

DECEMBER 2012

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Review was granted in the following case during the month of December 2012:

Secretary of Labor, MSHA v. Solar Sources, Inc., Docket No. LAKE 2009-373, LAKE 2010-774, LAKE 2010-902. (Judge Paez, October 31, 2012)

No petition was filed in which review was denied during the month of December 2012.

The Commission vacated their review in the following case during the month of December 2012:

Secretary of Labor, MSHA v. Richard Cyfers and Walter Mims, employed by Long Fork Coal Company, Docket Nos. KENT 2009-374, KENT 2009-375. Review was granted on September 25, 2012.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

December 5, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-413-M
v.	:	A.C. No. 41-04642-273595
	:	
RS MATERIALS GROUP, LLC	:	
d/b/a ROCK SOLID STONE QUARRY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 6, 2012, the Commission received from RS Materials Group, LLC d/b/a Rock Solid Stone Quarry (“RS”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on December 5, 2011, and became a final order of the Commission on January 4, 2012. RS asserts that it prepared a timely contest, but inadvertently never mailed it to the Department of Labor's Mine Safety and Health Administration ("MSHA"). RS discovered its mistake after receiving MSHA's delinquency notice, dated February 21, 2012. RS maintains that it has always timely paid and has never contested proposed assessments. The Secretary does not oppose the request to reopen and notes that MSHA received a payment for the uncontested penalties by check dated February 28, 2012. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 5, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-414-M
v.	:	A.C. No. 16-00352-274512
	:	
NORANDA ALUMINA, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

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

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

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

The record indicates that the proposed assessment was delivered on December 12, 2011, and became a final order of the Commission on January 11, 2012. Noranda asserts that it was one day late in filing the contest form, due to the departure of its safety manager, and the manager's failure to follow Noranda's standard procedures. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 5, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-67-M
v.	:	A.C. No. 13-00733-231379
	:	
NORTHERN FILTER MEDIA, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On October 25, 2011, the Commission received from Northern Filter Media, Inc. (“Northern”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

A record from the Department of Labor's Mine Safety and Health Administration ("MSHA") indicates that the proposed assessment was delivered on September 15, 2010, signed for by D. Shelangowski, and became a final order of the Commission on October 15, 2010. A notice of delinquency was mailed on December 1, 2010, and the case was referred to the U.S. Department of Treasury for collection on March 17, 2011. Northern asserted that its employee suffered from memory loss and general confusion for a few years before his employment was terminated in December 2010. Northern discovered that the employee sent a letter to an MSHA representative on August 3, 2010, and believed that letter was a sufficient contest.

The Secretary opposes the request to reopen and contends that Northern took no steps to ensure that the employee's work on MSHA safety compliance, reporting, and record keeping was being monitored. Moreover, the Secretary states that Northern did not explain why it took more than ten months to request reopening after receiving MSHA's delinquency notice.

Under Rule 60(c), a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. This motion to reopen was filed more than one year after becoming a final order. Therefore, Northern's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny Northern's motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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December 5, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-317-M
v.	:	A.C. No. 31-02167-272748
	:	
LUCK STONE CORPORATION	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 8, 2012, the Commission received from Luck Stone Corporation (“Luck”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Luck asserts that it received the proposed assessment on November 23, 2011. Luck states that it prepared a timely contest, but inadvertently never mailed it to the Department of Labor's Mine Safety and Health Administration ("MSHA"). Luck discovered its mistake after receiving MSHA's delinquency notice on February 7, 2012. The Secretary does not oppose the request to reopen and notes that MSHA received a payment for the uncontested penalties by check dated December 2, 2011. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

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December 5, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2012-97-M
v.	:	A.C. No. 19-01212-275527
	:	
DUKE’S SAND & GRAVEL	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 21, 2012, the Commission received from Duke’s Sand & Gravel (“Duke’s”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on December 22, 2011, and became a final order of the Commission on January 23, 2012. Duke's asserts that its former employee, who was not authorized to sign for packages, signed for the proposed assessment. Duke's states that it found the proposed assessment under a box on a workbench. The Secretary does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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December 10, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-408-M
v.	:	A.C. No. 02-00152-270348 M445
	:	
CEMENTATION USA, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On January 19, 2012, the Commission received from Cementation USA, Inc. (“Cementation”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on October 26, 2011, and became a final order of the Commission on November 25, 2011. Cementation enclosed a copy of MSHA's delinquency notice, dated January 10, 2012. The Secretary opposed the request to reopen, stating that Cementation provided no explanation for failing to timely contest the proposed assessment.

On March 23, 2012, the Commission sent Cementation a letter asking it to explain why it did not timely contest the proposed assessment, and what office procedures were implemented to prevent future defaults. In response, Cementation asserts that it missed the filing deadline due to changes in management and its recent move to a new location. Cementation further states that it discovered the penalty was not timely contested after receiving MSHA's delinquency notice, and has since implemented procedures to ensure the lack of communication will not happen again.

The Secretary does not oppose the revised motion to reopen, but notes that there has been no change to Cementation's address of record. The Secretary urges the independent contractor to notify the MSHA District Office of any address changes, and to submit a corrected Contractor ID Request (MSHA Form 7000-52).

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

December 10, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-415-M
v.	:	A.C. No. 41-04399-274603
	:	
RATLIFF READY MIX, L.P.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 8, 2012, the Commission received from Ratliff Ready Mix, L.P. (“Ratliff”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Ratliff asserts that it filed a timely notice of contest but neglected to mark the citations it wished to contest. Ratliff discovered its mistake after receiving MSHA's delinquency notice, dated February 27, 2012. The Secretary does not oppose the request to reopen, and notes that MSHA received one sheet of the contest form on December 16, 2011. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

December 10, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-469-M
v.	:	A.C. No. 41-04413-266953
	:	
E & G MASONRY STONE #2	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 20, 2012, the Commission received from E & G Masonry Stone #2 (“E&G”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

MSHA's record indicates that the proposed assessment was delivered on September 21, 2011, and became a final order of the Commission on October 21, 2011. E&G asserts that it mailed a timely notice of contest via first class mail. E&G further states that it resubmitted the contest on November 23, 2011, after receiving a different assessment. The Secretary does not oppose the request to reopen, and notes that MSHA received one sheet of the contest form on October 3, 2011, but it was not processed because it was incomplete. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

December 10, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-702
v.	:	A.C. No. 15-19297-278194
	:	
SAPPHIRE COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 16, 2012, the Commission received from Sapphire Coal Company (“Sapphire”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on January 24, 2012, and became a final order of the Commission on February 23, 2012. Sapphire asserts that it was one day late in filing the contest form, due to mistakenly failing to account for 31 days in the month of January. Sapphire further states that it received MSHA's delinquency notice on March 5, 2012, and filed this motion to reopen on March 9, 2012. The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated March 5, 2012. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

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December 10, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2012-880
v.	:	A.C. No. 15-18765-274255 A
	:	
GREG PERKINS, Employed by	:	
BLACK FUEL ENERGY, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 18, 2012, the Commission received from Greg Perkins, Employed by Black Fuel Energy, LLC (“Perkins”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Perkins asserts that he did not receive the proposed assessment until after it was considered delinquent, because MSHA mailed it to the wrong address. The Secretary does not oppose the request to reopen, and states that the proposed assessment was returned to MSHA because it was addressed to an unknown location.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

December 11, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. SE 2012-100-M
	:	A.C. No. 31-02242-265451
SHELTER CREEK CAPITAL, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On November 28, 2011, the Commission received from Shelter Creek Capital, LLC (“Shelter Creek”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment became a final order of the Commission on October 6, 2011. Shelter Creek asserts that it sent the proposed assessment to its counsel on September 7, 2011. Counsel submits that due to administrative confusion, her support staff placed the contest form in the client's file instead of mailing it to MSHA.

The Secretary opposes the request to reopen and asserts that the counsel's conclusory statements of "administrative confusion" are insufficient to justify reopening. The Secretary maintains that under well-established case law, attributing the failure to timely contest to the counsel rather than the operator, is not an adequate basis for reopening. The Secretary further notes that the counsel's office does not appear to have an internal tracking system to monitor and ensure that contests are timely filed.

In response to the Secretary's opposition, counsel for Shelter Creek maintains that the administrative confusion did not represent a pattern of inadequate office procedures. Counsel further avers that she has a long history of dealing adequately with proposed assessments. In addition, counsel submitted a motion to strike the Secretary's opposition, due to the Secretary's delay in filing beyond the required 8-day time frame. 29 C.F.R. § 2700.10(d).

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). Moreover, as the Commission stated in *M3 Energy Mining Co.*, 33 FMSHRC 1741, 1746 (Aug. 2011):

The fact that many of the inadequate and unreliable office procedures in these cases occurred at counsel's office rather than the office of the operators does not affect our analysis. As the Commission noted in *Keokee Mining, LLC*, 32 FMSHRC 64, 66 n.1 (Jan. 2010), "[i]n requesting relief from a final order, a client may be held accountable for the acts and omissions of its attorney." *Keokee Mining* relied on *Pioneer Investment Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 397 (1993), where the Supreme Court made clear that when a party's failure to meet a deadline was caused by the actions of its counsel, and the issue is whether the party would be exonerated on the basis of "excusable neglect," the party would "be held accountable for the acts and omissions of [its] chosen counsel." This is because the party "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Id.* (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962)).

(Footnote omitted). In this case, we conclude that the lack of any procedure to confirm that the required paperwork was timely filed represents an inadequate or unreliable internal processing system.

Despite taking the opportunity to submit a reply, Shelter Creek's counsel failed to respond to the Secretary's arguments and explain in detail what caused the administrative confusion, how counsel's office procedures were ineffective in this instance due to unusual circumstances, and how new office procedures have been implemented as a result of this failure, so as to prevent future defaults.

Having reviewed Shelter Creek's requests and the Secretary's response, we conclude that Shelter Creek has failed to establish good cause for reopening the proposed penalty assessment. Accordingly, we hereby deny Shelter Creek's motion to reopen and deny its motion to strike the Secretary's opposition.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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Cloverlick has not replied to the Secretary's statement to the Commission. Therefore, we conclude that Cloverlick has withdrawn its motion to reopen. Accordingly, this case is dismissed.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

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December 14, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-285-M
v.	:	A.C. No. 11-02646-206210
	:	
FOX RIDGE STONE CO., LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 6, 2011, the Commission received from Fox Ridge Stone Co., LLC (“Fox Ridge”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 16, 2011, Chief Administrative Law Judge Lesnick issued an Order to Show Cause which by its terms became a Default Order if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Fox Ridge’s failure to answer the Secretary’s February 9, 2010 Petition for Assessment of Civil Penalty. The record in this docket does not show a response from the operator.

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

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782,

786-89 (May 1993) (“*JWR*”). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Fox Ridge asserts that it contested the penalty assessment on December 21, 2009, and stated that the remaining penalties from this mine inspection were contested on November 24, 2009, and assigned docket No. LAKE 2010-187-M. Fox Ridge enclosed copies of these letters.

The Secretary opposes the request to reopen and notes that the operator fails to establish exceptional circumstances that warrant reopening. The Secretary states that Fox Ridge did not answer the penalty petition, nor the Show Cause Order. MSHA sent Fox Ridge a delinquency notice on August 19, 2011, and the case was referred to the Department of Treasury for collection on October 13, 2011. The Secretary further states that Fox Ridge does not explain why it failed to acknowledge or answer any of these documents, although they were mailed to its address of record.

Review of the record in Docket No. LAKE 2010-285-M, the docket at issue here, together with the Commission’s file in Docket No. LAKE 2010-187-M reveals that Fox Ridge timely contested all of the proposed assessments arising out of an MSHA inspection on September 16-17, 2009. The proposed assessments were contained in two separate dockets, with 28 citations assigned to Docket No. LAKE 2010-187-M and one citation, which was the subject of a Special Assessment, assigned to Docket No. LAKE 2010-285-M. Fox Ridge failed to respond to the Secretary’s Petitions for Assessment of Civil Penalty in either docket. On March 16, 2011, Chief Judge Lesnick issued separate (but identical except for the docket numbers) Orders to Show Cause in both dockets. On March 24, 2011, Fox Ridge sent a letter to the Commission responding to the Order to Show Cause, and explaining Fox Ridge’s reasons for disagreeing with the citations and penalties.¹ It appears that Fox Ridge intended that its March 24, 2011 letter (which had no docket number written on it) constitute a response to the Order to Show Cause in Docket No. LAKE 2010-285-M, as well as LAKE 2010-187-M.

¹ In Docket No. LAKE 2010-187-M, this letter was accepted by the Commission as sufficient response to the Order to Show Cause. All of the citations in this docket were subsequently settled by the parties, and Administrative Law Judge Margaret Miller issued a Decision Approving Settlement on September 21, 2011.

Having reviewed Fox Ridge's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

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December 14, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2011-627-M
ADMINISTRATION (MSHA)	:	A.C. No. 21-03314-250674
	:	
	:	Docket No. LAKE 2012-235-M
	:	A.C. No. 21-03314-186661
	:	
	:	Docket No. LAKE 2012-236-M
	:	A.C. No. 21-03314-236955
	:	
	:	Docket No. LAKE 2012-237-M
	:	A.C. No. 21-03314-230600
v.	:	
	:	Docket No. LAKE 2012-238-M
STOMMES CONSTRUCTION, INC.	:	A.C. No. 21-03314-248171

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On December 22, 2011, the Commission received from Stommes Construction, Inc. (“Stommes”) four motions seeking to reopen four penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a), and one motion seeking to relieve it from the order of default entered against it.¹

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2012-235-M, LAKE 2012-236-M, LAKE 2012-237-M, LAKE 2012-238-M and LAKE 2011-627-M, all captioned *Stommes Construction, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

The Commission has exercised jurisdiction over final orders arising from failure to respond to show-cause orders, *see, e.g., FMC Corporation*, 34 FMSHRC 1292, 1293 (June 2012), as well as orders that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *see also JWR*, 15 FMSHRC at 787.

In deciding to reopen final orders in the interests of justice, we have held that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In all cases under Rule 60(b), any motion for relief shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect under subsections (1), (2), and (3) of the rule, not more than one year after the judgment, order, or proceeding was entered or taken.

The record indicates that proposed assessment No. 000186661 was delivered on June 10, 2009, signed for by T. Miller, and became a final order of the Commission on July 10, 2009. A notice of delinquency was mailed on August 26, 2009, and the case was referred to the U.S. Department of Treasury for collection on December 10, 2009. Proposed assessment No. 000236955 was delivered on November 9, 2010, signed for by L. Miller, and became a final order of the Commission on December 9, 2010. A notice of delinquency was mailed on February 10, 2011, and the case was referred to the U.S. Department of Treasury for collection on May 12, 2011. Proposed assessment No. 000230600 was delivered on September 9, 2010, signed for by J. Miller, and became a final order of the Commission on October 11, 2010. A notice of delinquency was mailed on December 1, 2010, and the case was referred to the U.S. Department of Treasury for collection on March 17, 2011. Proposed assessment No. 000248171 was delivered on March 8, 2011, signed for by L. Miller, and became a final order of the Commission on April 7, 2011. A notice of delinquency was mailed on May 23, 2011, and the case was referred to the U.S. Department of Treasury for collection on September 8, 2011.

In LAKE 2011-627-M, which involves proposed assessment No. 000250674, Stommes contested the proposed assessment, but failed to answer the Secretary’s Petition for Assessment of Civil Penalty, issued on June 10, 2011. On August 22, 2011, Chief Administrative Law Judge

Lesnick issued an Order to Show Cause, which was delivered on August 26, and which by its terms became a Default Order on September 22 when the operator failed to file an answer within 30 days.²

In all five cases, Stommes asserts that it did not receive MSHA's proposed assessments. In three of the cases, those involving proposed assessments Nos. 000186661, 000236955, and 000230600, the motions to reopen were filed more than one year after becoming final orders. Therefore, those motions are untimely, and are denied. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

The Secretary opposes all of the requests to reopen and asserts that the operator identified no exceptional circumstances warranting reopening. In support of her opposition, the Secretary also submitted FedEx online tracking reports for three of the penalty assessments at issue.³ The Secretary further states that Stommes never responded to any of the delinquency notices, and the only payments received by MSHA over the past several years have been made through the Treasury collection efforts.

Moreover, the Secretary notes that Stommes filed its reopening request over seven months to two-and-a-half years after the proposed assessments became final Commission orders. Finally, the Secretary states that the operator's delinquency record, which shows that it has repeatedly disregarded final penalty assessments, indicates that it has not acted in good faith.

Stommes has not replied to the Secretary's opposition to its motion. Stommes' sole ground in seeking relief from the final order in proposed assessment No. 000248171 (as in Nos. 000186661, 000236955, and 000230600) is that it did not receive the proposed assessments.⁴ However, in light of the Secretary's un rebutted evidence in the form of a FedEx tracking slip that proposed assessment No. 000248171 was delivered and signed for on March 8, 2011 by L. Miller, we conclude that Stommes has failed to prove that the assessment was not properly delivered, and we thus conclude the operator received the assessment.

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

³ The Secretary states that the first assessment is too old for a FedEx online tracking report.

⁴ It is unclear from the motion whether Stommes is actually asserting that the proposed assessments were not delivered to it.

Regarding Stommes' failure to respond to the Show Cause Order in LAKE 2011-627-M, proposed assessment No. 000250674, Commission records include a United States Postal Service receipt indicating that the show cause order was received on August 26, 2011. Stommes' failure to respond to the Chief Judge's show cause order rendered it a default order. Stommes has provided no good reason to reopen it.⁵

Finally, it is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.*, 3 FMSHRC 314, 315 (Feb. 1981). Stommes' failure to respond to the Secretary's argument that Stommes' delinquency record demonstrates bad faith provides additional support for our conclusion that Stommes has not met its burden of establishing entitlement to extraordinary relief.

⁵ Even if there were not evident grounds for denying Stommes' motions, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17 (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, Stommes has failed to explain why it waited over 6 months after the delinquency notice for proposed assessment No. 000248171 was mailed before seeking relief. Stommes also filed its motion to reopen in LAKE 2011-627-M three months after the Default Order became effective and has not provided an explanation for this delay.

Having reviewed Stommes' requests and the Secretary's responses, we conclude that Stommes has failed to establish good cause for reopening the proposed penalty assessments and vacating the Default Order. Accordingly, we deny its motions with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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December 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of PETER L. DUNNE	:	
	:	Docket No. LAKE 2011-327-DM
v.	:	
	:	
VULCAN CONSTRUCTION	:	
MATERIALS, LP	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). On July 14, 2011, the Commission affirmed an administrative law judge’s order denying the request of Vulcan Construction Materials, LP (“Vulcan Materials”) to dissolve an order temporarily reinstating miner Peter L. Dunne, on an economic basis, under section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). 33 FMSHRC 1587 (July 2011).

Vulcan Materials petitioned the United States Court of Appeals for the Seventh Circuit to review the Commission’s decision. On October 25, 2012, the court, in *Vulcan Construction Materials, L.P. v. FMSHRC*, 700 F.3d 297 (7th Cir. 2012), granted the petition for review and reversed the Commission’s decision. The court held that under the Mine Act an order temporarily reinstating a miner cannot survive the Secretary of Labor’s decision not to proceed with the miner’s discrimination claim, notwithstanding the miner’s subsequent exercise of his right to pursue a discrimination claim on his own behalf under section 105(c)(3) of the Mine Act, § 815(c)(3). 700 F.3d at 310.

On December 17, 2012, the court issued its mandate in this matter, thereby returning the case to the Commission's jurisdiction. Accordingly, the order of temporary reinstatement is dissolved effective today.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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December 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2009-374
ADMINISTRATION (MSHA)	:	A.C. No. 36-08645-175710
	:	
v.	:	Docket No. PENN 2009-49
	:	A.C. No. 36-08636-163009
ROXCOAL, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 5, 2012, the Commission received from RoxCoal, Inc. (“RoxCoal”) two motions in cases in which Administrative Law Judge Janet Harner had issued decisions approving settlement dated August 11 and October 19, 2011. In its motions, RoxCoal asks the Commission to dismiss any interest or penalties erroneously accrued in these dockets.¹

RoxCoal asserts that it did not receive the judge’s Orders to Pay and Decisions Approving Settlement, dated August 11 and October 19, 2011. RoxCoal paid the settlement amounts, but asks the Commission to dismiss any penalties accrued by the U.S. Department of Treasury collection efforts.

The Secretary does not oppose the requests to reopen, but notes that the Decisions were mailed to RoxCoal’s legal counsel’s address of record. The Secretary states that MSHA mailed delinquency notices to RoxCoal on November 16, 2011 and February 6, 2012. Assessment Case No. 000175710 (in Docket No. PENN 2009-374) was referred to Treasury for collection on February 16, 2012, where additional administrative costs and collection fees were charged. The Secretary notes that MSHA received two payments for the agreed upon settlement amounts, by checks dated March 1 and 16, 2012. The Secretary also states that, in Docket No. PENN 2009-

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers PENN 2009-374 and PENN 2009-49, both captioned *RoxCoal, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

49, the motion to reopen should be dismissed as moot because the penalties have been paid and the case closed.

Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge's orders here have become final decisions of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993).

Having reviewed RoxCoal's requests and the Secretary's responses, in the interests of justice, we hereby reopen Docket No. PENN 2009-374 for the limited purpose of giving MSHA the authority to recall any collection actions by the U.S. Department of Treasury. RoxCoal's motion in Docket No. PENN 2009-49 is denied as moot.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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December 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-360-M
v.	:	A.C. No. 31-00002-274318
	:	
ARARAT ROCK PRODUCTS	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 26, 2012, the Commission received from Ararat Rock Products (“Ararat”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

MSHA's record indicates that the proposed assessment was delivered on December 12, 2011, and became a final order of the Commission on January 11, 2012. Ararat asserts that it timely mailed its notice of contest along with its payment for the uncontested penalties, but believes it sent the penalty contests to the wrong location. Ararat states that it discovered the delinquency during a hearing with MSHA for a different case. Ararat further states that it submitted payment for the contested penalties in protest, to prevent any additional penalties. The Secretary does not oppose the request to reopen, and notes that MSHA received payment for the uncontested penalties, by check dated December 21, 2011. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the civil penalty compliance office in Arlington, VA.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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December 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2012-251-M
v.	:	A.C. No. 44-00082-272810
	:	
CHEMICAL LIME COMPANY	:	
OF VIRGINIA, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 14, 2012, the Commission received from Chemical Lime Company of Virginia, Inc. (“Chemical”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The record indicates that the proposed assessment was delivered on November 23, 2011, and became a final order of the Commission on December 23, 2011. Chemical asserts that it mistakenly failed to include the contest form with the payment for the uncontested penalties, which it mailed on December 15, 2011.¹ The Secretary does not oppose the request to reopen, but notes that there is no record that the penalty contest form was received by the Department of Labor's Mine Safety and Health Administration's ("MSHA") Civil Penalty Compliance Office in Arlington, VA. The Secretary also notes that the MSHA payment center in St. Louis, MO, received a payment for the uncontested penalties, by check dated December 15, 2011. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the MSHA Arlington, VA address.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

¹ Chemical should note that while payments for uncontested penalties are sent to "Mine Safety and Health Administration, P.O. Box 790390, St. Louis MO 63179-0390," as stated on the Remittance Coupon, in order to contest a violation or proposed penalty, an operator must send the contest form to "Mine Safety and Health Administration, Civil Penalty Compliance Office, 1100 Wilson Blvd., Room 2526, Arlington, VA 22209-03939".

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1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

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December 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-1255
v.	:	A.C. No. 02-01195-287265 VH8
	:	
WEST STATES SKANSKA, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

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

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

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

The record indicates that the proposed assessment was delivered on April 30, 2012, and became a final order of the Commission on May 30, 2012. Skanska asserts that its Western Region safety director discovered the outstanding balance on a different proposed assessment and began an inquiry, revealing that the proposed assessment had been misplaced due to recent personnel changes. The Secretary does not oppose the request to reopen, and notes that the Department of Labor's Mine Safety and Health Administration ("MSHA") sent a delinquency notice dated July 16, 2012. MSHA's record also shows that Skanska filed a pre-penalty contest for this citation, docketed as No. WEST 2012-227-R.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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December 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-463-M
v.	:	A.C. No. 02-00024-273984
	:	
FREEMPORT-MCMORAN MORENCI, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

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

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

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

The record indicates that the proposed assessment was delivered on December 8, 2011, and became a final order of the Commission on January 9, 2012. Freeport asserts that it timely mailed its notice of contest on December 20, 2011, but has no postage tracking information since it did not use certified mail. Freeport states that this is not its normal practice, and that controls have been established to ensure this does not happen in the future.¹ The Secretary does not oppose the request to reopen, but notes that there is no record that the penalty contest form was received by the Department of Labor’s Mine Safety and Health Administration’s (“MSHA”) Civil Penalty Compliance Office in Arlington, VA, and no record of a payment received by the MSHA payment center in St. Louis, MO. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

¹ Freeport should note that while payments for uncontested penalties are sent to “Mine Safety and Health Administration, P.O. Box 790390, St. Louis MO 63179-0390,” as stated on the Remittance Coupon, in order to contest a violation or proposed penalty, an operator must send the contest form to “Mine Safety and Health Administration, Civil Penalty Compliance Office, 1100 Wilson Blvd., Room 2526, Arlington, VA 22209-03939”.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2012-753-M
v.	:	A.C. No. 04-05710-276306
	:	
RUNTS TRUCKING, INC.	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 10, 2012, the Commission received from Runts Trucking, Inc. (“Runts”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

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

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

The record shows that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No.000276306 on January 3, 2012, and it was delivered to Runts on January 9, 2012. The owner of Runts states that he mailed the form to contest the penalties listed on the proposed assessment within one week of receiving it. The Secretary states that there is no record of the contest being received by MSHA's Civil Penalty Compliance Office. On March 26, 2012, MSHA sent a delinquency notice to Runts, whose owner then contacted MSHA by telephone and submitted this motion to the Commission.

The Secretary does not oppose this motion, but urges the operator to take all steps necessary to ensure that future penalty assessments it wishes to contest are contested in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

/s/Michael G. Young
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/s/ Patrick K. Nakamura
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December 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2012-992
v.	:	A.C. No. 46-01456-279351
	:	
EASTERN ASSOCIATED COAL, LLC	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 19, 2012, the Commission received from Eastern Associated Coal, LLC (“Eastern”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

MSHA's record indicates that the proposed assessment was delivered on February 6, 2012, and became a final order of the Commission on March 7, 2012. Eastern asserts that its general manager was unexpectedly absent from the mine due to hospitalization during February and March, 2012. Eastern's general manager states in his affidavit that immediately upon discovering the proposed assessment, he forwarded it to the safety manager, who contested it on April 6, 2012. Eastern enclosed a copy of MSHA's delinquency notice, dated April 12, 2012.

The Secretary does not oppose the request to reopen, and notes that MSHA received a payment for the uncontested penalties, by check dated April 10, 2012. The Secretary states that Eastern had no procedure to ensure that proposed assessments were timely processed during the general manager's absence, and urges Eastern to adopt such procedures. The Secretary cautions that she may oppose future motions to reopen penalty assessments that are not contested in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

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

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December 20, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2012-130-M
v.	:	A.C. No. 28-00951-272258
	:	
R.E. PIERSON CONSTRUCTION	:	
COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On April 11, 2012, the Commission received from R.E. Pierson Construction Company (“Pierson”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

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

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chair

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

/s/ Patrick K. Nakamura
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ADMINISTRATIVE LAW JUDGE DECISIONS

A formal hearing was held in Rapid City, South Dakota, on May 11, 2012. At the hearing, Secretary's Exhibits 1-7, Respondent's Exhibits 1-7, and Joint Exhibit 1 were admitted into evidence,² and each party provided testimonial evidence. On May 1, the *Secretary's Motion to Amend Citation No. 6427348 To Allege, In the Alternative, Violations of 30 C.F.R. 56.12030 and/or 30 C.F.R. 56.12032*, was filed. That motion sought to amend Citation No. 6427348 to plead a violation of 30 C.F.R. § 56.12032 in the alternative. Without objection, that motion was granted. Tr. 7-8. Both parties then filed post-hearing briefs, the last of which was received on July 19.

Findings of Fact and Conclusions of Law

At the hearing, the parties stipulated that: Respondent was the operator of the Mine; the mine at which the citations were issued is a mine as defined in the Federal Mine Safety and Health Act of 1977; Respondent is engaged in mining operations that affect interstate commerce; Respondent is subject to the jurisdiction of the Mine Act, 30 U.S.C. §§ 801 *et seq*; the Federal Mine Safety and Health Review Commission and the ALJ have subject matter and personal jurisdiction over this case; the citations at issue were issued on the date indicated in section one of the citations; the inspector who issued the citations was acting in his official capacity and as an authorized representative of the United States Department of Labor; the proposed penalties will not affect Respondent's ability to continue in business; and that Respondent demonstrated good faith in abating the violations. JX 1, 1-2.

Respondent owns a portable Fast Pack plant that was operating at the Hot Springs quarry in Hot Springs, South Dakota. Tr. 25. There are usually five people working at this plant, but as many as ten might be working when the plant is being set up. Tr. 92, 100. The Fast Pack plant is a series of conveyors, crushers, springs and control vans that can be transported between quarries. Tr. 24. The plant is large in size, covering an area of 300 by 500 feet, and takes days to transport. Tr. 92. The Hot Springs quarry usually is inspected twice per year by MSHA Tr. 32.

On November 2, 2010, Inspector Alan Roberts visited the Hot Springs quarry for a routine inspection of the Respondent. Tr. 29-30. Roberts has been a MSHA Mine Inspector for approximately nine years. Tr. 22. Prior to working at MSHA, Roberts worked at an underground salt mine, performing all duties including serving as superintendent. Tr. 23-24.

On or before October 29, 2010, Hills Materials sent in a *Notification of Commencement* pursuant to 30 C.F.R. § 56.1000³ to inform the MSHA Rapid City Field Office that it intended to move its operations from Maverick Junction to Hot Springs. GX 7; Tr. 27-28. Roberts's field notes confirm MSHA's reception of the commencement notice, indicating that the Rapid City field office had received the notification on October 29, 2010. Tr. 27. Roberts testified that the purpose of the *Notice of Commencement* was to inform MSHA that the operation was moving, so that MSHA could conduct inspections more efficiently. Tr. 28; GX 7.

² Citations to the record of this proceeding will be abbreviated as follows: GX – Government's Exhibit; RX – Respondent's Exhibit; JX – Joint Exhibit; Tr. - Hearing Transcript; PBR – Petitioner's Brief; RBR – Respondent's Brief.

³ All of the regulations cited in this decision are contained in Title 30 of the Code of Federal regulations.

When Roberts arrived at the Hot Springs quarry, he attempted to contact Respondent's foreman, Cliff Drury, but was unsuccessful. Tr. 30. So initially, Roberts proceeded to perform his inspection of the plant unaccompanied by an employee of the Respondent, though at a later point Drury joined him. Tr. 30, 32. Roberts observed that the Fast Track plant was not operating. Tr. 30. Rather, Roberts said that while he saw mine activity, including "guys moving around here and there and doing maintenance and so forth," he opined that the plant "wasn't running." *Id.*

Roberts testified that he believed the plant was in "setup mode." Tr. 30. He explained that in setup mode, "different crushers and screens and conveyors ... have to be set up in a certain order ... they have to be lined up where the product will go from one conveyor to the next and the electrical has to be hooked up[.]" Tr. 30-31. Roberts then explained that a mine being in setup mode did not affect his inspection, stating that the "hours miners work[ed] in setup mode are reported as mine hours. We have a lot of accidents during setup and tear down. I personally believe it's a very important time to inspect." Tr. 31. In explaining the difference between setup mode and temporary closure, Roberts stated that at times of temporary closure, there was no mine activity. *Id.* Mine activity, while "not production ... not producing rock[.]" according to Roberts, includes setup mode. *Id.*

At 10:50 in the morning, Roberts and Drury came upon Respondent's onsite water trailer. Tr. 34. The water trailer housed a water tank, a boiler, a fuel tank, and some tools. *Id.* It was used to "heat the water for [Respondent's] dust control system in cold weather." *Id.* In Roberts's estimation, employees' use of the trailer depended on how windy the site was, and could be anywhere from a daily basis to once every few days. Tr. 35. Asked what items mine employees might bring in and out of the trailer, Roberts responded that he "observed hand tools on the floor in there. They would have to pull a hose in there to fill their water tank. They would have to carry and pull a fuel nozzle and hose to fill the fuel. And, then, they need tools that might be stored in there." *Id.*

When the mine was operating, miners would access the trailer by a 45-inch high set of stairs. GX 2. At the time of the inspection, the stairway had a single handrail installed. Facing the trailer from outside, the single handrail was on the left side of the stairway. The door to the trailer opened outward, from the left side. Accordingly, the door handle was on the left. Tr. 38, 43. The stairway was supposed to have a handrail on the right side as well, but according to Drury, while the stairway was being put in place it was discovered that the second handrail was missing. Tr. 94. It turned out that the second handrail had been left behind in Spearfish, South Dakota, where the trailer was last used. Tr. 37.

Roberts opined that "if someone would slip and fall, there's nothing that would tell us which direction they would fall. And a handrail would stop their fall off the side of the stairs." Tr. 37. Roberts determined that the absence of the right handrail on the stairs leading up to the trailer door constituted a violation of. §56.11002, which states: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided." Therefore, he issued Citation 6427347.

Roberts determined that this violation of §56.11002 was reasonably likely to cause injury; would result in lost workdays or restricted duty; and that the violation resulted from moderate negligence. Tr 38, 44. He based these determinations on the height of the steps; and that the condition had existed for “a couple days[.]” Tr. 42.

Later in the morning, Roberts was inspecting the electrical panels for the Fast Pack conveyor. Tr. 45. When Roberts arrived at the conveyor, he observed that there “was a lot of activity.” Tr. 46. On one of the electrical panels, he noticed that a strain relief bushing was missing from a half-inch hole in one of the panels. Tr. 48. Roberts stated that the control panel was not tagged or locked out. Tr. 54. Upon closer inspection, Roberts stated that the hole could allow a buildup of moisture, dust, and insects over time, which could create a risk of an arc flare or fire. Tr. 55-58. However, Roberts also stated that the power coming to the box was “locked out at its source.” *Id.* That meant that “where the power [left] the generator, the switch was turned off and a lock was placed on it so no one could energize any of the mine equipment.” Tr. 54-55.

During trial, Respondent called Doug Anderson as a witness. Tr. 113. Anderson is employed by Respondent as a journeyman electrician, and has been for over 16 years. Tr. 113-14. Anderson testified that the main energy source for the equipment was locked out. Tr. 116. Moreover, the power cable from the main energy source “wasn’t even plugged in.” *Id.* Anderson then testified that Respondent had an established protocol for setting up the electrical system. Tr. 116-17.⁴ In essence, the protocol requires a “double-check” of the electrical system. *See, e.g.*, Tr. 119. When he was questioned about the electrical box in contention, Anderson testified that

⁴ Anderson explained:

What we do first is, basically, Cliff and the boys, they set the conveyors, and we’ll help pull the cables, get them into place. There’s an added conveyors [*sic*], we’ve got to splice them, you know, because they’re not long enough. And, then, once they get everything in their position, we go and do a ground check, which enables us to, we go from the main grounding bus to each one of these conveyors [*sic*] will have a box like that on it, and we go open that box up, go inside, get on that ground bus, and we go from the main to that grounding bus, and then we go from that grounding bus on that conveyor to, there’s a hydraulic motor and a stacker motor on that conveyor. So, basically, we get in there twice. You know, we all do the main, from the bus, we go to all the conveyors, and then we go back and go into the conveyor box again, and then do the conveyors individually, if you understand what I’m saying?

... A main bus is where you put all your ground wires...

... And you go from there to there and make sure you have good continuity. And then you go from that grounding bus in that box to, you have a hydraulic motor, you go from there, and then also you have a conveyor motor, you have to go from there. So, and what we do is go from the main and do all the conveyors first, one guy goes around, you have, like, a thousand foot of lead wires, and you go to the conveyors first. And, then, after you get done with that, you move your spool to each conveyor so you can do each conveyor individually.

... And when you’re in there, you kind of do a visual check and make sure all your wires are tight and your communication cables are in there. If there’s [*sic*] any loose connectors or just do a visual to make sure that everything is, you know, because things get jarred around when they’re moving. And I do a visual, and that’s why we do it the way we do it because I’m in it one time, and the other electrician is in it the other time.

Tr. 116-17.

at the moment Roberts walked up, Respondent had not yet begun testing the grounding continuity on the particular panel. *Id.* In fact, Anderson stated that Respondent was still performing general repairs prior to any final testing. Tr. 120 Also, visual inspection would be performed prior to energizing the equipment. *Id.* Furthermore, Anderson testified that he did not believe dust or moisture would be a problem, as the operation of the equipment had not yet begun. Tr. 125. Lastly, Anderson testified that the system ground resistance check had not yet taken place. Tr. 126. A ground resistance check is undertaken to ensure that metal parts of the equipment are not energized. Tr. 127. Such checks are mandatory. Tr. 128. Evidence submitted demonstrated that at the time of the inspection, Respondent was still in the process of completing other grounding tests. Tr. 128-29.

Roberts determined that Respondent had violated §56.12030 which states: “When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.” In the alternative, Secretary now pleads a violation of §56.12032, stating: “Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.” Roberts determined that the injury was non S&S, and that injury was unlikely to occur because electricity was off. Roberts designated the level of injury as fatal and affecting one miner. Finally, he determined that the negligence level was “moderate” because Respondent failed to detect the alleged violation on a pre-shift inspection. GX 4.

Jurisdiction Of MSHA to Inspect Mines While Moving or Mobilizing.

At issue is whether the Fast Pack plant was operating as a “mine” for the purposes of the Mine Act. Section 3(h)(1) of the Mine Act defines the term “mine.” 30 U.S.C. § 892(h)(1). For purposes of this case, the relevant part of the definition defines a mine as “structures, facilities, equipment, machines, tools, or other property ... used in, or *to be used in*, the milling of ... minerals.” Emphasis added. The Commission, as well as the courts, have held that the term “mine” must be interpreted broadly to effectuate the intent of the Mine Act. *See, e.g. Cyprus Industrial Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir. 1981). The Mine Act's use of the language “used in, or to be used in, the milling of ... minerals” indicates that, for jurisdictional purposes, a “mine” includes not only facilities presently being used to mill minerals, but also facilities where mineral milling will be taking place in the future. 30 U.S.C. § 802(h)(1). Federal Courts of Appeals decisions confirm this interpretation referencing, with general approval, the interpretation of “to be used” to mean “contemplated use.” *Lancashire Coal Co. v. Sec'y of Labor*, 968 F.2d 388, 390 (3rd Cir. 1992). Another federal court held that activities conducted at a site in preparation for future mining may bring the site within the Mine Act's definition of “mine” for the same reason. *Cyprus Industrial Minerals Co.* at 1117-18. Note, however, that neither of these cases dealt with the issue of a mine in the process of setting up or which had filed a notification of commencement pursuant to §56.1000, which is the situation we have in this case.

Section 56.1000 provides the process by which a mine is legally “closed.” It provides:

The owner, operator, or person in charge on any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and

Health District Office before starting operations, of the approximate or actual date operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether the operations will be continuous or intermittent.

When a mine is closed, the person in charge shall notify the nearest district office as provided above and indicate whether the closure is temporary or permanent.

Thus, Respondent contends that a mine that is “closed” according to this provision would be removed from the applicability of the Mine Act. Respondent concludes that because it had filed a *Notice of Commencement*, it was removed from MSHA jurisdiction and the citations should consequently be dropped.

The Secretary argues that Respondent’s setup activity was part of the normal mining cycle. Essentially, the Secretary argues that all activities, “even prior to the actual commencement of mining” fall under the Jurisdiction of MSHA because “the Act is intended to prevent injuries and illnesses and that such protection logically applies whether employees are setting up equipment or engaged in production.” PBR 13 (citation omitted). In her brief, the Secretary cites three ALJ decisions to support her position. First, in *Khani Co., Inc.*, 32 FMSHRC 1339 (ALJ, Sept. 2010), the ALJ upheld a citation of a crusher that was being readied to commence mining, but did not mine for two weeks after the inspection. *Khani*, 32 FMSHRC at 1342. The Judge held that it is “undeniable that the hazards associated with those activities are present whether they occur during the mine’s set-up for operations to commence or during the actual process of mineral removal for its sale.” *Id.* at 1343. Second, the Secretary proffers *Royal Cement*, 31 FMSHRC 1459, 1462 (ALJ, Dec. 2009), which held that a plant that had been closed for three years but which was undergoing repairs was a mine under the Mine Act because the repairs were being made in preparation for production to resume. Last, the Secretary cites *The Pit*, 16 FMSHRC 2008, 2009-10 (ALJ, Sept. 1994), which held that “equipment ... located at a site where mining will take place, and will be used in the extraction of minerals, or the milling of minerals, is subject to MSHA jurisdiction - even if mining has not commenced.”

Respondent contends that the Mine was not subject to MSHA’s jurisdiction during the November 2, 2010 inspection. RBR 5. Respondent argues that the mine was temporarily closed and had not yet “commenced operations.” *Id.* at 6. It contends that the *Notice of Commencement* filed with MSHA on October 29, 2010 pursuant to 30 C.F.R. § 56.1000 confirms that the mine was closed and was not going to reopen until November 3, the day after the MSHA inspection was conducted. In support of its position, Respondent cites *Hansen Materials Co.*, 26 FMSHRC 293, 297, 2004 WL 787222, 4 (ALJ, Mar. 9, 2004). In *Hansen*, the Judge held that during times when equipment would not be operated, Hansen could notify MSHA pursuant to 30 C.F.R. § 56.1000 that its operations would temporarily be shut down for a period of time, and then mine would not be subject to inspections from MSHA for this period. This brief recitation of the salient facts shows why *Hansen* provides no support for Respondent’s position. For in *Hansen*, the mine was shut down; no activity was taking place and there was no potential for injury to miners. Here, activity by miners was ongoing, even though the plant was not yet operational, and the potential for injury to miners existed.

I hold that MSHA had jurisdiction to inspect Respondent's mine. As stated above, the Federal Courts and the Commission have long held that the term "mine" must be interpreted broadly to effectuate the intent of the Mine Act. *Cyprus Industrial Minerals Co., supra*, at 390; *Lancashire Coal Co., supra*, at 390. Respondent's activities cannot be construed as anything but setting up its plant to be used in mining, and thus its activities on November 2, 2010 were well within MSHA's jurisdiction. Although the plant may not have been milling material at the time of the inspection, it was going to start operating the next day. Further, injuries to miners can occur while a mine is being set up as they do while the mine is in operation, and the purpose of the Mine Act is to prevent injuries to miners. Ruling that MSHA does not have jurisdiction over mines which are being set up prior to the mining that is going to take place would read the phrase "or to be used" out of the definition of "mine". Respondent has failed to establish that filing a *Notice of Commencement* would revoke MSHA's authority to regulate a mine that is being readied for operation.

Citation 6427347

The Secretary alleges that respondent violated 30 C.F.R. §56.11002, which states:

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

The citation states that this standard was violated because a 45 inch stairway with five steps and a single handrail going up to the water trailer door exposed miners to a fall hazard due to the fact that there was "no handrail on the west side of the stairway to the Water Trailer." GX 2. The citation goes on to state that the mine operated in wet weather conditions and that miners could have tools in their hands while accessing the trailer. *Id.*

In order to prove that Respondent violated this standard, the Secretary must show by a preponderance of the evidence that Respondent failed to comply with §56.11002's requirement that "stairways shall be of substantial construction provided with handrails." *See, e.g., Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (1995) (*citing Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (1989)). There is no dispute that the right side handrail was missing at the time of Roberts's inspection. At issue is whether the evidence demonstrates that the stairway violated the standard.

The stairway went from the ground to the water trailer door. Facing the trailer, the stairway had a handrail only on the left side. To access the trailer, the door is opened by a knob on the left which swings outward toward the right side of the stairway, with the hinges of the door on the right. A miner climbing up the right side of the stairway would be hit by the door when opening it to enter the trailer. So it is highly unlikely that someone would use a handrail on the right side of the stairway. The only purpose a handrail on the right side of the stairway could serve would be to prevent someone from slipping off the stairway on the right side. Inspector Roberts opined that this created a dangerous hazard because such a fall could occur.

The Secretary argues that this was a violation of the standard. She argues that “the safety design of the stairway required two handrails.” PBR 17.

Respondent refutes this citation on two grounds. First, Respondent argues that it provided a handrail, which satisfies §56.11002. RBR 3. Second, Respondent argues that the mine was in set-up mode and that the trailer was not in use at the time of the inspection. RBR 3-4.

In regard to Respondent’s first argument, one handrail was provided, and under the circumstances the likelihood of a miner getting hurt because the right handrail was missing is negligible. It must be kept in mind that the entire stairway was only 45 inches high. A miner would probably walk up only three steps – certainly no more than four – before opening the door to the trailer. Since the door to the trailer had to be opened from the left side, it is highly unlikely that a miner would walk up the right side of the stairway for three or four steps, then cross over to the left side to open the door. Roberts was asked at trial:

Q. [Since] the door opens from left to right . . . would anyone actually walk up those steps holding onto a handrailing on the right? Wouldn’t that be completely nonsensical?

A. Yes I agree.

...

Q. So logically, you wouldn’t expect anybody to hold onto a handrail on the right side when they’re walking up those couple of steps ... am I right?

A. If the door was shut.

Tr. 82-83. Later, he stated: “the door was shut that day.” Tr. 84. The only use a right side handrail would have on this stairway would be to prevent a miner from slipping on the stairs and falling off on the right side. Due to the short length of the stairway and that anyone going in or out of the trailer would be walking on the side with the handrail, it is highly unlikely that the lack of a second handrail would lead to an injury.

But the likeliness or unlikeliness of an injury does not effect whether a regulation has been violated. That is a separate issue. The Secretary is entitled to deference in interpreting her regulations, and §56.11002 does say “handrails”, not “handrail”. Since the Secretary interprets §56.11002 to require handrails on both sides of a stairway regardless of the circumstances, and her interpretation is reasonable, then Respondent has not complied with that section of the regulations.

But regardless of whether a second handrail is required by §56.11002, another factor precludes its absence from being a violation in this case. As was noted above, the plant was in the process of being set up on November 2, 2010. The evidence establishes that the trailer was not going to be used for a day or two (Tr. 69, 109), and there was no reason for anyone to enter it. Respondent planned on installing the right side handrail as soon as it was brought back from Spearfish, where it had been left inadvertently when the trailer was moved to its new location.

It is clear that the Mine Act is intended to apply to mines that are in the process of being constructed or set up but are not yet in operation, as the definition of “mine” includes structures and equipment “to be used” in mining. This makes perfect sense. For the potential for injury exists when a mine is in the process of being set up as it does when mining operations are ongoing. For example, if the water trailer stored equipment which was being used in setting up the plant, and therefore miners would be using the stairway, it would pose the same hazard as when the trailer is being used once the mine is operational. But a mine operator cannot be expected to have all of its equipment ready to pass an MSHA inspection while it is in the process of setting up the mine and before it is in use. The operator must be given a chance to set up its equipment and check it for compliance with the safety standards at the time it is ready to be used. The purpose of the Mine Act is to prevent injuries to miners, and surely no miner will be injured by equipment which is not yet going to be used. The stairway to the trailer was in the process of being set up prior to being used. It would serve no purpose to find a violation under such a circumstance.⁵

Accordingly, I hold that MSHA had jurisdiction over activities at the site where the Fast Track plant was being set up, and the failure to have a second handrail installed on the stairway to the water trailer was insufficient to meet the requirements of §56.11002. Nevertheless, that the plant was in the process of being set up, the water trailer was not yet in use, and no one would have been using the stairway at the time of the inspection precludes the lack of a second handrail from being a violation of the regulation. Citation 6427347 is therefore vacated.

Citation 6427348

In Citation 6427348, the Secretary alleges that respondent violated §56.12030, which states that: “When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.” In the alternative, the Secretary pleads that Respondent violated §56.12032, which states: “Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.”

The evidence leaves no doubt that a violation of §56.12030 could not have occurred, since the control panel in which Roberts found an unplugged hole had not been energized. This explains why the Secretary amended the citation to alternately plead a violation of §56.12032. The Secretary argues that §56.12032 was violated because Roberts found an unplugged hole on the side of an electrical box that caused the “electrical conductors to be exposed to dusty, wet conditions that would expose miners to an electrical shock hazard.” GX 4; Tr. 46.

There is no conflict in the testimony on this issue. At the time of the inspection, the process of setting up the electrical equipment was ongoing, and testing and inspection of the control panel had not yet taken place. Further, not only was the electrical power source locked

⁵ In her brief, the Secretary cites page 102 of the transcript to support a finding that Drury “allowed the miners to continue to access the water trailer to retrieve tools and work on the boiler and water tank.” Nothing on that page of the transcript is remotely consistent with this representation. In fact, there is no evidence anywhere in the record to support a finding that the trailer had been in use at the Hot Springs site at the time of the MSHA inspection.

out, but the control panel was not even plugged in to the power source. Roberts agreed that there was no imminent danger of harm, rather only a “root cause ... over time if this was left to continue based on continued mining operation, over time [debris] could build up.” Tr. 50. Roberts stated that he “asked the foreman and the electrician what went through that hole, and neither one of them can answer immediately, which [told him] that the hole had existed for some period of time.” Tr. 55. This was pure speculation by Roberts. Roberts also believed that if he “would not have noticed it [the unplugged hole] it would have been left, left alone until something could accumulate and create the hazard.” Tr. 55. But Roberts had no basis for his belief that the unplugged hole would not be discovered, especially since Respondent was still in the process of setting up the equipment and performing necessary repairs prior to energizing it.

For the same reason I gave for concluding that Citation 6427347 must be vacated, I conclude that the Secretary has failed to prove that Respondent violated §56.12032. Safety standards have to be applied with common sense. In the case of electrical equipment, while the equipment is being set up, it is inevitable, as it is when repairs to electrical equipment are being made, that there will be exposed wires, junction boxes and other things which could be hazardous if they are connected to a power source. That is a particular problem in mobile equipment, for as Anderson testified, “things get jarred around when they’re moving.” TR 117. I see no substantial difference between “testing and repairs”, which are explicitly exempt from the requirements of §56.12032, and setting up the electrical machinery in a mine or plant. In this case, until all the equipment was set up, the Respondent had the opportunity to inspect the equipment, and the power was ready to be turned on, it was nonsensical to find a violation of §56.12032.

Thus, this citation must also be vacated.

ORDER

IT IS ORDERED that Citations 6427347 and 6427348 are ***VACATED***, the proposed penalties are ***DENIED***, and this case is ***DISMISSED***.

/s/ Jeffrey Tureck _____
Jeffrey Tureck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Avenue, N.W., SUITE 520N

WASHINGTON, D.C. 20004-1710

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December 6, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2010-979
Petitioner,	:	A.C. No. 15-02709-216244-01
v.	:	
HIGHLAND MINING COMPANY, LLC	:	Mine: Highland 9 Mine
Respondent.	:	

DECISION

Appearances: Neil A. Morholt, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of the Petitioner;

Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, KY; on behalf of the Respondent.

Before: Judge Rae

This case is before me upon a petition for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Administration Act of 1977, 30 U.S.C. §801 et seq. (the “Act”), charging Highland Mining Company, LLC (“Highland”) with one violation of 30 C.F.R. §75.400. The Secretary proposes a special assessment in the amount of \$30,200.00. A hearing was held in Henderson, Kentucky. Post-hearing briefs were submitted by the parties.

I. BACKGROUND

Highland operates its 9 Mine, a bituminous coal mine, in Waverly, KY. The alleged violation arises from a regular inspection conducted by MSHA on January 11, 2010.

The parties entered into the following stipulations of fact prior to the hearing:

1. The proposed penalty assessment will not affect Respondent’s ability to continue in business;
2. Highland is engaged in the selling of coal in the United States and its mining operations affect interstate commerce;
3. Highland is subject to the Federal Mine Safety and Health Act of 1977;

4. The administrative law judge has jurisdiction to hear and decide this matter;
5. All of the citations and the one order at issue in these two dockets¹ were properly served by a duly authorized representative of the Secretary upon an agent of Highland, on the dates stated therein; and,
6. The operator demonstrated good faith in abating the violations.

II. FINDINGS OF FACT CONCLUSIONS OF LAW

On January 11, 2010, Jeff Winders² was accompanied by trainee Phillip Carlisle³ on an inspection of Highland's 9 Mine. Also accompanying Winders was Highland's safety director, Travis Little⁴, and United Mine Workers Union representative Sam Dyer. The group traveled to the tail (or farthest inby point) along the 4C belt entry and proceeded to inspect the belt traveling by golf cart. Both Winders and Carlisle observed an accumulation of float coal dust located along the entry from crosscuts 72 to 26, a distance of approximately 3300 feet. Winders described the accumulations as "paper thin" with coal fines accumulated from crosscut 62 to 72 measuring two inches in depth. Tr. 39. The belt is approximately 12 to 18 inches above the floor in that area. Tr. 77. Winders described the coal dust as dark gray to black in color with little to no rock dust present. Tr. 38. Carlisle recalled seeing rock dust under the coal dust which became airborne when the golf cart rode over it. Tr. 14-15. Dyer commented to Winders and Carlisle that he had noted the accumulations in the belt book for several days but it went

¹ Docket No. KENT 2010-980 which was consolidated with this docket settled on March 15, 2012.

² Winders has been an MSHA inspector since October 2007. Prior to his employment with MSHA, he was a miner for 23 years running various pieces of equipment as well as acting as a fire boss and conducting belt examinations. He obtained his foreman's papers from the State of Kentucky in addition to his Kentucky state inspector's certificate. Tr. 31.

³ Carlisle was an MSHA inspector-in-training at the time of the inspection. He had eight years of mining experience prior to his MSHA position. He performed general labor, ran a roof bolter and scoops and was certified as an electrician in 2005. Tr. 10-11.

⁴ Little has 17 years of mining experience performing general labor tasks such as rock dusting and shoveling, and installing headers. He was involved in mine rescue for six years, was a section foreman and holds national and state EMT certifications as well as federal and state underground instructor qualifications. He currently is the safety manager for Highland. Tr. 97-98.

unabated. He then started splitting up the notations in the book and listed some areas one day and other areas on another day. Tr. 16-17, 46. At 10 am when the inspectors encountered the condition, Winders and Carlisle had seen a miner shoveling at the header of the belt but not in the vicinity in which they were located. The belt walker had also not made his way to the inby section of the belt at that time. Tr. 26, 57. Both inspectors acknowledged that there were no stuck rollers or sections where the belt was misaligned or other ignition sources in the belt entry. Tr. 28, 67. Neither inspector informed Highland personnel of the violation while underground. After contacting his supervisor while on the surface, Winders issued the following section 104(d) violation. Tr.20-21, 62, 111.

Citation 8494959

Float coal dust was allowed to accumulate on the rock dusted surfaces of the mine floor and ribs on the 4C beltline from crosscut #72 to crosscut #25, a distance of over 3300'. This condition has been recorded in the belt examination record book by the belt examiner since 01/05/2010, and was countersigned by a mine foreman on each day.

The company engaged in aggravated conduct constituting more than ordinary negligence in that the mine foreman knew of this condition and no action was taken to correct the condition. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. S-2.

The citation is designated as significant and substantial (S&S) with a reasonable likelihood of resulting in an injury or illness leading to lost workdays or restricted duty affecting two persons and the result of high negligence. In addition, it is alleged to be an unwarrantable failure to comply. The Secretary has proposed a special assessment in the amount of \$30,200.

The mandatory standard provides in relevant part “coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings.” 30 C.F.R. §75.400.

Highland concedes the violation but contests the S&S and the unwarrantable failure designations.

Significant and Substantial (S&S)

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC

822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also*, *Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec’y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

Accumulations/fire and ignitions

When evaluating whether violations charging accumulations are S&S, the Commission has stated:

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

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

As Winders explained, float coal dust propagates an explosion when in suspension. Heat sources in a belt entry are created by stuck rollers and misalignment of the belt. Tr. 48-49. Winders testified that he designated this violation as S&S because it was reasonably likely for an injury to occur if there was an explosion. He felt there was a “possibility” of an explosion. Tr. 50.

Examining the reasonable likelihood (rather than the “possibility”) of an explosion based upon the *Enlow Fork* factors, I make the following findings.

Extensiveness - Winders and Carlisle both testified that the float coal dust extended for approximately 3300 feet. It was described by Winders as paper thin but deep enough to leave a ripple when crossed with a golf cart. Tr. 39, 41. However, at a prior deposition, there was no mention of rippling or leaving tracks by Winders when asked to describe the depth of the material. Tr. 56. Carlisle described the area consisting of float coal dust on top of rock dust which became airborne when driven through with the golf cart. Tr. 15. Although Carlisle felt it was extensive, he felt the condition was mostly just in need of rock dusting rather than shoveling to clean. Tr. 14, 26. While Winders testified that there was little to no rock dust present, he did acknowledge that the belt book indicated that rock dusting was to continue which he interpreted as meaning rock dusting was being done. Tr. 59-60. Both of the Secretary’s witnesses stated that there was an individual shoveling the belt entry near the header. Tr. 26, 57. Winders recalled, additionally, that the belt examiner was making his rounds on the day of the inspection but had not yet made it to the inby section where the inspectors were located. Tr. 57.

Neither inspector found the coal dust to be so extensive as to warrant shutting down the belt or exiting the golf cart and walking the entry to avoid an ignition. Tr. 29, 67-68. After authorizing five hours for cleanup, Winders did not check for compliance until two days later. Tr. 68.

Travis Little, Highland’s safety manager, testified that he was present during the inspection and noted that the accumulations cited varied in color with some turning darker gray meaning rock dusting may be needed soon. Tr. 109-111. He also confirmed that Highland has a rock dusting schedule. With this belt entry having been dusted on January 5th, the next rock dusting evolution would take place on the night of the inspection or the following night. Tr. 115. Little further stated that different examiners and inspectors could have a difference of opinion as to what conditions warranted dusting and which did not. Tr. 107. In fact, Winders conceded this point and confirmed an incident one week prior to this inspection where a Highland belt examiner had noted an area that needed rock dusting. When Winders inspected it, he felt it did not. Tr. 108-109.

I find that while the accumulation of float coal dust was lengthy in dimension, it was not extensive in depth nor did it pose a reasonably serious degree of danger.

