September 2016

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Review was granted in the following cases during the month of September 2016:

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Review was not denied in any case during the month of September 2016.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 29, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. KNIGHT HAWK COAL, LLC	Docket Nos. LAKE 2014-121-R LAKE 2014-575

Before: Jordan, Chairman; Young, Cohen, and Althen, Commissioners[1]

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), involves the death of a coal miner who was crushed while operating mining equipment. Knight Hawk Coal, LLC ("Knight Hawk") was charged with failing to keep the miner out of the "red zone" surrounding the continuous mining machine, which constituted a violation of the mine's approved roof control plan under 30 C.F.R. 75.220(a)(1).[2] The Administrative Law Judge ruled that this violation was the result of Knight Hawk's high negligence and unwarrantable failure to comply.[3] 37 FMSHRC 632 (Mar. 2015) (ALJ). Knight Hawk appealed this decision and also challenged the Judge's penalty determination.

For the reasons discussed below, we affirm the Judge's decision.

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[1] Commissioner Patrick K. Nakamura participated in the consideration of this matter, but his term expired before issuance of this decision.

[2] 30 C.F.R. § 75.220(a)(1) states: "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered."

[3] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 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).

I.

Factual and Procedural Background

A. Facts

Knight Hawk operates the Prairie Eagle South Mine, a large underground coal mine in Illinois. On February 13, 2013, Miner Timothy Chamness was remotely operating a continuous mining machine when he entered the red zone of the machine and was fatally crushed between the continuous miner's conveyor tail and the right rib of the entry.[4] There were no witnesses to the accident. 37 FMSHRC at 633. Chamness, a former roof bolter, had been a continuous miner operator for four months at the time of the accident. Tr. 166, 168, 187.

In November 2013, MSHA issued its investigation report on the accident and cited Knight Hawk for violating its approved roof control plan by failing to keep Chamness out of the red zone of the continuous miner.[5] The inspector designated the violation as "significant and substantial" ("S&S"),[6] involving high negligence, and the result of the Knight Hawk's unwarrantable failure. MSHA proposed a specially-assessed civil penalty of $70,000. S. Ex. 1; 37 FMSHRC at 633.

Knight Hawk construed the term red zone as used at its Prairie Eagle South Mine more broadly than MSHA's regulatory use of the term. Knight Hawk defined red zone to include a danger zone or pinch point area around all mobile equipment, whereas MSHA's definition of red zone is confined to the danger zone around a continuous mining machine.[7] Prior to the issuance of the citation, MSHA was not informed that its definition of red zone, as used in Knight Hawk's roof control plan and as enforced under the Act, was different and narrower than the definition used for training and warning posters at the mine. The differences in these definitions constitute the central underpinnings of the dispute between the parties in this case.

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[4] According to MSHA, the "red zone" is the pinch point area where any part of the continuous mining machine can hit a miner during a move. Tr. 51; S. Br. at 3-4 n.2. It is not a set position, but is relative to the location of the continuous miner as the machine moves. *See* MSHA 2005 Summer Prop/Red Zone Special Safety Initiative, Bulletin 3.

[5] Knight Hawk's approved roof control plan states in pertinent part: "Safety Precautions for Remote Control Mining: . . . No one shall be in the red-zone when continuous miners are being trammed from place to place or being re-positioned in the working place." *See* Sec'y Exs. 1, 3 at 6.

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

[7] MSHA refers to the danger zone or pinch point areas around other mobile equipment as "no go zones." S. Br. at 4; KHC Ex. H at 169-72, 176-81.

In the course of the accident investigation, MSHA interviewed 10 miners. Five rank-and-file miners stated that they had seen employees in the "red zone" before, even though they had been trained to stay out of the red zone. Tr. 52-53. Knight Hawk Foreman Richard Pasquino, Chamness' immediate supervisor, stated that he had also seen miners in the "red zone" of various mobile machines and that he himself had breached the red zone before with a ram car and with a roof bolter. Tr. 193-94. The miners described the red zone encounters as sporadic, intermittent, and inadvertent.[8]

Pasquino said that before becoming Chamness' supervisor, he had observed Chamness in what Pasquino called the red zones of a shuttle car, ramcar/scoop, and a roofbolter on three separate occasions. After becoming foreman, Pasquino observed Chamness in the red zone on two more occasions, first around a ramcar, and then around a roof bolter five months later. Pasquino testified that, after he became a foreman, he verbally counseled Chamness on the importance of staying out of the red zone in the two latter instances he observed but did not report any of the five incidents to higher management. Pasquino testified that he never observed Chamness in the red zone of a continuous miner. Tr. 196-98, 207-10; 37 FMSHRC at 636.

Knight Hawk witnesses testified that the company had a progressive disciplinary policy in place that began with verbal counseling and allowed for more severe consequences for repeat violators. According to this safety policy, unsafe practices or deviations from company safety standards were to be reported to the immediate supervisor, who would then report them to the safety director.[9] However, Knight Hawk had only twice disciplined miners for actions related to the company's red zone policy.[10] Tr. 157-58; 252. In addition, Mine Superintendent Dale Winters confirmed that no violations of the mine's broader red zone policy were ever reported to mine management. Tr. 140-41, 205; 37 FMSHRC at 635.

Knight Hawk provided training on red zone safety involving mobile equipment during new miner training, experienced miner training, annual refresher training, and during weekly safety talks. The operator had conducted annual refresher training covering red zone dangers four days before the fatal accident. Knight Hawk also hung "Keep Out of the Red Zone" posters in

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[8] Knight Hawk representatives, including Mine Safety Director William Jankousky, were present during the interviews but were not allowed to participate. Tr. 239, 245.

[9] Section 2.01 of Knight Hawk's safety policy states: "Knight Hawk . . . will not tolerate unsafe practices or deviation from Knight Hawk, state or federal MSHA standards. . . . [A]ny deviations from standards and procedures, as well as any unsafe condition should be immediately reported to your immediate supervisor. The supervisor will then report it to the Safety Director." KHC Ex. I at 272.

[10] Knight Hawk was cited for a red zone violation in 2009 when a continuous miner operator pinched his arm doing a place change. In 2011, a miner intentionally trammed his continuous miner toward a co-worker. In the first incident, the operator did not consider it a red zone violation but issued the miner a letter of reprimand after MSHA cited it for a red zone violation. In the second incident, Knight Hawk discharged the employee. Tr. 122-29; KHC Ex. J; 37 FMSHRC at 635-36.

several areas of the mine cautioning miners to avoid red zones around mobile equipment. 37 FMSHRC at 635, 642.

After Chamness was killed, Knight Hawk modified the remote control box for the continuous miner to add a second function to prevent the miner from accidentally activating the tail swing. It also installed proximity devices on all nine of its continuous miners, at a cost of $80,000 per machine. Of the 36 violations issued to the operator in the 15 months prior to the incident, only two were S&S violations. The record reveals no specific evidence that Knight Hawk was ever warned by MSHA that its efforts to deter red zone violations at the Prairie Eagle South Mine were inadequate.

Knight Hawk filed a notice of contest challenging the Secretary's high negligence finding, as well as the unwarrantable failure designation and the proposed penalty amount. It stipulated to the fact of the violation and that it was S&S. The parties also stipulated to the operator's good faith and timely abatement. On March 18, 2015, the Judge issued a decision upholding the Secretary's high negligence and unwarrantable failure determinations, and assessing a penalty of $70,000.

B. <u>The Judge's Decision</u>

In affirming the high negligence determination, the Judge found it compelling that Pasquino had observed Chamness in the red zone of mobile equipment on multiple occasions, but had only verbally counseled him. Discounting the testimony of Mine Superintendent Winters and Pasquino, who stated that they had no reason to believe Chamness would enter the red zone, she concluded that Chamness' conduct was foreseeable.

The Judge found that Knight Hawk's practice of counseling employees for repeated red zone violations was inadequate and that the operator should have taken "more definitive action to prevent miners from repeatedly entering the red zone, as defined by the mine operator or by MSHA." She concluded that the mine imposed no consequences on miners when they violated the mine's red zone policy. She also found no evidence that Knight Hawk had established any specific policies or procedures for addressing red zone breaches or disciplinary approaches designed to discourage repeat violations. 37 FMSHRC at 637-38.

The Judge rejected Knight Hawk's assertion that the interviewed miners' statements about red zone violations were of minimal value because they were speaking of the red zone as broadly applied by Knight Hawk and did not understand that MSHA was referring only to the zone around the continuous miner. Based on the context in which the miners' statements were made and the training materials and posters, the Judge found that most, if not all, of the miners' statements to MSHA referred to the red zone of a continuous miner. In addition, because the miners' statements indicated that red zone policy violations were not uncommon at the mine, the Judge inferred that at least a portion of the reported violations occurred in the red zone of a continuous miner. Nonetheless, she stated that her findings would be the same under either usage of the term "red zone." *Id*.

The Judge found that although Knight Hawk provided some training on red zone dangers, the failure to enforce its own policies by disciplining errant miners rendered the training and supervision of those miners meaningless. She concluded that "the mine was highly negligent in

its training, supervision, and discipline regarding red zone violations," and the training, therefore, did not mitigate Knight Hawk's negligence. *Id*. at 638.

In affirming the Secretary's unwarrantable failure determination, the Judge found that while it is not clear how long Chamness was in the red zone, the duration of the violation ended only because the miner was fatally injured by engaging in the prohibited conduct. She stated that "[e]ven if this violation only existed for a short time, red zone violations can result in serious consequences in a short time and have been an ongoing issue at this mine since it opened in 2009." 37 FMSHRC at 639.

The Judge further found that although the operator took some steps to abate red zone issues by providing training and weekly safety meetings, there was no follow-through or enforcement, beyond counseling, in support of its policy against entering red zones. *Id*. at 642. She also determined that Knight Hawk was aware that greater compliance efforts were necessary because MSHA inspectors routinely discussed red zone hazards, and Knight Hawk's management knew that MSHA placed great emphasis on the topic. As support, the Judge pointed to MSHA's recently published final rule, which requires proximity detectors on continuous miners. 80 Fed. Reg. 2188 (Jan. 15, 2015) (codified at 30 C.F.R. § 75.1732). She also took official notice of MSHA's online publications addressing red zone hazards and safety. *Id*. at 641.

Finally, although the Judge stated that Knight Hawk abated the violation in good faith and commended it for installing the proximity devices, she nonetheless found the $70,000 proposed penalty to be appropriate in this case. She noted that the operator stipulated that the penalty would not affect its ability to continue in business, and that the gravity, negligence, and history of violations were addressed previously in her decision. *Id*. at 645. The Judge also acknowledged the operator's commendable violation history for the previous 15 months but did not make express findings in her penalty analysis. *Id*. at 640, 645.

II.

Disposition

A. Definition of "Red Zone"

Knight Hawk argues that during the investigative interviews, the miners who testified to seeing other employees in the red zone were not referring to the danger zone of the continuous miner as defined by MSHA, but to the danger zone of other mobile equipment as applied under the operator's broad red zone policy.[11] It maintains that MSHA should have informed the miners who were interviewed during its investigation that MSHA's definition of red zone was limited to the continuous miner. It further argues that this alleged confusion about what constituted a red zone led the Judge to conclude incorrectly that it was highly negligent and had engaged in an unwarrantable failure to comply.

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[11] For purposes of this discussion and to avoid confusion, we hereafter use the terms "danger zone" or "pinch point area" to generally refer to the dangerous area around all mobile equipment at the Prairie Eagle South Mine. The term "red zone" refers only to the pinch point area of a continuous mining machine, which is MSHA's interpretation of the term.

We reject this argument and conclude that substantial evidence supports the Judge's finding "that most, if not all, of the discussion of the red zone during the investigation, related to the red zone . . . [of] the continuous miner."[12] 37 FMSHRC at 637.

Although support for Knight Hawk's position can be found in Pasquino's statement to investigators describing seeing miners in the red zone of various pieces of mobile equipment (KHC Ex. R at 5; Tr. 63-64), the miners were being questioned in the context of an investigation about a miner who had just been killed in the red zone of a continuous miner. William Kendrick, an experienced continuous miner operator of 12 years and the miner who helped train Chamness, testified that he knew that when asked about the red zone, the investigative team was referring to the continuous miner. Tr. 178, 180. He also indicated that when discussing fatalities and red zone violations at training, the information provided to the miners concerned continuous mining machines. Tr. 173. Similarly, Safety Director Jankousky testified that he knew the investigators were referring to a continuous miner when they were discussing the red zone even though he believed the other miners did not. Tr. 245. He also stated that the miners are briefed on the roof control plan and that they understand that red zone in the roof control plan refers to the continuous miner. Tr. 247.

Additionally, Knight Hawk agents present for the interviews not only failed to inform MSHA of any suspected confusion, but neglected to inform investigators that the company used the term "red zone" more broadly at the Prairie Eagle South Mine. Tr. 245-46. While the operator's representatives asserted they were barred from actively participating in the interviews, there is no evidence that they were prohibited from speaking with investigators before or after the interviews were completed. Knight Hawk did not call the five rank-and-file miners interviewed by MSHA as witnesses at the hearing to rebut MSHA's assertion that the miners understood red zone to mean the pinch point area of a continuous miner.[13]

Lastly, any misunderstanding about the definition of red zone was the direct result of Knight Hawk's actions, not the Secretary's. The operator chose to use the term "red zone" more broadly, even though it knew that MSHA only applied the term to the danger zone around

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[12] When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *Jim Walter Res., Inc*., 28 FMSHRC 983, 989 (Dec. 2006); *DQ Fire & Explosion Consultants, Inc*., 36 FMSHRC 3090, 3095 (Dec. 2014); *Mach Mining, LLC*, 36 FMSHRC 1525, 1526-27 (June 2014); *Topper Coal*, 20 FMSHRC 344, 349 (Apr. 1998). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 n.9 (Aug. 2014).

[13] The operator also contends that the Judge improperly relied on vague and speculative hearsay statements of the interviewed miners. However, hearsay evidence is admissible in our proceedings so long as it is material and relevant. *Mid-Continent Res., Inc*., 6 FMSHRC 1132, 1135-36 (May 1984); *Richardson*, 3 FMSHRC 8, 12 n.7 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir.1982), *cert. denied*, 461 U.S. 928 (1983). The statements by Knight Hawk employees to investigators were clearly material and relevant to the issues being considered. Thus, the Judge did not err in admitting and relying on the testimony of Investigator Wilcox concerning what he was told by the five rank-and-file miners during the investigation.

energized continuous miners. Mine Superintendent Winters acknowledged that MSHA's definition of red zone is widely understood in the mining industry, and Jankousky stated that under MSHA regulations, the only equipment defined as having a red zone is the continuous miner. [14] Tr. 102; 235-37.

In addition, the Commission has recognized that "'[r]ed zone' issues involve procedures regarding the avoidance of a zone around *a continuous miner*, intended to address the hazards of moving equipment." *Prairie State Generating Co.,* 35 FMSHRC 1985, 1987 n.4 (July 2013) (emphasis added); *see also Kennedy v. Joy Techs., Inc.*, 269 F. App'x 302, 306 (4th Cir. 2008) (acknowledging red zone as being within the "turning radius of the [continuous] mining machine"). As the only party having knowledge of the dueling "red zone" definitions and the party who implemented the broad policy, it was incumbent upon Knight Hawk to ensure that miners understood what red zone meant for purposes of the MSHA investigation.

B. <u>The Relevance of Similar Danger Zone Violations</u>

Knight Hawk contends that because its roof control plan only prohibits miners from entering the "red zone" of a continuous miner, evidence of miners entering the danger zone of other equipment is irrelevant to whether the operator, in this instance, was highly negligent and whether there was an unwarrantable failure to comply with section 75.220(a). We disagree.

Because we are not bound by MSHA's Part 100 definitions, the Commission and its Judges employ a traditional negligence analysis in support of an independent determination on the issue.[15] *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1264 (D.C. Cir. 2016) (citing *Brody Mining, LLC,* 37 FMSHRC 1687, 1702 (Aug. 2015)). Under this analysis, "an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act." 37 FMSHRC at 1702. Considerations include "what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulations." *Id.*; *see generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

In the instant case, the record demonstrates that prior to becoming Chamness' supervisor, Pasquino personally observed Chamness on three occasions enter the danger zone of a shuttle car, a ramcar/scoop, and a roof bolter. After becoming foreman, Pasquino witnessed Chamness enter the danger zone of a ramcar, after which he counseled Chamness on the importance of

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[14] In the MSHA slides used by Knight Hawk in its training, MSHA refers to the dangerous area around various pieces of mobile equipment, including the continuous miner, as "no go zones" (KHC Ex. H at 169-72, 176-81), but the term "red zone" only appears on slides depicting a continuous miner. KHC Ex. H at 173-75; Tr. 141-47; *contra* Tr. 111-13.

[15] Part 100 regulations apply only to the *proposal* of penalties by MSHA and not to the *assessment* of penalties by the Commission. *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-02 (Aug. 2015); *Jim Walter Res. Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[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.").

staying out of pinch point areas. Despite this counseling, five months later, Pasquino again observed Chamness standing in the danger zone of a roof bolting machine while working as a roof bolter.

Of course, due to MSHA's definition of the red zone, these incursions into danger zones other than a continuous mining machine did not violate section 75.220(a). Nonetheless, they are highly relevant to whether Knight Hawk's actions were reasonable and prudent under the circumstances. Specifically, from the perspective of Knight Hawk's training and disciplining of miners, the previous instances evidenced a common carelessness with the violative conduct – entering the danger zone of mobile equipment – that ultimately led to Chamness' death. On five occasions before his fatal accident, Chamness was in direct violation of Knight Hawk's red zone policy – a policy that equally encompassed the red zone of the continuous miner. Indeed, according to the witnesses, many miners violated Knight Hawk's red zone policy without facing any discipline.

It is laudable when an operator goes beyond regulatory requirements in its safety program. However, when it does so and then utterly fails to enforce those policies, the actual lesson to the miners may well be, as it apparently and tragically was here, that the policies are not important and that entry into pinch point areas is not a matter of particular concern to the operator. A safety policy mimicking a mandatory standard that is not enforced creates a dangerous situation. Here, Chamness' *sixth* incursion into a danger zone was fatal.

The prior occurrences are also relevant to the unwarrantable failure analysis. As set forth in detail below, such events are directly relevant to many of the unwarrantable failure factors. Because the "unwarrantable failure" clause directs decision makers to consider the cause of the violation, the statute's language permits an interpretation that considers mine conditions beyond the violation itself, including conditions that do not themselves violate mine safety and health standards. *Sec'y of Labor v. Jim Walter Res., Inc.*, 111 F.3d 913, 919-20 (D.C. Cir. 1997); *see also Jim Walter Res., Inc*., 21 FMSHRC 740, 742 (July 1999); *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 157 (2d Cir. 1999).

Congress intended a broad reading of "unwarrantable failure," to accomplish the Act's purpose of protecting miners from health and safety hazards. *See Jim Walter*, 111 F.3d. at 920, citing S. Rep. No. 95–181, at 31–32 (1977), *reprinted* in Senate Subcomm. on Labor, Comm. on Human Res., Leg. Hist. of the *Federal Mine Safety and Health Act of 1977*, at 619-20 (1978). Accordingly, the Judge properly considered prior violations of Knight Hawk's red zone policy in her negligence and unwarrantable failure analyses.

C. <u>Negligence</u>

High negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Brody Mining,* 37 FMSHRC at 1703 (quoting *Topper Coal,* 20 FMSHRC at 350). A Commission Judge "is not limited to an evaluation of allegedly 'mitigating' circumstances" and should consider the "totality of the circumstances holistically." *Id.* For that reason, high negligence may be found, in spite of mitigating circumstances . . ." *Id.* at 1702–03.

We have held that the negligence of a rank-and-file miner cannot be attributed to the mine operator for civil penalty purposes. *Western Fuel-Utah, Inc.*, 10 FMSHRC 256, 262 (Mar.

1988). Instead, the Commission looks to the operator's actual or constructive knowledge of the violative condition or practice and its supervision, training, and disciplining of its employees to determine if the operator has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982).

Knight Hawk's red zone policy effectively treated all pinch point areas as having equal degrees of danger and care required. As such, it was imperative that the operator consistently enforce its policy through proper discipline, supervision, and training. Substantial evidence supports the Judge's finding that this did not occur. 37 FMSHRC at 638.

When asked to explain the company's policy for dealing with miners who violate the red zone policy, Pasquino stated: "One, you talk to him; two, you discipline him; and, three, you discharge." Tr. 213. He described it as a "zero tolerance" policy. Tr. 213. However, after personally witnessing Chamness violate the red zone policy on five separate occasions, including twice as Chamness' foreman, Pasquino never progressed beyond verbal counselling. He did not order supplemental training or closer supervision of Chamness' work. He also failed to follow Knight Hawk's safety policy, which required that "any deviation from standards and procedures, as well as any unsafe condition should be immediately reported to your immediate supervisor. The supervisor will then report it to the Safety Director." KHC Ex. I at 272.

Even though entering the danger zone of mobile equipment was undoubtedly a deviation from company safety standards, Pasquino testified that he "just didn't feel like it was necessary to report it" because he "thought it was unintentional."[16] Tr. 207-08, 210. This was woefully inadequate. A miner's repeated violation of the company's red zone policy would have caused a reasonably prudent foreman under similar circumstances to take more stringent disciplinary action to address the problem or, at least, report the occurrences to mine management. *See Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561-62 (D.C. Cir. 2012) (affirming high negligence determination, in part, because miner failed to alert management of potential hazard). Being subjected to disciplinary action might have impressed upon Chamness the severity of his actions and served as a deterrent for breaching the red zone of a continuous miner.

Further, as the Judge also noted, "Knight Hawk's alleged expanded view of the red zone may [have] in fact, dilute[d] the need for extra caution in the red zone around the continuous miner." 37 FMSHRC at 638. Counsel for Knight Hawk acknowledged that the operator adjusted its training after this accident to refer only to areas around continuous miners as "Red Zones" and to indicate that areas around other pieces of equipment are considered "danger zones." Tr. 24. The failure to distinguish hindered rather than advanced the goal of the mandatory standard to keep miners out of the highly lethal red zone of the *continuous mining machine*.

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[16] Prohibited red zone violations can be intentional or result from inattentiveness, i.e., "just forgetting where you are at in relation to [a] machine." Tr. 52-53, 84. To avoid red zone dangers, MSHA requires that continuous miners remain non-operational when miners are within the pivot point or the turning radius of the machine. *See* MSHA 2005 Summer Prop/Red Zone, Bulletin 3.

Moreover, although the miners were trained to stay out of the danger zone of mobile equipment, they often did not obey the training, and when miners were found in violation, they were not disciplined beyond verbal counseling. Therefore, even though Knight Hawk trained its miners in red zone dangers during new miner training, experienced miner training, annual refresher training, and weekly safety talks, the company failed to enforce the training. The Judge appropriately declined to weigh the training as a mitigating factor. [17]

Knight Hawk further maintains that punishing it for its expanded red zone rule, which was designed to provide added protection for miners, creates a bad policy and will deter operators from enacting additional safety measures for fear of it being used against them. We disagree. As noted above, an expanded application of the term "red zone," standing alone, is an improvement to any underground mine's safety plan. However, the Commission cannot ignore the flaws in an operator's "heightened" safety policy. Knight Hawk's broadly applicable but unenforced red zone policy appears to have worked, albeit unintentionally, in a manner contrary to MSHA's red zone provision because it diminished the level of caution required when in the red zone of a continuous miner.

Accordingly, considering the totality of the circumstances, the actions that a reasonably prudent foreman familiar with the mining industry would have taken under these circumstances, the relevant facts of this case, and the protective purpose of MSHA's red zone standard, we conclude that the substantial evidence supports the Judge's finding of high negligence.

D. <u>Unwarrantable Failure</u>

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

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering all of the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the

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[17] It was reasonable for the Judge to infer that at least a portion of the violations witnessed by miners occurred in the red zone of a continuous miner. 37 FMSHRC at 637-38. The Commission has held that "'the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence' . . . 'provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.'" *Consolidation Coal Co*., 20 FMSHRC 315, 320 n.4 (Apr. 1998) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)). Here, six miners told investigators that they had seen miners in red zones, and Pasquino acknowledged having found himself in the red zone as well. The statements were made during the course of an investigation regarding a miner who had just died from walking in the red zone of the continuous miner. In addition, none of the miners indicated that their statements excluded the red zone of a continuous miner.

violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See Manalapan Mining Co*., 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009).

The Judge's determination of unwarrantable failure is amply supported by these criteria. 37 FMSHRC at 640; *see also Consolidation Coal Co.*, 22 FMSHRC 328, 331 (Mar. 2000). Knight Hawk conceded that the violation posed a high degree of danger, and that the violation should have been obvious to Chamness. KHC Post H. Br. at 25.

As to the length of time the violative condition existed, the brief duration of a violative condition is not a mitigating factor and does not militate against a finding of unwarrantable failure if the hazardous condition is "readily distinguishable from other types of violations" due to the "high degree of danger" it poses and its "obvious nature." *Midwest Material Co.*, 19 FMSHRC 30, 36 (Jan. 1997). As the Judge found, it is unclear how long the decedent was in the red zone prior to the fatal accident. However, standing in the "red zone" of a continuous miner for any length of time will at *all* times pose an unacceptably high risk of death to the person standing there. We agree with the Judge that the duration of the violation ended at that time only because Chamness was fatally injured while engaging in the prohibited conduct of standing in the red zone. *See* 37 FMSHRC at 639, relying on *Midwest Material*, 19 FMSHRC at 36 (finding that "the hazardous condition existed for a brief period of time only because it culminated in the collapse of the boom on [the miner], resulting in his death.").

Regarding notice of the violative condition, Chamness had demonstrated a propensity for placing himself in harm's way of mobile equipment. The prior acts of indiscriminately violating danger zones under Knight Hawk's red zone policy placed Pasquino on notice that there was a likelihood that Chamness would enter the pinch point areas of other equipment, including a continuous miner. Under Commission case law, simply knowing that a miner *might* take a dangerous action can support a conclusion that the miner needs additional supervision. *A.H. Smith Stone Co*., 5 FMSHRC 13, 15-16 (Jan. 1983); *see also Spartan Mining Co.*, 30 FMSHRC 699, 710 (Aug. 2008).

The operator's prior abatement efforts were insufficient under the circumstances. Although Knight Hawk trained its miners, hung safety posters, and expanded its red zone policy in an effort to increase safety, the company's efforts in discouraging danger zone intrusions fell far short of what was required, especially after learning of Chamness' propensity for endangering himself. Pasquino, as the first line supervisor, failed to implement any meaningful disciplinary or corrective measures aimed at discouraging the decedent from entering red zones.

It is worth noting that Chamness' behavior and Pasquino's inadequate concern for repeated danger zone infractions were reflected in the indifference displayed by Knight Hawk's upper management. In particular, Safety Director Winters testified that if he saw a miner enter the red zone on two separate occasions seven months apart, he would only verbally reprimand him and "*maybe*" bring it to the attention of the mine superintendent. Tr. 155 (emphasis added). He further stated that if a miner was found in the red zone five times over four years, it would not raise flags in his mind. Tr. 148-49, 162.

The operator's disciplinary approach reflects this attitude. In particular, MSHA Investigator Wilcox testified that the accident investigation uncovered no evidence that disciplinary action had been taken against any miner found in violation of Knight Hawk's red zone policy. Tr. 50, 53-54. This is further supported by the testimony of Pasquino, who stated that in his two-and-a-half years as foreman at Knight Hawk, he had never disciplined a miner for violating a safety standard, and the testimony of Mine Superintendent Winters and Safety Director Jankousky, who each confirmed that no employee had ever been disciplined for being in the red zone, and that no red zone violations were ever reported to management. Tr. 211-12.

With regard to whether the operator was on notice that greater efforts were needed, there is no evidence that MSHA had previously warned the operator of problems with red zone compliance at the Prairie Eagle South Mine. It was improper for the Judge to rely on MSHA's online publications, such as the Rules to Live By, aimed at encouraging red zone safety industry-wide as specific evidence that Knight Hawk was on notice that greater efforts were necessary at its mine. Generally available MSHA publications do not supply the specific notice contemplated by this factor. MSHA's emphasis on the seriousness of red zone violations does not, by itself, establish that a particular operator was on notice that greater efforts were necessary at its mine. *See Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3080-81 n.5 (Dec. 2014) ("we examine the operator's [individual] history of violations, warnings from inspectors, and other forms of specific warnings to determine if the operator has been placed on notice of a persistent unsafe condition or practice at its mine").[18]

Nevertheless, Knight Hawk was on notice that miners repeatedly walked unsafely in danger zones in violation of its red zone policy, which included the red zone of the continuous miner as described in its roof control plan. *Compare with Dawes Rigging*, 36 FMSHRC at 3081 (noting that operator was not alerted in any other way that employees engaging in prohibited conduct represented an ongoing problem requiring corrective measures).

We conclude that Knight Hawk acted with aggravated lack of reasonable care in the administration of its broader red zone policy, and nothing in the record suggests that the operator employed a greater degree of care for the continuous miner. Accordingly, substantial evidence supports the Judge's determination that the violation was the result of Knight Hawk's unwarrantable failure to comply with the terms of its roof control plan, as required under section 75.220(a)(1). 37 FMSHRC at 644.

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[18] We do observe, however, that Judges may take official notice of the existence or truth of a fact or other extra-record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true. *See* McCormick on Evidence, 3rd Ed. §§ 329, 330 at 923-927, 1028-1032; Fed. R. Evid. 201; *Union Oil Co. of California*, 11 FMSHRC 289, 300 n.8 (Mar. 1989). The Commission may take judicial notice of MSHA's public documents. *Brody Mining, LLC*, 36 FMSHRC 2027, 2030 n.4 (Aug. 2014), citing *Jim Walter Res., Inc.*, 7 FMSHRC 1348, 1355 n.7 (Sept. 1985).

