “flagrant.”³

Once the Secretary statement has been filed, the company will have 15 days within which to respond after which the Court will consult with the parties regarding the date for a hearing, assuming one is necessary.

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

Distribution: (1st Class Mail)

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³ Presumably the existence of violations cited previous to the subject violation of section 75.400 will form at least part of the basis for the Secretary’s explanation. If so, the Secretary shall identify those prior violations by their citation/order numbers, their date, the standards violated and the section of the Mine Act under which the citations/orders were issued. In addition, the Secretary shall explain the role each such violation played in the Secretary’s determination that the violation of section 75.400 found in Order No. 6605922 was flagrant.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 22, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2012-941
Petitioner,	:	A.C. No. 46-08315-283103
	:	
	:	Docket No. WEVA 2012-1232
	:	A.C. No. 46-08315-289188
	:	
	:	Docket No. WEVA 2012-1431
v.	:	A.C. No. 46-08315-291897
	:	
	:	Docket No. WEVA 2012-1526
	:	A.C. No. 46-08315-294817
	:	
	:	Docket No. WEVA 2012-1651
	:	A.C. No. 46-08315-297587-02
MARFORK COAL COMPANY, INC.,	:	
Respondent.	:	Mine: Brushy Eagle

**ORDER DENYING ENTRY OF APPEARANCE AND
ORDER DENYING MOTIONS FOR SETTLEMENT**

Before: Judge Miller

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act” or “Mine Act”). The Secretary of Labor (“Secretary”) filed motions to approve settlement in the above captioned matters. The cases involve various numbers of citations and penalty amounts as set forth below. Given the apparent lack of understanding on the part of the CLR regarding what constitutes S&S, as well as the meaning of negligence, I deny her request for permission to practice. In addition, based upon the failure to justify the reductions in penalty as they relate to the six penalty criteria, and on the basis that the reductions sought undermine the purpose of the Mine Act, I deny the motions to approve settlement.

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 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 “[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

[1] [T]he 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).

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising this discretion, the Commission has reiterated that, in determining the amount of a penalty, a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The Commission also emphasized that 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.” *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC at 293). The Commission warned in *Sellersburg* that, 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 at 293.

Recently, in *Black Beauty Coal Co.*,³⁴ FMSHRC 1856 (Aug. 2012), the Commission reaffirmed that Congress intended the settlement of a penalty to be a transparent process that is open to public scrutiny and it is the Commission that has final approval authority of any settlement. The Commission has long recognized that Commission jurisdiction attaches to a case once an operator contests the Secretary's proposed assessment of penalty. *Id.* at 1862. The Commission has promulgated rules regarding the submission of settlements, which dictate that it is the ALJ's duty to set forth the reasons for approval, and that such approval “shall be supported by the record.” 29 C.F.R. § 2700.31(g). In that regard, the Commission has stated that the statutory language contained in section 110(k) of the Mine Act, 30 U.S.C. § 820(k) contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal. “Thus, Congress provided a broad mandate to the Commission (and its Judges), charging it with reviewing and approving all settlements of penalty cases pending before it and imposing no explicit limits on what should be consider in review.” *Black Beauty Coal Co.*, 34 FMSHRC at 1865. The Commission further explained that “it is eminently appropriate for a Judge to acknowledge the need for deterrence in deciding whether or not to approve a settlement[.]” *Id.* at 1866.

The information provided by the Secretary in these cases does not support a finding that the proposed settlement penalties are appropriate after considering the six penalty criteria in section 110(i). Moreover, the proposed settlements do not further the deterrent purposes of the

Act. While significant factual support was provided in the motions, the motions lacked facts relevant to support the proposed modifications. A brief review of each proposed settlement is set forth below. Overall, the CLR has modified a majority of the citations by eliminating the S&S finding and reducing the negligence to low. She seeks to modify the penalties to 40% of the originally proposed amount in the best case, and to as little as 5% of the originally proposed amount in another. I review hundreds of settlements over the course of a year, and have seen no other representative of the Secretary who consistently proposes and/or agrees to such drastic modifications to the citations and reductions in penalty.