Ignition Sources- By all accounts there were none. Carlisle testified that rollers and bearings can go out at any time but acknowledged that he found no stuck or frozen rollers, no misalignment of the belt or other ignition sources except for the possibility of the golf cart which he didn’t find necessary to abandon. T. 28-29. Both Carlisle and Winders testified that the danger posed by float coal dust is that it propagates an explosion. Tr. 18, 48-50. Winders

clarified that float coal dust does not pose a danger during normal mining operations if the belt is running correctly. Tr. 73-74. Winders also confirmed that he didn't find any stuck rollers or hot spots from a misaligned belt. In fact, because he found an ignition was not reasonably likely to occur, he did not feel it was necessary to shut down the belt or exit the golf cart. Tr. 67-68.

The Secretary countered the evidence of a lack of an ignition source by introducing evidence that rollers had been changed along the 4C belt as documented in Ex. S-3. Tr. 49. A review of that exhibit, however, makes note of a top roller at crosscut #3 but does not indicate that it was stuck or replaced. There are no notations for rollers being replaced in the cited area along the 4C belt entry from January 5 through the date of the inspection.

The fact that stuck rollers may occur or a belt may become misaligned is insufficient to find an ignition was reasonably likely to occur. In *Rockhouse Energy Mining Company* Judge Barbour aptly stated that if the fact that potential ignition sources might occur at some point in the future were enough to establish an S&S violation, then every accumulations violation would be S&S which is not contemplated by the Act. *Rockhouse Energy*, 31 FMSHRC 622 (June 2009).

Methane – The Secretary poses, based upon the testimony from another hearing involving Highland, that this mine was on a 10-day spot inspection for methane liberation as evidence of the presence of methane. However, Winders testified (as did the inspector in the other hearing) that he was not concerned with methane because he had never found levels of methane in excess of permissible levels in the belt entries. Tr. 78.

Equipment – There is no evidence of equipment in the belt entry except for the belt itself and the golf cart. Neither Winders nor Carlisle felt the cart posed a real threat of sparking an ignition necessitating their walking the entry instead of riding.

My conclusion, based upon the above, is that this violation is not S&S.

Unwarrantable Failure/Negligence

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

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,

194 (Feb. 1991) (“R&P”); [see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docket*, No. 01-1228 (4th Cir. Feb. 21, 2001) (“*Consol*”); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Lopke Quarries at 711.

Winders considered this violation to be a result of high negligence and an unwarrantable failure because of the length of time it had existed, the actions taken by Highland to abate the condition, their knowledge of the condition and that they had been put on prior notice regarding this type of condition. Tr. 53.

Length of time the condition existed – Carlisle and Winders testified that union representative Dyer, who was also a belt examiner, had noted in the belt examination book that the 4C belt entry was in need of cleaning for several days but the condition had not been abated. Tr. 16. Dyer apparently went on to say that because of the lack of attention, he started writing up one section on one day and another section on another day in the hopes that Highland would pay more attention to it. Tr. 16, 26, 69-70. When Winders was asked on cross-examination whether Dyer admitted to falsifying the examination book by omitting areas he believed were in need of cleaning, Winders’ response was that Dyer admitted that he broke it up into smaller units. Tr. 69. Winders was asked if he thought it was possible that Dyer felt the ten crosscuts that he omitted from the book were not in need of rock dusting, He stated it was possible, however, the belt examiner before and after Dyer included the entire area in the book as needing dusting. Tr. 70. When asked whether falsifying an examination book was a prosecutable offense, Winders

responded in the affirmative. Tr. 71. I find, based upon this exchange, Dyer's statements to the inspectors lacks credibility.⁵

The uncontested evidence of record indicates that the belt entry had been rock dusted six days prior to the inspection. Tr. 57. Little testified that based upon Highland's dusting schedule, it would be dusted again either the night of the inspection or the following night. Carlisle testified that he could see rock dust below the float coal dust. Tr. 14. Winders testified that he saw a notation in the belt examination book that said to continue to rock dust which he interpreted to mean they had been doing so. Tr. 57. The examination book for the 4C entry has several notations for need of cleaning at the header, tail and last pull as well as areas at certain crosscuts between January 5 and January 9. The corrections pages also indicate cleaning being performed repeatedly at the header, low framing, tail and other areas. Ex. S-3. The entries in the examination book do not necessarily indicate that the conditions noted were hazardous or left uncorrected.

When asked directly how long the condition had existed, Winders response was the he believed it had been for more than one shift. Tr. 42. As a normal by-product of mining, it is not unusual for accumulations to be present. One shift is not a particularly long period of time for a non-hazardous condition to exist. I note, additionally, that the belt walker and the miner cleaning the belt had not yet made it to the cited area on the day of the inspection.

Extent of the Violative Condition – as stated above in more detail, while the accumulation of float coal dust was lengthy, it was not extensive in depth nor did it pose a reasonably serious degree of danger.

Obviousness or high degree of danger – the accumulations may have been obvious but what is not is whether it was in need of immediate attention or routine rock dusting. Winders admitted there may be a legitimate difference of opinion (and not necessarily the operator's as opposed to the inspector's) as to when an area is in need of rock dusting. The accumulations were paper thin and not consistent in dryness. Neither Carlisle nor Winders felt it necessary to halt production during the five hours given for abatement or abandon the golf cart during the inspection. It did not pose a high degree of danger due to the lack of ignition sources, according to Winders.

The operator's knowledge of its existence – Highland was certainly aware that belt examiners had placed entries in the examination book of areas they felt were in need of attention.

⁵ I further find that Dyer's admissions constitute a serious offense and I question the Secretary's offering this testimony. It further taints the credibility of the inspector that he accepted the fact that a miner admitted to falsifying the examination book without taking appropriate action.

However, as stated above, the books also indicated that dusting was being done and there was no indication that the condition was a hazard in need of more immediate action than the scheduled dusting.

Notice of need for greater compliance - Winders testified that he had place Highland on notice that greater compliance was required of them for accumulations. He stated that on December 23, 2009, he met with mine management regarding this issue. Tr. 33-34. However, on cross-examination, he confirmed that when asked for his reasons for designating this violation as unwarrantable, he never mentioned this meeting. He also could not produce any notes or records to substantiate what was discussed. Tr. 55-56. He went further to clarify that his discussion with Highland, conducted at the behest of Peabody, not MSHA, was concerning accidents and violations in general and the need to reduce combustible materials accumulations. Tr. 34.

Accumulations violations run a very broad gamut and include many types of combustible materials such as oil, coal fines, trash and other fluids and solids. The claim that Winders held a general discussion regarding accumulations with Highland is insufficient evidence that Highland was placed on notice of the need for greater compliance with float coal dust accumulations along the belt entry for unwarrantable failure purposes here.

In sum, I do not find that the length of time, the extent or obviousness of the condition, or the degree of danger posed by the cited condition rises to the level of aggravating circumstances evidencing more than ordinary negligence.

The violation is reasonably serious but I do find Highland was engaged in rock dusting and had a schedule in place for dusting for non-hazardous accumulations. Their use of two person dusting machines as well as sling dusters and hand dusting with shovels is sufficient evidence of mitigation to reduce the level of negligence to moderate.

III. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo, including proposed special assessments, for violations of the Mine Act are well established. Section 110(i) of the Act delegates to the Commission and its judges the authority to assess all civil penalties provided in the Act. 30 U.S.C. §820(i). The Act requires that in assessing civil monetary penalties, the Commission or 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).

The parties have stipulated that the mine is a large mine and that the proposed penalties would not affect the operator's ability to continue in business. There is no dispute that the conditions were abated in good faith or that the mine has a significant history of violations. The findings with regard to the gravity and negligence involved are discussed at length above. The appropriate penalty is \$1200.00.

IV. ORDER

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(i), I modify the citation to non-S&S and not an unwarrantable failure. I reduce the negligence to moderate and assess a penalty of \$1200.00. Highland is **ORDERED** to pay the Secretary of Labor the sum of \$1200.00 within 30 days of the date of this decision.⁶

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

⁶ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 6, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2011-1710
Petitioner,	:	A.C. No. 46-08646-252437
	:	
v.	:	
	:	
ROCK N ROLL COAL COMPANY,	:	
INC.,	:	Mine: Mine No. 3
Respondent.	:	

DECISION

Appearances: Jeffrey M. Leake, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, Colorado 80202 for the Secretary

Jim Bowman , Litigation Representative, Rock N Roll Coal Company, Post Office Box 99, Midway, West Virginia 25878 for Respondent

Before: Judge Steele

STATEMENT OF THE CASE

This civil penalty proceeding is conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). This matter concerns Citation Nos. 8128602, 8128616, 8128630, and 8128631. These four citations were issued under Section 104(a) of the Act and served on Rock N Roll Coal Company, Inc. (“Respondent”) for failure to adequately rock dust. This matter also concerns Citation No. 8128603. This citation was issued under Section 104(a) of the Act and served on Respondent for failure to maintain permissible equipment. The Secretary seeks civil penalties in the amount of \$18,548.00. A hearing was held in Charleston, WV on August 23, 2012 where the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs.

JURISDICTION

Respondent’s activities in mining coal at the No. 3 Mine subject it to the jurisdiction of the Act as a “coal or other mine” as defined by section 3(h) of the Act, 30 U.S.C. § 802(h). Further, Respondent meets the definition of an “operator” as defined by section 3(d) of the Act,

30 U.S.C. § 802(d). Hence, this proceeding is subject to the jurisdiction of the Federal Mine Health and Safety Review Commission and its Administrative Law Judge (ALJ) pursuant to sections 105 and 113 of the Act, 30 U.S.C. §§ 805, 813.

LAWS AND REGULATIONS

All five citations in this matter were issued under Section 104(a) of the Federal Mine Safety & Health Act of 1977. That provision provides the following:

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

30 U.S.C. § 814(a).

Citation Nos. 8128602, 8128616, 8128630, and 8128631 deal with alleged violations of 30 C.F.R. § 75.403 (titled “Maintenance of incombustible content of rock dust.”). That section provides the following:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane.

30 C.F.R. § 75.403.

Citation No. 8128603 deals with an alleged violation of 30 C.F.R. § 75.503 (titled “Permissible electric face equipment; maintenance.”) That section provides the following:

The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.

30 C.F.R. § 75.503. In this case, the equipment alleged to be improperly maintained was a continuous miner. The relevant section requiring permissibility for a continuous miner is 30 C.F.R. § 75.500(c) (titled “Permissible electric equipment.”). That section provides the following:

All electric face equipment which is taken into or used in by the last open crosscut of any coal mine classified under any provision of law as gassy prior to March 30, 1970, shall be permissible...

30 C.F.R. § 75.500(c).

VIOLATIONS

1. Rock Dust Violations

A. Citation No. 8128602

On February 16, 2011 at 3:00 p.m. Inspector Tracy Calloway (“Calloway”) issued Respondent Citation No. 8128602. Calloway found:

Based on the lab analysis 898630 to 898630, the rock dust survey conducted on 01/07/2011 on the 001-0 MMU indicates 100 percent of the sample collected was non-compliant with the standard for incombustible content of the combined coal dust, rock dust, and other dust. The operator has been given a copy of the survey results.

GX. 2. Calloway noted that the risk of injury or illness for this violation was “Unlikely,” “Fatal,” “Not S&S” and would affect 14 persons. He further marked that Respondent exhibited “High” negligence with respect to this violation. Respondent took action to terminate the condition on February 23, 2011 at 6:00 a.m. Under “Subsequent Action” on March 1, 2011 at 8:00 a.m., Calloway noted:

Rock dust samples could not be collected due to mechanical problem of main mine fan. An extension is being issued so as to allow the operator to make repairs.

Id. The extension was issued until March 2, 2011. A further “Subsequent Action” was conducted on March 8, 2011 at 11:15 a.m. There, Calloway noted:

Abatement rock dust samples have been collected on the 001-0 MMU. An extension has been issued pending results of lab analysis.

Id. The extension was issued until March, 15, 2011.

On March 12, 2011 at 7:00 a.m. Calloway issued Respondent Order No. 8128646 for failure to abate Citation No. 8128602. This 104(b) Order is not a part of this proceeding. However, it was discussed at hearing, included in the exhibits, and contains pertinent information with respect to abatement of the underlying Citation. As a result, it will be discussed here. In the order, Calloway found:

Based on the lab analysis 910209 to 910210, the operator failed to abate the violation (citation #8128602) when an abatement rock dust survey was conducted

inby the section loading point of the 001-0 MMU. The results indicate 50 percent of the samples collected to be non-compliant with the standard for incombustible content of the combined coal dust, rock dust and other dust. The operator has been given a copy of the survey results. The operator has been informed all production on the 001-1 MMU working section is suspended until a complaint survey has been collected.

GX. 11. The “Area or Equipment” section of the order states, “001-0 MMU working section, (production only).” Id.

B. Citation No. 8128616

On March 1, 2011 at 5:00 a.m. Calloway issued Respondent Citation No. 8128616. Calloway found:

Based on the lab analysis 899766, the rock dust survey conducted on 1/18/2011 on the 001-0 MMU indicates 54.55 percent of the samples collected were non-compliant with the standard for incombustible content of the combined coal dust, rock dust and other dust. The operator has been given a copy of the survey results.

GX. 5. Calloway noted that the risk of injury or illness for this violation was “Unlikely,” “Fatal,” “Not S&S” and would affect 14 persons. He further marked that Respondent exhibited “High” negligence with respect to this violation. Respondent took action to terminate the condition on March 8, 2011 at 6:00 a.m. Under “Subsequent Action” on March 8, 2011 at 11:20 a.m., Calloway noted:

Abatement rock dust samples have been collected on the 4 Right Panel (001-0 MMU). An extension has been issued pending results of lab analysis.

Id. The extension was issued until March 15, 2011. A further “Subsequent Action” was conducted on March 23, 2011. There, Calloway noted:

Based on the lab analysis 910211 to 910255, the abatement rock dust survey conducted on the 001-0 MMU (4-right Panel) indicates 100 percent of the samples collected are now compliant with the standard for incombustible content of the combined coal dust, rock dust and other dust. The operator has been given a copy of the survey results.

Id. Termination was issued at 7:05 a.m.

C. Citation No. 8128630

On March 8, 2011 at 6:00 a.m. Calloway issued Respondent Citation No. 8128630. Calloway found:

Based on the lab analysis 905378 to 905381, the Outby Air Course Compliance

rock dust survey conducted on 2/17/2011 in the four air courses of the 001-0 MMU indicates 25 percent of the samples collected were non-compliant with the standard for incombustible content of the combined coal dust, rock dust and other dust. The operator has been given a copy of the survey results.

GX. 8. Calloway noted that the risk of injury or illness for this violation was “Unlikely,” “Fatal,” “Not S&S” and would affect 14 persons. He further marked that Respondent exhibited “Moderate” negligence with respect to this violation. Respondent took action to terminate the condition on March 12, 2011 at 6:00 a.m. Under “Subsequent Action” on March 23, 2011 at 10:05 a.m., Calloway noted:

Abatement rock dust survey has been collected in the intake air course of the 001-1 MMU. An extension has been issued pending results of lab analysis.

Id. The extension was issued until April 7, 2011. A further “Subsequent Action” was conducted on April 4, 2011. There, Calloway noted:

Based on the lab analysis 914409 to 914409, the abatement rock dust survey conducted on 3/23/2011 on the main intake (outby air course compliance survey), indicates 100 percent of the samples collected are now compliant with the standard for incombustible content of the combined coal dust, rock dust and other dust. The operator has been given a copy of the survey results.

Id. Termination was issued at 8:31 a.m.

D. Citation No. 8128631

On March 8, 2011 at 6:10 a.m. Calloway issued Respondent Citation No. 8128631. Calloway found:

Based on the lab analysis 904746 to 904751, the rock dust survey conducted on 2/15/2011 in the Left Return air course, (2 Right/3Right Panels) of the 001-0 MMU indicates 33.33 percent of the samples collected were non-compliant with the standard for incombustible content of the combined coal dust, rock dust and other dust. The operator has been given a copy of the survey results.

GX. 10. Calloway noted that the risk of injury or illness for this violation was “Unlikely,” “Fatal,” “Not S&S” and would affect 14 persons. He further marked that Respondent exhibited “Moderate” negligence with respect to this violation. Respondent took action to terminate the condition on March 12, 2011 at 6:00 a.m. Under “Subsequent Action” on March 23, 2011 at 10:10 a.m., Calloway noted:

An abatement rock dust survey has been collected on the 2 Right Panel. An extension has been issued pending results of lab analysis.

Id. The extension was issued until April 7, 2011. A further “Subsequent Action” was conducted on April 4, 2011. There, Calloway noted:

Based on the lab analysis 914410 to 914411, the abatement rock dust survey conducted on 3/23/2011 of the 2 Right Panel (left return), indicates 100 percent of the samples collected are now compliant with the standard for incombustible content of the combined coal dust, rock dust and other dust. The operator has been given a copy of the survey results.

Id. Termination was issued at 8:24 a.m.

2. Permissibility Violation

A. Citation No. 8128603

On February 17, 2011 at 8:00 a.m. Calloway issued Respondent Citation No. 8128603. Calloway found:

The #1 continuous mining machine (serial #9499) being operated on the 001-0 MMU is not being maintained in permissible condition. An opening in excess of 0.005” was observed across the plane flange joint of the off-side panel of the machine.

GX. 4. Calloway noted that the risk of injury or illness for this violation was “Unlikely,” “Fatal,” “Not S&S” and would affect 14 persons. He further marked that Respondent exhibited “Moderate” negligence with respect to this violation. Respondent took action to terminate the condition on February 17, 2011 at 8:30 a.m. The “Action to Terminate” states “the panel was sealed to permissible condition.” Id.

STIPULATIONS

The parties have stipulated to the following:

1. This docket involves an underground coal mine, Mine No. 3; owned and operated by Respondent.
2. The mine, MSHA ID No. 46-08646, is subject to the jurisdiction of the Federal Mine and Health Act of 1977 (“the Mine Act”).
3. The Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.
4. Respondent is an “operator” as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mine at which the Citations at issue in this proceeding were issued.

5. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.
6. Respondent is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
7. Inspector Tracy Calloway is an authorized representative of the United States Secretary of Labor assigned to the MSHA District 12, Pineville, West Virginia Office, and was acting in an official capacity when the Citations were issued.
8. The proposed penalties will not affect Respondent's ability to remain in business.
9. The certified copy of the MSHA Assessed Violations History reflects the history of the mine for fifteen months prior to the date of the Citations and may be admitted into evidence without objection by Respondent.

PARTIES' EXHIBITS

The Secretary's Exhibits are as follows:

GX 1: Certified Violation History

GX 2: Citation No. 8128602

GX 3: Rock Dust Analysis for Citation No. 8128602

GX 4: Citation No. 8128603

GX 5: Citation No. 8128616

GX 6: Rock Dust Analysis for Citation No. 8128616

GX 7: Citation No. 8128630

GX 8: Rock Dust Analysis for Citation No. 8128630

GX 9: Citation No. 8128631

GX 10: Rock Dust Analysis for Citation No. 8128631

GX 11: 104(b) Order No. 8128646

GX 12: Rock Dust Analysis for 104(b) Order No. 8128646

GX 13: Photo of Rock Dust Samples with Various Incombustible Contents

GX 14: MSHA Fatalgram 4-5-2010 Upper Big Branch

GX 15: MSHA Executive Summary – Upper Big Branch Accident Investigation

GX 16: MSHA Fatalgram 2-2-2006 Sago Mine

GX 17: MSHA Fatalgram 5-20-2006 Darby Mine

GX 18: MSHA Talking Points – Preventing Fire and Explosions

GX 19: MSHA Flyer – Rock Dusting Awareness

GX 20: MSHA Best Practices When Rock Dusting

GX 21: NIOSH Float Coal Dust Explosion Hazards

GX 22: MSHA Coal Dust Explosion Hazards

GX 23: MSHA Arc Flash Hazard Alert

GX 24: MSHA General Coal Mine Inspection Procedures

GX 25: Inspector Tracy Calloway's Inspection Notes

GX 26: Mine Map

Respondent's Exhibits are as follows:

RX 1: Citation No. 8128602

RX 2: Mine Map Related to Citation No. 8128602

RX 3: Rock Dust Survey for Citation No. 8128602

RX 4: 104(b) Order No. 8128646 for Citation No. 8128602

RX 5: Rock Dust Survey for 104(b) Order No. 8128646

RX 6: Citation No. 8128603

RX 7: Citation No. 8128616

RX 8: Rock Dust Survey for Citation No. 8128616

RX 9: Mine Map Related to Citation No. 8128616

RX 10: Citation No. 8128630

RX 11: Rock Dust Survey Conducted Prior to Re-Sampling in Citation No. 8128630

RX 12: Rock Dust Survey for Citation No. 8128630

RX 13: Mine Map Related to Citation No. 8128630

RX 14: Citation No. 8128631

RX 15: Rock Dust Survey for Citation No. 8128631

RX 16: Inspection Notes

RX 17: MSHA Air Analysis

RX 18: Violation History

SUMMARY OF THE TESTIMONY

1. Testimony of Inspector Tracey Calloway

A. Background

i. Inspector Calloway's Qualifications

Tracey Calloway works for the Mine Safety and Health Administration (“MSHA”) office in Pineville, West Virginia and is the District Electrical Specialist and a Coal Mine Inspector. Tr. 13. He is an Authorized Representative of the Secretary of Labor. Tr. 13, 14. Including his time as an inspector, he has approximately 11 years of mining experience. Tr. 18.

Calloway graduated from high school in 1989. Tr. 14. Starting in 2001, he worked for Elk Run Coal Company, a subsidiary of Massey Energy, in Whitesville, West Virginia. Tr. 14. He started in the mine as a surface tech and eventually entered the electrical apprentice program. Tr. 14. There, he worked with senior electricians and observed their work habits and ethics. Tr. 15. He attended two night classes a week for six months, for a total of approximately 400 hours of training. Tr. 15. Eventually he was certified as an electrician. Tr. 14. He worked at Elk Run until 2007, and then took a job as a coal mine inspector at MSHA. Tr. 15. He did not have supervisory duties at Elk Run and he is not a certified foreman. Tr. 91.

When Calloway applied at MSHA he took, and passed, a math test and a writing aptitude test. Tr. 16. After being hired, he was sent to the National Mine Academy in Beaver, West Virginia and attended six one-month-long modules consisting of four different subjects each. Tr. 16. The modules were staggered; he would go to class for a month, then commence field work for between one and three months, and then return to the classroom. Tr. 16, 17. Field work included observing other inspectors and traveling to mines. Tr. 17. In August 2008, between his fourth and fifth module, he became an Authorized Representative of the Secretary. Tr. 17.

As it relates to these citations, Calloway's training included instruction on coal dust and electrical equipment permissibility. Tr. 17, 18. He learned the history of mining explosions, the effects of coal dust ignition, the use of rock dust to render coal dust inert, and he examined samples of rock dust to determine the color and appearance of compliant and non-compliant accumulations. Tr. 17, 18. He also learned how to collect his own dust samples. Tr. 18.

ii. Calloway's Knowledge of Respondent

According to Calloway, No. 3 Mine is located near Hanover, West Virginia and is an underground bituminous mine. Tr. 20. There are around 12 to 14 employees. Tr. 20. Miners extract coal using a continuous miner and transport it from the face using scoops. Tr. 20. Miners travel the 3,000 to 4,000 feet from the portal to the section via rubber tired mantrips. Tr. 21. The entries in the mine are around 42 inches high and about 18 to 20 feet wide. Tr. 21. The mine is ventilated with a blowing fan. Tr. 21, 22. Calloway inspected No. 3 Mine two or three times. Tr. 19. At No.3 mine, an E01 inspection would take seven to 10 days and a spot inspection would take one to two days. Tr. 19.¹

iii. Calloway's Knowledge of Rock Dusting

Calloway testified that rock dust is crushed rock, sometimes limestone. Tr. 28, 29. It is applied by hand; miners throw rock dust from a bag or use a shovel. Tr. 29. However, it can be spread by machine using an auger. Tr. 29. Rock dust is used to prevent explosions. Tr. 29. In order to have an explosion, there must be an ignition source, oxygen and fuel. Tr. 30. Coal dust is a fuel source and must be covered. Tr. 30. Rock dust covers the coal dust and renders it incombustible. Tr. 29, 30. Rock dust is required in all areas, not just on the floor. Tr. 29.

GX 19 is an educational flyer published by MSHA regarding rock dust awareness. Tr. 42. That document states "Studies have shown that initially, for a float coal dust explosion, only the top 3/32 to 5/32 inches of floor dust layer is stripped off or entrained in the area," and further, "[s]tudies also show that a layer of pulverized float coal dust as little as 0.005 of an inch thick, about the thickness of a sheet of paper, deposited on top of rock dust surface can propagate an explosion." Tr. 42. The cover page of Exhibit 19 contains a picture of a demonstration in a controlled area showing the explosive nature of a coal dust explosion. Tr. 44, 45.

Rock dust must be continuously maintained, or there will be dangerous coal dust sitting on top of rock dust. Tr. 45, 46. For example, GX 21 is a report from the NIOSH about float coal dust explosion hazards. Tr. 45. A picture on that report shows a coal pillar that has been rock dusted and the caption reads, "Cross-section – cross-section of a very thin 0.01 inch explosible float coal dust layer deposited on top of 3/4 inch thick layer of rock dust." Tr. 45.

¹ An E01 inspection is a complete inspection of a coal mine including underground areas, surface areas, and all equipment used in the mining process. Tr. 23.

iv. Calloway's Knowledge of Rock Dust Sampling

Calloway stated that MSHA's lab deals with two kinds of tests to determine whether a mine is adequately rock dusted, spot analyses and survey analyses. Tr. 155. A survey sample occurs on an active panel during an EO1 investigation. Tr. 64. A spot sample is taken at the discretion of the inspector, not necessarily on the active panel. Tr. 64. GX 24 is the MSHA procedure manual for inspections. Tr. 155, 156. Page 8 of 13 states, "[i]t is the responsibility of the Mount Hope laboratory supervision to ensure that rock dust spot and survey analysis reports and accompanying analysis data are promptly made available for use by the districts. The rock dust retrieval application permits monitoring of prompt issuance of citations or orders for non-compliant samples or surveys, tracking wet survey location re-inspections, mining analysis data, and printing of oversight reports." Tr. 155. Taking a spot sample is normal, authorized protocol and issuing a citation is something that occurs after a sample is sent to the lab. Tr. 49, 156. According to GX 24, after a sample is tested, "[t]he responsible supervisor shall assure that all rock dust spot or survey analysis reports returned from the Mount Hope lab by e-mail attachment to the district are included within the appropriate inspection report. The citation or order shall be promptly issued for non-compliant rock dust samples or surveys," Tr. 156, 157.

v. Calloway's Knowledge of Methane

According to Calloway, the different explosive combinations in the coal mine include "Explosion of methane alone; explosion of coal dust alone; coal dust explosion started by methane ignition; methane explosion started by coal dust ignition (unlikely but possible); explosion of other flammable gasses alone," meaning acetylene or hydrogen, and "coal dust explosion started by ignition of flammable gases." Tr. 41. The most likely danger to occur at No. 3 Mine was coal dust explosion started by methane ignition. Tr. 42, 41.

Calloway witnessed a demonstration at the Mine Academy that showed the effects of coal dust on a methane explosion. Tr. 43. In that demonstration, a device that looked like a large barbecue smoker was filled with methane and ignited. Tr. 43. There was an explosion and noise. Tr. 44. Then coal dust was placed in the device, to show how that would affect the force of the explosion. Tr. 43, 44. That explosion was much louder. Tr. 44. Part of the sequence of events that occurs when there is a methane ignition is that coal dust is lifted into suspension from the floor and then kicked out through the explosion. Tr. 162. GX 19 contains a picture of a methane explosion that shows a black area at the front end of the fireball. Tr. 164. The black portion is coal dust. Tr. 165. That rock dust in the front would go right over rock dusted areas as it was carried along with the explosion. Tr. 165. However, Calloway is not sure about how deep the mine was for the picture taken at the demonstration. Tr. 97.

With respect to this mine, over the last two years there have been more than 50 air samples taken, perhaps as many as 57 samples. Tr. 167. Some of those samples showed the presence of methane, perhaps as many as 10. Tr. 167, 168.

vi. Calloway's Understanding of Respondent's Views on Rock Dusting

Prior to the issuance of any citations, Calloway discussed rock dusting with the mine foreman, Danny Justice and he testified as to the nature of that conversation. Tr. 30, 32. On the

day the sample was collected, it was obvious that the rock dusting was inadequate so he told the mine foreman that they needed to rock dust better. Tr. 30, 31. He could tell the area was improperly rock dusted simply by looking at the mine. Tr. 31. The area was uniformly dark gray or black in color. Tr. 31. Justice argued that, because of the low height of the mine and the fact that they moved coal with a scoop, proper rock dusting was not possible. Tr. 31, 32. If they held the scoop up during transport it would scrape the roof and fall out, but if they held the scoop low it would scrape the floor and lift up the rock dust. Tr. 31, 32. Justice made similar statements to the assistant district manager, Luther Marrs, and a field supervisor, Jules Gautier at an earlier date. Tr. 32. This conversation had occurred when the two traveled to No. 3 Mine to discuss the adequacy of rock dusting. Tr. 33. Gautier instructed Justice not to overfill the scoop basket. Tr. 34. On cross examination, Calloway admitted that he does not know why Marrs went to No.3 Mine or if he went to every coal mine. Tr. 93. He does not know if the MSHA officials went because the mine had a specific problem with rock dusting. Tr. 92, 93.

In addition to these statements, the mine has some history of rock dust violations. RX 18 is the two-year history of citations at this mine. Tr. 150. There were 8 citations in the two years before these citations issued under 75.403. Tr. 150. In those two years, there would only have been 16 normal samples taken, eight spots and eight surveys. Tr. 168. On cross examination, Calloway discussed changes in how these citations were treated before and after UBB. Before UBB, Respondent was issued Citation 8093011; a citation identical to the one at issue here. Tr. 150, 151. The penalty for the citation was \$634.00. Tr. 151. All the other citations of this kind range from \$100.00 to \$807.00. Tr. 151. After UBB, the next citation is S&S and \$13,609. Tr. 151. Calloway is unsure of the reason for the increase because inspectors do not assess penalties. Tr. 151. He does not know for certain if other mines are being forced to pay for Massey's sins at UBB. Tr. 151.

vii. Calloway's Knowledge of UBB, Sago, Darby, and the History of Disasters

Calloway also testified that there is a history of fatalities at underground coal mines caused by coal dust or inadequate rock dust. Tr. 34. For example, at UBB, there was an ignition of methane along the long wall face that was significant enough to suspend coal dust in the atmosphere, which in turn was ignited and exploded and continued to throw up more coal leading to further explosions. Tr. 37. Investigator determined that the rock dusting at UBB was insufficient. Tr. 38. GX 14 is a fatalgram is related to Performance Coal Company's Upper Big Branch Mine disaster where an explosion killed 29 miners. Tr. 35.² It states, "adequate rock dust, apply rock dust liberally even in wet areas, in all face and outby areas. Maintain the applications to prevent the propagation of coal dust explosions." Tr. 35. GX 15 is an executive summary report of the UBB disaster. On page 4, the section is titled "Specific Accident Investigation Conclusion, Performance Coal Company and/or Massey's Management Practices that Led to the Explosion." Tr. 36. On page 6, the section is titled, "Specific Accident Investigation Conclusions, Principal Causes of the Explosion." Tr. 36. That section states, "Performance Coal Company, Massey, allowed coal to accumulate throughout the Upper Big Branch Mine providing a fuel source for a massive explosion." Tr. 37. It also states,

² A fatalgram is a preliminary report that describes what happened in a mine accident and educates the mining community on potential dangers and hazards. Tr. 34, 35.

“Performance Coal Company, Massey, failed to rock dust the mine adequately to prevent a coal dust explosion and its propagation through the mine.” Tr. 37.

On cross examination, Calloway admitted that the only similarity between UBB and No. 3 Mine is that they are both coal mines. Tr. 93. UBB liberated more than 1,000,000,000 cubic feet of methane in 24 hours. Tr. 93, 94. No. 3 Mine does not compare to this level of methane liberation. Tr. 94. UBB had a longwall but No. 3 Mine does not. Tr. 95. However, both UBB and No. 3 Mine have a gob, with No. 3 Mine having some pillared areas, noted by Calloway to be about two inches from the deepest point of development outby on the map. Tr. 95, 96. He was uncertain about whether UBB had experienced any previous explosions or face ignitions before the explosion that killed 29 miners. Tr. 93. He is unsure if his evaluation of rock dust violations changed after UBB. Tr. 95. However, Calloway stated that the UBB disaster did not change the way he inspects mines, other than the fact that new dust standards were in place. Tr. 94.

Calloway also discussed other fatalgrams. GX 16 is a fatalgram from the Sago Mine. Tr. 38. At Sago mine an explosion occurred that resulted in the death of 12 miners. GX 16 states that the mining community should, “Apply rock dust liberally. Generous application of rock dust can prevent the propagation of coal dust explosions.” Tr. 38. On cross examination, Calloway admitted that Mine No. 3 has a refuge chamber. Tr. 97. He also allowed that if the miners at Sago had a refuge chamber, they would likely have survived. Tr. 96, 97.

GX 17 is a fatalgram from the Darby Mine in Kentucky. Tr. 38. 39. At Darby, five miners were killed in an explosion. Tr. 39. Under the section entitled Stand Down for Safety, Preventing Fires and Explosions, it states, “During the winter months, cold air entering the mine dries out mine surfaces, increasing the risk of fires and explosions. Miners should know about the various explosive substances in coal mine and potentially explosive combinations of these substances.” Tr. 40. All four citations issued here were issued in the winter. Tr. 41.

Two people at UBB survived the explosion. Tr. 94. At Sago, only one of the 12 miners was killed in the initial blast. Tr. 96. The other miners who lost their lives were on the face. Tr. 96. One miner in that area survived. Tr. 96. Not all of the miners at Darby were killed. Tr. 97.

B. Citation No. 8128602

i. Facts Surrounding Citation No. 8128602 as Described by Calloway

Calloway testified to the facts and circumstances surrounding the issuance of Citation No. 8128602 on February 16, 2011. Tr. 23. He was in the mine for a regular EO1 inspection. Tr. 23. He tested the rock dust because he was required to take a representative sample in the working section of the mine. Tr. 24. The determination of when rock dust is necessary is covered by 30 C.F.R. §75.402. Tr. 25. He issued this citation because a rock dust sample collected earlier in the inspection was not compliant for the standard of 80% incombustible content. Tr. 23, 24. He took the sample and issued the citation on the same day. Tr. 28.

The citation was issued on the working section between the section loading point and the working face. Tr. 26. This is a section of the mine where rock dusting is required. Tr. 26. This

citation is based a one-inch deep, six-inch wide sample taken in the last open crosscut in the No. 8 entry, or at least in the last open crosscut portal. Tr. 26, 103.³ Calloway marked GX 26 (the current mine map) to show the general location where this violation occurred. Tr. 27, 28. On cross examination, Calloway discussed RX 2, a mine map from his deposition showing where the dust samples were taken. Tr. 109, 110. On the map, the red marks, made during the deposition, indicate where the sample was collected. Tr. 113.⁴ The reason there are two red marks is that he took samples either inby or outby and he is certain he took a band sample including the ribs. Tr. 113, 114. But only one sample was taken. Tr. 113, 114. This sample was taken in an area where scoops travel and spillage occurs. Tr. 108, 109, 114.

The only physical evidence of this violation is the single sample taken. Tr. 103, 104. In a deposition, Calloway stated that one sample in a section with 11 entries would not be conclusive proof that the other ten entire were not compliant. Tr. 105, 106. However, he believed that this was a representative sample, he made an examination of the working sections and they appeared to be similar to the area cited. Tr. 104, 130. The sample taken was a spot sample. Tr. 154. A spot sample is not taken by reaching down and grabbing just one spot on the floor for rock dust but instead by collecting dust from the floor, the ribs, and the roof. Tr. 113, 154. That sample is representative in color, but also in that it is taken from the entire perimeter of the entry. Tr. 154, 155. In order to take a sample, Calloway has a small dust pan and a five-inch paint brush the he will use to sweep the coal ribs, the mine ribs, and the mine floor. Tr. 47. Calloway does not believe this section was wet because if it were he could not collect a sample. Tr. 114, 115. At the least, the area was not wet where he sampled. Tr. 115.

Once he collected enough for a sample, he sifted it through a 20-mesh sieve and the results were tested. Tr. 47. Given the nature of the sieve, it was impossible to know whether coal dust or float coal dust was collected in the sample. Tr. 97.⁵ He would need a two part sieve, like those used at the lab, to determine that. Tr. 97. Ultimately, the samples showed float coal dust on top of rock dust. Tr. 98. However, there was no evidence of accumulation on the section. Tr. 98. If an area has not been rock dusted it can be cited for an accumulation of combustible material or for not applying rock dust, even if no sample is taken. Tr. 106, 107. A sample is only taken if rock dust is applied. Tr. 107. He does not recall if the section was cited for accumulations on January 7, 2011. Tr. 109.

³ Calloway was not sure where the working faces or loading point would be on the map, even in light of the location of the last open crosscut. Tr. 111, 112, 114. The miners could have advanced past the projected crosscut ten feet in each direction. Tr. 112. However, Calloway's notes should accurately reflect where the last open crosscut is in the No. 8 entry. Tr. 113. RX-3 is the rock dust survey. Tr. 114. It says, "zero point two crosscuts inby survey station 2301." Tr. 114. That is indisputable evidence that the sample was in the last open crosscut. Tr. 114.

⁴ However, Calloway is unsure exactly where the sample was taken because, according to the survey location, it was in the intersection. Tr. 113.

⁵ The difference between coal dust and float coal dust is the size of the particles; float coal dust is smaller than coal dust. Tr. 161. Float coal dust can be fine particles within normal coal dust. Tr. 161.

Calloway sent away the sample because he did not know the exact percentage of incombustible material. Tr. 108. If an inspector takes a sample and does not issue a violation at the same time, there is some doubt about incombustible content, because the inspector is waiting for the lab results. Tr. 107. He cannot do a lab analysis simply by looking at a rock dusted area, he cannot tell the incombustible content without testing. Tr. 104, 105, 130. Sometimes you can tell if an area is not compliant, but if it is close it must be analyzed. Tr. 108, 154. GX 13 contains different rock dust and coal dust samples, with different gradations from light to dark. Tr. 152. If an inspector looks at dust that is completely white then it is not coal dust. Tr. 152, 153. If an inspector looks at dust that is completely black it is not rock dust. Tr. 153. With that said, floors of mines are never white, they are gray to black. Tr. 104. Here, he saw a uniform appearance in the area that he believed to be noncompliant. Tr. 153, 154. Further, he knew that Justice did not believe rock dusting in the working areas was worthwhile. Tr. 153.

After a sample is taken, it is mailed to a lab in Mount Hope, West Virginia. Tr. 48. The lab takes the samples on a first come, first serve basis that can sometimes take a week or even a month. Tr. 48. The lab analyzes the sample to determine the combustible content of the sample. GX 3 is a rock dust sample submission form that contains the laboratory results for the samples taken for Citation 8128602. Tr. 47. According to the results, the sample was 25.5% incombustible. Tr. 48. This is noncompliant in light of the 80% requirement. Tr. 48, 49.

ii. Calloway's Opinion on the Gravity of Citation No. 8128602

For this citation, Calloway marked the gravity as unlikely to cause injury or illness. Tr. 49, 127, 128. This was because the mine had little history of liberating methane, as in some quarters methane is detected but in many quarters it is not. Tr. 49, 127. Even when there is methane, it is generally a small amount. Tr. 49, 50. However, if methane were present in the mine, sparks on the face caused by the miner cutting into the coal could cause ignition. Tr. 51, 53.⁶ There was no methane on the section during the inspection. Tr. 50. There are methane gas wells in the area of the mine, including three in close proximity to the citations at issue here. Tr. 50, 51. The active section of the mine was near a methane gas well. Tr. 99. The proximity to the methane wells also increases the probability of an explosion. Tr. 52, 99, 100. These factors would apply to all four accumulation citations. Tr. 52, 53.

The methane gas wells are shown on GX 26 as round targets and there are several active wells. Tr. 50, 51, 98. MSHA approves the maps every six months, before the coal is ever mined. Tr. 99. Any projections within 200 feet of a gas well would have to have a special permit. Tr. 99. The projections in the area cited do not come close to the gas wells. Tr. 100. Further, on the map a red dotted line is an outcrop line, a solid black line is a boundary line, and the black dotted line is likely a hundred foot. Tr. 98, 99. If that hundred foot line shows subsidence, then it might not be possible to mine in that area, depending on the mine plan. Tr. 99. On cross examination, Calloway admitted that one gas well in the center of the map is in a sealed area and all other wells appear to be on the hundred foot line. Tr. 100.

⁶ In addition to the sparks from the miner, electrical equipment near the face that was not in permissible condition could be a potential ignition sources as well. Tr. 53. Calloway also wrote a citation regarding the permissibility of the continuous miner. Tr. 53

According to Calloway, the injuries to be expected in the event of an explosion would be fatal injuries to all 14 people in the mine. Tr. 53, 54, 97, 129.⁷ Miners could be killed directly by an explosion of this kind. Tr. 55. It is likely that if an explosion occurred, miners near the face would be killed. Tr. 55. This is a low seam mine and the miners were operating in a low seam area. Tr. 55. If an explosion were to occur it would be in this small, boxed in location. Tr. 55, 56. In this environment, even a small amount of coal dust could lead to a violent type of explosion. Tr. 56. Note that while an explosion would be unlikely, the likely injury is supposed to be assessed assuming an accident, however unlikely, actually occurred. Tr. 129. Further, an explosion here was merely unlikely, not impossible. Tr. 51, 52, 129.

The danger here was heightened because Respondent was not training its miners for quarterly evacuation drills properly and it was not conducting explosions scenarios for the gas emission as required by the emergency response plan. Tr. 54, 101. Some miners were not participating in any drills at all. Tr. 54. In general, the mine was not prepared for a potential explosion disaster scenario. Tr. 54. The operation was cited for these lapses. Tr. 54. However, that finding of inadequate training was the subject of an earlier hearing and is being contested. Tr. 101.⁸ Also, the danger present here was far (3,000 to 4,000 feet) from the exit where the miners could go for safety. Tr. 56, 57. The distance and the lack of training would exacerbate the situation in the event of an explosion. Tr. 56. Additionally, it would be difficult for emergency personnel or mine searchers to access victims of an explosion at that location, especially in light of all the debris and confusion caused by an accident. Tr. 57. Only small vehicles could travel in the low coal to get to the area affected. Tr. 57, 58.

iii. Calloway's Opinion on the Negligence Exhibited in Citation No. 8128602

Calloway marked the negligence for Citation 8128602 as "High" because it occurred on a working section with daily production, the area was examined twice by a certified foreman, it was traveled daily, and the color made the lack of rock dust obvious. Tr. 59, 60. In making this determination, he also considered Justice's opinion on the importance of rock dusting. Tr. 60. In short, the operator knew it was required to rock dust and chose to ignore the requirement. Tr. 60.

In his deposition Inspector Calloway defined high negligence as 'the operator knew, but very little mitigating circumstances.' Tr. 123. Under that definition there could be mitigating circumstances and it could still be high negligence. Tr. 124. However, he has since revised his definition such that high negligence is exhibited when the operator knew or should have known of the violation and there were no mitigating circumstances. Tr. 123. Here, he does not believe

⁷ Calloway believed, based on the evacuation drill records that 14 miners were in the area. Tr. 58. Upon review, he learned that at least 14 miners were in the area, if not more. Tr. 58. Those miners included the mine foreman, an assistant or section foreman, possibly a foreman in training, a miner operator, a roof bolter operator, and probably five scoop operators. Tr. 59. Their might have also been utility men building ventilation control and belt men working the belt. Tr. 59. All of these workers would have been in the area cited. Tr. 59.

⁸ These citations were for inadequate escapeway drills, which are training, but not under the Part 48 training section. Tr. 101.

the fact that it is impossible to accurately determine the content of coal dust samples is not a mitigating factor. Tr. 124.

On cross examination, Calloway discussed the length of time the cited condition existed and whether it would have been present during the last examination. This mine only works one shift per day. Tr. 124. The miners arrive for the shift at about six o'clock then go underground and do maintenance on equipment, belts, gates, and anything else. Tr. 124. At seven o'clock, the rest of the crew goes underground to begin production. Tr. 124. The citation was issued at 3:00 p.m. Tr. 124, 125. During the shift, the mine foreman moves throughout the section and presumably passed the area where the sample was collected prior to the scoops entering the area. Tr. 125. In deposition, Calloway stated he could not tell whether the spillage occurred after management or pre-shift examiners traveled through the area because he did not know when the last examiner had gone there. Spillage can occur quite quickly. Tr. 126.

iv. Calloway's Opinion on the Abatement of Citation No. 8128602

According to his testimony, Calloway gave Respondent seven days to abate the violation. Tr. 115. After those seven days, he went back and took two samples from what he considered to be the active working area. Tr. 157. Following the testing of those samples he issued RX 4, (b) Order No. 8128646, for failure to abate. Tr. 115. The order was issued nearly two months after the initial citation. Tr. 121. It dealt with a working section and there was likely equipment in the area. Tr. 122. The samples showed that Respondent's working sections were not in compliance and that is why he issued a failure to abate. Tr. 122, 123. When an Inspector believes that a citation has not been abated, he takes the samples to the operator and explains the situation. Tr. 118, 119. The (b) order states that two samples were collected, Bag No. 210209 and Bag No. 910210. Tr. 115, 116. Whether those samples are accurate is based on where they were taken. Tr. 119. Looking at the map he marked and RX 5, Calloway is certain that the brown marks indicate the two locations he sampled to determine that Respondent failed to abate Citation 8128602. Tr. 116.

There was some confusion as to the exact location of these two samples. One of the samples is associated with a spad that falls outside of a working section, even though Calloway stated that all samples were taken on the working section. Tr. 157, 160. This confusion could have been caused by difficulty in reading spad number. Tr. 157. Spad markers are small, like the size of a silver dollar if round and half an inch if square. Tr. 157. They are often painted over by operators or mine foreman drawing a center line. Tr. 157. They can also be rubbed by mine equipment, making them hard to read. Tr. 157, 158. Calloway initially marked his sample near 2239, but that is not near the working section. The brown circle on RX 5 shows where these documents say the sample was taken. Tr. 119. That sample, in that location, could not be a sample that would mark a failure to abate. Tr. 120. However, Calloway noted that Spad Number 2329 is similar to 2239 and it is closer to the active working area. Tr. 116, 159, 160. Further, according to the report from MSHA, rock dust samples were collected on 3-8-2011 from 4-Left off of 4-Right. Tr. 116, 117.

The other sample was Bag No. 210, and it was taken by the brown check mark inby spad number 2301. Tr. 120. On cross examination, Calloway discussed the fact that the brown check mark on the map is four crosscuts inby the last crosscut where the initial sample was taken. Tr.

120. Since the first sample was taken, the section had advanced and the initial area was no longer the working section. Tr. 120. So while these abatement samples were not taken in the exact location of the initial samples, they show a failure to abate because they were representative of the working section. Tr. 120. To abate the citation, Respondent must properly dust in the working sections of the mine. Tr. 120. Re-sampling can be anywhere on the working section. Tr. 120, 121. Sample 210, collected on 4-left, was in compliance. Tr. 121. However, Calloway still issued the order to stop production on the mine. Tr. 121. This was because the other sample was noncompliant.

The (b) order is not part of this hearing, however the issue is abatement; the (b) order occurred and so the employer did not receive a 10% reduction for abatement in good faith. Tr. 158. The mine ultimately abated the situation. Tr. 60, 160. Inspector Calloway knew the situation was abated when he took another dust sample to see if it contained 80 percent incombustible content. Tr. 60, 61.

C. Citation No. 8128616

i. Facts Surrounding Citation No. 8128616 as Described by Calloway

GX 5 is Citation 8128616 issued on March 1, 2011 at 5:00 a.m. to Justice. Tr. 62. This citation was issued for violation of §75.403. Tr. 62. Using a green marker, Calloway marked GX 26 to show the general area where this citation was issued. Tr. 62, 63. RX 9 is also a map marked to show where the samples listed here were taken. Tr. 130,131. He was at that area of the mine on January 18, 2011 to collect a required rock dust survey, not a spot sample. Tr. 63, 64.

GX 6 is a rock dust sample submission form that contains the laboratory results for the samples taken for Citation 8128616. Tr. 64,65. The readout shows 11 different numbers, indicating 11 different samples taken. Tr. 65. The readout indicates that these are band samples (samples taken from the roof, ribs, and mine floors). Tr. 65.⁹ The laboratory determined that these samples were noncompliant. Tr. 65, 66. Under MSHA guidelines 10 percent of samples need to be noncompliant in order for a survey to be deemed noncompliant. Tr. 66. Of the samples at issue here, six were noncompliant. Tr. 66. However, on cross examination Calloway admitted that only one entry was insufficiently rock dusted. Tr. 131, 132. The No. 1, 6, and 11 entries were compliant as were the two primary escape ways, entries 8 and 9, so the examiners would not have noticed anything there during their inspections of these areas. Tr. 131. But the sampled area in the No. 5 entry was 56.1% incombustible material instead of 80%. Tr. 132.

ii. Calloway's Opinion on the Gravity of Citation No. 8128616

The gravity determination for this citation is similar to Citation No. 8128602, it was unlikely to occur. Tr. 66. Inspector Calloway determined that 14 people would be affected and that the injuries would be fatal. Tr. 66, 67, 97.

⁹ There are non-band samples, they are samples that are just floor, or just roof and rib, or just rib and floor, or just rib. Tr. 65.

iii. Calloway's Opinion on the Negligence Exhibited in Citation No. 8128616

Calloway testified that initially, he determined that Respondent's negligence was "High" because the areas that most highly traveled were the least compliant in the survey and the Respondent would have to be aware of that. Tr. 67. This area was highly traveled because it was a working section that miners would go to everyday, as opposed to remote areas where miners do not go. Tr. 68. Also, the standard had recently changed, from 65% incombustible material to 80%, so Respondent knew it would have to go back and add rock dust. Tr. 72.

However, during the litigation, he had ample opportunity to analyze and reanalyze his determinations. Tr. 68. In doing so, he saw that the samples were collected in a straight line across the active panel, that area that were compliant included the No. 1 entry of the left return, the No. 6 entry of the main intake, and the No. 11 entry on the right return. Tr. 68, 69. These areas are regularly traveled, every seven days the mine examiner has to travel these areas, at least one entry of these air courses. Tr. 69. These three areas were the spots the examiner had inspected every seven days and they were compliant and rock dusted. Tr. 69. The other areas, including the noncompliant areas, did not have to be investigated with the same regularity. Tr. 69. The exception might be entry No. 4, the roadway where the miners come in and out of the mine to the section. Tr. 69. Calloway's initial determination that Respondent was highly negligent was because, if the area was highly traveled, it would be hard not to notice. Tr. 70. But during his deposition, he reevaluated the case and determined that due to the location of the noncompliant sample, this was more likely moderate negligence. Tr. 70, 71, 132. Since the deposition, he has re-read the standard for §75.403. Tr. 71. Despite the fact that the standard is the same in all areas of the mine, he stands by his deposition; this is moderate negligence. Tr. 68, 71.

iv. Calloway's Opinion on the Abatement of Citation No. 8128616

This citation was ultimately abated. Tr. 73, 89.

D. Citation No. 8128630

i. Facts Surrounding Citation No. 8128630 as Described by Calloway

GX 7 is Citation 8128630, issued on March 8, 2011 at 6:00 a.m. to Justice. Tr. 73. The sample was taken on February 17, 2011. Tr. 74. Calloway was at that mine taking a rock dust survey. Tr. 74. He marked the map, GX 26, to show the general location of this citation. Tr. 74. The noncompliant sample was not taken by the working face, but about 500 feet in by the entrance of the mine. Tr. 75, 134, 135. The distance from the working face to the portal is about one mile. Tr. 135. He was sampling this far from the face because of the recent change in standard that had boosted the requirement from 65% incombustible material to 80%. Tr. 75, 76.¹⁰ The other three samples, taken in the two returns and in the neutral were compliant. Tr. 135.

¹⁰ It is likely UBB was a factor in this increased standard. Tr. 76.

GX 15, on page 8 of 10, the UBB executive summary states, “[a]s a result of a systematic failure to properly apply rock dust, coal dust explosion continued to propagate through the mine killing miners as far as approximately 5,000 feet from the point of explosion.” Tr. 76, 77. This means that the location of the noncompliant area is unimportant as coal dust explosions can travel through the mine; therefore it is essential to keep proper rock dust levels even far from where miners are located. Tr. 77. This citation was less than 5,000 feet from working sections of the mine. Tr. 77. The danger was that an explosion in another area could propagate outby to the cited location. The rock dust survey in Citation No. 8128616 that was conducted on the No. 4 entry, the travel road, was 34.6% incombustible. Tr. 78. A road such as this would be connected to the active parts of the mine. Tr. 78. This means that in the event of an explosion, these roadways would provide linkages for the explosion to move down. Tr. 79. Despite the distance from the face, Inspector Calloway believes that if an explosion occurred at that spot, it would travel inby to where the miners were located. Tr. 136. The distance is not important as both the UBB disaster and the Sago disaster explosions occurred great distances from where the miners were located on the working face. Tr. 137.

However, he does not relate if the area between the portal and the face were properly rock dusted or wet. Tr. 132, 133, 136, 137. He traveled those areas, but he did not sample them. Tr. 133, 137. He is not even sure of the location of the working face on that day. Tr. 132. If the area between the spot where the sample was taken and the working face was wet or sufficiently rock dusted, it could stop an explosion from propagating. Tr. 133, 134. This would depend on how much fuel the explosion picked up and was airing at it traveled. Tr. 134. If there was enough fuel it could move past that area to insufficiently dusted spots outby, so it would depend on how violent the explosion was. Tr. 134. The violence of the explosion and whether it could propagate through a wet or properly rock-dusted area would related to whether it could reasonably be expected to fatally injure 14 miners. Tr. 134.

GX 8 is a rock dust sample submission form that contains the laboratory results for the samples taken for Citation 8128630. Tr. 74, 75. The samples in Bag No. 3 were found to be not compliant. Tr. 75. The level of incombustible material in that bag was 69.5%. Tr. 75.

ii. Calloway’s Opinion on the Gravity of Citation No. 8128630

The gravity determinations are the same as the other citations, for the same reasons, both for the fact that this would be unlikely, a fatal injury, and all persons affected. Tr. 79, 80, 97. Additionally, the miners were improperly trained for an explosion scenario. Tr. 137.

An accident such as this would be unlikely to occur, but it could occur. Tr. 79. Calloway does not know if there was methane in the main portal or main intake. Tr. 137, 138. But Citation 8128630 occurred in the vicinity of two return air courses. Tr. 160, 161. “Return Air” is air that passes the working face and then is directed outside towards the surface. Tr. 161. This air sometimes contains methane. Tr. 161. It is possible to have methane here even though it is not an active part of the mine. Tr. 161. It could also, under certain circumstances, accumulate and remain. Tr. 161.

iii. Calloway's Opinion on the Negligence Exhibited in Citation No. 8128630

The negligence in this citation is "moderate" because the sample was collected in the main intake, where fresh air is brought into the mine and coal seldom accumulates here. Tr. 80. After the standard changed, the foreman would have known that this area should have been re-rock dusted. Tr. 80, 81. It was not high negligence because the foreman might not have known it was noncompliant, but it is not low negligence because he knew the standard had changed and should have checked. Tr. 81. The operator should pay more attention to recently mined or active areas. Tr. 81.

iv. Calloway's Opinion on the Abatement of Citation No. 8128630

This citation was abated with the application of rock dust. Tr. 89

E. Citation No. 8128631

i. Facts Surrounding Citation No. 8128631 as Described by Calloway

GX 9 is Citation 8128631 and it was issued March 8, 2011 at 6:10 a.m. Tr. 81, 82, 138. The citation was based on a rock dust survey sample taken on February 15, 2011. Tr. 82. Inspector Calloway was at the mine to reassess areas that had been too wet to test in an earlier inspection. Tr. 82, 83, 139, 163. Under MSHA requirements, if an area is too wet to test during one inspection, an inspector must go to the wet area on subsequent inspections until a dry sample can be taken. Tr. 83, 138, 139. If the area is still wet on a subsequent inspection, it is marked on a tracking sheet. Tr. 163, 164. If, after an entire year, no adequate samples can be taken then the area is removed from tracking and considered too wet to test. Tr. 84, 138, 139, 164. The wet survey that Calloway was retesting on March 8, 2011 was collected by another MSHA Inspector on August 19, 2010. Tr. 138, 162. This survey is provided as RX 11 and shows that 21 out of 23 samples were too wet to test. Tr. 138. This sampling was a regular rock dust survey of the 2-Right Panel. Tr. 162, 163.

Calloway's re-samples were not taken in the same place as the initial, too-wet sampling. Tr. 141. RX 13 is a map marked in deposition and accurately marks the previously too wet sample areas in blue. Tr. 139. Calloway did not travel to all of the areas marked in blue on March 8, 2011. Tr. 146. He had a permissible ride that was driven to the areas tested. Tr. 146. Instead, he gathered samples from two different places for this citation, the 2-Right Panel and the 3-Right Panel. Tr. 85, 86. He indicated those two areas with a green pen on GX 26. Tr. 86. However, during the survey he assessed every entry. Tr. 146. All the areas where samples were not taken were too wet. Tr. 146. The section on the day the samples were taken on the 4-Right panel, but Calloway could not say where on the 4-Right panel. Tr. 143. 5-Right had not been started when he made his investigation. Tr. 143.

GX 10 are the lab results for these samples. Tr. 84, 162, 163. Calloway marked the sample "previously wet sample" for MSHA's files. Tr. 84. The 1-I sample and the 1-D sample taken there were not in compliance. Tr. 85, 139, 140. Both of these noncompliant samples came from the 2-Right Panel. Tr. 88, 89, 139. These non-compliant samples are marked with a yellow pen on RX 13. Tr. 140. On cross examination, Calloway admitted that this survey was taken on the roof and ribs, but not the floor. Tr. 140. A floor sample was not taken because it

was too wet or compacted. Tr. 140. Ninety to ninety-five percent of samples come from the floor, but this sample was taken from the ribs and roof. Tr. 145, 146. That eliminates some of the fuel that could possibly propagate an explosion. Tr. 146. Calloway is unsure if there are any sloping ribs in the mine. Tr. 141.

ii. Calloway's Opinion on the Gravity of Citation No. 8128631

In terms of gravity, Calloway determined this citation was unlikely to cause injury or illness. Tr. 86. This was because the mine had a low detectable presence of methane, albeit with some methane wells and occasional methane detection. Tr. 86. If an injury were to occur, it would likely be fatal to all 14 people in the mine, based on the same rationale as discussed in the other citations. Tr. 87, 97, 146.