E. Penalty

Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co*., 8 FMSHRC 491, 492 (Apr. 1986). A Judge's penalty assessment is reviewed under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601(May 2000) (citing *U.S. Steel Corp*., 6 FMSHRC 1423, 1432 (June 1984)); *Mid-Continent Res., Inc*., 16 FMSHRC 1218, 1222 (June 1994). In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria:

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

30 U.S.C. § 820(i).

The Judge discussed her findings related to five of the penalty criteria. She was clearly aware of the operator's history of previous violations, but she did not make express findings regarding this history in the context of her discussion of the assessed penalty. 37 FMSHRC at 640, 645. Although we could remand these proceedings to the Judge to make the required findings, we see no need to do so here. The Commission has held that although a Judge is charged with finding facts on each of the penalty criteria in the first instance, findings may be entered by the Commission on review based on undisputed record evidence. *See Sellersburg*, 736 F.2d at 1153; 29 C.F.R. § 2700.30(a). Therefore, in the interest of judicial economy, based on the undisputed record evidence, we find that of the 36 violations issued to Knight Hawk in the previous 15 months, only one citation was for a violation of its roof control plan and only two citations were S&S.

The operator's safety record weighs in favor of a penalty less than the $70,000 maximum. However, the Judge's findings regarding the other criteria support her penalty assessment.[19] In particular, the gravity of the violation was found to be S&S and was undisputed. Additionally, a reading of the Judge's entire opinion indicates that significant weight was given to the operator's

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[19] While Judges have broad discretion in assessing penalties, Commissioners Young and Althen question whether the maximum penalty imposed here conforms to the Commission's requirement that Judges fully explain their reasoning. In addition to the operator's history of violations, which appeared to reflect a commendable general safety record, the operator appears not to have been credited at all for its good-faith abatement, which was acknowledged by the Judge. Both factors are expressly required to be considered by Section 110(i). In establishing maximum penalties under the Act, Congress clearly was aware of the duty it had imposed on the Commission to consider these factors, yet the maximum penalty was imposed here despite their obvious mitigation. A Judge may properly find that mitigating factors are outweighed by other considerations, but the Judge's failure to expressly explain how they were in this case is troubling.

negligence, the high degree of danger posed by miners entering danger zones and Knight Hawk's complete failure to enforce its policy. We have recognized that in assessing a civil penalty, a Judge is not required to assign equal weight to each of the penalty assessment criteria. Rather, "[j]udges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (citing *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997)). Indeed, the Commission has held that Judges have not abused their discretion by more heavily weighing gravity and negligence than the other penalty criteria. *Signal Peak Energy*, LLC, 37 FMSHRC 470, 485 (Mar. 2015); *Lopke Quarries, Inc.*, 23 FMSHRC at 713.

Accordingly, based on a reading of the Judge's entire opinion and the undisputed facts, we conclude that the Judge did not abuse her discretion in reaching her penalty determination.

III.

Conclusion

For the reasons set forth herein, we conclude that substantial evidence supports the Judge's findings that the violation was a result of the operator's high negligence and was due to its unwarrantable failure to comply. We also affirm the Judge's penalty assessment of $70,000. Accordingly, the Judge's decision is affirmed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

September 29, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. CLAYTON'S CALCIUM INC.	Docket No. WEST 2014-966-M A.C. No. 10-02169-357939

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On July 17, 2015, the Commission received from Clayton's Calcium, Inc. ("Clayton") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On April 29, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to Clayton's failure to answer the Secretary of Labor's September 9, 2014 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on June 1, 2015, when it appeared that the operator had not filed an answer within 30 days.

Clayton claims that it timely responded to the Order to Show Cause but that it used the docket number for another case (WEST 2015-527) involving the same mine. The Secretary does not oppose the request to reopen and confirms receipt of the timely answer. Commission records confirm that the response bearing the incorrect docket number was received on May 26, 2015.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 8, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. KENT 2012-0166 A.C. No. 15-17497-269552-01
v.	
LEECO INCORPORATED, Respondent	Mine: No. 68

DECISION AND ORDER ON REMAND

Appearances: Latasha T. Thomas, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee for Petitioner

Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky for Respondent

Before: Judge McCarthy

I. Statement of the Case on Remand

The Mine Act is built around Congress's fundamental declaration that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a); *see Int'l Union, United Mine Workers of Am. v. MSHA*, 823 F.2d 608, 617 (D.C. Cir. 1987). Consequently, it is critical to construe the Mine Act in a manner that promotes miner safety.

In this case, continuous miner operator Bobby Smith was killed on June 24, 2010 when he stepped into the "red zone" and was pinned against the rib just two months after he was counseled by the mine superintendent for operating the continuous miner machine in the "outer area [range] of the red zone." Tr. 79-80. After holding a hearing on the issue of negligence, because settlement was stymied by a pending wrongful death suit, the undersigned affirmed the MSHA inspector's determination that the Respondent had displayed moderate negligence by failing to meet "the standard of care that a reasonably prudent operator, with knowledge of the goals of the Mine Act, would have undertaken in the same or similar circumstances to ensure against any recidivism by Smith" after the first red zone incident. *Leeco, Inc.*, 36 FMSHRC 1866, 1872 (July 2014) (ALJ). In what has been described by the dissenting Commissioner as "dangerous precedent" (see *Leeco, Inc.*, 38 FMSHRC ___, No. KENT 2012-0166, slip op. at 8 (July 18, 2016) (Comm'r Cohen, dissenting)), a Commission majority reversed my factual finding and credibility resolution that it was likely that Smith would revisit the red zone again,

and found that the Secretary failed to adduce substantial evidence in the record that Leeco was negligent in any way.[1]

> Without evidence that a reasonably prudent operator would have done more in the circumstances, it was error for the Judge to conclude that Leeco's response to Smith's previous incident was insufficient. Because the Secretary did not explain what a reasonably prudent operator would have done under these circumstances, we cannot find the operator to be negligent.

Leeco, Inc., 38 FMSHRC ___, No. KENT 2012-0166, slip op. at 6 (July 18, 2016).

The Commission recognized, as did I, that there were shortcomings in the Secretary's attempt to show what the operator "should have done" to meet its standard of care. Because the Secretary did not spell out the specific measures the operator should have taken to prevent Smith from approaching the red zone again, the Commission majority faults my reliance on such measures to establish that the operator should have exercised greater care under the roof control plan. What the Commission may not have recognized, given the paucity of the evidentiary record, is that I looked to the public record, to "best practice" measures promulgated by the Secretary to Leeco, the mining industry, and the public, to spell out the specific measures that Leeco should have taken to prevent Smith from approaching the red zone again.

The majority suggests that I must have pulled these measures from the Action Plan, and frolics into a discussion of subsequent remedial measures. As shown below, however, my analysis was informed by the Secretary's pre-existing and regularly published best practices for avoiding red zone accidents as set forth by MSHA in Fatalgrams, which have been issued to

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[1] Credibility determinations reside in the province of the administrative law judge's discretion, are subject to review only for abuse of that discretion, and cannot be overturned lightly. *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010) (citing *Buck Creek Coal Co*., 52 F.3d 133, 135 (7th Cir. 1995)). An administrative law judge's credibility findings can be very significant and affect whether the record supports an agency's contrary decision on administrative appeal. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (considering findings by an ALJ). Furthermore, the Commission has recently reiterated the "well established" principle that "it is not within our power to reweigh the evidence or to enter *de novo* findings of fact based on independent evaluation of the record." *See Knox Creek Coal Corp*., 38 FMSHRC ___, No. VA 2014-343-D, slip op. at 11 n.13 (Aug. 23, 2016) (citing *Island Creek Coal Co*., 15 FMSHRC 339, 347 (Mar. 1993)); *see also Wellmore Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, No. 97-1280, 1997 WL 794132, at *3 (4th Cir. 1997).

Leeco, the mining community, and the public for many years prior to June 24, 2010.[2] Had I failed to consider these best practices in determining the appropriate standard of care, I would have been feigning ignorance of the Fatalgrams and closing my eyes to the fact that red zone accidents have been a focus of MSHA's prevention efforts because the accidents are a leading and recurring cause of serious injury and death. In consideration of MSHA's best practices as set forth in Fatalgrams, I found the following:

> In short, Respondent failed to take sufficient steps to ensure that mining machine operators, including Smith, were outside the machine's turning radius before starting or moving the equipment, or to ensure that they were in a safe location while tramming the continuous miner from place to place, or repositioning the miner in the entry during cutting and loading. Although Respondent generally trained production crews and management to understand the hazards associated with avoiding red zones, there is no evidence that Respondent established any specific programs, policies, and procedures for avoiding red zone areas.[3] There is also no evidence that

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[2] Fatalgrams are notices published by MSHA to alert operators, the mining industry and the public to tragic losses of life in the mines and to prevent recurrences in the future by outlining best practices that all in the industry should follow. MSHA, *Preliminary Accident Reports, Fatalgrams and Fatal Investigation Reports*, http://arlweb.msha.gov/fatals/ (last visited Sept. 1, 2016). Leeco is familiar with Fatalgrams. Leeco's witnesses acknowledged that before the fatality occurred, MSHA had sent the company Fatalgrams pertaining to other red zone accidents, and management officials had discussed these Fatalgrams in safety meetings. Tr. 75-76, 90-91.

[3] MSHA has repeatedly recommended that mine operators establish specific procedures for avoiding red zone injuries when tramming mobile equipment. For example, in a 2003 Fatalgram issued after a continuous miner operator was fatally pinned to the rib, MSHA suggested the following best practice: "Ensure that a Standard Operating Procedure (SOP) is in place before tramming the remote controlled continuous miner to another entry or crosscut." MSHA, *Fatalgrams and Fatal Reports*, *Fatality #27 – October 22, 2003*, http://arlweb.msha.gov/FATALS/2003/fab03c27.pdf. In 2004, after another red zone crushing fatality, MSHA reiterated: "Develop a Standard Operating Procedure (SOP) for tramming remote-controlled continuous mining machines. Train the production crew in the SOP and ensure that it is followed." *Fatality #7 – April 3, 2004*, http://arlweb.msha.gov/FATALS/2004/fab04c07.pdf. See also *Fatality #23 – October 16, 2008*, http://arlweb.msha.gov/FATALS/2008/fab08c23.pdf ("Develop proactive programs, policies, and procedures for starting and tramming remote-controlled continuous mining machines. Train all production crews and management in the programs, policies, and procedures and ensure that they are followed."), *Fatality #9 – May 18, 2004*, http://arlweb.msha.gov/FATALS/2004/fab04c09.pdf ("Establish safe operating procedures for remote control continuous mining machine operations, including tramming and cable handling."), *Fatality #3 – February 1, 2004*, http://arlweb.msha.gov/FATALS/2004/fab04m03.pdf ("Establish procedures and follow them, especially when employees tram a remote controlled continuous miner."), and *Fatality #18 – August 12, 2002*, http://arlweb.msha.gov/FATALS/2002/FAB02c18.HTM ("Establish procedures for moving machinery and

(continued…)

Respondent routinely monitored work habits to ensure that operators were avoiding red zones.[4] No engineering controls were in place to prevent this type of fatality.[5] Nor did Respondent assign another miner or buddy to

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[3] (…continued)
equipment.").

As inspector Ashworth testified, the history of coal mining has shown red zone injuries to be "a frequent type accident" that "deserves a little more attention," i.e., this is one of the high-risk areas that mine operators should specifically address when developing safety policies and training programs. Tr. 39-40, 59. As a member of the coal mining industry, Leeco should have been aware of this before Smith died, especially since MSHA had recently called attention to red zone hazards as part of its Safety Targets initiative launched in 2008. *See* U.S. Dep't of Labor, Office of Public Affairs, *News Release: MSHA announces major initiative to bolster mine safety* (Oct. 16, 2008), http://arlweb.msha.gov/Media/PRESS/2008/NR081016.pdf (noting start of new "Safety Targets Training Program" to address common causes of fatalities); MSHA, *MSHA's Safety Targets Program: Safe Operation and Maintenance of Continuous Miners*, http://arlweb.msha.gov/Safety_Targets/Continuous%20Miner%20Package/RCCM.asp (last visited Sept. 1, 2016) (addressing red zone hazards). Yet there is no evidence that the Respondent implemented policies specifically addressing this common, serious hazard until after the fatality occurred.

[4] MSHA has repeatedly made the common-sense suggestion that mine operators should monitor workers to ensure that training programs have been effective and that proper procedures are being followed to avoid red zone accidents. For example, in the "best practices" section of a Fatalgram issued after a red zone crushing death in 2000, MSHA noted that training for safe operation of equipment includes "observation of all tasks required to be performed" and that "[p]roper follow up is required to assure the training is understood and implemented." *Fatality #12 – May 12, 2000*, http://arlweb.msha.gov/FATALS/2000/FAB00C12.HTM. As another example, in 2008, after yet another fatal red zone accident, MSHA recommended: "Frequently review, retrain, and discuss avoiding the 'RED ZONE' areas when operating or working near a remote controlled continuous mining machine. Follow established safe work practices and provide periodic training along with checks to ensure that the safe work practices have been properly implemented." *Fatality #7 – April 18, 2008*, http://arlweb.msha.gov/FATALS/2008/fab08c07.pdf. In the instant case, as the Commission acknowledges, a section foreman was aware that Smith had approached the red zone on a prior occasion while tramming the continuous miner and was told to "keep an eye out" for this behavior, yet he admitted that he had not, in fact, watched Smith tram the machine very often. Tr. 79-82, 111-12.

[5] Another best practice MSHA recommended after an April 2008 red zone fatality was to "[p]ursue new technology such as proximity detection to protect personnel and eliminate accidents of this type." *Fatality #7 – April 8, 2008*, http://arlweb.msha.gov/FATALS/2008/fab08c07.pdf. Several months later, after another crushing fatality, MSHA reiterated, "Install and maintain electronic proximity detection devices. **See the proximity detection single source page on the MSHA website**." *Fatality #23 – October 16, 2008*, http://arlweb.msha.gov/FATALS/2008/fab08c23.pdf (emphasis in original). MSHA had tested proximity detection
(continued…)

> assist Smith or other continuous miner operators when the miner was being moved or repositioned.[6] In these circumstances, Respondent failed to follow many of the best practices promulgated by MSHA. Accordingly, the citation was appropriately written with moderate negligence.

Leeco, Inc., 36 FMSHRC 1866, 1872 (July 2014) (ALJ) (footnotes added).

The footnotes above identify the Fatalgram principles that I relied on to pinpoint the sources of my knowledge of red zone hazards. I could have, and perhaps should have, expressly taken notice of the Fatalgrams and other MSHA public documents in my original decision under Commission precedent. *See Brody Mining, LLC*, 36 FMSHRC 2027, 2030 n.4 (Aug. 2014); *Sec'y of Labor on behalf of Acton v. Jim Walter Res., Inc.*, 7 FMSHRC 1348, 1355 n.7 (Sept. 1985). I could have, and perhaps should have, also taken notice pursuant to the broad doctrine of official notice under the Administrative Procedure Act. 5 U.S.C. § 556(e) (applicable to Commission proceedings under Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b)); *see Sykes v. Apfel*, 228 F.3d 259, 272 (3d Cir. 2000) (noting that APA provision is broader than judicial notice provision at Federal Rule of Evidence 201, in that APA provision permits notice of "technical or scientific facts that are within the agency's area of expertise").

Even without such explicit notice, however, it was apparent to me, based on specialized knowledge acquired from the specified Fatalgram best practices, that a reasonably prudent person who was familiar with the history of red zone accidents in the underground coal mining industry and the guidance and recommendations that MSHA has produced on this subject, and who was also familiar with the fact that Smith was counseled after approaching the red zone just

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[5] (…continued)
technology at certain mines between 2002 and 2006 and launched a "Remote Control Continuous Mining Machine Special Initiative" to inform operators and miners of red zone hazards in 2004, but crushing accidents continued to occur. *See* MSHA, *Request for Information: Proximity Detection Systems for Underground Mines*, 75 Fed. Reg. 5009, 5009-10 (Feb. 1, 2010). As a result, six months before the occurrence of the fatality at issue in the instant case, MSHA publicly concluded that "a safety program based on sound risk management principles should include proximity detection systems, or some other engineering control that addresses the hazard at the source" of the red zone crushing fatalities, and solicited input from interested parties regarding potential regulatory action. *Id.* at 5010. Ultimately, MSHA did promulgate a regulation requiring proximity detection systems on continuous mining machines, although the process took several years and the regulation became effective too late to have any impact on the events of this case. *See* MSHA, *Final Rule: Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines*, 80 Fed. Reg. 2188 (Jan. 15, 2015) (codified at 30 C.F.R. § 75.1732). However, it is very likely that long before the regulation was finalized, and before Smith died, coal industry players including the Respondent would have been well aware of MSHA's public push to promote proximity detection or similar engineering controls to prevent red zone crushing accidents.

[6] It is common knowledge that a "miner helper" is sometimes assigned to aid a relatively inexperienced continuous miner operator with tasks such as pulling cable and moving the machine.

two months earlier, would conclude that additional measures could have and should have been taken by Leeco to prevent Smith from approaching the red zone again. Indeed, the Supreme Court has taken a permissive stance toward allowing administrative agencies to make decisions based on facts within their "special knowledge," even if these facts are not part of the formal record. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) (noting that an administrative agency "is not confined to the evidence in the record in reaching its expert judgment"); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945) (rejecting argument that administrative tribunal had impermissibly "substitute[d] its knowledge of industrial relations for substantive evidence"). *See also American Coal Co.*, 38 FMSHRC __, No. LAKE 2011-13, slip op. at 7 (Aug. 25, 2016) (citing 30 U.S.C. § 823(a) and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994), to emphasize the "Commission's expertise" in construing the Mine Act).

In my view, a Commission administrative law judge should be permitted to rely on the type of specialized knowledge set forth by MSHA in Fatalgrams promulgating best practices in red zone cases. Those best practices, which were summarized in my initial decision in this case, were not based on the Action Plan or subsequent remedial measures. They arise from MSHA's pre-existing and widely publicized best practices in red zone Fatalgram cases, which the Commission has discounted because of insufficient evidence of record put on by the Secretary.

In sum, despite the ample public information regarding what Leeco could have done – and, in my view, should have done – to prevent Smith's recidivism and death, I accept the Commission majority's decision that Leeco was in no way negligent as the law of the case. Accordingly, as directed on remand, I determine the appropriate penalty based on the Commission majority's finding that Respondent was in no way negligent on this record when Smith was killed after again visiting the red zone just two months after being counseled not to do so.

II. Penalty Assessment Principles

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008).

As I discussed in my final *Big Ridge* decision, in an effort to avoid the appearance of arbitrariness, I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel*, 37 FMSHRC 1874, 1880 n.1 (Chairman Jordan and Commissioner Nakamura, concurring); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). This formula is not binding, but operates as a lodestar, since factors involved in a

violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. My independent and de novo penalty assessment of the citation in this case is explained below.

The Secretary proposed a penalty of $21,442 for the violation after considering the six statutory penalty criteria under the penalty formula set forth in 30 C.F.R. Part 100. The parties stipulated to the fact of the violation under 30 C.F.R. § 75.220(a)(1) and to the fact that the violation was significant and substantial ("S&S"), that one miner was fatally injured, and that Respondent abated the citation in good faith and in a timely manner. Tr. 8; Sec'y's Br. 2; Resp't's Br. 1. Accordingly, I find that the gravity of the violation is serious. Because the Secretary failed to explain what a reasonably prudent operator would have done under the circumstances, the Commission majority stated that it "cannot find the operator to be negligent." *Leeco, Inc.*, 38 FMSHRC __, slip op.at 6 (July 18, 2016). Exhibit A to the Secretary's penalty petition shows Leeco's size and violation history, and Leeco has not challenged the Secretary's findings in this regard. Ex. S-5 (MSHA's Assessed Violation History Report). The parties have also stipulated that the proposed penalty will not affect Leeco's ability to remain in business. Tr. 8.

Based on the legal principles outlined above, after considering the six statutory penalty criteria under section 110(i) of the Act, I assess a civil penalty of $4,500 for Respondent's violation of 30 C.F.R. § 75.220(a)(1).

III. Order

It is **ORDERED** that Citation No. 8359591 is **AFFIRMED**, **AS MODIFIED** by the Commission, with a finding of no negligence attributable to Respondent Leeco. It is further **ORDERED** that Respondent pay a civil penalty of $4,500 within thirty days of this Order.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 20, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. COEUR ALASKA, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2015-346-M A.C. No. 50-01544-370187 Docket No. WEST 2015-401-M A.C. No. 50-01544-373015 Docket No. WEST 2015-422-M A.C. No. 50-01544-373488 Docket No. WEST 2015-470-M A.C. No. 50-01544-375449 Mine: Kensington

DECISION

Appearances: Sean J. Allen, U.S. Department of Labor, Office of the Solicitor, MSHA Backlog Project
1244 Speer Blvd., Suite 216, Denver, Colorado 80204

Donna V. Pryor, Husch Blackwell LLP
1700 Lincoln St., Suite 4700, Denver, Colorado 80203

Before: Judge Simonton

I. INTRODUCTION

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Coeur Alaska, Inc., at the Kensington Mine, pursuant to the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. §801. These cases involve ten citations issued between July 17, 2014 and December 5, 2014, with a total proposed penalty of **$199,047.00**. The parties presented testimony and documentary evidence at a hearing held in Juneau, Alaska on November 3-5, 2015.

II. BACKGROUND

Coeur Alaska, Inc. ("Coeur") operates the Kensington Mine in the Berners Bay Mining District 40 miles north of Juneau, Alaska. Tr. 475. The mine consists of an underground gold mine, a process facility, a water treatment plant, a camp for the miners, an administration

building, a maintenance shop, and a port facility. *Id*. Coeur has operated the Kensington Mine since July 1995. *Id*. The mine's underground levels are labeled by number based on elevation. Tr. 477; Ex. P-3.

On July 17, 2014, MSHA Inspector Robert Dreyer ("Dreyer") began his inspection of the Kensington Mine. Tr. 37:2. Dreyer was accompanied by Tom Herndon ("Herndon"), the Health and Safety Coordinator at the Mine, and Arnoldo Tapia ("Tapia"), a Miner's Representative. Tr. 711: 6-12. Dreyer found repeated instances of torn or damaged wire mesh adjacent to loose or separated rock and material throughout the Kensington Mine. Tr. 56-57, 64, 67, 81. Between July 17 and July 19, Inspector Dreyer issued five citations[1] for alleged violations of 30 C.F.R. § 57.3360 for failure to maintain installed ground support. *See* Ex. P-2; P-7; P-10; P-12; P-15. Coeur abated each hazard and the citations were terminated.

On December 3, 2014, MSHA Inspector Thomas E. Rasmussen ("Rasmussen") began his inspection of the Kensington Mine. Tr. 327. Rasmussen observed repeated instances of damaged wire mesh and loose rocks present throughout the mine that created potential hazards to miners. *See* Ex. P-17, P-22, P-26, P-30. Between December 3 and December 5, Inspector Rasmussen issued Citations No. 8786150 and 8786162 for alleged violations of 30 C.F.R. § 57.3360 for unmaintained ground support. Ex. P-17, P-30. He also issued Citations No. 8786152 and 8786153 for alleged violations of 30 C.F.R. § 57.320 citing failure to take down, support, or barricade hazardous ground conditions. Ex. P-22, P-26. Coeur abated each hazard and the citations were terminated.

On December 4, 2014, MSHA Inspector James E. Stembridge ("Stembridge") inspected the Kensington Mine. Tr. 298-99. Stembridge observed loose rocks present among the 1140-180 up ramp and the 1425 and 1485 areas that created potential hazards to miners in the area. Ex. P-35. The rocks were barred down, and Stembridge issued Citation No. 8780941 for an alleged violation of 30 C.F.R. § 57.3200 for failure to correct or warn of ground conditions that pose a hazard to miners. *Id*. Coeur abated the hazard and the citation was terminated.

The Secretary designated six violations of § 57.3360 and one violation of § 57.3200 as Significant and Substantial ("S&S"), and specially assessed penalties for six of the violations of § 57.3360. At hearing, Coeur contested each of the ten alleged violations. Resp. Br. 1. Coeur contested the factual representations of the MSHA inspectors, the legal basis for finding the violations, the S&S and negligence designations, and the special penalty assessments. *See* Resp. Br. 1-2. At hearing, Inspectors Dreyer, Stembridge, and Rasmussen all testified on behalf of the Secretary. Witnesses for Coeur included (1) Jeff Murray, Health and Safety Manager; (2) Justin Wilbur, Mine Captain; (3) Thomas Herndon, Health and Safety Coordinator; (4) Eddie Petrie,

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[1] The citations, all alleging unmaintained ground support, include: Citation No. 8611872 for five separate instances in the 480 North travelway and the 196, 200, 212, 216, 220, and 240 intersections; Citation No. 8611874 in the 555 South travelway and the 188 and 180 intersections; Citation No. 8611875 in the 555 North travelway and the 200, 208, and 236 intersections; Citation No. 8611879 in the back of 1355 intersection and the main upramp; and Citation No. 8611880 in the 1355 at the 189 and 214 intersections. *See* Ex. P-2; P-7; P-10; P-12; P-15.

Underground Mine Trainer; (5) Robert Rich, Grader Operator and Miners' Representative; (6) Alan Gordon, Underground Mine Trainer; (7) Arnoldo "Arnie" Tapia, Paste Plant Operator and Miners' Representative; and (8) Radford Langston, a geologist and engineer that served as an expert witness. I have organized my findings and detailed my final ruling by each individual citation.

For the reasons stated herein, I affirm the underlying violations for nine citations and vacate Citation No. 8780941. I reduce the negligence designation for Citation No. 8611879 from high to moderate. I increase the negligence designations for Citations No. 8786152 and 8786153 from moderate to high. I vacate the S&S designation for Citation No. 8786152 and reduce the gravity to unlikely to result in lost workdays or restricted duty. In addition, I vacate the special assessments in Citation Nos. 8611875 and 8611879. After considering the necessary criteria for penalty assessments, I find that a penalty of **$159,634.00** is appropriate.

III. STATEMENT OF LAW

A. 30 C.F.R. § 57.3360

Section 57.3360 states:

> "Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks."

30 C.F.R. § 57.3360. Section 57.3360 requires that in locations (1) where ground support is necessary, (2) the support system shall be designed, installed, and maintained to support the ground (3) in places where persons work or travel. *See Hecla Limited*, 37 FMSHRC 877, 884 (Apr. 2015) (ALJ). Loose and fractured rock is a violation of the standard. *See ASARCO Mining Co.*, 15 FMSHRC 1303, 1304 (July 1993). Section 57.3360 does not specify the type of ground support to be used, but only requires a showing that the area required the support. *See id*. at 1308-09.

The Secretary bears the burden of proving by a preponderance of the evidence that a reasonably prudent person familiar with the mining industry and the standard's protective purpose would have recognized the hazardous condition. *Canon Coal*, 9 FMSHRC 667, 668 (Apr. 1987). "To prove by a preponderance of the evidence means that the evidence supporting the violation must be more convincing than the evidence which is offered in opposition to it." *Newmont Gold Company*, 20 FMSHRC 1035, 1038 (Sept. 1998) (ALJ) (citations omitted). The Commission has held that testimony by MSHA inspectors regarding the requirement of ground control measures constitutes substantial evidence where the judge determines that the inspector's testimony is reliable. *See id*. at 1307.

B. 30 C.F.R. § 57.3200

Section 30 C.F.R. § 57.3200 states:

> "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry."

30 C.F.R. § 57.3200. The provision aims to require elimination of hazardous conditions. *ASARCO, Inc.*, 14 FMSHRC 941, 951 (Jun. 1992). The Secretary may not use the occurrence of a ground fall in itself as sufficient evidence of a violation, but must prove that a "reasonably detectable hazard" existed prior to the ground fall. *Id*. The Secretary's conclusion must be supported by substantial evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id*. at 951 (citations omitted). Testing an area of questionable roof and erroneously concluding that it is safe is sufficient to violate section 57.3200. *Id*. at 946-47. Factors to be considered to determine whether loose ground is present includes "the results of sounding tests, the size of the drummy area, the presence of visible fractures and sloughed material, 'popping' and 'snapping' sounds in the ground, the presence, if any, of roof support, and the operating experience of the mine or any of its particular areas." 14 FMSHRC at 952; *Amax Chemical Corp.*, 8 FMSHRC 1146, 1149. Material is loose and hazardous when it can be pried free by hand with scaling bars. *See Springfield Underground*, 17 FMSHRC 613, 619 (Apr. 1995) (ALJ) (Upholding violation where "loose" material was scaled down by hand while vacating violations where material was brought down by a large mechanical scaler).

C. Significant and Substantial

A violation is significant and substantial (S&S), "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

In order to uphold a citation as S&S, the Commission has held that the Secretary of Labor must prove: 1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984).

The Secretary must prove there was a reasonable likelihood that the hazard contributed to by the violation will cause an injury, not a reasonable likelihood that the violation, itself, will cause injury. *West Ridge Resources, Inc.*, 37 FMSHRC 1061, 1067 (May 2015) (ALJ), citing *Musser Eng'g, Inc.,* 32 FMSHRC 1257, 1280-81 (Oct. 2010). Evaluation of the four factors is made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

D. Negligence

Under the Mine Act, operators are held to a high standard of care, and "must 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." 30 C.F.R. § 100.3(d). High negligence occurs when the operator "knew or should have known of the violative condition and there are no mitigating circumstances." 30 CFR § 100.3: Table X. Moderate negligence occurs when the operator "knew or should have known of a violative condition or practice, but there are mitigating circumstances." *Id.*

E. Penalty Assessment

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (March 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ shall consider the six statutory penalty criteria:

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

30 U.S.C. 820(I).

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. If the conditions of the violation so warrant, the Secretary may waive the regular assessment under § 100.3(a) and specially assess a penalty. 30 C.F.R. § 100.5(a). The special assessment must also be based upon the six criteria outlined above, and all findings must be in narrative form. 30 C.F.R. § 100.5(b).