I also take issue with the fact that the CLR has, in many instances, modified the number of persons affected and used the Part 100 criteria to significantly reduce penalties without an adequate explanation. The CLR defends her use of Part 100 and does not grasp that the Commission is not bound by that regulation. Additionally, her justifications for radical penalty reductions include a dissertation on the rigors of mining, and other safety measures which are required by the Mine Act. Finally, while the CLR has used boilerplate language regarding the remaining penalty criteria, the exhibit A that is referenced to support the history element of the penalty is not included in the file. I find that the Secretary has not sufficiently justified the extreme reductions in penalty in these cases.

On February 8, 2013, the Secretary, through the CLR, filed two Marfork settlement agreements that drastically reduced the penalty by at least 90% in each case. The settlement motions included long explanations of the proposed modifications, but I find that they did not justify the reductions sought. The explanations described facts related to gravity, when it was the negligence that had been proposed to be reduced. Similarly, the number of persons affected was reduced in many instances based upon inadequate or unsubstantiated statements. Given that the number of persons affected is a way to easily manipulate the penalty, it is important that relevant facts accompany such reduction. As a result of the errors in the motion, I contacted the parties and explained that I could not approve the settlement as written and suggested that the CLR look at the Commission's decision in *Cumberland Coal*, 33 FMSHRC 2357 (Oct. 2011), for guidance regarding S&S. I further suggested that she review the MSHA regulations regarding the meaning of negligence. The CLR responded by email and, instead of addressing the gravity and negligence issues as I suggested, she explained that the CLR's have a large case load and therefore cannot conduct conferences with operators. Accordingly, she treats the contest to the penalty as if it were a pre-penalty contest. In doing so, she opines that she must be fair to both sides. She stated:

Due to our large caseload, our CLR's who in the past held numerous Health & Safety conferences resolving many incorrectly issued citations, no longer have time to hold the regular Health & Safety Conferences. As a result, the Coal Operators have not been afforded an opportunity to get incorrectly cited citations modified prior to the assessment and litigation process. If the Health & Safety Conferences had been held, the citations/orders would most likely have been corrected at that time, eliminating the need for further litigation. It is this reasoning as to why the Part 100 penalty is being used

Email from Linda Hrovatic, CLR, MSHA, to Judge Margaret Miller, FMSHRC, (February 19, 2013 11:23 AM MDT).

The CLR also explained that District 4 has seen two major mine disasters in recent years and, consequently, the inspectors, many of whom are inexperienced, are under pressure to write citations. As a result, inspectors are “over-writing” the citations. The errors in the citations as originally written would have been found, she states, if the mine operator had held a safety and health conference prior to contesting the penalties. She stated that, because MSHA would have used Part 100 in addressing penalties during the safety and health conference, she was justified in relying upon those penalties in a settlement proposal.

Because the explanation sent by email from the CLR did not address the concerns raised about the settlement, I scheduled a telephone conference with the parties. During that call, I asked the CLR to look at the definition of negligence and S&S. I also explained that the penalty criteria found at Part 100 does not apply once the case is before the Commission, and that, in my view, a change from 7 persons affected to 3 has minimal impact on the gravity and the subsequent penalty. If the CLR wishes to give it a greater impact, then it must be adequately justified. The attorney for the operator, predictably, defended the CLR, saying that she was thorough and fair, and that the negligence and gravity are a “matter of opinion.” The parties agreed to take another look at the proposed settlement.

On March 13, 2013, the parties filed an amended motion in Docket Nos. WEVA 2012-1526 and WEVA 2012-1651 and, while the new motions addressed some errors with the negligence and raised the penalties from a 90% reduction to a 75% reduction, they continued to lack meaningful facts to support the reduction.

During the pendency of the two dockets named above, the CLR filed a number of other settlement requests, at least one of which I approved, i.e., WEVA 2012-962, with a reduction of nearly 80% off of the originally proposed assessed penalty. When I observed the patterns beginning to emerge in the submitted settlement motions, including the same modifications and lack of justification discussed above, I determined that the CLR was not carrying out the purposes of the Mine Act. Accordingly, I have rejected the settlement motions and deny the CLR’s request to enter an appearance in these cases. What follows is a docket by docket summary of selected parts of the proposed settlement motions.