RX 17 shows the maximum amount of methane that has been detected at this mine, according to the air samples to be 0.01 percent. Tr. 147. The last air analysis on RX 17 is for the same day that the sample here was collected. Tr. 147. That analysis shows that there was zero methane in the right return and inconclusive in the left because the bottle was voided. Tr. 147, 148. Zero methane cannot explode. Tr. 148. No. 3 Mine has been operating for 18 years and the highest level of methane that has ever been detected there is 0.7%. Tr. 149. Calloway is unsure if 0.7% methane can ignite, but the explosive range of methane is 5 to 15%. Tr. 148, 149. In his deposition, Inspector Calloway said he did not think that 0.7% methane would ignite, but at the hearing he does not know. Tr. 148, 149. However, just because the mine has operated for that long with such little methane does not mean that an explosion is not possible. Tr. 149. There is a likelihood that 5% of methane could accumulate in this mine. Tr. 149. It could come from adjacent gas wells. Tr. 149. The gas wells tap into veins of gas and it is impossible to know where those veins lead, perhaps they would go to the working face. Tr. 149, 150. Inspector Calloway has seen cracks in a mine floor before, but he cannot say if he has seen them in this mine. Tr. 150.

If an explosion propagated on 4-Right it would travel towards 3-Right and 2-Right. Tr. 143. If everything was properly dusted on 3-Right, it might stop an explosion from going to 2-right, but it would depend on the fuel the explosion collected on 4-Right. Tr. 143. If it were an enormous amount of fuel in front of a fireball, it would not stop at the 3-right like it is hitting a wall, it will go over top of the wet or dusted areas until it burned out or collected more fuel. Tr. 143, 144. That fuel can include coal dust. Tr. 144. Eventually, if there were no more fuel it would stop. Tr. 144. However, a very small properly rock dusted area is not enough to stop the explosion. Tr. 144, 145. Even if 3-Right is properly rock dusted, the explosion could move through it, and it may pick up fuel from the pillared area, because there is no way to know what is in that gob. Tr. 145. The pillared area cannot be accessed to be tested or dusted. Tr. 145.

iii. Calloway's Opinion on the Negligence Exhibited in Citation No. 8128631

Calloway determined Respondent was guilty of moderate negligence. Tr. 87. This citation was not high negligence because this was a non-active area of the mine and usually only one person, the examiner, would be in that area and only once a week. Tr. 87, 88. However, it was still the operator's responsibility to examine the area where the two non-compliant samples

were taken and make sure all areas are properly rock-dusted. Tr. 88, 141, 147.¹¹ If an operator is not examining the mine to ensure 80% incombustible material, then any deficiency is the fault of the operator. Tr. 147.

On cross examination, Calloway admitted that the area where the samples were taken had already been worked out. Tr. 142. The mine was already three sections below where those samples were taken. Tr. 142. However, the law states that areas mines will be maintained at 80% incombustible material, so the operator would have to examine all areas of the mine except those that were inaccessible. Tr. 142.

iv. Calloway's Opinion on the Abatement of Citation No. 8128631

This citation was abated through the application of rock dust. Tr. 90.

F. Citation No. 8128603

i. Facts Surrounding Citation No. 8128603 as Described by Calloway

According to Calloway's testimony, GX 4 is Citation 8128603 and deals with an alleged violation of § 75.503 issued on February 17, 2011 to Justice. Tr. 169, 170. This citation was issued as part of a regular EO1 investigation. Tr. 169. That investigation included checking electrical equipment, to ensure they meet the standards for permissibility. Tr. 170. "Permissible" in this context means how well an explosion proof panel is sealed. Tr. 171. It must have a clearance of 0.004 inches or less, because the studies show this is the size that cools a flame coming through an opening. Tr. 171, 172. The 0.005 inch standard comes from 30 C.F.R. §18.31. Tr. 186, 187. One piece of equipment, a continuous miner, did not meet the standards because it had an opening across the flame path (the plain flange joint) of an offside panel in excess of 0.005 of an inch. Tr. 170, 172.¹² This panel is on the left, rear side of the machine, at the center near the mine floor. Tr. 172. Calloway measured the machine to test if the gap was in excess of the permissible limit with a 0.005 feeler gauge. Tr. 174. The gauge is 0.005 inches large and so it is able to enter a crack, the crack is larger than the permissible limit. Tr. 174.

The standard in question here is designed to prevent gas from entering the machine and causing an ignition. Tr. 173. There are electrical components in a continuous miner. Tr. 173. Underneath the panel there are contactors and bare electrical conductors. Tr. 173. Sparking and arcing occurs there and if gas were present, this could cause an ignition. Tr. 173. This could

¹¹ The exact locations the examiner would travel in checking this area would depend on what was being examined. Tr. 141, 142. It is possible that if he was just making an examination of the return air course, he would just have to travel one entry. Tr. 141, 142. If an examiner only went through the 1 and 11 entries he would not see the noncompliant areas. Tr. 142.

¹² A continuous miner extracts coal from the face. Tr. 172. A miner is one of the pieces of equipment that must be maintained in a permissible condition, in fact is listed as 75.500(c). Tr. 171. That standard states, "[a]ll other electric face equipment which is taken into or used in by the last crosscut of any coal mine classified under any provision of law as gassy prior to March 30, 1970, shall be permissible." Tr. 171.

lead to a larger ignition of the gas outside of the machine. Tr. 173, 174. Arcing and sparking occur in a continuous miner when there are system failures; meaning the wires became frayed or the jacket became brittle and flaked off. Tr. 174. It could also occur if a short circuit occurs between two wires inside the panel; a situation where contactors make connection constantly through the mining process. Tr. 174. If a short circuit occurs, it creates a similar situation as when a cord is pulled out of the wall while the vacuum is running, a spark occurs. Tr. 174, 175. When a piece of equipment is under load and the connection is broken, the electricity will try to make up the distance, burning the contactor. Tr. 175. This burning will wear out the contactor and eventually the arc will get bigger and bigger. Tr. 175. This analysis is based on Calloway's own experience as an electrician. Tr. 175.

ii. Calloway's Opinion on the Gravity of Citation No. 8128603

Calloway felt that an accident from this violation would be unlikely because the history of methane at this mine was inconsistent. Tr. 176. He does not recall if he detected methane on 2-17-2010 when he wrote this citation. Tr. 183. Therefore an ignition is unlikely, but not impossible. Tr. 176. The danger associated with the unsafe miner is explosion. Tr. 177. A non-permissible miner would be an ignition source in the fire triangle. Tr. 175. Oxygen would also be present in the mine. Tr. 176. These dangers were exacerbated by the level of training at the mine. Tr. 176. The injuries that would result from such an explosion would be fatal to all 14 persons in the mine. Tr. 176, 182, 186. However, on cross examination Calloway admitted that if an ignition occurred, the number of people hurt would depend on how many people were in the area. Tr. 183, 184. It could be just one person. Tr. 184. But he also noted that if an accident were to occur that included the continuous miner it would be in close proximity to the miners, in fact the miner is center of operations in the mine. Tr. 177, 183. A continuous miner at the face will have one operator and at least one miner behind him loading. Tr. 183.

Also on cross, Calloway admitted that there was no accumulation of combustible material. Tr. 184. The ventilation was also compliant. Tr. 184. He does not recall the condition of the rock dust. Tr. 184. He issued a violation on February 16, 2011, for insufficient rock dust, then came back the next day and issued this permissibility citation, but he probably did not go back and check to see if the area had been rocked dusted. Tr. 185.

iii. Calloway's Opinion on the Negligence Exhibited in Citation No. 8128603

Respondent was cited for moderate negligence. Tr. 177. In making this determination, Calloway considered the fact that the examination records show that the miner was examined within the required time frame and he considered the fact that only one electrician is responsible for opening the miner and ensuring it is sealed. Tr. 177, 178. However, at the time an electrician inspects the miner, he is an agent for the operator. Tr. 178. Impermissibility is a dangerous condition. Tr. 180. The reason Calloway did not choose high negligence was because the operator made weekly examinations as shown in the records. Tr. 180, 181.¹³ However, this does not excuse the impermissible condition. Tr. 181.

¹³ The examiner is supposed examine the continuous miner every week. Tr. 181. A weekly exam must only be conducted one day each week, so in fact there can be 13 days between examinations; here it was 10 days and was therefore compliant. Tr. 181.

GX 14, the report about UBB, also contained information about permissibility violations. Tr. 178. It states, “[p]roper examinations and immediate corrective actions. Conduct proper pre-shift, on-shift, supplemental, and electrical examinations. Immediately eliminate hazards involving inadequate ventilation, insufficient rock dust, methane accumulations, and permissibility violations.” Tr. 178, 179.

iv. Calloway’s Opinion on the Abatement of Citation No. 8128603

The citation here was abated in 30 minutes. Tr. 187. All that was required was a tightening of the bolts. Tr. 187.

2. Testimony of Chad Sloane

A. Background

i. Mr. Sloane’s Qualifications

Chad Sloane (“Sloane”) is an electrician, mine examiner, and purchase agent employed by Respondent and has worked there for a little more than six years. Tr. 188. All of his mining experience has been with Respondent. Tr. 189. In his career he has done maintenance, purchasing, airway examinations, worked on tracks and CO systems, and other miscellaneous jobs. Tr. 189. He has acted as a mine foreman. Tr. 189. He is a certified foreman, an electrician, a respirable dust sampler, EMT, and certified MSHA instructor. Tr. 189.

ii. Sloane’s Knowledge of No. 3 Mine and Respondent’s Rock Dusting Procedure

Sloane is familiar with the workings of No. 3 Mine because he has been on the section and watched it in operation. Tr. 190. He has been through the areas Calloway discussed. Tr. 190. With respect to appearance, the floor of No. 3 is gray slate, black slate, and some sandstone. Tr. 191. If the bottom were ground into a dust it would be gray or black. Tr. 191. Sloane is also familiar with the clean up plan used at the mine. Tr. 190. On a mining cycle, miners will go into the mine, cut the coal, the roof bolter will bolt, the scooper will clean up and then 50-pounds of rock dust will be spread by hand within 40 feet of the face. Tr. 190. After the initial hand dusting an additional 3,000 pound bag of dust will be loaded into a scoop bucket and flung on the area. Tr. 191.

B. Violations

ii. Sloane’s Opinions on No. 3 Mine’s Rock Dust

An explosion happens at a coal mine when there is an ignition source, fuel, and oxygen to substantiate the explosion. Tr. 193. If methane were to ignite at the face, it would have to pick up fuel source to propagate through the mine. Tr. 193. A well rock dusted area will stop an explosion. Tr. 193. It is impossible to tell, simply by looking, whether dust contains the proper amount of incombustible material. Tr. 192, 193. Sloane believes that the rock dust citations at

issue here were excessive considering some of the areas were properly rock dusted and other areas were wet. Tr. 193, 194.

ii. Sloane's Opinions on Methane in No. 3 Mine

Despite traveling to every area discussed in the hearing, Sloane has never detected any methane on the Solaris. Tr. 191. Sloane has checked the sample tubes at the back conceal, the omegas, and the seal area on No. 10. Tr. 191, 192. The gas content is 0.04, 0.03 in the sealed area, or .004 of one percent. Tr. 192. Sloane has never seen any surface cracks at this mine. Tr. 192. Because there is no adjacent mining, there is not likely to be a methane inundation. Tr. 192. The seam height of this mine is, on average, 36 inches and Sloane does not know of any underlying or overlaying mines. Tr. 192.

iii. Sloane's Opinions on the Gravity of these Citations

The likelihood of an ignition in this mine is unlikely to zero. Tr. 191. There is no likelihood that the conditions cited here would kill 14 coal miners. Tr. 194. There is no place in the mine where all 14 people could be injured at once. Tr. 194.

iv. Sloane's Opinions on the Violation History at No. 3 Mine

In the mine's violation history, there are eight previous violations of the rock dust standard in the last two years, seven were non-S&S. Tr. 195. These penalties were lower, perhaps because of the S&S designation. Tr. 195. None of these were marked as likely to fatally injure someone. Tr. 195. MSHA's decision to mark these citations as fatal increased the amount of the penalty. Tr. 195. The reason the penalties have increased is because of UBB. Tr. 195.

CONTENTIONS OF THE PARTIES

The Secretary contends that Citation No. 8128602 was validly issued, was unlikely to cause injury but would be fatal to all 14 persons in the mine if the danger was realized, and was the result of Respondent's high negligence. The citation is valid because the lab results indicate that the sample was not in compliance and it was taken in an area representative of the entire working section. (Secretary's Post-Hearing Brief at 6). The fact that this was a spot, not survey, sample does not diminish the validity of this sample because spot sampling is allowed, the rock dust in the area appeared uniform to the Inspector, and it was a "band sample" taking dust from the full perimeter of an entry. Id. The condition is unlikely to cause injury because the mine has little history of methane liberation. Id. at 7. However, the mine does liberate some methane and it is in close proximity to active methane wells. Id. at 7-8. If methane liberation did occur it could be ignited by impermissible equipment. Id. at 8. Furthermore, the risk of an explosion is greater in the winter months, when this citation was issued. Id. In the unlikely event that an explosion did occur, it would likely be fatal to all 14 persons. Id. at 9. The Secretary believes this because all of the miners are exposed, there is a history of similar explosions, this mine is low in seam and has places for explosive force to be boxed in, and the face is a great distance from the portal. Id. at 9-10. Respondent exhibited high negligence because the sample was found on the working section where daily production occurs and examinations occur twice a day and the condition was clearly visible. Id. at 10-11. In addition, Respondent had a known poor

attitude regarding rock dusting and had been warned about rock dusting in the past, leading its negligence to rise almost to the level of reckless disregard. Id. 11-12.

The Secretary also contends that Citation No. 8128616 was validly issued, was unlikely to cause injury but would be fatal to all 14 persons in the mine if the danger was realized, and was the result of Respondent's high negligence. The citation is valid because the lab results indicate that the sample was not in compliance. Id. at 12. The Secretary argues that the gravity of this citation is the same as Citation No. 8128602 and for the same reasons. Id. at 12-13. Respondent exhibited high negligence because the sample was found on the working section and it had been warned about rock dusting just 11 days earlier. Id. at 13. In addition, 6 of the 11 samples were noncompliant and they were located in logical pathways for explosion. Id. The Secretary asks that Calloway's change of heart be disregarded with respect to the level of negligence in this matter. Id.

The Secretary also contends that Citation No. 8128630 was validly issued, was unlikely to cause injury but would be fatal to all 14 persons in the mine if the danger was realized, and was the result of Respondent's moderate negligence. The citation is valid because the lab results indicate that the sample was not in compliance. Id. at 14. The Secretary argues that the gravity of this citation is the same as Citation No. 8128602 and for the same reasons. Id. In addition, while this was not on the working face, the disaster at UBB showed that anywhere in a mine is dangerous during an explosion. Id. at 15. Respondent exhibited moderate negligence because it knew that it had to maintain the rock dust in the area, but it may not have known that it was not in compliance. Id.

The Secretary also contends that Citation No. 8128631 was validly issued, was unlikely to cause injury but would be fatal to all 14 persons in the mine if the danger was realized, and was the result of Respondent's moderate negligence. The citation is valid because the lab results indicate that the sample was not in compliance. Id. at 16-17. The Secretary argues that the gravity of this citation is the same as Citation No. 8128602 and for the same reasons. Id. at 17. Respondent exhibited moderate negligence because the respondent knew that it had to maintain the rock dust in the area, but it may not have known that it was not in compliance. Id.

The Secretary also contends that Citation No. 8128603 was validly issued, was unlikely to cause injury but would be fatal to all 14 persons in the mine if the danger was realized, and was the result of Respondent's moderate negligence. The citation is valid because a 0.005 inch gap occurred in the panel of a continuous miner, an impermissible condition. Id. at 18. The condition is unlikely to cause injury because the mine has little history of methane liberation. Id. at 19. However, the mine does liberate some methane and it is in close proximity to active methane wells. Id. at 19. If methane liberation did occur it could be ignited by impermissible equipment. Id. An explosion ignited by impermissible equipment could kick up coal dust and increase the force of an explosion. Id. The Secretary argues that the number of people affected and the likely injury of this citation is the same as Citation No. 8128602 and for the same reasons. Id. In addition, the miners were not properly trained for an evacuation. Id. at 20. Respondent exhibited moderate negligence because the respondent knew that it had to maintain the miner in permissible condition, but the electrician on duty (and therefore Respondent) may not have known the condition existed. Id. Also, the equipment had been examined just 10 days prior to the citation. Id.

Respondent contends that Citation No. 8128602 should be modified to low negligence and the gravity should be reduced to no lost work days and no persons affected. The negligence should be lowered because the sample was taken in the last open crosscut where coal is often dumped and therefore is not representative of all 11 entries on the working face, a fact the Inspector conceded. (Respondent's Post-Hearing Brief at 4-5). Further, the incombustible standard had just been raised in November 2010. Id. at 4. The gravity should be reduced because no methane was present to cause an ignition and therefore an explosion was not merely unlikely, but instead impossible. Id. at 5.

Respondent also contends that Citation No. 8128616 should be modified to low negligence and the gravity should be reduced to no lost work days and no persons affected. The negligence should be lowered because the entries where certified examiners were required to travel were sufficiently rock-dusted with the exception of one, the areas between the working section and the area sampled could have been wet or sufficiently rock-dusted, and the Inspector believed the negligence should be lowered to "moderate." Id. at 6. Further, five of the entries were sufficiently rock dusted and would contribute to stopping an explosion by placing rock dust in suspension. Id. at 5. The gravity should be reduced because no methane was present to cause an ignition and therefore an explosion was not merely unlikely, but instead impossible.

Respondent also contends that Citation No. 8128630 should be modified to low negligence and the gravity should be reduced to no lost work days and no persons affected. The negligence should be lowered because three of the four samples collected were compliant, there was no evidence that the area between the working section and the portal was not adequately rock dusted, and the noncompliant sample was 500 feet in by the portal and therefore approximately a mile from the face. Id. at 6. Further, the noncompliant sample was 69.5% incombustible. Id. The gravity should be reduced because no methane was detected. Id.

Respondent also contends that Citation No. 8128631 should be modified to low negligence and the gravity should be reduced to no lost work days and no persons affected. The negligence should be lowered because the mine floor was too wet to test, the four rock dust samples collected in 3-Right were compliant, and the area between 2-Right and the face was adequately rock dusted. Id. at 6-7. Further, 90% of rock dust samples come from the mine floor, but the noncompliant samples here were collected from the roof and ribs. Id. at 7. The gravity should be reduced because no methane was detected. Id.

Respondent also contends that Citation No. 8128603 should be modified to no lost work days and no persons affected. The gravity should be reduced because the mine does not have a history of liberating methane, the continuous miner was inspected in the time required by the regulation, and the rock dust violation that had been cited before this citation had already been abated. Id. Further, no methane was detected during this investigation and there was no likelihood of explosion. Id.

DISCUSSION AND EVALUATION

Respondent has conceded that all the citations at issue here were validly issued.¹⁴ Therefore, the only issues that remain are the gravity of the citations, the negligence, if any, exhibited by Respondent, and the reasonable penalty.

1. Gravity

To properly determine the gravity of the citations here, it is helpful to have a proper understanding of that term. The only mention of the term “gravity” in the Mine Act is contained in Section 110(i), which states that in determining the appropriateness of a penalty, the Secretary must consider, among other things, “the gravity of the violation.” 30 U.S.C. § 820. The Secretary promulgated a three-factor test under 30 C.F.R. § 100.3(e) to determine the gravity of a citation for purposes of determining the penalty.¹⁵ Those factors are:

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

30 C.F.R. § 100.3(e).

Respondent challenges the Secretary’s findings for all three of these factors for all of the citations at issue here. To a certain extent, I believe those challenges are based on a misunderstanding those factors. I will consider each factor in turn in hopes of determining how those factors apply to this case.

The first factor, likelihood, is arguably at issue in this case. Every citation issued in this case was cited as “Unlikely.” Calloway re-affirmed that finding at the hearing. Tr. 49, 66, 79, 86, 179. According to the Secretary, these citations were marked “Unlikely” because an ignition of methane could be sparked by impermissible equipment and propagate following the suspension of coal dust. (Secretary’s Post-Hearing Brief at 7). In addition, the mine was near gas wells and these citations occurred in the winter when explosions are more likely. *Id.* at 8. However, this was unlikely to happen because the mine had little history of methane liberation.

¹⁴ In Respondent’s Post-Hearing Brief, it requests several changes to each citation, but also states, “the respondent would pay the appropriate penalty as determined by the six criteria.” (Respondent’s Post-Hearing Brief at 19).

¹⁵ The Mine Act, and therefore Congress, does not further define the term “gravity.” Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Secretary’s reasonable construction of an ambiguous statute is granted wide deference. 467 U.S. 837, 842–843 (1984) *see also* *Martin v. Occupational Safety and Health Review Com’n*, 499 U.S. 144 (U.S. 1991) and *Energy West Min. Co. v. Federal Mine Safety and Health Review Com’n*, 40 F.3d 457, 460-461 (D.C.Cir. 1994).

Id. at 7. Respondent disagreed with this assessment. For example, Sloane stated in his direct testimony, following a discussion on the low amounts of methane in the mine, that the likelihood of an ignition at the mine is “unlikely to zero.” Tr. 191. In addition, Respondent’s post-hearing brief states, “[i]n this case the event of an explosion is remote and speculative that there is no likelihood of the event at all.” (Respondent’s Post-Hearing Brief at 9-10).

I find Calloway to be more credible with respect to the likelihood of an explosion. Calloway took pains to explain that he did not believe an explosion was likely as the mine liberates very little methane. Instead he noted that it was merely possible that accumulations of coal dust on top of rock dusted areas could lead to an explosion. It is entirely plausible that this mine, which is not traditionally gassy, might liberate some methane and cause an explosion. There is clearly methane in the area, as several methane wells operate in close proximity to the mine. In addition, all of these citations were issued in winter, when explosions are more likely. While this scenario is unlikely, I find that it is not impossible. Furthermore, neither the law nor the regulations make any distinction with respect to gassy and non-gassy mines as it relates to the requirements of 30 C.F.R. § 75.403. If the drafters of the regulations believed that improper rock-dusting was only a danger in gassy mines, they would have limited the application of § 75.403 to gassy mines. By making the provisions of that regulation generally applicable, the drafters made a determination, following notice and comment, that explosions facilitated by improper rock dust could propagate even in mines with little history of gas liberation. Beyond that, there are other explosive combinations involving float coal dust and impermissible equipment that do not involve methane, and while they may be very unlikely, they are still possible. Therefore, I find that inspector Calloway’s testimony with regards to the likelihood of an explosion is more credible.

The second factor used to determine gravity 30 C.F.R. § 100.3(e) deal with severity. Respondent requested that the dust citations at issue here be modified to reduce the severity from “fatal” to “no lost workdays.” Respondent argues that the Secretary’s determination in this case that the expected injuries would be fatal to all persons in the mine is unreasonable.

In making this claim, Respondent objects to the Secretary’s practice of evaluating the severity of the injury expected while assuming that the feared event occurred. In this case, that means evaluating the injuries as though an explosion (however unlikely) has taken place. Respondent draws an analogy between this practice and the practice disallowed by the Commission in Cement Division, National Gypsum Company, 3 FMSHRC 826 (Apr. 1981). In that case, the Commission prevented inspectors from marking all citation S&S and instead urged Secretary to consider each citation on a case-by-case basis. Respondent explains this analogy as follows:

MSHA now by virtue of its training has moved past the prohibited, all violations are significant and substantial, and found new ways to unreasonably punish coal operators with elevated penalties. The second and forth [sic] part of the gravity evaluation under Item B and D of the gravity are not one size fits all just as it was in the predecessor of all violations are significant and substantial.

(Respondent's Post-Hearing Brief. at 10). The essence of the argument is that, like marking all citations S&S, marking a citation as fatal regardless of how likely an explosion would be unfairly punishes the Respondent as though the event occurred.

Respondent states that while these citations are not marked S&S, the standard for S&S provided in Mathies Coal Co., 6 FMSHRC 1 (January 1984) provides a fairer framework for evaluating gravity. Specifically, Respondent points to the third element of the Mathies test: the Secretary must prove "a reasonable likelihood that the hazard contributed to by the violation **will** result in an injury." (*Emphasis added by Respondent*). Respondent argues that this prevents remote or speculative hazards from being over-evaluated because it only applies to situations that will result in an injury. In short, Respondent argues that the severity of an injury expected must be considered in light of how likely the feared event is to occur. Under this understanding of gravity, an unlikely event could never be fatal, because if an event is unlikely to occur it follows that no injuries are likely to result.

However, Respondent fundamentally misunderstands the nature of gravity analysis. Calloway's gravity analysis is grounded in properly promulgated regulations, not in some arbitrary desire to over-evaluated penalties. The Secretary's practice of evaluating the severity of a citation as if the event occurred is based on 30 C.F.R. § 100.3(e). The second and third factors in that section state that gravity is determined by "the severity of the illness or injury if the event has occurred **or was to occur**; and the number of persons potentially affected if the event has occurred **or were to occur**." (*Emphasis added*). To the extent that an inspector's training encourages this sort of analysis, it is not based on the Secretary's arbitrary desire to over-evaluate penalties but instead based on a regulation properly promulgated following notice and comment.¹⁶ Respondent therefore had fair notice that of MSHA's method of analyzing severity. Calloway was bound by this regulation to analyze the severity as he did and any deviation from the regulation would have been arbitrary and impermissible.

Beyond the technical sufficiency with respect to administrative law, I fail to see how this standard is fundamentally unfair for Respondent. The Secretary's framework first considers the likelihood of an accident occurring. In this case, the Secretary determined that an injury was unlikely. Because the Secretary found an injury to be unlikely, she assessed a penalty lower than she would have assessed if the injury was reasonably or highly likely. The next issue is how severe an accident would be if the event were to occur. The Secretary determined that in the unlikely event of an explosion, there would be fatal injuries. Respondent now asks for additional discount from its penalty because the event is unlikely. However, the Secretary already considered the low likelihood in assessing the penalty. The severity of the expected injury is a different matter altogether. Essentially, Respondent is asking that the factor that is favorable to it (likelihood) be counted twice and the factor that is unfavorable to it (severity) be ignored. This

¹⁶ MSHA published the proposed rule on Friday, September 8, 2006. 71 FR 53054-01. The Secretary provided extensive opportunities for interested parties to be heard, stating "MSHA must receive comments on or before October 23, 2006. MSHA will hold six public hearings on September 26, 2006, September 28, 2006, October 4, 2006, October 6, 2006, October 17, 2006, and October 19, 2006. Details about the public hearings are in the SUPPLEMENTARY INFORMATION section of this document." *Id.* The final rule was published Thursday, March 22, 2007. 72 FR 13592-01.

is not a one-size fits all practice like the one condemned in National Gypsum, instead it is a careful weighing of all the factors individually. Likelihood and severity are two different components of gravity and it is fair for the Secretary to consider each separately and equally.

Even if I were to agree for the sake of argument that 30 C.F.R. § 100.3 is unfair and instead take Respondent's position and use the Commission's analysis in S&S cases, the evaluation does not change. Looking at the Mathies test in its entirety, the Commission held that to prove S&S the Secretary must show:

- (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. As a practical matter, the last two elements will often be combined in a single showing.

Mathies, at 3-4

Part one of the Mathies test is simple, it asks a binary question; whether a safety standard has or has not been violated. The second part of the test asks whether the violation adds in some way to a safety hazard. The third part asks whether the hazard expressed in the second part will lead to an injury. It is highly significant that the third part is no longer discussing the violation, but instead the “hazard contributed to.” Finally, the question is whether that expected injury would be reasonably serious in nature. Perhaps an example on how this S&S standard could be applied would best illustrate why Respondent's request is not availing. Assuming an S&S case involved a violation of 30 C.F.R. § 75.402, under Mathies a discrete safety hazard that might be contributed to by that violation would be an explosion. The next question is whether that hazard, the explosion, would result in an injury. The answer to this question cannot be answered by asking whether or not the explosion is likely to occur. The only issue here is how dangerous the hazard would be if it occurred. In that sense, the Mathies test as it relates to the likelihood of an injury and the seriousness of that injury is same as the penalty assessment criteria at 30 C.F.R. § 100.3. Therefore, modeling the gravity analysis on the Mathies test will not change the results of the evaluation.

Finally, the third factor used to determine gravity 30 C.F.R. § 100.3(e) deal with persons affected. Respondent requested that all the citations be modified to reduce the number of persons affected from 14 to zero. (Respondent's Post-Hearing Brief at 19). The Secretary argues that if an explosion occurred, all those in the mine would be killed because an explosion would be very violent and could travel throughout the mine. (Secretary's Post-Hearing Brief at 8-10). In his testimony, Calloway cited both the violent history of coal mine explosions and certain demonstrations he witnessed showing the explosive power of coal dust to determine that all miners could be killed. Id. at 9. These dangers are especially acute in a boxed in mine in a low seam of coal like No. 3 Mine. Id. at 10. The Secretary also claims that the miners were improperly trained and far from the mine portal. Id. The Respondent claims that there is no place in the mine where all 14 miners could be injured at once. (Respondent's Post-Hearing Brief at 12-13). Further, even if an explosion were to occur in one section, it could not travel through properly rock-dusted areas or wet areas to harm miners in different parts of the mine. Id.

at 13. Furthermore, it noted that all of the examples coal mine explosions provided by the Secretary (UBB, Sago, and Darby) all left survivors. Id. at 12.

I find that the Secretary's evidence was more credible on this point. Respondent is again confusing the "likelihood" factor of the gravity analysis with the other factors. While an explosion may be unlikely, if it occurred it could be fatal to all persons in the mine. I do not believe that intermittent areas that were properly rock-dusted or sufficiently wet would be capable of completely stopping a catastrophic explosion in its tracks. That is the reason all areas are supposed to be adequately rock dusted, not merely the active areas of the mine. Finally, the fact that some miners miraculously survived the devastation at UBB, Sago, and Darby does not mean that their lives were not in mortal danger nor is it a license for other mines to fail to live up to the rock-dust requirements. Counting on the fact that, in the event of an explosion, some miners may somehow survive, is hardly a reasonable argument for why "no persons" would be injured.

2. Negligence

Under the Mine Act there are four different levels of negligence: reckless disregard (when an operator displays conduct that exhibits the absence of the slightest degree of care); high negligence (when an operator knew or should have known of a Mine Act violation, and there were no mitigating circumstances); moderate negligence (when an operator knew or should have known of a Mine Act violation, but there were mitigating circumstances); and low negligence (when an operator knew or should have known of a Mine Act violation, but there are considerable mitigating circumstances). 30 C.F.R. § 100.3(d), Table X.

A Citation No. 8128602

The Secretary claims that Respondent exhibited "High" negligence with respect to Citation No. 8128602. The Secretary cites to Inspector Calloway's observations that the violation occurred on the active section of the mine where daily production occurs, that the section is traveled twice daily by the mine foreman, and the entire area looked uniformly dark and gray. (Secretary's Post-Hearing Brief at 10-11). In addition, Calloway spoke with Justice regarding the Respondent's inability to maintain proper rock-dusting because the buckets scraped the floor and roof. Id. at 11. Finally, MSHA's fatalgrams put Respondent on notice of the importance of 30 C.F.R. § 75.403. Id. Respondent claims that there were mitigating circumstances in this situation including the fact that it had no prior notice, there was no evidence that a mandated examination was conducted in the last open crosscut, spillage is normal in the area, and there was some rock dust in the area. (Respondent's Post Hearing Brief at 15). In addition, Respondent notes knowing the exact content of visible dust is impossible and that the bottom of the mine was black to gray slate, perhaps making the appearance of coal dust more difficult to detect. Id.

I find the Secretary's evidence more credible. These samples were taken in highly traveled areas that required twice-daily monitoring. Respondent's argument that the required examinations were not completed is hardly availing. I do not believe that the fact that the Respondent negligently failed to conduct the proper examinations should mitigate Respondent's negligent failure to properly rock dust. In addition, Calloway stated that he felt, simply by

looking at the area he could tell they were not compliant. Respondent places too much emphasis on the fact that Calloway stated he could not tell the combustible content of the dust simply by looking at it. The clear meaning of his testimony is that he could not tell the exact percentages of combustible material and incombustible material in the dust. So he could not tell, merely by looking, that dust is 60% combustible or 61% combustible, but he could tell it was non-compliant. Also, the fact that spillage occurs in this area and that it is difficult to see whether an area has coal dust or simply slate indicates that the Respondent should have been especially vigilant in applying rock dust and does not constitute a mitigating factor. Finally, Respondent presented no evidence that this area was wet and it was evidently dry enough to take a sample.

B. Citation No. 8128616

The Secretary claims that Respondent exhibited “High” negligence with respect to Citation No. 8128616. The Secretary relies on the fact that 6 of the 11 survey samples were non-compliant, one sample came from a highly-traveled haulage road (and was only 24.6% incombustible), and haulage roads provide linkages to propagate an explosion through the mine. (Secretary’s Post-Hearing Brief at 13). Respondent argues that Calloway, who initially marked these citations as “High” negligence, later re-evaluated the facts and determined that the citations exhibited only “Moderate” negligence. (Respondent’s Post-Hearing Brief at 14). This was because three of the four areas examined were in compliance. *Id.* However, Respondent asks that the citations be lowered even further, to “Low” negligence. *Id.*

I find Calloway’s opinion to be most credible. MSHA inspectors are entitled to a certain level of deference and it is clear in this case that Calloway intended to be thorough and certain, going so far as to re-evaluate his initial determination. *See e.g. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995) (ALJ did not abuse discretion in crediting expert opinion of experienced inspector); and *Mathies Coal Co.*, at 5. I do not believe that the Secretary can effectively maintain that this citation was highly negligent in light of the fact that the person who actually observed and cited the condition no longer believes that to be the case. However, I also do not believe that there are “considerable mitigating circumstances” in this case. The operator still knew that it had to apply rock dust (both from the regulations and the various fatalgrams sent after mine disasters) and this was still an area that was reasonably well-traveled.

C. Citation No. 8128630

The Secretary claims that Respondent exhibited “Moderate” negligence with respect to Citation No. 8128630. The Secretary relies on the fact that Respondent was aware of the need to rock dust all areas and should have evaluated all of these outby areas. (Secretary’s Post-Hearing Brief at 16). However, there is no evidence that Respondent was aware of its non-compliance or that it chose not to correct a known violation. Respondent argues that three entries were sampled at 90%, 91%, and 89% incombustible, showing that Respondent made the effort to rock dust. (Respondent’s Post-Hearing Brief at 17). Because that effort was made, Respondent claims it was unaware and could not be aware that one area was noncompliant. *Id.*

I find the Secretary’s evidence to be more credible. In making the negligence determination, Calloway noted that the Respondent was likely not aware of its noncompliance,

and that is why the citation is not marked as “High” negligence. But Respondent was still aware that it was required to maintain the proper level of rock dust and failed to do so. The fact that some areas were properly rock dusted does not change the fact that one area was not compliant.

D. Citation No. 8128631

The Secretary claims that Respondent exhibited “Moderate” negligence with respect to Citation No. 8128631. The Secretary relies on the fact that Respondent was aware that it was required to rock dust all areas. (Secretary’s Post-Hearing Brief at 17). But she recognizes that these areas were no longer active sections of the mine. Id. Respondent argues that this sample was taken only on the roof and rib because the floor was too wet, but 90% of samples come from the mine floor. (Respondent’s Post-Hearing Brief at 18). In addition to being wet, this area was not required to be examined often. Id.

I find the Secretary’s evidence to be more credible. In making the negligence determination, Calloway noted that the area was no longer active and that is why the citation is not marked as “High” negligence. But Respondent was still aware that it was required to maintain the proper level of rock dust and failed to do so. The fact that some areas were wet or dusted does not change the fact that an area was tested and was not compliant.

3. Abatement

According to the parties, Citation Nos. 8128603, 8128616, 8128630, and 8128631 were all abated without issues. Tr. 73, 87, 89, 90, 187. However, there is disagreement as to whether Respondent abated Citation No. 8128602. The Secretary claims that MSHA issued Order No. 8128646 because Respondent failed to abate this citation. Tr. 115. Calloway claims to have taken the samples for the abatement survey on the working section of the mine. Tr. 157, 158. Furthermore, he claims that any confusion about the exact location of the sample was caused by obscured or hard-to-read Spad markers. Tr. 157, 158, 160. Respondent argues that the abatement survey was not taken in the same location as the initial citation and that one of the two samples was compliant. (Respondent’s Post-Hearing Brief at 16-17).

The 104(a) citation at issue here was a failure to properly rock-dust. Inspector Calloway took another sample to determine if the citation was abated and again the tests indicate the mine was improperly rock-dusted. The exact location of the survey is immaterial; the key issue is whether the Respondent is still in violation of the standard not a technical requirement about sample location. Therefore the citation was not abated. I do not have to pass judgment on the validity of Order No. 8128646.

4. Penalty

Respondent argues that it was cited in the past for improper dust levels and received penalties between \$100.00 and \$807.00. Id. at 18. It claims that it is now being punished for the UBB disaster with increased fines despite the fact that the conditions are identical in the mine before and after UBB. Id.

Since the Sago disaster, Congress and MSHA have become more aggressive with respect to violations in general and dust violations in particular. These changes ratcheting up of enforcement continued after UBB. This decision was made with respect to all mines and all miners, not just UBB or just Sago. This was not done to punish mine operators for UBB, but to ensure that such a disaster does not happen again. After all, the purpose of mine safety penalties is to provide a “strong incentive for compliance with mandatory health and safety standards.” Nat’l Indep. Coal Operators’ Ass’n v. Kleppe, 423 U.S. 388, 401 (1976). Respondent was kept abreast of these changes both in the form of new regulations issued by MSHA and fatalgrams that were issued after the disasters. I do not believe that MSHA in any way surprised Respondent with increased fines. Taken to its logical conclusion, Respondent’s argument would render any attempt to increase penalties under any circumstances to be impossible, an absurd result.

ANALYSIS AND CONCLUSIONS

Citation No. 8128602

Validity

As stated previously, Respondent concedes that the citation is valid.

Gravity

I find that this citation was unlikely to lead to an injury or illness. Nonetheless, an accident is possible given the fact that a methane inundation could occur and other factors could cause an ignition. If an accident were to occur as a result of this condition (most notably an explosion fueled by float coal dust) all 14 people in the mine could be affected and I expect they could suffer fatal injuries.

Negligence

I find that Respondent demonstrated high negligence with respect to this citation. Most importantly, the condition at issue here was found in the active working section of the mine, in a location that was supposed to be frequently examined by the Respondent. Respondent’s failure to perform and record these examinations does not mitigate the fact that this condition existed. Further, the condition was obvious upon visual examination. Respondent was on notice as to the importance of rock dusting because of fatalgrams issued after mine disasters as well as conversations with inspectors and other MSHA personnel. Respondent has a history of taking its rock dusting duties lightly and this ambivalence was exhibited even at the hearing when it (through Sloane) claimed that an explosion as a result of inadequate rock-dusting in this mine was impossible. Therefore, I uphold the inspector’s negligence finding.

Penalty

Under the assessment regulations described in 30 C.F.R. § 100, the Secretary proposed a penalty of \$7,176.00 for Citation No. 8128602. While the Secretary’s proposal was duly considered, under 30 U.S.C. § 820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made.

I will now evaluate each of those factors in turn with respect to proposed penalty to Citation No. 8128602:

(1) The Operator's history of previous violations – The Operator was cited for inadequate rock dusting eight times in the two years prior this citation. Given the fact that this mine was only sampled 16 times in that time period, this means half of its rock dust samples were inadequate.

(2) The appropriateness of the penalty compared to the size of the Operator's business – No. 3 Mine produces 124,061 tons of coal and Respondent produces 226,865 tons coal in all its operations. According to MSHA's penalty assessment guidelines this gives No. 3 Mine nine "mine size points" out of a possible 15 and Respondent four "controller size points" out of a possible 10. *see* 30 C.F.R. § 100.3(b). Thus, Respondent is a moderately sized operator with an above-average sized mine.

(3) Whether the Operator was negligent – As previously shown, the operator was highly negligent.

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

(5) The gravity of the violation – As previously shown, this violation is unlikely to cause an injury, but if it did it would be fatal to all 14 people present at the mine.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – As previously shown, this citation was not abated and MSHA issued a 104(b) order.

For these reasons, I see no need to alter the penalty proposed by the Secretary. Therefore, Respondent is ordered to pay \$7,176.00 with respect to this citation.

Citation No. 8128616

Validity

As stated previously, Respondent concedes that the citation is valid.

Gravity

I find that this citation was unlikely to lead to an injury or illness. Nonetheless, an accident is possible given the fact that a methane inundation could occur and other factors could cause an ignition. If an accident were to occur as a result of this condition (most notably an explosion fueled by float coal dust) all 14 people in the mine could be affected and I expect they could suffer fatal injuries.

Negligence

I find that Respondent demonstrated moderate negligence with respect to this citation. Respondent knew, or should have known, that it was required to rock dust all areas of the mine. The condition was obvious upon visual examination. Respondent was on notice as to the importance of rock dusting because of fatalgrams issued after mine disasters as well as conversations with inspectors and other MSHA personnel. Respondent has a history of taking its rock dusting duties lightly and this ambivalence was exhibited even at the hearing when it claimed that an explosion as a result of inadequate rock-dusting in this mine was impossible. However, this violation was mitigated by the fact that it occurred in a less-traveled area of the mine. Therefore, I find that Respondent was moderately negligent, a finding lower than indicated on the citation.

Penalty

Under the assessment regulations described in 30 C.F.R. § 100, the Secretary proposed a penalty of \$6,458.00 for Citation No. 8128616. While the Secretary's proposal was duly considered, under 30 U.S.C. § 820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will now evaluate each of those factors in turn with respect to proposed penalty to Citation No. 8128616:

(1) The Operator's history of previous violations – The Operator was cited for inadequate rock dusting eight times in the two years prior this citation. Given the fact that this mine was only sampled 16 times in that time period, this means half of its rock dust samples were inadequate.

(2) The appropriateness of the penalty compared to the size of the Operator's business – No. 3 Mine produces 124,061 tons of coal and Respondent produces 226,865 tons coal in all its operations. According to MSHA's penalty assessment guidelines this gives No. 3 Mine nine "mine size points" out of a possible 15 and Respondent four "controller size points" out of a possible 10. *see* 30 C.F.R. § 100.3(b). Thus, Respondent is a moderately sized operator with an above-average sized mine.

(3) Whether the Operator was negligent – As previously shown, the operator was moderately negligent, a lower designation than indicated on the citation.

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

(5) The gravity of the violation – As previously shown, this violation is unlikely to cause an injury, but if it did it would be fatal to all 14 people present at the mine.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – As previously shown, this citation was properly abated.

As I have decided to modify the negligence of this citation from “High” to “Moderate,” I believe that it is necessary to also reduce the proposed penalty. As a general matter, I believe that the penalty criteria used by the Secretary is helpful. Therefore, I used the same formula the Secretary uses in the penalty criteria and determined that a reduction from “High” to “Moderate” negligence would drop the total penalty points in this case from 112 to 97. A citation with 97 penalty points is cited at \$2,161.00 under the penalty criteria. Therefore, Respondent is ordered to pay \$2,161.00 with respect to this citation.

Citation No. 8128630

Validity

As stated previously, Respondent concedes that the citation is valid.

Gravity

I find that this citation was unlikely to lead to an injury or illness. Nonetheless, an accident is possible given the fact that a methane inundation could occur and other factors could cause an ignition. If an accident were to occur as a result of this condition (most notably an explosion fueled by float coal dust) all 14 people in the mine could be affected and I expect they could suffer fatal injuries.

Negligence

I find that Respondent demonstrated moderate negligence with respect to this citation. Respondent knew, or should have known, that it was required to rock dust all areas of the mine, even outby areas like this. The condition was obvious upon visual examination. Respondent was on notice as to the importance of rock dusting because of fatalgrams issued after mine disasters as well as conversations with inspectors and other MSHA personnel. Respondent has a history of taking its rock dusting duties lightly and this ambivalence was exhibited even at the hearing when it claimed that an explosion as a result of inadequate rock-dusting in this mine was impossible. However, this violation was mitigated by the fact that it occurred far from the working face of the mine. Therefore, I uphold the Secretary’s negligence finding.

Penalty

Under the assessment regulations described in 30 C.F.R. § 100, the Secretary proposed a penalty of \$1,944.00 for Citation No. 8128630. While the Secretary’s proposal was duly considered, under 30 U.S.C. § 820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will now evaluate each of those factors in turn with respect to proposed penalty to Citation No. 8128630:

(1) The Operator’s history of previous violations – The Operator was cited for inadequate rock dusting eight times in the two years prior this citation. Given the fact that this mine was only sampled 16 times in that time period, this means half of its rock dust samples were inadequate.

(2) The appropriateness of the penalty compared to the size of the Operator's business – No. 3 Mine produces 124,061 tons of coal and Respondent produces 226,865 tons coal in all its operations. According to MSHA's penalty assessment guidelines this gives No. 3 Mine nine "mine size points" out of a possible 15 and Respondent four "controller size points" out of a possible 10. *see* 30 CFR § 100.3(b). Thus, Respondent is a moderately sized operator with an above-average sized mine.

(3) Whether the Operator was negligent – As previously shown, the operator was moderately negligent.

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

(5) The gravity of the violation – As previously shown, this violation is unlikely to cause an injury, but if it did it would be fatal to all 14 people present at the mine.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – As previously shown, this citation was properly abated

For these reasons, I see no need to alter the penalty proposed by the Secretary. Therefore, Respondent is ordered to pay \$1,944.00 with respect to this citation.

Citation No. 8128631

Validity

As stated previously, Respondent concedes that the citation is valid.

Gravity

I find that this citation was unlikely to lead to an injury or illness. Nonetheless, an accident is possible given the fact that a methane inundation could occur and other factors could cause an ignition. If an accident were to occur as a result of this condition (most notably an explosion fueled by float coal dust) all 14 people in the mine could be affected and I expect they could suffer fatal injuries.

Negligence

I find that Respondent demonstrated moderate negligence with respect to this citation. Respondent knew, or should have known, that it was required to rock dust all areas of the mine, even outby areas like this. The condition was obvious upon visual examination. Respondent was on notice as to the importance of rock dusting because of fatalgrams issued after mine disasters as well as conversations with inspectors and other MSHA personnel. Respondent has a history of taking its rock dusting duties lightly and this ambivalence was exhibited even at the

hearing when it claimed that an explosion as a result of inadequate rock-dusting in this mine was impossible. The fact that some of this area was wet does not affect Respondent's negligence nor does the fact that the sample did not include dust from the floor. However, this violation was mitigated by the fact that it occurred far from the working face of the mine. Therefore, I uphold the Secretary's negligence finding.

Penalty

Under the assessment regulations described in 30 C.F.R. § 100, the Secretary proposed a penalty of \$1,944.00 for Citation No. 8128631. While the Secretary's proposal was duly considered, under 30 U.S.C. § 820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will now evaluate each of those factors in turn with respect to proposed penalty to Citation No. 8128631:

(1) The Operator's history of previous violations – The Operator was cited for inadequate rock dusting eight times in the two years prior this citation. Given the fact that this mine was only sampled 16 times in that time period, this means half of its rock dust samples were inadequate.

(2) The appropriateness of the penalty compared to the size of the Operator's business – No. 3 Mine produces 124,061 tons of coal and Respondent produces 226,865 tons coal in all its operations. According to MSHA's penalty assessment guidelines this gives No. 3 Mine nine "mine size points" out of a possible 15 and Respondent four "controller size points" out of a possible 10. *see* 30 C.F.R. § 100.3(b). Thus, Respondent is a moderately sized operator with an above-average sized mine.

(3) Whether the Operator was negligent – As previously shown, the operator was moderately negligent.

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

(5) The gravity of the violation – As previously shown, this violation is unlikely to cause an injury, but if it did it would be fatal to all 14 people present at the mine.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – As previously shown, this citation was properly abated

For these reasons, I see no need to alter the penalty proposed by the Secretary. Therefore, Respondent is ordered to pay \$1,944.00 with respect to this citation.

Citation No. 8128603

Validity

As stated previously, Respondent concedes that the citation is valid.

Gravity

I find that this citation was unlikely to lead to an injury or illness. Nonetheless, an accident is possible given the fact that a methane inundation could occur and other factors could cause an ignition. If an accident were to occur as a result of this condition (most notably an explosion ignited by this impermissible machine) all 14 people in the mine could be affected and I expect they could suffer fatal injuries.

Negligence

I find that Respondent demonstrated moderate negligence with respect to this citation. The Secretary found that Respondent exhibited moderate negligence and the Respondent did not challenge this finding in its briefing and I find that it conceded the point.

Penalty

Under the assessment regulations described in 30 C.F.R. § 100, the Secretary proposed a penalty of \$1,026.00 for Citation No. 8128603. While the Secretary's proposal was duly considered, under 30 U.S.C. § 820(i), the power to assess a penalty is vested with the Commission. That law also dictates several factors be considered before an assessment is made. I will now evaluate each of those factors in turn with respect to proposed penalty to Citation No. 8128603:

(1) The Operator's history of previous violations – The Operator was cited 6 times at No. 3 Mine under § 75.403 and an additional two times at its other operation in the two years before this citation.

(2) The appropriateness of the penalty compared to the size of the Operator's business – No. 3 Mine produces 124,061 tons of coal and Respondent produces 226,865 tons coal in all its operations. According to MSHA's penalty assessment guidelines this gives No. 3 Mine nine "mine size points" out of a possible 15 and Respondent four "controller size points" out of a possible 10. *see* 30 C.F.R. § 100.3(b). Thus, Respondent is a moderately sized operator with an above-average sized mine.

(3) Whether the Operator was negligent – As previously shown, the operator was moderately negligent.

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

(5) The gravity of the violation – As previously shown, this violation is unlikely to cause an injury, but if it did it would be fatal to all 14 people present at the mine.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – As previously shown, this citation was properly abated.

For these reasons, I see no need to alter the penalty proposed by the Secretary. Therefore, Respondent is ordered to pay \$1,026.00 with respect to this citation.

ORDER

Respondent, Rock N Roll Coal Company, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$14,251.00 within 30 days of the date of this decision.¹⁷

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

¹⁷ 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: (Certified U.S. Mail)

Jeffrey M. Leake, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202

Jim Bowman, Litigation Representative, Rock N Roll Coal Company, Inc., Post Office Box 99, Midway, WV 25878

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004-1710
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December 7, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-1029
Petitioner,	:	A.C. No. 15-18734-181783
	:	
	:	
v.	:	
	:	
POWELL MOUNTAIN ENERGY LLC,	:	Mine #1
Respondent.	:	

DECISION

Appearances: Brian D. Mauk, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, and Billy A. Parrott, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Barbourville, Kentucky, for Petitioner.

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

Before: Judge Tureck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Powell Mountain Energy LLC (“Respondent”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§815 and 820 (“the Act”). The Secretary proposes assessing penalties against Powell totaling \$7,788.00 for a 104(d)(1) citation and an ensuing 104(d)(1) order. The Secretary contends that the violations on which the citation and order were based were reasonably likely to result in permanently disabling injuries, involved seven persons, involved high negligence, and were unwarrantable failures to comply with mandatory standards. Powell challenges the severity of the assessed penalties and whether the citation and order can be sustained as written.

The following are issues for resolution in this case: (1) whether the Respondent violated 30 C.F.R. §§ 75.370(a)(1) and 75.362(a)(2); (2) whether the violations were both significant and substantial and unwarrantable failures to comply with mandatory

standards; (3) whether it is reasonably likely that seven miners could be affected by the violations at issue and suffer permanently disabling injuries; and (4) whether the violations were attributable to Respondent's high negligence.

A formal hearing was held in Jonesborough, Tennessee on August 31, 2011. At the hearing, Secretary Exhibits S-1 through S-6 and Respondent Exhibits R-1 and R-2 were admitted into evidence. The Respondent's Post-Hearing Brief was received on November 2, 2011, and the Secretary's Post-Hearing Brief was received on November 3, 2011.

Findings of Fact and Conclusions of Law

Powell Mountain Energy Mine #1 ("the Mine") is an underground coal mine located in Harlan County, Kentucky. Tr. 30. Gary Oliver is an MSHA inspector, a position that he had held for five years at the time of the hearing. Tr. 15. Inspector Oliver is both an accident investigator and a collateral duty conference and litigation representative. Tr. 16. Prior to working for MSHA, Inspector Oliver worked approximately five years in the coal mining industry. Tr. 18. In total, Inspector Oliver had ten years of experience in the mining industry at the time of the hearing. Tr. 18.

On February 17, 2009 at 10:00 p.m., Inspector Oliver arrived at the Mine to conduct an EO-1 inspection. Tr. 22-23. An EO-1 inspection involves an inspection of the entire mine, including the surface, the records, and everything underground. Tr. 23. Mine inspectors are to conduct EO-1 inspections four times a year at underground mines. Tr. 23-24.

Inspector Oliver had inspected the Mine many times prior to February 17, 2009, and he was familiar with its layout. Tr. 24. In addition, Inspector Oliver testified that he was familiar with the ventilation plan because inspectors are required to review all plans prior to starting an inspection. Tr. 31-32. When Inspector Oliver arrived at the mine, he conducted a safety meeting with the third shift. He then went underground accompanied by the third shift maintenance foreman, Tim Minton. When he arrived at the section of the Mine that he was supposed to inspect, he conducted an imminent danger run. Tr. 24-25. On the night of the inspection, there were workers from the second shift producing coal and their shift overlapped with the workers from the third shift, which is typically a maintenance shift. Tr. 29-30, 48.

According to Inspector Oliver, three or four miners told him that only 20 foot cuts were being made because the scrubber was down on the miner. Tr. 26.¹ When he arrived at the section, he saw that a cut exceeding 20 feet had been taken. *Id.* Inspector Oliver measured the cut to be 32 feet deep. Tr. 26-27. After some discussion, Inspector Oliver asked to see the section foreman. Tr. 27. When he arrived, Inspector Oliver asked him how the cut of 32 feet was taken without the scrubber. The foreman's response was, "I

¹ The scrubber is more formally known as a "flooded bed dust collector system." Tr. 35.

think it's working." Tr. 28. Inspector Oliver said, "Okay. Let's go over to the miner and we'll see." When Inspector Oliver arrived at where the continuous miner was cutting, he asked the continuous miner operator, Ron Muse, to turn the scrubber on. When he attempted to turn the scrubber on, it would not turn on. Tr. 28.

Inspector Oliver testified that he then asked Muse if he checked the dust parameters on the miner prior to starting the miner that night. Muse answered that he had not. Tr. 29. Inspector Oliver then turned to the section foreman and asked him if he had done the dust parameter checks on the miner or if he had watched someone else do them; He answered that they had checked the scrubber. Tr. 29.

Inspector Oliver then informed the section foreman that he was issuing Citation Number 8318195 under §104(d)(1) for failure to follow the ventilation plan by taking extended cuts beyond 20 feet without the scrubber working. He also informed the section foreman that he was issuing Order Number 8318196 for not examining the scrubber as a part of the dust parameter checks. Tr. 29. Inspector Oliver testified that he issued Citation Number 8318195 because "[t]he scrubber was inoperative, and so therefore, they had to be violating the ventilation plan because the plan limited them to 20 foot cuts because of the malfunction of the scrubber." Tr. 31. Inspector Oliver found both the Citation and Order to be the result of high negligence and unwarrantable failure. Tr. 45-46; 57-58. Citation No. 8318195 was abated by Inspector Oliver holding a safety meeting with the section foreman and the miner operator. Order Number 8318196 was abated by holding a safety meeting with the second shift crew on the section and instructing them to make the required on shift examinations and not to take cuts of more than 20 feet if the scrubber is not working. Tr. 51.

The purpose of a scrubber is "[t]o reduce the levels of dust that people could be exposed to." Tr. 37. It works similarly to a vacuum cleaner. It pulls dust through its duct work and sprays water on the dust to trap it into the bottom of the scrubber system. Tr. 35-36. At the same time, the de-mister puts fresh air back into the mine. Tr.37. The wet dust that is settled into the bottom of the scrubber is sucked out by a pump, and is then discharged onto a conveyor and out of the mine via the conveyor belt. Tr. 37.

Inspector Oliver testified that the ventilation plan states "when a flooded-bed dust collector system is not used, an exhaust curtain will be installed and maintained within 20 feet of the face." Tr. 35. He further testified that the greater the distance that a cut is from a curtain, the less effective the ventilation will be in controlling dust. The scrubber is essentially an additional safety precaution for extended cuts. Tr. 37. Inspector Oliver further testified that when an extended cut is taken, there will generally be more dust suspension. This could lead to coal dust ignition or a possible explosion. In addition, dust suspension in the air exposes miners to respirable dust inhalation, which can lead to black lung and silicosis. Tr. 38.

Respondent's ventilation plan required the use of a scrubber only when cuts greater than 20 feet were made. Tr. 27-28; Sec'y Ex. S-4. Prior to Inspector Oliver's inspection of the mine, the mine had a history of respirable dust samples that were above

the standards mandated by MSHA regulations. On the day of the inspection, the mine was on a reduced standard for respirable dust due to excessive weight gains in the dust samples that had been collected. Tr. 41-42. These samples showed that either there was a lot of respirable dust or high levels of spores present in the mine. Tr. 42.

Ron Muse is 60 years old and has been working in the mines for over 30 years. Tr. 83. He has been a continuous miner operator for 20 of those years. He only worked at the Mine for five months, leaving in March, 2009. Tr. 84. On the night of the alleged violations, Muse was the miner operator on the second shift. Tr. 85. Muse testified that on the evening of the inspection, the scrubber had been malfunctioning. When Muse came in for his shift, he was told by the day shift operator that “[t]he scrubber has been giving us problems. It will kick off. Sometimes it will run, sometimes it won’t.” Tr. 86. He added that “[y]ou can run maybe three or four 20-foot cuts then the scrubber would back down and run for a few moments and then go back off.” Tr. 86.