IV. ANALYSIS

1. Citation No. 8611872

MSHA Inspector Robert Dreyer ("Dreyer") issued Citation No. 8611872 on July 17, 2014 for an alleged violation of 30 C.F.R. § 57.3360. Ex. P-2. The citation alleged that wire mesh used for ground support in the mine was damaged and improperly maintained. *See id*. Dreyer observed loose material adjacent to the patches of damaged wire mesh along the 480 North travelway ("the 480 North") and the 196, 200, 212, 216/220, and 240 intersections. *See* Ex. P-2, P-3. The 480 is the only means to reach these intersections. Tr. 83:14-20. Inspector Dreyer testified that the damaged wire mesh and loose materials could have resulted in five separate citations rather than one single citation for the entire area. Tr. 80: 13-18. He designated the violation as S&S, reasonably likely to result in permanently disabling injury, and the result of

high negligence. Ex. P-2. The Secretary specially assessed a penalty of $33,400.00. Ex. P-2, R-Z-1, R-Z-2.

a. The Violation

Coeur violated section 57.3360 because Coeur failed to maintain wire mesh that was necessary to reduce scaling requirements along the 480 North. To prove a violation of § 57.3360 a reasonably prudent person familiar with mining must conclude that (1) the area required ground support, (2) the method was installed, designed, and maintained to support the ground, and (3) miners worked in or traveled along the walkway. *See Canon Coal*, 9 FMSHRC 667, 668 (Apr. 1987); *Hecla Limited*, 37 FMSHRC 877, 884 (Apr. 2015) (ALJ).

Ground support is necessary in the 480 North travelway. Inspector Dreyer identified fractured or separating rock located near or adjacent to torn or damaged wire mesh in five different areas along the 480 North. Tr. 51:11-15. During his testimony, Dreyer circled and identified rocks of concern in the photographs he took during the inspection. *See* Ex. P-2, C-3, C-6, C-12, C-17. He noted a large fractured and separating rock in the 196 intersection. Tr. 53-54. He estimated that the rock measured 18 inches by 18 inches by 6 to 8 inches and weighed over 100 pounds. Tr. 53-54; Ex. P-2, C3. He observed a 12-inch tear in a protruding portion of wire that was full of loose material on the rib of the 200 section. Tr. 62-63:15; Ex. P-3, C-6. Exposed loose material was adjacent to a large hole in the wire in the 212. Tr. 71:18-22. A "keyed" in rock adjacent to torn wire in the 216 and 220 intersections; if that rock were removed, more loose material would fall as well. Tr. 72:17-73:5. He also observed broken wire and loose rock located approximately 16 feet above a vehicle and an equipment operator in the 240. Tr. 77:6-23; Ex. P-2, C-17, C-19.

Coeur contests Inspector Dreyer's findings and argues that the Kensington Mine consists of diorite rock of such outstanding quality that ground support is not necessary in the cited areas. Resp. Br. 9. Radford Langston, a geologist, engineer, and Coeur's expert witness, testified that the diorite in the Kensington Mine is very strong and is characterized by minimal loosening and movement along the fractures. Tr. 575:22-579:7. Yet Mr. Langston also testified that the high quality diorite nonetheless requires scaling to ensure that loose rock does not become a hazard. *See* Tr. 622, 634, 638. In fact, the first page of Coeur's ground control manual for the Kensington Mine indicates that scaling and barring down rock is necessary. *See* Ex. R-O, 1. Langston also agreed that wire mesh can be used as a form of ground support, though he did not believe that it was being used in that capacity here. Tr. 616:20-22.

In each of the cited areas, torn or rusted wire mesh was located near or adjacent to the areas of loose rock that concerned Dreyer. Tr. 49-50. The torn or rusted wire was clearly visible in Inspector Dreyer's photographs. *See generally* Ex. P-2. While Coeur argues that Inspector Dreyer was unable to point out evidence of loose material in a number of his photographs, he testified credibly to personally observing fractures, cracks, and gaps along the rocks in the cited areas. Tr. 232.

The evidence also shows that the wire mesh was designed, installed, and maintained to support the ground because the wire mesh reduced the need to scale. Coeur argues that the wire

mesh is "redundant;" it posits that its ground control plan does not require wire mesh to be installed and that the mesh was intended for convenience rather than for ground support because it was not installed throughout the entire mine. Resp. Br. 10. These arguments are not persuasive. The wire mesh *was* installed throughout the 480 North and other cited travelways. Tr. 627:19-628:18. The wire mesh may be convenient because its installation and maintenance cut down on scaling time, but its purpose is to reduce the ground support responsibilities of individual miners. Resp. Br. 10; Tr. 493: 13; Tr. 634:6-10. The wire thus acts as substitute ground support, and was installed to function as such. Inspector Dreyer's observations show loose or unconsolidated material behind unmaintained wire. Without the wire mesh, the material would be have to be scaled or could create a hazard, and Coeur's failure to maintain the wire increased the risk of that hazard.

Furthermore, Coeur's ground support manual indicates that wire mesh should be installed throughout the mine "as needed." *See* Sec'y Br. 13; Tr. 609, 625-30; Ex. R-O, p. 28,44, 48, 50. "As needed" appears to mean "necessary;" Coeur's miners have no discretion in installing the wire mesh, and the mesh is present throughout the 480 North. *See* Resp. Br. 3, FN 2. Both Mr. Langston and Inspector Dreyer agreed that once installed, the wire mesh needed to be maintained. Tr. 46-49; 634. While the ground support manual does not explicitly require wire mesh, it is obvious, given the extent of loose material behind it, that it was installed and intended to act as such. *See* Tr. 624-629.

Finally, it is clear that miners work near and travel along the cited areas in the 480 North. Inspector Dreyer saw three miners exiting the 480 North during his inspection. Tr. 200:24-202:1. He also took pictures of a vehicle located directly under the hazard identified in the 240 intersection and testified that an equipment operator was working in the same area. Tr. 77-80; Ex. P-2, C-17-19. The outlay of the 480 North indicates that the equipment operator must have traveled by every violation in order to reach the 240. Tr. 84:1-4: Ex. P-3.

Ground control was necessary along the 480 North and the wire mesh was installed to reduce manual ground control efforts. Loose rock was present behind portions of wire mesh that Coeur clearly failed to properly maintain. Inspector Dreyer personally observed miners near the travelway on foot, and in one case parked and working near one of the hazards. Citation No. 8611872 is **AFFIRMED**.

b. Significant and Substantial

I have already held that Coeur violated 30 C.F.R. § 57.3360, a mandatory safety standard, when it failed to maintain wire mesh in the 480 North. Coeur's failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the area. Given the particular facts surrounding this citation, the hazard was reasonably likely to occur. Inspector Dreyer's photographs clearly indicate that the wire was damaged or poorly maintained throughout the entire 480 North. *See* Ex. P-2. Loose material was identified near the damaged wire in the cited areas, and miners worked or traveled in the 480 North during the inspection. Coeur's failure to maintain or repair the damaged wire mesh would

contribute directly to the occurrence of such hazard by allowing the loose material to fall through the damaged areas and contact passing miners. Tr. 87.

The hazard of the falling material was reasonably likely to result in injuries to miners because loose material and damaged or torn wire were found throughout the 480 North. S&S violations are determined not only on the facts existing at the time of the citation, but also in the context of continued mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (1984). Loose rock adjacent to torn or damaged wire mesh existed throughout the 480. Tr. 63:20-25; 66:9-14; 72-73:10. The loose material was likely to come down through natural mining processes. Tr. 57:6-7. The prevalence of damaged or unmaintained wire mesh in each cited area indicates that there is a reasonable likelihood that miners would be exposed to the risk of contact by loose material.

Coeur points to adequate roof bolting and the soundness of the rocks in the back and ribs of the 480 North. Resp. Br. 28. Coeur's witness Arnoldo Tapia ("Tapia") testified that any material that became loose would fall near the rib on the side of the travelway where miners are instructed not to travel. *Id.* Yet the presence of loose material indicates that neither bolting nor the solidity of the rocks eliminated the need for scaling or functional wire mesh. The location of the falling material is also unpersuasive. The entire 480 North was open for travel. Tr. 84-58. Coeur has no written plan requiring miners to walk down the center of travelways. Tr. 85:8-16; Tr. 555. Dreyer also testified that he and the accompanying miners traveled in all sections of the 480 North during his inspection. *Id*. The deterioration of the wire mesh contributed to the hazard of falling loose material in a utilized travelway, and would be reasonably likely to result in the injury of a passing miner.[2]

The extent of unmaintained wire mesh and the size of the loose material throughout the 480 indicate that the hazard created a reasonable likelihood of exposure to a serious and permanently disabling injury. The damaged wires were often adjacent to the loose material and the height of the loose material ranged from about 6 to 8 feet high in the 216 to nearly 14 feet high in the 200. Tr. 64; 72:14-17. Inspector Dreyer estimated that the 18 inch by 18 inch rock observed in the 196 weighed nearly 100 pounds, and would undoubtedly result in broken bones or crushing injuries. Tr. 57, 87. I agree and therefore uphold Citation No. 8611872 as S&S.

c. Negligence

I also find that the violation was the result of high negligence on the part of Coeur. High negligence occurs when the operator "knew or should have known of the violative condition and there are no mitigating circumstances." 30 CFR § 100.3: Table X. The unmaintained wire mesh was extensive throughout the travelway and Coeur failed to demonstrate any mitigating

[2] While I have reservations that a reasonable likelihood of injury exists in the muck bay at the 196 intersection, Inspector Dreyer observed miners and equipment in the 240 and exiting the 480 North. Tr. 51:19-22. Even if no miners were exposed to the hazards in the 196, the extent of the unmaintained wire mesh and the lack of care in maintaining the wire throughout the area demonstrate that the violation on the whole is S&S. If even one of the hazards described in this the citation could be designated S&S, it is sufficient to uphold the entire citation as such.

circumstances. The existence of torn or unmaintained wire mesh along the entire 480 North demonstrates that Coeur's lack of care was not an isolated occurrence. Tr. 88:9-18.

While Coeur disputes the length of time the violations existed and whether management knew of the violation, actual knowledge is not required to designate a violation highly negligent. *See* 30 C.F.R. § 100.3(d): Table X. Individuals were present in the cited areas and were even working directly under the violations. Tr. 78; 89; 199. They either failed to notice the unmaintained wire and loose material or took no action in response to it. In many areas, the torn wire showed signs of rust, which is unlikely to occur overnight or within a single shift. Tr. 58; P-1, C-11. The torn wire was obvious and frequent throughout the 480 North, and Coeur should have known of its existence. Tr. 88:9-18.

I also credit Inspector Dreyer's decision to refuse to consider the mine rehabilitation program and employee training program to be mitigating factors.[3] The evidence indicates that Coeur took minimal measures to prevent, correct, or limit exposure to risks created by the torn wire. Inspector Dreyer continuously asked Safety Coordinator Tom Herndon to provide evidence of mitigating factors, and Herndon failed to do so. Tr. 90-91. Rather, he merely responded that the conditions along the 480 North were "bad." *Id*. Inspector Dreyer saw no evidence that any rehabilitation had taken place in the 480 North. Tr. 210. I credit Inspector Dreyer's testimony that the rehab program and miner training were irrelevant factors in the citation; either factor, if properly implemented in the area, would have reduced the extent of the violations. I therefore uphold the high negligence designation.

d. Special Assessment

Although I assess monetary penalties de novo, the Secretary submitted a specially assessed penalty of $33,400.00. *See* Ex. R-Z-1, 2. The citation was for a violation of a Rule to Live By, which Inspectors are required to submit for consideration of a special assessment. Ex. R-Z-1; Tr. 91:10-92:5.

Coeur's violation history is reasonable. Ex. P-1; R-Z-1. However, this citation describes five areas each of which could constitute separate citations. Coeur is a large operator, and there is no indication that the penalty will interfere with its ability to continue operations. *See* Ex. R-Z-2. As discussed above, the violation was S&S with a reasonable likelihood of permanently disabling injury and the result of Coeur's high negligence. The pervasive and obvious nature of the violations throughout the 480 North indicates that the wire mesh was not closely examined or that miners were unaware of the threat the loose material may pose. The wire mesh was likely not maintained for an extensive period of time because it showed signs of rust, and because Coeur believed that the rock was of such high quality that ground support was generally not necessary. Coeur demonstrated good faith in abating the citations. The gravity, negligence,

[3] Both parties cite Coeur's miner workplace examination cards as another factor that should have been considered. Tr. 99-101; Resp. Br. 29. While I admitted the workplace exam information as evidence, I place little weight on them because the Inspectors did not use them or rely on them when they wrote the various citations. *See* Tr. 99-101:5.

extensiveness of the violation and size of Coeur all justify the assessment of a special assessment in this instance.

Coeur contests all of the Secretary's special assessments because they falsely state that management was aware of the violations. *See* Resp. Br. 44. While it is true that the Special Assessment Narrative Form inaccurately stated that Coeur's management was aware of the hazards, actual knowledge that a violation exists is not the sole factor in designating high negligence or specially assessing a penalty. *See* Ex. R-Z-1. High negligence and gravity are also designated through continued mining operations, and it is sufficient to determine that the operator should have known that the violation existed. Here, the presence of miners and the amount of damaged wire along the 480 North indicate that Coeur should have been aware of the condition. I therefore uphold the special assessment of $33,400.00.

2. Citation No. 8611874

On July 18, 2014, Inspector Dreyer issued Citation No. 8611874 for an alleged violation of 30 C.F.R. § 57.3360. Ex. P-7. The citation alleged that the conditions in the 555 South travelway ("the 555 South") and the 180 and 188 intersections required bolts to be installed and the damaged mesh wire to be maintained. *See Id*. The area is an access road to various other headings. Tr. 108. There were no barriers, barricades or signage to prevent entry. *Id*. The citation alleged that the violation was S&S, likely to result in a permanently disabling injury, and the result of high negligence. *Id*. The Secretary specially assessed a penalty of $33,400.00. Ex. R-Z-2.

a. The Violation

As with the previous citation, I find that the wire mesh here was necessary for ground support and was installed to support the ground because Coeur used the wire mesh throughout the entire area to reduce scaling. Inspector Dreyer observed loose material above the 555 South, on the 188 pillar, and between the 180 and 188 intersections. Tr. 108:13-17. A pile of loose material was located directly beneath one area of concern on the floor in the 188. Tr. 109: 9-12. Cracks and fractures were visible in the rock. *Id*. Inspector Dreyer's photographs show loose material and torn wire, as well as a bolt plate that no longer touched the face of the rock. *See* Ex. P-7, C-7, C-8. Torn, ripped, or otherwise unmaintained wire mesh was present near each of these areas. *Id*. Dreyer also observed bar marks in the area that demonstrated some rehabilitation, but the existence of loose and flaky material indicated that the rehabilitation was insufficient or incomplete. Tr. 108: 19-23. Coeur's assertion that the 555 South travelway had been rehabbed three days before the citation was issued supports these observations. *See* Resp. Br. 13; Tr. 109-111.

I also find that miners worked in or traveled through the 555 South. While Inspector Dreyer did not observe any miners in the area, the 555 South was not barricaded and did not warn against travel. Tr. 125:9-126:8. It remained open to the miners, as evidenced by a vent bag in the area. Ex. P-7, C-5; Tr. 123:9-17. Mobile equipment traveled through the area and, according to Coeur, was the likely cause of damage to the wire mesh. Tr. 114:21-25. Citation No. 8611874 is **AFFIRMED**.

b. Significant and Substantial

I have already upheld Coeur's violation of § 57.3360. Coeur's failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the areas. Given the particular facts surrounding this citation, the hazard was reasonably likely to occur. Damaged wire mesh was present in the area, and loose material was visible above the 555 South and on the pillar of the 188. Tr. 108-109. Coeur's failure to maintain the wire exposed the loose material, and it was reasonably likely that the rocks would fall through the damaged or torn wire mesh and contact a miner. Thus, the violation constituted a discrete safety hazard to miners.

The hazard was reasonably likely to result in injury to miners because loose, cracked, and fractured material was located above the travelway and on the pillar. Loose material was visible on the pillar and on the floor directly beneath the unmaintained wires. Tr. 118, 122-23. The 188 pillar is the first pillar seen by miners entering the 555 South, and miners stage and park equipment in the area. Tr. 125-26. The location of the torn mesh and loose material directly above an unblocked and un-barricaded travelway created a reasonable likelihood of injury.

The hazard is reasonably likely to result in a serious injury. Ex. P-7, C-7. Inspector Dreyer considered the loose rock on the 188 pillar one of the most dangerous conditions in the first inspection because fractures were visible and the material could be easily dislodged. Tr. 109-111. Again, miners would have to travel past the hazards to enter or exit the 555 South. Tr. 125-26. I credit Inspector Dreyer's testimony that the size and location of the hazards were also likely to cause serious injuries such as broken bones and crushing. Tr. 128:8-14. I thus uphold the S&S designation.

c. Negligence

I find the Secretary's high negligence designation to be appropriate due to the open and obvious extent of the hazards in the area. The hazards were located close to the level access and the area was used to stage equipment, where traffic is more frequent. Tr. 125: 15-25. Furthermore, evidence of barring demonstrates that individuals knew of the hazard but did not complete the rehabilitation or scaling process. Tr. 130:1-7. While Coeur argues that there is no evidence that the area was in use, it also explained to Inspector Dreyer that the wire mesh was likely torn by mobile equipment. Tr. 114: 16-25. This suggests that the area was either recently used for travel or that the hazard existed for a long period of time. For this reason, I also credit Inspector Dreyer's decision to disregard the rehabilitation and miner training as mitigating factors. The evidence of incomplete barring and the presence of loose material a mere three days after rehabilitation allegedly took place indicate that neither program was effective. I therefore hold that Coeur should have been aware of the hazards, and uphold the high negligence designation.

d. Special Assessment

The Secretary specially assessed a penalty of $33,400.00. *See* Ex. R-Z-2. The citation was for a violation of a Rule to Live By; Inspectors must submit violations of Rules to Live By for consideration of a special assessment. Ex. R-Z-2; Tr. 91:10-92:5. Coeur's violation history is reasonable. Ex. P-7. However, this violation consisted of three different areas that could have qualified as separate citations. Ex. P-7. In addition, Inspector Dreyer issued five citations to Coeur for violation of § 57.3360 during the course of his inspection. The violation was S&S with a reasonable likelihood of permanently disabling injury and the result of Coeur's high negligence. The pervasive and obvious nature of the violations throughout the 555 South indicates that the wire mesh was not closely examined or properly rehabilitated. If vehicles caused the damage to the wire mesh in the 555 South, it indicates that miners were in the area recently or that the violation existed for a significant period of time.

Coeur is a large operator, and there is no indication that the penalty will interfere with its ability to continue operations. *See* Ex R-Z-2. Coeur abated the violation within a reasonable amount of time. *Id*. The gravity and negligence of the violation justify the assessment of a special assessment. I therefore uphold the special assessment of $33,400.00.

3. Citation No. 8611875

On July 18, 2014, Inspector Dreyer issued Citation No. 8611875 citing an alleged violation of § 57.3360. Ex. P-10. The citation alleged that several areas of damaged and stressed wire mesh existed in the 200, 208, and 236 intersections of the 555 North travelway ("555 North"), and were not properly maintained to prevent hazards to miners. *Id*. The citation alleged that the violation was non-S&S, unlikely to result in lost workdays or restricted duty, and was the result of high negligence. *Id*. The Secretary specially assessed a penalty of $3,000.00. Ex. R-Z-2. Coeur challenged the underlying violation, high negligence designation, and the special assessment. Resp. Br. 14, 32, 47.

a. The Violation

As with the previous citations, I find that the wire mesh was necessary for ground support in the Kensington Mine and was installed to support the ground because Coeur used the wire mesh throughout the entire area to reduce scaling. Loose material was visible throughout the 555 North. Tr. 137; Ex. P-10, C-2, C-7. A large, bulging section of wire filled with loose material existed directly over the 555 North and the 208 intersection. Tr. 139; Ex. P-10, C-2. Inspector Dreyer also noted and photographed unmaintained wire mesh in the 236, adjacent to loose and separated material. Ex. P-10, C-10, C-11. The 555 North is a travelway to other intersections. Tr. 108. Miners would walk through the 555 to access other parts of the mine. Citation No. 8611875 is **AFFIRMED**.

b. Significant and Substantial

Inspector Dreyer designated the violation as non-S&S and unlikely to result in lost workdays or restricted duty. Ex. P-10. Dreyer testified that the bulging section of material held in

place by stressed and damaged wire mesh in the 208 had not yet failed and that the loose material within the bulge was relatively small. Tr. 143:11-19. Dreyer testified that the unmaintained wire in the 200 and 236 intersections left only small openings. Tr. 143:23-25. He did not believe that the loose material was likely to fall through the openings and contact a miner. Tr. 144:1-6. Furthermore, Dreyer believed that if the material in any section were to contact a miner, the contact would result in less concerning injuries such as cuts and lacerations. Tr. 144:14-18.

I find Inspector Dreyer's testimony to be credible. Coeur violated a mandatory standard and the violation was likely to contribute to a discrete safety hazard because the loose material could fall through the unmaintained wire mesh and contact a miner. However, the bulging wire mesh in the 208 was still intact, albeit damaged, and the holes in the wire mesh in the 200 and 236 intersections were quite small. Furthermore, the loose material observed in all three intersections was relatively small. The hazard was not reasonably likely to cause a serious injury. I therefore defer to Inspector Dreyer's testimony and uphold his assessment of the violation as non-S&S and unlikely to result in lost workdays or restricted duty.

c. Negligence

The open and obvious extent of the hazards in the 555 North justifies a high negligence designation. The frequency with which Inspector Dreyer observed loose material near damaged or unmaintained wire mesh during this inspection demonstrate a large-scale failure to address these hazards. Tr. 145:3-146:15. Again, I credit Inspector Dreyer's decision to disregard the rehabilitation and miner training as mitigating factors. Tr. 145. Safety Coordinator Herndon offered no explanation for the poor condition of the wire mesh. *Id*. While Coeur argues that the area had been rehabbed just three days prior, such evidence is not visible in Mr. Dreyer's photographs, and I find it unlikely that a bulging section of wire filled with loose material developed over the course of three days. Resp. Br. 15; *See* Ex. P-10. Coeur's training and rehabilitation procedures were thus insufficient to identify or remedy the damaged wire mesh and loose material, and cannot be considered mitigating factors. I therefore uphold the high negligence designation.

d. Special Assessment

The Secretary proposed a special assessment of $3,000.00. Ex. R-Z-2. The citation was for a violation of a Rule to Live By; Inspectors are required to submit these violations for consideration of a special assessment. Ex. R-Z-2; Tr. 91:10-92:5. Coeur's citation history prior to this inspection is reasonable, but Coeur was issued five citations for the same violation over the course of the inspection. The violation was non-S&S and unlikely to result in lost workdays or restricted duty, and the result of high negligence. Ex. P-10. Loose material was clearly visible and located close to unmaintained wire mesh. Ex. P-10, C-10, C-11.

There is no indication that the penalty will interfere with Coeur's ability to continue operations. *See* Ex R-Z-2. Coeur demonstrated good faith in abating the citations. *Id*. Because, unlike the two citations above, this violation was non-S&S and was unlikely to cause serious injury, the special assessment appears excessive. I therefore vacate the special assessment and assess a penalty of $1,203.00.

4. Citation No. 8611879

On July 19, 2014, Inspector Dreyer issued Citation No. 8611879 for an alleged violation of § 57.3360 for Coeur's failure to maintain wire mesh at the 1355 intersection and upramp. Ex. P-12. The 1355 is a main route and was located near a primary escape way. *Id*. The citation alleged extensive damage to wire mesh at the back of the intersection near large, loose rocks. *Id*. Miners and equipment traveled through the area. *Id*. The citation alleged that the violation was S&S, reasonably likely to be fatal, and the result of high negligence. *Id*. The Secretary specially assessed a penalty of $60,000.00. Ex. R-Z-5.

a. The Violation

As in the previous violations, ground support was necessary to ensure that loose material did not become a hazard and the wire mesh was installed to reduce scaling and support the ground. It is clear here that Coeur failed to maintain its ground support. Large rocks were balanced on the wire mesh and a large patch of damaged wire mesh was visible 18 feet above the ground in the 1355. Tr. 158; Ex. P-12, C-9. The rock was already protruding past the point of damage on the wire mesh. Tr. 159:12-13. Maintenance of the wire was therefore necessary to prevent a hazard developing in the 1355.

The 1355 is a travelway to other portions of the mine. Tr. 163:6-13. Though Coeur argues that no loading took place in the area for at least two days, Inspector Dreyer's conversations with other miners indicate that the rock could have only been loosened by contact from loading a truck in the intersection. Resp. Br. 16; Tr. 168:2-11. Furthermore, Dreyer observed a Porta-Potty in the area, indicating miners had reason to access the area by foot. Tr. 163-64. I credit Inspector Dreyer's detailed testimony and uphold the violation. Citation No. 8611879 is **AFFIRMED**.

b. Significant and Substantial

I have held above that Coeur violated §57.3360, a mandatory standard. The failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the areas. Given the particular facts surrounding this citation, the hazard was reasonably likely to occur. Loose rocks were balanced on the damaged wire, and could break through the wire mesh and contact a miner. Tr. 158. Coeur's failure to maintain the wire mesh thus made it reasonably likely that the hazard would develop.

The hazard was reasonably likely to result in injury to a miner because loose rock and damaged wire were located directly above an area with the potential for high traffic. The rock was likely loosened by loading or unloading beneath the hazard. Tr. 168:2-11. Equipment was present in the area at the time the citation was issued, and miners used the 1355 to reach the Porta-Potty and to access other areas of the mine. Tr. 163-64. Again, Coeur's argument that the rock's location slightly off to the side of the travelway reduced its threat of injury is unpersuasive. Resp. Br. 35. The 1355 has no designated or required paths and Coeur has no written plan requiring miners to walk in the center of travelways. Tr. 85:8-16; Tr. 555. The

potential for traffic along the travelway suggests that the rock posed a reasonable likelihood of injury to miners.

The size of the rock was reasonably likely to cause a serious, if not fatal, injury. The rock appeared to be about 12 inches by 6 inches by 3.8 inches in size. Tr. 158. It was located 12 to 18 feet above the travelway. Tr. 171:6-10. The rock was visible, loose, and balanced on a damaged portion of the wire mesh. *Id*. If it were to fall and contact a miner, the result could have been a serious broken bone or crushing injury. The risk of the rock falling during continued mining operations supports the S&S designation.

c. Negligence

Inspector Dreyer designated the violation as high negligence. Ex. P-12. He referenced Coeur's repeated violations during the inspection, as well as the fact that the inspection crew immediately diverted their efforts removing the hazard once discovered. Tr. 172:3-21. Unlike the other violations, however, there remains significant question as to how long the hazard existed and how the hazard was created. Miners working in the area from inside the mucker had a restricted view of the area, and thus the violation was not particularly obvious or noticeable. *See* Ex. P-12; Tr. 173:15-18. These miners were also protected by haul truck cabs at the time. Tr. 265:8-12. The restricted view of the miners working in the area and the unknown duration of the hazard's existence are valid mitigating factors that should have been considered. I therefore reduce negligence from high to moderate.

d. Special Assessment

The Secretary issued a special assessment of $60,000.00. Ex. R-Z-5. The citation was for a violation of a Rule to Live By; Inspectors are required to submit these violations for consideration of a special assessment. Ex. R-Z-2; Tr. 91:10-92:5. While Coeur's citation history is reasonable, Dreyer issued five citations to Coeur for the same violation over the course of the inspection. I found that the violation was S&S with a reasonable likelihood of fatal injury, and reduced the negligence designation from high to moderate. The hazard was obscured from view and the miners in the area were protected by truck cabs. *See* Ex. P-12; Tr. 173:15-18.

There is no indication that the penalty will interfere with Coeur's ability to continue operations. *See* Ex R-Z-2. Coeur demonstrated good faith in abating the citations. *Id*. I find the special assessment to be excessive for a violation of moderate negligence. I therefore vacate the special assessment and assess a penalty of $19,794.00.

5. Citation No. 8611880

On July 19, 2014, Inspector Dreyer issued Citation No. 8611880 for an alleged violation of § 57.3360 for failure to maintain wire mesh at the 1355 intersection ("the 1355"). Ex. P-15. Partially damaged wire mesh was observed throughout the area. *Id*. About 9 to 10 feet up the pillar hazardous ground existed where the wire mesh was completely destroyed. *Id*. Two rocks, measuring 17 inches by 29 inches by 7 inches and 28 inches by 15 inches by 10 inches, were barred down during the inspection. *Id*. The citation designated the violation as S&S, reasonably

likely to result in a permanently disabling injury, and the result of high negligence. *Id*. The Secretary specially assessed a penalty of $33,400.00. Ex. R-Z-2.

a. The Violation

Again, I first find that the wire mesh here was necessary for ground support and was installed to support the ground because Coeur used the wire mesh throughout the entire area to reduce scaling. Here, Inspector Dreyer observed loose and separated rock adjacent to the damaged wire throughout the 1355, and particularly near the 189 and 214 intersections. Tr. 179. In the 189, a large rock was visible 9 to 10 feet up the pillar and was barred down during the inspection. Tr. 179-80; Ex. P-15, C-7. Additional large rocks were barred down in the 214 intersection. Tr. 186; Ex. P-15, C-11. In fact, Coeur was barring down rock during the entire advance through the section to ensure safety for the inspection crew. Tr. 190. Coeur Safety Coordinator Herndon admitted that the area contained broken wire mesh and loose rock. Tr. 538, 541-42, 557. Finally, the presence of the mucker in the 214 intersection indicates that miners traveled and worked in the area. *See* Tr. 182:17-183:14. Regardless of whether Dreyer observed the mucker's operator actually working in the area, the 1355 is a travelway and the mucker was present near the hazard. Mr. Herndon also testified that there was a miner in the area at the time of the inspection. Tr. 560:8-9. Citation No. 8611880 is **AFFIRMED**.

b. Significant and Substantial

I have already held that Coeur violated § 57.3360, a mandatory safety standard. The failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the areas. Here, a safety hazard already existed at the time of the inspection. Coeur was actively barring down rocks in this area during the inspection to ensure it was safe to continue on. *See* Tr. 179-80; 190; P-15. Immediate scaling likely would not have been necessary if Coeur had properly maintained the wire mesh, and their violation contributed to the likelihood of the hazard.