Docket No. WEVA 2012-1651, as amended, reduces the penalty from \$35,100.00 to \$14,040.00. While an improvement over the first proposed order, the agreement modified many citations to one person affected, thereby significantly reducing the penalty. It also eliminates the S&S designation of 3 of the 5 violations. One of the violations that does not eliminate the S&S designation nevertheless suggests reducing the penalty from \$1,111.00 to \$499.00 based primarily upon a discussion of gravity. Even though the CLR purports to strictly adhere to the Part 100 point system, she does not always do so.

Docket No. WEVA 2012-1526, as amended, reduces the penalty from \$14,295.00 to \$4,448.00. Two of the four violations, those with the largest penalties, are reduced to non-S&S.

The Secretary states that management wasn't aware of the violation, or there were other safety measures in place. Yet this docket, along with the one discussed above, deals with the belt entry, malfunctioning CO sensors and air movement. The fire sensors on the belt were not functioning, and the roof bolter was not in permissible condition. I conclude from these proposed settlements that the CLR did not consider the appropriate facts that relate to the gravity of the violation.

Docket No. WEVA 2012-1431 contains 13 violations assessed at \$22,572.00 with a proposed reduction to \$5,303.00. The settlement proposed to change nearly every citation to non-S&S, and most to low negligence. Two of the violations relate to escapeways used during an emergency. The negligence changes to "low" have no acceptable explanation, or explain simply that management was not aware of the condition. The Secretary's regulations, however, explain that "high" negligence exists if management knew or should have known of the condition and there are no mitigating circumstances, while "moderate" negligence exists if there are mitigating circumstances, and "low" negligence exists if there are considerable mitigating circumstances. 30 C.F.R. § 100.3(d) Table X. Based on the motions before me, there are not mitigating circumstances in these cases to justify low negligence. Given the changes the CLR seeks to make, a significant penalty reduction follows. However, those penalty reductions are not justified. For example, according to the motion, on at least one citation with a proposed change to non-S&S, the penalty was reduced from \$2,678.00 to \$100.00. With regard to Citation No. 8150887, which was issued for a power cable with holes in it, the motion proposes to modify the citation to non-S&S and reduce the penalty from \$3,405.00 to \$687.00. The motion incorrectly relies on harsh mining conditions and other required safety measures as mitigating circumstances. The citations in the docket also address monitors, belt spillage, and roof conditions, all during the same inspection.

Docket No. WEVA 2012-1232 involves a proposed reduction in penalty from \$2,138.00 to \$394.00, the modification of the two alleged S&S citations to non-S&S, and the modification of two citations to low negligence because management didn't know about the condition.

Finally, Docket No. WEVA 2012-941, contains three citations originally assessed at \$18,830.00 and reduced to \$4,689.00. The justifications for the modifications include statements like "loose roof was not specifically identified" and in general the mine is in compliance with many other MSHA standards. In one citation, the motion asserts that the accumulation citation is not S&S because "hot to the touch" is not enough to sustain the designation and no heat gun was used to ascertain just how hot the subject area was.

There are errors in each docket and a pattern common to each proposed settlement. With regard to modifications of gravity, many of the modifications rely on the rigors of mining for justification and the many other safety precautions required by the regulations, making it nearly impossible to sustain and S&S designation. Further, she does not relate the definition of the levels of negligence to the violation described or the modification proposed. Finally, whatever this CLR would like her role to be, once the penalties are contested, they are not in the prehearing penalty safety & health conference phase, and, Part 100, while it may be a useful tool, it is not mandated. By focusing on the Part 100 changes, the Secretary fails to see the total picture in proposing reductions in cases that are before the Commission and particularly in

relying on the number of persons affected as the sole basis for significantly reducing a penalty. While the Secretary has provided justification, little of it supports a reasonable basis to modify the gravity and negligence, or to support fewer persons affected, as she asserts, and consequently there is no basis to reduce the penalties by such significant amounts.

I have considered the representations and documentation submitted and I conclude that the proposed settlements are not appropriate under the criteria set forth in section 110(i) of the Act. The motions to approve settlement are **DENIED**. The CLR may not appear in these cases and the parties have thirty (30) days to restructure or further explain the proposed settlements before these cases are set for hearing.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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