It was Muse who made the extended cut on February 17th and 18th for which Inspector Oliver cited the Mine. Muse’s testimony during the hearing regarding how he made the extended cut was fairly incomprehensible. For example, Muse initially testified that the sequence he utilized for the extended cut was to first make the 32-foot cut and then cut on the curtain side, then, when the scrubber started, he completed the cut to 32 feet. He then stated that he ran the entire 32-foot cut with the scrubber on. He then completed the other 12-foot cut on the curtain side. Tr. 89. Muse then testified that the sequence he utilized was a 20-foot cut on one side, a 12-foot cut on the other side, and then a 32-foot cut. Tr. 91. He later testified that he made a 20-foot cut first, then he added 12 feet on top of that 20-foot cut, and then he backed out and did a 32-foot cut. Tr. 101. Later still, he testified that he made two 20-foot cuts and then two 12-foot cuts on both sides. Tr. 104. He also contradicted himself by saying that he had cut the curtain side first. Tr. 111.

Because of Muse’s confusing and inconsistent testimony, it is difficult to determine how he made the extended cut. However, what is undisputed is that when Muse was two feet from completing an extended cut with the scrubber, the scrubber stopped working; and after it died, Muse completed the extended cut without the scrubber. Tr. 89-91.

Muse examined the miner machine when he came to work that evening. He examined the water sprays, headlights, and emergency stop switches, but he did not examine the scrubber because it “wouldn’t turn on.” Tr. 98. Curtis Davis, the section foreman, was not present when Muse made the extended cut that was cited by Inspector Oliver. Muse did not know where Davis was at the time the extended cut was made. Tr. 98.

Muse testified that there was no suspended dust in the air when he made the extended cut and that he did not make the extended cut with the scrubber disconnected. Tr. 100. He further testified that the other miners in the section would not have been exposed to the air from the cutting because they were not in the path of return air. Tr. 95.

Davis, the section foreman, was aware of problems with the scrubber because he approached Muse during the first part of the shift and told him, "You know they're having problems with the scrubber." Muse then responded, "Yeah, that's what Ron told me." Tr. 116.

The above facts are what led Inspector Oliver to issue the 104(d)(1) Citation and Order that are at issue in this case. Both state that the violations were reasonably likely to result in permanently disabling injuries, involved seven persons, involved high negligence, and were significant and substantial ("S&S") violations and unwarrantable failures to comply with mandatory standards. Sec'y Ex. S-1; Sec'y Ex. S-2.

Significant and Substantial; Unwarrantable Failure

Citation No. 8318195 and Order No. 8318196 are both alleged to be "significant and substantial" and "unwarrantable" as defined in 30 U.S.C. § 814(d)(1).

30 U.S.C. § 814(d)(1) provides:

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

The Commission and several courts of appeals have agreed that four conditions must be met to find that a violation is "significant and substantial":

[T]he 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. *Secretary of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984); see also, *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir.1988); *Consolidation Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 824 F.2d 1071, 1075 (D.C.Cir.1987).

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

To determine if this violation meets the requirements of being an unwarrantable failure, the Judge must assess “the extent of a violative condition, the length of time it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator’s compliance efforts made prior to the issuance of the citation or order.” *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinlands Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard.” *Amax Coal Company*, 19 FMSHRC 846, 851 (May 1997).

Further, “these unwarrantable failure factors must be examined in the context of all relevant facts and circumstances of each case to determine if an operator’s conduct is aggravated, or whether an operator’s negligence should be mitigated. In considering the factors in this context, some may be relevant, while others may not be.” *San Juan Coal Co.*, 29 FMSHRC 125 (March 2007).

Citation No. 8318195

Citation No. 8318195 alleges a violation of §75.370(a)(1), which requires that a mine operator develop a ventilation plan. The citation alleges that the operator was not complying with the approved plan. The practice alleged to be significant and substantial and an unwarrantable failure of §75.370(a)(1) is as follows:

The operator is not complying with the provisions of the approved ventilation plan for scrubber and extended line curtains for the 004 MMU. An extended cut of 32 feet has been cut in the 4 Right crosscut and the scrubber for the Joy continuous miner is not working. The approved ventilation plan only permits cuts no greater than 20 feet when a mechanical failure of the scrubber occurs. This condition would expose miners working on the 004 MMU to excessive amounts of respirable dust. Exposure to respirable dust is the leading cause of Black Lung and

Silicosis in coal miners. The 004 MMU has been cited in the past for excessive quartz in respirable dust samples. Taking extended cuts without all safety precautions in place constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard. Seven miners are present on the 004 MMU.

Sec'y Ex. S-1. The gravity is alleged to be reasonably likely to result in an injury or illness that could be reasonably expected to be permanently disabling, with seven persons affected. Negligence is alleged to be high. The proposed penalty is \$3,689.00 and the citation is a 104(d)(1) citation.

Section 75.370(a)(1) states, in relevant part:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in §75.371 and the ventilation map with information as prescribed in §75.372.

Order No. 8318196

Order No. 8318196 alleges that there was an inadequate on-shift examination of the scrubber on the miner, a violation of 75.362(a)(2). The condition alleged to be significant and substantial and an unwarrantable failure of section 75.362(a)(2) is as follows:

The operators [*sic*] agent failed to conduct an adequate on shift examination to assure compliance with the respirable dust parameters outlined in the approved ventilation plan for the 004 MMU. There was [*sic*] no checks conducted of the flooded wet bed dust collector of the Joy continuous miner. An extended cut was taken in the 4 Right crosscut without the use of the scrubber. If an adequate examination had been conducted as required, then the operators [*sic*] agent would have known that the scrubber was not working and could have avoided taken [*sic*] an extended cut and exposing the miners who work on the 004 MMU to excessive amounts of respirable dust. The failure to conduct this required examination constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard.

Sec'y Ex. S-2. The gravity is alleged to be reasonably likely to result in an injury or illness that could be reasonably expected to be permanently disabling, with seven persons affected. Negligence is alleged to be high. The proposed penalty is \$4,099.00 and the alleged order is a 104(d)(1) order.

Section 75.362(a)(2) states, in relevant part:

A person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan. In those instances when a shift change is accomplished without an interruption in production on a section, the examination shall be made anytime within 1 hour of the shift change. In those instances when there is an interruption in production during the shift change, the examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and control device placement, and any other dust suppression measures required by the ventilation plan. Measurements of the air velocity and quantity, water pressure and flow rates are not required if continuous monitoring of these controls is used and indicates that the dust controls are functioning properly.

Discussion

Citation No. 8318195

The first issue to be resolved is whether there was a violation of 30 C.F.R. §75.370(a)(1), *i.e.*, whether there has been a violation of the Mine's ventilation plan. The ventilation plan for the mine requires the use of a scrubber if a cut beyond 20 feet is to be made. Specifically it states:

The flooded-bed dust collector system shall be operated at all times except as noted below or when a mechanical failure occurs. If a mechanical failure occurs, then an exhaust line curtain will be maintained to within 20 feet of the face and a minimum of 4500 CFM or 60 FPM mean entry air velocity, whichever is greater, will be maintained at the end of the line curtain.

Sec'y Ex. S-4.

Citation No. 8318195 alleges that the operator was not complying with the approved ventilation plan since an extended cut of 32 feet was taken while the scrubber was not working. Inspector Oliver issued the citation because of his belief that the entire 32-foot cut was made while the scrubber was inoperable.² He believed that the scrubber was inoperable during the entire extended cut primarily because he was told it was not working by the roof bolt operators and, when he asked Muse to turn on the scrubber, it would not turn on. Tr. 31, 79. But he did not ask Muse or anyone else in a better position than the roof bolters to know what had occurred whether the scrubber was working at the time the extended cut was made. Tr. 71. When asked if he knew if the scrubber had worked at all during the second shift, Inspector Oliver testified, "I suspected that it didn't." Tr. 70.

Muse admitted that he was told that the scrubber was malfunctioning since the 1st shift. Tr. 86. He was approached by Davis, the section foreman, who informed him that the scrubber was malfunctioning. Tr. 116. But Muse testified that the scrubber was not disconnected at the time the extended cut was made. Tr. 100. Rather, he testified that the scrubber started operating when he began making the extended cut, and it continued to work until he was two feet from completing it. He completed the cut anyway. Tr. 89-90.

I credit Muse's testimony on this point, about the only one where his testimony was consistent. If he was going to lie about what happened, one would expect him to have testified that the scrubber was working throughout the entire cut rather than admit it had shut off but he completed the cut anyway. This testimony was neither in his own interest nor the Respondent's. Moreover, he only worked for Respondent for a short time, and had not worked for Respondent for about 2 ½ years at the time of the hearing, giving him little reason to slant his testimony in respondent's favor.

² Inspector Oliver relied to some extent on what he states he was told by a miner who approached him when he was outside on the surface. That miner allegedly told Inspector Oliver that the scrubber was unhooked in the panel board and he was the one who unhooked it because it was tripping the breaker on the miner. Tr. 80. The miner also allegedly told Inspector Oliver that he would look him in the eye and call him a liar if he was brought into court because he was worried about losing his job. *Id.* Inspector Oliver testified that he promised to keep the identity of the miner confidential, and he has. *Id.*

Although hearsay may be admitted under the Commission's rules (*see* §2700.63(a)), it does not have to be. The hearsay evidence regarding Inspector Oliver's conversation with the unnamed miner is not inherently reliable, and the Respondent has no possible way to challenge the miner's observations or his veracity since Respondent does not know his identity, let alone have the opportunity to confront him. I will not consider this evidence.

The ventilation plan specifically states: “The flooded-bed dust collector system shall be operated at all times except as noted below or *when a mechanical failure occurs*. *If a mechanical failure occurs*, then an exhaust line curtain will be maintained to within 20 feet of the face....” (Emphasis added). Sec’y Ex. S-4. Since part of the extended cut was made while the scrubber was not functioning, the ventilation plan was not complied with. Therefore, Respondent has violated 30 C.F.R. §75.370(a)(1).

The next issue is whether the violation was S&S. Since I have found that a violation of §75.370(a)(1) occurred, the first element of the *Mathies* test has been satisfied.

The second element of *Mathies* requires that there be a discrete safety hazard that was contributed to by the violation. Coal dust-induced respiratory ailments remain a pernicious risk to coal miners’ health. Recent data from the National Institute for Occupational Safety and Health indicate that black lung is becoming more common among the nation’s coal miners, with even younger miners showing evidence of advanced and seriously debilitating lung disease. *Lowering Miners’ Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors*, 75 Fed. Reg. 64, 412, 64, 413 (Oct. 19, 2010).

The Commission has long recognized the insidious nature of black lung disease. In affirming an administrative law judge’s decision holding that respirable coal dust in excess of the permissible level prescribed by 29 C.F.R. §70.100(a) is serious and substantial, the Commission stated that, “[t]here is no dispute, however, that overexposure to respirable dust *can* result in chronic bronchitis and pneumoconiosis.” *Consolidation Coal Co.*, 8 FMSHRC 890, 898 (June 1986) (emphasis added), *aff’d*, 824 F.2d 1071 (D.C. Cir. 1987).

Nevertheless, I find that the second element of *Mathies* has not been met. No evidence was presented showing that a discrete safety hazard resulted from making a single two foot cut without an operational scrubber. No air quality readings were taken, so there is no evidence that the air quality exceeded mandated limits despite the failure of the scrubber for two feet of the cut. Further, there is no evidence that the episode at issue was a frequent practice at the Mine. Rather, it appears to have been an anomaly resulting from a miner’s poor judgment. Therefore, the level of negligence, as well as a determination of whether the violation was S&S, must be based on only a single brief instance of exposure to coal mine dust. Moreover, the evidence indicates that a full 32-foot cut would have taken about 35-40 minutes (TR 101); therefore, two feet of that cut should not have taken more than two or three minutes. I take judicial notice that it takes many years – most often decades - of exposure to coal mine dust for respiratory disease to develop from it. Even if the air quality during those few minutes the scrubber was off exceeded regulatory standards, it is impossible for the effects of that two minute exposure to coal mine dust to have created a hazard even if there was evidence to show that it exceeded allowable limits.

Thus, I find that the second element of *Mathies* has not been satisfied. There is no evidence that making the extended two-foot cut without the scrubber operating caused the

air quality even in the immediate area of the miner to exceed allowable limits; and even if it did cause the dust level to reach unallowable limits, that still would not have created a hazard. Since *Mathies*'s second element has not been met, the violation set out in Citation 8318195 cannot be found to be S&S. Therefore, the third and fourth elements of *Mathies* will not be discussed.

Number of Miners Affected

Inspector Oliver testified that, at the time of the citation, approximately 12 to 14 miners from both the second and third shifts were working in the section. Tr. 50. He determined that seven persons would be affected by this violation because "I was counting the possibility that the bolt machine would be on the return side of the miner. So that's two persons. The miner/operator would be three persons. The shuttle car operators would be two or three additional persons depending on the number of shuttle cars in operation. And then, of course, you've got a boss, an electrician and maybe some other a scoop operator that could have been exposed." Tr. 41.

Muse testified that besides himself, the other men in the section at the time would have been drill operators, a scoop operator, and shuttle car operators. Tr. 113. He did not know exactly where the scoop would have been located at the time the extended cut was made. Tr. 94. He testified that the ventilation system in the mine would have carried the dust produced by his cutting away from the other miners. *Id.* He testified that the other miners in the section at the time the extended cut was made would have had no reason to be in the path of the return air. Tr. 95.

Comparing the evidence submitted from both sides regarding the number of miners that would have been affected, Inspector Oliver made his determination that seven miners would be affected based on the number of miners that would have been in 004 MMU at that time, whereas the Respondent submitted evidence through a mine map and Muse's testimony that any suspended dust generated by his cutting would have been circulated away from the five or six other miners in the vicinity at the time the extended cut was taken. He also testified, as I mentioned above, that the miners in the section would not have had any reason to be in the area where the return air was circulating. The Secretary does not address this evidence in her post-hearing brief, nor did she cross-examine Muse based on this specific testimony. She only relies on Inspector Oliver's determination, based on his estimation at the time he wrote the citation. The Respondent argues that, at most, Muse would have been the only miner affected by any suspended dust at the time the extended cut was made. Res'p Br. 11.

I find this argument convincing. The Secretary has not met her burden of proving that seven miners would have been affected by the violation of 30 C.F.R. § 75.370(a)(1). Therefore, for Citation No. 8318195, I modify the number of miners affected from seven to one.

Further, based on the above discussion, I modify the gravity level from “reasonably likely” to “unlikely”, from “permanently disabling” to “no lost work days”, and from “S&S” to “non-S&S.”

Negligence and Unwarrantable Failure

Next, it must be determined if a finding of high negligence for Citation No. 8318195 is appropriate. 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.” . . . 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. . . . MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” 30 C.F.R. §100.3(d). Low negligence exists when “[t]he operator knew or should have known of the violative conditions or practices but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* at Table X. *See also Brody Mining, LLC*, 2011 WL 2745785 (2011) (ALJ).

Curtis Davis, the foreman, who is an agent of the Respondent, was on notice that the scrubber was malfunctioning. Tr. 116. In fact, he approached Muse and told him, “they’re having problems with the scrubber.” *Id.* Since the scrubber was malfunctioning, and Davis knew that cuts in excess of 20 feet were contemplated at that time, he should have taken the scrubber out of service or, if there was value in making just 20 foot cuts until the scrubber was repaired, instructed the miner operator not to make any cuts in excess of 20 feet. There was no evidence presented that he took either of these actions. Nevertheless, there is no indication that Davis had reason to believe Muse would make an extended cut if the scrubber was not functioning, nor is there evidence that Muse would have attempted the extended cut if the scrubber had not been working when he started it. Had Muse stopped the cut as soon as the scrubber stopped working no violation would have occurred. Further, there is no evidence that making an extended cut without an operational scrubber was a generally accepted practice at the Mine.

Under these circumstances, I find that the Respondent was only moderately negligent. For one thing, there was a mitigating circumstance that was not considered by Inspector Oliver. Inspector Oliver admitted that “[i]f they had told me that it [the scrubber] was working during the shift that would have played into my consideration.” and he would have considered that to be a “mitigating factor.” Tr. 72. In addition, although it was not unforeseeable that Muse would attempt to make the extended cut since the continuous miner was not locked out and it had been working intermittently, a reasonable man in Davis’s place would not have expected that an experienced miner operator such as Muse would continue to make the extended cut if the scrubber stopped working. Finally, there is no evidence that Davis sanctioned Muse’s actions.

Lastly in regard to Citation 8318195, I conclude that this violation was not an unwarrantable failure. An unwarrantable failure is a higher standard of negligence. It involves “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp. v. Secretary of Labor*, 9 FMSHRC 1997, 2001 (Dec. 1987). This violation did not involve aggravated conduct on Respondent’s part. There is no evidence that Respondent knew the extended cut was going to be made or encouraged its miner operators to make cuts in violation of the Mine’s ventilation plan. Moreover, none of the conditions listed in *Mullins & Sons Coal Co.* which must be present to find a violation to be an unwarrantable failure are present here. Accordingly, I conclude that Respondent did not engage in a unwarrantable failure to comply with §75.370(a)(1).

Order No. 8318196

The first issue to be resolved in regard to this order is whether there was a violation of 30 C.F.R. § 75.362(a)(2), which requires an on-shift examination to assure that the ventilation plan is being carried out. The approved Ventilation Plan at the time of the violation at issue required:

Scrubber

Include checks of the following as part of on-shift exam of dust control parameters where appropriate:

- Scrubber air quality
- Cleanliness of duct, screen, etc.
- Water pressure for screen spray
- Operation of screen spray
- Operation of demister and sump
- Centerline pitot reading correlates to full traverse

S-4, at 17.

The evidence in the record shows that there were no on-shift checks made on the scrubber of the Joy continuous miner. Tr. 58. Muse admitted that he did not examine the scrubber. Tr. 98, 107. The Respondent argues in its post-hearing brief that since Muse had been told at the beginning of the shift that the scrubber was not operating, Muse’s failure to turn on the scrubber in order to do the dust parameter check cannot be high negligence. Resp. Br. 6-7. This argument has no merit. Regardless of whether this would absolve Respondent of the need to do an on-shift examination of the scrubber at that time, the fact remains that eventually Muse elected to make a cut for which he needed the scrubber. Once he made that decision, the rationale for failing to perform an on-shift examination of the scrubber is no longer applicable. That an on-shift examination was not conducted prior to using the scrubber is a clear violation of the ventilation plan requirements cited above. Thus, the evidence unequivocally shows that there was a violation of 30 C.F.R. §75.362(a)(2).

Significant and Substantial/Gravity of Violation

The next issues to be resolved are whether the failure to check the scrubber is a significant and substantial violation of a mandatory standard and whether the gravity level should be affirmed. The citation lists the violation as having a reasonable likelihood of injury or illness that could be reasonably expected to result in a permanently disabling injury, with seven persons affected.

Failing to conduct an on-shift check of the scrubber satisfies the first prong of the *Mathies* test, as an underlying violation of the mandatory safety standard §75.362(a)(2).

In regard to *Mathies's* second element, Inspector Oliver determined that the discrete safety and health hazard from Respondent's lack of an adequate on-shift examination was the exposure of miners to excessive amounts of respirable dust. Tr. 58. But the mere fact that the scrubber was not examined did not cause "a measure of danger to safety". Even if the scrubber was not working, the continuous miner could be operated without putting any miners at risk of injury. Danger to safety, *i.e.*, an unsafe level of respirable dust, would only occur if the miner was operated without an operational scrubber in violation of the ventilation plan, that is, if the miner was making extended cuts with the scrubber off. That no danger to safety existed is emphasized by the fact that Inspector Oliver did not require the continuous miner to be removed from service to abate the violation. He simply required that the miner not be used to make extended cuts until the scrubber was repaired. TR 52-53. This is different from the failure to perform a required examination of items such as a vehicle's brakes or steering, for a vehicle cannot be operated safely at all if items such as these are not working properly. The miner could be operated safely despite the malfunctioning scrubber provided no extended cuts were made.

I find that the failure to conduct an on-shift examination of the scrubber did not cause a danger to safety. Accordingly, I conclude that the second prong of the *Mathies* test has not been satisfied, and the violation was not significant and substantial.

Negligence/Unwarrantable Failure

Next, it must be determined if a finding of high negligence for Citation No. 8318196 is appropriate and if there was an unwarrantable failure to comply with a mandatory standard. Davis, the foreman, who is an agent of the Respondent, was on notice that the scrubber was malfunctioning. Tr. 116. He told Inspector Oliver that no one checked the scrubber, as was required by the dust parameter checks. Tr. 76. This was confirmed by Muse's testimony that he did not check the scrubber. Tr. 98, 107. As stated above, this is a direct violation of the ventilation plan requirements, although that violation is not at issue here. Further, it was negligent on the part of Davis since the section was under his direct oversight and control.

As was noted above, high negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating

circumstances.” As there are no mitigating circumstances to this negligent behavior on the part of the mine operator, it meets the requirements of high negligence.

Although I have found that Respondent’s failure to conduct an on-shift examination of the scrubber constituted high negligence, the evidence fails to prove that Respondent acted with reckless disregard or intentional misconduct. The evidence also does not show that the violation at issue occurred more than once, for there is no history of similar violations. Further, the violation occurred within a discrete period, since the on-shift examination was required to be conducted within an hour of the start of the third shift. In addition, although the violation was obvious, it did not create a high degree of danger. Although in failing to examine the scrubber Respondent acted with indifference, and Respondent was on notice that greater efforts were needed to comply with its ventilation plan since it was on a reduced respirable dust standard, I find that these factors do not outweigh the elements of an unwarrantable failure that have not been met. Therefore, I conclude that the failure to perform the on-shift examination of the scrubber was not an unwarrantable failure.

Civil Penalty

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The Mine Act delegates the duty of proposing penalties to the Secretary, 30 U.S.C. §§ 815(a) and 820(a), but delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty, but the Commission is not bound by the Secretary’s proposed assessment. 29 C.F.R. §§2700.28, 2700.30(b). Under Section 110(i) of the Mine Act, the Administrative Law Judge must consider the following six criteria in determining an appropriate civil penalty:

[1] the operator's history of previous violations; [2] the appropriateness of such penalty to the size of the business of the operator charged; [3] whether the operator was negligent; [4] the effect on the operator's ability to continue in business; [5] the gravity of the violation; and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

Reviewing the operator's history of violations, the Mine had a relevant history of 12 violations at the time of the hearing, with penalties totaling \$1,369.00, none of which were 104(d)(1) citations or orders. Altogether, the operator's mines had 22 violations with penalties totaling \$2,369.00. Sec’y Ex. S-5. Respondent produced approximately 203,763 tons of coal in the year in which the contested citation and order were issued. Sec’y Br. 1. As established by my analysis above, the operator was negligent in its violations of 30 C.F.R. §§75.370(a)(1) and 75.362(a)(2). The operator does not contend that payment of the proposed penalties would affect its ability to continue in business. As I have concluded above, the violation of §75.370(a)(1) was unlikely to cause injury and was

moderately negligent, but it was not S&S. In violating §75.362(a)(2), Respondent was highly negligent but the violation was not S&S or an unwarrantable failure.

As to abatement, in regard to the violation of §75.370(a)(1), Inspector Oliver had a safety meeting with the section foreman and the miner operator immediately after the violation was discovered, and it was agreed that no more extended cuts would be made until the scrubber was repaired. The violation of §75.362(a)(2) was abated with another safety meeting, this time with all the production crews, regarding the requirements of the on shift dust parameter checks.

Taking into account the six penalty criteria set forth in the Mine Act, including the reduction in the level of negligence for Citation No. 8318195, I find that the following penalties are appropriate in this case:

Citation No. 8318195 – 104(a) citation, moderate negligence, injury unlikely, no lost workdays, non-S&S, and one person affected: \$100.00.

Order No. 8318196 – 104(a) citation, high negligence, injury unlikely, permanently disabling, non-S&S, and one person affected: \$1,500.00.

Order

Based on the foregoing, Citation No. 8318195 is modified to a citation issued pursuant to section 104(a) of the Act with moderate negligence, injury unlikely, no lost workdays, one person affected, non-S&S. Order No. 8318196 is modified to a citation issued pursuant to section 104(a) of the Act, injury unlikely, non-S&S, one person affected. Powell Mountain Energy LLC is hereby **ORDERED** to pay the Secretary of Labor the sum of \$1,600.00 within 30 days of the date of this decision.

/s/ Jeffrey Tureck

Jeffrey Tureck

Administrative Law Judge

Distribution (Certified Mail):

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710

December 7, 2012

BRADLEY R. ASHBY, : DISCRIMINATION PROCEEDING
Complainant :
 :
 : Docket No. KENT 2011-1225-D
 : MADI CD 2010-06
v. :
 :
 :
 : Freedom Mine
OHIO COUNTY COAL COMPANY, : Mine ID 15-17587
Respondent :

DECISION

Appearances: Bradley R. Ashby, Nortonville, Kentucky, *pro se*, Complainant;
Jeffrey K. Phillips, Esq., Steptoe & Johnson PLLC, Lexington, Kentucky, on
behalf of the Respondent.

Before: Judge Tureck

This case is before me upon a complaint of discrimination filed by Bradley Ashby (“Ashby”) against Ohio County Coal Company (“Ohio County”) pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”), 30 U.S.C. §815(c).

Ashby’s employment as a ram car driver at the Freedom Mine ended on March 29, 2011, just his third day of work at the mine. Tr.105. Within a few days of his termination, Ashby filed a complaint with the Mine Safety and Health Administration (“MSHA”) alleging discrimination under section 105(c) of the Mine Act. *Id.* By letter dated April 11, 2011, MSHA informed Ashby that his complaint of discrimination was assigned to a special investigator named Kirby Smith. Ex. C-2. Subsequently, on April 29, 2011, MSHA informed Ashby that, after an investigation, it had determined that a violation of section 105(c) of the Mine Act did not occur. Ex. R-1. Ashby, through an undated letter, which was received by the Commission on June 27, 2011, initiated this case under section 105(c)(3) of the Act, 30 U.S.C. §815(c)(3).¹ Ex. R-2.

¹ Section 105(c)(3) of the Mine Act states, in relevant part: Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representatives of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this

(continued...)

A hearing was held in Owensboro, Kentucky on January 19, 2012 pursuant to section 105 of the Act, 30 U.S.C. § 815. Subsequent to the hearing, the parties submitted briefs² and I have considered their arguments in the course of this decision.³

Ashby alleges that a continuous miner operator was belittling him, which led to a hostile work environment. In addition, he alleges that Ohio County was operating the ram cars in a hazardous and unsafe manner. Furthermore, he alleges that he became sick due to the hostile work environment, stopped working prior to the end of his shift, and was then fired.

Ohio County denies that Ashby's actions were related to a protected activity under §105 (c). Instead, it claims that Ashby quit by voluntarily abandoning his job two hours before his shift was scheduled to end, while he was still a 90-day probationary employee, and then falsely claimed to management that he was sick in order to attempt to keep his job.⁴

For the reasons stated below, Complainant's discrimination claim is dismissed.

Findings of Fact and Conclusions of Law

Bradley Ashby, who was 41 years old at the time of the hearing, began working at Freedom Mine on March 26, 2011 and prior to that had worked at various mines throughout his career since he was 19 years old with intermittent breaks in between. Tr. 19-22. Prior to working at Freedom Mine, Ashby worked at Armstrong Coal Company's Big Run Mine for two years as a ram car driver. Tr. 21. He had never worked on ram cars before his time at Armstrong Coal. Tr. 64. He had operated a shuttle car for four years at the Vision Mine prior to joining Armstrong Coal and he testified that ram cars and shuttle cars are completely different. Tr. 21, 64.

¹(...continued)

subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). 30 U.S.C. § 815(c)(3).

² Ashby's "brief" was a short, handwritten letter.

³ In Ashby's post-hearing brief, he cites 30 CFR § 48.7 and argues that he was not properly trained as required by this standard in performing his task of operating the ram car since he had no prior work experience operating a ram car with push button switches. Compl. Br.1-2. Since this issue had not been raised at any stage of this proceeding prior to Complainant's post-hearing letter, it will not be considered.

⁴ Since I find that Ashby did not engage in protected activity, there is no reason to decide whether he quit his job or was fired. It will be assumed for purposes of this decision that he was fired.

During his time as a ram car driver at Armstrong Coal, Ashby was not a decision maker on the routes required for the ram cars. Tr. 65. The decision about the types of routes required for ram cars were made before Ashby started working at Armstrong Coal. Tr. 66. In addition, Ashby was not a mining engineer and had never taken an engineering class. Tr. 66. Ashby was terminated from Armstrong Coal in April of 2010 and was unemployed for 11 months before he was hired by Ohio County. Tr. 21-22; 67. He worked for close to ten years in the coal mines prior to working in Ohio County's Freedom Mine. Tr. 22. Ashby commenced his employment at Freedom Mine as a 90-day probationary employee and received the employee policy manual. Tr. 67, 70.

Ashby commenced his employment at Freedom Mine as a 90-day probationary employee and received the employee policy manual. Tr. 67, 70. On Saturday, March 26, 2011 at 7:00 a.m., Ashby started working at Freedom Mine. Tr. 23, 77. Freedom Mine operates two units simultaneously, with each unit having a first, second, and third shift, the third shift being a non-production maintenance shift. Tr. 33; 240. Ashby met with the safety director, Dennis Travis, and received safety training for about 3 or 4 hours. Tr. 23-24; 231. Afterwards, he was taken underground, was shown a ram car, and was asked if he knew how to drive it, to which he said he did. Tr. 24. The man who brought him underground to Unit 2, Bill Barnett, left with the two other new employees that had come underground with Ashby. Tr. 27; 231.

Ashby attempted to operate the ram car but had difficulty because the ram cars he was used to operating at Armstrong Coal's Big Run Mine had directional switches that were placed at a different location from the ram cars at Freedom Mine. Tr. 27. Someone came and explained to him how to operate the directional switch and he proceeded onto the unit. *Id.* However, he continued to have difficulty because the ram car kept stalling. *Id.* He testified that no one explained to him for two days what he needed to do to stop the stalling. *Id.* He further testified that he overheard on the radio someone say, "Don't you think you ought to task train the new guy?", but he states he was never task-trained by the face boss, the superintendent, or the assistant mine foreman, although they all knew that he was having problems. Tr. 27-28. Ashby testified that for the rest of the shift he attempted to learn how to properly operate the ram car. Tr. 28. He added that he asked the face boss on the opposite unit to show him how to operate the ram car and was allegedly told by him that every unit on every shift operated in a different manner, which Ashby believed to be a hazard. Tr. 28-29.

According to Ashby, having two units operating on two production shifts allowed for four different ways to operate the ram cars. Tr. 33. He further testified that he observed the other ram car drivers operating on the beltline through four or five breaks of curtains, all backwards, which made them blind to pedestrians. Tr. 30.

Sometime during his shift, Ashby testified that he went to David Bryant, the face boss in his unit, and told him that he knew a "much better way" of operating the ram cars. Tr. 80. He admitted at hearing that he never told Bryant that he knew a "much safer way" to operate the ram cars. Tr. 81. Bryant allegedly responded, "Well, it works pretty good . . . when everybody knows what's going on." Tr. 31. Ashby then testified that he spoke to the lead car driver, Ray Carroll,

and said to him that he knew of a much better way of operating the ram cars, to which Carroll allegedly said “Not down here you don’t.” *Id.* Ashby testified that the better method he believed was to drive forward, not backwards, in order to allow for better visibility of pedestrians. Tr. 31.

Subsequently, Ashby was chastised by Jerry Carr, the continuous miner operator in Unit 2, who told him, “You blocked these cars twice. If you can’t do it any better, take your car outby and park it.” Tr. 82. Ashby testified that he was confused by the operation of the ram cars and told Carr that it was his first day at work. *Id.*

On Monday, March 28, 2011, Ashby reported for his second day of work at the mine. He had a conversation with Bob Bosch, the general manager, and did not mention any safety issues to him. Tr. 84. Instead, he said “I guess I don’t know driving cars all that well the way I told you because I don’t know, you know, how much or how they are doing it down there. I don’t understand the routes.” *Id.* That day, Ashby was put in with Unit 1 on the first shift, which had a completely different crew from the one he had worked with on Saturday. Tr. 85. Bill Evans was his face boss on this unit and Ashby observed what he considered negligent operation of the ram cars. Tr. 35. Ashby testified that he did not fully understand the operation of the ram cars in the unit but he believed that the miners were operating the ram cars negligently because they were operating the cars differently from how he would have done it. Tr. 36. As the second day progressed, Ashby was still having difficulty with the ram car so a mechanic was called to look over the car. Tr. 38. While this was being done, the face boss, Bill Evans, told him “If you don’t know what to do, take your car outby, park it, come up here, and watch the car drivers.” Tr. 84. Ashby testified that he went up to observe and was there for no more than 30 seconds before he was told by Evans to get back into his ram car. Tr. 86. Ashby continued to have problems and the mechanic went back to working on his ram car while Ashby told him about the problems that he was having. Tr. 86.

Ashby was told that nothing was wrong with the ram car after another mechanic got in his ram car and drove it around without any problems. Tr. 87-88. At this time, a younger miner approached Ashby and told him to let go of the steering stick in order to prevent the ram car from stalling. Tr. 38, 88. Ashby testified that his difficulty was caused because he did not know how to operate a Stamler ram car, which was the only type of ram car used at Freedom Mine. Tr. 87. When he came aboveground, Ashby did not speak to a supervisor about the problems he was having that day with the ram car. Tr. 39-40; 89. He also did not raise the alleged safety issues that he saw with Evans. Tr. 78-79.

On Tuesday, March 29, 2011, Ashby was back on Unit 2. When he got off the mantrip, Ashby believed that there was a group of men whispering amongst themselves about him. Tr. 91-92. He testified that Aaron Farmer, a production analyst, was sent down with him to help him understand how to operate the ram cars in the unit and was there for four or five hours. Tr. 37, 92. Ashby alleges that the ram car drivers completely changed the way that they had operated the ram cars from the prior two days that he had been in the mine, operating them the same way that he had for the two years he worked at Armstrong Coal. Tr. 37-38. He believed that this was how Ohio County actually wanted the work done and the ram car drivers were only following

company protocol because the production analyst was around. Tr. 41. Ashby alleges that his car was able to transport more coal than the three other cars around him combined and that he was running the whole route by himself. Tr. 93. After Farmer left, Ashby alleges that David Bryant was not happy because Farmer was down in the mine and Ashby was performing so well. Tr. 94. He allegedly began to aggravate Ashby over the radio and call him names. Tr. 42. Ashby decided to slow his production down and only take two-thirds of a load of coal and to slow his speed to two-thirds of a normal speed. Tr. 96.

Later on, Jerry Carr, the miner operator, allegedly said to Ashby, “Hey, you [m____ f____]. Don’t you ever [f__ing] pull away from this goddamn miner until I flag you. You have been spilling coal all day long.” Tr. 45.⁵ Ashby testified that he had not been spilling coal and that Jerry Carr made it up. *Id.* In response to Carr, Ashby told Carr that this had been the second time Carr had cursed at him and that there would not be a third time or else Ashby would crawl out of his car and show him what a real man was. Tr. 99. Ashby testified that he felt that his safety was threatened by Carr and that he believed that it was a hostile work environment, so he made the decision to leave. Tr. 45-46. Ashby told David Bryant that he wanted to leave and also told him that he felt that he was running the unit like a circus and Ashby wanted no part of it. Tr. 48. Bryant told Ashby that he could use a golf cart to get out of the mine, and Ashby rode the golf cart the one hour long ride out of the mine by himself. Tr. 49. There was about two hours remaining in the shift. *Id.*

Once Ashby got outside, he testified that he came across the same miner that had brought him down in the mine the previous Saturday, Bill Barnett. Tr. 50. Barnett asked Ashby if he decided to quit and Ashby responded that he was sick and that he would be back the next day. *Id.* At hearing, when Ashby was asked if he had actually been sick, Ashby responded that he had been “disturbed.” Tr. 52.

After taking a shower, Ashby went to speak to the general manager, Bob Bosch, and he apologized for coming out early because he was sick, that it would not be a habit, and that he would be back the next day. Tr. 52. Bosch responded “that wasn’t what he had heard.” Tr. 53. Ashby alleges that he protected Jerry Carr by not reporting him to Bosch and that Carr was nearby and was friendly to him when he saw Ashby talking to Bosch. Tr. 54. During this conversation, Ashby did not tell Bosch about any safety concerns or hazards. Tr. 102.

Ashby was then told by Bosch that he would receive a phone call that night to let him know if they were willing to keep him or not. Tr. 55. When he did not receive the phone call, Ashby testified that he went back the next morning to talk to Bosch and was allegedly told that he was fired. *Id.* After being terminated by Bosch, Ashby told him that his uncle was a part of the FBI, that he was going to call him to come and talk to Bosch, and that he had “miner’s rights.” Tr. 56. Ashby testified that he does not have an uncle that was a part of the FBI and did not know why he told Bosch this. Tr. 57.

⁵ For the sake of propriety, profanity has been edited in this decision.

Sometime following his termination, Ashby went to the Madisonville, Kentucky MSHA office and spoke to a secretary who took down his story. Tr. 58, 105-06. During his discovery deposition, Ashby stated that he did not go to MSHA until after his unemployment claim was denied. Tr. 105. In that claim, it is stated, among other things, that he “had made suggestions to the face boss on safer more productive way to travel” Ex. R-3. That was the only reference to anything having to do with safety in the MSHA complaint. The crux of the complaint was his confrontations with Carr, which he stated caused a hostile environment which led to his removing himself from the mine. *Id.* A few weeks after going to MSHA, Kirby Smith, the special investigator, interviewed Ashby at his father’s house and allegedly told him that he had a case. Tr. 59-60. A short time later, on April 29, 2011, Ashby received a letter stating that MSHA’s investigation has determined that no discrimination had taken place. Tr. 60; Ex. R-1. The letter informed Ashby that he had 30 days from the date of the letter to file a complaint on his own behalf. Ex. R-1. However, Ashby did not file a complaint until June 27, 2011. Ex. R-2. In his complaint to the Commission, Ashby made no mention of safety concerns and, instead, focused on the alleged hostile work environment. Tr. 110.; Ex. R-2. In his request for an appeal of MSHA’s decision, which was untimely filed, Ashby again did not allege any safety concerns. Ex. R-3.

At the hearing, the first witness for Ohio County was Aaron Farmer. Tr. 124. Farmer, a superintendent at Freedom Mine, has been in the mining industry for 16 years holding various positions. *Id.* He spent much of his career helping to design the routes that the ram cars use at Freedom Mine. *Id.* He testified that he had never seen nor heard of any accidents that resulted from established ram car routes at the mine nor had anyone ever made a complaint to him that the ram car routes were hazardous or unsafe. Tr. 126. He also had never seen any ram car drivers backing through four or five curtains. Tr. 127. Farmer testified that he is familiar with the Big Run Mine and its routes since he helped open Big Run when it first started and that the Big Run Mine and Freedom Mine have different routes because they are very different mines. Tr. 125.

On both Monday, March 28, 2011, and Tuesday, March 29, 2011, Farmer was underground in Freedom Mine as a continuous improvement coordinator and his job was to evaluate cable delay issues on different machines that were caused by spliced cables. Tr. 128. Farmer contradicts Ashby’s testimony by stating that on Tuesday, March 29, 2011, Bob Bosch did not assign him to examine the routes of the ram cars or to help Ashby with his understanding of the ram cars. Tr. 129. Instead, Farmer testified that he was there on both Monday and Tuesday to assess the cable delay issues. Tr. 128. In addition, Farmer testified that on both days the ram car routes were not different from the way he had helped plan the routes years earlier. Tr. 130. When Farmer went down the mine with Ashby on Tuesday, March 29th, he testified that he said to Ashby that he might give him a little help with the routes but that was not the reason he was sent down to the mine by Bosch. Tr. 131.

The second witness for Ohio County Coal, William Evans, had been at Freedom Mine since January 1995. Since 2004, he has been a face boss and then a mine foreman. Tr. 135. According to his testimony, ram cars were first used in the mine in the late 1990's. Tr. 135-36. Evans had never seen nor was he aware of any accidents that resulted from the ram car routes

used at Freedom Mine. Tr. 137. He also never received any complaints that the ram car routes were unsafe or hazardous. *Id.* He also testified that the ram car routes remained consistent throughout every shift unless there was a rare issue that prevented the ram car drivers from using their normal routes. Tr. 137.

Evans also testified that there should never be a time where any ram cars are backing through four or five curtains and he never witnessed it happening. Tr. 156-57. He further testified that there may be a need to back the ram car into a continuous miner on a few unusual occasions but that there would have needed to be a turnaround spot for the ram car. Tr. 155-56. He also testified that he saw no difference with going “bucket first” (driving the ram car backwards) versus driving “battery first” (driving the ram car forwards) through the mine as a miner can see better bucket first due to the lack of a battery blocking his view. Tr. 158-59. In addition, a miner driving bucket first can see because the curtains are raised up by the ram car creating an opening in the curtain; further, the curtain is made out of clear vinyl. Tr. 159-60.

On Monday, March 28th, Evans was filling in as face boss on Unit 1. Tr. 138. Evans testified that Ashby received an explanation about the routes that he was going to drive. Tr. 139. He further testified that Ashby was experiencing a lot of trouble and there were miners trying to help him and show him which route to go. Tr. 140-41. Evans witnessed Ashby going into a miner battery first when he was supposed to go into the miner bucket first, so he stopped Ashby and asked him to park his car. *Id.* Ashby told Evans that his ram car kept shutting off so Evans had two mechanics look at the ram car while they talked and watched how the ram cars were pulling. Tr. 141-42. Evans testified that the mechanics told him that there was no problem with the ram car. Tr. 142. He further testified that the person who had used the ram car in the prior shift had not had any issues. Tr. 143.

Evans then testified that he spoke to Ashby as the ram car was being looked at and Ashby told him that the other three ram car drivers were going the wrong way. Tr. 143. Evans testified that he had worked at Big Run Mine before Freedom Mine and had helped get it started. Tr. 144. Evans never received any safety complaints from Ashby and testified that he tried to help him learn the routes by letting him watch a mechanic operate the ram car. Tr. 145-46. Evans did not observe any safety problems or near accidents while the mechanic operated the ram car. Tr. 147. After the mechanic evaluated the ram car and reported that there were no issues, Ashby decided to begin driving the ram car again and was advised to follow behind Dennis Gish, the most experienced ram car driver in the unit. Tr. 148. Ashby continued to have problems by getting lost. Tr. 149.

The third witness, Dennis Gish, a 56 year old ram car driver who had been a coal miner for 26 years at the time of the hearing, helped open up the Big Run Mine. Tr. 161. He has been at Freedom Mine since its opening in 1995 and has operated the ram cars from the time they were first introduced at Freedom Mine in the late 1990's. Tr. 162. Only Stamler ram cars are used in Freedom Mine. Tr. 164. He testified that he had never heard of any accidents related to the way the ram cars were driven through the routes nor did he find the ram car routes unsafe. Tr. 165. He further testified that the routes remain consistent regardless of the day of the week or the shift

with the exception of going into a face from the first cut to a second cut, when a change in routes is required. *Id.*

Gish never witnessed ram cars backing through four curtains nor did Ashby ever express any safety concerns to him. Tr. 166; 169-70. On Monday, March 28th, Gish testified that Ashby was having trouble understanding the explanations from other miners over the radio of how to operate his ram car. Tr. 167-68. Will Evans, the foreman, asked Ashby to get out of his ram car and watch the other ram car drivers. Tr. 168. Evans then asked Ashby to follow behind Gish so that he could understand how to drive the ram car through the routes. *Id.* Ashby made a wrong turn and the other miners lost sight of him. Tr. 169. They kept communicating with him over the radio and Ashby found his way back on the route. *Id.* Ashby told Gish that the way he and the other ram car drivers were pulling through the mine was wrong, but Ashby never mentioned that he thought it was unsafe. Tr. 172-73. Gish explained to Ashby that the way the pulling was done at Freedom Mine was very different from other mines and that Ashby simply was not familiar with the system, which, according to Gish, was more aggressive and efficient than at other mines. Tr. 173. According to Gish's testimony, what made driving the ram cars safe in the mines was the fact that they used radios, which allowed for constant communication. Tr. 174. Gish explained that he believed that Big Run Mine and Freedom Mine operated their ram cars differently because Big Run Mine had a bad top and was restricted to no more than 20-foot cuts. Tr. 174-75.

The fourth witness, Jerry Carr, had been a coal miner since 1975. He had been at Freedom Mine for four years and was working as a continuous miner operator in March, 2011. Tr. 176-77. Carr testified that Freedom Mine's ram car routes are safe and efficient and that he never saw nor heard of any accidents that resulted from them. Tr. 179. Carr's job was to cut the coal with the continuous miner, and the ram car drivers loaded the coal he cut and took it to the feeder. *Id.* Carr first came across Ashby on Saturday, March 26th, and his impression was that Ashby was capable of driving the routes but did not understand the routes and thought he knew a better way than the other ram car drivers. Tr.180-81. Carr witnessed Ashby operating the ram car the wrong way and told him that he needed to start following the other cars since his operation of the ram car was causing a jam. Tr. 182.

On Tuesday, March 29th, Carr testified that Ashby did not notify him when he was pulling off after he obtained a load of coal, which caused coal to be dumped on the ground. Tr. 185. The third time this happened, Carr testified that he said to Ashby, "Buddy, don't pull out from under me anymore. Make sure I know that you're fixing to leave. Every time you dump coal behind me, I got to back this damn miner and clean the [crap] up." *Id.* Ashby responded by saying, "That's twice you have cussed me and there won't be a third time. I will come out of this car and teach you what a man is." Tr. 186. Carr then told Ashby to do whatever he needed to but if he was going to drive the ram car behind him, he needed to do it right. *Id.* Ashby became upset and told the face boss, Bryant, that he wanted to leave. Tr. 187. Bryant asked him if he was sure and Ashby said yes and drove himself out of the mine. Tr. 189. According to Carr's testimony, Ashby did not indicate to Carr that he was sick nor did he make any safety complaints in Carr's presence. *Id.* Carr interpreted Ashby's actions of leaving the mine before the end of his shift as

an indication that he quit. Tr. 188. Carr saw Ashby when he was aboveground talking to Bosch but testified that he did not act friendly towards Ashby. Tr. 188.

The fifth witness, David Bryant, the face boss in Unit 2 during March, 2011, had been mining since 1990 and obtained his first experience operating a ram car at the Freedom Mine. Tr. 190-91. He gained familiarity with the ram car routes at the Freedom Mine over a 14-year period, and testified that the ram car routes were run the same way on Monday, March 28th as they were on Tuesday, March 29th. Tr. 192. When Ashby was assigned to his crew, Bryant talked to the ram car drivers and asked them to help Ashby become familiar with the routes. Tr. 193. Ashby told Bryant that there was a better way to operate the ram cars on the routes but never expressed any safety concerns. Tr. 193. Bryant believed Ashby's statements meant that he believed that there was a more productive way to operate the ram cars, not that there was a safety issue with the current operation of the ram cars. Tr. 194. He told Ashby that they had been operating the ram cars in the current manner the whole time Bryant had been in the mine and that it would continue because it was productive and safe. *Id.*

On Tuesday, March 29th, 2011, Bryant heard on the radio that Ashby was having trouble but also heard the three other ram car drivers helping Ashby by instructing him on where he needed to go. Tr. 194. He also observed Ashby pulling his ram car away from the continuous miner earlier than he should have, which caused spills of coal which had to be cleaned up. Tr. 194-95. He saw Carr chastise Ashby by telling him not to pull away until he flagged him and that he was causing a mess that was costing time. Tr. 195. Ashby said that he did not have to put up with it and told Bryant he wanted a ride out. *Id.* Bryant asked him if he was sure and Ashby said yes. *Id.* According to Bryant, if a miner requests "a ride out", that means he is quitting his job. Tr. 196. Bryant called Tommy Watkins, who was superintendent in March 2011, and told him that Ashby wanted a ride out and that he had asked to Ashby if he was sure that was what he really wanted to do. *Id.* Before he left, Ashby told Bryant that he should tell Carr that if he ever saw him again that he would "skin him like a squirrel." Tr. 197.

The sixth witness, Richard Demar, had five and a half years of experience in the coal mines, with most of his experience as a mechanic. Tr. 201. In March of 2011, Demar was employed as unit mechanic. Tr. 202. According to Demar's testimony, when Ashby came into the unit on Monday, March 28, 2011, Demar task trained him on the controls and functions of the ram car. Tr. 203. After Ashby started driving, he said that his car was stalling for no reason so Demar checked what he believed would be the most likely cause of the car stalling - the braking system - but found no mechanical problems. Tr. 208-09. Demar then called his boss, Darren Browning, and he got into the car, drove it around, and pulled coal but found no problems with the ram car. *Id.* Demar heard Ashby say over the radio that they were operating the ram cars wrong and he could show them a better way, but he never heard him mention anything about safety issues. Tr. 209-10.

Demar testified that the Stamler ram car had lights in both the battery end and the bucket end so that miners could see it coming and going. Tr. 211-12. According to Demar, there were no secrets regarding the operation of the ram car that were being withheld from Ashby. Tr. 212.

Interestingly, while cross-examining Demar, Ashby speculated that the reason the ram car kept stalling may have had something to do with his “bad habit” of leaning on the joystick. Tr. 214.

Ohio County's next-to-last witness, Bill Barnett, was a miner with 35 years of experience. He was Freedom Mine's compliance officer during March, 2011. Tr. 217. On Saturday, March 26th, Barnett took Ashby, along with another new hire, to Unit 2. Tr. 218. He left for a few minutes to escort the other new hire and came back to explain to Ashby how to operate the Stamler ram car including its joysticks, lights, parking brake buttons, and panic bar. He also had Ashby drive up and down the entries. Tr. 219. He knew that Ashby had never operated a ram car like the ones at Freedom Mine but that he believed it should not have been a problem. Tr. 219, 221. He then had Ashby get in line and follow behind Ray Carroll, one of the lead car drivers, so that he would not get lost. Tr. 219.

Consistent with William Evans, Barnett testified that it is safe to drive through the backup curtains in reverse since ram car drivers can see just as well, or even better, from the bucket end as they can see from the battery end. Tr. 222.

Ohio County's final witness, Robert Bosch, was the operations manager during March, 2011, which gave him the authority to hire, fire, or discipline miners. Tr. 226. Ashby was hired based upon a recommendation by other mine employees. Tr. 228. On Tuesday, March 29th, Bosch received a radio call from David Bryant, who was underground, stating that Ashby wanted to leave the mine immediately. Tr. 232. Tommy Watkins, the mine superintendent who was with Bosch when he received the call, asked if Ashby was sick or injured and Bryant said no, that Ashby simply wanted to come out. Tr. 233. After Ashby had come outside after taking a shower, Ashby came to talk to Bosch and Watkins and told them that the reason that he left his job early was because he was sick, which was the first time Bosch had heard anything about Ashby being sick. Tr. 233.

Bosch told Ashby that he would talk to the miners who had been in the unit and find out what happened before he made any final decisions about Ashby's employment. Tr. 234. Bosch believed that Ashby's decision to leave early meant that he was quitting because he was not happy with his job. Tr. 235. From his experience in the mining industry and at Ohio County, if a miner leaves a job before the end of his shift, it means that the individual had quit his job. Tr. 236. After speaking to some of the miners in the unit, Bosch attempted to call Ashby but could not reach him. *Id.* The next day, Ashby came to the mine and Bosch explained to him that he had spoken to everyone in the unit and believed that Ashby had walked off the job when he left. Tr. 237. Ashby asked Bosch if he was firing him and Bosch responded that he considered Ashby to have quit. 237-38. Ashby then became upset, said that he had “miner's rights” and that he had an uncle in the FBI. Tr. 238.

Ashby never presented any safety complaints or concerns to Bosch regarding the ram car routes or anything else. Tr. 236, 239. In addition, Bosch testified that Aaron Farmer was directed to go underground at Freedom Mine on both Monday March 29th and Tuesday March 29th, to look at ways to improve the down time on power cables, not to examine the routes of the

ram cars or to show Ashby how the ram car routes were supposed to go, as Ashby had testified. Tr. 238-39.

Discussion

Section 105(c)(1) of the Mine Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. §815(c)(1).

Under established Commission law, a Complainant establishes a *prima facie* case of a violation of section 105(c) if a preponderance of the evidence proves (1) that the Complainant engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall* 663 F. 2d 1211 (3rd Cir. 1981).

The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n. 20 (Apr. 1981). If the mine operator cannot rebut the *prima facie* case, it may defend affirmatively by proving that it would have taken the adverse action based upon the miner's unprotected activities alone. *Driessen*, 20 FMSHRC at 328-29; *Pasula*, 2 FMSHRC at 2800.

In evaluating whether a complainant has proven a causal connection between protected activities and adverse action, the following factors are to be considered: (1) knowledge of the protected activity; (2) hostility or animus towards protected activity; (3) coincidence in time between protected activity and adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The ultimate burden of persuasion is with the Complainant. *Pasula*, 2 FMSHRC at 2800.

Protected Activity

Regarding what is considered a protected activity under the Act, the Commission has held that “the listing of protected rights contained in section 10[5](c)(1) is intended to be illustrative and not exclusive. The wording of section 10[5](c) is broader than the counterpart language in section 110 of the Coal Act and [Congress] intend[ed] [for] section 10[5](c) to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.” *Pasula*, 2 FMSHRC at 2791-92.

Furthermore, Commission cases have shown that protected activities can include, *inter alia*, testifying at mine safety proceedings, assisting inspectors, serving as miners’ representatives, complaining about unsafe equipment and safety issues within mines, and refusing to perform work in the face of a perceived hazard. *Sec’y of Labor o/b/o Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837-38 (May 1997); *Sec’y of Labor v. Chicopee Coal Co.*, 21 FMSHRC 717, 718 (July 1999); *Sec’y of Labor v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1533-34 (Sept. 1997); *Sec’y of Labor o/b/o Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519 (Mar. 1984).

Here, the Respondent disputes that Ashby engaged in any protected activity. Ashby testified that he suggested a better way for the ram cars to travel, but I find that he did not inform his supervisors at Freedom Mine of a dangerous condition or of a health or safety violation. Tr. 31, 80-81, 85, 145-46, 169-70, 189, 193-94, 209-10, 236, 239. Instead, he told the managers that he could show them a better way, not a safer way, for the ram cars to operate. *Id.* Also, he told Bosch that he did not understand driving ram cars all that well and that he may not be as good as he made himself out to be when they interviewed him because he did not understand the routes in Freedom Mine. Tr. 84. During this conversation, he never mentioned any safety issues. Tr. 85. In fact, Ashby did not mention any safety issues to anyone until after he was no longer employed at Freedom Mine. Tr. 91.

Where material conflicts exist in the testimony between Ashby and other witnesses, I credit the other witnesses. Ashby's hubris seems to know no bounds. Someone who immediately after starting a new job tells everyone he knows how they should run their business better than they do is arrogant beyond belief. This is particularly true here, since Ashby did not know how the mine operated and did not know how to operate the mine's Stamler ram cars. The record also shows that Ashby is not overly concerned with the truth. He lied in telling several people that he left the mine on March 29th because he was sick; he falsely told Bosch that his uncle was an FBI agent, in an apparent attempt to intimidate him; and he misrepresented his ability as a ram car driver.

Furthermore, testimony from Respondent’s witnesses showed that there had never been any accidents or safety concerns in Freedom Mine due to the operation of the ram cars. Tr. 127,

165, 179, 191. I also credit the testimony of the witnesses who stated that driving the ram cars in reverse provides adequate visibility and does not cause a safety issue. Tr. 156-57, Tr. 222. Further, Ashby did not present any evidence of safety violations at the mine. In addition, Ashby's testimony that the ram car routes operated differently on Tuesday, March 29th from the way they operated on the previous Saturday and Monday was rebutted by Farmer, who was in the mine on both Monday and Tuesday. Tr. 130. Thus, I find that Ashby did not have a reasonable or good faith belief that the operation of the ram cars and the ram car routes themselves presented safety issues in Freedom Mine.

Accordingly, I conclude that Ashby did not show that he engaged in protected activity leading to his termination on March 29, 2011. Therefore, his discrimination complaint is denied.

ORDER

It is hereby **ORDERED** that Complainant's discrimination claim be **DISMISSED**.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

Distribution (certified mail):

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/lo

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 11, 2012

SMALL MINE DEVELOPMENT, LLC,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. WEST 2011-1153-RM
v.	:	Citation No. 8605242; 06/07/2011
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine: Vista Mine
Respondent.	:	Mine ID 26-02693 A3V
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2011-1351-M
Petitioner,	:	A.C. No. 26-02693-261328 A3V
	:	
v.	:	
	:	
SMALL MINE DEVELOPMENT,	:	
Respondent.	:	Mine: Vista Mine

DECISION

Appearances: Isabella Finneman, Office of the Solicitor, U.S. Department of Labor, San Francisco, California for Petitioner;
Charles Newcom, Sherman and Howard, LLC, Denver, Colorado for Respondent.

Before: Judge Miller

This case is before me on a notice of contest and a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Small Mine Development (“SMD”) at the Vista Mine (the “mine”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act” or “Act”). These cases involve one citation issued on June 7, 2011. The parties presented testimony and documentary evidence at a hearing commencing on October 3, 2012 in Reno, Nevada.

I. BACKGROUND

The Vista Mine (the “mine”) is an underground gold mine, owned and operated by Newmont Gold, located near Winnemucca, Nevada. (Tr. 10). Small Mine Development was awarded a contract by Newmont to perform underground exploration and development at the mine in order to determine whether gold was mineable. (Tr. 10-11, 122). A separate contractor provided diamond drillers to drill core samples in various areas as it was developed by SMD.

The parties stipulated that the Vista Mine is a mine subject to the Mine Act, and that SMD was a contractor subject to the provisions of the Mine Act. SMD Prehearing Submittal 4. The parties agree that SMD was engaged in exploration and development of the ore body at the Vista Mine, but that it was not producing any ore product. *Id.* At the time the citation was issued, the Vista Mine had one drift, which functioned as the mine’s one escapeway, and no refuge chamber underground. *Id.* MSHA issued the citation at issue for SMD’s alleged failure to have a refuge chamber at the Vista Mine. After listening to the witnesses, reviewing the exhibits, transcripts and the briefs of each party, and after careful consideration of all the evidence and the demeanor of the witnesses, I make the findings set forth below.