The hazard in the 1355 was reasonably likely to result in injury to miners because it was used for travel and Coeur's representatives barred down loose rock adjacent to the unmaintained wire mesh. *See* Tr. 179-80; 190. The 1355 was open for travel, as evidenced by the presence of the mucker in the area. Tr. 182:10-19. In order to reach the mucker, miners would have to travel past the hazards. Tr. 183. Mr. Herndon testified that there was a miner in the area at the time of the inspection. Tr. 560:8-9. The loose rocks were therefore likely to fall through the damaged wire and cause an injury.

Again, I reject Coeur's argument that an injury to a miner was not reasonably likely because the rocks fell close to the rib and not directly over the travelway. Resp. Br. 36. Coeur has no written plan requiring miners to walk down the center of travelways. Tr. 85:8-16; Tr. 555. In addition, vehicle traffic affects where foot traffic is able to walk in the travelway. *See* Tr. 8485. In the course of continuous mining operations, miners would be exposed to these hazards. Given the size of the loose rocks it is also reasonably likely that these hazards, had they not been

barred down, would have led to a permanently disabling injury such as crushing or broken bones. *See* P-15, C-7, C-8. I therefore uphold the S&S designation.

c. Negligence

Inspector Dreyer designated the violation to be the result of Coeur's high negligence. Ex. P-15. The damaged wire and loose rock throughout the 1355 were obvious, as evidenced by the barring that took place before Inspector Dreyer passed through the area. Tr. 190, 282. Dreyer also noted that the wires were rusted. Tr. 190:24. Contrary to Coeur's representation in their brief, Mr. Herndon explained that he could not provide mitigating factors for this citation because there was a miner working in the area during the inspection. *See* Resp. Br. 37; Tr. 560:8-9. It is clear from these facts that Coeur should have known that dangerous conditions existed in the 1355 and once again failed to address them. The absence of mitigating factors and the presence of miners and equipment in the area support a designation of high negligence.

d. Special Assessment

The Secretary specially assessed a penalty of $33,400.00. *See* Ex. R-Z-2. The citation was for a violation of a Rule to Live By; Inspectors are required to submit these violations for consideration of a special assessment. Ex. R-Z-2; Tr. 91:10-92:5. While Coeur's citation history is reasonable, Coeur was issued five citations for the same violation over the course of the inspection. The violation was S&S with a reasonable likelihood of permanently disabling injury and was the result of Coeur's high negligence. The poor condition of the wire mesh throughout the 1355, an area where miners were present, indicates that the wire mesh was not closely examined or properly rehabilitated, and that Coeur should have been aware of the condition.

There is no indication that the penalty will interfere with Coeur's ability to continue operations. *See* Ex R-Z-2. Coeur demonstrated good faith in abating the citations. *Id*. I uphold the special assessment of $33,400.00.

6. Citation No. 8780941

On December 4, 2014, Inspector James Stembridge issued Citation No. 8780941 for an alleged violation of 30 C.F.R. § 57.3200. Ex. P-35. The citation alleged that ground conditions created a hazard along the 1140-180 upramp ("the 1140") that was not taken down or supported. *Id*. The rocks varied in size and were located 3 to 7 feet above the ground. *Id*. The citation alleges that the violation was non-S&S, unlikely to result in a permanently disabling injury, and the result of moderate negligence. *Id*. The Secretary assessed a penalty of $263.00.

Coeur's arguments against the three violations of 30 C.F.R. § 57.3200 are relatively similar. Coeur argues that the Secretary failed to prove the existence of a "reasonably detectable hazard" as required by the provision because no employees worked in or near the area affected by the hazard. Resp. Br. 1, 21. Coeur also argues that the fact that some material was scaled down is not sufficient to support a violation of the standard. *Id*.

a. The Violation

I find that the Secretary failed to establish that the hazards discovered in the 1140 were "reasonably detectable" under § 57.3200. *See ASARCO, Inc.*, 14 FMSHRC 941, 951 (Jun. 1992). While testing an area of roof and erroneously concluding it is safe is sufficient under the provision to merit a violation, the Secretary provided no evidence that miners worked or traveled in the area to the extent that they would be able to reasonably detect the hazard. *See id*. at 946-47. Inspector Stembridge acknowledged that there was minimal foot traffic in the area. Tr. 305:24-25. Coeur's witness Alan Gordon also testified without refutation that the area had been mined out and backfilled. *See* Tr. 695:11-21. Absent evidence to the contrary, I credit Mr. Gordon's testimony that there would be no reason to travel here to detect the hazard. Tr. 696:11-13. There is no evidence to prove that the hazard would not have been detected had the area been used or entered regularly. Citation No. 8780941 is **VACATED**, and for that reason I need not address the Secretary's gravity or negligence designations.

7. Citation No. 8786150

On December 3, 2014, Inspector Thomas Rasmussen issued Citation No. 8786150 for an alleged violation of § 57.3360, citing Coeur's failure to maintain wire mesh along the 1635 development heading ("the 1635"). Ex. P-17. Inspector Rasmussen noted a 12 inch by 36 inch hole in the wiring and loose rocks near the area. *Id*. The hazard existed approximately 6 feet above the ground, and Rasmussen observed one miner in the area. *Id*. The citation alleged that the hazard was non-S&S, unlikely to result in an injury causing lost workdays or restricted duty, and the result of moderate negligence. *Id*. The Secretary assessed a penalty of $176.00. Coeur challenges the underlying violation and the designation of moderate negligence. Resp. Br. 18, 37-38.

a. The Violation

As discussed above, I find that the wire mesh here was necessary for ground support and was installed to support the ground because Coeur used the wire mesh throughout the entire area to reduce scaling. Inspector Rasmussen's photographs show loose material behind the wire mesh and on the ground below the hazard. Ex. P-17, C-2, C-3. The damaged wire mesh was adjacent to loose rocks in the middle of the 1635 and approximately 100 feet from the face. Tr. 332:22-23; Ex. P-17, C-2, C-3. Inspector Rasmussen also noted other loose material on the rib 15 feet from the hole that was barred down during the inspection. Tr. 332:13-333:9.

The 1635 is a development travelway where drilling, blasting, and mucking take place to access new ore. Tr. 331:6-17. A miner was present in the area operating a bolter between the hazards on the face and on the rib. Tr. 333:15-18. These factors indicate that miners were present and working near the hazard and unmaintained wire mesh. Citation No. 8786150 is **AFFIRMED**.

b. Significant and Substantial

Inspector Rasmussen designated this violation as non-S&S and unlikely to result in lost workdays or restricted duty. Ex. P-17. Rasmussen testified that the loose rocks that he observed in the 1635 were smaller in size than in the previous areas he inspected and only partially exposed by the unmaintained wire mesh. Tr. 338: 14-20. These facts rendered the chance of an injury to passing miners less likely. *Id*. Further, Rasmussen explained that were such an injury to occur, it was likely to result in cuts and bruises, and not broken bones or crushing injuries. Tr. 339:3-9.

Considering the violation in light of the *Mathies* factors, I find Inspector Rasmussen's testimony to be credible. Coeur violated the mandatory safety standard and the loose materials and unmaintained wire mesh created a discrete safety hazard because they could fall and contact a miner. But the small material and its partial exposure indicate that the hazard was not reasonably likely to result in serious injury. I defer to Inspector Rasmussen's testimony and uphold his assessment that the hazard was non-S&S and unlikely to result in lost workdays or restricted duty.

c. Negligence

Inspector Rasmussen designated the violation as the result of moderate negligence. Inspector Rasmussen testified that the bolter operator had already scaled the area that day and missed the cited hazard. Tr. 340:7-9. While the bolter operator should have noticed the hazard, the rocks that were barred down were no larger than four inches and were only partially exposed. Tr. 339:3-9. The size of the loose rocks and the evidence that some rehabilitation took place in the area prior to the inspection are mitigating factors. I uphold the designation of moderate negligence.

d. Penalty Assessment

The Secretary has proposed a regularly assessed a penalty of $176.00 for this citation. The violation was non-S&S, unlikely to result in an injury causing lost workdays or restricted duty, and the result of moderate negligence. Ex. P-17. Coeur's citation history is reasonable. *Id*. Coeur is a large operator, and there is no indication that the penalty will interfere with Coeur's ability to continue operations. Coeur demonstrated good faith in abating the citation. *Id*. In light of these criteria, I uphold the penalty of $176.00 for Citation No. 8786150.

8. Citation No. 8786152

On December 3, 2014, Inspector Thomas Rasmussen issued Citation No. 8786152 for an alleged violation of § 57.3200. Ex. P-22. The citation alleged that Coeur failed to take down, support, or barricade ground condition hazards located by the secondary escape way entrance in the 1485 travelway ("the 1485"). *Id*. Large rocks, the largest of which measured 12 inches by 18 inches by 6 inches, were easily barred down from 4 to 6 feet above ground level and landed in the 1485. *Id*. The citation designated the violation S&S, reasonably likely to result in a

permanently disabling injury, and the result of moderate negligence. *Id*. The Secretary assessed a penalty of $1,304.00.

a. The Violation

The loose material was a reasonably detectable hazardous condition because a significant amount of material was barred down and was visible and in close proximity to the travelway. The 1485 is an active mining area and travelway, and a secondary escape way is located nearby. Tr. 347:18-21. The escape way entrance is visible in the photographs near the barred material. Tr. 348:3-7; P-22, C-1.

Coeur's witness and miners' representative Robert Rich testified that he did not believe the material posed a hazard because it was located low on the rib and required scaling. Tr. 684:23-685:3. However, loose material is considered hazardous if it can be pried free by scaling. *See Springfield Underground*, 17 FMSHRC 613, 619 (Apr. 1995) (ALJ). While located low on the rib, the area was not secured with wire or any ground support. Tr. 346:4-8. The material was large in size; one of the rocks measured 12 inches by 18 inches by 6 inches. Tr. 346:12-14. When barred down, the material did not settle directly below the rib but rolled approximately 2.5 to 3 feet out of from the rib. Tr. 350:14-15; Ex. P-22, C-1, C-2. The size of the material and the slant of the ground indicate that the rocks posed a hazard as they fell. Furthermore, Inspector Rasmussen testified that he observed miners working up the ramp during the inspection. Tr. 350:18-19. The proximity of the intersection to an active mining area and an escape way, and the prominence of the material removed from the rib, indicate that a reasonably detectable hazard existed.

Coeur also failed to install a warning or barrier near the hazard until it could properly be taken down or supported. The loose material was barred down during the inspection. Tr. 347:6-7, 683:10-15. Aside from a dusty "Carbon Monoxide" ("CO") sign in the area, there was no other sign present and no barricade or warning indicating that the hazard existed. Tr. 351:20-24. Citation No. 8786152 is **AFFIRMED**.

b. Significant and Substantial

I upheld the violation of § 57.3200, a mandatory safety standard. The failure to take down or support the hazardous ground conditions also contributed to a discrete safety hazard. The specific hazard posed by the violation was that the loose material would fall and contact miners working in or traveling through the areas. I find that the hazard was reasonably likely to occur. Coeur failed to bar down the material until the inspection. *See* Tr. 347:6-7. In addition, Coeur's failure to barricade or mark the area also contributed to the hazard because miners were still permitted to travel through the area. The hazard of falling rocks was thus reasonably likely to occur due to Coeur's failure to provide support or barricade the area.

Here, however, the hazard does not present a reasonable likelihood of injury to miners because the area no longer saw heavy traffic. Inspector Rasmussen testified that miners would travel past the area, and in an emergency they would travel past the loose rib. Tr. 346, 348, 351. He also testified that the CO sign was stretched across the entry directly adjacent to the loose

rock to warn miners of the risk of high carbon monoxide levels after a blast. Sec'y Br. 40; Tr. 349. The Secretary argues that presence of the CO sign indicates that one or more miners would have walked past the hazard to place the sign there and to retrieve it. Sec'y Br. 40. Mr. Rich, however, testified to a second escape way door on the other side of the pillar that was operational at the time of the inspection. Tr. 681:7-23. Rasmussen was uncertain of whether that door was operational at the time of the inspection, and therefore I credit Mr. Rich's testimony that it was present. *See* Tr.424: 21-23. Further, the Secretary does not provide any proof that the CO sign was placed there while the hazard was present. Rasmussen was uncertain as to when the sign was put up, and testified that it looked dusty in the photographs. Tr. 425: 15-22.

Even if an injury were to occur, the hazard's height off of the ground indicates that it is unlikely to be serious. Mr. Rich and Mr. Rasmussen both testified that the material was located only 4 to 6 feet above ground level. Tr. 345:19-346:1, 682:1-4. Falling material from this height is not reasonably likely to cause a permanently disabling injury. Therefore, I vacate the S&S designation and reduce the gravity to unlikely to cause lost workdays or restricted duty.

c. Negligence

Inspector Rasmussen designated the violation to be the result of Coeur's moderate negligence. Ex. P-22. Rasmussen testified that although an obvious hazard existed in the 1485, he gave Coeur the benefit of the doubt because management had not yet visited this part of the mine at the time of his inspection. Tr. 356: 4-10. Rasmussen also acknowledged Coeur's rehabilitation program as a mitigating factor in this particular area of the mine. Tr. 356:23-357:3.

I see no evidence that distinguishes Coeur's rehabilitation efforts in the 1485 from their efforts in the other cited areas. Coeur's rehabilitation program did little to address the hazards existing in other areas of the mine and therefore was not credited as a mitigating factor. There is no indication that Coeur's management would have properly addressed the hazard upon visiting the 1485. Rather, the other citations indicate that Coeur continuously failed to address similar hazards. Coeur should have known that loose material was present in the travelway. The material was loose, and Rasmussen observed miners working up the ramp nearby who could have noticed and addressed the hazard. To credit Coeur's rehabilitation program here, when the program failed to mitigate numerous other hazards throughout the mine, would be inconsistent and contrary to the evidence. I increase Coeur's negligence from moderate to high.

d. Penalty Assessment

The Secretary has proposed a regularly assessed a penalty of $1,304.00 for this citation. I have held that the violation was non-S&S, unlikely to result in an injury causing lost workdays or restricted duty, and the result of high negligence. Coeur's citation history is reasonable. Ex. P-22. Coeur is a large operator, and there is no indication that the penalty will interfere with Coeur's ability to continue operations. Coeur demonstrated good faith in abating the citation. *Id*. In light of these criteria, I hereby modify the penalty to $651.00.

9. Citation No. 8786153

On December 3, 2014, Inspector Rasmussen issued Citation No. 8786153 for a violation of § 57.3200. Ex. P-26. The citation alleged that hazardous ground conditions on the upramp at the 1425 entry intersection ("the 1425") were not taken down, supported, or properly barricaded to prevent entry. *Id*. Large rocks, measuring approximately 8 inches by 8 inches by 8 inches, were barred off the ribs, while other loose rocks were visible along the edge of the wire. *Id*. Inspector Rasmussen designated the violation as S&S, reasonably likely to result in permanent disability, and the result of moderate negligence. *Id*. The Secretary assessed a penalty of $1,304.000.

a. The Violation

The loose material was a reasonably detectable hazard because large, loose rocks were visible along a main travelway. Tr. 361:5-11. The loose rocks were barred down during the inspection, and no sign or barricade was posted to restrict travel in the 1425. *Id*. In addition, the loose material was 5 to 9 feet up the rib near a waste pass. Tr. 359-62. Inspector Rasmussen testified that he observed "broken, separated rocks with large cracks." Tr. 362:5-9.

Mr. Rich testified that he performed the scaling on the rib and that the rocks took some effort to bar down. Tr. 545:9-11. He was also unable to bar down the material in the back. *Id*. While the ease with which the material was barred down is disputed, loose material can be considered hazardous if it can be pried free by scaling. *See Springfield Underground*, 17 FMSHRC 613, 619 (Apr. 1995) (ALJ). Mr. Rich was able to bar down the rocks by hand, and therefore they constituted a hazard.

The amount of material barred down is also significant. *See* Ex. P-26, C-2, C-6. Mr. Herndon testified that the material was behind undamaged wire mesh. Tr. 544-45. Yet Inspector Rasmussen's photographs show no evidence of undamaged wire covering the barred area. Ex. P-26, C-1. In fact, only one picture shows loose material held up by wire mesh. Ex. P-26, C-9. The other photographs show damaged wire or no wire at all. *See generally* Ex. P-26.

Coeur also argues that because the waste pass was seldom used, the hazard was not reasonably detectable. Resp. Br. 23-24. However, the rocks were located along the 1425, which granted access to the upper level of the mine. Tr. 359-60. The 1425 was a main escape way, and miners would also access the back. Tr. 370:21-371:1. Furthermore, Inspector Rasmussen explained that the waste pass was seldom accessed *by foot*, but was accessed by a variety of vehicles, including open cab vehicles. Tr. 362:10-16. I credit Inspector Rasmussen's detailed testimony. Citation No. 8786153 is **AFFIRMED**.

b. Significant and Substantial

I have held that Coeur violated section 57.3200, a mandatory safety standard. The failure to support or remove the hazardous ground, or to barricade the area, also contributed to a discrete safety hazard. The specific hazard posed by the violation was that the loose material could fall and contact miners working in or traveling through the area. Given the particular facts

surrounding this citation, the hazard was reasonably likely to occur. Coeur failed to support or scale the area until the loose material was discovered during the inspection, and the material came down in large quantities. Tr. 544-45. Thus, it is clear that Coeur's violation contributed to likelihood that the rocks would fall and contact a miner.

The hazard was reasonably likely to result in injury to miners because it was located in a travelway and the material was loose. The hazards were located in a travelway to upper levels of the mine where covered and uncovered vehicles moved through the area. Tr. 370-71. Some rocks were already loose and balanced on wires at the time of the inspection, increasing the likelihood that they would fall through the damaged wire mesh under continued normal mining operations. Tr. 369. I find it reasonably likely that miners would be injured by falling rock hazards in the travelway.

The hazard was also reasonably likely to cause a serious injury given the height and amount of barred material from the two locations. The loose rock in the rib was 5 to 9 feet up and fell close to the rib, while the material in the back was 16 feet above the ground. Tr. 359-62; 370:4-6. The photographs show that significant amounts of material were barred down. Ex. P-26, C-2, C-6, C-7. Thus, if the loose material were to fall, it is reasonably likely that the rock could cause serious crushing injuries. I therefore uphold the S&S designation.

c. Negligence

Inspector Rasmussen designated the violation as a result of Coeur's moderate negligence. Inspector Rasmussen was unsure of whether management had been in the area yet that day to discover the hazard, and thus credited Coeur's rehabilitation plan as a mitigating factor. Tr. 362:10-16. As discussed previously, however, I find no reason to credit Coeur's rehabilitation program here when it was ineffective throughout the other areas of the mine. Coeur should have been aware of the violation because the loose material was large and located along the 1425 travelway and upramp, a frequently traveled area. Tr. 373. Multiple vehicles drove through the area and past the hazards to access the waste ramp. Tr. 362:10-16. Coeur should have noticed the hazard, and should have barred down the loose material prior to doing so during the inspection. There is no evidence that management would have properly addressed the issue had they been in the area. I therefore increase the negligence designation from moderate to high.

d. Penalty Assessment

The Secretary has proposed a regularly assessed a penalty of $1,304.00 for this citation. I have upheld that the violation was S&S and reasonably likely to result in a permanently disabling injury. I also increased the Secretary's negligence designation from moderate to high. Coeur's citation history is reasonable. Ex. P-22.

Coeur is a large operator, and there is no indication that the penalty will interfere with Coeur's ability to continue operations. Coeur demonstrated good faith in abating the citation. *Id*. In light of these criteria, I hereby modify the penalty to $4,810.00.

10. Citation No. 8786162

On December 5, 2014, Inspector Rasmussen issued Citation No. 8786162 for an alleged violation of § 57.3360 for failure to maintain adequate ground control in the 480 South travelway at the 152 intersection ("the 480 South"). Ex. P-30. The citation alleged that rocks up to 12 inches by 12 inches by 8 inches in size were located near areas of damaged wire mesh. *Id*. A large segment of wire was also missing from the pillar, where large rocks were easily barred off. *Id*. An electrical outlet providing power to a jumbo roof bolter was also located nearby. *Id*. Inspector Rasmussen designated the violation as S&S, reasonably likely to cause fatal injuries, and the result of high negligence. *Id*. The Secretary specially assessed a penalty of $32,800.00. Ex. Z-7.

a. The Violation

For the reasons already discussed, I hold that ground support was necessary throughout the Kensington Mine and that the wire mesh was installed to reduce scaling and support the ground. The conditions of the 480 South are no exception. Three holes in the damaged wire were visible approximately 16 feet above the ground. Tr. 382; Ex. P-30, C-1, C-2. The holes ranged from approximately 24 inches by 24 inches, 12 inches by 24 inches, and 8 inches by 8 inches. Tr. 382:11-13. In addition, torn wire was ripped away from the pillar between the 148 and 152 intersections, and several bolts on the pillar were bent and bolt plates missing. Tr. 378; Ex. P-30, C-8, C-9, C-10. Inspector Rasmussen testified that Coeur painted the word "Bolt" onto the affected area during the inspection to ensure that new bolts would be installed. Tr. 397:3-12; P-30, C-10.

Coeur's witness Eddie Petrie disputed the proximity of the loose rocks to the holes in the mesh, and whether new bolts were needed. Tr. 650:2-6, 9-10. Coeur argues that Inspector Rasmussen's testimony is unreliable because he could not point to areas of loose rock during his deposition, but was able to do so during the hearing. Resp. Br. 20, FN 8. I disagree. During his testimony, Inspector Rasmussen attempted to point out loose materials in his photographs and explained that he was not "100 percent certain" which rocks were loose. Tr. 386:1-7. His testimony does not amount to the "pure speculation" that Coeur alleges in its brief. *See* Resp. Br. 39. Rasmussen credibly testified that the loose material was easier to see in the enlarged photographs available at the hearing. Tr. 435:11-15. Most of the enlarged photographs do in fact show loose material and damaged wire, even if Rasmussen could not positively identify loose material in every photograph. *See* Ex. P-30, C-1, C-3, C-8, C-9, C-10. I believe that the enlarged photographs improved Mr. Rasmussen's ability to see the loose material and adequately explained the discrepancy between his deposition and testimony.

It is also clear that miners worked and traveled in the 480 South. The 480 South is an active mining area and a main travelway to reach other intersections. Tr. 380:6-13. The area was recently rehabbed multiple times. *Id*. at 20. The power cord connecting to the jumbo roof bolter ran underneath one of the hazards and the bolter itself was located within 100 feet from the hazard. Tr. 384:9-17. It is therefore clear that ground support was necessary in the area, and that Coeur's failure to maintain the wire mesh could affect miners traveling or working nearby. Citation No. 8786162 is **AFFIRMED**.

b. Significant and Substantial

I have already held that Coeur violated § 57.3360 in the cited area. The failure to maintain the wire mesh also contributed to a discrete safety hazard. The specific hazard posed by the violation was that loose material would fall through torn or unmaintained wire mesh and contact miners working or traveling through the 480 South. Given the particular facts surrounding this citation, the hazard was reasonably likely to occur. The loose rocks near the pillar could fall through the torn and unmaintained wire mesh, contact a miner, and cause injuries.

The hazard was reasonably likely to result in injury to miners because the loose material was barred down with ease and miners worked or traveled in the vicinity. A jumbo roof bolter was present in the area. Tr. 384:9-17. The jumbo roof bolter had to travel past the pillar at some point to be parked closely to the intersection. Tr. 383-84, 393. A miner also had to route the power cord under the hazard. Tr. 394, 98. While the bolter may not have been used during the shift on which the citation was issued, the jumbo bolter was likely to be used during continued mining operations, at which time its operator would be subject to a reasonable likelihood of injury. *See* Tr. 398. Thus, it is reasonably likely that miners would be exposed to the falling rocks.

Mr. Rasmussen's photographs also indicate that some of the rocks barred down were quite large. Ex. P-30, C-8, C-9. That the barred rocks were over 100 pounds and would likely cause fatal injuries to the miners exposed to them. Tr. 407; Ex. P-30, C-7, C-8, C-9. I therefore uphold the S&S designation.

c. Negligence

Inspector Rasmussen designated Coeur's negligence as high because the violations were extensive and obviously visible from some distance away. Tr. 407:24-409:13. The jumbo roof bolter was present and set up prior to the inspection shift. Tr. 394:16-18. Given Inspector Rasmussen's testimony that the wire mesh was rusty, the hazard likely existed longer than one shift and the power cord was set up while the condition existed and went unnoticed. Tr. 410:8-12. Finally, Coeur was issued the same violation six months earlier in the 480, indicating they should have been on notice for ground support problems in the area. Tr. 409. Even if Coeur rehabbed the area multiple times since the previous violation, it is unlikely that the rust and loose material developed within the ten days since the last rehab, indicating that Coeur's rehabilitation procedure in the 480 is insufficient and not a mitigating factor. *See* Resp. Br. 39. I therefore uphold the high negligence designation.

d. Special Assessment

The Secretary issued a special assessment of $32,800.00 for this citation. Ex. R-Z-7, 8. The citation was for a violation of a Rule to Live By; Inspectors must submit violations of Rules to Live By for consideration of a special assessment. *See* Ex. R-Z-7, 8; Tr. 91:10-92:5. Coeur's violation history was relatively normal until the period at issue in this case, where Coeur was issued six citations for violation of § 57.3360 between July and December 2014. In fact, Coeur

was issued a citation for failure to maintain ground support in the 480 six months earlier, and thus should have been aware of potential ground support issues in the area. Tr. 409. The violation was S&S with a reasonable likelihood of fatal injury and the result of Coeur's high negligence. Miners were working in the area, and Inspector Rasmussen testified that he found it hard to believe that whoever drove the vehicle that impacted the area did not know about the hazard. Tr. 411:7-412:4. The violation was obvious and pervasive, and appears to be the result of a systematic disregard for the condition of wire mesh in the Kensington Mine.

There is no indication that the penalty will interfere with Coeur's ability to continue operations. *See* Ex R-Z-2. Coeur demonstrated good faith in abating the citations. Ex. R-Z-8. I therefore uphold the special assessment of $32,800.00.

V. Penalty Summary

Citation No.	Originally Proposed Assessment	Judgment Amount	Modification
WEST 2015-346			
8611872	$33,400.00	$33,400.00	
8611874	$33,400.00	$33,400.00	
8611875	$3,000.00	$1,203.00	Remove Special Assessment
8611880	$33,400.00	$33,400.00	
WEST 2015-422			
8611879	$60,000.00	$19,794.00	Remove Special Assessment Reduce negligence from "High" to "Moderate"
WEST 2015-401			
8786150	$176.00	$176.00	
8786152	$1,304.00	$651.00	Remove Significant and Substantial Designation Reduce Gravity from "Reasonably Likely to Cause Permanently Disabling Injury" to "Unlikely to Cause Lost Workdays or Restricted Duty" Increase Negligence from "Moderate" to "High"
8786153	$1,304.00	$4,810.00	Increase Negligence from "Moderate" to "High"
8780941	$263.00	--	Vacate Citation
WEST 2015-470			
8786162	$32,800.00	$32,800.000	
TOTAL:	**$199,047.00**	**$159,634.00**	

VI. ORDER

Respondent is hereby **ORDERED** to pay the Secretary of Labor the total sum of **$159,634.00** within 30 days of this order.[4]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

[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

Distribution: (U.S. First Class Mail)

Sean J. Allen, U.S. Department of Labor, Office of the Solicitor, MSHA Backlog Project, 1244Speer Blvd., Suite 216, Denver, CO 80204

Donna V. Pryor, Husch Blackwell LLP, 1700 Lincoln St., Suite 4700, Denver, CO 80203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 23, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2014-0746 A.C. No. 11-03141-360105
v.	
MACH MINING, LLC, Respondent	Mine: Mach No. 1 Mine

AMENDED DECISION AND ORDER

Appearances: Daniel McIntyre, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner

Chris Pence, Esq., Hardy Pence, PLLC, Charleston, West Virginia, for Respondent

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This case is before me upon a petition for the assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act"), 30 U.S.C. § 815(d). Docket No. LAKE 2014-0746 involves thirteen section 104(a) citations issued by the Secretary of Labor ("the Secretary") between July 14 and 28, 2014, charging Mach Mining, LLC ("Mach") with violations of mandatory health and safety regulations. On October 29, 2015, the Secretary submitted a motion to approve settlement for 11 citations, which I approve below.

A hearing was held in St. Louis, Missouri on November 2, 2015 on Citations Nos. 8450924 and 8450926. During the hearing, the parties offered testimony and documentary evidence.[1] Witnesses were sequestered.

[1] In this decision, "Tr." refers to the hearing transcript, "ALJ Ex. #" refers to the ALJ's exhibits, "P. Ex. # refer to the Petitioner's exhibits, and "R. Ex. #" refers to the Respondent's exhibits. ALJ Exs. 1 and 2; P. Exs. 1, 2, 4, and 5; and R. Exs. 1 and 2 were received into evidence at the hearing. R. Ex. 4 (Longwall Production Reports for July 12-14, 2014) and R. Ex. 5 (Continuous Miner Production Reports for July 12-14, 2014) were submitted after the hearing, and I now admit them into the record.

Citation No. 8450924 charges Mach with violating 30 C.F.R. § 75.400 for failing to prevent and clean up accumulations of coal dust, loose coal, and other combustible material. The Secretary alleges that the violation was significant and substantial (S&S)[2] and the result of Mach's high negligence. Citation No. 8450926 charges Mach with violating 30 C.F.R. 75.363(b) for failing to properly record the accumulation hazard alleged in Citation No. 8450924. The Secretary alleges that this violation was also S&S and the result of Mach's high negligence. The issues presented in the case are whether Mach violated the standards cited by the Secretary; if so, whether the Secretary properly assessed the gravity of the violations and the level of negligence attributed to Mach; and what penalties, if any, should be assessed against the Respondent. For the reasons set forth below, I affirm Citation No. 8450924, as written, and assess a civil penalty of $15,570. I also affirm Citation No. 8459026, as written, and assess a civil penalty of $6,996.

Based on a careful review of the record, including the parties' post-hearing briefs and my observation of the demeanor of the witnesses,[3] I make the following findings of fact and conclusions of law:

II. STIPULATIONS AND GENERAL FACTUAL BACKGROUND

A. Stipulations of Fact and Law

At hearing the parties stipulated to the following:

1. Mach was at all times relevant to these proceedings engaged in mining activities at the Mach Number One Mine located in or near Johnson City, Illinois.

2. Mach's mining operations affect interstate commerce.

3. Mach is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*

4. Mach is an "operator" as the word is defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Mach Number One Mine (Federal Mine I.D. No. 11-03 141) where the contested citations in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to section 105 of the Act.

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

[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, experience and credentials, and consistency, or lack thereof, within the testimony of witnesses and between the testimony of witnesses.

6. On the dates the citations in these dockets were issued, the issuing MSHA coal mine inspectors were acting as duly authorized representatives of the United States Secretary of Labor, assigned to MSHA, and were acting in their official capacity when conducting the inspections and issuing the MSHA citations.

7. The MSHA citations at issue in these proceedings were properly served upon Mach as required by the Mine Act.

8. The citations at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing their issuance.

9. Mach demonstrated good faith in abating the violations.

10. In 2013, the Mach Number One Mine produced 6,694,630 tons of coal and its controlling entity produced 18,772,988 tons of coal.

11. The penalties proposed by the Secretary in this case will not affect the ability of Mach to continue in business.

Resp't's Pre-Hrg. Rpt. 1-2; Pet'r's Br. 2-3.

B. General Factual Background

1. Mine Examiner Adams' Shift Examination

On July 14, 2014, mine examiner David Adams conducted a midnight shift examination of the slope belt at approximately 6:00 a.m.[4] Tr. 116. The slope belt is located in the mine travel way, which slopes downward from the surface to the underground sections of the mine. Tr. 54-55. The ceiling is approximately ten feet high, and is supported by a steel, arch-supported line opening. Tr. 55. The travel way is divided into two parts: a 12-foot-wide road for vehicles on the left-hand side and a seven-foot-wide slope belt flanked by a four-foot-wide walkway on the right-hand side. Tr. 55, 68, 222. The travel way and the slope belt are separated by steel beams placed at five foot intervals. Tr. 197. There are four carbon monoxide ("CO") detectors and a fire suppression system present along the slope. Tr. 346-47.

Adams conducted his examination by driving along the 3,600-foot slope belt and checking for accumulations of coal, structural damage, and hazards on both the driving side and

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[4] David Adams worked full time for Respondent from 2007 until March of 2015. Tr. 212. At the time of the inspection, Adams was a mine examiner, who was required to check all working sections, belt lines, and air courses for hazardous conditions or violations. Tr. 214. At the time of the hearing, Adams had retired and was working for Respondent as a part-time contractor. Tr. 212. Adams began mining in 1972, and held mine examiner, mine manager, EMT and electrical certifications. He has thirty years of experience in the mining industry. Tr. 213-15.

back side of the slope belt. Tr. 215, 222, 239. At the end of his examination, Adams filled out the examination book for each belt line and travel way, which takes about 20 minutes. Tr. 231. He observed spillage on the slope belt due to washback, but denied observing any accumulations in contact with the belt. Tr. 227, 229.

At the time of the inspection, Respondent was mining a new panel, which resulted in water coming off the longwall face, and spillage onto the slope belt. Tr. 283. Although some of this water was discharged through water pumps and pipes, some was transported with coal and rock via the belt. As the material was transferred from one belt to another, the weight of the water and other material made it difficult for the belt to force the material uphill and out of the mine. Tr. 98. As a result, the material washed back downhill, flooding the area below. Tr. 98. Mine manager Rorer described this as "washback," which happens when water builds up to a certain peak on the belt, and rolls back on the belt instead of exiting the slope.[5] Tr. 334.

Adams testified that accumulations can occur very quickly on a slope belt due to spillage resulting from "washback," which consists of water, coal, and other materials sliding down the slope belt as a result of efforts to remove the water discharged from longwall mining operations. Tr. 253. Mach has a 44-46 percent recovery rate, meaning that 44 to 46 percent of what is mined by weight is coal. The rest is rock or other rejected material. Tr. 390.

Respondent had previously investigated the washback phenomenon, and mine manager Parker Phipps visited other mines to view their dewatering systems.[6] Tr. 389. After these visits, Phipps ordered a new dewatering system to address the washback issue. Tr. 337, 389. It took about three months to purchase and install the system. Tr. 339. The dewatering system was installed at the mine nearly two months after the issuance of Citation No. 8450294. Tr. 389.

In the interim, Phipps testified that additional miners were hired to shovel as needed each shift, and company foremen patrolled the belt for rollers contacting accumulations. Tr. 227, 383, 399. The number of shovelers varied from day to day, but more miners were needed early in the week because the longwall was idled on Saturdays and Sundays, and then started again on Sunday, causing washback. Tr. 391. Rorer testified that in order to combat the water, the mine would set pumps over the weekends. On Sunday night, before the long wall began production, the gates on the tail would be opened to run water off the long wall before coal was produced. Tr. 333.

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[5] Rorer has worked at Mach for over seven years. Tr. 321. He spent one year running a scoop, three years as a belt foreman, and the three years before the inspection as a certified mine manager. Tr. 321, 323-24. Prior to working at Mach, Rorer worked at the Eagle Valley mine for five years as a roof bolter, and then at the Willow Lake mine as a roof bolter and a scoop operator. Tr. 322.

[6] Phipps has a Bachelor of Science in Mining Engineering. Tr. 382. He holds underground mining foreman papers from Colorado, and a mine manager certification for Illinois. Tr. 382. Phipps has seven years of underground mining experience. Tr. 382. He began working for Mach Mining in 2013, and was promoted to general manager in July of 2014. Tr. 383.

After his examination, Adams spoke to mine manager Rorer to relay the results of his examination and the progress that the shoveling miners had made at that point. Tr. 232; 236. Adams noted in the slope belt examination book that the "slope belt needs cleaned—work in progress." Tr. 116, 229; R. Ex. 1. This July 14, 2014 entry was standard practice at the mine. Adams testified that Rorer would "know what [his notation] meant." Tr. 264. Adams testified that he would verbally have told Rorer any additional or more specific information. Tr. 264.

2. The Instant Inspection

MSHA Inspector Bernard Reynolds arrived at the mine at 7 a.m. on July 14, 2014 to conduct a regular E01 inspection.[7] Tr. 51, 186. During that inspection, miner Guy Webster drove Reynolds into the mine.[8] Tr. 54, 56, 301. As they proceeded down the travel way, an unidentified miner stopped their vehicle to inform Webster that a set of rails on the slope was broken, and that the belt was running in contact with coal accumulations. Tr. 56.[9] Hearing this, Reynolds decided to inspect the broken rail on foot. The broken rail was located approximately 300-500 feet from the top of the slope. Tr. 57-58.

When Reynolds set out on foot, there were five to seven miners at the top of the slope cleaning the belt. Tr. 69. Reynolds observed coal accumulations up to 30 inches deep and six feet wide. Tr. 60. In some places, rollers touched the accumulations. Tr. 60. Based on the extent of the accumulations, Reynolds estimated that the accumulations had existed for several shifts. Tr. 63-64.

As Reynolds walked the belt, he found accumulations 12 inches deep on the back side of the belt approximately 100 feet from the slope collar. Tr. 65. At 200 feet, he found accumulations approximately 14 inches deep. Tr. 66. The accumulations increased to about 16 inches at 250 feet. Tr. 66. At 570 feet down the belt, Reynolds observed that the belt and three of the bottom idler rollers were running in approximately ten feet of coal dust accumulations that were 24-30 inches deep. Tr. 69-70, 72.

At 650 feet, Reynolds found that three bottom roller brackets were hot from contact with the moving belt. Tr. 78. Further, the belt had cut into the I-beam approximately one-eighth of an

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[7] Reynolds has been an inspector with MSHA for 7 years. Tr. 33. He is a ventilation specialist and has a Bachelor's of Science degree in Mining Engineering. Tr. 33. Reynolds had 22 years of experience in underground mining. Before becoming an inspector, most of this experience involved long-wall mining. Tr. 34, 37.

[8] Webster has twenty years of experience in underground mining. Prior to the hearing, Webster worked for Mach for ten years, the last six as an out-by boss. Tr. 278. As an out-by foreman, Webster led a team performing various jobs and projects, other than producing coal. Tr. 279-80. Webster has mine examiner and mine manager papers. Tr. 279. At the time of the inspection, Webster supervised underground miners, who were performing tasks other than extracting coal, such as shoveling the belt. Tr. 277.

[9] The rail is part of the belt structure's framework and supports the rollers on the belt. Tr. 57-58.

inch. Tr. 78. Reynolds estimated that the rubber belt had rubbed into the steel I-beam for at least 24 hours. Tr. 79.[10]

Approximately 1,100 feet down the belt, near the slope tripper drive, Reynolds observed another area of significant accumulation, where five rotating rollers were rubbing the belt, creating a frictional heat source. Tr. 80.[11] Reynolds testified that dust was visible in the air near the slope tripper drive, which led Reynolds to conclude that the coal in that area was fairly dry. Tr. 83, 131. Although Reynolds did not observe any miners in the immediate area, Reynolds noted that the air would take the suspended dust up the slope, toward the location where the five to seven miners were cleaning the belt at the top of the slope. Tr. 81, 83-84. Water sprays were installed near the slope tripper drive to suppress the dust, but they were non-functional on the day of the inspection because the water from the main pipe had been shut off. Tr. 86-87.

Approximately 1,600 and 2,000 feet down the belt, Reynolds observed even more significant accumulations in contact with roughly fifteen feet of the moving belt and two rotating belt rollers. Tr. 87-88. Further down the belt, at 2,000 to 2,200 feet, Reynolds observed varying amounts of accumulations, up to 30 inches deep, in contact with two rollers and ten feet of the belt. Tr. 88. At 2,200 feet, Reynolds observed 24-inch-deep accumulations in contact with one bottom belt roller. Tr. 89. At 2,300 feet, Reynolds observed accumulations between four and 24 inches deep along half the width of the belt, but no potential heat sources were present. Tr. 90.

In sum, Reynolds observed six discrete locations where bottom rollers contacted accumulations. In total, 14 bottom rollers and 105 feet of belt were in contact with coal. Tr. 100; P. Ex. 4, at 14.

Initially, Reynolds thought it would be necessary to shut the belt down to clean up the accumulations, but thereafter he determined that the accumulations could be cleaned while the belt was running. Tr. 91. Reynolds declined to issue a closure order because he determined that shutting the belt down would cause a buildup of water. Tr. 93-94.

Based on his observations, Reynolds issued Citation No. 8450924, alleging a violation of 30 C.F.R. § 75.400. Section 75.400 provides that "coal dust, including float coal dust deposited on rock dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not

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[10] This estimate is in dispute. Webster testified that this result would have occurred after a "long time." Tr. 301-302. Adams testified that it would not take very long, possibly four hours. Tr. 268-269. In light of their substantial combined experience, I credit the testimony of Reynolds and Webster indicating that the friction between the belt and I-beam likely existed for a significant period of at least 24 hours, and I reject Adams' contrary testimony.

[11] The slope tripper drive provides increased power to the belt to keep it moving and transporting coal. Tr. 81. The slope tripper drive is a transfer point, where coal travels from one belt to another. When coal is dumped onto another belt, it travels through the air before landing on the next belt. This transfer often generates coal dust as the coal being transferred breaks and creates dust. Tr. 82.

be permitted to accumulate in active workings, or on diesel powered and electric equipment therein." 30 C.F.R. § 75.400. The condition alleged in Section 8 states:

> Loose coal was allowed to accumulate in excessive amounts along the slope belt, from approximately 100 feet below the slope collar to the bottom. These accumulations were in continuous windrows along both sides of the belt (the majority of the instances were along the back side of the belt), which ranged from 4" to 30" deep & from 16" to 72" wide, and occasionally up to the full width of the belt. Additionally, the accumulations were in contact with the moving belt and bottom rollers at the following approximate locations: 570' station; 1100' station; 1900' station; 2100' station; 2200' station; 2300' station.

P. Ex. 2. Reynolds designated the violation as significant and substantial, and determined that, as a result of Respondent's high negligence, the alleged violation was reasonably likely to result in lost workdays or restricted duty for six miners. *Id*. The Secretary initially proposed a penalty of $15,570.

After his underground inspection, Reynolds inspected the Respondent's record books for the previous month. Tr. 119. The belt inspection examination entries are kept in a separate book. A review of the belt examination book indicates that each of the eleven belts at the mine is inspected every shift, and the results are recorded on a separate page for each morning, evening, and midnight shift. Thus, each page represents one shift, and contains eleven entries, one for each belt examined during the shift. The pages include spaces to designate the mine name, the date of the examination, and the shift, and contain the following instruction:

> List all belts checked and make notation of any corrections needed or made in the following spaces. Include violations of designated regulations. If belt inspected is OK, so state. Indicate all corrections by action taken, date, and signature.

R. Ex. 2.

As noted, slope belt examination book entry at issue that Adams made for July 14, 2014 states that the "slope belt needs cleaned—work in progress." Tr. 116, 229; R. Ex. 1.

All of the slope belt exam notations for each shift from July 9 to July 13, 2014 (the five days and fifteen shifts preceding the issuance of Citation No. 8450924 on July 14) stated either "needs cleaned—work in progress" or "needs cleaned—cleaning in progress," except for the July 9 evening shift, which stated "none." *Id.* Some of the entries for other belts were more specific, such as the July 9 day shift entry for the east belt ("Need to clean under rollers from 3 to 8") or the July 10 day shift entry for the SM3 belt ("Need to clean 7A flowthrough"). These more specific entries were followed by the additional notation "done," and initials, presumably from the miner or supervisor, who took the corrective action. *Id*.

The slope belt exam book entry for the July 15 midnight shift (the first shift examination following the issuance of Citation No. 8450942) states: "Needs cleaned 100 foot inby tripper to tailpeace [sic] on back side tripper to travel road side 300 foot from tripper to top travel road

side." The July 15 day shift entry states: "Need to clean from 1800 to 2300 and 1000 to 1100 need to clean tail of take up." The July 15 evening shift entry reads: "Need to clean tail on backside and under tail roller, need to clean from 300 ft marker to tripper backside and from tripper to tail backside. Need to clean from tripper to tail travel road side. Need to clean take-up under belt." *Id*.

Reynolds testified that the accumulations that he observed on the morning of July 14, 2014 were too extensive for an examiner to miss. He found that the examination record simply stated "slope belt needs cleaned, work in progress." R. Ex. 1; Tr. 121-124. Reynolds described this as "non-specific, non-critical" language which did not mention "coal accumulation" or "washback." Tr. 116-17, 124. According to Reynolds, if the examiner had, in fact, noticed the extent of the accumulations on the slope belt, then the language "needs cleaned" failed to indicate the extent of the accumulations or that they needed to be removed immediately. Tr. 117-18.

Since the notation made by Adams did not reflect the conditions Reynolds observed in the mine just two hours after Adams' examination, Reynolds issued Citation No. 8450926 for an alleged violation of 30 C.F.R. § 75.363(b), which states in pertinent part:

> (b) A record shall be made of any hazardous condition and any violation of the nine mandatory health or safety standards found by the mine examiner. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition or violation of the nine mandatory health or safety standards is found *and shall include the nature and location of the hazardous condition or violation and the corrective action taken.* This record shall not be required for shifts when no hazardous conditions or violations of the nine mandatory health or safety standards are found. (italics added)

The citation alleged:

> The mine examiner has not properly recorded hazardous conditions in the examination record as were found to exist along the slope belt. Six individual areas were observed which posted distinct safety hazards in that accumulations of combustible material in the form of loose coal was in contact with the moving belt and bottom belt rollers. The exam record for the last examination of this area, which was completed just prior to the MSHA inspection, only indicated that the slope belt "needs cleaned." This language does not indicate the hazard that was found to exist.

Ex. P-3. Reynolds designated the violation as significant and substantial, and determined that the alleged violation was reasonably likely to result in lost workdays or restricted duty for six miners, as a result of Respondent's high negligence,. *Id*. The Secretary proposed a penalty of $6,996.

Two weeks later, on July 28, 2014, MSHA inspector Brittain Belford issued Citation No. 8451307, alleging another violation of 30 C.F.R. § 75.400 based on slope belt accumulations "extend[ing] from the bottom of the slope to the top and rang[ing] from approximately 1 ft-4 ft in depth and 1 ft-3ft in width." P. Ex. 5. Inspector Belford also observed rollers touching the accumulations. *Id*. Respondent agreed to settle Citation No. 8451307, as part of the partial settlement in this docket. ALJ Ex. 1.

III. PRINCIPLES OF LAW

A. Establishing a Violation

To prevail on a penalty petition, the Secretary bears the burden of proving by a preponderance of the evidence that a violation of the Mine Act occurred. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). A mine operator is held strictly liable for violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The operator may avoid liability only by showing that it was not properly on notice of the violative nature of its conduct. Even in the absence of actual notice, the Secretary may properly charge the operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

B. Gravity and Significant and Substantial (S&S)

The Mine Act describes a S&S violation as one "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). By contrast, the gravity of a violation "is often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996).)). The seriousness of a violation can be examined by looking at the importance of the standard violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. *See, e.g.*, *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

As the Commission has noted, the gravity component of the penalty assessment is not synonymous with finding that a violation is S&S, but may be based on the same evidence. The gravity inquiry is concerned with the effects of a hazard, while the S&S analysis focuses on the reasonable likelihood of serious injury. *See Consolidation Coal Co.*, 18 FMSHRC at 1550 (explaining that "the focus of the [gravity inquiry] is not necessarily on the reasonable likelihood of serious injury… but rather on the effect of the hazard if it occurs"). Alternatively, 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." *Cement Div., Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981).

To establish an S&S violation, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard–that is, a measure of danger to safety–

contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.[12] *Mathies Coal Co.*, 6 FMSHRC 1, 3-4. (Jan. 1984). The S&S determination should be made assuming "continued normal mining operations." *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985). This evaluation is also 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, without any assumptions regarding abatement. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *see also Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014); *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989); *Knox Creek*, 811 F.3d at 165-66 (upholding Commission's rejection of "snapshot" approach to evaluating S&S for accumulations violation); *Mach Mining*, 809 F.3d at 1267-68 (discussing the operative timeframe for violations in the context of S&S analyses).

The Commission has explained that "the reference to 'hazard' in the second element [of the test] is simply a recognition that the violation must be more than a mere technical violation – i.e., that the violation presents a measure of danger." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug.1984) (internal citation omitted). "There is no requirement of 'reasonable likelihood'" encompassed in this element. *Musser Engineering, Inc. & PBS Coals, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010). Rather, longstanding Commission precedent indicates that the likelihood of harm should be accounted for in the third *Mathies* element, which "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*, 6 FMSHRC at 1836 (quoted by the Commission on numerous occasions over the next two decades, including in *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1254-55 (Nov. 1998); *Zeigler Coal Co.,* 15 FMSHRC 949, 953 (June 1993); and *Texasgulf*, 10 FMSHRC 498, 500 (Apr. 1988). The Secretary, however, "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc.*, 32 FMSHRC at 1281). Further, the Commission has found that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc.*, 32 FMSHRC at 1281 (citing *Elk Run Coal Co.*, 27 FMSHRC at 906); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996).

In a decision issued on January 21, 2016, the Fourth Circuit shifted the focus of the traditional S&S analysis from the third to the second *Mathies* prong, restricting the consideration

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[12] The Secretary, mine operators, and the federal appellate courts have accepted the *Mathies* test as authoritative. *See Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 160 (4th Cir. 2016) (noting federal appellate courts' uniform adoption of *Mathies* test and parties' recognition of authority of the test); *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016) (applying *Mathies* criteria); *Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria).

of the facts bearing on the reasonable likelihood of injury under the third prong. *See Knox Creek*, 811 F.3d at 162. The Fourth Circuit interpreted the second *Mathies* prong to entail an inquiry into the likelihood of harm, stating:

> In our view, the second prong of the test . . . primarily accounts for the Commission's concern with the *likelihood* that a given violation may cause harm. This follows because, for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.

Id. Under the Fourth Circuit's application of *Mathies*, the occurrence of the hazard must be assumed under the third prong of the test. *Id.* at 161-65. Evidence of the likelihood that the hazard will occur is not considered at this prong. Rather, the inquiry is whether the hazard, assuming it occurred, would likely result in serious injury. *Id.* at 162. The Seventh Circuit has previously adopted a similar interpretation of the *Mathies* test, stating that the question in applying the third prong of *Mathies* "is not whether it is likely that the hazard . . . would have occurred[,]" but "whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result." *Peabody Midwest*, 762 F.3d at 616.

For violations that contribute to the hazard of an ignition, fire, or explosion, the Commission has held that the third *Mathies* element is satisfied when a "confluence of factors" is present that could have triggered an ignition, fire, or explosion, under continued normal mining operations. *Zeigler Coal Co.*, 15 FMSHRC at 943; *Texasgulf*, 10 FMSHRC at 501; *see, e.g.*, *Paramont Coal Co. Va., LLC*, 37 FMSHRC 981, 984 (May 2015). In particular, "the confluence of factors analysis requires consideration of the particular circumstances in the mine, including the possible ignition sources, the presence of methane, and the type of equipment in the area." *Excel Mining, LLC,* 37 FMSHRC 459, 465 (Mar. 2015).

The fourth *Mathies* factor requires the Secretary to show, by a preponderance of the evidence, a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3. The Commission noted in *Mathies* itself that, "as a practical matter, the last two elements will often be combined in a single showing." *Id*. Consistent with this approach, MSHA inspectors determine whether a violation meets the criteria for S&S by the likelihood of injury and the expected severity of injury, which correspond to the third and fourth *Mathies* elements.[13]

C. Negligence

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15

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[13] Inspectors are trained not to designate a violation as S&S, unless item 10.A on the citation form is marked "reasonably likely," "highly likely," or "occurred," and item 10.B is marked "lost workdays or restricted duty," "permanently disabling," or "fatal." *See* MSHA, PROGRAM POLICY MANUAL, Vol. I, § 104 (2003).

(Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining*, 30 FMSHRC at 708 (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining*, 37 FMSHRC 1687, 1701 (Aug. 2015) (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining, LLC*, 37 FMSHRC at 1701; *accord Mach Mining*, 809 F.3d at 1263-64. Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of allegedly mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody*, 37 FMSHRC at 1701.

Although MSHA's regulations regarding negligence are not binding on the Commission, *see Wade Sand & Gravel Co*., 37 FMSHRC 1874, 1878 n.5 (Sept. 2015), as noted, MSHA has defined negligence by regulation in the civil penalty context 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. The negligence criterion assigns penalty points based on the degree to which the operator failed to exercise a high standard of care.

30 C.F.R. § 100.3, Table X.

I note that the Commission generally gives deference to MSHA's regulations. *See Auer v. Robbins,* 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulation is controlling unless "erroneous or inconsistent with the regulation"); *cf. Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3101-02 (Dec. 2014) (holding that the ALJ was not bound by the Secretary's definition of "high negligence" set forth in 30 C.F.R. § 100.3(d)). Under MSHA's standard, high negligence is properly designated when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id*. This analysis considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. 30 C.F.R. § 100.3(d). MSHA's negligence regulation further provides that mitigation is an

affirmative action by the operator with knowledge of the potential hazard being mitigated, and that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions. *Id*.

D. Penalty Criteria

The Act requires that the Commission consider the following statutory criteria when assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the business; (3) the operator's negligence; (4) the operator's ability to stay in business; (5) the gravity of the violation; and (6) any good-faith compliance after notice of the violation. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). The Commission is not required to give equal weight to each of the criteria, but must provide an explanation for any substantial divergence from the proposed penalty based on such criteria. *Spartan Mining*, 30 FMSHRC at 723.

I look to the Secretary's penalty regulations and assessment formula as a reference point that provides useful guidance when assessing a civil penalty. *Big Ridge Inc.*, 36 FMSHRC 1677, 1681-82 (July 2014) (ALJ); *see also Wade Sand & Gravel*, 37 FMSHRC at 1880 n.1 (Jordan, Chairman and Nakamura, Comm'r concurring); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency's interpretation of its own regulation should be given controlling weight unless it is plainly erroneous or inconsistent with the regulation). The Secretary's assessment is not binding, but operates as a lodestar, since the factors involved in a violation, such as the level of negligence, may fall on a continuum rather than fit neatly into one of five gradations. Unique aggravating or mitigating circumstances will be taken into account and may call for higher or lower penalties that diverge from this paradigm. My independent penalty assessment analysis applies to each of the two citations at issue in this case.

IV. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Accumulation Violation, Citation No. 8450924

As discussed above, on July 14, 2014, Reynolds found that the accumulations which ran the length of the slope belt constituted a violation of 30 C.F.R. § 75.400, a mandatory safety standard. P. Ex. 2. Reynolds designated the violation as S&S, and reasonably likely to result in lost workdays or restricted duty for six miners. P. Ex. 1. He found that the violation was attributable to Respondent's high negligence.

The Secretary requests that I affirm the citation as written. Sec'y Br. 32. The Respondent requests reduction of the negligence designation, deletion of the S&S designation, and reduction of the number of persons affected. Resp't's Br. 3, 30. Although Respondent does not contest the fact of the violation, it argues that the Secretary has not met his burden to support the second, third, and fourth prongs of the *Mathies* test. Resp't's Br. 15. Respondent argues that the coal was wet and mixed with other material, that the accumulations were being shoveled, and that safety measures were in place to negate any risks of ignition or explosion. Accordingly, Respondent argues that ignition was unlikely, and even if an ignition were to occur, injuries would be minimal. Resp't's Br. 16.

1. Citation No. 8450924 was Appropriately Written as S&S.

I find that the large amount of coal accumulations in continuous contact with the belt rollers created the possibility of a belt fire, which constitutes a discrete safety hazard under the second element of the *Mathies* test. I find unpersuasive the Respondent's argument that the dampness of the accumulations and the absence of any ignition sources negate the existence of a hazard. *See* Resp't's Br.16. Although Reynolds conceded that he did not measure the heat of the belt parts that were in contact with the coal, and did not issue an imminent danger withdrawal order because he did not observe a visible flame or any smoldering or smoke, I do not find these facts fatal to the Secretary's assertions that the accumulations created a discrete safety hazard. Tr. 100-101, 178. The Commission has long held that "wet coal accumulations pose a significant danger in underground coal mines." *Consolidation Coal Co.*, 35 FMSHRC 2326, 2329-30 (Aug. 2013); *Black Diamond*, 7 FMSHRC at 1120-21 (rejecting the argument that wet coal does not pose a dangerous combustible risk because wet coal can dry out and fuel or propagate a fire or explosion); *see also Continent Res. Inc*., 16 FMSHRC 1226, 1230-32 (June 1994) (affirming S&S determination and holding that "accumulations of damp or wet coal, if not cleaned up, can dry out and ignite").

I also find that the discrete safety hazard created by the accumulations was reasonably likely to cause harm, satisfying the second prong of the Fourth Circuit's application of *Mathies. Knox Creek*, 811 F.3d at 162. In other words, the accumulations were reasonably likely to ignite, and such an ignition would likely case cause harm. Respondent argues that the wetness of the coal and the 45% recovery rate reduce the likelihood of an ignition. Resp't's Br. 16. Reynolds' testimony, however, establishes that the frictional heat from the belt would dry the coal under continued normal mining conditions, and the accumulations touching the belt therefore constituted a potential ignition source. Tr. 70. In fact, Reynolds testified that three of the bottom roller brackets that he observed were hot from contact with the moving belt. Tr. 78. Phipps conceded that if heat is applied to wet material, the water would eventually evaporate, drying the material. Tr. 410.

Respondent also argues that the likelihood of ignition was reduced due to the smaller percentage of combustible material being transported by the belt. Resp't's Br.16-18. Phipps testified that 44 to 46 percent of what is mined by weight is coal, and the rest is rock or other rejected material. Tr. 390. Although Reynolds conceded the possibility that only 45 percent of the material transported by the belt was coal, this fact did not change his opinion that the accumulation constituted an S&S violation. Tr. 178, 179, 180, 200. Reynolds' determination is consistent with Commission precedent holding that "even wet coal accumulations are prohibited by section 75.400 because they can dry out in a mine fire and ignite." *Manalapan Mining Co., Inc.*, 32 FMSHRC 690, 698 (June 2010) (citing *Utah Power & Light Co.*, 12 FMSHRC 965, 968-69 (May 1990) (internal citations omitted). Reynolds explained that if coal is present, it is combustible, and any ignition will spread through both the combustible and noncombustible material. Tr. 200. Therefore, due to the frictional heat sources present, I find that the coal accumulations presented an ignition hazard that would likely result in an injury under the Fourth Circuit's application of the *Mathies* test. *See Knox Creek*, 811 F.3d at 162 ("[F]or a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm.").