II. DISCUSSION

On June 7, 2011 MSHA Inspector Merlin McMullen issued Citation No. 8605242 to SMD for an alleged violation of 30 C.F.R §57.11050(b) for failing to have a method of refuge in the Vista Mine. Just prior to hearing, the Secretary moved to amend the citation to allege, in the alternative, a violation of 30 C.F.R. § 57.11050(a). That motion was granted. The citation alleges in pertinent part that:

The Vista Vein Drift located at the Vista Pit was not provided with a refuge chamber for miners to access in the event of a ground fall. The drift was down approximately 1000 feet underground at a 10% grade. . . . There was no secondary escapeway in place or provided for [m]iners to access in the event of a rib or back failure blocking access to the portal exit. In [m]ines with only one escapeway (those developing a second escapeway or in exploration or development), [m]iners must have access to a refuge area. The condition exposes persons to fatal ground injuries with no refuge chamber available to the [m]iners working underground in the event the main portal was blocked due to a fall of ground.

McMullen determined that a fatal injury was reasonably likely to occur, and that the alleged violation was S&S and the result of moderate negligence on the part of SMD. The Secretary has proposed a penalty of \$8,893.00.

The Violation

a. Summary of Relevant Testimony

On or about February 23, 2011, SMD submitted a legal ID report to MSHA, along with a training plan, mine rescue plan and escape plan for its work in developing the Vista mine and at about the same time because establishing a portal at the mine. SMD Ex. A. The drift was designed to be approximately 16 feet wide and 16 feet high and, at the time the citation was issued in June, 2011, the drift had been driven approximately 1000 feet. (Tr. 22, 24, 34, 85, 122). The plan called for four crosscuts, which were designed to be used for storage and core drilling stations. One of the crosscuts was to be used for a refuge chamber.¹ (Tr. 26). The refuge chamber was not in the mine at the time of the inspection and, rather, was on the surface awaiting installation. (Tr. 26).

MSHA Inspector Merlin McMullen has been a mine safety and health inspector since June 2008 and has worked in the mining industry since 1975. (Tr. 18). McMullen's experience includes blasting activities, quarry supervisor duties, and operation of diesel powered and other equipment in mines. (Tr. 19). On June 7, 2011, Inspector McMullen was instructed to travel to the Vista Mine to conduct a spot inspection of the new operation. (Tr. 21-22). Upon arriving, McMullen learned from Newmont personnel that SMD was the primary contractor at the site. (Tr. 22). McMullen was accompanied by Newmont supervisors and SMD personnel on his first visit to the mine. (Tr. 23, 27, 39).

McMullen testified that SMD was contracted to drive the drift at the Vista Mine and, in doing so, was responsible for drilling, blasting, bolting, shotcreting, hauling explosives in and out of the mine, and mucking and hauling material to the surface. (Tr. 24-25). Three SMD employees worked at the mine on two 12 hour shifts, seven days a week. (Tr. 25). McMullen testified that he was told that SMD was 1300 feet underground at the time of his inspection and had plans to install a refuge chamber, but a chamber had not yet been installed. (Tr. 22). Rather, the chamber was sitting on the surface on the day of the inspection. (Tr. 22). The same day, June 7th, McMullen observed a scoop and a dump truck travel out of the mine portal. (Tr. 27). In addition, he observed other diesel equipment on the surface that was ready for use. (Tr. 27). At McMullen's request, SMD provided a map of the underground area. Sec'y Ex. 5 (Sec'y Ex. 2 is a reduced size of Sec'y Ex. 5); (Tr. 25-26). McMullen testified that the map indicated that SMD was working 1000 feet underground, had blasted past the 4th crosscut, and was nearing the completion of the first phase of its work. (Tr. 25-26). McMullen believed that since the mine had only one escapeway and no refuge chamber underground on that day, it was unsafe to travel into the mine. (Tr. 31). Accordingly, McMullen issued the subject citation. McMullen testified that the following day, June 8th, he met SMD's safety supervisor and traveled underground as the chamber was being installed in the third crosscut. (Tr. 23, 26-27).

¹ While Inspector McMullen testified that the third crosscut was to be used for the chamber, Engelson testified that the left side of the fourth crosscut was to be used for the chamber.

Brian Engelson, SMD's assistant superintendent at the mine at the time the citation was issued, agreed with the testimony of McMullen concerning the activities at the mine. (Tr. 120, 122). He explained that SMD was driving a 16 foot by 16 foot exploration drift at a decline, while cutting drill stations every 300 feet along the drift. (Tr. 122-123). Diamond drillers were operating in the drilling stations along the drift. (Tr. 125). Engelson testified that once SMD completed the refuge chamber crosscut, which he described as the left side of the fourth crosscut, provided ground support, and shotcreted the area, it was going to place the refuge chamber underground in the crosscut. (Tr. 127).

Engelson explained how the development of the drift progressed. (Tr. 129). First, SMD drills out the round, then explosives are brought in by truck from the outside storage magazine directly to the face area where the explosives are loaded. (Tr. 129). The mine is then cleared and the area is blasted. (Tr. 129-130). A crew returns to muck out and bolt the area after the area is properly ventilated. (Tr. 129-130). The cycle is repeated as the face is advanced. (Tr. 130). Engelson explained that each blast advances the face from eight to twelve feet. (Tr. 130). The mine roof and ribs are controlled by the use of wire mesh, installed with roof bolts and additional bolts at the intersections. (Tr. 130-131). Following the ground control installation, the mine uses shotcrete once each week to cover the ground support in an effort to prevent machine damage and strengthen the stability of the support. (Tr. 131). The majority of the mobile equipment pieces at the mine have fire suppression systems, and all of the equipment pieces have fire extinguishers. (Tr. 132).

Engelson testified that the diesel equipment is, for the most part, parked on the surface and brought underground as it is needed. The diesel equipment at the mine includes a dump truck, a powder truck, a mucker, scoop, and a fuel truck. All but the fuel truck would be used underground during the mining cycle. For the most part the vehicles were six to ten feet wide and eight to thirteen feet tall. (Tr. 141-142).

Engelson explained that the ventilation fan for the mine stands at the portal and is shown in Sec'y Ex. 3. (Tr. 128). Compressed air and water are piped to the face from the portal. (Tr. 132-133). Engelson explained that the fan forces air into the mine through connected ten foot long sections of 42 inch tubing. (Tr. 128). The system is designed so that the air sweeps the face and the exhaust is carried back out the drift. (Tr. 128). Engelson believes that, given the incline of the drift from the face, any smoke in the mine would travel up and out of the mine. (Tr. 128-129). Engelson testified that prior to and at the time the citation was issued, there had been no problems with ground conditions or control at the mine. (Tr. 134-135). Engelson opined that, given the more than 1000 feet of the drift, it would take ten minutes to walk at a normal gait out of the mine from the working face. (Tr. 135).

The citation at issue here was not the first one that had been issued to SMD for the lack of a method of refuge. On February 9, 2006 MSHA issued Citation No. 4673221 to SMD for a violation of Section 57.11050 at the Pinson Mine. Sec'y Ex. 9. Michael Drussel, the safety director for SMD and a former MSHA inspector, has 43 years of mining experience and worked at the Pinson Mine when that citation was issued. (Tr. 102-103, 110-111); Sec'y Ex. 9. At hearing, counsel for the Secretary represented that, while the Pinson citation was vacated by the Secretary, SMD was instructed at that time, through their attorney, that a refuge was necessary

even during exploration and development. (Tr. 105). Drussel remembers only that he was told by SMD's attorney that MSHA was going to promulgate a policy as to the refuge requirements of 57.11050 and the mining community would have the opportunity to comment on the policy. (Tr. 109, 116). MSHA subsequently issued a Program Information Bulletin ("PIB") on February 28, 2007. Drussel recalled receiving the bulletin. (Tr. 106). He also recalled a second PIB on the subject that was issued in 2009 and understood them to be identical. (Tr. 106-107). Drussel does not recall discussing the refuge requirements with any supervisor at the mine prior to the issuance of the present citation. (Tr. 107-108).

Kevin Hirsch, an MSHA assistant district manager in Vacaville, California, explained the issuance of the PIBs regarding the mandatory standard and the requirements for a method of refuge. (Tr. 67). Hirsch testified that, prior to the issuance of the subject citation, he was contacted by Ron Jacobson, McMullen's supervisor. (Tr. 76). Hirsch informed Jacobson that, based on the mine map that had been provided, and the conditions described to him, SMD was required to have a refuge chamber. (Tr. 77-78). Hirsch explained that it is MSHA's policy, as explained in the PIB that, prior to the installation of a second escapeway, the mine is required to install a refuge chamber. (Tr. 80-81); Sec'y Ex. 6. PIBs are issued for the purpose of clarifying MSHA's intent and interpretation. Hirsch explained that this particular PIB, Sec'y Ex. 6, was issued on February 28, 2007 by the MSHA administrator for metal/nonmetal and addressed Section 57.11050 and its requirements. (Tr. 81). Hirsch testified that the PIB states that mines must have a refuge when no secondary escapeway is in place. (Tr. 81); Sec'y Ex. 6 p. 2. Moreover, the PIB further indicates that, even in the course of exploration and development, there must be a method of refuge if there is not a secondary escapeway in place. *Id.* The PIB was distributed to all metal/nonmetal mine operators, all program policy manual holders and it is posted on the internet. (Tr. 81-82); Sec'y Ex. 6 p. 3. Hirsch explained that a substantively identical PIB was issued again on June 4, 2009. (Tr. 82). This second PIB, Sec'y Ex. 7, was a re-issue of the earlier PIB, differs in no substantive way, and was distributed in the same manner. (Tr. 82-83). Both PIBs explain the policy and interpretation of the standard to mine operators. While the PIBs don't necessarily explain where to install the refuge, Hirsch has always understood that the refuge is to be moved as the face progresses so that it is near the work area. (Tr. 84-85, 89). Hirsch explained that, based on the information he was presented, there were a number of open crosscuts available to place a refuge chamber. (Tr. 85).

The second PIB states that "until the second escapeway is established a refuge area must be provided." Sec'y Ex. 7 p. 1. The PIB, after discussing that a refuge must be provided in all mine areas with one escapeway, even during development and explanation, states, "[i]n summary[,] that "[i]n mines with only one escapeway (those developing a second escapeway or in exploration or development), miners must have access to a refuge area." Sec'y Ex. 7 p. 2. Finally, the PIB states that "the ability of underground miners to escape or find shelter in times of emergency is critical." *Id.* Hirsch testified that, after reading the minutes of the April 6-7, 1971, Metal and Nonmetal Mine Safety Advisory Committee meeting, he determined that MSHA has had the same interpretation regarding refuge chambers over the past 40 years. (Tr. 88); Sec'y Ex. 8. pp. 3-7. The minutes of that meeting, which are included in a memo dated April 26, 1971, explain the promulgation of the original standard, Section 57.11-50. Sec'y Ex. 8. Page 7 of the exhibit includes the following language: "The revised wording makes it clear that a refuge chamber cannot be used as a substitute for a second opening to the surface except

when a second opening is not possible such as during exploration or development work[.]” Sec’y Ex. 8 p. 7.

b. Summary of Parties’ Arguments

The Secretary maintains that Section 57.11050 can only be read one way; in any mine with only one escapeway, even during the course of development or exploration, a method of refuge is mandatory. Accordingly, the Secretary argues that SMD violated the standard when it failed to “provide a ‘method of refuge’ for its miners working underground at the Vista Mine while [SMD] was engaged in exploration or development mining.” Sec’y Br. 2-3.

The Secretary avers that her interpretation of Section 57.11050 is entitled to deference given that it is “consistent with the plain language of the standard or, in the alternative, [is] a reasonable and safety-promoting interpretation.” Sec’y Br. 3-4, 7. As support for her argument, the Secretary cites the regulatory history of the cited section’s predecessor standard, Section 57.11-50, which was first promulgated on February 25, 1970. Sec’y Br. 4. Based upon the published minutes of a meeting of the drafters of the regulation, the intent of the standard was “to require methods of refuge in underground mines engaged in exploration and development.” Sec’y Br. 6. The drafters clearly understood that, while “a secondary escapeway is the preferable means of ensuring miners reach safety in the event of an emergency, . . . a method of refuge would be utilized in underground mines when creating a secondary escapeway ‘is not possible such as during exploration or development work.’” Sec’y Br. 6 (citing Sec’y Ex. 8 pp. 6-7). Further, the Secretary asserts that she has never “wavered in her position that a method of refuge is required in underground mines engaged in exploration or development work.” Sec’y Br. 4. Furthermore, the Secretary has issued two Program Information Bulletins (“PIBs”) which clarify that in mines with only one escapeway, including those that are engaged in exploration or development, miners must have access to a refuge area. Sec’y Br. 5. In addition, the Secretary’s interpretation is supported by “common sense,” given that SMD’s proposed interpretation would eliminate a safety alternative and fail to “serve the overarching purpose of promoting the safety and health of miners[.]” Sec’y Br. 7.

Finally, the Secretary notes that, while the PIBs were not promulgated contemporaneously with Section 57.11050 in 1977, these interpretive guidance documents are nevertheless due a high level of deference. Sec’y Br. 6. In the cases where deference has not been afforded to such documents, it has been because the interpretation was “a significant change from [a] longstanding practice[.]” which is not the case in the matter at hand. Sec’y Br. 6-7. Moreover, SMD specifically was put on notice of the Secretary’s interpretation when it was issued a citation for a violation of the same standard in 2006. Sec’y Br. 7.

SMD asserts that the plain and unambiguous language of the standard does not require a refuge area during exploration and development mining. SMD Br. 5. Specifically, SMD argues that the second sentence of subsection (a) only requires a refuge while a second opening is being developed, while the third sentence of the subsection “makes clear such second opening is never required in the development or exploration mining setting[.]” SMD BR. 8. Accordingly, given that SMD was engaged in exploration and development, it was not required to have, nor did it

have, two separate escapeways, and, therefore, the second sentence's refuge requirement was not triggered. SMD Br. 8.

SMD acknowledges that, under the language of the predecessor standard, Section 57.11-50, it would have been required to have a refuge at the Vista Mine. SMD Br. 5. However, the legislative history leading up to the promulgation of the current standard in 1977 indicates that an exception was "carved out for exploration/development mining versus production mining[.]" SMD Br. 6. The interpretation put forth by MSHA "reads much of the language added in 1977 out of the standard." SMD Br. 6. Specifically, SMD suggests that, if the Secretary's interpretation is sustained, the "exploration and development" exception in the third sentence of subsection (a), as well as the "in addition to separate escapeways" provision of subsection (b) will be rendered meaningless. SMD Br. 9.

SMD argues that, even if MSHA's proposed interpretation "had some potential for support," MSHA's inconsistent interpretation of the standard over time undermines the new interpretation. SMD Br. 10. SMD asserts that MSHA is completely "revising its enforcement posture in a way which is at odds with the standard's language along with 30 years of enforcement practice. SMD Br. 11. MSHA's own Program Policy Manual makes no reference to the need to provide a method of refuge during development or exploration mining. SMD Br. 11. Further, the two PIBs at issue would seemingly find compliance if a refuge area were within 30 minutes of the face. SMD Br. 12. Given that it only took 10 minutes to walk out of the mine, compliance with these PIBs could be achieved if the chamber were an additional 20 minute walk outside of the mine once one had reached the portal. SMD Br. 12.

SMD argues that Assistant District Manager Hirsch's testimony about when a refuge would be required in this case, when mining had reached a second open crosscut, has no basis in the language of the standard. SMD Br. 12. Had SMD not cut a second crosscut until it "reached the end of its work some 1300 feet in, under his interpretation, no method of refuge would have been required until the end of the project." SMD Br. 12. Nothing in the standard says where the refuge must be, "other than with[in] 30 minutes of the face."² SMD Br. 12.

Finally, SMD argues that the fact of violation should not be sustained based on the Secretary's "speculative testimony" of whether an event would occur that would require the use of a refuge. SMD Br. 13. Conversely, all of SMD's testimony was based on "first hand observations of the ground conditions[.]" SMD Br. 14. Moreover, MSHA's interpretation regarding location of the refuge does not address where an event may occur that would necessitate the use of a refuge, that the "hypothesized peril could happen at 10 feet or 1200 feet." SMD Br. 14. Accordingly, SMD argues that the citation should be vacated.

² The matter of where the refuge chamber must be located is not at issue in this case and therefore, I do not address it.

c. Analysis

The Commission and the Courts have often discussed the procedure for analyzing a standard and its interpretation. In *Akzo Nobel Salt, Inc.*, 21 FMSHRC 846, 852 (Aug. 1999), the Commission wrote:

The Commission has recognized that “[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning.” *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989), *see also Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996). It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature “are to be given their usual, natural, plain, ordinary, and commonly understood meaning.” *Western Fuels*, 11 FMSHRC at 283 (citing *Old Colony R.R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932)). It is only when the plain meaning is doubtful that the issue of deference to the Secretary’s interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered “only when the plain meaning of the rule itself is doubtful or ambiguous”) (emphasis in original).

The Commission has also instructed that the plain meaning is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). If the Court cannot interpret the plain meaning of the regulation, then it must look to the reasonableness of the Secretary’s interpretation.

At the heart of this case is a dispute over whether a mine is required to have a method of refuge when only one escapeway exists during exploration and development. Section 57.11050 of the Secretary’s regulations states as follows:

(a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

(b) In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways within a time limit of one hour when using the normal exit method. These

refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his workplace.

30 C.F.R. § 57.11050.

The fact of violation in this case depends on the interpretation of the standard, particularly the first part, subsection (a). Simply stated, the first sentence of subsection (a) requires every mine to maintain two separate escapeways. The second sentence requires a method of refuge while a second escapeway is being developed and, therefore, contemplates the mine having only one escapeway during that time. The third and final sentence of subsection (a) provides an exception to the requirement for two escapeways during exploration and development. The second subsection of the standard, subsection (b), requires that “[i]n addition to separate escapeways,” in certain circumstances, determined by the distance that can be covered by a miner in a period of time, a refuge is required in “addition to separate escapeways.”

I interpret Section 57.11050 as a whole to require that all mines have two escapeways except during exploration or development. The standard clearly expresses that refuges are required in at least two instances: (1) when there is only one escapeway, and (2) when there are two escapeways and the mine is large enough such that it will take longer than one hour to travel the escape route to the surface. Refuges must be located such that miners can reach them within thirty minutes. The standard, as a whole, is designed to provide miners with alternative means of survival in the event of an emergency.

It is undisputed that the Vista Mine had only one escapeway, was engaged in development mining, and had no method of refuge. With regard to the fact of violation, the only issue that remains is a dispute over the meaning of the cited standard in the context of the facts of this case. I find that subsection (b) of the standard does not apply in this instance since the first part of that subsection (i.e., “In addition to separate escapeways”) qualifies when the subsection is to be applied. That is, it only applies and dictates when a method of refuge is required for those mines that already have two escapeways. SMD was engaged in exploration and development and had only one escapeway. Accordingly, I find that only subsection (a) of the standard may apply, and I address that part of the standard below.

Commissioner Cohen noted in *North Fork Coal Corp.*, 33 FMSHRC 27, 45 (Jan. 2011) (Commissioner Cohen concurring), that an analysis of the plain meaning of the standard requires that the court look at the text, structure, history, and purpose of the standard to determine whether they convey a plain meaning that requires a certain interpretation. In discussing these factors, one must be cognizant of “whether the language of [the standard] is susceptible to more than one natural meaning.” *Taing v. Napolitano*, 567 F.3d 19, 23 (1st Cir. 2009) (citation omitted) (addition in original).

While neither the Act nor the Secretary’s regulations expressly discuss the requirements for a refuge during development and exploration, both the Secretary and SMD assert that a plain meaning reading of the standard is dispositive of this matter. The Secretary and SMD both presented witnesses, all of whom easily qualify as reasonably well-informed persons familiar with the mining industry, who advanced diametrically opposed interpretations of the standard in

the context of the question before me. While the Secretary asserts that the plain language of the second sentence of subsection (a) is determinative of this matter, SMD counters that subsection (a) must be read to require a “method of refuge” only when a secondary escapeway is being developed and, given that no secondary escapeway was required at the subject time, the refuge requirement is inapplicable.

First, a review of the express language of the standard indicates that the standard does not speak clearly to the issue raised, where a mine operator has one escapeway during exploration and development. The text and structure of subsection (a) describe the general requirement for two escapeways, and, in the event of only one escapeway, the additional requirement that a method of refuge be provided. The last sentence of subsection (a) provides for an exception to the two escapeway requirement during exploration and development of the mine. The standard, however does not expressly address the need for a refuge in the exploration or drilling phase.

Next, since the language is not express, I must examine the legislative and regulatory history. Given the “constant threat of unforeseen hazards in underground mines[,]” the escapeway and refuge requirements are of “utmost importance to miner safety.” *See Akzo Nobel Salt, Inc.*, 21 FMSHRC 846, 853 (Aug. 1999). The Commission in *Akzo Nobel Salt* went on to state the following:

When Congress enacted the escapeway requirement as an interim mandatory standard for all underground coal mines, it specifically provided that two escapeways be provided *at all times*. Section 317(f) of the Mine Act provides: “[A]t least two separate and distinct travelable passageways which are maintained to insure passage *at all times* of any person, . . . and which are to be designated as escapeways, . . . shall be provided from each working section continuous to the surface . . .” 30 U.S.C. § 877(f) (emphasis added). This two escapeway requirement was originally included in section 317(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (“Coal Act”), and was carried over without change to the Mine Act. . . . The report from the Senate Committee responsible for drafting the Coal Act states:

Mine fires, extensive collapse of roof, or similar occurrences may completely block the regular travelway between the working section and the surface, thus cutting off escape in an emergency unless an alternate route is provided to the surface. As recently as March 1968, 21 men at a *salt mine* lost their lives because a second escapeway was not provided.

S. Rep. No. 91-411, at 83 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare,

94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 209 (1975) (emphasis added).

Akzo Nobel Salt, Inc., 21 FMSHRC 846, 853-854 (Aug. 1999). Congresses reasoning behind the need for two escapeways is consistent with the similar requirement that a method of refuge be provided when a second escapeway is not. The requirement for, and underlying purpose of, a method of refuge is consistent with the Congressional view of escapeways. Moreover, it is entirely consistent with the primary purpose of the Mine Act. See *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (“This court has several times observed that the ‘primary purpose’ of the Mine Act was ‘to protect mining’s most valuable resource—the miner’ and that ‘Congress intended the Act to be liberally construed’ to achieve this goal”) (Citations omitted). The Commission in *Akzo* noted with approval the Secretary’s statement that the “‘purpose of the standard and the statute is to ensure that miners will have a way out of the mine at all times, even if something happens during an emergency situation and one escapeway is damaged.’” *Akzo Nobel Salt, Inc.*, 21 FMSHRC at 854 (quoting the Secretary’s Brief).

Given that the purpose of escapeways and refuges is to provide an alternative means of escape or survival to miners should the primary means be compromised, it is reasonable to address them in similar fashion. I find that, because subsection (a) of the standard requires a method of refuge when only one escapeway is present, it is a substitute for the two escapeway requirement, and the reasoning for the refuge parallels the reasoning for the requirement of two escapeways. An analysis of the factors discussed above reveals that, while the text and structure of the standard provide some guidance as to the plain meaning, the history and purpose of the standard and other similar standards seem to require a certain interpretation. That interpretation is that the standard requires, in all instances where there are not two escapeways, a method of refuge be employed by the mine.

The ultimate issue in this case is whether the cited area requires a method of refuge within the meaning of the safety and health standard, 30 C.F.R. 57.11050(a). The legal framework for resolving that issue requires determining whether the regulation is ambiguous, if so, whether the Secretary’s interpretation can be afforded deference. Both parties argue that the plain meaning of the standard supports the interpretation they set forth. While I tend to agree, the arguments made by both parties are reasonable and therefore, there may be some ambiguity in the standard. In addition, there is some indication that the D.C. Circuit finds the standard ambiguous and therefore, I analyze the case pursuant to those factors. In *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301 (D.C. Cir. 2000), the D.C. Circuit overturned the Commission majority’s decision, holding that the regulation requiring two escapeways, does not unambiguously require that two escapeways be *functional* at all times when miners are underground. *Id.* at 1303. The Court remanded the case so that the Commission could secure from the Secretary an “authoritative interpretation” of section 57.11050 and apply standard deference principles to that interpretation. *Id.* at 1305.

“Ambiguity exists when a regulation is capable of being understood by reasonably well-informed persons in two or more different senses.” *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 6 (5th ed. 1992)). The conflicting reasonable interpretations

are evidence of the inherent ambiguity in this case. See *Alcoa Alumina & Chemicals, L.L.C.*, 23 FMSHRC 911, 914-915 (Sept. 2001). Since I find that the standard is ambiguous, I must determine whether the Secretary's interpretation of her regulation is due deference. In *The Doe Run Company*, 22 FMSHRC 1243 (Oct. 2000) (ALJ), Judge Zielinski set forth the following statement of law:

It is well-established that the Secretary's interpretation of her own regulations in the complex scheme of mine health and safety is entitled to a high level of deference and must be accepted if it is logically consistent with the language of the regulation and serves a permissible regulatory function. *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 121261-62 (D.C.Cir. 1994), *cert. denied*, 115 S.Ct. 2611 (1995); *Island Creek Coal Co.*, *supra*, and cases cited therein. . . .

I find that the Secretary's interpretation of the regulation is more consistent with the safety promoting purposes of both this particular standard and the Act as a whole than that espoused by Respondent. Requiring a refuge when only one escapeway is present certainly enhances the safety of miners working in those areas. SMD argues that the Secretary's interpretation is not entitled to deference because it was newly minted during this case, was not formally announced in any policy memorandum or embodied in any agency document, is inconsistent with other interpretations, and has not been consistently applied. However, a review of the legislative, regulatory, and enforcement history pertaining to this standard says otherwise. Moreover, "courts defer to agency interpretations of ambiguous regulations first put forward in the course of litigation, but only where the 'reflect the agency's fair and considered judgment on the matter in question.'" *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301, 1304 (D.C.Cir. 2000) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)) and cases cited therein.

I find that the Secretary's interpretation advanced here reflects the agency's fair and considered judgment on the matter in question. SMD included an extensive history of the refuge requirement in its submissions in this case. SMD Ex. J. However, contrary to SMD's argument, while the text of the standard has changed since its first iteration as Section 57.11-50, nothing in the record leads me to believe that the Secretary has ever adopted a different interpretation than that which she has argued in this matter, that, where only one escapeway exists in a mine, a method of refuge is required during exploration and development. While SMD focuses a great deal of its argument on the relevance of the "exploration or development" exception in the third sentence of subsection (a), that exception is only applicable to the requirement of a second escapeway, and does not affect any method of refuge that may be required. Further, I find no relevant history of the Secretary's inconsistent enforcement actions in the record before me. Furthermore, the two PIBs discussed above, which were both distributed to the mining community long before the subject citation was issued, are entirely clear as to the Secretary's

interpretation of the specific issue before me.³ While SMD attempts to claim that the PIBs exhibit ambiguity, SMD BR. 11-12, its arguments deal exclusively with subsection (b) of the standard and the time limit provisions contained in such. However, I have already explained that subsection (b) pertains only to those mines which already have a second escapeway, and, accordingly, I need not address those arguments.

Under the circumstances presented here, the Secretary's interpretation is entitled to deference and SMD's arguments to the contrary are rejected. *See National Wildlife Federation v. Browner*, 127 F.3rd 1126, 1129-30 (D.C.Cir. 1997); *The Doe Run Company* 22 FMSHRC 1243 (Oct. 2000) (ALJ).

As discussed above, the purpose of this particular standard is to provide miners with a safe escape route out of the mine *at all times* and, if that is not available, a safe location to wait out the emergency. The reading suggested by SMD ignores the effect of the mining environment, the protective purposes of this particular standard, and the primary purpose of the Mine Act. Rather, the interpretation suggested by SMD would afford miners no potential alternative means of survival should the one escapeway be rendered impassable. Certainly this result is not what is contemplated by either the standard or the Mine Act in general. *See Central Sand & Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001).

The final inquiry that must be made in addressing the issue of ambiguity, is whether the Secretary's proposed interpretation of the cited standard is reasonable. "The Secretary's interpretation of a regulation is reasonable where it is 'logically consistent with the language of the regulation and . . . serves a permissible regulatory function.'" *Alcoa Alumina & Chemicals*, 23 FMSHRC 911, 913-914 (Sep. 2001) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted)). I find that the Secretary's proposed interpretation of the standard is reasonable in this instance. While SMD asserts otherwise, I find that the Secretary's interpretation is consistent with the language of the standard. The Secretary argues that her interpretation is "reasonable and safety promoting." Sec'y Br. 7. I agree. The purpose of the refuge requirement is to provide to miners an alternative means of escape or survival should the

³ I credit Assistant District Manager Hirsch's explanation of the PIBs. The two PIBs were issued by MSHA to explain the mandatory standard and address the need for a method of refuge. The PIB's, though identical, were issued on separate dates. The Secretary utilizes PIBs to clarify MSHA's intent and interpretation of standard. The PIBs were provided to all metal/nonmetal mine operators, all program policy manual holders, and are posted on the MSHA website. The more recent of the two PIBs states that "until the second escapeway is established a refuge area must be provided." Sec'y E. 7 p. 1. Further, under the "summary" heading, the PIB explains that all mines, even those mines that are in the course of exploration and development mining, must have a method of refuge when no secondary escapeway is in place. *Id.* at p. 2. The PIB states that "the ability of underground miners to escape or find shelter in times of emergency is critical." *Id.* In addition to the PIB, the Secretary also provided a memo, dated April 26, 1971, explaining the promulgation of the original standard, Section 57.11-50. Sec'y Ex. 8. That document explains that "the revised wording makes it clear that a refuge chamber cannot be used as a substitute for a second opening to the surface except when a second opening is not possible such as during exploration or development work..." *Id.* p. 8.

primary means be compromised. The Secretary's interpretation, in addition to being logically consistent with the language of the standard, is also consistent with the underlying purpose of the standard and the Act. I find that the Secretary's proposed interpretation is reasonable. Based on the above analysis, and the parties' stipulations, I find that SMD failed to provide a method of refuge in accordance with the requirements of Section 57.11050(a). Accordingly, I affirm the violation.

d. S&S and Gravity

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

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

McMullen determined that the violation was S&S and reasonably likely to result in a fatal injury. I have already concluded that a violation occurred. Moreover, there can be little doubt that the failure to provide a method of refuge created a discrete safety hazard, that of miners having no alternative means of survival in the event of an emergency that blocks the single escapeway. However, as is frequently the case, the question of whether or not this citation is S&S turns on the third element of the *Mathies* test.

Inspector McMullen testified that he uses fatal grams as a training tool and to raise awareness of what can happen during the regular course of mining. (Tr. 35). He explained that he was aware of two MSHA equipment hazard alerts at mines in the Winnemucca area. (Tr. 36). In the first instance, an electrical fire on a forklift necessitated the evacuation of a mine, and, in the second instance, a blown hydraulic line on a mucker required evacuation. (Tr. 36). According to McMullen, a fuel truck, powder truck, dump truck and mucker were sitting on the

surface of the mine. (Tr. 28). Most of the vehicles were diesel powered and, with the exception of the fuel truck, all of those vehicles would have been used underground at the Vista Mine. (Tr. 28-29). Moreover, he observed a fork lift and dump truck exit the portal while he was there. (Tr. 27, 41). The mobile equipment at the Vista Mine ranged in size from six to twelve feet wide. (Tr. 29). McMullen explained that, in the event of a similar occurrence at the Vista Mine, there would be only one means of escape from the mine, which, if blocked, would result in changes to airflow, smoke, and fatal injuries. (Tr. 37). McMullen testified that the sole purpose of the refuge chamber is that it is to be used in the event of any emergency. (Tr. 38). Hirsch confirmed McMullen's view that the violation was S&S. Based on Hirsch's experience in the industry, it is highly probable that diesel powered equipment will catch fire underground. (Tr. 78-79). Fires occur in mines across the nation, and the district in which this mine is located has had numerous equipment fires. (Tr. 79). While Hirsch has not been to the Vista Mine, he also testified that he has inspected mines within five miles of the area that have had several ground failures, some of which have resulted in fatalities. (Tr. 74-75). Hirsch would expect the geological formations at the Vista Mine to be similar in nature to the mines that are close to it. (Tr. 74).

McMullen acknowledged that he inspected the mobile equipment on the surface and that he found no problems with the equipment or the fire suppression systems that were present. (Tr. 39). McMullen agreed that shotcreting does provide some additional ground fall protection in addition to that which is provided by bolting. (Tr. 42-43). Hirsch acknowledged that he was not aware of any ground control issues, equipment fires, or other safety hazards at the Vista Mine prior to the issuance of the subject citation, or since. (Tr. 93-94)

Engelson testified that he did not believe there would be a fall of ground. (Tr. 134-136). He also stated that, while some diesel equipment had fire suppression systems, all equipment had fire extinguishers. (Tr. 132). For the most part, the vehicles used at the mine were six to ten feet wide and eight to thirteen feet tall. (Tr. 141-142). Engelson testified that, in the event the exit was somehow blocked, he would find a phone and call out to let someone know what was going on and, if ventilation were not affected, he would be fine. (Tr. 136). If ventilation were affected, he would get inside the vent bag at the end of the ventilation tubing and use the air from the compressed air line. (Tr. 136-137). However, on cross-examination, Engelson acknowledged that the vent bag was not a refuge area, as it did not have water lines, suitable hand tools, or stopping materials, and he was not sure whether it was "gas tight". (Tr. 140-141). Drussel testified, also on behalf of SMD, that ground conditions of the mines in northeast Nevada area, "vary considerably" from one another and comparatively, the Vista Mine is on good ground. (Tr. 115). Based upon my observations at hearing, I find that Drussel's answers were evasive and that his demeanor diminished his credibility. Accordingly, I afford his testimony little, if any, weight.

I find that the Secretary has established a reasonable likelihood that the hazard contributed to will result in an injury. In *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2367 (Oct. 2011) the Commission, in addressing the S&S designation of a lifeline violation stated the following:

Evacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs. When the citation for a violation of an evacuation standard is issued, presumably no emergency exists at that moment. While it is the hope and objective of all who work in mine safety that no emergency will ever occur in the future, if an emergency does occur, it is imperative that the requirements of the evacuation standard be met at that time.

Id. 2367. The Commission went on to state that, “with regard to evacuation standards, the applicable analysis under *Mathies* involves consideration of an emergency[.]” *Id.* at 2366. I find that the logic the Commission utilized in Cumberland with regard to lifeline standards is equally applicable to the present situation. Refuge standards, just as evacuation standards, are “intended to apply meaningfully only when an emergency actually occurs.” A refuge is of no use until an emergency exists. Accordingly my analysis of this factor involves consideration of an emergency.

SMD’s miners had been working on the site round the clock; three men on each twelve hour shift, conducting drilling, blasting, bolting, shotcreting, and operating mobile equipment. The miners were routinely exposed to the mine atmosphere and accompanying risks. The Secretary’s witnesses convincingly testified that unexpected falls of roof and equipment fires do occur in mines throughout this district and at mines in close vicinity to the Vista Mine. The size of SMD’s mobile equipment was such that miners would have had little room to maneuver up the drift past the equipment if there were an equipment fire. Further, the drift was the only exit out of the mine. Core drilling and blasting can cause unexpected falls of ground. Given the lack of a method of refuge, any fire or roof fall that blocked the single escapeway and compromised the ventilation would leave the trapped miners without an alternative means of survival. I find that, were an emergency to occur that blocked the drift, the SMD miners would not have had the alternative means of escape or survival that the standard contemplates. A trapped miner would be at the mercy of the elements, which would include, among other things, fire, smoke, lack of breathable air, and lack of water. Without a method of refuge the miners’ means of survival would be extremely limited such that one would reasonably expect fatal injuries to be sustained. Based on my above findings, I affirm the Secretary’s S&S determination.

e. Negligence

McMullen determined that SMD’s negligence was moderate. He based this on his determination that SMD thought it was doing things correctly and it allegedly did not have a current version of the PIB that was issued. (Tr. 37). Moreover, McMullen explained, SMD did have a refuge chamber on the surface and chamber was going to be installed soon. (Tr. 37-38). He gave SMD a copy of the PIB and spoke to them about it.

On cross-examination Engelson acknowledged that early in the development of the Vista project he had a conversation with someone from Newmont during which he learned that Newmont wanted SMD to install a refuge chamber underground. (Tr. 138). It was his impression that the chamber was only for the use of Newmont’s diamond drillers, and not for

SMD employees. (Tr. 138-139). While a chamber had been delivered to the mine prior to the subject citation being issued, and was sitting on the surface at the time, Engelson believed that SMD did not need to install it prior to the completion of its work on this particular part of the mine. (Tr. 138-139). McMullen's testimony, as well as the testimony of the SMD witnesses, indicates that there may have been some, but not a significant number, of mitigating circumstances involved. Based on the evidence before me and the testimony of Inspector McMullen, I affirm his finding of moderate negligence in this instance.

III. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

SMD is a small size operator and terminated the violation in good faith. The penalty as proposed is appropriate given the size of this operator and will not affect SMD's ability to continue in business. The history of violations is part of the record as Sec'y Ex. 11. I have discussed the gravity and negligence above. Based upon the record as a whole, and considering the six statutory criteria, I assess a penalty of \$8,893.00.

IV. ORDER

Small Mine Development, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$8,893.00 within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

1331 Pennsylvania Avenue

Washington, D.C. 20004

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December 12, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2011-61-M
Petitioner	:	A.C. 07-00093-240045
	:	
v.	:	
	:	
PENNSY SUPPLY, INC.,	:	Mine: Tarburton Pit
Respondent	:	

DECISION

Appearances: Maria Del Pilar, Esq., Andrea J. Appel, Esq., U.S. Department of Labor, Office of the Regional Solicitor, Philadelphia, Pennsylvania, for the Petitioner

Sarah T. Brooks, Esq., Old Castle Law Group, Atlanta, Georgia, for the Respondent

Before: Judge Koutras

STATEMENT OF THE CASE

This civil penalty proceeding pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et seq. (2000), hereinafter the "Mine Act", concerns a Section 104(a), non S & S Citation No. 8580394, served on the Respondent on October 12, 2010, citing an alleged violation of mandatory safety standard 30 C.F.R. § 50.10(a), for failing to report a mine accident within fifteen (15) minutes. The Citation included a "no likelihood" of injury or illness gravity designation, and a "high" negligence finding. The Secretary's motion to plead an alternative alleged violation of 30 C.F.R. § 50 (b), was granted on October 12, 2011.

A hearing was held in Dover, Delaware, on May 30, 2012, and the parties appeared and participated fully therein. The parties filed post-hearing briefs and I have considered their arguments in the course of this decision.

The parties agreed to the following:

- 1) The Tarburton Pit Mine is owned and operated by the Respondent. The Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

- 2) The Administrative Law Judge has jurisdiction over the above-captioned proceedings.
- 3) The citation at issue was properly issued and served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the date, time, and place stated therein.
- 4) Payment of the proposed penalty of \$5,000 will not affect the Respondent's ability to continue in business.

The Alleged Violation

Section 104(a) non - S & S Citation No. 8580394, issued at 7:30 a.m., October 12, 2010, alleges a violation of 30 C.F.R. § 50.10(a), and states as follows (Ex. P-2):

The operator failed to report a serious accident that resulted in a fatality. On October 8, 2010, at 12:40 p.m., a truck driver was found on the weigh scale not breathing. Mine management was aware of the incident having reasonable potential to cause death when emergency personnel was alerted at 12:45 p.m. CPR was started at 12:45 hours. Emergency personnel arrived at 13:10 hours. MSHA national call center was notified at 14:42 hours, one hour and fifty seven minutes later.

Kevin T. Hardester testified that he is currently employed as a supervisory MSHA inspector for approximately one year and has been employed by MSHA for nine and a half years. He confirmed his prior mine experience, including previous inspections at the Respondent's mine. He stated that he went to the mine on October 8, 2010, in response to a call from the National Call Center, to investigate a fatality concerning a customer truck driver who may have had a heart attack, and he arrived at 5:30 p.m. (Tr. 19-21,26).

The inspector testified that he met with the Respondent's operations manager, Jeff Dawson. Mr. Dawson explained that at 12:45 p.m., a truck driver (Curtis Taylor) pulled onto the scale with a load of sand, stepped out and picked up his ticket, climbed into the truck and shut the door. After not leaving the scale, the driver behind him approached the truck, opened the door and found Mr. Taylor slumped over the steering wheel unresponsive. The other driver pulled him from the truck and started CPR. The inspector confirmed that Mr. Dawson did not witness the event and related to him what he had learned after the incident. (Tr. 27 - 2&).

The inspector stated that while CPR was being performed, Tina Jackson, who was in the scale house, called 911 and called Mr. Dawson to alert him of the situation. The paramedics arrived at 12:55 p.m. and continued the CPR, put Mr. Taylor in an ambulance, and took him to Kent General Hospital at 1:10 p.m., and MSHA was called at 2:42 p.m. (Tr. 29).

The inspector stated that Mr. Dawson did not inform him about any investigation that he had conducted, and he did not speak to anyone other than Mr. Dawson because the mine was closed. The inspector stated he went to the hospital, the 911 dispatch office, the police station, and the EMS unit, and obtained a death certificate as part of his investigation (Tr. 31; Ex. P-8). He confirmed that he obtained the death certificate prepared by the Coroner from the Office of Vital Records (Tr. 32).

The inspector explained the result of his investigation after speaking with Mr. Dawson and obtaining the documents he gathered as follows at Tr. 34:

A. That the victim was unresponsive when they pulled him from the truck, not breathing. They started CPR, transported him to the hospital. According to the regulations, they have 15 minutes to call. If they're performing CPR, there's a chance that the victim is going to pass, and that call should be made.

Q. And did you observe any conditions which would have been dangerous to other miners?

A. No.

The inspector confirmed he issued the citation at 7:30 a.m., on October 12, 2010, citing a violation of 30 C.F.R. § 50.10(a), and modified the cite section to 50.10(b), because he initially cited the incorrect standard. He confirmed he issued the citation on October 12th because October 8th was a Friday at the end of the day, and he could not receive his document's paperwork until Monday. He issued the citation to Mr. Dawson (Tr. 35 -36).

The inspector stated that his determination that a violation of the cited standard occurred was based on his interview with Mr. Dawson, the 911 dispatch report, the EMS, and the death certificate, that "clearly states they didn't call until 2:42 p.m., an hour and 57 minutes later" (Tr. 37 -38). He confirmed that the Respondent should have called within 15 minutes, by 1:00 p.m., of starting CPR, "realizing that he was unresponsive, not breathing", and "because there was a possibility that man was going to die" (Tr. 37).

The inspector based his high negligence finding on his belief that the Respondent had enough people on the site to perform the CPR and to call MSHA, that it was aware of the regulations, and waited an hour and 57 minutes to call. He confirmed that the violation was abated when the Respondent called the National Call Center (Tr. 38).

The inspector confirmed that MSHA does not require an operator to halt CPR in order to call MSHA. He stated that the standard requires a report within 15 minutes and the Respondent did not call within 15 minutes of EMS arriving. He confirmed that calls were made to 911 and Mr Dawson, and to his knowledge, no one else was called (Tr. 39). He stated that an "800 number poster" was by the Respondent's telephone to call within 15 minutes in the event of an emergency. He confirmed that after a call to 911 was made, a call was placed to Mr. Dawson and the paramedics arrived at 12:55 p.m., and performed the CPR. The Respondent made no calls within 15 minutes of Mr. Taylor being transported to the hospital, and called one hour and 57 minutes later, after the accident happened (Tr. 40).

On cross examination the inspector explained that the level of negligence based on how long after an accident was reported to MSHA would depend on the prevailing circumstances, on a case-by-case basis depending on any justifications called to his attention, including the availability of a phone line. He repeated his earlier testimony concerning his support for the violation (Tr. 40 - 43).

The inspector stated that three people at the accident scene were performing CPR and he identified them as the victim's brother and Respondent's employees Dale Wharff and Darrin Smith. He also identified Tina Jackson, the "scale lady" who was working phone calls. He based his high negligence finding on the fact that three people were performing CPR and one person was making phone calls. He confirmed that Mr. Dawson identified the two employees performing CPR (Tr. 45).

The inspector denied that he issues citations based on the preamble to the mandatory standard and that he does not look at the preamble to determine whether a standard has been violated (Tr. 49). He stated that the only violation that can be issued for a non-mine related accident is a reporting violation (Tr. 51). He believed the purpose of reporting within 15 minutes "is because that's what the regulation states", and when performing CPR the victim is not breathing, not responsive, and there is a potential for death (Tr. 53).

The inspector confirmed that he made the decision to issue the violation and denied that he is pressured to issue a citation as part of his investigation (Tr. 55). He could not recall that employee Dale Wharff performed CPR for 25 minutes, with the phone line open to 911, in order to receive emergency medical instruction. Assuming that were the case, he would not have expected Mr. Wharff to hang up or put 911 on hold and call MSHA to verify he was performing CPR (Tr.56).

The inspector believed that the Respondent handled the incident in good faith "as far as CPR, trying to save the guy, sure they did" (Tr. 56). He did not believe the Respondent was attempting to avoid compliance or receiving a citation (Tr. 56, 58). He believed the Respondent should have called when Mr. Taylor was first found unresponsive and slumped over the steering wheel, and if he were not breathing, there was a chance he would die. He confirmed once the Respondent began performing CPR, a call should have been made within 15 minutes "because there's still a chance that he's going to die" (Tr. 59).

Jeffrey P. Dawson, general manager, stated that he has served in this position for approximately six weeks. In October, 2010, he was serving as the aggregates operation manager, that included five locations, including the Tarburton Pit. He stated that he has received MSHA new mining training, annual refreshers, and attended multiple MSHA and Penn State Mine Safety seminars. He has a B.S. Degree in Mining Engineering from Virginia Tech University (Tr. 74). He confirmed his knowledge of the regulations applicable to the Tarburton Pit and that his duties include compliance with those regulations. He identified an affidavit statement of facts he prepared under oath explaining the events that occurred on October 8, 2010 (Tr. 61-64; Ex. P-5).

Mr. Dawson stated that he was an hour and 15 minutes away from the pit that day with sales representative Ed Holston, in Delmar, south of the site. He received a hands free cell phone call from scale clerk Tina Jackson informing him of an injury at the pit and that the first responder EMT's were at the site. He returned to the site to begin an investigation and arrived at approximately 2:15 p.m. (Tr. 66-68).

Mr. Dawson stated that Ms. Jackson informed him that Mr. Taylor apparently had a heart attack, that EMT's had arrived, some were on the way, and that Mr. Taylor was going to be taken to the hospital. Mr. Dawson stated he was informed that Mr. Taylor had passed out in his truck and was not told CPR was being performed. He confirmed that he did not tell Ms. Jackson to call MSHA or anyone else (Tr. 67).

Mr. Dawson stated that he called Darrin Smith on his way back to the site because he was a manager closer to the site and would be there to take the initial interviews. He could not recall the time when he called Mr. Smith and it was his understanding that Mr. Smith arrived after the EMTs left the site with Mr. Taylor. Mr. Smith was not performing CPR when he was on the phone because Mr. Taylor had been transported off site at that time (Tr. 70).

Mr. Dawson explained that he did not call MSHA on his way back to the pit because it was his understanding that the regulation concerned an accident or injury with a likelihood to cause a death. At that time, he did not believe an accident or injury was involved, no real or immediate danger to anyone else on site, and he had no knowledge of any death. He considered it an isolated incident and did not believe it met the criteria for an immediately reportable accident. He further believed the term "reasonable likelihood" to be "fairly nebulous" (Tr. 70). He agreed that it was possible that someone receiving CPR might die (Tr. 71).

Mr. Dawson explained his understanding of the language of Section 50.10(b), requiring immediate reporting of an "injury which has a reasonable potential to cause death". He believed an "injury" is the result of something physical, such as a fall or broken leg, and that someone "passing out" may have had a pre-existing condition and he did not believe that would be an "injury". He confirmed his understanding that the term "accident", as defined by the regulation, means the death of an individual at a mine (Tr. 74).

Mr. Dawson stated that after returning to the pit he met with Mr. Smith who informed him that according to the EMTs, Mr. Taylor had a heart attack and had been transferred to Kent General Hospital. Mr. Dawson stated there were two or three telephone land lines at the scale house and he believed Tina Jackson made the call from there (Tr. 75). He confirmed that an MSHA poster is located by the telephone in the library, but could not recall any specific poster and confirmed that they are all posted in compliance with the federal laws (Tr. 76).

Mr. Dawson confirmed that he did not call anyone after speaking with Mr. Smith because he did not at that time classify a heart attack, and transporting Mr. Taylor to the hospital, as an accident "and it was not a death to me at that point. I did not quantify a heart attack as an injury". He did not at that time speak to any employees who were present during the heart attack (Tr. 76-77).

Mr. Dawson stated after MSHA had been notified, and after Mr. Taylor's brother confirmed that Mr. Taylor had died, he spoke with Dale Wharff and Tina Jackson while in the process of securing the site as required by MSHA after their phone call. He confirmed that after receiving phone calls from Mr. Smith and Ms. Jackson by cell phone while away from the site, he did not have to pull over because they were incoming calls and he was able to use the hands-free device. He has never used that device to make outgoing calls (Tr. 76-78).

Mr. Dawson confirmed that when he received the phone calls from Mr. Smith and Ms. Jackson, he could have asked them, as well as Mr. Holston, to call MSHA "had I known that it was something that would have fallen under that requirement" (Tr. 78).

Mr. Dawson stated that he called MSHA at 2:42 p.m., approximately 10 minutes after Mr. Smith received a call from Mr. Taylor's brother informing him of the death. Mr. Dawson was in Mr. Smith's office at that time (Tr. 79). He met with inspector Hardester when he arrived at the site and reviewed the event for him and gave him a rough outline and the timelines that Mr. Smith prepared as part of his incident report. He gave the inspector the incident report, the employee statements, and gave him an accurate account of what happened.

Mr. Dawson stated that he returned to the site after he was off-site because he was informed the inspector was there and because it was a serious incident that would need management support in reporting it, and it involved a non-employee passed out in the truck, and that Ms. Jackson and Mr. Smith informed him that EMS had arrived and left the site (Tr. 81-82).

In response to a suggestion that he knew it was a serious condition because there was a reasonable likelihood that someone might die, Mr. Dawson responded as follows (Tr. 82-83):

A. No, I wouldn't say that. Just because EMS is on-site, in my mind does not mean that it has a reasonable likelihood to cause death.

Q. But that is what the standard requires; right? We read that together.

A. Yes, the standard does require that if it has a reasonable likelihood to cause death, then it needs to be performed, not that EMS has been called, as written in the standard.

Q. How about if you knew someone hadn't been breathing, would that be something that you think would be encompassed by the Standard? Passed out, not breathing.

A. I think it would probably depend on the circumstances surrounding it. It's hard to look at anything in that small, narrow window.

On cross-examination. Mr. Dawson confirmed that upon his return to the site he met with Mr. Smith at 2:15 or 2:20 p.m., and that Mr. Taylor's brother, Purnell, called at 2:30 p.m. while he and Mr. Smith were meeting and discussing what had happened. He received a draft report that Mr. Smith was typing to submit to the safety department. Mr. Dawson stated he did not receive a citation while he was at the site on the day of the incident because the inspector informed him he did not feel a need to write one, but would have to return to the office to check (Tr. 84).

Mr. Dawson was recalled by the Secretary. He testified that he knew a Robert Dailey for a brief period and identified him as the Respondent's safety director. Mr. Dawson confirmed that he was familiar with MSHA's web site and has relied on it at times to look up a mine history of violations for

his own locations (Tr. 129-130, 135). He confirmed that he has seen an MSHA printout of the Respondent's violation printout, and noted a contested Citation No. 6062656, 10/10/2008, citing Section 50.10, and a proposed penalty assessment of \$5,000 (Tr. 139).

Darrin Smith, the Respondent's transportation manager, testified that he previously served as a driver supervisor and a dispatcher, and that while his duties do not include MSHA compliance, he was recently MSHA certified in February 2012, in the needs to enter MSHA sites. He stated he was not responsible for any mines in his capacity as the regional transportation manager (Tr. 89). His duties include supervising the dispatch group to ensure that hired truck haulers are safe and compliant in delivering material to customers (Tr. 89).

Mr. Smith stated that he did not receive formal MSHA training, but was trained in MSHA accident reconstruction "and went through this whole process of reviewing the training programs" (Tr. 90). He stated he was in his office on the day Mr. Taylor was found passed out in his truck. Mr. Dawson called him sometime between 1:05 and 1:15 p.m., and informed him that "somebody passed out over at the scale house and he informed him that he would go to check it out. Mr. Smith could not recall that Mr. Dawson informed him that EMS had been called (Tr. 92).

Mr. Smith identified Ex. P-6 as an incident report he prepared from another report filled out by Dale Wharff, and that he "pretty much took the context of that, copied it and pasted it onto the form (Tr. 94). He prepared the report after receiving a phone call from Purnell Taylor informing him that his brother passed away and stated "we try to get it as accurate as we possibly can. He would not have prepared a similar report if Mr. Taylor had survived because a different personal injury report form would be used (Tr. 95).

Mr. Smith confirmed that Mr. Wharff filled out a personal injury report and that he copied all of that information onto the report he prepared (Tr. 96). He stated that the report he copied is as accurate as the same report on file at company headquarters. He explained that while on his way to the scale house, he observed the fire truck and ambulance arriving and described in detail the scene of the accident and what was going on. He was keeping everyone away from Mr. Taylor in order to allow the emergency personnel to work on him and he was directing the incoming truck traffic to keep them out of the way of any emergency vehicles (Tr. 98-100).

Referring to Mr. Wharff's report, Mr. Smith stated that Respondent's employees began performing CPR on Mr. Taylor at 12:45 p.m., and that it was performed by Mr. Wharff and Mr. Taylor's brother, Purnell, and that they continued doing so until 1:10 p.m. when the first emergency personnel arrived and took over and continued the process (Tr. 101-102).

Note: At this point in the hearing, and upon inquiry from the Court, Mr. Smith stated that his incident report (Ex. P-6), that he prepared by copying Mr. Wharff's report, which speaks in terms of "I", "we", and "us", are actually the words of Mr. Wharff as stated in his report and not his (Tr. 103-106).

Mr. Smith identified Ex. P-7 as a Personal Injury and Illness Report kept at company headquarters and confirmed that it was prepared by Mr. Wharff, but he could not state when it was prepared. Mr. Smith stated that his incident report was prepared at 2:30 p.m., and that the information on Mr. Wharff's personal injury report is the exact information that is in his serious incident report

(Tr. 108). He confirmed that a company employee would be responsible for preparing a personal injury report, but since Mr. Taylor was not an employee, he had Mr. Wharff, the person closest to the situation, filled it out because he was responsible for ensuring it is done correctly (Ex. P-7, Tr. 111).

Mr. Smith stated that he was not in the scale house and assumed that Ms. Jackson was still on the phone with 911. He did not know where Mr. Wharff was, or what he was doing, and assumed he was not performing CPR after the EMS arrived (Tr. 115). He confirmed that he had a cell phone that time and made a call to the company safety and health department "to make them aware that we had a gentleman that was collapsed, and we were administering CPR", and the call would have been made between 1:15 to 1:30 p.m. (Tr. 117).

Mr. Smith did not believe it was necessarily true to conclude that it was reasonable that someone receiving CPR might pass away, and 'there's a chance that person can survive and have a normal living life'. The same could be true of anyone found not breathing and "there's always a chance for anything" (Tr. 118).

Mr. Smith stated he received no phone calls while on site between 12:45 and 2:40 p.m., but did receive a call from Mr. Dawson between 1:15 and 1:30 p.m., and then called his safety and health department. He could not have directed Ms. Jackson or Mr. Wharff to call MSHA because he was not MSHA certified at that time and did not know about the 15 minute rule. He was not in the scale house and his function was to ensure everyone stayed away (Tr. 121-122).

Mr. Smith confirmed that his dispatch group is located in the scale house and he has been there. He was unsure whether there is an MSHA poster located by a phone and he stated there was no library in the scale house (Tr. 123). He stated that when he called the safety department, he spoke with Dawn Darkes, who was the administrator at that time and is no longer in that position. She did not tell him to call MSHA and requested him to keep her informed of the situation (Tr. 124-125).

On cross-examination, Mr. Smith stated that he was not "comfortable" about his testimony concerning the different times related to the events because he was not looking at his watch or writing anything down. He confirmed he followed the fire truck and ambulance onto the property, the EMS and fire marshal were already there, and "it was chaotic and traumatic, and it was over two years ago" (Tr. 127).

Mr. Smith stated that when Mr. Taylor was being placed in the ambulance he asked one of the EMS members about his condition but received no reply. He was later informed of Mr. Taylor's death when he received a call from his brother at 2:40 p.m. He confirmed that he gave his brother his phone number in order to hear about Mr. Taylor's condition.

Dale Wharff was previously employed by the Respondent as a dispatcher, weigh master, and scale operator from July 2007, until he was laid off in January 2012. He served as a dispatcher on October 8, 2010, from an office trailer next to the scale house. He stated that Mr. Taylor's brother, Purnell, found him passed out in his truck and yelled to call an ambulance. Mr. Wharff called for an ambulance, handed the phone to weigh master Tina Jackson, helped remove Mr. Taylor from the truck, and he and Purnell proceeded to do heart compressions. He estimated they started sometime after 12:30 p.m. and he and Purnell alternated with CPR (Tr. 146-149).

Mr. Wharff stated that he and Purnell alternated with CPR because it was difficult for one person to keep up the compressions. Ms. Jackson was on the phone speaking with the emergency operator keeping her aware of what was going on and the operator wanted to keep her on the line until someone was on-site. He stated that no one else was in the scale house at that time, and when a fire marshal arrived, he took Mr. Taylor's vitals and administered an electrical shock with a defibrillator and monitored him with pads. He stated that Mr. Taylor had foam in his mouth and he could not tell if he was breathing (Tr. 151).

Mr. Wharff did not know what Ms. Jackson was doing in the scale house after the fire marshal arrived and was working on Mr. Taylor. He did not know if she called anyone else other than the EMS, and that Darrin Smith was not present at this time and arrived later when the ambulance and fire trucks arrived. At that point, Mr. Smith was talking on the phone, but Mr. Wharff did not know who he was speaking to (Tr. 152).

Mr. Wharff identified Ex. P-7, as a transcript of a personal injury report he prepared on October 8, 2010. He confirmed that he prepared the typed narrative paragraph in the middle of the report but did not know who filled in the rest of the report. He sent the information to Darrin Smith after receiving an email asking him to do so (Tr. 154). He believed he finished the report at 2:30 p.m., and was sent home. He did not know that day that Mr. Taylor had died and he had prepared and emailed the report to Mr. Smith before leaving (Tr. 155).