Regarding the third *Mathies* factor, Respondent argues that the reasonable likelihood of an injury was so low that Reynolds allowed the belt to continue operating, and therefore the S&S

designation should be deleted. Resp't's Br. 12. Reynolds permitted the belt to continue operating because, after consultation with Webster, he determined that the accumulations could be cleaned up without immediate danger. Tr. 292. The Fourth Circuit and Seventh Circuit's *Mathies* application requires an assumption that the hazard occurred, and the third prong of the test focuses on whether the hazard is likely to result in a serious injury. *Knox Creek*, 811 F.3d at 162; *Peabody Midwest*, 762 F.3d at 616. Based on the extent of the accumulations and the presence of ignition sources, I credit Reynolds' testimony that if the accumulations were left unabated, then an ignition would likely result. Tr. 105. Circuit Court precedent indicates that equipment operating in coal accumulations constitutes an ignition source for S&S purposes, even absent any defects in the equipment. *See Buck Creek*, 52 F.3d at 135 (affirming S&S designation where the frictional heat from a roller turning in coal dust could easily cause a fire, despite no evidence that the roller was either hot or defective). Additionally, Commission judges have found accumulation violations to be S&S based solely on contact between accumulated coal dust and non-defective equipment that could constitute an ignition source. *See, e.g.*, *American Coal*, 36 FMSHRC 1311, 1343 (May 2014). High levels of methane may also increase the risk of ignition and are appropriately considered in a confluence-of-factors analysis. *Excel Mining, LLC,* 37 FMSHRC at 462. The mine was on a 5-day spot inspection because the mining process liberated an excessive amount of methane. Tr. 188. In short, the gassiness of the mine, coupled with the extent of accumulations touching hot rollers, created a dangerous combination that was reasonably likely to cause an ignition.

Regarding the fourth *Mathies* factor and the likelihood that any injury caused by the hazard would be of a reasonably serious nature, Respondent argues that the violation is not S&S because the CO detectors on the belt would alert miners to fire, and the slope's fire suppression equipment would prevent any serious injury. Resp't's Br. 18. Redundant safety measures do not constitute a defense to an S&S allegation. The Commission has held that extra precautions may reduce risks, but do not make a violation non-S&S. *Consolidation Coal Co.,* 35 FMSHRC at 2330. The Seventh Circuit has specifically rejected the contention that fire prevention and safety measures mitigate the S&S status of an accumulation violation. *Buck Creek*, 52 F.3d at 135; *see also Cumberland Coal Res., LP*, 33 FMSHRC at 2369 (treating redundant mandatory safety protections as a defense to S&S findings would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made)*, aff'd sub nom., Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Comm'n*, 717 F.3d 1020, 1029 (D.C. Cir. 2013). Even Rorer testified that an extinguished fire would still generate smoke, which could be inhaled by a miner downwind. Tr. 354. In addition, Reynolds testified that in the event of an ignition, not only would miners in the immediate area be affected by flames, smoke inhalation, or carbon monoxide exposure, but miners downwind of the vent would also be exposed to smoke and carbon monoxide. Tr. 106. Furthermore, the slope is next one of two designated escapeways, potentially exposing miners to burns and smoke inhalation as they attempt to exit a mine during an emergency. Tr. 191. Smoke inhalation and burns constitute serious injuries for purposes of the *Mathies* analysis. *Amax Coal*, 19 FMSHRC 846, 847 (May 1997) (upholding judge's finding of S&S based on evidence of smoke inhalation and burns as serious injuries) . Accordingly, I reject the Respondent's argument that the presence of CO detectors or the fire suppression system justifies deleting the S&S designation.

In conclusion, I find that even if the accumulations were wet and the belt primarily transported non-combustible material, the reasonable likelihood of an ignition risk remained.

Frictional heat was likely to dry the coal accumulations, and high methane concentrations compounded the risk of ignition. Any injury from an ignition would likely result in smoke inhalation and burns, which constitute serious injuries likely to result in lost work days or restricted duty. In these circumstances, I find that the citation was properly designated as S&S.

2. Citation No. 8450924 was the Result of Respondent's High Negligence.

As noted above, in determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC at 1910. Reynolds testified that, based on the extent of the accumulations observed, mine managers or examiners, who traveled the slope numerous times every day, should have recognized and dealt with the accumulations. Tr. 109. Accordingly, Reynolds designated Respondent's negligence as "high." P. Ex. 2.

Respondent argues that its actions regarding the accumulations were consistent with what a reasonably prudent operator familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have done in the circumstances. Resp't's Br. 14. The Respondent argues that Mach's mitigation efforts weigh in favor of a lower negligence designation. Resp't's Br. 5-8. Respondent argues that the accumulations increased significantly between Adams' initial examination and Reynolds' inspection about two hours later. In light of that alleged rapid build-up, Respondent argues that the actions it took were sufficient to mitigate Reynolds' high negligence designation. Resp't 13.

Respondent also argues that while it awaited the arrival of the new dewatering system, conditions on the slope belt were being monitored and abated. As noted, the dewatering system was installed at the mine nearly two months after the issuance of Citation No. 8450294. Webster testified that ten miners were shoveling the belt around the clock. Tr. 283, 304; Resp't's Br. 13. Phipps testified that additional miners were hired to shovel as needed, and company foremen patrolled the belt for rollers contacting accumulation. Tr. 383, 389, 399. I note, however, that only five to seven miners were shoveling at the time of the inspection, and they were located at the top of the slope belt where the accumulations were less significant.

While installing a dewatering system was a prudent long-term decision, Respondent's belated reaction to the recurring washback issue fails to mitigate its negligence. Rorer conceded that it would have been possible to shut the long wall down and install a dewatering system before mining the longwall panel, but Respondent declined to do so. Tr. 367. As indicated by the receipt of another accumulation citation just two weeks after the instant citation, Respondent's mitigation efforts were inadequate to address the accumulation hazards. P. Ex. 5.

Reynolds testified that the washback phenomenon was a predictable consequence of Respondent's decision to use the belt conveyor to transport water out of the mine, and opined that since the Respondent was using the belt conveyor to discharge water, its pumping system was inadequate to handle the amount of water encountered. Tr. 97-99. Although Respondent argues that the severity and timing of the washback was unpredictable, it also admits that the phenomenon itself was an inevitable consequence of using the slope belt to remove water. Tr. 385; Resp't's Br. 14. As the Secretary argues, the development of accumulations is therefore

directly attributable to Respondent's choice to expel water using the slope belt. Sec'y's Br. 19; *see also* Tr. 99, 199.

I find that despite the foreseeability of the washback accumulations and the assignment of miners to shovel the belt each shift, Respondent did not implement adequate measures to keep the belt clear of accumulations. In fact, Respondent was only able to keep the slope clear an estimated ten percent of the time in the month prior to the issuance of Citation No. 8450294. Tr. 403; R. Ex. 1; Sec'y's Br. 20. Given the high methane concentrations within the mine, Respondent should have been particularly attentive to recurring accumulations with possible ignition hazards present. Tr. 334.

Both the Secretary and Respondent have directed my attention to a prior case involving a section 75.400 citation issued to Respondent at Mach No. 1 Mine for slope belt accumulations. *See Mach Mining, LLC*, 33 FMSHRC 763 (March 2011) (ALJ). In that case, Judge Manning deleted the Secretary's S&S designation due to the wetness of the accumulations and the redundant fire-suppression safety measures. *Id*. at 773. The accumulations at issue in that case, however, were significantly less extensive than those at issue here. *Id*. at 770. Furthermore, as discussed above, precautionary safety measures do not make a violation non-S&S. *Consolidation Coal Co.,* 35 FMSHRC at 2330; *see also Buck Creek Coal, Inc.*, 52 F.3d at 135; *Cumberland Coal Res., LP*, 33 FMSHRC at 2369. Judge Manning's decision was not appealed and is not binding here. I find it particularly significant, however, because it indicates that Respondent was aware of the issues caused by the washback phenomenon for at least five years prior to the installation of the dewatering system.

In sum, I conclude that Respondent failed to address serious and largely self-imposed accumulation hazards that developed over the course of several shifts in a particularly gassy mine. I do not find persuasive Respondent's contention that its actions were consistent with what a reasonably prudent operator familiar with the mining industry, the relevant facts, and the protective purpose of the regulation would have done in the circumstances, particularly since Respondent knew of the washback problem as early as 2011. Resp't's Br. 14. Furthermore, in the 15 months preceding Citation No. 8450294, Respondent received 58 citations for violating section 75.400. P. Ex. 2. Respondent was aware of the frequent and extensive accumulations caused by using the slope belt to transport water and the consequent washback accumulations. Respondent's failure to timely assign sufficient miners to correct the recurring problem demonstrated more than an ordinary lack of care. The totality of circumstances warrants a finding of high negligence.

B. Recordkeeping Violation, Citation No. 8540926

The Respondent requests that Citation No. 8540926 be vacated, the negligence designation be reduced, and the S&S designation be deleted. In support of its request to vacate, Respondent argues that the accumulations at the time of Adams' examination were not in contact with the slope belt, that Adams' notations satisfied 30 C.F.R. § 75.363(b), and that Respondent did not have fair notice that MSHA required more detail in recordkeeping notations. Resp't's Br. 20.

Adams testified that at the time of his shift examination two hours before Reynolds' inspection, Adams observed spillage on the belt due to washback, but did not observe

accumulations touching the belt. Tr. 228-29. Adams' testimony is corroborated by Webster, who stated that accumulations were not touching the belt at 6:00 a.m., and by Rorer, who passed by the belt at 7:15 a.m. Tr. 299; Tr. 342, 344.

While it is possible that the accumulations occurred rapidly as a result of the washback, considering all the circumstances of this case, I credit Reynolds' testimony that accumulations had existed for several shifts. Tr. 64. Adams conducted his slope belt examination as he drove out of the mine. Reynolds conducted his inspection on foot by walking the length of the belt from top to bottom. Tr. 56, 196, 239. Reynolds testified that the majority of the accumulations were on the back side of the belt, opposite the travel way, and partially obstructed from view by the steel I-beams and the belt itself. Tr. 56, 196-98. Reynolds opined that it would be difficult to conduct a thorough examination of the belt from a moving vehicle, as Adams had done, due to these obstructions. Tr. 197-98. Reynolds also testified that there were fewer accumulations on the side of the belt facing the road, and it appeared that those accumulations had been cleaned. Tr. 68.

In addition, at 650 feet down the slope, Reynolds observed that the slope belt had cut into the I-beam for approximately one-eighth of an inch. He estimated that this would have taken at least 24 hours for the rubber belt to cut into the steel I-beam. Tr. 78-79. Webster confirmed that it would have taken some time for the rubber belt to cut one-eighth of an inch into a three-eighths of an inch-thick, steel I-beam. Tr. 301-02. As noted above at note 10, I have credited the testimony of Reynolds and Webster that the friction between the belt and I-beam likely existed for a significant period of at least 24 hours. As such, it should have been noted by Adams. The frictional damage to the I-beam undercuts Respondent's claim that it was actively monitoring belt conditions because Adams or other shift examiners should have noticed and documented such belt damage, and they did not. Based on the facts outlined above, I find that the Secretary proved by a preponderance of the evidence that the accumulations existed at the time of Adams' inspection and were in contact with the belt rollers.

1. Citation No. 8450926 was Properly Issued for Respondent's Failure to Record the Nature and Location of Hazardous Conditions as Required by 30 C.F.R. § 75.363(b).

Respondent argues that section 75.363(b) requires five elements:

> [1] A record shall be made of any hazardous condition and any violation of the mine mandatory health or safety standards found by the mine examiner. [2] This record shall be kept in a book maintained for this purpose on the surface of the mine. [3] The record shall be made by the completion of the shift on which the hazardous condition or violation of the mine mandatory health or safety standards is found and [4] shall include the nature and location of the hazardous condition of the violations and [5] the nature of the corrective action taken.

30 C.F.R. § 75.363(b); Resp't's Br. 23. Based on these elements, Respondent argues that Adams' notation of "slope belt needs cleaned—work in progress" satisfied the first four requirements, and was insufficient only in that it did not specifically refer to precise locations along the belt where accumulations had occurred. *Id*. The Secretary argues that the notation was inadequate

because it failed to identify the specific hazard of accumulations touching the running belt in six locations. Sec'y Br. 24; Tr. 113.

Although my research reveals that the Commission has not addressed section 75.363(b), the Secretary points out that prior Commission ALJ decisions have recognized three discrete elements pertaining to records kept under the requirements of section 75.363(b): the nature of the hazard, the location of the hazard, and the corrective action taken. *Drummond Company, Inc.*, 25 FMSHRC 644, 646 (Oct. 2003) (ALJ). The Secretary contends that Adam's notation is deficient in that it fails to document the extent of the accumulations and the locations where the rollers and the moving belt were in contact with the accumulations. Tr. 116-17; Sec'y's Br. 23. Respondent argues that Adams' notation regarding the accumulations was sufficient to meet the requirements of section 75.363(b) because the notation of "slope belt needs cleaned" would have been understood by a reasonable person familiar with the mining industry to mean that the entire belt needed cleaning from top to bottom. Resp't's Br. 9, 20, 22-23.

The purpose of section 75.363(b) is to create a history of conditions in the mine that "mine management can use . . . to determine if the same hazardous conditions are occurring and if the corrective action taken is effective." *Safety Standards for Underground Coal Mine Ventilation*, 61 Fed. Reg. 9764, 9803 (March 11, 1996) (codified at 30 C.F.R. § 75.363). The adequacy of records is analyzed from the perspective of a miner reading the record for requisite information. *Twentymile Coal Co.*, 34 FMSHRC 2138, 2156 n. 22 (ALJ 2012).

Reynolds testified that the "slope belt needs cleaned—work in progress" notation was inadequate because slope belts generally need cleaning every shift. Tr. 117. While the notation may have been generally understood by a reasonable miner to indicate that the entire slope belt needed cleaning, the notation failed to give notice as to the specific hazards posed by the slope belt accumulations, as evidenced by the fact that six miners cleaning the belt during Reynolds' inspection were working at the top of the belt where there were fewer accumulations, rather than farther down the belt where there were greater accumulations near possible ignition sources. Tr. 126.

In addition, the nearly identical previous entries for the slope belt examinations and Respondent's long history of slope belt accumulation citations indicate that the entries were not sufficiently specific to serve the regulation's purpose of demonstrating to mine management whether its corrective actions were effective. I therefore find that Adams' "slope belt needs cleaned—cleaning in progress" notation did not identify the nature or location of the hazard, nor the nature of the corrective action, i.e. that the slope belt was actually cleaned at the locations of the numerous accumulation hazards.

2. Respondent had Fair Notice Regarding the Requirements of Section 75.363(b).

The Respondent also argues that it did not have fair notice that its recording practices violated 30 C.F.R. § 75.363(b). Resp't's Br. 7. Fair notice provides a defense when the standard at issue is "so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Ideal Cement Co.*, 4 FMSHRC 2128, 2129 (Dec. 1982). On the other hand, where a regulation is clear, "the terms of the 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." *Lode Star Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002).

Regulatory interpretation is a two-step analysis. *Walker Stone*, 19 FMSHRC 48, 51 (Jan 1997), *aff'd*, 156 F.3d 1076, 1081 (10th Cir. 1998). The first step is to determine whether the regulation is clear and unambiguous. *Northshore Mining Co. v. Sec'y of Labor*, 709 F.3d 706, 709 (8th Cir. 2013). The regulation must be applied as written where the regulatory language is clear and unambiguous. *Id*. If the regulation is ambiguous, the second step is to determine whether the agency's interpretation is reasonable. *Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n*, 519 F.3d 1176, 1192 (10th Cir. 2008) (citing *Auer v. Robbins*, 519 U.S. 451, 461 (1997)). An interpretation is reasonable unless it is plainly erroneous or inconsistent with the regulation. *Id*. In making this reasonableness determination, the Commission considers the regulatory language and history. *Twentymile Coal*, 36 FMSHRC 2009, 2012-13 (Aug. 2014).

Even absent actual notice, the Secretary may charge an operator with a violation when a reasonably prudent person familiar with the protective purposes of the cited standard and the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would have recognized a hazard warranting corrective action within the purview of the applicable regulation. *LaFarge North America*, 35 FMSHRC at 3500-01; *Ideal Cement Co.*, 12 FMSHRC at 2415-16; *Alabama By-Products Corp.*, 4 FMSHRC at 2129. The Secretary argues that the requirements of section 75.363(b) are explicit: the record of the hazard must contain the nature of the hazard, the location of the hazard, and the correction action taken. Sec'y's Br. 23. As discussed above, Respondent argues that the plain language of the statute contains five requirements: a record maintained in a book on the surface of the mine that identifies the nature and location of hazards during shift inspections and the corrective action taken to alleviate those hazards.

A review of the record book itself indicates that notations for other belt examinations contained the elements that the notations for the slope belt lacked. For example, the July 9 day shift entry for the east belt states: "Need to clean under rollers from 3 to 8." The July 10 day shift entry for the SM3 belt states: "Need to clean 7A flowthrough." Both of these entries were followed by the additional notation "done," and initials. R. Ex. 2. As demonstrated by these notations, Respondent recognized the essential elements of the regulation and properly recorded at least some of the hazards identified during its examinations prior to the issuance of Citation No. 8450962. Accordingly, I find that Respondent had fair notice regarding the plain language of the requirements of section 75.363(b). The regulation at issue is clear and unambiguous, and thus should be interpreted in accordance with its plain language.

Even assuming that the regulation is ambiguous, the Secretary's interpretation is reasonable and should be accorded deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). As noted above, the purpose of section 75.363(b) is to create a history of conditions in the mine that "mine management can use . . . to determine if the same hazardous conditions are occurring and if the corrective action taken is effective." *Safety Standards for Underground Coal Mine Ventilation*, 61 Fed. Reg. 9764, 9803 (March 11, 1996) (codified at 30 C.F.R. § 75.363). I find that the Secretary's interpretation of the regulation is consistent with this purpose. To allow generalized notations like Adams made to satisfy this standard would nullify the regulation's requirements to identify the nature and location of the hazard, and the specific identification of the corrective action taken for such hazard, thereby undermining the purpose of the regulation.

Accordingly, I find that Adams' notation of "slope belt needs cleaned—cleaning in progress" does not satisfy the requirements of 30 C.F.R. § 75.363(b).

3. Citation No. 8540926 Was Appropriately Written as S&S.

Recording hazardous conditions discovered in a shift examination is crucial to the health and safety of miners. *See, e.g.*, *American Coal Co*., 34 FMSHRC 2058, 2082 (ALJ 2012). In the context of an S&S designation, the Commission must determine whether the failure to record contributed to a hazard that is reasonably likely to result in a serious injury. *Id*. Reynolds issued Citation No. 8540926 because, in his opinion, Adams' notation did not identify the nature and location of the accumulations hazards that were prevalent at numerous locations along the slope belt. As discussed above, accumulations touching the belt and rollers constituted an S&S violation that contributed to the discrete safety hazard of an ignition that was reasonably likely to result in a serious injury. Accordingly, I turn to the issue of whether the failure to properly record the nature and location of the slope belt accumulations contributed to the discrete safety hazard that management and miners would be unaware of the nature and location of the ignition hazards and any corrective actions taken, thereby enhancing the likelihood of reasonably serious injuries resulting in lost work days or restricted duty.

Reynolds designated Citation No. 8540926 as reasonably likely to result in a lost workdays or restricted duty injury because the location and nature of the accumulation hazards were not detailed in the examination report. Consequently, management and miners would not be able to immediately address the accumulations most likely to result in ignitions. Tr. 130. In fact, at the time of the inspection, miners were shoveling where ignition hazards were not present. Adams' poor and deficient documentation of the accumulation and ignition hazards present were reasonably likely to enhance an actual ignition during continued mining operations, and the ignition itself was reasonably likely to result in serious injuries of smoke inhalation and burns.

Respondent argues that Adams' notation "slope belt needs cleaned—work in progress" served the purpose of notifying miners and management of specific hazards in the mine because six workers were assigned to shovel the accumulations on the slope belt, potentially abating the discrete hazards that might arise from inadequate reporting. Tr. 242, 317; Resp't's Br. 29. I disagree. I reject this argument. The belt was running. No specific hazards were mentioned, nor was the specific location of such hazards mentioned. Further, as Adams testified, the six or so miners were shoveling at the top of the slope, rather than addressing those areas of the belt where the accumulations were touching the rollers or the belt itself. Tr. 126.

In addition, 27 miners were assigned to clean the belt after the issuance of Citation No. 8450924. Tr. 132. It took the 27 miners between two and three days to abate the hazards. P. Ex. 2. It is therefore unlikely that the six miners assigned to shovel the belt on the morning of July 14 had any significant effect on abating the hazards, even had they been shoveling in locations were the accumulations touched the belt and rollers. Without noting the specific location of the hazards observed, Adams' notation did little to enable miners or management to abate hazards within the mine, and thus rendered the examination reporting ineffective in carrying out the purpose of the regulation. Accordingly, I uphold the S&S designation and find that Adams' notations failed to properly record the location and nature of the accumulations, thereby contributing to the reasonable likelihood of an ignition that would result in serious injuries.

4. Citation No. 8540926 Was Appropriately Written as High Negligence

Respondent argues that examiner Adams' notations accurately reflected slope conditions at the time of his inspection, and accordingly his recordkeeping was not negligent. Resp't's Br. 27. Although Reynolds conceded that Adams may have observed a "minimally less extensive" amount of accumulations during his examination, I have found that the Secretary established that the accumulations had accrued over more than one shift, and that Adams' examination from a moving vehicle precluded him from observing the accumulations and ignition sources on the far side of the belt. Tr. 139-141.

Respondent also argues that Adams' notation provided an opportunity for the examiner and the foreman to discuss accumulation issues. According to Adams, his July 14, 2014 entry was standard practice at the mine, and the mine foreman Rorer "would know what [his entry] meant." Tr. 264. Adams testified that when he spoke to Rorer after the examination at 7 a.m., Adams told Rorer that the entire belt needed to be cleaned. Tr. 262. Adams further testified that after his examinations, he usually would verbally convey to Rorer where shoveling was needed, rather than indicating such locations in the record book. Tr. 264, 357. However, miners going underground after the examination are entitled to review the examination book to determine the nature and location of hazardous conditions and violations found, and the corrective actions taken. Allowing verbal communications between examiners and supervisors to substitute for the written record required by section 75.363(b) would deprive miners of this right. The plain language of section 75.363(b) does not allow verbal communication to substitute for its written recording requirements. Furthermore, despite his discussion with Rorer, Adams' notation did not result in any significant action regarding the abatement or mitigation of the accumulations hazards until after the citation was issued. In addition, Respondent's belt examination book entries for July 9 and 10 indicate that Respondent attempted to at least comply with the standard's specific location requirements when it wanted to do so. In these circumstances, I find that Respondent's examiner was highly negligent in failing to properly document the nature and location of the numerous accumulation hazards, and the corrective action taken.

V. Civil Penalty

The Secretary initially proposed a penalty of $15,570 for Citation No. 8450924 and a penalty of $6,996 for Citation No. 8450926. In his post-hearing brief, the Secretary requested that the proposed penalty be increased to a total of $45,000 for both citations, but provided no supporting rationale. Pet'r's Br. 32. At trial, the Secretary did not move to amend its Petition for the Assessment of Civil Penalty to increase the proposed penalty.

The parties stipulated that in 2013, the Mach Number One Mine produced 6,694,630 tons of coal and its controlling entity produced 18,772,988 tons of coal. The parties also stipulated that the penalties proposed by the Secretary in this case will not affect the ability of Mach to continue in business, and that Mach demonstrated good faith in abating the violations. Respondent was cited 58 times for violations of section 75.400 in the fifteen months prior to the issuance of Citation No. 8450924. Given this history of violations, my confirmation of inspector Reynolds' gravity, negligence, and S&S determinations, and Respondent's good-faith abatement of the violation, I assess a penalty of $15,570 for Citation No. 8450924 under the penalty criteria set forth in Section 110(i) of the Act.

Citation No. 8450926 was the first time Respondent was cited under 30 C.F.R. § 75.363(b). Given the absence of any history of violations, my confirmation of Reynolds' gravity, negligence, and S&S determinations, and Respondent's good-faith abatement of the violation, I assess a penalty of $6,996 for Citation No. 8450926 under the penalty criteria set forth in Section 110(i) of the Act.

VI. Approval of Partial Settlement

On October 29, 2015, the Secretary submitted a motion to approve settlement for 11 citations, and proposed a reduction in penalties from $34,317 to $25,461. The Solicitor states that Citation No. 8439597 has been vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *See, e.g.*, *RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993). The Solicitor also requests that:

> Citation No. 8439593 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation;
>
> Citation No. 8439594 be modified to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation;
>
> Citation No. 8439599 be modified to reduce the level of negligence from "high" to "moderate;" and
>
> Citation No. 8451307 be modified to reduce the number of persons affected from "ten persons" to "five persons."

The remaining citations and penalties are unchanged.

Pursuant to 29 C.F.R. § 2700.1(b) and Federal Rule of Civil Procedure 12(f), I strike paragraph four from the Secretary's Motion to Approve Settlement as immaterial and impertinent to the issues legitimately before the Commission. The paragraph incorrectly cites and interprets the case law and misrepresents the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have evaluated the proposed settlement in accordance with sections 110(i) and 110(k) of the Act.

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

Citation No.	Assessment	Settlement
8439592	$334	$334
8450925	$745	$745
8439593	$2,282	$2,282
8439594	$1,944	$1,944
8451302	$108	$108
8439595	$460	$460
8451306	$11,306	$11,306

8439598	$2,282	$2,282
8439599	$5,503	$2,000
8451307	$8,893	$4,000
TOTAL	$33,857	$25,461

VII. ORDER

Citation Nos. 8450924 and 8450926 are **AFFIRMED, AS WRITTEN**.

It is **ORDERED** that Citation No. 8439593 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

It is **ORDERED** that Citation No. 8439594 be **MODIFIED** to reduce the likelihood of injury or illness from "reasonably likely" to "unlikely," and to delete the significant and substantial designation.

It is **ORDERED** that Citation No. 8439599 be **MODIFIED** to reduce the level of negligence from "high" to "moderate."

It is **ORDERED** that Citation No. 8451307 be **MODIFIED** to reduce the number of persons affected from "ten persons" to "five persons."

To the extent it has not already done so, Mach Mining is **ORDERED** to pay a total civil penalty of $48,027 for the litigated and settled citations within thirty (30) days of the date of this Decision and Order.[14]

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

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[14] 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.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 1, 2016

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, on behalf of STEVE GLOSSON, Complainant, v. LOPKE QUARRIES, INC., Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2016-299-DM MSHA Case No. SE-MD-16-09 Mine: Dunn Construction Mine ID: 01-03411

ORDER VACATING AWARD OF TEMPORARY REINSTATEMENT

This matter is before me upon an Application for Temporary Reinstatement under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 815(c)(2), and Commission Procedural Rule 45, 29 C.F.R. § 2700.45.

The application was filed with the Commission on August 16, 2016. The Secretary represented that she had served the Respondent via email on the previous day. Relying on his representation, on August 29, I issued an order of temporary reinstatement pursuant to 29 C.F.R. § 2700.45(c). Today, the Solicitor notified the Court that she erroneously failed to serve the Respondent via email as she had so certified. The Respondent did not receive the application by mail until August 22, meaning that today is actually the deadline to request a hearing. The Respondent has now timely requested a hearing.

Accordingly, my August 29, 2016 Order of Temporary Reinstatement in this case is hereby **VACATED**.

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

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September 6, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. SE 2014-455 A.C. No. 01-03130-357670
v.	Docket No. SE 2015-29-M A.C. No. 01-03130-363329
COUCH AGGREGATES, LLC, Respondent.	Mine: B & R Sand & Gravel

ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Simonton

On August 11, 2016, the Respondent filed with the undersigned a Motion for Partial Summary Decision and Incorporated Memorandum in the above-captioned proceedings.[1] On August 24, 2016, the Secretary filed a Response, opposing the Respondent's Motion.

The relevant undisputed facts are as follows:[2]

- On May 28, 2014, Bobby Stroud was a miner and employee of Couch Aggregates at the B & W Sand & Gravel Mine.
- On May 28, 2014, Mr. Stroud was involved in an incident in the electrical control room that resulted in his injury.
- On June 3, 2014, MSHA Inspector Timothy S. Schmidt issued Citation No. 8834740 for a violation of 30 C.F.R. §50.10(b) for failure to notify MSHA within 15 minutes of an accident occurring at a mine which had a reasonable potential to cause death. The Secretary assessed a penalty of $5,000.00.

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[1] Respondent's motion requests Summary Decision. However, Dockets SE 2014-455 and SE 2015-29 were consolidated on December 11, 2015. In their Motion for Summary Decision, the Respondent only requests summary judgment for Docket SE 2014-455, and only addresses that citation in their argument. Thus, the Respondent's Motion will be read as seeking Partial Summary Decision.

[2] In its motion, Respondent lists undisputed facts mandating relief, all of which, Respondent claims, are taken entirely from documents produced by MSHA. In its response, the Secretary disputes all or part of each of these facts. Therefore, the relevant facts listed above include only those portions that are not disputed by either party.

- On June 3, 2014, MSHA Inspector Timothy S. Schmidt issued Citation No. 8834742 alleging a violation of 30 C.F.R. §56.12040. The citation alleged that Couch Aggregates violated the standard because operating controls for the starters in two electrical disconnect boxes were not located so that they could be operated without danger of contacting energized conductors. The Secretary assessed a penalty of $17,800.00.

The Respondent argues that Partial Summary Decision should be granted because the alleged undisputed facts establish that no injury with the reasonable potential to cause death occurred, and Couch Aggregates was never on notice that an accident with an injury with the reasonable potential to cause death occurred. The Respondent argues that by the time Couch Aggregates learned of the purported injury to Mr. Stroud, it was already apparent that the injury did not have a reasonable potential to cause death. Because Mr. Stroud recovered from the incident so quickly, the operator was not required to notify MSHA within the requisite 15 minute time frame. Therefore, the Respondent argues that the Motion for Partial Summary Decision should be granted.

The Secretary argues that none of the facts provided by the Respondent are undisputed because the Secretary has not been able to verify their accuracy through discovery. The Secretary argues that none of the provided evidence has been properly verified or supported by reference to affidavits or other verified documents. Aside from disputing or partially disputing each provided fact, the Secretary provides additional facts that the Respondent has yet to stipulate are true or undisputed. Even if the Respondent's facts are undisputed, the Secretary argues that genuine issues of material of fact exist regarding the severity of Mr. Stroud's injury, whether an electrical shock occurred, and whether Mr. Stroud experienced unconsciousness. Therefore, the Secretary argues that the Contestant's Motion for Summary Decision should be denied.

The Court may grant summary decision where the "entire record…shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. §2700.67(b); *see also UMWA, Local 2368 v. Jim Walter Res., Inc*., 24 FMSHRC 797, 799 (July 2002); *Energy West Mining*, 17 FMSHRC 1313, 1316 (Aug. 1995) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), which interpreted Fed.R.Civ.P. 56). The Commission has analogized its Rule 67 to Federal Rule of Civil Procedure 56, which authorizes summary judgments upon a proper showing of a lack of a genuine, triable issue of material fact. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007). A material fact is "a fact that is significant or essential to the issue or matter at hand." *Black's Law Dictionary* (9th ed. 2009, *fact*). "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." *Greenberg v. Bellsouth Telecommunications, Inc*., 498 F.3d 1258, 1263 (11th Cir. 2007)(citation omitted). The court must evaluate the evidence "in the light most favorable to … the party opposing the motion." *Hanson Aggregates*, 29 FMSHRC at 9. Any inferences drawn "from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Id.* Though the moving party bears the initial burden of informing the court of the basis for its motion, it is not required to negate the nonmoving party's claims. *Celotex*, 477 U.S. at 323. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some

metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380 (2007) (citation omitted).

In the instant case, there are clearly genuine issues of material fact in dispute such that summary decision must be denied. The Secretary's response disputes part or all of the facts that the Respondent alleges are undisputed concerning the events surrounding the citation. Most important among these issues is the extent of Mr. Stroud's injuries, whether Mr. Stroud lost consciousness and if so for how long, and whether that period of time suffices to categorize the injury as reasonably likely to cause death. In addition, there remains dispute regarding the reasons and motives behind Couch Aggregate's decision not to notify MSHA of the injury at any time during or after the event. These dockets are scheduled to be heard on October 27-28, 2016 in Montgomery, AL, at which time the parties can present evidence concerning the incident event giving rise to the citation and the events that preceded and followed it. Accordingly, the Respondent's Motion for Summary Decision is **DENIED**.

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

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September 14, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KELLY RAWLEY, Complainant, v. J.L. SHERMAN EXCAVATION CO., Respondent.	DISCRIMINATION PROCEEDING: Docket No. WEST 2016-545-DM MSHA Case No. WE-MD 16-07 Mine: J.L. Sherman Excavation Co. Mine ID: 43-03100

REQUEST FOR STATEMENTS OF POSITION ON CONFLICT ISSUE

The court has before it a complaint of discrimination filed by the Secretary of Labor pursuant to section 105(c)(2) of the Mine Act on behalf of Kelly Rawley against J.L. Sherman Excavation Co. In the case, the Secretary alleges that Mr. Rawley engaged in protected activity on October 7, 2015, when he called the Secretary's Mine Safety and Health Administration ("MSHA") to complain of unsafe brakes on a front end loader and again in November 12, 2015, when he called MSHA to report he had been terminated following his report about the unsafe brakes. According to the Secretary, Mr. Rawley was later told he had been laid off for winter rather than terminated and that he would return to work in the spring. However, on or about April 12, 2016, Mr. Rawley was fired, and the Secretary asserts the April termination discriminated against Rawley in violation of section 105(c)(1) the Act. The Secretary requests a finding that Mr. Rawley's rights were unlawfully interfered with by the company in violation of the Act. The Secretary also requests an order requiring the company to fully compensate Mr. Rawley for lost wages and pay-related benefits plus interest, an order requiring the company to compensate Mr. Rawley for consequential damages, expenses and the costs that he incurred as a result of his alleged illegal termination, an order directing Mr. Rawley's personnel file be expunged of any disciplinary action taken against him as the result of his termination, an order awarding damages for emotional distress and loss of reputation, and the Secretary asks the court to assess a civil penalty of $25,000 against the company for its alleged violation of section

105(c).[1] Secretary's First Amended Complaint 3-4. The discrimination case is presently scheduled to go to hearing on October 4, 2015.[2]

Subsequent to scheduling the case for hearing, the court and counsels agreed to have settlement attorneys work with counsels to determine if the matter could be settled in a mutually agreeable way. Order of Assignment to Settlement Attorneys (August 22, 2016). The court has been advised by the settlement attorneys that a settlement does not appear possible and if this remains the case the authority of the settlement counsels will end no later than September 23, 2016. *Id.*

In the meantime, and unbeknownst to the court at the time, in addition to proceeding on Mr. Rawley's behalf in the temporary reinstatement case (Docket No. WEST 2016-467) and in the discrimination case (Docket No. WEST 2016-545-DM), the Secretary filed with the Commission a petition for assessment of civil penalty **AGAINST** Mr. Rawley. The case is *Secretary of Labor v. Kelly S. Rawley*, Docket No. WEST 2016-605-M. The Secretary's case against Mr. Rawley is brought pursuant to Section 110(c) of the Act and requests the Commission to assess Mr. Rawley with total civil penalties of $4,700 for violations of the Secretary's safety standards for surface metal and nonmetal mines (30 C.F.R. Part 56) as set forth in a section 104(d)(1) citation and in a section 104(d)(1) order issued on October 15, 2014. The case is presently assigned to Commission Administrative Law Judge Richard Manning and the Secretary is represented in the case by Winfield J. Wilson of the Arlington, Virginia Solicitor's Office, Department of Labor.

The situation is highly unusual. Indeed, the undersigned, who has heard Mine Act cases for over twenty years, recalls no prior instance of assignment to a case in which the Solicitor has brought an action on behalf of a claimant while suing the claimant in another case. In the court's view the situation raises possible conflict of interest issues that should be addressed before the merits of the discrimination complaint are heard.

It seems certain to the court that an attorney and his or her law firm could not both represent a client in a case and at the same time sue the claimant in another case. Basic conflict principles would prevent it. *See, e.g., Model Rules of Professional Conduct, Rule 1*. However, the court recognizes that legitimate arguments can be made that conflict principles barring a firm

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[1] Prior to being assigned the discrimination complaint, the court was assigned an application for Mr. Rawley's temporary reinstatement. The application was filed by the Secretary on Mr. Rawley's behalf pursuant to section 105(c)(2) of the Act. *Secretary of Labor Mine Safety and Health Administration (MSHA) on behalf of Kelly Rawley v. J.L. Sherman Excavation*, Docket No. WEST 2016-467-DM. The complaint was the subject of good faith negotiations by counsels for the Secretary and the company. The negotiations resulted in a settlement pursuant to which the company agreed, *inter alia*, to economically reinstate Mr. Rawley to his position as a crusher supervisor at a specified rate, and to provide benefits associated with Mr. Rawley's employment and consistent with those provided pre-termination. On May 26, 2016, the court approved the settlement and the economic reinstatement of Mr. Rawley went into effect. *Approval of Settlement and Orders to Comply* (May 26, 2016).

[2] After the Secretary filed his discrimination complaint, Mr. Rawley, obtained his own counsel who entered an appearance on Mr. Rawley's behalf.

from participating in such dual actions may not be applicable to the Solicitor when she proceeds under the Mine Act. The court is mindful that the Commission, when confronted with a situation in which the Secretary delayed filing a temporary reinstatement proceeding for a complainant while a section 110(c) investigation was pending against the same complainant, acknowledged the primacy of section 105(c) and proceedings brought under it. *Disciplinary Proceeding*, 24 FMSHRC 28 (January 2002). While not denying the presence of a conflict of interest, the Commission also implied that situations can arise in which the Secretary might properly carry out his responsibilities under both sections 105(c) and 110(c) of the Act. 24 FMSHRC at 33. The Commission's observations, however, are dicta and may, or may not, be applicable to the situation before the court.

The court also notes that when the referenced disciplinary proceeding was at issue the Solicitor expressed her desire to "avoid a conflict of interest between the Solicitor's prosecutorial role as the Secretary of Labor's counsel, and the Solicitor's role in representing miners under the anti-discrimination provision of the Mine Act." 24 FMSHRC at 31. It is not clear to the court whether the Secretary still entertains such a desire. It may be the Solicitor believes that in the case before the court no such conflict exists. Or, it may be she recognizes the conflict but believes she has taken appropriate steps to neutralize it. It will be helpful to the undersigned and to the parties if the parties will state their positions regarding whether or not the Solicitor's representation of the claimant under section 105(c) of the Act and the Secretary's simultaneous suit of the claimant under section 110(c) is permissible and whether the section 110(c) action against Mr. Rawley can remain extant while the Solicitor's section 105(c) case on his behalf goes forward. It will also be helpful to the court if the parties will state their views as to whether and to what extent the Model Rules of Professional Conduct are applicable to the situation. The parties should respond on or before **September 23, 2016**, and they are requested to file their responses by email and to submit hard copies via the United States Postal Service.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 16, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS
	Docket No. YORK 2014-176-M A.C. No. 30-03879-354202
	Docket No. YORK 2015-96-M A.C. No. 30-03879-379161
v.	Docket No. YORK 2015-143-M A.C. No. 30-03879-387176
H. BITTLE & SON, INC. Respondent.	Mine: H. Bittle & Son

ORDER ON CROSS-MOTIONS FOR SUMMARY DECISION

These proceedings are before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor ("Secretary") against H. Bittle & Son, Inc. ("Bittle" or "Respondent"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815, which Bittle timely contested. Chief Administrative Law Judge Robert J. Lesnick assigned to me Docket Nos. YORK 2015-176-M, YORK 2015-96-M, and YORK 2015-143-M. On February 18, 2016, I consolidated these three dockets and set this matter for hearing. On March 21, 2016, I granted the parties' request to continue the hearing given representations they sought to resolve a jurisdictional dispute through cross-motions for summary decision.

The parties filed Joint Stipulations addressing the material facts involved in the dispute on April 29, 2016. The parties then filed cross-motions for summary decision on May 13, 2016. In his motion for partial summary decision on jurisdiction, the Secretary asserts that Bittle engages in mineral milling and therefore falls under the Mine Act's purview. (Sec'y Mot. at 4–9.) In contrast, Bittle claims in its motion for summary decision that its operation is too remote from any actual mining activity to be defined as a "mine" under the statute and seeks dismissal of its pending dockets before me for lack of jurisdiction. (Resp't Mem. at 1; Resp't Mot. at 1–2.)

I. STIPULATED FACTS

The parties have stipulated to the following facts:

1. H. Bittle & Son, Inc. ("Bittle") has operated a materials construction yard ("Bittle site") in the County of Suffolk, State of New York since 1988.

2. The Bittle site is a twenty six (26) acre area that consists of construction trailers, office buildings, parking, and piles of material largely consisting of sand and gravel.
3. Bittle is the owner of the Bittle site.

4. On April 23, 2013, MSHA issued the Bittle site Mine ID No. 30-03879.

5. On April 23, 2013, MSHA issued Bittle 26 citations.

6. Bittle paid all the citations issued by MSHA on April 23, 2013.

7. Bittle purchases sand and gravel that is excavated from construction sites on Long Island by construction companies and land developers.

8. The construction sites and land development sites where the material is excavated is between three (3) and sixty (60) miles away from the Bittle site.

9. The sand and gravel is trucked from the construction sites and land development sites over public roads to the Bittle site.

10. Bittle stockpiles and screens the sand and gravel at the Bittle site.

11. Sand and gravel is "screened" is when it is separated into groups by size (i.e. "sized").

12. Bittle was the owner of the cited Chieftan 1400 Powerscreen (the "powerscreen") and portable stacker when the citations were issued in dockets YORK 2014-0176, YORK 2015-0096, and YORK 2015-0143.

13. The powerscreen and stacker were physically located at the Bittle site when the citations were issued in dockets YORK 2014-0176, YORK 2015-0096, and YORK 2015-0143.

14. Bittle used the powerscreen and portable stacker to screen unprocessed sand and gravel into fine grain sand and two other sizes of gravel, all of which was then deposited into separate piles.

15. The powerscreen had three separate discharge conveyors. Two of the conveyors screened two different sizes of gravel and one conveyor screened sand.

16. Bittle sells the screened sand and gravel to the public for various uses, including so it can be applied to Long Island roads for ice control.

17. The powerscreen and portable stacker was machinery and equipment that was manufactured outside of New York.

18. The powerscreen was made in Northern Ireland.

19. On April 22, 2014, MSHA Inspector Gary C. Merwine issued seven (7) citations to Bittle at the Bittle site (i.e. Citation Nos. 8800523, 8800524, 8800525, 8800526, 8800527, 8800528, and 8800529).

20. The guards were missing from the powerscreen as alleged in Citation Nos. 8800523, 8800524, 8800525, 8800526, and 8800527.

21. On February 24, 2015, MSHA Inspector Michael C. Hammond issued five (5) citations to Bittle at the Bittle site (i.e. Citation Nos. 8807122, 8807123, 8807124, 8807125, and 8807126).

22. The guards were missing from the powerscreen as alleged in Citation Nos. 8807122, 8807123, 8807124, 8807125, and 8807126.

23. On June 6, 2015, MSHA Inspector issued seven (7) citations to Bittle [at] the Bittle site (Citation Nos. 8916030, 8916031, 8916032, 8916033, 8916034, 8916035, and 8916038).

24. Citation No. 8916038 involves the Sanvik QE340 Plant (i.e. Sanvik stacker), which is owned by the operator and was physically located on the Bittle site.

25. The guards were missing from the powerscreen, portable stacker, and Sanvik stacker as alleged in Citation Nos. 8916030, 8916031, 8916032, 8916033, 8916034, 8916035, and 8916038.

(Joint Stipulations at 1–3.)

II. PRINCIPLES OF LAW

A. Summary Decision

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue of material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 20 C.F.R. § 2700.67(b). The Commission has consistently held that summary decision is an "extraordinary procedure" and analogizes it to Rule 56 of the Federal Rules of Civil Procedure.[1] *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, has determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). The Supreme Court has also held that both the record and "inferences drawn from the underlying facts" are viewed in the light

[1] Federal Rule of Civil Procedure 56(a) provides for the filing of motions for summary judgment and states that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

most favorable to the party opposing the motion. *Id.* at 2988 (quoting *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

B. Mine Act Jurisdiction

Section 4 of the Mine Act provides, in part, that "[e]ach coal or other mine, the products of which enter commerce . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 4 unambiguously expresses Congress' intent to regulate the mining industry to the full extent under the Commerce Clause, which includes the power to regulate mines whose products are sold entirely intrastate. *D.A.S. Sand & Gravel, Inc. v. Chao*, 386 F.3d 460, 464 (2d Cir. 2004). In the legislative history of the Act, Congress instructed "that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation" and that "doubts be resolved in favor of . . . coverage of the Act." S. Rep. No. 95-181, at 14 (1977).

Section 3(h)(1) of the Act defines "coal or other mine" to include "workings, structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, *the milling of such minerals*, or the work of preparing coal or other minerals[.]" 30 U.S.C. § 802(h)(1) (emphasis added). Section 3(h)(1) expressly delegates authority to the Secretary to further define what constitutes mineral milling.[2] *Id.*; *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 673 (July 2002); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984) (stating section 3(h) "gives the Secretary discretion, within reason, to determine what constitutes mineral milling").

In 1979, MSHA and the Department of Labor's Occupational Safety and Health Administration ("OSHA") entered into an agreement (hereinafter, "Interagency Agreement") to provide notice and guidance to the regulated community on the two agencies' jurisdiction. 44 Fed. Reg. 22,827 (Apr. 17, 1979). The Interagency Agreement places sand and gravel under MSHA's regulation and states that "[m]illing consists of . . . crushing, grinding, pulverizing, [and] *sizing*," among other processes. 44 Fed. Reg. at 22,829 (emphasis added). Given the explicit delegation in section 3(h)(1) of the Mine Act to the Secretary, the Interagency Agreement is to be deferred to whenever it is reasonable in light of the Mine Act's definition of "mine." *State of Alaska, Dep't of Transp.*, 36 FMSHRC 2642, 2648 (Oct. 2014) (citing *Donovan*, 734 F.2d at 1552).

Both the D.C. Circuit and Commission have specifically upheld the Interagency Agreement's classification of sizing as mineral milling. *Donovan*, 734 F.2d at 1553 (upholding Secretary's determination that a slate gravel processing facility, which did not extract but instead crushed and sized the slate for sale, constituted a "mine" under section 3(h)); *State of Alaska, Dep't of Transp.*, 36 FMSHRC at 2649 (finding that a state agency used a screener to size sand

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[2] Section 3(h)(1)(C) provides that "[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment[.]" 30 U.S.C. § 802(h)(1)(C).

and gravel for road construction and therefore engaged in mineral milling); *see generally In re Kaiser Alum. & Chem. Co.*, 214 F.3d 586, 592 (5th Cir. 2000) (holding that the Secretary's interpretation of "milling" as including liquid-based alumina extraction was reasonable in part because the Interagency Agreement expressly included alumina within MSHA's jurisdiction).

III. ANALYSIS AND CONCLUSIONS OF LAW

Bittle stipulates to owning and operating a materials construction yard containing piles of sand and gravel. (Joint Stipulations at 1–2, Nos. 1–3, 10.) Likewise, Bittle stipulates that it "sizes" the sand and gravel. (*Id.* at 2, Nos. 11, 14.) Additionally, Bittle utilizes machinery manufactured outside of New York, including a powerscreen made in Northern Ireland. (*Id.* at 2, Nos. 17–18.) The Interagency Agreement defines mineral milling to include "sizing" sand and gravel. 44 Fed. Reg. at 22,829. Given the stipulated facts, the Interagency Agreement, and well-established case law upholding the Interagency Agreement's classification of "sizing," it appears that Bittle engages in mineral milling and is subject to the Mine Act's jurisdiction.[3] Nonetheless, given that subject matter jurisdiction may be raised at any juncture in a proceeding,[4] I entertain and dispose of Bittle's arguments *infra*.

First, Bittle argues it is not subject to the Mine Act because the sources from which it collects sand and gravel extract these minerals incidental to construction activities, such as installing pools and constructing roads.[5] (Joint Stipulations at 2, Nos. 7–9; Resp't Mem. at 1–3.) Bittle relies on MSHA's Program Policy Manual ("PPM") stating that "MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity" because "the company is not functioning for the purpose of producing a mineral." I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, §§ 3-1, 4-1, at 1–3 (2013). Here, because Bittle screens minerals primarily for market for various uses, including application to Long Island roads for ice control, I determine that Bittle functions for the purpose of producing a mineral. (Joint Stipulations at 2, Nos. 14, 16.) Contrary to Respondent's arguments, the PPM supports a determination that Bittle is subject to the Mine Act.

Second, Bittle stipulates that it stockpiles sand and gravel at the Bittle site and uses machinery to size the minerals for sale on the market. (Joint Stipulations at 2, Nos. 10–11, 14, 16.) The Commission has held that a mine "is not limited to an area of land from which minerals

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[3] This may explain why Bittle initially paid the civil penalties associated with 26 citations issued to it by MSHA in 2013. (Joint Stipulations at 2, Nos. 5–6.)

[4] Fed. R. Civ. P. 12(h)(3); *see* 20 C.F.R. § 2700.1(b) (Commission Judges shall be guided as far as practicable by the Federal Rules of Civil Procedure); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) ("[t]he objection that a federal court lacks subject matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation . . . .") (citation omitted).

[5] The Commission has held that an entity extracting or processing sand and gravel solely for construction purposes may be subject to the Mine Act. *State of Alaska, Dep't of Transp.*, 36 FMSHRC at 2646-50 (holding a state's transportation department subject to the Mine Act because it extracted and screened sand and gravel in order to maintain a highway).

are extracted, *but also* includes facilities, equipment, machines, tools and other property used in . . . *the milling or preparation of the minerals*." *Maxxim Rebuild Co.*, 38 FMSHRC 605, 608 (Apr. 2016) (quoting *Jim Walter Res., Inc.*, 22 FMSHRC 21, 25 (Jan. 2000)) (emphasis added). As the D.C. Circuit explained, milling and preparation "do not, on their face, appear to include the process of extracting a mineral substance" but rather describe the separate process of treating minerals for market subsequent to their extraction. *Donovan*, 734 F.2d at 1551.[6] Consequently, the activities undertaken to treat and process minerals for sale are independently subject to the Mine Act regardless of who performs the extraction of those minerals. *See, e.g.*, *Donovan*, 734 F.2d at 1551-54 (stating a "mine" need not "be owned by a firm that also engages in the extraction of minerals from the ground or . . . be located on property where such extraction occurs"); *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979) (holding that an operator who purchased dredged refuse from the State of Pennsylvania in order to separate substances in the material for sale is subject to the Mine Act); *Shamokin Filler Co.*, 34 FMSHRC 1897, 1906 (Aug. 2012) (holding that operator who purchased prepared anthracite coal and screened the coal for bulk sale engages in the "work of preparing coal"), *aff'd*, 772 F.3d 330 (3d Cir. 2014). Case precedent, therefore, firmly supports a determination that Bittle is subject to the Mine Act regardless of how the minerals Bittle processes are extracted and later utilized by other entities.[7]

Finally, Bittle contends it should not be subject to the Mine Act because no other similarly situated material supply business in its area has been inspected by MSHA or subject to the Mine Act. (Resp't Mot. at 1–3, Heinlein Aff. at 1–2.) Even if Bittle had provided specific evidence of this allegation, which it did not, MSHA has broad discretionary authority to cite operators. *See Speed Mining, Inc v. FMSHRC*, 528 F.3d 310, 314 (4th Cir. 2008) (holding that the Secretary has unreviewable discretion to cite an independent contractor, a mine owner, or

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[6] Bittle cites to dicta in *Donovan* to suggest that what constitutes mineral milling depends on the physical proximity of the minerals' extraction to where milling occurs. (Resp't Mem. at 4); *Donovan*, 734 F.2d at 1551 (stating "the physical proximity and operational integration" of the extraction and milling processes made the court's decision "less artificial"). Contrary to Bittle's suggestion regarding the lengthy distance here from the extraction points, the court in *Donovan* distinguished "milling [and] preparation" from "extraction" and determined that each process is separately subject to the Mine Act, emphasizing the Mine Act's expansive definition of a mine. (Joint Stipulations at 2, Nos. 8–9); *Donovan*, 734 F.2d at 1551.

[7] Bittle offers a six-factor test posited by an Occupational Safety and Health Review Commission ("OSHRC") ALJ to suggest it does not engage in mining activity. (Resp't Mem. at 4–5.); *Southern Crushed Concrete*, 23 BNA OSHA 1778 (No. 10-2556, 2011) (ALJ). Yet OSHRC ALJ decisions are not binding on me, and the OSHRC ALJ's decision was never subsequently examined and adopted by OSHRC or a reviewing court. Moreover, the OSHRC ALJ applied the factors only after concluding that the operator's activity was ambiguous under the Interagency Agreement and ultimately found the operator subject to MSHA's jurisdiction. 23 BNA OSHA 1778. Here, no ambiguity exists because Bittle engages in "sizing," which the Interagency Agreement specifically defines and categorizes as milling. 44 Fed. Reg. at 22,829.

both for violations committed by the independent contractor). Regardless, I must base my determination on the law and stipulations as they apply to Bittle, not its competitors.

After reviewing the evidence provided by the parties I conclude that Bittle is an "operator" under the Mine Act, inasmuch as it engages in mineral milling at the Bittle site and is thus a "mine" whose business and products affect interstate commerce. Based on the record, I determine that there is no genuine issue of material fact as to the Mine Act's jurisdiction over Bittle. I therefore conclude that, when viewing the record in the light most favorable to the party opposing each motion respectively, the Secretary is entitled to partial summary decision as a matter of law.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that the Secretary's motion for partial summary decision on the question of jurisdiction is **GRANTED**, and Respondent's motion for summary decision is **DENIED**.

Accordingly, this matter will be set for a hearing on the merits regarding the pending citations issued by MSHA to Bittle.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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September 19, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CLIMAX MOLYBDENUM COMPANY, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-0838-M A.C. No. 05-02256-385302 Climax Mine

ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION & ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Climax Molybdenum Company ("Climax") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties filed simultaneous cross-motions for summary decision and responses. For the reasons set forth below, the Secretary's Motion for Summary Decision is **GRANTED** and Respondent's Motion for Summary Decision is **DENIED**.

BACKGROUND

On May 7, 2015, MSHA Inspector John C. Kalnins issued Citation No. 8761777 to Respondent under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 56.14107(a) of the Secretary's safety standards. 30 C.F.R. § 56.14107(a). The citation states as follows:

> There were no guards to prevent miners from coming in contact with the mills or the openings in the floor around the mills. There were handrails with warning signs meant to keep the miners out of the hazardous area. A miner coming in contact with moving machine parts or falling thru the floor could receive fatal injuries. This hazard was open and obvious but was not recognized as a hazard.

Inspector Kalnins determined that it was unlikely an injury or illness would be sustained as a result of the violation, but that any injury could reasonably be expected to be fatal. He determined that the violation was not of a significant and substantial nature ("S&S"), would

affect only one person, and was a result of Respondent's moderate negligence. The Secretary proposed a penalty of $263.00 for the alleged violation.

STIPULATED FACTS

On July 5, 2016 the parties submitted joint stipulations, as well as three photographs, i.e., Figure 1a, Figure 1b, and Figure 2. The stipulations are as follows:

1. Respondent Climax Molybdenum Company ("Climax") operates the Climax Mine in Colorado, which mines and mills molybdenum.
2. Climax's mining operations affect interstate commerce.
3. Climax is subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. (the "Mine Act") and jurisdiction of the Mine Safety and Health Administration ("MSHA").
4. Climax is an "operator" as that word is defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the Climax Mine (Federal Mine I.D. No. 0502256) where the contested citations in these proceedings were issued.
5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to § 105 of the Act.
6. On the dates the citation in this docket was issued, the issuing MSHA inspector was acting as a duly authorized representative of the United States Secretary of Labor, assigned to MSHA, and was acting in his official capacity when conducting the inspection and issuing the MSHA citation.
7. The MSHA citation at issue in these proceedings was properly served upon Climax as required by the Mine Act.
8. The citation at issue in these proceedings may be admitted into evidence by stipulation for the purpose of establishing its issuance.
9. The photographs taken by the issuing inspector, John C. Kalnins, are a fair and accurate representation of the condition of the mills and surrounding area as observed by Mr. Kalnins on the date of the inspection at which the contested citation was issued.
10. Figures 1a and 1b, attached to these stipulations, is an aerial photograph of the two mills.
11. The mills are situated within an enclosed facility which, as shown in Figures 1a and 1b, contains a network of platforms, travelways, and stairways. These two photographs were taken on July 5, 2016 and depict the mills in the condition they existed after the abatement of this citation. They are included primarily to provide context to the general area.
12. The handrails depicted in the photographs are approximately waist-high.
13. Climax demonstrated good faith in abating the violation.
14. As part of the milling process, Climax employs two mills – one semi-autogenous grinder (SAG) mill, and one ball mill. The primary function of the mills is to grind the ore, and the key feature of each is the large cylinder (or drum) into which ore is fed – the cylinder

rotates, churning the ore, while heavy metal balls inside the cylinder facilitate the grinding process.

15. It is the rotating cylinders of each of the two mills that constitute the "moving machine parts" that are relevant to this contest proceeding.
16. At the time of the inspection at which the contested citation was issued, there existed at certain places along the handrail system metal guarding approximately eight feet in height from the floor. The yellow guarding shown in Figure 2 is representative of this.
17. The locations at which the yellow guarding existed at the time of inspection were within seven feet of the exposed moving parts of the mills. At all other locations, the handrails were situated at least seven feet away from the exposed moving parts of the mills.
18. Gates are situated at various points in the handrail system to provide access to the mills. It is the policy of Climax that these gates are kept locked when the mills are operating and that no miner (or any other person) is to work or walk on the inside (the mill side) of the handrails except for maintenance when the mills are locked and tagged out.

SUMMARY OF PARTIES' ARGUMENTS

The Secretary argues that Respondent violated section 56.14107(a) when it failed to guard the rotating cylinders of the two mills. Sec'y Mot. 4. While portions of the mills were guarded, other areas were not. The unguarded areas were surrounded by handrails with locked entry gates. Perimeter or area guarding, such as fences or locked gates, does not meet the requirements of the cited standard. *Id*. at 5 (citing *Walker Stone Co. Inc.*, 16 FMSHRC 337 (Feb. 1994) (ALJ) and *Oil-Dri Production Co.*, 32 FMSHRC 1761 (Nov. 2010) (ALJ)). *Id*. The fact that the operator had a policy prohibiting miners from walking or working in the areas inside the handrails unless the mills were locked and tagged out is irrelevant to the question of whether there was a violation. *Id*. 5-6. Here, there is no dispute that "miners entered the gated area of the mills for maintenance of the moving machine parts; thus a violation exists under strict liability." *Id*. 7. While section 56.14107(b) contains an exception to the guarding requirement when walking or working surfaces are at least seven feet away from the moving machine parts, that exception does not apply to the situation at hand because the areas inside the handrails and gates were accessed to conduct maintenance. *Id*. Finally, the Secretary argues that a miner coming in contact with these moving machine parts could suffer a fatal injury and that the violation was the result of moderate negligence given its open and obvious nature. *Id*. 8.