Mr. Wharff stated that after the ambulance took Mr. Taylor to the hospital, six trucks were lined up at the scale to leave with their loads and he monitored the phones while Ms. Jackson was operating the scales to process the trucks that were there (Tr. 155). He confirmed that the pit site has a multiline land phone for customer service and he had a cell phone the day of the accident and it was on his desk and not with him. He did not place or receive any phone calls that day between 12:45 and 2:42 p.m. No one told him to call MSHA, he heard no one discussing a phone call to MSHA, or to the company safety or health office (Tr. 156).

On cross-examination. Mr. Wharff guessed that he and Purnell Taylor administered CPR on his brother for 20 to 25 minutes after the fire marshal arrived at the scene. He explained that his experience performing CPR on Mr. Taylor was traumatic, that he was distraught and "it's something you react to quickly", and that reporting the accident was "not what was on my mind at that point in time". He stated that he had performed CPR on his four-year old son prior to October 2010, when he fell out of a third-story window, and knew that he had to react. Given the same circumstances, he would do it again, notwithstanding knowing MSHA's 15-minute rule (Tr. 161).

Mr. Wharff stated he was aware of a state transportation department regulation related to a report but was not aware of MSHA's 15-minute accident response regulation. He stated there is no bulletin board in the scale house with different state or Federal notices. He confirmed he was laid off because the Respondent purchased an interest in another company who brought in its own personnel (Tr. 162).

The Secretary's Arguments

The Secretary states that Curtis Taylor suffered a heart attack at the mine weight scale, and that his brother Purnell was in a truck behind him, and after pulling Curtis from the truck, he and employee Dale Wharff and truck driver Mark Colburn attended to Curtis. Mr. Wharff contacted the EMS at 12:45 p.m., and ten minutes later he and Purnell began performing CPR on Curtis until EMS arrived at 1:03 p.m. At that time, the EMT's took over performing CPR from Mr. Wharff and Purnell, and then discontinued CPR and used a defibrillator.

The Secretary states that at approximately 12:45 p.m., employee Tina Jackson called Jeff Dawson and informed him that Curtis Taylor had been found passed out in his truck, that he had suffered a heart attack and that a call to 911 had been placed. Jackson did not call MSHA. The Secretary asserts that Mr. Dawson was at another Respondent mine with employee Ed Holston and despite having the capability to make and receive phone calls, Dawson, who is the person with the most knowledge of MSHA compliance and has attended multiple MSHA training, did not instruct Jackson to call MSHA and report Curtis Taylor's injury.

The Secretary states that at the hearing Dawson claimed that he believed that no call was necessary because he did not think that an accident or injury with a likelihood to cause a death had occurred (Tr. 70). However, Dawson admitted that he knows that if CPR is being performed, there is a possibility that the person will die. The Secretary asserts that while Dawson was on the phone with Jackson, transportation manager Darrin Smith was on mine property and that at approximately 1:10 p.m. Dawson called him and informed him that someone had passed out at the weight scale. At that time, Smith was responsible for filling out incident reports and notifying the corporate office if an accident occurs, but he did not call MSHA from his desk. Instead, he drove to the weight scale as the ambulances were driving into the mine.

The Secretary argues that although Smith knew that CPR had been administered, and that EMTs were continuing to render aid, he did not provide first aid and that once he arrived at the accident scene, he directed traffic. Between 1:10 p.m. and 1:30 p.m., Smith telephoned the Respondent's Safety Department and informed the department that a man had collapsed on mine property and that CPR was being rendered. Despite having access to a phone, and despite having rendered no aid to Taylor, Smith never made the required call to MSHA.

The Secretary states that after Curtis Taylor was taken to the hospital, the mine continued its business as usual. Smith instructed Wharff to write up a "serious incident report", and Wharff then went back to his dispatching job. The Secretary concludes that despite the fact that Curtis Taylor was not breathing, two rounds of CPR and defibrillation had been unsuccessful, and Taylor had been transported to the hospital, no one at the mine made the required call to MSHA. The Secretary points out that Curtis Taylor was pronounced dead at the hospital at 1:56 p.m., and that once Mr. Dawson learned that he had passed away, he called MSHA at 2:42 p.m., one hour and 32 minutes after Purnell Taylor and Dale Wharff began performing CPR on Curtis Taylor, and one hour and 11 minutes after the ambulance took him to the hospital.

The Secretary concludes that although required to do so within 15 minutes, the Respondent failed to alert MSHA about the accident until one hour and 32 minutes after its manager knew that Curtis Taylor had stopped breathing and knew that CPR was being performed on the prostrate, non-responsive miner. The Secretary concludes that because multiple people had many opportunities to timely notify MSHA, its conduct violated 30 C.F.R. § 50.10(b), and constituted an egregious delay that supports a "High" negligence level and warrants a civil penalty assessment of \$5,000.

The Secretary argues that the standard, Section 50.10(b), plainly requires that a mine "operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number... once the operator knows or should know that an accident has occurred involving... an injury to an individual at a mine which has a reasonable potential to cause death." Section 50.10(b) is triggered once an accident occurs. Section 50.2(h) defines an "accident" as an injury to an individual at a mine which has a reasonable potential to cause death.

The Secretary asserts that Curtis Taylor's heart attack was an injury with reasonable potential to cause death, and that it was a reportable accident that need not be caused by occupational factors; instead, the "nature" and "act" of the accident must be only evaluated as to whether they had a reasonable potential to cause death, citing Cougar Coal Co. Inc., 25 FMSHRC 513, 520 (Sept. 2003). The Secretary further cites the Court decisions in Standard Sand and Silica Co., WL 6880704 (ALJ Dec. 2011), and E.S. Stone & Structure, 33 FMSHRC 515 (ALJ Jan. 2011), holding that an injury at a mine that requires CPR constitutes an "injury" which has a reasonable potential to cause death that requires reporting to MSHA pursuant to Section 50.10(b).

The Secretary concludes that there is no dispute that Curtis Taylor suffered a heart attack that is an "injury... which has reasonable potential to cause death", and that neither the language of the statute nor relevant case law distinguishes between injuries which occur due to work hazards. The Secretary points out that separate standard, Section 50.1(e) defines "occupational injury" and "occupational illness" and that a violation of Section 50.10(b) is established regardless of whether the accident was work related or non-work related.

The Secretary argues that violations of Section 50.10(b), in the Standard Sand and E.S. Stone cases, supra, were virtually identical to the instant case before the Court. She states that in Standard Sand a mine manager arrived while the EMTs were performing CPR on the victim. EMTs performed CPR for approximately half an hour until the victim was loaded into an ambulance, and he was pronounced dead at the hospital. In E.S. Stone, the victim also suffered a heart attack at the mine site. His co-workers and then EMT workers performed CPR on the victim at the mine in the presence of the victim's supervisor. The victim was then taken to a hospital, where he was pronounced dead.

The Secretary maintains that the fact that Curtis Taylor was found by Respondent's employees to be unresponsive and breathing, and that employees and EMTs performed CPR in an attempt to revive him indicates that his injury had a reasonable potential to result in death and that the Respondent should have known that this was the case. Under the circumstances, the Secretary concludes that the Respondent is without excuse regarding its failure to timely report the accident.

The Secretary argues that the language of Section 50.10(b) is clear and does not depend on a manager's individual judgment as to what constitutes an "injury", and points out that the cited standard does not speak in terms of probability with no requirement that death be the more likely result of an injury. She further argues that the ordinary meaning of the word "potential" is something "capable of being", or which presents the "possibility" that something might occur in the future, and that Dawson and Smith admitted that someone could die as a result of unsuccessful CPR.

The Secretary concludes that the word "reasonable" qualifies that the "potential" for death to occur as a result of the injury must be reasonable or "not far-fetched", and that there is a reasonable potential for death when someone suffers a heart attack and does not immediately respond or receives emergency lifesaving procedures.

The Secretary asserts that the Respondent's trial testimony (Tr. 70), that no reportable accident occurred because it believed that only deaths were reportable, is erroneous in that a death of an individual at the mine is covered by Section 50.10(a), and not the cited Section 50.10(b), in this case. Likewise, citing the E.S. Stone decision supra, holding that a heart attack itself was a reportable accident, the Secretary rejects that Respondent's argument that no injury occurred because there was no physical or work-related action which led to the injury and that a reportable injury cannot be due to a pre-existing condition (Tr. At 70).

The Secretary takes issue with the testimony of Dawson that at the time he received a phone call from Smith, he did not believe the accident was reportable because, among other things, there was no immediate danger to anyone, and points out that the reporting requirement is not dependent on any immediate danger to any one else, and does not include any exceptions or exemptions for naturally occurring heart attacks at mines.

The Secretary maintains that it is clear from the history of Section 50.10 that MSHA intended to remove any exception to the 15-minute reporting requirement. The emphasis is on reporting to MSHA as soon as possible, Cf. Cougar Coal, 25 FMSHRC at 521 ("the decision to call MSHA must be made in a matter of minutes.").

The Secretary rejects Dawson's belief that the requirements of the standard were "fairly nebulous" (Tr. 70). She finds no support for any misinterpretation, and states that if an operator is unclear as to whether or not a reportable accident has occurred, that operator must err on the side of reporting, Newmont USA Ltd. 32 FMSHRC 391, 396 (ALJ April 2010). Further, the Secretary refers to the fact that several phone calls were made to Respondent's managers and that Dawson instructed Smith to head to the accident scene. The Secretary concludes that these actions contradict Dawson's assertion that he did not believe there was a reasonable potential for Curtis Taylor to die.

The Secretary asserts that even if Dawson did not believe that a heart attack was an injury as defined under the standard, the standard requires reporting in cases where the operator should have known that a reportable accident had occurred. She argues that the Respondent should have known that there was a reportable accident because Taylor was unresponsive and not breathing, employees performed CPR, and EMTs performed emergency life saving procedures, citing Mainline Rock and Ballast Inc. v. Sec'y of Labor, 2012 WL 1111258, at *6 (10th Cir. 2012). The Secretary maintains that at any of

these moments they knew, or certainly should have known, that Taylor had suffered an injury which had reasonable potential to cause death.

The Secretary argues that the Respondent's argument that no injury or illness had occurred is undermined by its own internal reporting policy for injuries and illnesses. She points out that after the ambulance left mine property, Smith instructed Wharff to write an incident report, and that Smith admitted that it is company policy to write up this report whenever there is an injury or illness. While Taylor was receiving CPR, Smith also called the Respondent's corporate office. The Secretary suggests that placing a call to MSHA to report the same accident would have required no additional effort on the part of the Respondent, and that its belief that no reportable accident occurred is unreasonable and far-fetched.

Finally, the Secretary concludes that the Respondent did not contact MSHA within 15 minutes of learning of Curtis Taylor's heart attack, and called only once after he was pronounced dead and almost two hours after he was found unresponsive and not breathing in his truck.

Conceding that before the fifteen minute reporting requirement is triggered, an operator may take time to investigate an accident, the Secretary states that the standard preamble and case law make it clear that any investigative efforts by an operator are only to determine whether an accident has happened, 71 FR 12260; Standard Sand, supra. In the case at hand, the Secretary asserts that Respondent's management did not need to investigate whether an accident had occurred because the employees were so concerned about Mr. Taylor's condition that they immediately called 911 and began performing CPR. Accordingly, the Secretary concludes that it was clear that an accident had occurred and no management investigation was necessary.

In response to the Respondent's arguments that in order to call within 15 minutes it would have had to stop providing CPR to Mr. Taylor, the Secretary asserts that such an interpretation of the standard "would lead to absurd results", and the standard "requires no such thing". The Secretary concludes that giving any weight to the Respondent's argument, one would have to believe that only one individual, Wharff, the only employee performing CPR, was capable of calling MSHA.

In support of her arguments, the Secretary asserts that at the hearing the Respondent admitted that there were at least three employees, Smith, Dawson, and Holston, who were neither investigating whether an accident had occurred, nor providing lifesaving measures. Further, the Secretary states that Respondent's employees telephoned people between the time Curtis Taylor was discovered and the time they found that he had died, and that any of these individuals could have also called MSHA. She states it is undisputed that once EMS arrived onsite and took over CPR from the employee, they were free to call MSHA. Moreover, the ambulance took Taylor away at approximately 1:31 p.m., and that at that time there were at least five employees who could have called MSHA within the required 15 minutes.

With regard to the "High" negligence determination associated with the alleged violation, the Secretary relies on the "inordinate delay" of two hours from the time Mr. Taylor was found unresponsive to the time it was reported to MSHA, coupled with the number of people who were available to call MSHA, but only one called instead, clearly supports the High negligence designation.

In support of her negligence arguments, the Secretary states that there were at least four employees who were not performing life-saving procedures who failed to call MSHA within 15 minutes after discovering Mr. Taylor not breathing in his truck. Immediately after the accident occurred, Jackson informed Dawson that Taylor was found passed out in his truck and that 911 was onsite (Tr. 67-68). Dawson and Holston then drove up from Respondent's mine in Maryland (Tr. 67). During their almost two hour drive up to the pit, both Dawson and Holston had cell phones (Tr. 69). Neither one of them placed a call to MSHA.

The Secretary states that Dawson, the person with the most knowledge of MSHA compliance and has attended multiple MSHA trainings, also did not instruct Jackson to call MSHA even though she clearly had access to the phone she used to call them (Tr. 67,74). Employees Smith, Jackson, and Wharff, who were in the mine also did not call MSHA. As a manager, Smith was responsible for providing written accident reports and accident updates to the corporate office (Tr. 107). Smith testified that after EMS arrived, they took over all life-saving efforts and he resorted to directing traffic (Tr. 99). Smith also observed as Mr. Taylor was loaded into the ambulance, thereby ending any possible injury-related activities at the worksite (Tr. 101,117), Smith never called MSHA, but he called Respondent's Safety and Health division (Tr. 117).

The Secretary described the routine work activities of employees Smith, Wharff, and Jackson, and argues that any of them could have complied with MSHA's simple reporting requirements. The Secretary asserts that the Respondent's argument that only Wharff was able to call MSHA is undermined by the fact that employees placed three non-emergency phone calls from the time they discovered Mr. Taylor was not breathing to the time they called MSHA. First, Jackson called Dawson immediately after calling 911. Second, Dawson called Smith to alert him of the accident at the mine. Finally, Smith called his safety department. The Secretary concludes that these calls show that the Respondent knew that Curtis Taylor's injury was serious and had reasonable potential to cause death. However, Respondent only chose to report the incident internally and made no effort to comply with MSHA's mandatory requirement.

The Respondent's Arguments

Although the Respondent denies that it violated the cited standard, it nonetheless takes the position that if the Court should find that a violation has been established, the Court should find in its favor and find no negligence on its part and assess a nominal civil penalty. In support of this argument, the Respondent believes that the Secretary has attempted to establish a technical violation "based on a strict liability regime that is unforgiving and does not account for common sense."

The Respondent asserts that contrary to the Secretary's actions in this case, it not only acted in good faith and without delay in attempting to save the life of Mr. Curtis Taylor, who had a heart attack under very traumatic circumstances, it reported the death of Mr. Taylor within fifteen minutes of conclusively knowing that it had experienced a reportable incident.

Recounting the events on October 8, 2010, the Respondent states that Mr. Taylor's brother, Purnell Taylor, discovered him passed out in his vehicle at the scale house some time after 12:30 p.m., and yelled into the scale house for an ambulance. Employee Dale Wharff, who was in the scale house, called 911, reported what was occurring, and asked for an ambulance. Responding to Purnell

Taylor's call for help, Mr. Wharff handed the phone to scale house employee Tina Jackson, the only other employee present, and then proceeded to help pull Curtis Taylor out of the truck.

Respondent asserts that Mr. Wharff alternated with Purnell Taylor in performing heart compressions (CPR) for approximately 25 minutes, while Tina Jackson was on the phone with 911 keeping the line open and relaying information back and forth. Respondent points out that after 25 minutes, the fire Marshall arrived and assisted with the care of Curtis Taylor.

The Respondent states that Mr. Wharff testified that even if he knew that MSHA would require him to call within 15 minutes of starting CPR, he would not have done anything differently. The Respondent strongly suggests that prioritizing contacting MSHA over saving a man's life, as "suggested" by the Secretary as the appropriate course of action in this case, "is not right", particularly when there was no hazard created or risk of harm to other persons who were present

With regard to the role of Jeff Dawson, the Respondent's general manager who testified that he served in that position for approximately six weeks at the time of the hearing and was the aggregates operation manager on October 8,2010, the Respondent asserts that he was the only MSHA certified employee working that day.

The Respondent asserts that Mr. Dawson was approximately an hour to an hour and fifteen minutes away from the pit site when he learned that Curtis Taylor had passed out in his truck on mine property and immediately returned to the mine in order to be there in his managerial capacity and arrived at approximately 2:20 p.m. Prior to his arrival, Respondent asserts that based upon the limited information that he had at that time, Mr. Dawson did not believe that the incident met the criteria for immediately reporting the accident.

The Respondent states that after arriving at the mine, Mr. Dawson met with transportation manager Darrin Smith, who testified that he was not MSHA certified until February, 2012, in order to learn the information he had gathered as part of his initial accident reconstruction investigation pursuant to his MSHA training.

Mr. Smith was in his office on the day that Curtis Taylor was found passed out in his truck when he received a call from Purnell Taylor informing him of his brother's death. Mr. Dawson was with him at that time and he called MSHA at 2:42 p.m., to report the incident, approximately 10 minutes after Mr. Smith received the call from Purnell Taylor, less than 15 minutes later. Mr. Dawson continued to gather additional information about the incident to review the facts.

With regard to the role of the inspector in this case, the Respondent states that he did not arrive at the mine until the evening of the incident and stated that he did not feel a need to issue a citation at that time because he needed to return to his office and check, citing transcript reference pg. 84. However, that statement was made by Mr. Dawson and not the inspector. The inspector testified that he did not make such a statement (Tr. 49).

The Court notes that the inspector testified credibly that he issued the citation at 7:30 a.m. on October 12, 2010, citing a violation of Section 50.10(a), and that he modified it to cite a violation of Section 50.10(b), because he initially cited an incorrect section, and issued it on October 12th,

because October 8th was a Friday and he did not receive his documentary paperwork until Monday when he served the citation on Mr. Dawson (Tr. 36-37).

The Respondent asserts that the inspector mistakenly believed that employees Dale Wharff and Darrin Smith, as well as Purnell Taylor, were performing CPR on Curtis Taylor, and that he based his high negligence finding on his mistaken belief that three people were performing CPR and one employee (Tina Jackson) was making phone calls. The Respondent argues that the inspector concluded it should have called MSHA within 15 minutes of starting CPR because he believed that to be the rule. The Respondent further states that the inspector was unable to articulate the purpose or goal of the reporting rule and simply concluded "that's what the regulation states", and "that's what Congress decided. Ask them" (Tr. 53). The Respondent cites the inspector's testimony agreeing that it acted in good faith in handling the subject incident and was not attempting to avoid compliance or a citation (Tr. 56-58).

The Respondent concludes that during the time frame from the discovery of Curtis Taylor passed out in his truck until Jeff Dawson contacted MSHA to report his death there was no unreasonable delay because acting in good faith in handling a traumatic situation, it contacted Emergency Medical Services, performed CPR on Mr. Taylor, assisted in rendering aid, and ensured there were no immediate dangers to other miners. Further, the Respondent asserts that Mr. Taylor died from coronary artery disease, a non-occupational illness, and not any work-related act or occurrence that posed danger to other miners.

The Respondent points out that although Mr. Dawson contacted MSHA at 2:42 p.m., the inspector did not arrive at the mine until 5:30 p.m., 3 hours after the incident was reported. The Respondent concludes that MSHA would not have benefitted from any knowledge that CPR was being performed within 15 minutes of the initiation of CPR versus knowing of the incident within 15 minutes of the Respondent conclusively knowing it had experienced a reportable incident. There was no hazard created and it was a non-occupational illness unrelated to any activities at the mine.

The Respondent concludes that in adopting the 15 minute reporting requirement, MSHA recognized that there would be situations, such as the instant case, "where the strict application of its rule would create a ridiculous result". In support of its argument, the Respondent cites MSHA's "common sense" position during the adoption of the final rule as reported at 71 Fed. Reg. 236, 71435 (Dec. 8, 2006), which states as follows:

If a situation were to arise involving extenuating circumstances, such as an operator having to choose between saving someone's life and notifying MSHA, enforcement discretion would take those circumstances into account MSHA does not expect that an operator who has to make a decision between rendering life-saving assistance and calling MSHA would be penalized for providing that assistance.

The Respondent concludes that the Secretary has focused more on winning this case than on the big picture, has not demonstrated common sense in pursuing this case, and that its proposed application of the standard is illogical and contrary to the prioritization of the health and safety of miners. The Respondent further concludes that the inspector's mistaken belief as to important facts in

support of his high negligence finding, his lack of understanding of the Standard and how it should be applied, and his lack of awareness that he has enforcement discretion all support the fact that he issued the citation when he should not have.

Finally, in summarizing its defense in this case, the Respondent maintains that the Secretary has not established a violation because it did not conclusively know that a reportable incident had occurred until Darrin Smith received the phone call from Purnell Taylor at 2:30 p.m. MSHA's documentation indicates that a call from Respondent came in to MSHA at 2:42 p.m., reporting the death of Curtis Taylor, which was less than 15 minutes later.

FINDINGS AND CONCLUSIONS

Fact of Violation

Mandatory accident reporting standard 50 C.F.R. § 50.10, states in relevant part as follows:

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1533, once the operator knows or should know that an accident has occurred involving:

1. A death of an individual at the mine;
2. An injury of an individual at the mine which has a reasonable potential to cause death.

Section 50.2(h)(1), Title 30, Code of Federal Regulations, defines an "accident" as "a death of an individual at a mine." In this matter the citation initially alleged a violation of Section 50.10(a), for failing to report, within fifteen minutes, "a serious accident that resulted in a fatality" (Ex. P-2). The citation was subsequently modified by the inspector to reflect an alleged violation of Section 50.10(b), and I find that the previously described alleged condition or practice stating "management was aware of the incident having reasonable potential to cause death," has been incorporated by reference. The Secretary's motion to plead in the alternative to cite Section 50.10(b) was granted on October 12, 2011.

Section 50.10(b) requires the reporting of an injury that has a reasonable potential to cause death within 15 minutes. There are no exceptions to the 15-minute rule, and the aforementioned cited Commission case law reflects that covered accident incidents requiring cardio-pulmonary resuscitation (CPR), ipso facto constitute "injuries which have a reasonable potential to cause death," and must be reported within 15-minutes of initiating CPR. The citation, on its face, states that Mr. Taylor was found not breathing at 12:40 p.m., that CPR was started at 12:45 p.m., MSHA was not called until 2:42 p.m., "one hour and fifty-seven minutes later".

The Secretary's arguments that the prevailing circumstances that prompted the issuance of the violations of Section 50.10(b), in the Standard Sand and E. S. Stone cases are "virtually identical to the instant case before the Court", are not well-taken. The Secretary states that in Standard Sand, a

mine manager arrived at the scene while the EMT's were performing CPR on the victim, and that in E. S. Stone, EMS workers performed CPR on the victim in the presence of the victim's supervisor.

Cougar Coal Co., Inc. 25 FMSHRC 513 (Sept. 5, 2003) involved a serious accident in which a miner received a severe electrical shock, sustaining serious injuries that required CPR and hospitalization. The CPR was performed by a foreman, a management position, and the miner apparently lost his pulse while CPR was being performed. The Commission took particular note of the fact that CPR was performed by a foreman and imputed the knowledge that the miner lost his pulse to the operator.

The Secretary argues that there were multiple instances when the Respondent knew or should have known that it had experienced a reportable accident. The Secretary states that the first instance was at 12:45 p.m. when Mr. Taylor was found unresponsive and not breathing, a condition that should have been reported within 15 minutes of his discovery. The second instance cited was at 12:55 p.m., when Mr. Wharff and Mr. Taylor's brother performed CPR.

The inspector testified that he based his high negligence finding on his belief that there were "enough people" at the scene that could have called MSHA without stopping CPR. He stated that three people were performing CPR, and he identified them as Respondent's employees Dale Wharff and Darrin Smith, and Mr. Taylor's brother, who was not an employee (Tr. 43).

In response to a question whether the two employees were both performing CPR, the inspector stated "they were both present" (Tr. 43). In response to the Court's inquiry if they were both performing CPR "in tandem, or all at one time" he responded he could not answer, "but they were both assisting in the CPR" (Tr. 44). He further confirmed his high negligence finding was based on three people performing CPR, namely the two employees he identified and Mr. Taylor's brother. He identified a fourth person as Tina Jackson who was on the telephone in the scale house calling for emergency assistance (Tr. 44), (Ms. Jackson did not testify in this case.)

The Respondent's accident report prepared by Mr. Wharff reflects that three people came to the immediate assistance of Curtis Taylor, namely Mr. Wharff, Mr. Taylor's brother, and Mark Colburne. Mr. Colburne was not employed by the Respondent and did not testify, and Mr. Smith's name is not mentioned (Ex. P-7).

The Description of Accident report prepared by Mr. Smith gives the appearance that he was present and helped remove Mr. Taylor from his truck and actively participated in the administration of CPR at the scene (Ex. P-6). However, as previously noted, Mr. Smith, in response to the Court's inquiry for clarification, stated that his report was prepared by copying Mr. Wharff's report, and that the use of the words "I", "we", and "us", are actually the words of Mr. Wharff as stated in his report and not his (Tr. 103-106).

Mr. Smith testified credibly that he was in his office and not at the scale house when Mr. Taylor was found unresponsive in his truck and that Mr. Dawson called him between 1:05 and 1:15 p.m., and informed him that "somebody passed out at the scale house". He further testified that he was not MSHA certified at that time and did not know about MSHA's 15 minute reporting rule. There is no testimony from Mr. Smith that he performed CPR and on cross-examination, he was not asked.

In this regard, I note that the Secretary's arguments that at least four employees were not performing life-saving procedures included Mr. Smith.

Mr. Dawson testified credibly that he called Mr. Smith on his way back to the site after he received the call from Tina Jackson from the scale house and he understood that Mr. Smith arrived after the EMT's left the site with Mr. Taylor and that he was not performing CPR when he spoke to him because Mr. Taylor had been transported off site (Tr. 67,70).

I conclude and find that the inspector's testimony that three people were conducting CPR on Mr. Taylor is not credible. To the contrary, I conclude and find that the credible evidence establishes that only two people were immediately performing CPR on Mr. Taylor, namely Mr. Wharff, an employee, and Mr. Taylor's brother, who was not an employee.

With regard to Mr. Taylor's brother, since he was not an employee, I find he had no obligation to call MSHA. Further, even if he were an employee, I cannot conclude that it would be reasonable to expect him to interrupt his CPR efforts to call MSHA under the rather traumatic circumstances that prevailed with respect to his brother's condition at that time.

With regard to Mr. Wharff, the inspector could not recall that he performed CPR for 25 minutes with the 911 phone line open to receive emergency medical instructions. The inspector agreed that if this was true, he would not have expected Mr. Wharff to hang up, or put the 911 call on hold, in order to call MSHA to verify that he was performing CPR (Tr. 55-56).

Mr. Wharff testified that while he was aware of a state transportation department rule related to accident reporting, he was not aware of MSHA's 15-minute reporting rule. He candidly admitted that even if he were aware of that requirement, in view of an emergency situation that occurred prior to October 2010, when he had to quickly react and administer CPR on his four-year old son who had fallen from a third-story window, he would again react in the same manner, notwithstanding any knowledge of MSHA's 15-minute rule.

I find no credible evidence of the presence of any management personnel at the immediate scale house weigh station scene at the time Mr. Taylor was removed from his truck shortly after 12:30 p.m. on October 8, 2010. I further find no credible evidence that any management personnel participated in the CPR process, or were immediately present at the scene observing the CPR efforts of Mr. Wharff, who at that time was employed as a non-management dispatcher working from an office trailer next to the scale house, and Mr. Taylor's brother, who was not employed by the Respondent. I further find that an individual in a management position has a higher level of responsibility and expectation to be aware of the reporting requirements of the standard than a rank-and-file miner whose duties may not bestow that responsibility on him.

I conclude and find that from the time Mr. Taylor was removed from his truck and was found unresponsive and not breathing at 12:45 p.m., when Mr. Wharff contacted the EMS, and handed off his CPR efforts to the EMS at 1:03 p.m., Mr. Wharff and Tina Jackson were the only employees at the immediate scene at that time.

Ms. Jackson, who did not testify, was on the telephone monitoring emergency instructions and Mr. Wharff was actively engaged in administering CPR to Mr. Taylor. Under the circumstances, I find that it was not reasonable to expect them to cease what they were doing to call MSHA within the 15-window required by the regulation.

The Secretary cites additional instances when the Respondent could have also called MSHA, namely, at 1:00 p.m., when employees were relieved from performing CPR; at 1:31 p.m., after observing the EMT's performing emergency lifesaving procedures; and finally, no later than when the Respondent had a duty to report the accident to MSHA when the ambulance left with Mr. Taylor at 1:46 p.m.

The Secretary asserts that employees Smith, Dawson, and Holston, who were neither investigating whether an accident had occurred nor providing lifesaving measures, knew that Mr. Taylor had a heart attack and that there was a reasonable potential for death because CPR and other emergency efforts were taking place, and they were available to call MSHA but did not do so within the required fifteen minutes. The Secretary further argues that since Jackson, Dawson, and Smith made non-emergency phone calls from the time Mr. Taylor was found unresponsive and not breathing to the time MSHA was called, they were available to immediately make the calls.

The Secretary states that Jackson called Dawson immediately after the 911 call was made (Tr. 65); Dawson called Smith to alert him of the accident (Tr. 69); and that Smith called the Respondent's safety division (Tr. 117). The Secretary does not state that these employees were aware of the fact that CPR had been performed on Mr. Taylor when the calls were made shortly after he was removed from his truck.

There is no evidence that Tina Jackson, who did not testify, informed Mr. Dawson that CPR was administered when she called him. Mr. Dawson testified credibly that she did not inform him of any CPR (Tr. 67). Although she told him that EMS had been called, he did not believe that the standard required immediate notification to MSHA based on that fact alone (Tr. 82).

Mr. Smith testified credibly that Mr. Dawson called him at approximately 1:05 to 1:15 p.m. to inform him that someone had passed out at the scale house, but he could not recall that he was told that EMS had been called (Tr. 92). Mr. Smith stated that he then called the Respondent's safety department between 1:10 to 1:30 p.m., to make them aware of the fact that CPR had been administered (Tr. 117). He took the position that he could not have directed Ms. Jackson or Mr. Wharff to call MSHA at that time because he was not MSHA certified and was not aware of MSHA's 15-minute reporting requirement (Tr. 122).

With regard to Mr. Holston, the record reflects that he was employed as a sales representative and was with Mr. Dawson away from the mine when he received the call from Ms. Jackson (Tr. 63). Mr. Holston did not testify in this case and although he had a cell phone with him while traveling with Mr. Dawson, there is no evidence that he was aware of the reporting requirements or had any information or direct connection with the events that transpired at the time of the accident. Accordingly, the Secretary's attempt to include him in this scenario is rejected.

Although Mr. Smith and Mr. Dawson, who were in management positions, testified credibly that they were not informed that CPR was performed on Mr. Taylor when he was initially removed from his truck, they were subsequently informed that this was the case.

Mr. Smith testified that he did not initially believe that the incident was a fatality because Mr. Taylor had survived (Tr. 95-96). He confirmed that he knew that CPR had been performed on Mr. Taylor at 1:10 p.m., when the EMT personnel and ambulance arrived (Tr. 102). He also stated that when he placed a call to his safety department between 1:15 and 1:30 p.m., he informed them "we were administrating CPR" (Tr. 116-117). Mr. Smith further testified that he did not necessarily believe that it was reasonable to conclude that anyone receiving CPR might die because "that person can survive", he nonetheless conceded that someone undergoing CPR could die (Tr. 117-118).

Notwithstanding Mr. Smith's assertion that he could not have directed Ms. Jackson or Mr. Wharff to call MSHA because he was not MSHA certified and was not aware of the reporting rule, he did report the incident to his safety department because that was part of his managerial responsibility. I find that he had an opportunity at that time to place a call to MSHA, or to at least make an inquiry with his safety department as to whether such a report was required.

With regard to Mr. Dawson, I have considered the fact that he was away from the mine when he received the initial phone call from Ms. Jackson informing him of the incident and that he immediately returned to the mine after calling Mr. Smith who was closer to the scene and would be available to further look into the matter.

Mr. Dawson testified that the initial phone calls from Mr. Smith and Ms. Jackson were incoming calls over his automobile's hands-free device, connected to his cell phone, and there was no need for him to pull over on his way back to the mine to use his cell phone (Tr. 66). Although he stated that he never used the hands-free device to make outgoing calls while driving, he conceded that he could have pulled over to make a call, and could have asked Mr. Holston to make a call. He also stated that he could have asked Ms. Jackson to place a call if he knew that the incident was covered by the regulation (Tr. 77-78).

Mr. Dawson explained that his decision not to call MSHA while returning to the mine was based on his understanding that while the reporting regulation concerned an accident or injury with a likelihood to cause death, he did not at that time believe that an accident or injury exposing anyone other than Mr. Taylor to danger had taken place, and his lack of any knowledge that a death had occurred (Tr. 70). He further believed that an "injury" is the result of a physical condition such as a fall or broken leg; that someone passing out may have had a pre-existing condition; and that the term "accident" as defined by the regulation means the death of an individual at the mine (Tr. 74).

I find that Mr. Dawson's understanding of the term "accident" found in Section 50.10, and its application to the facts of this case, is incorrect. The death of an individual at a mine is required to be reported pursuant to Section 50.10(a). The Respondent in this case is charged with a violation of Section 50.10(b), not Section 50.10(a). With regard to Mr. Dawson's understanding of the term "injury", Section 50.2(h)(2), defines an "accident" as an "injury to an individual at a mine which has a reasonable potential to cause death", the identical language found in the cited Section 50.10(b).

Webster's New World Dictionary of the American Language. Second College Edition, defines an "injury" as "physical harm or damage to a person".

Mr. Dawson confirmed that Ms. Jackson informed him that Mr. Taylor had passed out in his truck, that he apparently had a heart attack, and that he was going to be taken to the hospital (Tr. 67). He also confirmed that when he returned to the mine, Mr. Smith informed him that Mr. Taylor had a heart attack and was taken to the hospital (Tr. 76). Although Mr. Dawson was not informed that Mr. Taylor had received CPR before returning to the mine, he believed that it was possible that someone receiving CPR might die, and that he returned to the mine because he knew that Mr. Taylor had passed out in his truck and that it was a serious incident that required management support to report it (Tr. 71, 81).

The evidence in this case establishes that Mr. Taylor was unresponsive, passed out, and not breathing when he was removed from his truck, that CPR was administered, and he was then taken to the hospital. Under these circumstances, I conclude and find that he suffered an injury that included physical harm and damage to his person.

I reject the Respondent's argument that a violation did not occur because it did not conclusively know that Mr. Taylor had died until 2:30 p.m., when Mr. Smith received a call from Mr. Taylor's brother, and promptly reported the death to MSHA within fifteen minutes. As previously noted, Respondent is charged with a violation of Section 50.10(b), requiring the reporting of any injury which has a reasonable potential to cause death.

I conclude and find that the fact that Mr. Taylor was found unresponsive and not breathing, and that CPR was immediately applied by Mr. Wharff and continued by the EMT personnel before he was transported by ambulance to the hospital, Respondent's management should have realized and known that Mr. Taylor's condition and injury, which I find posed a reasonable potential to cause death, should have been reported to MSHA, at least by the time he was transported to the hospital at approximately 1:10 p.m. Given the fact that Mr. Taylor was not at the mine, I find they had an opportunity to report the incident. Mr. Smith and Mr. Dawson both knew that Mr. Taylor had been taken to the hospital and Mr. Smith knew that CPR had been administered to Mr. Taylor and reported this fact to his safety department.

Although Mr. Dawson may not have known at the time he received the first call from Ms. Jackson while he was on his way back to the mine, that CPR was being administered to Mr. Taylor. He acknowledged that the question of whether or not the reporting requirements of Section 50.10 would apply to an individual found passed out and not breathing would depend on the "surrounding circumstances" (Tr. 83).

Based on all of the aforementioned prevailing circumstances and findings and conclusions that I have made in this case, I conclude and find that a violation of Section 50(b) has been established by a preponderance of the credible evidence adduced in this case and the citation IS AFFIRMED.

History of Prior Violations

The Secretary argued at the hearing that a prior citation issued on October 10, 2008, for a violation of Section 50.10, establishes that the Respondent had prior knowledge of the reporting requirements because the citation provided an "extra warning" and "instruction", and put the Respondent on notice that it must comply with the standard (Tr. 132-136; Ex. P-9).

I take note of the fact that the citation in question was issued as a Section 104(a) non -S & S citation and that it was issued at another quarry in Pennsylvania operated by the Respondent. The violation was assessed at \$5,000, and the exhibit reflects that it was contested and that no penalty assessment was paid. The Secretary's counsel had no further information regarding the facts because she received a copy a day before the hearing (Tr. 132). Although counsel indicated she would provide additional arguments in her post-hearing brief, no further information was forthcoming.

The Secretary's brief, at page 14, states that the history of prior violations at the Tarburton Pit is reflected in Ex. P-4, and that the aforementioned previous violation of Section 50.10(b) is stated in Ex. P-9. Exhibit P-4 reflects no prior violations of Section 50.10, at the Tarburton Pit over an intermittent period as early as August, 1994, and ending in September, 2011. The record reflects that forty (40) Section 104(a) citations were issued, thirty-two were non - S & S and eight (8) were S & S.

I have given little weight to the Secretary's argument that the prior Section 50.10 citation constituted some sort of extra or unique enforcement warning, instruction, or edict by MSHA, issued two years prior to the issuance of the citation in this case. The statement that "MSHA has instructed the operator to report within the 15 minute time period all accidents meeting the requirement" was apparently made in conjunction with the abatement of the violation. Statements of this kind are routinely made, and the Respondent is obligated to comply with the requirements of any safety standard not withstanding any gratuitous MSHA instructions.

I conclude and find that for an operation of its size, the Respondent has a fairly good compliance record that does not support any additional increase in the penalty assessment made in this case.

Good Faith Compliance

The Secretary agrees that the Respondent abated the cited violation in good faith.

Gravity

The Secretary determined that the gravity of the violation was not significant and substantial, and that there was no likelihood that an injury or illness would result from the violation.

Size of Business Effect of Civil Penalty Assessment on the Respondent's Ability to Remain in Business

Based on the information provided in Ex. A of the Secretary's civil penalty assessment petition, I find that the Tarburton Pit was a small operation and that the Respondent's controller is a large mine operator. The Respondent has admitted that the penalty assessment for the violation will not adversely affect its ability to remain in business.

Negligence

Although I have concluded that the Respondent failed to strictly comply with Section 50.10(b), a regulation that provides no exceptions, and has been interpreted to require the immediate reporting of an accident within fifteen minutes of the initiation of CPR, I take note of a recent Tenth Circuit Court of Appeals slip decision of April 4, 2012, in Mainline Rock and Ballast Inc. v. The Secretary of Labor, et al., affirming a violation of Section 50.10 for failure to report an accident involving a miner who was entrapped in a moving conveyor belt and required long-term hospitalization for permanent disabling injuries. In that decision, the Court cited the Commission's affirmance of a Section 50.10 violation in Secretary of Labor v. Consol Coal Co. 11 FMSHRC 1935, 1938 (1989), that stated in part as follows:

“The immediateness of a operator's notification under Section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting.”

The inspector testified that he based his "high" negligence finding on his belief that there were "enough people" at the scene when Mr. Taylor was removed from his truck who could have called MSHA without stopping CPR. However, as previously discussed, the inspector was mistaken when he testified that two of the three people administering CPR were employees. The credible evidence established that Mr. Wharff was the only employee performing CPR.

With respect to the Secretary's arguments that "multiple people" were available to immediately place a call to MSHA when Mr. Taylor was removed from his truck supports the inspector's "high" negligence determination. I have concluded that truck driver Colburne, Mr. Taylor's brother, Purnell, and sales representative Holston were not employees and were not reasonably expected to place any calls to MSHA.

On the facts of this case, I conclude and find that the Secretary's assertion that the one hour and thirty minute delay after the Respondent's manager knew that Curtis Taylor had stopped breathing, and that CPR was being performed, constituted egregious conduct

and delay, warranting a minimum \$5,000 civil penalty assessment because "multiple people" had many opportunities to timely report the incident to MSHA, is not well taken.

The term "egregious" has been defined by several dictionaries as "flagrant", "outrageous", and "blatant". I note that the Secretary's Part 100 penalty assessment criteria for negligence includes consideration of mitigating circumstances for a "moderate" degree of negligence, and a finding of "high degree" of negligence in the absence of mitigating circumstances. The highest degree of negligence is "reckless disregard" when an operator "displayed conduct which exhibits the absence of the slightest degree of care." In this regard, I note that the citation in this case was issued as a Section 104(a) citation and was not designated as a "reckless disregard" level of negligence.

The inspector in this case conceded that the Respondent handled the accident in good faith in its attempts to save Mr. Taylor's life by immediately performing CPR before the arrival of the EMT's after the 911 call was placed, and he did not believe the Respondent was attempting to avoid compliance or receiving a citation (Tr. 56-58). The inspector agreed that the level of negligence in any case would depend not only on the lapse of time after the occurrence of an accident and its report to MSHA, but also on the prevailing circumstances, on a case-by-case basis (Tr. 40-43).

I conclude and find that notwithstanding the fact that the Respondent failed to contact MSHA with 15-minutes of finding Curtis Taylor unresponsive, the immediate placement of a telephone call to 911 for emergency assistance, coupled with the fact that the Respondent's employee was attempting to revive Mr. Taylor through CPR under the most trying and emotional prevailing circumstances at that point in time, while the employee who placed the 911 call was still on the phone in communication with the emergency responders, merits consideration in determining the appropriate negligence level associated with the violation, particularly in view of the inspector's erroneous belief concerning the number of people who were allegedly performing CPR.

I further find it appropriate to consider the nature of the incident in this case that placed no miners or others at risk, and was not the result of any normal mining activities. I also take note of the fact that in response to the report informing MSHA at 2:42 p.m. of Mr. Taylor's death, the inspector arrived at the mine three hours later and met with Mr. Dawson. Mr. Dawson was completely cooperative, reviewed the incident with the inspector, and provided him with the Respondent's incident reports and employee statements, gave him an accurate account of the accident, and together they viewed the scale and Mr. Taylor's truck that was parked and locked down at the scale house. (Tr. 80-81).

Based on the facts of this case, I find that the failure of the Respondent to report the incident in question to MSHA immediately within fifteen minutes did not prejudice MSHA or otherwise undermine the intent of the regulation. I find that MSHA would not have benefitted from any knowledge that CPR was being performed within fifteen minutes of the initiation of CPR immediately after Mr. Taylor was removed from his truck in contrast to being informed

within fifteen minutes of knowing that it had experienced a reportable event when it learned that Mr. Taylor had died, and reported it to MSHA within fifteen minutes.

Based on all of the aforementioned circumstances that I conclude and find mitigate the inspector's "high" negligence determination, that initial finding IS **MODIFIED** to a finding of moderate negligence, and a civil penalty assessment of \$1,500 is appropriate.

WHEREFORE, IT IS **ORDERED** that Section 104(a) Citation No. 8580394, October 12, 2010, for a violation of 30 C.F.R. 50(b), IS **AFFIRMED**, with a modified moderate level of negligence.

IT IS FURTHER **ORDERED** that the Respondent pay a civil penalty assessment of \$1,500, for the violation. Payment shall be submitted to the Mine Safety and Health Administration (MSHA), U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390, referencing Docket No. YORK 2011-61-M. Upon receipt of payment, this case is **DISMISSED**.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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December 14, 2012

PETER L. DUNNE,	:	DISCRIMINATION PROCEEDING
	:	
Complainant,	:	Docket No. LAKE 2011-457-DM
	:	NC-MD 11-01
v.	:	
	:	
VULCAN CONSTRUCTION	:	Mine: Bartlett Underground Mine
MATERIALS, L.P.,	:	Mine ID: 11-03115
	:	
Respondent.	:	

DECISION

Appearances: Peter L. Dunne, pro se Complainant, Hannover Park, Illinois; Complainant

William K. Doran, Esq., OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Washington, D.C., for Respondent.

Before: Judge L. Zane Gill

This discrimination case was filed pro se by complainant Peter L. Dunne (“Dunne”) against Vulcan Construction Materials (“Vulcan” or “Respondent”) , alleging a violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”). 30 U.S.C. §815 (c) (2012). A trial was held in Bartlett, Illinois on December 13, 2011.

I. Procedural History

Dunne initiated his discrimination action pursuant to section 105(c) (2) of the Mine Act by mailing a standard complaint form to the Mine Safety and Health Administration (“MSHA”), dated December 12, 2010. Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2) (2012). MSHA informed Dunne in a letter dated February 15, 2011, that based on the information gathered during its investigation of his complaint of discrimination, it had determined that a violation of section 105(c) of the Mine Act had not occurred. Without the assistance of counsel, Dunne initiated this phase of his case under section 105(c) (3) of the Act in a letter to the Commission dated March 13, 2011. Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (2) (2012). Dunne alleges that Vulcan terminated his employment at the Bartlett mine for complaints he made regarding health and safety at the Bartlett mine.

Vulcan does not acknowledge that Dunne was engaged in protected activity or suffered any actionable adverse action. It asserts that Dunne was removed from his position operating a roof bolting machine because he made a false report to an MSHA inspector which was in no way connected to or motivated by Dunne's alleged protected activity.

For the reasons set forth below, I dismiss Dunne's discrimination claim.

II. Statement of the Case

After conducting an internal investigation, Vulcan terminated Dunne's employment on September 16, 2010, allegedly because he made a false statement to an MSHA inspector. The inspector had cited Vulcan because he found, during the course of a routine inspection, that Dunne was underground without his company-issued, brass ID tags. Dunne told the inspector that his granddaughter had been playing with his keys and had removed the ID tags just the day before the inspection without his knowing it. Vulcan's investigation determined and confirmed that Dunne had noted his ID tags' absence some weeks before the citation was issued, and that he had knowingly and admittedly given the MSHA inspector false information about the missing ID tags at the time of the inspection.

Fourteen months prior to the ID tag incident, Dunne claimed to have found a "bomb" consisting of a common blasting cap and a charge booster on the roof bolter he was operating. Dunne turned the device over to the appropriate co-worker for disposal, but did not report finding this "bomb" until two weeks later when, in a display of anger over being transferred to a new work shift, he claimed that someone had planted the device on his roof bolter. During his outburst, Dunne also quit his job, only to be talked into retracting by his co-workers. Vulcan investigated the blasting cap incident, reached a dead end, and was unable to determine what had happened to extent necessary to take any action. The company concluded its investigation, deemed the matter closed internally, and turned the related information over to the local police department. Neither Vulcan nor the police department did anything else in response to the investigation.

Dunne resurrected the "bomb" incident in the context of his firing, 14 months later. Vulcan considered it a closed issue and approached the termination solely as a response to Dunne's false report to an MSHA inspector. Dunne filed the discrimination complaint that initiated this case with MSHA on March 13, 2011. The MSHA investigation that resulted from Dunne's complaint was limited to the circumstances surrounding the false report. MSHA concluded that no violation had occurred. Dunne initiated and presented his case at trial without legal counsel.

III. Legal Principles

Section 105(c) (1) of the Mine Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the

operator [...] of an alleged danger or safety or health violation.” Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1) (2012).

In order to establish a *prima facie* case of discrimination under section 105 (c) (1), 30 U.S.C.A. 815(c) (1), Dunne must show: (1) that he engaged in protected activity; and (2) that the adverse action he complains of was motivated, at least partially, by that activity. *Drissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr.1998); *Sec’y of Labor on behalf of Robinette v. United Castle Coal, Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981). To satisfy his burden of establishing a *prima facie* case, Dunne must first show that he engaged in protected activity. In the context of this case, Dunne must show that he had a reasonable, good faith concern that the blasting cap he found on his roof bolting machine constituted a safety hazard. See, e.g., *Bennett v. Newmont Gold Co.*, 21 FMSHRC 252, 262 (Feb. 1999) (ALJ).

Under section § 105(c), 30 U.S.C.A. § 815(c), the operator may rebut the miner’s *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it was also motivated by the miner’s unprotected activity. It is not enough under 30 U.S.C.A. § 815(c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

In analyzing a mine operator’s asserted justification for taking adverse action under the *Pasula-Robinette* framework for evaluating discrimination claims under the Act, the inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator’s actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The ALJ may not impose his own business judgment as to an operator’s actions, *Sec’y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-517 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), and he may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec’y on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sep. 2001).

IV. Findings of Fact and Conclusions of Law

a. Stipulations

1. Vulcan Construction, LP is a mine operator subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 807.
2. Bartlett Underground Mine is a 'mine' as defined by the Mine Act, and the mining operations at the Bartlett Underground Mine are subject to the jurisdiction of the Mine Act.

3. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide these proceedings.

4. Peter Dunne reported the finding of a blast cap to Jason Hook on July 13, 2009.

5. On September 16, 2010, Vulcan terminated Peter Dunne's employment.

b. Post-Hearing Stipulation

1. The anonymous hazard complaint referred to in the hearing transcript and in Exhibit R-2 was made on or about November 17 or 18, 2010.

c. The Story

Dunne worked for Vulcan as an underground miner in its Bartlett, Illinois facility. At the times relevant to this case, Dunne operated a roof bolting machine. (Tr. 37:6-14; 68:19-24.) The Bartlett mine produces limestone products (Tr. 26:19-23), which are mined underground in a process that involves a mining “cycle” of drilling blast holes, packing the holes with explosives and detonation caps, blasting the rock, mucking out the blasted material, and preparing the site for the next identical cycle. (Tr. 53:2-54:2.)

(1) The “Bomb”

On approximately July 8, 2009 (Tr. 10:5-21; Ex. D-1),¹ Dunne found a damaged blasting cap (Tr. 25:6-15; 32:10-11; 36:20-37:1) and attached cast booster² (Tr. 26:24-27:6) lying on an articulation point of the drive line of his roof bolting machine. (Tr.10:5-21; 30:5-11; 48:15-20; Joint Stipulation 4.) It was most likely a misfire, inasmuch as it was damaged in ways that are consistent with it having been a misfire. (Tr. 28:21-29:9; 36:20-37:1; 31:18-32:11; 53:22-54:2.) Dunne testified³ that he considered this unusual and potentially dangerous because: (1) all such

¹ Dunne did not report finding the blasting cap and booster on his roof bolter immediately. Most references in the record speak of an approximate two week delay in reporting, i.e., July 13, 2009, which would place the discovery around July 1, 2009. (Tr. 70:21-71:1; 76:18-23; 103:5-15.) However, Dunne stated in his opening statement that he found the cap and booster on July 8, 2009. (Tr. 10:5-6.)

² A cast booster is a higher power explosive used to detonate the primary explosive. The blasting cap ignites the booster, which in turn ignites the primary explosive. (Tr. 27:9-28:8.)

³ Since Dunne was self-represented at the hearing, he was placed under oath at the outset with the understanding that all of his testimony, questions to other witnesses, and comments during the hearing could be considered testimonial evidence. (Tr. 8:17-9:1.)

explosives were to be accounted for by company policy and should not have been found where this was (Tr. 260:3-261:3); (2) he believed it could explode unexpectedly (Tr. 28:21-29:21); and (3) he believed the cap and booster to have a potential blast strength equal to a full stick of dynamite. (Tr. 11:3-8; 271:10-272:8; 285:1-21.)⁴

Dunne showed the cap and booster to co-workers Ivan Beans⁵ and Ernie Faga.⁶ (Tr. 10:12-21; 22:1-9; 23:11-13.) Beans' duty was to dispose of misfired ordnance. (Tr. 23:5-8.) He took possession of the cap and booster and disposed of it later that day by exploding it along with other misfires, which was his normal procedure.⁷ (Tr. 23:5-20; 33:12-19; 37:2-5; 67:11-68:1.) No one reported the discovery to management at that time. (Tr. 37:15-23.) Beans gave alternate reasons why he did not report it to management. First he testified that he did not pass on the report because Dunne asked him not to. (Tr. 37:21-38:5.) Then he claimed that it was because he did not want to get Dunne in trouble. (Tr. 280:23-281:11.) Beans later changed his explanation to state that he had not reported the find because he had destroyed the cap and booster, along with other items, and had not noted the incident in the log book. (Tr. 280:23-281:18.) Dunne also failed to report the incident to his union steward and lead miner Jimmy Warren, who along with Beans was authorized to handle misfired ordnance. (Tr. 127:2-20; 63:24-64:9.)

On July 13, 2009, Dunne's supervisor, Jason Hook, told Dunne that he and his roof bolting machine were being moved to the second shift. (Tr. 11:9-20; 52:21-53:1; 68:19-69:17.) Dunne became very agitated. (Tr. 69:22-70:5; 76:24-77:5; 127:23-128:4.) He told Hook and Jimmy Warren, who was also present, that he was going to quit and told them to take him to the surface immediately because he was done with Vulcan. (Tr. 70:6-9; 77:3-17; 124:21-125:1.) As they were getting ready to return to the surface, Dunne told Hook and Warren about finding the cap and booster and showed them where he had found it. (Joint Stipulation 4; Tr. 7:23-24; 11:21-12:4; 54:11-13; 70:13-20.) Hook told Dunne that he would have to pass the report on to higher management. As he had done with Beans, Dunne tried to convince Hook not to report the discovery (Tr. 128:12-23), but Hook told him that he was obligated to take the report to higher authority even if Dunne carried out his threat to quit his job. (Tr. 71:9-17; 72:1-11; 128:12-23.)

⁴ Other witnesses testified that the power of a blasting cap and booster was much less than what Mr. Dunne believed. (Tr. 32:17-33:2; 33:20-34:9; 279:10-24.) It appears, however, that even the lower estimate could result in very serious damage. (Tr. 33:20-34:9.)

⁵ Beans was the night shift foreman and lead blaster. (Tr. 21:8-9.)

⁶ Dunne claimed that Mike Emmert was also present when he reported finding the cap and booster. Beans contradicted this and claimed that Emmert was not present although he had gone down into the mine with the others. (Tr. 10:8-21; 21:19-23:4.)

⁷ Apparently, Dunne had been tasked with disposal of misfires prior to the stand-down. After the stand-down, Ivan Beans was given the responsibility of collecting and disposing of misfires. (Tr. 63:24-64:9; 103:5-15; 277:10-278:18.)

Hook reported the incident to his area manager, Phil Hovis. (Tr. 55:17-24; 64:22-65:1; 65:8-66:1; 71:18-24.)

Vulcan conducted an investigation into the blasting cap incident within days of the report. (Tr. 49:13-20; 72:12-17; 257:1-5.) An inventory of explosives was taken; nothing was missing. (Tr. 257:6-16.) Dunne and other miners were interviewed. (Tr. 12:5-10.)⁸ Vulcan was unable to determine if anything actionable had happened with regard to the blasting cap and booster report. (Tr. 137:22-138:11; 231:20-233:16; 248:15-249:6; 258:2-16.) The company determined that the cap and booster had not been planted on Dunne's equipment and that nothing had happened that would require a report to MSHA. (Tr. 232:11-18; 260:18-261:13.) Within a week of starting their investigation, Vulcan management met with local police officials, turned over their investigation materials, and left any further action up to them. (Tr. 248:15-23; 258:13-260:7; 263:23-264:7.) Vulcan concluded its investigation without taking any action. (Tr. 232:5-233:16; 267:6-268:4.)

After meeting with the Bartlett police, Vulcan had a closeout interview with Dunne about the investigation into the blasting cap incident. Terry Browning⁹ explained Vulcan's investigation process and their consultation with the police. (Tr. 248:24-249:6.) Browning explained why Vulcan did not report to the Bureau of Alcohol, Tobacco and Firearms ("ATF"). (Tr. 260:7-17; 264:17-266:17.) From that time until Dunne was terminated for the ID tag issue some 14 months later, there was no more discussion of the issue. (Tr. 205:7-16; 222:22-223:13; 233:4-16; 266:18-267:2.)¹⁰

Someone made an anonymous report of the blasting cap incident to MSHA on or about November 17, 2010. (Post-Hearing Stipulation; Ex. R-2; Tr. 14:20-15:3; 261:14-262:3.) MSHA sent an investigator to the Bartlett mine to look into the allegations. (Tr. 15:4-15; 97:13-23; Ex. S-2.) MSHA concluded its investigation and determined that it would not take any action on the complaint. (Tr. 98:6-12; 137:22-138:11; 261:14-262:3.)

⁸ Dunne intimated that he was concerned that Vulcan might conclude that he had planted the blasting cap himself and take action against him. (Tr. 66:12-24.) He offered to undergo a polygraph exam, if necessary. (Tr. 12:11-15; 241:21-242:3.)

⁹ Terry Browning was Vulcan's Midwest Division Health and Safety Manager. (Tr. 252:9-253:2.)

¹⁰ At the hearing, Dunne argued that the discovery of the blasting cap and booster constituted a "loss of control" of explosives, which would necessitate a report to ATF. (Tr. 55:11-13; 63:7-64:9; 272:17-23.) Vulcan was also concerned that the incident might be considered a "loss of control," but when Vulcan management turned their investigation over to the Bartlett Police Department, they were told that there was no reason to make a report to ATF. (Tr. 260:3-17; 272:17-23.)

(2) ID Tags

It is a matter of training and common knowledge that all Vulcan miners must carry metal ID tags any time they are working underground. (Tr. 39:14-40:10; 42:11-14; 50:12-17; 73:18-74:8; 151:18-153:9.) They are required to “tag in” when they go underground and “tag out” when they return to the surface. (Tr. 49:21-50:10.) This facilitates knowing who is underground and is particularly helpful in case of an underground emergency. (Tr. 40:13-19.)

On September 15, 2010, some 14 months after the blasting cap incident (Tr. 233:17-20), MSHA inspector James Kirk came to the Bartlett mine to conduct a regular quarterly inspection. (Tr. 147:10-148:7.) Dunne was responsible for one of the three citations Kirk issued that day. (Tr. 59:13-15; 60:3-6.)

Dunne did not have his metal ID tags on his person. (Tr. 41:22-42:9.) Kirk spoke to Dunne during his inspection and asked him to produce his ID tags. (Tr. 132:22-133:8.) Dunne told Kirk that he did not have them and that, unknown to him, his granddaughter had removed them from his key ring the evening before while she was playing with them. (Tr. 150:8-13; 199:6-200:16.) Kirk required that Dunne return to the surface immediately to get new ID tags. (Tr. 134:4-135:3; 150:24-151:10; 190:13-22.) Kirk issued a citation for Dunne’s failure to have ID tags while underground. (Ex. R-1; Tr. 135:4-6; 140:9-141:8.) On the way to the surface, Dunne told Jimmy Warren that he had given inspector Kirk false information about the missing ID tags, and that in reality the tags had been stolen out of his work locker several weeks before. (Tr. 135:7-137:4; 285:22-287:3.) After returning underground, Dunne also told mine manager George Taylor that he had lied to Kirk about the ID tags. (Tr. 190:23-191:15.)

While Kirk was still at the Bartlett mine, Vulcan management decided they had to reveal that they believed that Dunne had lied to Kirk about the ID tags. Management was concerned that Vulcan could be liable for a serious penalty if the company was aware that Dunne had made a false statement to an MSHA inspector and took no action. (Tr. 155:21-158:20; 160:12-161:13.) Before Kirk left the mine, Vulcan’s Safety and Health Manager, Jerry Murphy, and Mine Manager, George Taylor, met with him in an inspection close-out meeting. Murphy told Kirk that Dunne had lied about what happened to his ID tags. (Tr. 192:6-22.)

Graham Ault, Midwest Division Human Resources Manager, suspended Dunne on September 16, 2010, pending an investigation.¹¹ (Tr. 196:16-197:2; 214:1-215:5.) Ault’s investigation focused on the two issues Dunne had already admitted to: (1) failure to have ID tags while underground; and (2) giving false information to an MSHA inspector. (Tr. 199:6-24; 217:18-23; 220:16-221:20.) At the time of the suspension, Dunne asked Ault what Vulcan had

¹¹ Another miner, Matt Tripp, was also suspended on the same day allegedly for giving Inspector Kirk false information about a piece of mining equipment – the subject of another citation issued by Inspector Kirk. (Tr. 218:12-17.) Tripp was reinstated after an investigation convinced decision makers that he had not misrepresented facts to the MSHA inspector. (Tr. 93:24-95:20.)

done in response to his earlier report of finding the cap and booster. Ault told him that the issue had been investigated before, discussed with Dunne, and was considered a closed issue. (Tr. 222:22-223:13.)

Ault consulted with Taylor and Murphy (Tr. 215:17-219:14), referenced Vulcan's personnel policies (Ex. R-3), and determined preliminarily that not having ID tags underground and knowingly giving false information to an MSHA inspector could violate two separate company policies. (Tr. 217:18-23.) Ault determined that the false statement should be treated as a "Level One" violation, which justified immediate termination under the personnel policies in place at the time. (Tr. 226:1-227:3; Ex. R-4.)

On September 20, 2010, Ault and Taylor met with Dunne and union business agent Dan Opatkiewicz to confirm Dunne's information about the missing ID tags and the false statement. (Tr. 219:15-222:18.) During the meeting, Dunne confirmed that he had been without his ID tags for some time and that he had given Inspector Kirk false information about how he lost his ID tags. (Tr. 220:16-222:21.) Ault notified Dunne that the false statement violation was serious and that the company would take some time to make a final decision. (Tr. 222:4-12.) Dunne was later terminated, effective September 16, 2010. (Joint Stipulation 5; Tr.8:1-2.)

(3) Inferential Evidence

In assessing whether Dunne has successfully stated a prima facie case under the Act, the Court must decide whether Vulcan's decision to terminate Dunne was in any way influenced by his revelation that he found the blasting cap and booster on his roof bolting machine. To make this determination, the Court may factor in reasonable inferences drawn from circumstantial evidence.

[T]he consideration of indirect evidence when examining motivational intent necessarily involves the drawing of inferences. As the Commission stated in *Bradley v. Belva Coal Co.*, "circumstantial evidence [of discriminatory motivation] and reasonable inferences drawn therefrom may be used to sustain a prima facie case." 4 FMSHRC 982, 992 (June 1982). Furthermore, inferences drawn by judges are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)."

Colorado Lava, Inc., 24 FMSHRC 350, 354 (April 2002).

I summarize here the evidence relating to Dunne's prima facie burden and conclude that certain inferences are possible— thus, legally sufficient for use in supporting his prima facie case— but I do not make findings as to this inferential evidence beyond the acknowledging that a reasonable person could draw the inference.

Dunne's arguments at hearing suggested two possible motives for his firing: to protect another employee from a potentially damaging inquiry, and to cover up the failure of measures Vulcan had recently put in place to improve the handling of misfired ordnance. In support of the first possible motive, Dunne suggested that the two men who worked the shift just before he discovered the blasting cap, Juan Serrano and Ben Manis, could have planted the cap on his roof bolting machine. (Tr. 13:11-15; 54:14-55:9; 111:11-114:2; 245:21-246:6; 272:9-274:4.) Ben Manis is Vulcan's Mid-West division president Rob Vogel's son-in-law. Dunne intimated that he was fired in order to short-circuit any inquiry that might harm Manis. (Tr. 13:19-21; 240:16-241:10.) George Taylor, Vulcan's Bartlett plant manager and the person who made the decision to fire Dunne, did not consult with Vogel prior to making the decision. (Tr. 187:16-188:6.) Taylor had been with Vulcan only a short time prior to Dunne's termination. He had not heard about the cap and booster incident, had not played any part in the investigation, or been alerted to any issues involving Dunne. (Tr. 166:1-14.) He first learned of the cap and booster incident when MSHA inspector David Thomey responded to the anonymous complaint and showed up at the Bartlett mine to conduct his investigation. (Tr. 166:20-167:17.) I am not persuaded that these events reveal a bad motive by Vulcan vis-a-vis Dunne, and I do not find it as a fact. The theory they raise is possible, however, and therefore legally sufficient as inferential evidence to be used to support Dunne's prima facie burden.

The second motive that Dunne's evidence hints at – an attempted cover-up of ongoing problems with misfire disposal at the Bartlett Mine – relates to new safety measures put in place prior to the "bomb" incident. Shortly before Dunne found the cap and booster,¹² Vulcan had instituted a week-long, safety-related "stand-down", during which the Bartlett mine was shut down and Vulcan provided safety-related training to the miners. (Tr. 10:22-11:2.) One of the topics for training was the proper handling of misfired explosives. (Tr. 24:14-20; 61:10-22; 91:2-24.) The previous plant manager, Tim McFarland, was fired at about the time of the stand-down. (Tr. 24:14-20; 45:22-46:22.) Dunne suggested that McFarland's termination was the result of shoddy handling of explosives under his watch. (Tr. 46:5-13; 277:23-278:12.) Dunne argued that management had threatened that if there were a repeat incident of improper handling of explosives, it would simply shut the Bartlett mine down for good, which made Dunne hesitate to report the bomb discovery. (Tr. 9:5-14; 10:22-11:2; 45:22-46:22; 120:4-11.) He also intimated that those threats showed that management was motivated to ignore or cover up his blasting cap discovery because the incident would prove that its efforts to better deal with misfires had been ineffective. (Tr. 16:4-10.)

After Dunne reported finding the blasting cap and booster to Ivan Beans, Beans did not report it to management, even though it was his duty to dispose of and account for all misfired ordnance. (Tr. 21:8-18; 23:1-8; 33:8-19; 37:15-23; 47:12-16.) Dunne hints that this failure to report the stray misfire to management is evidence of an atmosphere of subtle dissuasion, and that immediately and clearly reporting his blasting cap discovery would risk potential harm to himself and his co-workers. He further implied that the same fear prompted some co-workers

¹² Dunne estimates it was one or two weeks before he discovered the blasting cap and booster. (Tr. 103:5-15.)

(most notably, Ivan Beans) to keep mum about the blasting cap incident. Dunne nonetheless asked Beans not to report the find. (Tr. 38:3-5.) Later, when Dunne objected to being transferred to another shift, threatened to quit on the spot, and reported finding the blasting cap and booster to Warren and Hook, he again asked them not to report it. (Tr. 69:22-70:5; 128:12-23.)

Finally, It appears that Dunne himself may have played a role in the events that led to the stand-down and the need to provide additional training about the proper handling of misfired ordnance. Just prior to the stand-down, Dunne had the task of collecting and disposing of misfires. (Tr. 104:23-108:13.) Jimmy Warren testified that Dunne was known to use a screw driver to extract the misfires from the bore holes– a risky tactic– and to allow several misfired blasting caps to accumulate and “roll around” in the cab of his bolting machine. (Tr. 104:23-108:13.) After the stand-down, the duty of collecting and destroying misfires was given to Ivan Beans. (Tr. 63:19-64:9.)

In light of the evidence presented, it is possible to conclude that Dunne felt singled out by Vulcan’s stand-down, and that the events related to Vulcan’s handling of his cap and booster discovery were influenced by the institutional memory of his history handling ordnance and the company’s efforts to improve its practices through the stand down training. (Tr. 16:4-10.) Dunne believed that the investigation into the blasting cap discovery was so ineffective as to constitute a cover-up by management. (Tr. 242:4-24.) He also suggested that Vulcan’s investigation into his blasting cap report was pro forma at best and purposefully kept superficial to avoid revealing that the prior problems with handling explosives had not been remedied by the stand-down and had, in fact, continued.¹³ Dunne argued that Vulcan’s reaction to his offer to submit to and pay for a polygraph test proves this. (Tr. 12:5-15; 84:6-14; 274:5-11.) After his termination, Dunne pursued getting a copy of his personnel file because he thought it would include dates relating to the blasting cap incident. (Tr. 209:10-16.) He reviewed the contents of his personnel file and found no mention of the blasting cap incident. He considered this evidence of a cover-up (Tr. 209:17-18) and felt bolstered in his opinion that Vulcan should have reported the blasting cap incident to both ATF and MSHA. (Tr. 56:1-15; 63:11-23; 243:10-21; 274:5-17; 289:10-290:13.)

It is conceivable that Vulcan could have subtly steered its investigation of the cap and booster incident so as to avoid creating evidence that the prior problems had not been remedied by the stand-down and that perhaps Dunne’s carelessness was merely evidence of a more general institutional laxness. Dunne argued that there was evidence that Vulcan discouraged full participation and disclosure by the miners regarding any issue related to the failure of the stand-down to remedy the earlier problems with handling explosives in particular (Tr. 9:15-10:4; 10:22-11:20), and more generally regarding any matter being investigated by MSHA. (Tr. 120:18-122:22.) This seems related to Jason Hook’s testimony that he may have told Dunne that he would not let the blasting cap incident be covered up (Tr. 55:11-16; 66:14-24), and gains

¹³ I mention this in the interest of giving Dunne’s evidence and arguments full consideration, although his presentation and argument were so sparse and disjointed that I risk going beyond what he actually intended by entertaining such a sweeping inference.

some support from Dunne's arguments about Vulcan's failure to notify ATF about a loss of control of explosives and the failure to notify MSHA about the cap and booster incident. Although the evidence presented is insufficient to convince me beyond the point of merely recognizing Dunne's theories, Dunne has presented evidence from which it is possible to draw an inference for use in supporting his prima facie case.

Dunne intimated that being fired for not having ID tags was a pretext to quiet him about the underlying blasting cap issue. (Tr. 16:4-10.) In support of this, Dunne pointed out that Vulcan had never disciplined anyone for violating the ID tag requirement before (Tr. 61:7-9); that there was no written policy statement that made it clear that miners had to have ID tags at all times when working underground (Tr. 173:4-174:15); and that in thirty years, Dunne had never been asked to show his ID tags before. (Tr. 288:15-289:9.) This, of course, ignores several salient facts:

- Dunne's ID tag violation occurred 14 months after the cap and booster incident;
- Dunne admitted not having his ID tags and that he gave Inspector Kirk a false story about how he lost his tags;
- Vulcan's policies fairly and clearly make a knowing breach of company policy or rule or a breach of trust or dishonesty "Type I" infractions which justify immediate termination. (Ex. R-3); and
- Nothing was offered in evidence or argument that would show that MSHA Inspector Kirk, on whose citation the termination was based, knew anything about the cap and booster issue.

As to this point, Dunne fails to present evidence from which a reasonable person could draw an inference for use in making out a prima facie case of discrimination. In light of the evidence on the record, the idea that Vulcan had a secret plan to lie in wait until something like the ID tag issue came along to create a pretextual cover for the true plan to fire Dunne because he found the cap and booster is fanciful at best.

Finally, there is the matter of Matt Tripp. Tripp gave information to Inspector Kirk during his inspection on September 15, 2010, that appeared at first blush to be false. Taylor suspended Tripp at the same time as Dunne, pending an investigation. Dunne believed the treatment of Matt Tripp was either a smoke screen to hide the discriminatory motive against Dunne or evidence of disparate treatment because Tripp was reinstated whereas Dunne was fired. Tripp was brought back two days later, after it was determined that he had innocently misspoken based on incomplete information. (Tr. 87:2-5; 93:24-95:20; 114:8-20; 156:10-158:4; 172:16-22; 194:16-196:1; 212:14-213:2.) Again, this part of Dunne's theory is too insubstantial to make out a reasonable inference that can be used to support a prima facie case of discrimination. There is nothing in the record to suggest that the Tripp scenario was in any way connected to Dunne other than by happenstance and coincidental timing.

V. Analysis and Conclusions of Law

The evidence establishes that Dunne engaged in protected activity and that he was discharged. However the evidence fails to convince that there was any nexus between Dunne's protected activity and his discharge.¹⁴

A. Protected Activity¹⁵

To satisfy the first prong of the *Pasula-Robinette* test for a prima facie case of discrimination, Dunne must show that he engaged in protected activity. *Drissen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC 803; *Pasula*, 2 FMSHRC 2786. In order to show that he engaged in protected activity, Dunne must first establish that he had a reasonable, good faith concern that the blasting cap he found on his roof bolting machine constituted a safety hazard. See, e.g., *Bennett*, 21 FMSHRC at 262. In assessing whether Dunne's apprehension about having found a blasting device on his equipment was reasonable and held in good faith, it is relevant to consider the delay between his finding it, his reporting it to his superiors, and his raising it as a prohibited consideration in his termination.

Dunne's credibility regarding his good faith belief that a violation of a safety regulation had occurred in connection with his finding and eventually reporting the blasting cap is significantly compromised by his failure to report it immediately and by the circumstances under which he finally made the revelation – an angry and impetuous reaction to learning that he was being moved to a different work shift. In combination with the evidence of Dunne's casual duplicity regarding the missing ID tags and the fact that he displayed the propensity to react precipitously to circumstances he took to be inimical to his personal interest, it is difficult to have anything more than the barest conviction that he actually considered the blasting cap discovery a real threat to his (or others') safety.

Another piece of evidence affects my analysis of Dunne's good faith reporting of a safety hazard. Jimmy Warren testified, in response to questions by Dunne, that Dunne was known to accumulate misfired blasting caps in the cab of his roof bolting machine and was perceived to be sloppy in the way he extracted, collected, and disposed of them. This was apparently a factor in

¹⁴ The evidence would also support an affirmative defense under *Robinette*, but we need not go there. 3 FMSHRC 803.

¹⁵ There is another possible protected activity. (Tr. 9:21-10:4; 11:9-20.) Dunne testified obliquely that he felt that Jason Hook moved him to a different shift as an act of retaliation for reporting a safety issue during the stand-down. (Tr. 11:9-20.) This could constitute a second and distinct protected activity if the evidence were sufficient to convince that such an event occurred and that the subject matter and circumstances of the alleged communication were substantial enough to support a finding of fact. However, there is no other mention of this complaint in the record, so it is impossible to assess it as a possible protected activity.

the decision to take the responsibility of disposing of misfires away from Dunne and give it to Ivan Beans. (Tr. 105:22-108:13.) It is possible that the blasting cap that Dunne considered to be a “bomb” might have simply been one of the misfires he allowed to accumulate and roll around in the cab of his machine that fell out and was placed back on the machine by someone else. Moreover, Dunne’s concern about the danger associated with mishandling misfired blasting caps seems tailored to fit the larger scenario that played out when he was transferred to the other shift and necessarily downplays the possibility of a benign explanation of how the device found its way onto his equipment. It is perhaps understandable that Dunne would emphasize a version of the story that ignored his own carelessness with explosives, but it is not convincing. In fact, Dunne’s willingness to look beyond his own carelessness in his attempt to prove a larger conspiracy impacts his overall credibility and weakens his case.

Regardless of his personal reactions and motivations, the evidence is sufficient to support a finding that the blasting cap should not have been found where it was, and that, objectively, its discovery implicates miner safety sufficiently to satisfy the first element in the *Robinette - Pasula* analysis. Thus, on balance I find that the evidence weighs sufficiently in favor of Dunne’s having had a good faith belief that a danger existed to satisfy the initial “protected activity” requirement and to proceed to the analysis that follows.

B. Vulcan’s Motivation to Terminate Dunne

In order to make a prima facie case of discrimination, the second prong of the *Pasula-Robinette* analysis required Dunne to show that the adverse action he complains of was at least partially motivated by his protected activity. *Drissen*, 20 FMSHRC at 328; *Robinette*, 3 FMSHRC 803; *Pasula*, 2 FMSHRC 2786. As part of his burden to make a prima facie showing of discriminatory intent, Dunne must show that his termination was motivated, at least partially, by his earlier report about finding the blasting cap on his roof bolting machine. I must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his prima facie burden to show discrimination.

There is rarely any direct evidence of a company’s motivation to take action against a miner in response to his complaint about protected activity. The Commission has held that it is appropriate to look to circumstantial evidence to establish the prima facie case of discrimination. *Chacon*, 3 FMSHRC at 2510. In *Chacon*, the Commission identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Id.* at 2510. Consideration of indirect evidence involves the drawing of reasonable inferences from the facts of record. In *Bradley v. Belva Coal Co.*, with regard to the issue of motivation, the Commission found that “circumstantial evidence [...] and reasonable inferences drawn therefrom may be used to sustain a prima facie case.” 4 FMSHRC 982, 992 (June 1982) (*citing Chacon*, 3 FMSHRC at 2510-12).

The Commission recently sharpened the focus on the appropriate quantum of proof needed to establish the prima facie case. *Turner v. Nat’l Cement Co. of California* reiterated the

clear difference in the quantum of proof a claimant must provide to ultimately prevail in a discrimination case as opposed to the minimal showing required to establish the prima facie case. 33 FMSHRC 1059 (May 2011). “[T]o make out a prima facie case of discrimination, the [discriminatee] need only submit enough evidence so that the record *could* support an inference” that the termination resulted, at least in part, from protected safety complaints. *Id.* at 1066 (internal citations omitted).

In this instance, Vulcan had knowledge of the protected activity, albeit not immediately. Once Dunne announced that he had found the blasting cap and booster on his roof bolter and his co-workers passed that information on to management, management undertook a timely investigation, including interviews of Dunne and some of his co-workers. Due, in part, to Dunne’s delay in reporting the incident and the fact that the cap and booster had been destroyed in due course before the investigation was started, Vulcan management was unable to draw any actionable conclusions. They passed their investigation results on to the local police and deemed the incident closed.

Dunne attempted to sketch a pattern of animus from the testimony, arguments, hints, and inferences outlined above. When I apply the generously lenient standard outlined in *National Cement*, I am unable to say that there is no basis to infer that certain Vulcan management personnel might have held animosity toward Dunne. I cannot conclude, however, that the inferential evidence supports anything more than the barest of threshold inferences. As discussed below, this inferential evidence ultimately yields to the strength of the contrary evidence argued by Vulcan.

The lack of temporal proximity between the disclosure of Dunne’s finding the cap and booster and Vulcan’s decision to terminate him argues against any bad motive on Vulcan’s part. Fourteen months passed between Dunne’s report of the “bomb” and his termination, during which there is no evidence in the record that Vulcan took any untoward action against Dunne.

Dunne sought to show disparity in the way Vulcan treated him vis-à-vis Matt Tripp for their respective “false” statements to the MSHA inspector. However, the two situations are substantively different, and to the extent of any overlap between them, Vulcan appears to have responded to the two situations consistently. At first glance, it appeared that both Dunne and Tripp had made false statements to the MSHA inspector. Working from that assumption, Vulcan management immediately suspended both men pending an investigation. (Tr. 196:16-197:7.) From that point, the facts surrounding the two cases diverge dramatically. First, Dunne readily admits that the story he told the inspector about why he did not have his brass ID tags was false, and he knew it was false when he told it. Second, Tripp’s “false” statement turned out to have been innocently based on his assumption of facts that were determined to be inaccurate. When the actual facts were compared to Tripp’s assumption, the falsehood melted away. Dunne’s falsehood was treated differently than Tripp’s because in Dunne’s case Vulcan determined that he had knowingly made a false statement to the inspector (Tr. 17:12-16), and in Tripp’s case, it determined in light of all the facts that no false statement had been made. Tripp was reinstated, while Dunne was terminated for cause.

In sum, the inferential evidence discussed above barely suffices to satisfy Dunne's burden to establish a prima facie case of discrimination. The evidence could, conceivably, support an inference of discriminatory animus. With that, the analytical burden shifts to Vulcan to prove that it terminated Dunne for conduct unrelated to the protected activity.

C. Vulcan's Rebuttal

Dunne has produced a prima facie case of discrimination. The evidence establishes that he engaged in protected activity and supports a plausible inference of discriminatory animus. However, Dunne fails to convince me that his termination was in any legally significant way related to his protected activity. As discussed above, the operator may rebut a prima facie case of discrimination by showing that the adverse action for which the miner seeks relief was not at all motivated by the miner's protected activity. *Pasula*, 2 FMSHRC at 2799-800. A preponderance of evidence supports the conclusion that there is no connection between Dunne's protected activity and Vulcan's eventual decision to terminate his employment. Vulcan has thus rebutted Dunne's prima facie case.

It is impractical, if not impossible, to separate the analysis of Vulcan's rebuttal of the prima facie case from that of an affirmative defense. In order to determine whether Dunne's termination lacked any meaningful relationship to his protected activity, I must assess the evidence of Vulcan's affirmative defense, even though I conclude that Vulcan did not act with discriminatory animus and, therefore, needs not mount an affirmative defense.

Vulcan argues that it terminated Dunne's employment on September 16, 2010, because he knowingly made a materially false statement about why he did not have his brass ID tags on his person when the MSHA inspector asked to see them. This constituted a violation of company policies and justified immediate termination. It is undisputed that the story Dunne told the inspector about his granddaughter taking the tags off his key ring the night before was false. He also admitted that his ID tags had been missing for some time and that he believed they had been stolen out of his locker at work. Vulcan provided convincing evidence that Dunne's falsehood created a credible potential liability for the company in that management believed that it was a violation of law to make a false statement to an MSHA inspector (Tr. 170:23-171:19), that making such a statement constituted a deliberate violation of company policy (Tr. 158:5-20), and that the false statement could result in an S&S and unwarrantable failure citation. (Tr. 160:12-161:13.) Vulcan disclosed to the MSHA inspector that it believed that Dunne had purposely lied to him about his ID tags and that they would investigate and determine what they should do about it. (Tr. 164:19-165:6.) The company investigated Dunne's falsehood in due course and handled it in the same manner as Tripp's apparent falsehood. It determined that Dunne's actions constituted a violation of two company personnel policies and were serious enough to justify immediate termination without any special application of the policies. (Tr. 200:20-201:14.) The evidence also shows that there is no credible nexus between Dunne's protected activity and Vulcan's

decision, 14 months later, to terminate him for making the unprotected false statement.¹⁶ Not only has Vulcan proved that Dunne deserved to be fired for making the false statement, it has proved that the false statement alone justified termination and that it would have terminated him irrespective of the earlier protected activity. If Vulcan were required to prove an affirmative defense, this evidence would suffice.

The strongest indicator of a lack of nexus between Dunne's protected activity and his eventual firing is the lapse of time. The parties stipulated that Dunne reported finding the blasting cap and booster on his equipment on July 13, 2009, and that he was terminated on September 16, 2010. (Stip 4 and 5; Tr. 233:17-20.) There is no credible evidence that Vulcan bided its time until Dunne did something else that would give it a plausible pretext to fire him. Vulcan's responses to the report of the cap and booster incident and the ID falsification incident were both reasonably prompt, carried out in a reasonably thorough and credible manner, and concluded with suitable transparency. The time between the two events and the finality with which the first was concluded belie any credible inference of a connection between the two, other than the fact that Dunne was involved in both.

Dunne's actions after the discovery of the cap and booster further weaken any possible inference of bad acting on Vulcan's part. Dunne implied that he hesitated to report the incident because someone from management had reportedly commented that if there were any further problems handling explosives, the entire operation would be shut down. (Tr. 10:22-11:2.) Nothing in the record corroborates or validates this. Moreover, Dunne's credibility is compromised by the evidence of his willingness to expose what he took to be a grand conspiracy by the company when his personal interest was impacted by a transfer to a less favorable shift, but he actively sought to prevent management from learning about the cap and booster incident when it happened. One questions the *bona fides* of his later complaint when the relative severity of a reassignment is contrasted with the potential danger of physical injury. One would assume that being the target of a bomb plot would be a stronger impetus to report the incident than the inconvenience of a reassignment.

Dunne's theory contrasts sharply with what Vulcan's management did in response to the cap and booster claim and the ID tag incident. Once it learned what happened, Vulcan reacted promptly to investigate Dunne's report of finding the cap and booster. Dunne's delay in reporting and insistence that Ivan Beans not report the event to management prevented Vulcan from acting sooner or being able to examine the cap and booster before they were destroyed. Vulcan conducted interviews of some employees. The evidence does not show that the interviews were purposely selective. Although Dunne hinted that Vulcan engineered the investigation to keep the focus off Regional Manager Rob Vogel's son-in-law Ben Manis, one of two men who Dunne believed had access to his roof bolter on the previous shift, the evidence in the record fails to support this theory. When Vulcan was unable to make any actionable conclusions about the cap

¹⁶ Jerry Murphy, Vulcan's safety and health representative for underground operations, was not aware of the cap and booster issue at the time of Dunne's false report about the ID tags, even though he was located at the Bartlett facility. (Tr. 145:4-14; 166:7-11; 170:19-22.)

and booster incident, it turned its investigation results over to the Bartlett Police Department and, after conferring with Dunne in a close-out interview, considered the issue closed. (Tr. 233:21-234:8.)

When management learned that Dunne and Tripp had made allegedly false statements to the MSHA inspector, it took even-handed action to suspend both men pending an investigation. (Tr. 214:23-216:18.) The ID tag investigation was done with reasonable speed and integrity. (Tr.197:3-198:19.) Dunne admitted knowingly making a false statement to the MSHA inspector. Tripp's statement was ultimately determined to be technically correct although in its original context it appeared to be false. Tripp was exonerated and reinstated. Within hours of Dunne's false statement, management reached the conclusion that it had to disclose the falsehood to the MSHA inspector while he was still on the premises. The decision to fire Dunne was made by the Bartlett mine manager, George Taylor¹⁷ (Tr. 186:6-187:13), in consultation with the Midwest Division HR department manager, Graham Ault. (Tr. 169:23-170:1; 196:2-15; 201:15-23; 214:23-215:1.) Taylor consulted Vulcan's established personnel discipline policies, determined that Dunne's false statement violated two distinct provisions¹⁸ (Tr. 223:23-224:20; 226:1-227:12), confirmed that Dunne's actions justified immediate termination (Tr. 226:1-9), and notified Dunne that he was fired. (Tr. 227:13-19.) Since Dunne was a union member, Vulcan also notified a union official, Dan Opatkiewicz, of its decision. (Tr. 198:20-199:5.) The decision to fire Dunne had nothing to do with his report of the cap and booster. (Tr. 249:7-13; 266:18-267:2.) It was based only on the false report to Inspector Kirk. (Tr. 202:3-203:16.)

¹⁷ George Taylor was hired by Vulcan approximately three months three months before the ID tag incident. He testified that he knew of the cap and booster incident when he made the decision to terminate Dunne, but that it did not factor into the decision to terminate him at all. (Tr. 18:3-8; 184:8-20; 202:3-203:16.)

¹⁸ Dunne violated the breach of trust policy by lying to and trying to mislead the MSHA inspector and the "willful violation" policy for going without his ID tags for several weeks. (Tr. 226:10-227:12; Exhibit R-3.)

Considering the weight of the evidence, however, I conclude that Vulcan's decision to terminate Dunne was not motivated by or related to his earlier report of the cap and booster device. There was no connection between Dunne's protected activity and the ultimate decision to terminate his employment.

ORDER

Dunne's complaint of discrimination under section 105(c) (2) of the Mine Act, 30 U.S.C. § 815(c) (2) is **DISMISSED**.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Ave., N.W., Suite 520N
Washington, D.C. 20004-1710

December 17, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-308
Petitioner	:	A.C. No. 11-02632-241358-02
	:	
	:	Docket No. LAKE 2011-467
	:	A.C. No. 11-02632-246824
	:	
	:	Docket No. LAKE 2011-690
	:	A.C. No. 11-02632 – 251982
	:	
	:	
TRI COUNTY COAL, LLC	:	Mine Name: Crown III Mine
Respondent.	:	

DECISION

Appearances: Emily B. Hays, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
Wesley T. Campbell, Manager of Safety and Training, Tri County Coal, LLC, Crown III Mine, Farmersville, Illinois, for Tri County Coal, LLC.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.

§ 815(d). The petitions allege that Tri County Coal, LLC, is liable for 12 violations of the Secretary’s Mandatory Safety Standards for Underground Coal Mines¹ and a related regulation, and propose the imposition of civil penalties in the total amount of \$50,442.00. Prior to the hearing, the parties agreed to settle six of the violations. That settlement will be approved. A hearing was held in St. Louis, Missouri, on the remaining violations, for which \$21,551.00 in penalties were assessed. The parties filed post-hearing briefs following receipt of the transcript. For the reasons that follow, I find that Tri County committed the violations, and impose civil penalties in the total amount of \$12,225.00.

¹ 30 C.F.R. Part 75.

Findings of Fact - Conclusions of Law

The Crown III mine is a large underground coal mine located in Macoupin County, Illinois. It is owned by Springfield Coal Company and is operated by Tri County Coal, LLC. The violations in contest in these proceedings were issued by authorized agents of the Secretary in August 2010 and January and March 2011. Civil penalties assessed for the violations were timely contested by Tri County.

Docket No. LAKE 2011-308

Citation No. 8418832

Citation No. 8418832 was issued by MSHA inspector Jeffrey Adams² at 11:00 a.m., on August 5, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. §75.1725(a), which requires that, "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The violation was described in the "Condition and Practice" section of the citation as follows:

The #102 Simmons-Rand battery ram car, located at the Unit #4 battery barn is not being maintained in safe operating condition. The service brakes are weak and will not readily bring the equipment to a stop. The ram car was immediately removed from service.

This standard was cited 27 times in two years at this mine.

Ex. G-9

Adams determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was moderate. A specially assessed civil penalty in the amount of \$3,700.00 was proposed for this violation.

The Violation

Adams was conducting a regular quarterly inspection of the Crown III mine on August 5, 2010. At the unit 4 battery barn, he inspected a battery-powered ram car. The car was not locked and tagged out, and by all appearances was available for use. At Adams' request, the miners' representative that accompanied him operated the car. When the brakes were applied, the car pulled to one side, and the operator remarked that "something wasn't quite right with the brakes." Tr. 108; Ex. G-10. The car was taken out of service. Maintenance foremen soon

² Adams has been an MSHA inspector for over four years. Prior to joining MSHA, he worked for 26 years in the coal mining industry at the Galatia mine, both on the surface and underground, performing a wide range of duties. He holds a bachelor's degree in industrial education. Tr. 102-03.

arrived and, after checking the car, determined that one of two brake systems on the car was not working. Tr. 109.

The ram car brake systems are comprised of springs and friction plates, and are integral to the car's two gear cases, one on each side of the equipment. When the car is operating, hydraulic pressure releases the brakes and allows the car to move. Depressing the brake pedal "dumps" the hydraulic oil back into a tank, releasing the pressure and allowing the brakes to engage. The gear cases are complicated mechanical assemblies, and the mine does not attempt to repair them. The defect was remedied by replacement of the defective gear case.

Tri County concedes that the brake on the car was defective, and that safety standards must be complied with for all equipment unless it has been effectively taken out of service. However, it argues that, while the car was available for service, the citation should be vacated because the defective condition was identified during what was essentially a typical pre-operational inspection.³ Tri County has a policy that requires pre-operational inspections of mobile equipment. It contends that the defect would have been discovered during the inspection and that the car would not have been put into service. The argument appears to be based, in part, upon *Wake Stone*, 33 FMSHRC 1205 (May 2011) (ALJ) (review granted, June 9, 2011), wherein two citations alleging defects in mobile equipment at a surface metal/nonmetal mine were vacated because they were discovered when the MSHA inspector allowed the operator to conduct a pre-operational inspection mandated by regulation prior to inspecting the equipment, which was found to have negated the operator's strict liability.

I cannot accept Tri County's argument. The decision in *Wake Stone*, which is presently on review before the Commission, was based upon regulations applicable to surface metal and nonmetal mines, and is arguably inconsistent with Commission precedent. See *Allen Lee Good*, 23 FMSHRC 995, 996-98 (Sept. 2001). While those regulations require that audible warning devices on mobile equipment be "maintained in functional condition," they also require that such equipment be inspected before being put into operation and that any defects affecting safety be "corrected in a timely manner," or that the equipment be taken out of service.⁴ In contrast, the regulations applicable to underground coal mines require that equipment be maintained in safe operating condition and that "equipment in unsafe condition shall be removed from service immediately."⁵ There is no statutory or regulatory mandate to conduct pre-operational inspections of non-diesel powered equipment in underground coal mines. Moreover, as noted in

³ In its argument on negligence, Tri County posits that there may have been nothing wrong with the gear case and that the brakes may have functioned properly if the hydraulic system had been allowed to warm up. However, its maintenance foremen determined that the brake was defective and that the gear box needed to be replaced. It was, in fact, replaced, no doubt an expensive repair that would not have been performed if not necessary. Tri County's "warm up" argument is no defense to the fact of violation or whether it was S&S.

⁴ 30 C.F.R. §§ 56.14100(a), (b) and (c), 56.14132(a).

⁵ 30 C.F.R. § 75.1725(a).

Wake Stone, I had previously issued a decision at odds with that holding. See *Bilbrough Marble Div., Texas Architectural Aggregate*, 24 FMSHRC 285 (March 2002) (ALJ).

As Tri County notes in its brief, there is no dispute that the ram car had a defective brake and that it was available for use by miners, i.e., it had not been removed from service immediately. Under the Act's strict liability rule, Tri County is liable for the violation. Application of the strict liability doctrine is consistent with the Act's overriding purpose of assuring the safety of miners. It does not reflect negatively on the importance or obvious merit of Tri County's policy of requiring pre-operational inspections.

Significant and Substantial

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

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

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

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).

....
....

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether

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

there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury.” *Id.* at 1281. Importantly, we clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The fact of the violation has been established. The violation contributed to a discrete safety hazard, an impaired braking system that made the ram car stop more slowly and pull to one side creating an increased risk of a collision with a miner, an object, or another vehicle. Any injury resulting from such a collision would most likely be reasonably serious. The question is whether the discrete safety hazard was reasonably likely to result in an injury producing event.

Adams determined that the violation was S&S because the defective brake caused the car to stop more slowly and to pull to one side. The car was operated on a split working section, where as many as 15-20 other miners might be working. Tr. 110. He reasoned that a miner might suffer crushing injuries to lower extremities if he were struck and pinned against another piece of equipment or a coal rib if the car pulled to the side or failed to stop quickly enough. Such a collision could also result in injury to the operator of the car, although not as severe. The operator might also suffer an injury if the car collided with a coal rib or another vehicle.

Tri County raises two arguments against the S&S allegation. It asserts that no injury was likely because its policy of requiring pre-operational inspections dictated that the defect would have been discovered in the normal course of continued mining operations before the car was put back into service. It also challenges Adams’ testimony on the likelihood that a miner might be pinned against a rib or another piece of equipment by the car’s pulling to the side. It has a strict policy that no one can be in the “red zone” on either side of a machine while it’s being trammed in any direction. Tr. 157. When asked whether a miner might enter the red zone of a piece of equipment, John Rolando, a Tri County safety technician with 38 years of mining experience, testified “absolutely not.” Tr. 161-62. Adams stated that he had never seen a Tri-County miner in the red zone of a piece of equipment. Tr. 126.

Violations of safety standards under the Mine Act are evaluated taking into account the vagaries of human conduct. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Here, despite Tri County’s policies, a miner might operate the piece of equipment with the known defect, or a miner might put himself, or be put in, close proximity to the ram car where he might be injured as a result of the defective brake. There is evidence of such vagaries of human conduct here. Adams believed that the defect could not have occurred while the car was sitting idle at the battery barn, a reasonable conclusion that Tri County appears to agree with. Tr. 115-16; Resp. Br. at 20. Consequently, the last miner to operate the car should have been aware of, what the parties agree, was an obvious problem with the brake. Richard Frigo, chairman of Tri County’s safety committee, opined that no one would operate the car “if they found that condition existed.” Tr. 167. However, the defect was not reported, and the ram car

remained available for use by another miner. Moreover, it would not have been necessary for a miner to violate Tri County's red zone policy in order to suffer an injury, although that would certainly have been within the realm of possibilities. The defective brake could have resulted in the car's colliding with a rib or another piece of equipment, either on the working section or while traveling to or from it, resulting in an injury to one or both operators.

In order to establish the significant and substantial nature of a violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event. *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987). Considering the vagaries of human conduct, I find that the discrete safety hazard was reasonably likely to result in a reasonably serious injury, and that the violation was S&S.

Negligence

Tri County argues that its negligence was no more than low because there is no evidence that it had any knowledge of the defective condition. Adams believed that the defect could not have occurred while the car sat idle at the battery barn, and that the miner that last operated it should have known of the defect and reported it. Tr. 115-16. That equipment operator was, no doubt, negligent. However, the negligence of a rank and file miner cannot be imputed to Tri County. *Whayne Supply Co.*, 19 FMSHRC 447, 451-53 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982). There is no evidence that the defect was reported to a Tri County manager or agent.

I find Tri County's negligence to have been low.

Order No. 6676764

Order No. 6676764 was issued by MSHA inspector Dennis Baum⁷ at 12:50 a.m., on August 23, 2010, pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.202(b), which requires that, "No person shall work or travel under unsupported roof." The violation was described in the "Condition and Practice" section of the order as follows:

Evidence is present to indicate that persons have been working and/or traveling under unsupported roof in the number 3 entry in the 2 South/Main West. There are at least 8 roof bolts just inby #8 crosscut that the roof has fallen away from the bolts or there is only loose shale between the plates and the roof, and at crosscut 9 ½, there are at least 6 bolts with a like condition. Those bolts are no longer effectively supporting the roof. These areas have been cleaned with a scoop or mini-trac with a bucket and there are tire tracks still visible to show the location of travel in the area. The operator engaged in aggravated conduct constituting

⁷ Baum worked for 31 years in the coal mining industry, including 26 years at the Crown III mine, in a variety of positions. He became an MSHA inspector in 2007 and was promoted to the position of roof control specialist in June 2012. Tr. 170-73.

more than ordinary negligence in that they allowed persons to operate equipment under these unsupported areas. This violation is an unwarrantable failure to comply with a mandatory standard. The area has been closed to all persons except those allowed under Section 104(c) of the Mine Act. Standard 75.202(b) was cited 3 times in two years at mine 1102632 (3 to the operator, 0 to a contractor).

Ex. G-13.

Baum determined that it was reasonably likely that the violation would result in a lost work days or restricted duty injury, that the violation was S&S, that one person was affected, and that the operator's negligence was high. The order was issued pursuant to section 104(d)(2) of the Act because Baum determined that the operator's negligence rose to the level of unwarrantable failure. A specially assessed civil penalty in the amount of \$8,400.00 was proposed for this violation.

The Violation – S&S

A major roof fall occurred at the Crown III mine on August 20, 2010, which blocked an escapeway and a travelway to the working section. An order was issued pursuant to section 103(k) of the Act, barring entry to the area until it could be examined, and Tri County could prepare and secure MSHA's approval of a plan to rehabilitate the area. Thereafter, miners were allowed to perform approved rehabilitation work. The area in question, the #3 entry near crosscuts #8 and #9, had not been actively used prior to the fall. However, as part of the rehabilitation plan, the #3 entry was to become a travelway, and re-supporting of the mine roof was needed in this and other areas in proximity to the roof fall.

Baum was involved in MSHA's examination of the fall and, on August 23, was inspecting the rehabilitation work.⁸ Tr. 174. He was accompanied by Ken Fox, the superintendent, and Steve Norman, a miner's representative. Considerable rehabilitation work had been done in the #3 entry between crosscuts #5 and #8. Ex. G-14. Eight foot tension bolts had been installed and props had been set. The area from the #8 to the #9 crosscut had yet to be rehabilitated. Baum observed that that area had been cleaned, most likely by a scoop or a mini-trac, both of which he observed in the area. Tr. 186. The entry had been cleaned rib-to-rib, indicating that multiple passes had been made, and the material had been pushed past the #9 crosscut. There were two clusters of roof bolts in the #3 entry, around which material had fallen away. Inby the #8 crosscut there were eight bolts from which the immediate mine roof had fallen away, leaving the plates 18 to 24 inches from what was "apparently rock roof." Tr. 178. As Baum described it, the mine roof in that area consisted of a small layer of coal below a layer

⁸ Baum had been in the area of fall prior to his August 23 visit, and had participated in the approval of the installation of roof supports in the belt entry to facilitate its use as an alternate escapeway. He had not, however, visited the #3 entry where the violation was cited. Tr. 196-98.

of shale approximately two feet thick, which was topped by the limestone main mine roof. Over time, the coal and shale dried and fell from between bolts. Two of the bolts were “coned,” i.e., broken shale remained resting on the 6" x 16" roof bolt plates, in a cone shape.⁹ The second area was just inby the #9 crosscut, where six-to-eight bolts were exposed, most of them being coned. The material remaining around those bolts consisted of larger chunks, up to the size of a basketball, and it appeared ready to fall if disturbed. Tr. 180. The tire tracks of the vehicles that had cleaned the entry ran directly under the clusters of bolts with loose material around them.

Baum considered the loose material around the shafts of the bolts to be unsupported roof. Since the tire tracks of the vehicles that had cleaned the area ran directly under the unsupported roof, and neither of the vehicles had protective canopies, he determined that the standard had been violated and that the violation was S&S.

Tri County does not dispute the accuracy of the conditions described by Baum. Nor does it argue that the violation was not S&S.¹⁰ Rather, its challenge is directed to the unwarrantable failure allegation. It contends that the section 104(d)(2) order should be changed to a section 104(a) citation, with an appropriate reduction in penalty. Resp. Br. at 22-24.

There is ample evidence that a miner traveled under unsupported roof while making multiple trips to clean the entry. A reasonably serious injury was reasonably likely to result from the safety hazard contributed to by the violation, and the violation was S&S.

⁹ The bolts were rebar tension bolts. Unlike fully grouted bolts, which form a “beam effect” supporting the roof for their entire length, only the tops of tension bolts are anchored by resin in limestone. Where material in the immediate mine roof has fallen and loosened the plates, there is no longer tension on the bolts, and they provide no support to the remaining immediate mine roof. Tr. 215. Baum was concerned about the fall of loose material that remained on and between the plates of the coned bolts. Tr. 183. He was not concerned about a major fall of the limestone main mine roof. Tr. 181, 216.

¹⁰ On the issue of the exposure of miners to the roof condition, Tri County notes that Baum did not observe which vehicle actually was used for the cleaning, and that there was a battery-powered scoop tractor with a canopy that could have been used. However, Baum observed the diesel-powered scoop and mini-trac in the area, and he had no recollection of seeing a battery-powered scoop. I find that the cleaning was done with a vehicle without a canopy, and that the operator was exposed to the unsupported roof.

Unwarrantable Failure - Negligence

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

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

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

The Secretary argues that the violation was the result of Tri County's unwarrantable failure because the condition was obvious and extensive, it existed for three days, it posed a high degree of danger to miners, Respondent had been put on notice that greater efforts were needed for compliance, and management knew the violation existed. The Secretary's focus on the "condition," as opposed to the violation overstates her case somewhat. Tri County argues that MSHA has addressed coned bolts inconsistently in the past, and that it is not clear that a supervisor actually observed a miner travel under the coned bolts.

Obviousness – Length of time

The “condition,” the material fallen from between the bolts, no doubt was obvious and had existed for a lengthy period, probably months. However, as Baum explained, the #3 entry had been an “extra” entry, i.e., it had not been used and “no one probably would have been there, they were on the regular travelway.” Tr. 191. It only became active because of the August 20 roof fall in the main travelway, which necessitated re-routing of travelways and escapeways, and use of the #3 entry. Following the fall, and the issuance of the section 103(k) order, access to the area was restricted, and a plan was developed to rehabilitate the area around the fall and those areas that would be used for re-routed travelways and escapeways. That the coned bolts had existed, and continued to exist until the area was scheduled for rehabilitation, was not a violative condition. The violation was the miner’s travel under the loose material on the “coned” bolts.

The violation occurred over a relatively short period of time, however long it would have taken for a scoop to have made several passes through the area, possibly an hour or less. It would have been obvious that travel under the bolts coned with loose material would have been hazardous, although there apparently was a difference of opinion on the degree of danger posed by coned bolts, at least in certain areas.¹¹

Danger to miners

Baum was concerned about loose material falling and striking a miner, which he determined could result in an injury necessitating lost work days or restricted duty. Tr. 183. That loose material was on the coned bolts, not bolts that were completely exposed, i.e., where the immediate shale roof had fallen away up to rock. He was not concerned about a major roof fall, which could have had far more serious consequences. Tr. 181, 216. The first group of bolts consisted largely of “clean” bolts, i.e., there was no loose material remaining on the plates. Only “a couple” of those bolts were coned, and the loose material consisted of dried shale, which typically flakes and falls in thin layers. Tr. 178. Of more concern was the second cluster of 6 to 8 bolts, only a “couple” of which were clean – the rest being coned with larger chunks of loose material. Tr. 180. Those bolts were apparently at the outer end of the area that was to be rehabilitated. They were in by at crosscut #9 1/2 and Baum’s notes reflect that “the only area to be completed yet is reinforcing #3 entry from 8-9 xc and 9 xc back to entry 4 from 3.” Ex. G-14 at 8.

¹¹ Baum’s impression was that Fox, the superintendent, didn’t see anything wrong with the fact that cleaning had been done by operating equipment under the loose bolts. Tr. 192, 212. He confirmed that, in the past, citations may not have been issued for such bolts if the immediate mine roof was solid. If a coned bolt was in an infrequently traveled area it may have been allowed to be flagged, i.e., marked for later repair and to prohibit travel under it. Tr. 182, 205-06. As an example, he indicated that such action might be taken if the bolt was in an air course traveled only by an examiner and there was room to travel the air course without passing under the loose bolt. Tr. 183. However, Baum explained that such instances did not involve clusters of loose bolts on a travelway, and none of the scenarios related by Tri County in its brief involved MSHA’s tolerance of miner’s travel under bolts coned with loose material. Tr. 205-06.

The violation posed a measure of danger to miners, a reasonable possibility of an injury resulting in lost work days or restricted duty. There were only a “couple” of coned bolts in the first area, and the loose material on the plates was relatively small pieces of shale. There was a larger number of coned bolts, with larger pieces of loose material, in the second area. Under the facts of this case, I find that the violation posed a moderately high degree of danger to miners.

Operator’s knowledge

Tri County certainly had knowledge of the condition of the bolts. As Baum explained, issuance of the section 103(k) order restricted entry to the area of the fall to MSHA, state inspectors, and company and miners’ representatives, who had to closely examine the entire area. Tri County had to prepare a plan to rehabilitate the area, and establish a new travelway and escapeways. That plan had to be approved by MSHA before the 103(k) order was modified to allow implementation of the plan. Fox, who accompanied Baum, stated that four supervisors oversaw the rehabilitation work and at least one was present in the area at all times. Tr. 186. That was consistent with Baum’s understanding of how a rehabilitation plan was typically implemented, i.e., “there was also a management person there. They didn’t just send people there – somebody oversaw that work all the time.” Tr. 189-90.

The rehabilitation plan was not introduced into evidence. While all involved parties knew, or should have known, about the defective bolts in the #3 entry, there apparently was nothing in the plan specifically addressing the sequence of steps for cleaning and re-bolting those areas. Baum believed that the proper sequence to perform those tasks was to clean the entry up to the loose bolts, install new bolts, and then finish the cleaning. Tr. 194. Instead, the entire area was cleaned before any re-bolting was done, most likely, as Baum suspected, because it may have been deemed “quicker to scoop the whole thing.” Tr. 194.

While Tri County knew about the loose bolts, it is unclear whether a Tri County manager directed or oversaw the actual cleaning and travel under the coned bolts, or whether a rank-and-file miner simply decided to clean the whole area, rather than stop at the first cluster of loose bolts. The roof fall affected a relatively large area, and a supervisor overseeing rehabilitation work would not necessarily have been present in the #3 entry when the cleaning was done. It is possible that the work could have been overseen, or at least tacitly approved, by a manager, because Tri County did not share Baum’s views on the dangers posed by loose or coned bolts. However, there is insufficient evidence upon which to base a finding that a manager directed or oversaw the hazardous travel.

Extensiveness

The extensiveness factor involves consideration of the scope or magnitude of a violation, not an additional consideration of dangerousness or obviousness. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). The violation cited is travel under unsupported roof, which has at least two components, space and time. The first cluster of loose bolts encompassed an area of approximately 10' x 18', but only a “couple” of bolts in that area were coned with loose material. The second area was somewhat smaller, but contained more coned

bolts. Travel under those bolts most likely occurred for a relatively short period of time. I find that the violation was not extensive.

Notice of a need for greater compliance efforts

In issuing the order, Baum had considered Tri County's "history of roof falls and accidents," and the fact that he had previously issued two citations for violations of section 75.202(b). Tr. 192, 195. The offhand reference to a history of roof falls and accidents, unquantified as to time and number, is of little relevance, particularly since Baum was not concerned about a major roof fall. Similarly, I find that the issuance of two citations for violations of section 75.202(b), without disclosure of when or under what circumstances they were issued, is not sufficient to find that Tri County had been put on notice of a need for greater compliance efforts with respect to this violation.

Abatement efforts

The focus of the abatement effort factor is on compliance efforts made prior to the issuance of the violation, generally a measure of an operator's response to violative conditions that were known, or should have been known to it. While the parties stipulated that Tri County exhibited good faith in abating the violation, post-citation efforts are not relevant to the determination of whether the operator engaged in aggravated conduct by allowing a violative condition to occur. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997).

Again, the distinction between unsupported roof conditions, and the actual violation – travel under unsupported roof – must be kept in mind. The roof conditions were known to Tri County, and to all other involved parties, including MSHA and State inspectors. A rehabilitation plan had been approved, pursuant to which those conditions were being addressed. In the course of implementation of that plan, a miner operated an open scoop or mini-trac under the unsupported roof. There is no direct evidence that Tri County had notice of the actual violation, prior to its occurrence. I find that the abatement efforts factor should not be considered in the unwarrantability determination.

Conclusion

Of the factors considered to determine unwarrantability for this violation, the most significant are that the violation posed a moderately high degree of danger to a miner, and the operator's knowledge. That the violation was not extensive, existed for a relatively short period of time, and the fact that the operator had not been put on notice of a need for greater compliance efforts, mitigate against a finding of unwarrantability. That travel under the coned bolts was an obvious violation is an important consideration, but is largely subsumed in the consideration of the operator's knowledge.

Upon consideration of all of the factors, I find that the violation was not the result of Tri County's unwarrantable failure. Baum's determination was largely based upon a belief that Tri County supervisors were involved in the determination to scoop the area before correcting the

unsupported roof conditions. However, it is equally plausible that that determination was made by a rank-and-file miner, and was executed without the knowledge of a supervisor.

Nevertheless, Tri County's managers were heavily involved in the rehabilitation effort and, at the very least, they did not assure that the miners performing the rehabilitation work did so in a manner that did not involve travel under the loose bolts. I find its negligence to have been high.

Docket No. LAKE 2011-467

The violations at issue in this docket relate to ineffective and improperly sealed splices in a trailing cable of a roof bolter. On January 8, 2011, Baum issued two unwarrantable failure orders pursuant to section 104(d)(2) of the Act. The first violation was for the ineffective splices on the cable. The second was for an insufficient examination of the cable.

Order No. 8419153

Order No. 8419153 alleges a violation of 30 C.F.R. §75.604(b), which requires that, "When permanent splices in trailing cables are made, they shall be [e]ffectively insulated and sealed so as to exclude moisture." The violation was described in the "Condition and Practice" section of the order as follows:

The number 2, 3-conductor trailing cable supplying 480 VAC power to the number 67 Fletcher roof bolter, in service in the unit 1, 3 West/2 South Panel, contains five defective permanent type splices that are not effectively insulated and sealed so as to exclude moisture. The outer jackets on three of these splices are cut or torn exposing the insulated inner conductors and two of these splices have the outer jacket cut or torn such that the insulating material is so thin as to not be effective. The records of the weekly electrical examination of this bolter indicates that this bolter was just checked on the last previous shift. The condition of these splices is so obvious that anyone would have seen them during an examination. The only record of any hazardous conditions found during the weekly examination on 1/8/11 was a B.O. splice with corrective action showing it had been taped, but during the inspection of this bolter there were no areas in the cable that had any new tape. The operator has engaged in aggravated conduct constituting more than ordinary negligence in that the damaged splices were not found and properly recorded. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-17.

Baum determined that the violation was unlikely to result in a fatal injury, that it was not S&S, that one person was affected, and that the operator's negligence was high. The order was issued pursuant to section 104(d)(2) of the Act, and alleged that the violation was the result of Tri County's unwarrantable failure to comply with the standard. A civil penalty in the amount of \$4,000.00 was assessed for this violation.

Order No. 8419155

Order No. 8419155 was also issued pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.512, which requires that:

All electrical equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions.^[12] When a potentially dangerous condition is found on electrical equipment, such equipment shall be removed from service until such condition is corrected. A record of such examination shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

The violation was described in the “Condition and Practice” section of the order as follows:

An inadequate weekly electrical examination of the number 67 Fletcher roof-bolter, in service in the unit 1, 3 West/2 South panel, was conducted on the midnight shift on 1/8/11. Five defective permanent type splices were found in the trailing cable as cited in a 104(d)(2) order issued during this inspection shift. The condition of these splices is very obvious and should have been found and corrected during the weekly examination. It is obvious that the cable has not been removed from the reel and examined. The operator has engaged in aggravated conduct constituting more than ordinary negligence in that a complete examination has not been conducted on this bolter resulting in the failure to find and correct obvious hazardous conditions. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-19.

Baum determined that if the violation was unlikely to result in a fatal injury, that it was not S&S, that one person was affected, and that the operator’s negligence was high. A civil penalty in the amount of \$4,000.00 was assessed for this violation.

The Violations

On January 8, 2011, during a regular quarterly inspection, Baum inspected a Fletcher roof bolter and its trailing cable. The inspection was conducted during the day shift, on a Saturday. The mine had been idle since the second shift the day before. He was accompanied by Shane Gilpin, a fill-in committee man, who served as the miners’ representative. Tri County declined the opportunity to participate in the inspection. Baum started to examine the bolter’s cable, after it had been disconnected from the power center. He performed a “hand-over-hand” inspection of the cable, starting from the plug and moving toward the equipment. At the last open crosscut, where the cable was hung along the rib, he noticed two splices that appeared to be

¹² Section 75.512-2 specifies that the examinations required by section 75.512 shall be made at least weekly.

inadequately insulated. He examined the splices more closely, and observed that they had “opened up,” such that there was only a layer of tape covering the opening to the inner conductors

When he reached the bolter, he pulled the rest of the cable off the storage reel, and observed three additional splices that were completely open, exposing the inner conductors. The pilot wire for the ground check system was protruding from one of the splices. He called the chief repairman and had all five splices cut open so that he could closely examine the inner conductors. Because the insulation on those conductors was intact, he determined that the conditions were unlikely to result in an injury, and that the violation was not S&S. However, in the course of continued normal mining operations the insulation on the inner conductors could be damaged, in which case a fatal injury would be possible to a miner handling the cable in the damp conditions. Tr. 241.

He was able to see the weakened splices in the cable on the rib as he walked up to them. He felt that they were obvious, and should have been observed and corrective action taken. The three open splices that were discovered as the cable was removed from the reel were very obvious, and appeared to have existed for a substantial period of time, i.e., 4-5 days. When he exited the mine he checked the record of the bolter’s most recent permissibility examination, the equipment’s required weekly electrical examination. The report bore a date of January 8, 2011, indicating that it had been made on the midnight maintenance shift immediately prior to the day shift during which the inspection was conducted. Tr. 242-43; Ex. G-22. The report did not reflect any defects in the cable, noting only that one splice was retaped. Baum had not seen any recently applied tape on the cable. He then issued a second violation for failure to perform an adequate electrical examination. He rated Tri County’s negligence with respect to both violations as “high.”

Gilpin, was working for Tri County as an outby repairman at the time he accompanied Baum on the inspection. In March of 2012, he joined MSHA, and at the time of the hearing was an inspector in-training. He confirmed that there were five bad splices on the cable, and that the three that were exposed when the cable was taken off the reel were open and obvious. Tr. 281-82.

When he issued the violations, Baum believed that the mine had had a “clean” inspection, and had come off of the “d-chain.”¹³ As a result, the violations were issued pursuant to section 104(a) of the Act. As Baum explained it, the only thing keeping them from being issued

¹³ For mines without a current history of section 104(d) violations, a violation must be found to be both S&S and unwarrantable to justify issuance of a citation pursuant to section 104(d)(1) of the Act. If another unwarrantable violation is found within 90 days of such a citation, a withdrawal order is issued pursuant to section 104(d)(1). Thereafter, any unwarrantable violation results in issuance of a withdrawal order pursuant to section 104(d)(2) (the “d-chain”), until a complete inspection of the mine discloses no similar violations (a “clean” inspection), at which time the provisions of section 104(d)(1) again become applicable to that mine, i.e., the mine is no longer subject to the “d-chain.” 30 U.S.C. §114(d).

pursuant to section 104(d) was the fact that the violations were not S&S. However, when he called his supervisor to advise of the issuance of the citations, he was told that the mine had not had a clean inspection, and was still subject to section 104(d)(2) orders for unwarrantable violations that were not S&S. He amended the citations to orders issued pursuant to section 104(d)(2) of the Act, and proceeded back underground to “red tag” the bolter.