Climax argues that Citation No. 8761777 should be vacated because the cited areas fit within the guarding exception set forth in section 56.14107(b). The exception permits moving machine parts to remain unguarded when those parts are at least seven feet from walking and working surfaces. Here, guards were not needed because the only walking or working surfaces where guards had not been installed were at least seven feet from the moving machine parts on the mills. Climax Mot. 1-2. The operator "clearly delineated the walking and working surfaces more than seven feet from the mills with contiguous waist-high handrail barriers and signage, and therefore did not need additional guarding[.]" *Id*. 6. Miners do not walk or work in the areas inside the handrails unless the mills are locked and tagged out. *Id*. 6, 10-11. Finally, Climax asserts that, even if the court were to accept the Secretary's position, given MSHA's lack of prior

enforcement and the clear language of the guarding exception standard, the citation should be vacated based on lack of notice of the Secretary's interpretation. *Id*. 6-7.

The Secretary, in his response to Respondent's motion, argues that the use of signage to indicate "danger," the existence of a lock out tag out policy, and any evidence that persons never worked or walked by the mills unless the mills were locked out and tagged out are immaterial to the determination of whether a violation existed. Sec'y Response. 1-3. Further, the Secretary argues that the lack of enforcement of the standard in the past is an issue addressed through the negligence analysis and a reasonably prudent person would have understood that the mills required guarding based upon the plain language of the cited standard. *Id*. 3.

Climax, in its response to the Secretary's motion, reiterates many of the same points made in its motion for summary decision, and stresses that when machine parts are not moving it does not matter whether an adjacent space is a walking or working surface since no guarding is required. Climax Response 1-2. Further, persons only perform maintenance when the mills are locked out and tagged out and there is no evidence that that this policy is not followed. *Id*. 2. Furthermore, the Secretary's interpretation of subsection (b) of the standard is unreasonable since, "under his logic, no amount of distance between a walking or working surface and moving parts would suffice because there would always be the possibility that a miner could find a way to access the moving parts and perform maintenance without first locking and tagging out the machinery." *Id*. 2

DISCUSSION AND ANALYSIS

Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2)That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

The Commission has long recognized that "summary decision is an extraordinary procedure." *Energy West Mining Co.,* 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.,* 3 FMSHRC 2470, 2471(Nov.1981)). The Commission has analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007); *See also Energy West*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). When the Commission reviews a summary decision under Rule 67, it looks "'at the record on summary judgment in the light most favorable to . . . the party opposing the motion,' and that 'the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.'" *Hanson Aggregates New York Inc.*, 29 FMSHRC at 9 (quoting *Poller v.*

Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The citation was issued under section 56.14107(a) which requires mine operators to guard moving machine parts in order to protect against persons coming in contact with those parts. 30 C.F.R. § 56.14107(a). Subsection (b) of the standard provides an exception to the guarding requirement when the moving machine parts are at least seven feet away from walking or working surfaces. 30 C.F.R. § 56.14107(b). In order for the Secretary to sustain a violation in this case the undisputed material facts must establish a violation under subpart (a) of the cited standard. As the Secretary correctly points out, this involves a three step analysis. Sec'y Mot. 4. First, the court must determine whether moving machine parts were present. Second, if moving machine parts were present, then the court must then look to see whether those parts were guarded. Third, if the moving machine parts were unguarded, the court must determine whether those parts were at least seven feet away from walking or working surfaces.

With regard to the first step of the analysis, the parties have stipulated that "two rotating cylinders of each of the two mills" are "moving machine parts" as contemplated by the cited standard. Jt. Stip. 15. Consequently, I must next determine whether the moving machine parts were guarded. The Secretary states in a footnote that the areas of the rotating cylinders that "were guarded by yellow metal guarding" are not at issue. Sec'y Mot. 4 n. 1. Rather, he only takes issue with the areas where handrails and locked gates were present in lieu of guards. Sec'y Mot. 4. Accordingly, I have restricted my analysis to these areas where handrails, and not the 8 foot tall yellow metal guarding, were present.

I find that moving machine parts on the two mills were not guarded. Climax, in its motion, concedes that that the moving machine parts were not guarded. It does not argue that the handrails were guards. [1] Rather, it argues that guarding was not required in these areas because the walking and working surfaces were not within seven feet of the moving machine parts. Climax Mot. 7-9. Aside from the handrails, no other guarding is alleged to have been present.

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[1] Climax, in a footnote, states that it believes the handrails "could qualify as sufficient guards in their own right, even in the absence" of the guarding exception in section 56.14107(b). However, it then goes on to say that the issue is not one it asks the Commission to address. Climax Mot. 10 n. 2. Nevertheless, I note that a handrail is generally not a guard. The term "guard" is not defined in the Secretary's regulations. "In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term." *Simola, emp. by United Taconite, LLC*, 34 FMSHRC 539, 544 (Mar. 2012). The dictionary defines a "guard" as "a protective or safety device; . . . a device for protecting a machine part or the operator of a machine." *Webster's New Collegiate Dictionary* 505 (1979). While the handrails and gates delineated the working areas outside the handrails from the areas inside the handrails, they did not protect the machine parts from being contacted by a person. Moreover, when the term "guard" is viewed in the context of surrounding standards, such as section 56.14112(a)(1) which requires that guards "[w]ithstand the vibration, shock, and wear to which they will be subjected during normal operation[,]" it is clear that the Secretary contemplated that guards would typically be attached to the subject equipment. The handrails at issue certainly do not fit within this concept of what constitutes a guard.

Accordingly, I find that moving machine parts of the two mills were not guarded in areas where only handrails, and not the 8 foot tall yellow metal guarding, were present.

The final element of my analysis, i.e., whether the moving parts of the mills were more than seven feet from walking and working surfaces, is the key issue raised in this case. The parties are in agreement that the "handrails were situated at least seven feet away from the moving machine parts of the mills." Jt. Stip. 17. The handrails, at the very least, delineated the walking or working surface on the outside of the handrails from the areas between the handrails and the moving machine parts. However, the Secretary alleges that the areas between the handrails and the moving machine parts of the mills are also walking or working surfaces. I agree. The parties have stipulated that miners "work or walk on the inside (the mill side) of the handrails" in order to conduct maintenance. Jt. Stip. 18. While the term "walking or working surface" as used in the standard is not defined, conducting maintenance in the areas constitutes working in the areas.[2] Therefore, I find that the areas inside the handrails were working surfaces and that those surfaces were within seven feet of the moving machine parts.[3]

Climax raises two arguments that are essentially one and the same. First, it argues that, because the mill parts would not be moving at the particular time when miners were inside the rails, there were no "moving machine parts" to guard. Climax Response 3. Second, it argues that the areas inside the handrails are not "walking or working surfaces" because no one would ever

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[2] Climax cites a number of cases for the proposition that areas must be "regularly accessed or susceptible to regular access by employees," in order for the areas to be considered a walking or working surfaces and for the guarding requirement to be triggered. Climax Response 5-8. Climax misses the point that the area inside the handrails was in fact a working surface. As a result, miners would be in the area and in close proximity to unguarded machine parts. Unlike many of the cases cited by Climax in its response, there is no dispute that maintenance was performed on the machinery that was inside the handrails. The record does not disclose the frequency of such maintenance, but that factor would be considered when analyzing the gravity of the violation.

[3] As an aside, I note that the guarding exception set forth in in subpart (b) is designed to address situations where contact with the moving machine parts is physically impossible or very difficult. Here, while persons were not permitted to go inside the handrails when the mills were in operation, someone could easily do so and come in contact with moving parts. Other than a handrail, there was no impediment to entering the areas. Because no guarding was present in these areas, a person inside the handrails would have had nothing between him and the mill cylinders at issue. Many of the administrative law judge decisions cited by Climax involve moving machine parts that were physically difficult to gain access to.

be in the areas unless the mills were locked out.[4] *Id*. Climax asserts that it is the operator's policy to keep the gates in the handrails locked when the mills are operating and MSHA has no evidence that anyone ever worked in the areas while the mills were in operation and the machine parts were moving. Climax Mot. 6, 10-11. I find these arguments unpersuasive.

Once it has been determined that machinery or equipment includes moving machine parts, those parts must be guarded. The standard applies whether or not those parts are moving at any particular time. The parties agree that the two rotating cylinders are moving machine parts. As a result I find that the cylinders must be guarded at all times. The only time when the parts are not required to be guarded is when repairs are taking place and steps have been taken by the operator to power off the equipment and block it against motion.[5] 30 C.F.R. § 56.14105. Once the repairs have been completed, the guards must be replaced. Here, no guards were present and the moving parts were exposed. Further, just as the standard applies whether or not parts are moving at a particular time, the question of whether an area is a walking or working surface is not dependent on whether persons enter the area when the equipment is operating or it is locked out. Rather, the issue is simply whether persons work or walk on the surface. Here, as discussed above, the areas inside the handrails and gates were working surfaces where persons performed maintenance.

In *Nelson Quarries, Inc.*, 36 FMSHRC 3143, 3146 (Feb. 2014) (ALJ) this court stated:

> The Commission has held that a violation of a guarding standard requires a "reasonable possibility of contact and injury" that includes "contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984). To determine whether a reasonable possibility exists, the Commission stated that all "relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct" must be considered. *Id*.

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[4] Climax states that "MSHA has . . . conceded that, at walking and working surfaces within seven feet of the mills, Climax was in compliance with the standard[,]" Climax Mot. 7. I disagree. The stipulations cited for this proposition, i.e., Jt. Stips. 16 and 17, state only that guarding was present in some areas within seven feet of the moving machine parts, while handrails at least seven feet away from the moving machine parts were present in other areas. Those stipulations do not address whether there were unguarded moving machine parts within seven feet of walking or working surfaces on the inside of the handrails.

[5] 30 C.F.R. § 56.14112(b) does provide an exception allowing guards to be removed while the equipment is operating when testing or adjustment cannot be performed without removal of the guard.

The Commission's concern in *Thompson Brothers* is directly applicable to the present matter. Even though Climax had a policy prohibiting persons from entering the gates when the mill was in operation, the standard is meant to account for the kind of momentary inattention or ordinary human carelessness that would be associated with a miner entering the area when the mills are in operation, or when the mill parts are not moving but the mills are not locked or tagged out. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions" and enter the area without first shutting down the mills. *Great Western Electric Co*., 5 FMSHRC 840, 842 (May 1983). The parties stipulated that miners tasked with maintenance would be in the area. Jt. Stip. 18. While the handrails, gates, signage, policies and procedures would dissuade a miner from entering the areas on the inside of the handrails, only guards on the moving machine parts will provide a physical barrier between the individual working in the areas and the cylinders of the two mills.[6] The areas inside the handrails are working surfaces even if every miner, past and future, locks out and tags out the mills before entering the areas. Accordingly, I find that, based on the undisputed material facts, a violation is established.[7]

Climax states that "[u]nder the Secretary's logic a mine operator could erect a perimeter fence around moving machine parts at a radius of 10, or 100, or even 1000 or more feet, and yet that would still violate subsection (a) because there would always be a chance that a miner might enter within the fence line and perform work on the moving machine parts without first locking and tagging out the machinery." Climax Response 10. It argues that this interpretation is unreasonable since all moving parts require occasional maintenance. I disagree with Climax's assertion and find that the Secretary's interpretation is reasonable given the language and purpose of the cited standard, as well as the Commission's holding in *Thompson Brothers*. If work is going to be conducted within seven feet of unguarded parts that can move, guarding must be present. The Secretary's concern regarding the use of a fence or handrails is generally not that someone will reach over the fence or handrails and contact the moving machine parts, but rather that someone will go inside the fence or handrails in order to carry out assigned work without first locking out the machinery and he will come in contact with the moving machine parts. The purpose of the standard is to prevent just such an occurrence because, as stated in *Thompson Brothers*, "ordinary human carelessness" and "the vagaries of human conduct" cannot always be accounted for.

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[6] The Secretary, in promulgating the cited standard, stated in the preamble that "[g]uards provide a physical barrier, which offers the most effective protection from hazards associated with moving machine parts. MSHA recognizes that guards provide only one of several safety measures for preventing injuries which can result from contact with moving machine parts. Proper work procedures, safety training, and attentiveness to hazards all play a role in reducing those injuries." Standard for Loading, Hauling, and Dumping and Machinery and Equipment at Metal and Nonmental Mines, 53 Fed. Reg. 32496-01, 32509 (Aug. 25, 1988). Here, while Climax's policies and procedures prohibiting miners from entering the area did provide a degree of safety, they did not satisfy the standard's requirement.

[7] While the citation, as issued, involved allegations of unguarded openings in the floor around the mill, the Secretary did not raise the issue in his motion, nor have the parties addressed the issue in the joint stipulations. Accordingly, I have not addressed the issue.

Respondent is really arguing with the language of the safety standard. Under the interpretation urged by Climax, an operator would not be required to provide guards for moving machine parts at a surface operation if it installs a locked perimeter fence at least seven feet from the machinery and instruct employees to always lock out and tag out the machinery before entering the area. That is not what the language of the safety standard provides and it is not how this safety standard has been enforced by the Secretary or interpreted by the Commission.

I also find that Climax had notice of the Secretary's enforcement position. Climax asserts that the Secretary did not provide "any notice that it would treat walking or working surfaces seven or more feet from moving machine parts . . . as somehow not falling within the scope of" the guarding exception set forth in section 56.14107(b). Climax Mot. 13. However, Climax's argument misses the point. As with its argument regarding the fact of violation, much of Climax's notice argument is premised on its belief that the areas inside the handrails were not a walking or working surface. However, for reasons discussed above, the areas inside the handrails were clearly walking or working surfaces because miners entered the areas to perform maintenance.

The Secretary has consistently interpreted section 56.14107 to require the actual guarding of moving machine parts and has not allowed the use of perimeter fencing or other barriers to be substituted for guarding. For example, two administrative law judge decisions from the 1990s demonstrate that the Secretary has consistently disallowed using fences with locked gates as a substitute for guarding moving machine parts. *Moline Consumers Company*, 15 FMSHRC 1954 (Sept. 1993) (ALJ); *Wake Stone Company, Inc.*, 16 FMSHRC 337, 356-57 (Feb. 1994) (ALJ).

Climax's failure to identify the areas inside the handrails as walking of working surfaces where miners would be in close proximity to moving machine parts does not absolve it of the fact of violation, nor does it lend itself to a finding that it lacked notice. "[I]f the language of a regulation provides clear and unambiguous notice of its coverage and requirements, no further notice is necessary." *DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3088 (Dec. 2014) *(*citing *Bluestone Coal. Co.,* 19 FMSHRC 1025, 1029 (June 1997) and *Nolichuckey Sand Co.,* 22 FMSHRC 1057, 1061 (Sept. 2000)). The cited regulation is clear that moving machine parts need to be guarded to protect persons from coming in contact with those parts. The exception set forth in subpart (b) is equally clear that it applies only when moving machine parts are at least seven feet from the walking or working surfaces. Here, the working surfaces inside the handrails were not at least seven feet away from the moving machine parts and the parts were not guarded to protect against miners in the areas coming in contact with the moving parts. Accordingly, I find Climax was on notice that guards were required.

APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). The Secretary, in his motion, asserted that the violation could result in a fatal injury and that Respondent was moderately negligent. At no point in its motion or response to the Secretary's motion did Climax dispute the Secretary's findings regarding gravity or negligence. Consequently, I find that the Secretary's gravity and negligence designations are affirmed. *See* 29 C.F.R. § 2700.67(d). The violation affected one person and was

a result of Climax's moderate negligence. The violation was not S&S. The parties have stipulated that Climax abated the violation in good faith. Jt. Stip. 13. Climax had a history of about 50 violations in the 15 months preceding the issuance of the subject citation, about 16 of which were significant and substantial.[8] Climax is a large operator, owned by Freeport McMoRan Inc., with over 750,000 operator hours worked at the mine in both 2014 and 2015.[9] I find that the originally proposed penalty of $263.00 is appropriate for this violation.

ORDER

For the reasons set forth above, Citation No. 8761777 is **AFFIRMED** as issued. Climax Molybdenum Company is **ORDERED TO PAY** the Secretary of Labor the sum of $263.00 within 30 days of the date of this decision.[10]

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

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[8] The parties did not submit a history of violations. The court obtained the history data from MSHA's Mine Data Retrieval System, available at http://www.msha.gov/drs/drshome.htm.

[9] The parties did not submit a stipulation regarding the size of the operator. The court obtained the size data from MSHA's Mine Data Retrieval System, available at the same website.

[10] 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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September 19, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **RONALD BOWERSOX**, Complainant, v. THE MARSHALL COUNTY COAL CO., MCELROY COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor.	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-398 MSHA No. MORG-CD-2016-04 Mine: Marshall County Mine Mine ID: 46-01437
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **RONALD BOWERSOX**, Complainant, v. OHIO COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor.	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-399 MSHA No. MORG-CD-2016-05 Mine: Ohio County Mine Mine ID: 46-01436

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **RONALD BOWERSOX**, Complainant, v. HARRISON COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor.	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-400 MSHA No. MORG-CD-2016-06 Mine: Harrison County Mine Mine ID: 46-01318
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **RONALD BOWERSOX**, Complainant, v. MARION COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor.	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-401 MSHA No. MORG-CD-2016-06 Mine: Marion County Mine Mine ID: 46-01433
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **RONALD BOWERSOX**,	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-402

Complainant, v. MONONGALIA COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor.	MSHA No. MORG-CD-2016-07 Mine: Monongalia County Mine Mine ID: 46-01968

ORDER DENYING RESPONDENT'S MOTION FOR THE WITHDRAWAL OR RECUSAL OF THE ADMINISTRATIVE LAW JUDGE

Before: Judge Miller

These cases are before me based upon complaints of interference brought by Ronald Bowersox against five mines owned and operated by Murray Energy Corporation. The cases were brought pursuant to the interference provisions of section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). On July 13, 2016, the Respondents filed a Motion for the Withdrawal or Recusal of the Administrative Law Judge. The Secretary filed a Response in opposition to the Respondents' motion on July 20, 2016. For the reasons set forth below, I **DENY** the Respondents' motion.

On November 15, 2015, I issued a decision disposing of complaints of interference brought by a number of employees at five mines owned and operated by Murray Energy Corporation. *Secretary of Labor on behalf of Thomas McGary, et al. v. The Marshall County Coal Co., et. al.*, 37 FMSHRC 2597 (Nov. 2015) (deciding the "Awareness Meeting Cases"), *aff'd in part, rev. in part*, 38 FMSHRC ___ (Aug. 26, 2016). At issue in those cases was a mandatory "awareness meeting" held at each of the Respondent mines in which the CEO of Murray Energy, Robert Murray, discussed complaints that had been made by miners to the Mine Safety and Health Administration ("MSHA"). I concluded that the awareness meetings violated the interference provision of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). 37 FMSHRC at 2607. Just before the hearing on the awareness meetings case, which took place on September 22, 2015, a complaint was filed by several of the Respondents in a U.S. District Court alleging a breach of the collective bargaining agreement when miners had complained to MSHA without taking those complaints first to the mine operator. The Respondents' federal lawsuit was dismissed without prejudice on June 10, 2016, and has not been appealed. *See Consolidation Coal Co. v. United Mine Workers of America*, Civ. Action No. 1:15CV167, 2016 WL 3248427 (N.D.W.Va. June 10, 2016).

The instant cases arise from the now dismissed federal lawsuit. The complaint alleges that "Respondents . . . interfered with the exercise of statutory rights by miners and their representatives by filing a federal lawsuit in retaliation against and in an attempt to intimidate

miners filing Section 103(g) and 105(c) complaints." *Sec'y Complaint* at 15. The Respondents have moved for my recusal on the following grounds:

> In a prior Mine Act proceeding [the Awareness Meeting Cases], the Administrative Law Judge considered and issued rulings regarding the legality of the Federal Court Lawsuit – the very issue in dispute in this case – going so far as to refer to it as a[n] "extension of intimidation," holding that it was an "attempt to intimidate witnesses," and then issuing enhanced civil penalties based at least in part on its filings. These rulings prejudice and decide the issues in dispute in the instant matters. Accordingly, fair judgment for the Respondents is impossible and the Administrative Law Judge should recuse herself from any further proceedings.

Resp. Mot. at 3.

The Commission has set forth the standard to be applied when it decides whether a judge should be recused from a Mine Act proceeding. Quoting the U.S. Supreme Court decision in *Liteky v. United States*, 510 U.S. 540 (1994), in *Medusa Cement Co.*, the Commission noted as follows:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . [T]hey cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required … when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of … current … or … prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible. Thus, judicial remarks during the course of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

20 FMSHRC 144, 149 (Feb. 1998), quoting Liteky, 510 U.S. at 555 (citations omitted). The Commission further held that "appearance of bias is an insufficient ground upon which to order recusal when the allegation of bias is based on prior judicial proceedings (as opposed to extrajudicial conduct)." 20 FMSHRC at 150 (citing Liteky, 510 U.S. at 552-53 & n.2, 556, and other cases).

The question here is thus whether the record in the prior judicial proceedings on which the Respondents rely "display a deep-seated favoritism or antagonism that would make a fair judgment impossible," 20 FMSHRC at 149, in the instant proceedings. In the

Awareness Meeting proceedings, I was presented with evidence of potential intimidation of witnesses that caused me legitimate concern. Given the seriousness of such an allegation, it was incumbent upon me to ensure that the record was complete on that issue. My efforts to do so exhibited no favoritism or antagonism towards the Respondents. To the contrary, I discharged my duty to ensure the integrity of the proceedings. Moreover, to the extent I relied upon the bringing of a federal lawsuit in my Awareness Meeting decision, I limited my reliance to what I found to be an appropriate penalty. 37 FMSHRC at 2609-10. Notably, on appeal by the Respondents, the Commission vacated my penalty assessments and remanded the cases to me to reassess the penalties "without considering Respondents' filing of the federal court suit," this "[i]n light of the federal court's recent dismissal of the suit." 38 FMSHRC ___, slip op. at 20.

The Respondents also argue as grounds for recusal that assignment of the instant proceedings to me violated Commission Procedural Rule 50. Resp. Mem. at 10-12. Rule 50 states that "Judges shall be assigned cases in rotation as far as practicable." 29 C.F.R. § 2700.50. Under this rule, the Chief Administrative Law Judge has a great degree of discretion to assign cases so as to preserve Commission resources and ensure judicial efficiency. Here, in assigning interrelated cases to me, even the Respondents do not suggest that the Chief Judge abused his discretion in assigning the instant cases to me. I find their argument, which rests upon a single non-precedential decision by an Administrative Law Judge, unconvincing. In fact, the Commission has held that "Section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d), gives an operator the right to a hearing before an administrative law judge but it does not confer the right to a hearing before a particular judge. *See also* 29 C.F.R. § 2700.50." *Big Horn Calcium Co.*, 12 FMSHRC 1493, 1496 (Aug. 1990).

Having considered of the Respondents' motion, affidavit, and supporting memorandum of law, as well as the Secretary's response, I find the Respondents' position without merit. If the Respondents wish to file a request for interlocutory review they must file a separate motion. I do not rule on that issue here. Accordingly, the Motion for the Withdrawal or Recusal of the Administrative Law Judge is **DENIED**.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 27, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KELLY RAWLEY, Complainant, v. J.L. SHERMAN EXCAVATION CO., Respondent.	DISCRIMINATION PROCEEDING: Docket No. WEST 2016-545-DM MSHA Case No. WE-MD 16-07 Mine: J.L. Sherman Excavation Co. Mine ID: 43-03100

NOTICE OF RESOLUTION OF CONFLICT ISSUE

The court has before it a complaint of discrimination filed by the Secretary of Labor pursuant to section 105(c)(2) of the Mine Act on behalf of Kelly Rawley against J.L. Sherman Excavation Co. The complaint alleges that on or about April 12, 2016, Mr. Ralwey was fired in violation of section 105(c) of the Act for engaging in protected activity in October and November of 2015. The complaint also alleges that J.L. Sherman unlawfully interfered with Mr. Rawley's exercise of statutory rights on October 6, 2015, when the owner of the company instructed Mr. Rawley not to speak to an MSHA inspector about unsafe brakes on a front-end loader and told him to leave after an argument ensued. Since filing this discrimination complaint, the Secretary has also filed with the Commission a petition for assessment of civil penalty against Mr. Rawley pursuant to section 110(c) of the Act for violations of the Secretary's safety standards for surface metal and nonmetal mines (30 C.F.R. Part 56) as set forth in a section 104(d)(1) citation and in a section 104(d)(1) order issued on October 15, 2014. The Respondent in the discrimination proceeding alleges that Mr. Rawley was terminated "for reasons entirely unassociated with any alleged protected activity," and that "[o]ne of those reasons was his ongoing complete disregard for safety," of which "[t]he incidents to which the 110(c) [petition] refers are examples." *Resp't's Resp. to Req. for Statement of Position on Conflict Issue* at 1-2.

On September 14, 2016, the court issued a Request for Statements of Position on Conflict Issue. The request noted the highly unusual nature of the Solicitor bringing an action on behalf of a claimant while suing the claimant in another case and the possible conflict of interest issues that could arise from the Solicitor's dual roles in these matters. The court asked the parties to state their positions on whether the Secretary may permissibly assume both roles simultaneously, and whether the 110(c) action against Mr. Rawley could remain extant while the 105(c) case on his behalf goes forward. The court also requested that the parties state their views as to whether and to what extent Rules of Professional Conduct are applicable to this situation. *Req. for Statements of Position on Conflict Issue* at 2-3. On September 23, 2016, counsels for the Secretary, Mr. Rawley, and J.L. Sherman filed responses to the Request.

All parties state that there is no conflict under various Rules of Professional Conduct, because such rules focus on potential conflicts among multiple clients, while the Solicitor only has one client in this case – the Secretary – and there is no attorney client relationship between the Solicitor and Mr. Rawley. *Sec'y's Position Statement Re: Potential Conflict of Interest* at 4; *Statement of Position of Miner Kelly Rawley Regarding Conflict Issue* at 2; *Resp't's Resp. to Req. for Statement of Position on Conflict Issue* at 2. The Solicitor and counsel for Mr. Rawley go on to state that even disregarding the Rules of Professional Conduct, they do not believe there is a conflict because the Solicitor has implemented and followed procedures to address potential conflicts, including informing Mr. Rawley that the Solicitor's Office represents the Secretary's interests and does not represent him, allowing Mr. Rawley to retain his own private counsel in this matter (which he has done), and implementing a firewall between the two proceedings involving separate attorneys, in separate offices, supervised by separate managers with no communication between those attorneys. *Sec'y's Position Statement Re: Potential Conflict of Interest* at 4-5; *Statement of Position of Miner Kelly Rawley Regarding Conflict Issue* at 4. Further, the Solicitor and counsel for Mr. Rawley state that there is no conflict in these specific proceedings because the actions that led to the 110(c) action in 2014 are irrelevant to the question of whether Mr. Rawley was retaliated against in violation of section 105(c) 14 months later. *Id*. Counsel for J.L. Sherman disagrees on this latter point and adds that it "would be extremely prejudicial to J.L. Sherman . . . [i]f it is the Solicitor's intention to object to the admissibility of information from the 110(c) action to avoid conflict." *Resp't's Resp. to Req. for Statement of Position on Conflict Issue* at 2.

The court has reviewed the responses to its request and has concluded that the case will go forward as scheduled. Any potential issues that may arise regarding the admissibility of evidence related to the 110(c) proceeding will be addressed at the hearing upon counsels' motions. Further, while the court does not find the question of whether the Solicitor and the complainant have any attorney-client relationship in a section 105(c) discrimination proceeding to be as clear-cut as the parties represent,[1] the court is satisfied that the Solicitor's Office has

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[1] As the Commission has previously noted,

> The first stage at which attorneys from the Solicitor's Office publicly represent the interests of such a complainant is in temporary reinstatement proceedings, for which *only* the Secretary may apply. If the Secretary subsequently concludes that the anti-discrimination provisions of the Act have been violated, she must prosecute a discrimination complaint, "suing on behalf of the complainant." *Eastern Assoc. Coal v. FMSHRC*, 813 F.2d 639, 644 (4th Cir. 1987); 30 U.S.C. § 815(c)(2). The caption in these cases always reads "Secretary of Labor on behalf of" the miner." In addition, attorneys in the Solicitor's Office during the course of litigation of a temporary reinstatement or discrimination claim perform many of the same tasks that an attorney in such a case would perform on behalf of a client (such as acting on behalf of the miner in settlement negotiations, etc.)."

Disciplinary Proceeding, 24 FMSHRC 28, 34–35 (Jan. 2002) (footnote omitted)

taken sufficient steps to address the specific conflict issues raised by the Model Rules of Professional Conduct.[2]

That being said, the court remains concerned that the Solicitor's Office may feel inhibited from advocating effectively on Mr. Rawley's behalf and presenting the strongest arguments and evidence possible in this discrimination proceeding if the Secretary concludes that any such arguments may undermine his case against Mr. Rawley in the 110(c) proceeding. The potential for this court's findings to have preclusive effect in the 110(c) proceeding further complicates this matter. The court harbors similar concerns regarding effective communication and disclosure between Mr. Rawley and the Solicitor in this case, given the potential for such information to be used by one party against the other in the 110(c) proceeding. The screening procedures implemented by the Solicitor's Office and Mr. Rawley's retention of his own private counsel may help to mitigate these risks. However, the court urges all parties to remain mindful of these concerns and encourages Mr. Rawley's counsel in particular to alert the court at any point if he believes that the Secretary's dual role as Rawley's prosecutor and advocate is limiting effective representation or presentation of evidence in this matter.

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

[2] While Rule 1.11(d) subjects public employees to the Rule 1.7 provisions regarding conflicts among clients with directly adverse interests or among a client and a third person to whom the lawyer owes a responsibility, Comment 2 for Rule 1.11 notes that Rule 1.11(d) does not impute the conflicts of an individual government employee to other associated government employees, although "it will be prudent to screen such lawyers."

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