Tri County introduced no evidence to rebut the descriptions of the conditions of the splices given by Baum and Gilpin. It argues that the examination of the cable was actually conducted on January 4, nearly four days earlier than the date reflected on the report. Consequently, it contends that the Secretary did not prove that the bad splices were present during the examination and that the examination order should be vacated. Based upon the same argument, it contends that the unwarrantable failure designation of the bad splice order should be deleted and that the order should be modified to a citation issued pursuant to section of 104(a) of the Act, and the penalty adjusted accordingly.

Tri County’s defenses are based upon its contention that the date on the electrical examination report reflects the date that the examination of the bolter was completed, not the date that the cable was examined. It contends that the examination was actually started several days earlier, and that the cable was inspected on January 4. It places primary reliance on a memorandum dated January 12, 2011, subject “Investigation of Citation #8419155.” Ex. R-11. The body of the report consists of typed summaries of statements made by three electrical repairmen who participated in the examination of the roof bolter. They relate that the examination was started on Monday, January 3, 2011, and that the cable was inspected while the bolter was de-energized during a power move on January 4. Two of the repairmen stated that a splice was made on Monday, one stated that in addition to the splice, one “spot was re-taped” on Tuesday. They indicated that the date on the examination report, January 8, was the date that the examination was completed. None of the repairmen were called to testify at the hearing. Two remained employed by Tri County; one worked for a different mine.¹⁴ Tr. 288-89.

Aymer explained that weekly electrical examinations were generally started on Monday, and it was often not possible to complete an examination on a bolter in one day because the repairmen were frequently called away to attend to other, more urgent, repair tasks. Gilpin agreed that the equipment at the mine is relatively old and, as a result, more items may require attention, which can extend an examination. Breakdowns on other equipment can also divert repairmen’s attention from examinations.

¹⁴ The Secretary argues that an adverse inference should be drawn against Tri County under the missing witness rule based on its failure to call the two examiners who remained employed. Sec’y. Reply Br. at 7-9. However, while the Secretary concedes that she could have subpoenaed the departed repairman to testify, she fails to explain why the other repairmen could not also have been subpoenaed, apparently relying upon their continued employment status to contend that they were not equally available to her. I decline to draw an inference under the missing witness rule as to this violation, or to other violations where the argument was asserted. The witnesses in question were available to be subpoenaed by either party to give testimony during discovery or at the hearing.

The examiners use pre-printed forms, listing the components of each piece of equipment that need to be examined. As a component was examined, a check mark was placed in a box next to that component on the examination sheet. When all items for a particular piece of equipment had been checked, a date was entered reflecting that the examination had been completed. Aymer explained that they were “always told” to enter the date completed, that MSHA did not want a start date, just a completion date. Tr. 302. Dates were not entered reflecting when individual components had been examined because the issue “had never come up.” Tr. 311. Following issuance of the orders, Tri County’s procedures were modified, such that dates were entered when each component of a piece of equipment was examined. Tr. 305, 311. Frigo concurred with Aymer’s explanation of the history of Tri County’s use of the examination form. Tr. 315-21.

When Baum returned to the mine the following Monday, January 10, officials from Tri County wanted to discuss the orders, explaining that the inspection of the cable actually occurred on January 4th, during a power move, as reported during its “investigation.” Baum replied to Tri County’s representative that he did not believe what the repairmen had reported.¹⁵ While Baum conceded that it was possible that an electrical examination of a piece of equipment might not be completed in one shift, he stated that he did not see anyone “piecemeal” an examination when he worked at the mine. Tr. 248. Moreover, he did not believe that a proper electrical examination had been conducted, even if the cable had been examined on the 4th, because he believed that the three open splices that were exposed when the cable was removed from the reel would have been present on the 4th, and he did not observe any recently applied tape as one repairman had claimed. Tr. 252. He repeatedly stated his conclusion that the orders were properly issued as unwarrantable failure violations even if the examination of the cable had been performed on the 4th. Tr. 248, 252, 255.

Tri County’s contention that the cable was examined on January 4, rather than January 8, is plausible. Although it is also plausible that the repairmen fabricated their accounts in an effort to avoid discipline. However, the argument is unavailing because the three open splices in the cable would have been present at that time, and should have been discovered in the course of a competent examination. Assuming that a power move was done on January 4, i.e., the power center was moved in by closer to the working faces, the excess cable on the bolter would have been wound up on the reel. Tr. 295. It would have remained on the reel until Baum pulled it off to inspect it on January 8. No plausible argument or explanation has been advanced as to how the obvious damage to the cable could have occurred after it had been examined but before it was wound up on the reel, or while it was on the reel. Consequently, it had to have existed at the time of the power move. Gilpin observed dirt in the open splices, indicating that they had been dragged through the gob and mud, prior to being rolled onto the reel. Tr. 294-95. Both Baum and Gilpin testified, credibly, that the three open splices had existed for a considerable period of

¹⁵ Baum was concerned that the repairmen would not have admitted to failing to examine the cable because their jobs may have been at risk. Tr. 248. When Gilpin reported the issuance of the orders to his union president, he was concerned that the repairmen might lose their jobs. Tr. 288.

time, e.g. four to five days. Tr. 248, 252, 255, 283. It follows that, either the cable had not been examined, or the examination was conducted in a grossly negligent manner.

I find that Tri County violated section 75.604(b) as alleged in the bad splice order, Order No. 8419153. I also find that Tri County violated section 75.512 as alleged in the examination order, Order No. 8419155.

Unwarrantable Failure - Negligence

In carrying out required examination duties for an operator, an examiner may be appropriately viewed as being charged with responsibility for the operation of part of a mine, and “therefore, the examiner constitutes the operator’s agent for that purpose.” *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Pocahontas Fuel Co. v. Andrus*, 590 F.2d 95 (4th Cir. 1979) (holding that preshift examiner’s knowledge was imputable to the operator for unwarrantable failure purposes under principles of respondeat superior); *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1561 (Sept. 1996) (finding relevant that employee made required daily examinations and entered findings in an examination book).

The negligence of the electrical examiners, who failed to conduct a proper examination of the bolter’s cable are imputable to Tri County. As a result, five improper splices, three of which were open and obvious, were allowed to remain as hazards to miners handling the cable. That negligence, either a complete failure to perform that part of the examination, or a grossly incompetent conduct of that part of the examination, is easily characterized as aggravated conduct constituting more than ordinary negligence.

No detailed analysis of the other factors typically considered in the unwarrantable failure analysis is required.¹⁶ The overriding factor, knowledge imputable to the operator, combined with the obviousness of the violation is sufficient to establish that the violations were the result of Tri County’s unwarrantable failures to comply with the respective standards.

¹⁶ Through its examiners, Tri County knew or should have known of the bad splices and failed to correct them. They existed for at least four days. While they did not, in their condition on January 8, pose a high degree of danger to miners, they did present hazards that may have posed such a danger if allowed to continue to exist. Considering that five bad splices existed over a large portion of the cable, the violation was reasonably extensive. There is no evidence that the operator was placed on notice that greater efforts were necessary for compliance, or that it exercised sub-standard efforts to abate the conditions once known.

Docket No. LAKE 2011-690

Citation No. 8429564

Citation No. 8429564 was issued by MSHA inspector and health specialist Marsha Price¹⁷ at 10:30 a.m., on March 9, 2011, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 72.630(b), which requires that “Dust collectors shall be maintained in permissible and operating condition.” The violation was described in the “Condition and Practice” section of the citation as follows:

The dust collection system provided on Company No 60, Fletcher Double Boom Bolter, (Serial Number 99028/2009304, Dust Approval Number 25B-1058) being used on the active Number 1 Unit (MMU 010-0), the 3rd West Miner Section is not being maintained in permissible and operating condition. The following items were found in the dust collection system:

- (1) The left side collection system has a leak in the dust collection hose from the drill pod to the drill arm.
- (2) The left side and right side collection boxes have dust on the clean side of the filters.

Ex. G-4.

Price determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that two persons were affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$1,026.00 was assessed for this violation.

The Violation

On March 9, 2011, Price was conducting respirable dust sampling as part of the regular quarterly inspection of the Crown III mine. In the third west miner section, MMU 010-0, she examined the dust collection system on a Fletcher, double-boom, roof bolter. There is an independent dust collection system for each of the two drill heads. A vacuum system draws air from the drill chuck, through hoses, to dust collection boxes and filters. The cleaned air is exhausted at the rear, or sides, of the machine. The vacuum, measured at the drill chuck, is required to be between 12 and 20 inches of mercury. As Price placed a vacuum gauge on the left drill chuck, she heard a leak, and saw a hole in the vacuum hose. She measured the vacuum at the drill heads at 19 inches of mercury on the left and 16 inches on the right, both well within the

¹⁷ Price has worked for MSHA for more than seven years as an inspector, health specialist, and Conference and Litigation Representative. She has been a member of the national respirable dust team. Prior to joining MSHA, she worked for 15 years in an underground coal mine as a general laborer, equipment operator, mine examiner, and fill-in face boss. Tr. 10-14.

required range.¹⁸ She then examined the dust boxes and filters and found visible dust on the brackets holding the filters and dust in the ducts on the “clean” side of the filters on both the right and left side collection systems. Tr. 22. In her experience, it was very uncommon to find dust on the brackets, which indicated either that the systems had been leaking severely or that they had been leaking for a long time. Tr. 22.

She determined that the dust collection systems were not being maintained in permissible or operating condition, in violation of the standard. The term “permissible” is defined in the regulations as: “Permissible, as applied to a dust collector, means that it conforms to the requirements of this part, and that a certificate of approval to that effect has been issued.” 30 C.F.R. § 33.2(a).

Manufacturers of dust collection systems for use on roof bolters in mines must submit them for testing by MSHA, which entails measuring the net concentration of airborne dust at each drill operator’s position while a series of test holes are drilled. *See, gen.* 30 C.F.R. Part 33. Dust concentrations may not exceed 10 million particles (5 microns or less in diameter) per cubic foot of air. 30 C.F.R. § 33.33(b). Systems that pass the test are issued a certificate of approval, which must be reproduced as an approval plate. The plate must be stamped or affixed to the unit, which identifies it as permissible. *Id.* § 33.11. Without an approval plate, no unit has the status of “permissible.” *Id.* § 33.11(d). Use of the approval plate is not authorized except on units that conform strictly with the drawings and specifications upon which the certificate of approval was based. *Id.* § 33.11(e).

Price determined that both conditions that she observed on the dust collection systems could not have conformed with the drawings and specifications upon which the approval certificate was based. Tr. 17, 21, 33-34. Consequently, they had not been maintained in permissible condition. She also determined that the conditions impaired the operation of the systems, such that they had not been maintained in operating condition.

Tri County argues that, under the Secretary’s regulations, dust collection systems must be evaluated as a whole, and that the citation must be vacated in the absence of a dust sampling at the drill operator’s position revealing non-compliance with applicable performance standards.¹⁹ The regulation relied upon applies to the initial testing of dust collection systems, successful completion of which would result in the issuance of a certificate of approval to the manufacturer. It is well-settled, however, that section 72.630, upon which the citation was based, is a workplace standard designed to protect, not only drill operators, but other miners in the

¹⁸ Price initially stated that the vacuum was 16 inches on the left and 19 inches on the right.

Tr. 20. However, her notes reflect that the measurements were just the opposite, and when questioned about the higher vacuum on the left, she did not disagree. Tr. 31, 41; Ex. G-4.

¹⁹ A section of the Secretary’s regulations entitled “Certification of dust-collecting systems” includes the statement, “Individual parts of dust-collecting systems will not be certified for performance.” 30 C.F.R. § 33.9.

immediate area, and that enforcement of the standard does not require dust sampling. *Jim Walter Resources, Inc.*, 17 FMSHRC 1423, 1444-45 (Aug. 1995) (ALJ); *aff'd Jim Walter Resources, Inc. v. Sec'y of Labor*, 103 F.3d 1020, 1024 (D.C.Cir. 1997), cited in *Genwal Resources, Inc.*, 27 FMSHRC 580, 588 (Aug. 2005) (ALJ); *White Buck Coal Co.*, 30 FMSHRC 535, 541-42 (June 2008) (ALJ).²⁰

Arguably, the hole in the left-side vacuum hose did not render the system inoperable because it maintained a vacuum of 19 inches of mercury at the drill chuck. However, the certificate of approval would not have been issued for a system with a hole in the vacuum hose. Consequently, the left-side dust collection system was not maintained in permissible condition. The presence of visible dust on the filter brackets and in the ducts behind the filters conclusively established that the dust collection systems were not maintained in a permissible or operating condition. If the systems were working properly, there should not have been any dust on the clean side of the filters. The fact that no visible dust was observed emanating from the systems, as Price conceded, is of no consequence. Tr. 38, 40; Ex. G-4. If visible dust could bypass the filters, certainly invisible respirable dust could also bypass the filters, and would have been exhausted into the mine atmosphere. Tr. 23, 26.

I find that the hole in the left-side vacuum hose and the presence of dust on the filter brackets and in the ducts on the “clean” sides of the filters established that the dust collection systems were not being maintained in permissible or operating condition in violation of the standard.

S&S

The fact of the violation has been established. The improperly maintained dust collection systems contributed to a discrete safety hazard, respirable dust being expelled into the mine's

²⁰ As observed in *White Buck Coal Co.*, 30 FMSHRC at 541-42:

[S]ection 72.630 was promulgated by the Secretary to protect miners from exposure to harmful respirable dust. Thus, in the introduction to the promulgation of this rule, the Secretary noted that during drilling, “there is the potential for extremely high exposures in short periods of time to both miners doing the . . . drilling and to other miners in the immediate areas. Air Quality Standards for Abrasive Blasting and Drill Dust Control, 59 Fed. Reg. 8318 (February 18, 1994). The Secretary went on to state that: “The development of silicosis and pneumoconiosis among underground coal miners has been well documented, *particularly among roof bolters* and transportation workers.” *Id.* at 8322 (emphasis added). Finally, the Secretary set out that “§ 72.630 is a work place standard that does not require sampling.” *Id.* (emphasis in original)

atmosphere which presented a risk of contracting silicosis or pneumoconiosis to miners who might be exposed to it. Any such injury would be serious. Whether the violation was S&S turns on whether the hazard was reasonably likely to result in an injury causing event.

Price determined that two persons were affected by the violation, i.e., exposed to the dust that was exhausted by the systems “directly into the mine atmosphere.” Tr. 23, 27. Those persons were the two roof bolt operators, who were not wearing respirators. Tr. 27. However, the exhaust ports of the systems, where inadequately filtered air was discharged, were located at the rear or on the sides of the machine. Tr. 61-62. The ventilation air current, channeled by line curtain within 5 feet of the bolter, flowed into the face of the entry and back out. Tr. 62. Consequently, the systems’ exhaust ports were “downstream” from the operator’s positions in the prevailing air flow. Tr. 62-67. Price conceded that the roof bolt operators were “upstream” of the exhaust ports, and that they were either not exposed to the inadequately filtered air or their exposure was substantially reduced.²¹ Tr. 65-67.

Price testified that there may have been other miners downstream of the roof bolter that could have been affected by the violative condition. She identified a scoop operator, a car driver and a foreman as persons who might have been exposed. Tr. 71. However, Price did not identify any such persons as being affected by the violation when it was cited, or in the course of her direct examination, and there is no evidence that such persons were actually exposed. While I would find that sampling was not required in order to establish that a dust control violation was S&S, there are serious questions as to the degree of any such exposure here. Price did not observe any visible dust in the air in the vicinity of the roof bolter, which suggests that there was not a great amount of dust bypassing the filters. Tr. 38. Any such dust would have been disbursed in the 3,000 cubic-feet-per-minute of air ventilating the working faces. Consequently, downstream exposure would not have been nearly as intense as that from a defect in the collection part of the system that would have directly affected the bolter operators.

While, as Price stated, exposure to even small amounts of respirable dust over a period of time can cause lung damage or disease, I find that the uncertainties as to the amount of exposure here, including the concentration of any respirable dust, whether miners downstream of the bolter were actually exposed, and, the amount of time that any such miner would have been exposed, preclude a finding that the hazard contributed to was reasonably likely to result in a reasonably serious injury or illness.²² I find that the violation was unlikely to result in a permanently disabling injury to one person and was not S&S.

²¹ The bolter operators would have been affected by any defect that significantly reduced the vacuum at the drill chucks, the intake ports for the dust collection systems, which would have been directly upstream from them. However, the hole in the left-side vacuum hose had virtually no effect on the vacuum at the drill chuck, which was measured at 19 inches of mercury. Price based her S&S determination solely on the presence of dust on the clean side of the filters.

Tr. 28.

²² Respondent’s approved ventilation plan required that the dust collection systems be examined during every on-shift examination when in operation. Ex. G-5. If the plan’s provisions were followed, the duration of the violation would have been relatively short.

Negligence

Respondent's approved ventilation plan required that the dust collection systems be examined during every on-shift examination when in operation, and that the entire system be cleaned if the system was found to be contaminated, i.e., "dust is observed coming from a muffler or dust collects behind the dust box filter." Ex. G-5. Price determined that Respondent's negligence was moderate because she was told that the on-shift examination of the dust collection systems had been done, which should have disclosed the violative conditions. Tr. 29-30. She did not write a citation for failure to perform an adequate on-shift examination of the systems. Tr. 30, 42. Tri County argues that its negligence should be rated as low because MSHA's inspection of the system was more comparable to the manufacturer's recommendation for a periodic or weekly examination, and the more demanding requirements in its ventilation plan are not specifically required by the Secretary's regulations.

Respondent's arguments miss the mark. The fact is that thorough on-shift examinations were required by its ventilation plan, and supposedly were performed on the date and shift in question. While there is some question as to how long the violative conditions existed, they most likely should have been discovered at that time. I find that Tri County's negligence was moderate.

Citation No. 8429565

Citation No. 8429565 was issued by Price at 1:15 p.m., on March 9, 2011, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.1505(b), which requires that escapeway "maps shall be kept up-to-date and any change in route of travel, location of doors, location of refuge alternatives, or direction of airflow shall be shown on the maps by the end of the shift on which the change is made." The violation was described in the "Condition and Practice" section of the citation as follows:

All maps shall be kept up-to-date and any change in route of travel, location of doors, location of refuge alternatives, or direction of airflow shall be shown on the maps by the end of the shift on which the change is made. The Refuge Chamber located at crosscut 39 between entry 6 and entry 7, The Refuge Chamber located at crosscut 39 and the lifelines in the primary and secondary escapeways are not noted on the active Number One Unit, the Third West, MMU 010-0.

Standard 75.1505(b) was cited 2 times in two years at mine 1102632 (2 to the operator, 0 to a contractor).

Ex. G-7.

Price determined that it was unlikely that the violation would result in a fatal injury, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$425.00 was assessed for this violation.

The Violation - Negligence

When Price inspected the subject unit, she observed that maps located at rescue chambers in the primary and secondary escapeways were not accurate in that they reflected that the chambers were located at crosscut 35, whereas the chambers were located at crosscut 39. Maps located near phones at the beginnings of the escapeways reflected the same error. The chambers were actually located within two crosscuts of the primary escapeway phone and within four crosscuts of the secondary escapeway phone, four crosscuts closer to the phones than as erroneously shown on the maps. Tr. 74. Price determined that the failure to update the maps was a violation of the standard, and that a miner who was outby could have been misled as to the location of a chamber and could have perished as a result.

Tri-County does not dispute the fact of the violation, or the determination that its negligence was moderate.

Gravity

Price determined that the hazard contributed to by the violation was unlikely to result in an injury because there was no immediate hazard at the time, i.e., that it was unlikely that an emergency condition necessitating evacuation of miners would occur. Her determination that one person was affected was not explained in detail. However, it was apparently based upon an assessment that no more than one person would have been outby and could have suffered the consequences of finding no rescue chamber at crosscut 35, i.e., would not have survived long enough to realize that the chamber was four crosscuts inby and to reach it before available emergency breathing aids were exhausted. It was unclear how a person attempting to reach one of the rescue chambers from outby could have been misled by the maps. Tr. 96.

At the hearing, Price testified that, in light of decisions “like the *Cumberland* decision,” she would have determined that a fatal injury was reasonably likely.²³ Tr. 75. She explained that such violations should be evaluated as though an emergency situation existed, and “if there was smoke in the air or if someone was panicked and it was an emergency, they are not going to know where the chambers are.” Tr. 76. Price also stated that the “whole working section” should have been affected, rather than one potential person outby. Tr. 78. No evidence was offered as to the number of persons that would have been on the working section.

Tri-County challenged Price’s opinion that a fatal injury could occur because of the inaccurate maps. It argues that the maps at the beginnings of the escapeways were unlikely to cause a miner to fail to find a rescue chamber because a miner would follow the lifeline out the escapeway and would see the chamber at crosscut 39, getting to it sooner than anticipated. If

²³ In *Cumberland Coal Res.*, 33 FMSHRC 2357, 2366-67 (Oct. 2011), the Commission recognized that evacuation standards “are intended to apply meaningfully only when an emergency actually occurs,” and that Commission “decisions demonstrate that, with regard to evacuation standards, the applicable analysis under *Mathies* involves consideration of an emergency.”

unable to see because of smoke, the miner would, nevertheless, find the chamber because the lifelines have tactile alerts on them which indicate the location of the chambers. Price confirmed that, in her opinion, miners attempting to evacuate the section in an emergency should be able to find a rescue chamber by following a lifeline, and that tactile markers on the lifelines would alert them to the locations of the chambers. Tr. 85-86. She also confirmed that the lifelines were in good condition.²⁴ Tr. 100.

Obviously, the erroneous maps located at the chambers could not have caused anyone to fail to find the chambers. Tr. 95. Price opined that miners in the chambers might mislead potential rescuers if they were able to communicate with the surface, prompting persons attempting to drill a rescue shaft to drill in the wrong location. Tr. 86-87. However, up-to-date maps are also required on the surface and Price did not include inaccurate surface maps in the citation. Tr. 87. She did not know if those maps were up-to-date. Tr. 94. It would be unlikely that the maps at the beginnings of the escapeways would mislead a person approaching from outby. If an emergency condition occurred outby, a miner who was outby might proceed inby, rather than move to exit the mine. However, he would almost certainly follow a lifeline and would find a rescue chamber, either by sight, or through the tactile indicator on the lifeline, before he reached the end of the lifeline where the erroneous maps were located. Tr. 95-96.

From the discussion above, it would be questionable whether the violation contributed to a discrete safety hazard that was reasonably likely to result in a reasonably serious injury, i.e., whether the violation could have been S&S. However, it is not necessary to reach that issue. In her brief, the Secretary argues that the citation “was properly designated as S&S” and should be affirmed. Sec’y Br. at 17-18. However, the violation was not designated as S&S in the citation. It was rated as “Unlikely” to result in an injury, and the “No” box was checked in the Significant and Substantial block. Ex. G-7. In her reply brief, the Secretary argues that the citation “should be affirmed as written.” Sec’y Reply Br. at 5.

This raises the question whether the citation should be amended to allege that the violation was S&S. The Secretary has not moved to amend the citation. However, under the guidance of Fed. R. Civ. P. 15(b), post-hearing amendment of a citation or order is permissible in Commission proceedings even in the absence of a formal motion. *See Cumberland Coal Res., LP*, 32 FMSHRC 442, 446-48 (May 2010). As explained in *Cumberland*, in order to justify such an amendment it must be shown that the issue was tried with the express or implied consent of the parties, and that the opposing party had a fair opportunity to defend against the issue. When evidence supporting an issue allegedly tried by implied consent is also relevant to other issues actually pleaded and tried, implied consent may not be found. *Id.* The Commission has recognized Rule 15(b)’s “emphasis upon the parties understanding that the unpleaded claim is, in fact, being litigated” in determining whether a posthearing amendment of a citation is warranted. *Consolidation Coal Co.*, 20 FMSHRC 227, 236 (March 1998).

²⁴ It may have been those considerations that prompted Price to exclude miners on the working section inby from the persons affected when she issued the citation.

I decline to amend the citation here. A Commission Administrative Law Judge cannot unilaterally elevate a non-S&S violation to S&S status. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996). Under *Mechanicsville* it is doubtful that such an amendment would be permissible even if it were found that the issue was tried with the implied consent of the parties. A timely motion to amend would be the proper procedure to add an S&S allegation. However, the Secretary has never moved to amend the citation. There was ample time to have done so prior to the hearing. The Commission's decision in *Cumberland* was issued on October 5, 2011, and the hearing was held over eight months later. The Secretary's prehearing report, filed on May 18, 2012, made no mention of an intention to change the S&S designation on the citation. It merely stated that the "Secretary will present evidence in support of Citation 8429565 and prove that the refuge chamber located at crosscut 39 and the lifelines in the primary and secondary escapeways were not noted on the map as required." Sec'y Prhr. Rep. at 6. Inspector Price was identified as a witness who would testify regarding "the issuance of the Citation including the gravity and negligence characterizations, and the basis for the proposed penalty assessments." *Id.* at 7.

Since the addition of an S&S allegation was never formally proposed, Tri-County did not expressly consent to litigate that issue. It did challenge the allegation that the violation could result in a fatal injury. It so stated in its prehearing report, and the Secretary likewise stated that that was her understanding of Tri-County's position on the violation. The evidence presented on the likelihood of a fatal injury closely paralleled the evidence that the Secretary relies upon to argue that the violation was S&S. While Respondent's representative performed reasonably well in presenting defenses to the alleged violations at the hearing, he is not a lawyer, and has no formal legal training. Under the circumstances, a finding of implied consent would have to rest largely on Tri-County's representative's failure to object to a brief exchange during Price's direct examination in which her "looking back" testimony on the S&S issue was elicited. Tr. 75-76.

I find that the issue of whether the violation was S&S was not tried with the express or implied consent of Tri-County, and find that the violation was unlikely to result in a fatal injury.

The Appropriate Civil Penalties

As the Commission recently reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC ____ (Aug. 7, 2012) (slip op. at 4-5):

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

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

30 U.S.C. § 820(i).

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

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that Tri County demonstrated good faith in abating the violations and that the proposed penalties would not affect its ability to remain in business. Stipulated Facts. The parties did not stipulate to the Tri County’s size as an operator. However, forms reflecting calculations of penalty assessments, filed with the petitions, indicate that Tri County is a very large operator and that it’s controlling entity is also large, and I so find.

History of Violations

A portion of Tri County’s history of violations is reflected in six reports from MSHA’s database. Ex. G-1, G-2. The reports list violations issued at the Crown III mine that had a “Final Order Date” between August 23, 2008 and March 8, 2011, while the mine was under three different controllers and three different operators, including Tri County. Aside from its apparent overbreadth, the violation history set forth in the exhibits is deficient in that it provides no qualitative assessment, i.e., whether the number of violations attributable to Tri County is high, moderate or low. *See Cantera Green*, 22 FMSHRC at 623-24.

Some qualitative violations’ history information can be found on forms reflecting calculations of the proposed assessments, which were filed with the petitions. The assessment forms for the six litigated violations reflect an assessment of two to five points for overall violation history. Those numbers correspond to a relatively low history of total violations on the regulatory scale of 0 - 25 points. *See* 30 C.F.R. § 100.3(c)(1)

I find that Tri County’s overall history of violations, as relevant to these violations, was low, and should be considered a mitigating factor in the penalty assessment process.

Docket No. LAKE 2011-308

Citation No. 8418832 is affirmed as an S&S violation. However, Tri County's negligence was found to be low, rather than moderate. A specially assessed civil penalty in the amount of \$3,700.00 was proposed for this violation. The reduction in the level of Tri County's negligence would have resulted in a regular assessment under the Secretary's Part 100 regulations in the range of \$400.00. Considering the factors itemized in section 110(i), and the diminished likelihood that a special assessment would have been deemed appropriate for the violation as modified, I impose a penalty of \$500.00 for this violation.

Order No. 6676764 is affirmed as an S&S violation. However, while Tri County's negligence was found to be high, the violation was not the result of its unwarrantable failure. A specially assessed civil penalty in the amount of \$8,400.00 was proposed for this violation. A penalty calculated pursuant to the Secretary's Part 100 regulations would have resulted in an assessment in the range of \$1,660.00. Considering the factors itemized in section 110(i), and the diminished likelihood that a special assessment would have been deemed appropriate for the violation as modified, I impose a penalty of \$3,000.00 for this violation.

Docket No. LAKE 2011-467

Order Nos. 8419153 and 8419155 are affirmed as S&S and unwarrantable failure violations. Civil penalties in the amount of \$4,000.00 were assessed for these violations. Section 110(a) of the Act mandates that the minimum penalty imposed for a violation issued under section 104(d)(2) shall be \$4,000.00. 30 U.S.C. § 820(a)(3), (4). While it appears that section 110(a)(4) is directed at Federal appellate courts, it would be incongruous to hold that a reviewing circuit court was compelled to impose at least the statutory minimum penalty, but that the Commission was not so constrained. I impose a penalty in the amount of \$4,000.00 for each of these violations, which I also find to be appropriate upon consideration of the factors itemized in section 110(i) of the Act.

Docket No. LAKE 2011-690

Citation No. 8429564 is affirmed as a violation. However, it was found to be unlikely to result in a permanently disabling injury to one person, and was not S&S. A penalty in the amount of \$1,026.00 was assessed for this violation. The reduction in the likelihood of injury and the number of persons affected, justifies a corresponding reduction in the penalty. Considering the factors itemized in section 110(i), and guided by the Secretary's penalty assessment regulations, I impose a penalty of \$300.00 for this violation.

Citation No. 8429565 is affirmed as a violation in all respects. A regularly assessed penalty in the amount of \$425.00 was proposed for this violation. Considering the factors itemized in section 110(i), I impose a penalty of \$425.00 for this violation.

The Settlement

As announced at the commencement of the hearing, and as reflected in a post-hearing motion to approve partial settlement, the parties agreed to settle Citation Nos. 8418836 and 8418840 in Docket No. LAKE 2011-308, Citation Nos. 8418845 and 6676757 in Docket No. LAKE 2011-467, and Citation Nos. 8419441 and 8419442 in Docket No. LAKE 2011-690.²⁵ The total of the penalties assessed for those violations is \$28,891.00 and the proposed penalties for settlement total \$27,247.00. The bases for the compromises were disclosed at the hearing. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly the settlement will be approved and Respondent will be ordered to pay civil penalties in the amount of \$27,247.00 for the settled citations.

ORDER

Upon consideration of the above, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay penalties in the amount of \$27,247.00 for the settled violations.

Citation No. 8429565 and Order Nos. 8419153 and 8419155 are **AFFIRMED**. Citation Nos. 8418832 and 8429564 are **AFFIRMED, as modified**. Order No. 6676764 is modified to a citation issued pursuant to section 104(a) of the Act, and is otherwise **AFFIRMED**. Respondent, Tri County Coal, LLC, is ordered to pay civil penalties in the amount of \$12,225.00 for the litigated violations.

Civil penalties in the total amount of \$39,472.00 shall be paid within 45 days.²⁶

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

²⁵ In announcing the settlement of Citation Nos. 8418836 and 8418840 at the hearing, errors were made in the amounts of the assessments and amounts agreed to in settlement. Tr. 8. The post-hearing motion to approve partial settlement corrected those errors.

²⁶ 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 (Certified Mail):

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20004-1710
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December 19, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-674
Petitioner	:	A.C. No. 46-07812-172228
	:	
v.	:	
	:	
EXTRA ENERGY, INC.,	:	Mine: Roadfork Strip & Auger
Respondent	:	

DECISION

Appearances: Patrick M. Dalin, Esq., U.S. Dept. of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, for Petitioner;

James F. Bowman, Bowman Industries, Midway, West Virginia, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”), against Extra Energy, Incorporated, (“Extra Energy”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815. The Secretary seeks a total civil penalty in the amount of \$34,600.00 for two alleged violations of her mandatory safety standards.

A hearing was held in Charleston, West Virginia. The following issues for resolution are: (1) whether Respondent violated 30 C.F.R. §§ 77.1000 and 77.1713(a); (2) whether the violations were significant and substantial; and (3) whether the violations were attributable to Extra Energy’s unwarrantable failure to comply with the Secretary’s safety standards. The parties’ Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the citation and order, as issued, and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. Extra Energy was an “operator,” as defined in section 3(d) of the Mine Act, as amended, 30 U.S.C. § 802(d), at the Roadfork Strip & Auger Mine, at the time that Order No. 7207738 and Citation No. 7207737 were issued.

2. The operations of Extra Energy at the Roadfork Strip & Auger Mine at the time that Order No. 7207738 and Citation No. 7207737 were issued are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges, pursuant to sections 105 and 113 of the Mine Act.

4. The individual whose signature appears in Block 22 of the citation and order at issue in this proceeding was acting in his official capacity, and as an authorized representative of the Secretary when the citation and order were issued.

5. True copies of Order No. 7207738 and Citation No. 7207737 were served on Respondent and/or its agents, as required by the Mine Act.

6. Payment of the total proposed penalty for Order No. 7207738 and Citation No. 7207737 will not affect Respondent’s ability to continue in business.

7. The citation and order contained in Exhibit A, attached to the Secretary’s petition, are authentic copies of the citations and orders at issue in this proceeding, with all appropriate modifications or abatements, if any.

8. Each inspector’s evaluation of the number of persons that would be affected as a result of the conditions or practice cited, as found in Block 10(D) of each of the orders, is true and accurate, given the circumstances set forth in said orders.

9. MSHA’s Data Retrieval System, publically available at:<http://www.msha.gov/drs/drshome.htm>, accurately sets forth:

a. The controller of the Roadfork Strip & Auger Mine, at the time of the violation, produced between 1,000,000 and 3,000,000 tons of coal in 2007.

b. The Roadfork Strip & Auger Mine produced 24,419 tons of coal in 2007.

c. The Roadfork Strip & Auger Mine had 0 violations issued in one inspection day in the 15-month period preceding the violations at issue.

10. Extra Energy, Inc. stipulates to the authenticity of all exhibits that the Secretary identified in her Pre-hearing Statement. Extra Energy, Inc. further stipulates that the Pre-Shift Reports, Daily Reports and On-Shift Reports, and photographs that it produced in response to the Secretary's discovery requests are authentic and admissible.

11. The Secretary stipulates to the authenticity of all the exhibits that Extra Energy, Inc. identified in its Pre-hearing Statement.

II. Factual Background

Extra Energy operates the Roadfork Strip & Auger Mine, a small surface mine located in McDowell County, West Virginia. Resp. Br. at 2. The mine contains a refuse pile comprised of slate, rock, and coal estimated to have been dumped on the site in the 1950s or 1960s by a former coal mining operation. Tr. 137, 173, 460, 478. Extra Energy extracts refuse material from the pile to recover coal, which it then sells for profit. Tr. 30-31. Governing Extra Energy's refuse removal operation is its MSHA-accepted Ground Control Plan and Amendment for Removal of Existing Dry Refuse Pile ("Plan").¹ Ex. P-21. The Amendment is a list of ten practices to be followed when extracting coal from the refuse pile.

On March 13, 2008, MSHA inspector trainee Clarence Meadows was accompanying Inspector Bruce Billups on a regular inspection of the Roadfork Strip & Auger Mine.² Tr. 30. At that time, Meadows had been an MSHA inspector for approximately one year. Tr. 26. Prior to working for MSHA, he had approximately 27 years of experience in the mining industry, holding various positions including section boss, mine foreman, and superintendent. Tr. 26-27.

During this inspection, Billups and Meadows traveled through the mine along a haul road. Tr. 32. After briefly stopping to review the Plan, the inspectors turned onto a road that ran above the refuse pile. Tr. 38, 43; Ex. P-24. From their vantage point above the pile, they observed a haul truck traverse an access road to the far end of the refuse pile, where it stopped next to a parked excavator.³ Tr. 43-44; Ex. P-24. Using a range finder, the inspectors determined the distance from the top of the pile to the excavator to be approximately 100 feet. Tr. 69, 71. They observed foreman Robert ("Chuck") Preservati exit the haul truck, start the

¹ MSHA "accepts" operator-promulgated ground control plans if they meet its requirements. If a plan is not accepted, the operator may not mine until MSHA has accepted a revised plan. An acceptance is equivalent to an approval.

² Inspector Billups has since retired and did not appear as a witness; the testimony of Meadows was used by the Secretary to establish facts surrounding the violation.

³ An access road is a route constructed to enable plant, supplies, and vehicles to travel to a mine, quarry, or opencast pit. Am. Geological Institute, *Dictionary of Mining, Mineral and Related Terms* 3 (2nd ed. 1997) ("DMMRT").

excavator and remove material from the pile, then load it onto the truck. Tr. 65. There was approximately 100 feet of unconsolidated refuse above where Preservati was working. Tr. 71, 73. This material sat above the access road on a steep slope that was vertical in some areas. Tr. 139, 162-63. Meadows noticed a large slip, where tons of material had broken loose and slid down to the area above the access road.⁴ Tr. 91, 123; Ex. P-24. The slip was approximately 40' wide, 40' long, and 4' deep. Tr. 58. Upon observing Preservati working beneath the unstable material, and determining the area to be unsafe, Billups immediately instructed Meadows to go down to the access road and order Preservati to leave the area. Tr. 65-66. After Preservati drove away from the bottom of the refuse pile, the inspectors instructed him to dig a large ditch to prevent access to the area. Tr. 66-68. When Preservati closed off the access road, the inspectors informed him that Extra Energy was mining in violation of its Ground Control Plan. They advised him of their intention to issue an order preventing further mid-pile extraction, and a citation for failing to conduct adequate pre-shift examinations, as evidenced by the hazardous conditions that they observed. Tr. 93-95.

III. Findings of Fact and Conclusions of Law

A. Order No. 7207738

Inspector Billups issued 104(d)(1) Order No. 7207738, alleging a “significant and substantial” violation of section 77.1000 that was “highly likely” to cause an injury that could reasonably be expected to be “fatal,” and was caused by Extra Energy’s “high” negligence and “unwarrantable failure” to comply with the standard.⁵ The “Condition or Practice” is described as follows:

The operator fail [sic] to follow the amended ground control plan, dated 02-09-08, at this mine for the removal of a refuse pile. Instead of removing the material from top to toe in 12 ft. lifts the operator started app. 100 ft. below the top and the road cut under the material reduced the stability of the working face and also violated the plan by making the material being removed higher than the operator’s cab. An area 40 ft. x 40 ft. had broken lose [sic] from the face and was easily visible. It is highly likely that the material being removed would break lose [sic] and engulf the worker below who at times was walking between the truck and material being removed. This is more

⁴ A slip, also known as a landslip, minor landslide, or a small fault is a subsiding mass of rock or clay in a quarry or pit. *DMMRT* 514.

⁵ 30 C.F.R. § 77.1000 provides: “Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits, and spoil banks . . . which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods . . . shall be selected to insure highwall and spoil bank stability.”

than aggravated conduct and constitutes more than ordinary negligence.

30 C.F.R. § 77.1000. Ex. P-19.⁶ The order was terminated after the Amended Ground Control Plan was updated.

1. Fact of Violation

In order to establish a violation of one of her mandatory safety standards, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). The Commission has recognized that section 77.1000 requires the operator of a surface mine to establish and follow a ground control plan. *RNS Servs., Inc.*, 18 FMSHRC 523 n.1 (Apr. 1996).

The Secretary argues that the Plan permits only two methods of extracting coal refuse: excavation in successive horizontal lifts with a maximum elevation differential of 12 feet, or excavation down the face of the existing slope from top to toe. Sec’y Br. at 11. According to the Secretary, when Preservati was extracting refuse from mid-pile, with un-consolidated material situated above him, Extra Energy was mining in violation of the Plan and destabilizing the pile.

Arguing a contrary position, Extra Energy maintains that the standard does not apply because the mine does not have “highwalls,” and the operator was not actually mining, but was, in fact, in the process of constructing the access road. Resp. Br. at 6, 16-17. Therefore, according to Extra Energy, it was not violating the Plan.

MSHA Inspector Andrew Sedlock, a surface mine specialist with extensive experience evaluating and approving ground control plans required by MSHA under section 77.1000, testified as the Secretary’s expert witness. Tr. 178-181, 207. He has also drafted several dozen ground control plans for a surface mine operator. Tr. 184-85. Sedlock explained that removing material from the toe in advance of upper level material reduces the stability of the working face, making it highly likely that hundreds of tons of material will break loose and slide down onto the work area, engulfing any miner working beneath the slope. Tr. 212, 219. Furthermore, Sedlock stated that the operator failed to re-slope the material to a 2H:1V angle (2 horizontal:1 vertical slope required by the Plan), failed to re-slope the 40’ by 40’ slip in order to stabilize the area, and

⁶ A highwall is the unexcavated face of exposed overburden and coal or ore in an opencast mine, or the face or bank on the uphill side of a contour strip mine excavation. *DMMRT* 261.

A spoil bank is: (a) a term common in surface mining to designate the accumulation of overburden, (b) underground refuse piled outside, (c) that part of a mine from which coal has been removed and the space more or less filled up with waste, or (d) leaving coal and other minerals that are not marketable in a mine. *DMMRT* 529.

left walls of material higher than the cab heights of the haul truck and excavator. Tr. 221-22. He determined that removal of material 100 feet down the slope reduced the stability of the pile, and that the extensive slip at the base demonstrated its instability. Tr. 229-230, 234, 238-240.

The president of Extra Energy, Steve Haynes, testified on behalf of the operator. He testified that he had observed nothing on the access road that was likely to cause an injury or fatality, and that there were no highwalls along the access road. Tr. 391, 403-04. Regarding slope stability, Haynes was unable to identify the natural angle of repose or the meaning of "2H:1V."⁷ Tr. 405-08. In Haynes' opinion, Extra Energy did not violate the standard because the Plan allowed for skipping areas that the operator deemed unfeasible to mine. Tr. 402.

Foreman Chuck Preservati also testified for Extra Energy. At the time of the alleged violations, Preservati had been the surface foreman at the mine for about eight years. Tr. 422-23. Preservati testified that Extra Energy was building the access road, rather than mining. Tr. 427. Furthermore, he stated that the mine had no highwalls, and that the un-sloped material sat at the natural angle of repose. Tr. 428.

As a preliminary matter, I find that Extra Energy was mining rather than building the access road because Meadows' and Billups' observations of Preservati using the excavator to load the haul truck with refuse material are augmented by Billups' inspection notes of March 13, which report Preservati as having stated that Extra Energy elected to remove material from mid-pile because there was too much rock in the top to make money. Ex. 18, p. 13.

While neither the Act nor the regulations define the term "highwall," I need not decide whether the cited condition constituted a highwall since the plain, unambiguous language of the standard encompasses "spoil banks," as well. Clearly, the refuse pile meets two common industry uses of that term, i.e., the accumulation of overburden, and underground refuse piled outside. The standard does not, as the operator argues, exempt from stability requirements unexcavated faces of exposed overburden and coal that are not specifically classified as "highwalls." The purpose of the standard is to prevent exposure to unstable unconsolidated material. Therefore, it was expedient for the inspectors to remove the foreman from the dangerous conditions immediately.

As Sedlock pointed out, if Extra Energy were building the access road, it was still required to follow the Plan in order to maintain pile stability, by extracting material in successive horizontal lifts with a maximum elevation of 12 feet between working benches, or excavating down the face of the existing slope from top to toe. Moreover, Sedlock testified that the walls of the pile were near vertical in places, in clear violation of the Plan, and that none of the controls that MSHA requires in a ground control plan for this type of refuse extraction were present.

⁷ The angle of repose, or angle of rest, is the maximum slope in which a heap of loose or fragmented solid material will stand without sliding or come to rest when poured or dumped in a pile or on a slope. *DMMRT* 19.

The plain language of the Plan is intended to ensure pile stability. The instability of the pile was evidenced by the 40' by 40' slip above the active mining area that broke loose and slid down. The slip occurred as a result of material being extracted from mid-pile and not re-sloped. Even if Extra Energy's mid-pile method of extraction left parts of the pile resting at the angle of repose, they still would have been resting at a steeper angle than the required 2H:1V slope.⁸ While the Plan allows the operator to skip over horizontal areas when mining, it, nevertheless, requires removal of material from top to toe. To interpret the Amendment as a grant of authority to mine in a manner that reduces the stability of the refuse pile, thereby endangering miners working beneath the area, would frustrate the intent of the Act and Extra Energy's Ground Control Plan. I conclude that the refuse pile comes within the purview of the standard and, therefore, that the Secretary has proven that Extra Energy violated section 77.1000 by removing refuse in disregard of the requirements of its MSHA-accepted Ground Control Plan.

2. Significant and Substantial

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also* *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1998); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987).

The fact of violation has been established. The second element of the *Mathies* test has been met because the miner's work area was situated in the wake of the unstable pile, which subjected him to the discrete safety hazard of being engulfed by unconsolidated refuse material being extracted from above. The focus of the S&S analysis, then, is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would be serious.

The Commission has found that it is unsafe to push refuse over the edge of a pile without compacting it, properly grading the slope, or adhering to an engineering plan. *See Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 812-13 (Aug. 1998) (affirming the judge's determination that a large slip in a refuse pile occurred as a result of the unsafe manner in which the pile was constructed). In the instant case, the use of an unsafe mining method contributed to the hazard of

⁸ Sedlock testified, un rebutted, that the angle of repose for loose coal is 32 degrees, and that the 2H:1V slope required by the Plan is about 27 degrees. Tr. 217-18.

tons of material breaking loose, sliding downward, and engulfing, suffocating, and crushing the miner below. This condition resulted in a high likelihood that the affected miner working beneath the area of extraction would be seriously injured or killed. Therefore, I conclude that the violation was S&S.

3. Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136. The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, the operator's efforts in eliminating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See Consolidation Coal Co.*, 22 FMSHRC 328, 331 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). The Commission has also considered whether the violative condition is obvious or poses a high degree of danger. *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Construction, Inc.*, 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984)). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consol*, 22 FMSHRC at 353).

I do not find that there were any mitigating factors. The overwhelming weight of the evidence shows that the instability of the refuse pile was obvious, as evidenced by the near-vertical angle of the slope in places and the extensive slip. Although Preservati testified that he did not see the slip before Billups showed it to him, his testimony tends to lack credibility considering that he also stated that he did not consider the slip to be a hazard. Tr. 447. I find that the slip was present, at least on March 13, when Preservati conducted his pre-shift examination. The operator should have been aware of the danger that the un-sloped wall of unconsolidated material created, and taken steps to prevent this very serious hazard. Therefore, I find that the Secretary has met her burden of establishing aggravated conduct, and that the violation was a result of Extra Energy's unwarrantable failure to comply with the standard.

B. Citation No. 7207737

Inspector Billups issued 104(d)(1) Citation No. 7207737 alleging a "significant and substantial" violation of section 77.1713(a) that was "highly likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Extra Energy's "high negligence" and "unwarrantable failure" to comply with the mandatory safety standard. The "Condition or Practice" is described as follows:

The certified person designated by the operator to conduct safety examinations for hazardous conditions at the mine failed to observe that the work being performed was not in compliance with the approved ground control plan dated February 9, 2008. Instead of starting at the top and excavating the material in 12 foot lifts, the operator started removing the material app. 100 ft. below the top. The road cut under the material being removed reduced the stability of the working face and also violated the plan by making the material being removed higher than the operator's cab. An area 40 ft. x 40 ft. had broken lose [sic] from the face and was easily visible to the most casual observer and was not reported, recorded, or corrected by the operator before duties were assigned in this area. This is aggravated conduct and constitutes more than ordinary negligence.

Ex. P-20.⁹ The citation was terminated after the hazards were recorded, and the hazardous area was barricaded.

1. Fact of Violation

Preservati testified that he conducted pre-shift examinations each morning from March 6 to March 13, and that he did not record any hazards in the examination book. Tr. 435-440. He further stated that he did not see the slip at the time of his pre-shift examination on March 13, despite the fact that the inspectors observed it later that morning.

The Commission has recognized that section 77.1713(a) embodies the requirements of examining the workplace for hazardous conditions, noting the hazards, and correcting them. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495-96 (Oct. 1979). Based on my finding that the slip existed at least during Preservati's pre-shift examination, he failed to note for correction the hazards of mid-pile extraction, which created excessively steep slopes and rendered the wall above the work area higher than the height of the truck and excavator cabs. These are obvious conditions which Preservati, as foreman, should have recognized as very hazardous and inconsistent with the requirements of the Plan. Likewise, Preservati should have noted the 40' by 40' slip. Based on the obviousness of the dangerous mining technique, the excessively steep slopes, and the extensiveness of the slip, I conclude that the Secretary has proven that Extra Energy violated section 77.1713(a) by failing to conduct pre-shift examinations that would have reported the hazards and corrected them.

⁹ 30 C.F.R § 77.1713(a) requires that: At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person . . . and any hazardous conditions noted during such examinations shall be reported . . . and shall be corrected by the operator.

2. Significant and Substantial

The fact of the violation has been established. Preservati's failure to record the hazard of mining from mid-pile, the obvious slip, and the excessive height of material above the work area foreclosed immediate attention to the instability of the pile and compliance with the Ground Control Plan. Therefore, it was highly likely that were mining to continue, serious injury or death would result to miners working beneath the slope from tons of sliding material. Therefore, I conclude that the violation was S&S.

3. Unwarrantable Failure

Extra Energy's failure to note and correct conditions so obviously out of compliance with the safety measures required by its Ground Control Plan, with very serious consequences, constitutes aggravated conduct. If the steep condition of the pile, caused by Extra Energy's election to excavate from mid-pile, did not put the operator on notice that its mining method was hazardous, the slip, alone, was evidence of the pile's instability. Furthermore, based on the justification that Preservati gave Billups for deviating from the Plan, the operator's behavior was deliberate. What could be seen as a mitigating factor, then, that the slip may have existed for only a short period of time, is outweighed by Extra Energy's deliberate disregard of its Plan. While the Secretary has not established how long the slip existed, the evidence makes clear that Extra Energy had been engaging in mid-pile mining prior to the date of the inspection. Therefore, I find that Extra Energy's failure to conduct adequate pre-shift examinations was a result of its unwarrantable failure to comply with the standard.

IV. Penalties

While the Secretary has proposed a total civil penalty of \$34,600.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 20 U.S.C. § 820(j). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 763 F. 2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Extra Energy is a small operator, with no history of similar prior violations and an overall record that is not an aggravating factor in assessing appropriate penalties. As stipulated, the proposed total civil penalty will not affect Extra Energy's ability to continue in business. Stip. 6. I find that Extra Energy demonstrated good faith in achieving rapid compliance after notice of Order No. 7207738 and Citation No. 7207737.

The remaining criteria involve consideration of the gravity of the violations and Extra Energy's negligence in committing them. These factors have been discussed fully, respecting each violation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Order No. 7207738

It has been established that this S&S violation was highly likely to cause an injury that could reasonably be expected to be fatal, that one person was affected, and that it was timely abated. As to negligence, Extra Energy knew that it was required to excavate the refuse pile according to the specifications of its Ground Control Plan. The steepness of the slopes and the obvious, extensive slip were evidence of the hazard created by deviating from the Plan. Thus, I find that Extra Energy was highly negligent and engaged in aggravated conduct that constituted an unwarrantable failure to comply with the standard. Applying the civil penalty criteria, I find that a penalty of \$17,300.00, as proposed by the Secretary, is appropriate.

B. Citation No. 7207737

It has been established that this S&S violation was highly likely to cause an injury that could reasonably be expected to be fatal, that one person was affected, and that it was timely abated. I find that Extra Energy's failure to note and correct the hazardous conditions created by its deliberate deviation from its Ground Control Plan was due to high negligence and aggravated conduct that constituted an unwarrantable failure to comply with the standard. Applying the civil penalty criteria, I find that a penalty of \$17,300.00, as proposed by the Secretary, is appropriate.

ORDER

Accordingly, Order No. 7207738 and Citation No. 7207737 are **AFFIRMED**, and Extra Energy is **ORDERED TO PAY** a civil penalty of \$34,600.00 within 30 days of the date of this decision.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 19, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2011-791-M
Petitioner	:	A.C. No. 09-01126-263238
	:	
v.	:	
	:	
LAFARGE BUILDING MATERIALS,	:	Mine: Morgan County Mine Site
Respondent	:	

DECISION

Before: Judge Moran

Appearances: Melanie L. Paul, Esq., Office of the Solicitor, U.S. Department of Labor, and James R. Shaffer, Conference and Litigation Representative, MSHA, for the Petitioner.

Brian D. McNamara, CMSP, for the Respondent.

This case is before the Court upon a petition for civil penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Mine Act” or “Act”). The docket consists of a single alleged violation of the Act, with a proposed penalty of \$100. Petitioner issued a citation alleging a violation of standard 30 C.F.R. § 56.20003, the relevant part of which requires that working places be kept clean and orderly. In this instance, the focus was upon a cluttered truck bed. At trial, the Secretary pled, in the alternative, that standard 30 C.F.R. § 56.11001 was violated. That standard requires that a safe means of access shall be provided and maintained to all working places. The underlying issue in this case is whether and under what conditions a service truck’s bed can be considered to be a “working place” under the cited standards.

For the reasons that follow, the Court finds that the truck bed was a working place, that the materials within that bed presented a slip, trip, and fall hazard, and accordingly, that the standard was violated. While the Court determines the truck’s bed to be within the standard’s ambit, it also recognizes that this represents an apparently new application of the standard. Taking that into account, the Court modifies the level of negligence from “moderate” to “low” and reduces the penalty to \$20.

Also, in considering the appropriate penalty, the Court takes note that both sides presented plausible arguments as to the application of the term “working place” to the cited truck bed. Although the Court takes into account that mining is, by its nature, not a pristine activity, in looking to the remedial nature of the Mine Act, the Court finds that upon considering the items in the truck bed and how those items were used, LaFarge’s truck bed was a working place. The undisputed cluttered condition of the bed violated standard 56.20003’s requirement.

The Working Place Issue: Citation No. 8631203, alleging a violation of 30 C.F.R. § 56.20003, by failing to have a clean and orderly working place.

Standard 30 C.F.R. § 56.20003 addresses various aspects of working place cleanliness and order. The portion at issue, section (a), provides:

At all mining operations--

- (a) Working places, passageways, storerooms, and service rooms shall be kept clean and orderly[.]

The “Condition or Practice” section of the citation states:

At the time of [the MSHA] inspection, the C5500 Chevy service truck bed was cluttered with several articles and debris. The bed was strewn with buckets, hoses, welding leads, ladders, chocks, blocks of wood, chains[,] and come-a-longs. This exhibited poor housekeeping, and [runs contrary to the standard’s requirement that] passageways shall be kept clean and orderly to prevent slip, trip and fall hazards to miners.

Ex. P-5; Ex. R-1.

Fact of Violation

Inspector William Russell Hall, a MSHA inspector with five years of experience, conducted a routine inspection of Respondent company LaFarge’s Six Mine (“Respondent”) at the Morgan County mine site, a rock quarry, on June 15, 2011. Tr. 15, 21, 22, 77. Inspector Hall met with Allen Aaron, Respondent’s quality control technician, who accompanied him on the inspection. Tr. 20, 22. Don Richards, who serves as LaFarge’s Six Mine plant manager, was not present on the tour but met Hall at the closeout conference. Tr. 20-22, 33.

During the course of his inspection, Hall examined LaFarge’s C5500 Chevy service truck. Tr. 23. At the hearing, Hall noted that a service truck has several functions and that it typically carries tools to assist in tasks at the mine. Tr. 30. The service truck at issue was no different in providing that function.

The Inspector examined and took photographs of the truck’s bed. As the photos reflect, he saw buckets, hoses, welding leads, ladders, chock blocks, chains, gas cans, a chainsaw, a sledgehammer, come-a-longs, a creeper, and a compressor. Tr. 23, 25, 45-53, 59; Ex. P-7, P-8. It was Hall’s opinion that the truck bed’s contents were the sort of items that a worker “might need

during [his] work day.” Tr. 25. Hall later asserted that the items he observed in the truck were not the sorts of parts likely to be thrown away. Tr. 31.

One of the larger items that Hall saw was an air compressor that was mounted on the truck bed, just behind the cab. Tr. 47; Ex. P-7, P-8. Hall testified that he had inspected this type of air compressor previously and, at trial, Petitioner presented a manual that included the manufacturer’s prescribed maintenance schedule for the compressor. Tr. 34; Ex. P-30-38. The schedule included a daily maintenance regimen that included checking the oil, lubricating the machine, and draining moisture via a valve on the bottom of the compressor. Tr. 37-38; Ex. P-32. The schedule also included weekly and periodic maintenance schedules which required changing the crankcase oil, inspection of the air system, tightening of the nuts and bolts, and replacement of various parts as needed. Tr. 39; Ex. P-33. Hall stated that the maintenance requirements, including fueling the compressor, changing the crankcase oil, tightening the compressor’s nuts and screws, and checking the gaskets could only be performed from *within* the truck bed. Tr. 38-40. Therefore, those tasks could not be performed from outside of the truck bed. *Id.* Hall also stated that the compressor was not locked or tagged out, indicating that it was “available to be used as needed.” Tr. 82.

At trial, Hall concurred with the Court’s suggested definition of “work” as “activities related to the performance of various jobs at a mine site[.]” Tr. 49-50.¹ The Court then asked Hall whether the types of items found—the chain saw, the blocks, and the compressed air cylinder—would all be instruments that would be used for activities related to the performance of various jobs at the mine site; Hall replied “[y]es.” Tr. 54.

Hall’s concern was that a miner performing his daily activities would risk injury while performing work in the truck bed. He believed that if a miner tried to walk over the items in the bed there was a good chance that he would encounter a slip, trip, and fall hazard. Tr. 45. Even if the truck bed did not contain the mounted air compressor, Hall testified that it would still be possible for the bed to be cited, unless there was “safe access ... to perform the jobs that need[ed] to be performed.” Tr. 55. For example, Hall noted that a miner needing to retrieve the hoses from the truck’s bed to perform a task would be performing work. Tr. 56. The Court then posed a hypothetical to Hall asking whether, if there was no compressor, it would still be unsafe for a miner to access the other items located at the front of the truck bed; Hall replied affirmatively, believing that a miner could not safely access those items. Tr. 58-59.

¹ While his testimony did not directly address the definition of “work,” Richards’ statements accord with the definition recommended by the Court. When he was being questioned about the service truck’s function, Richards replied:

A: Some days it's used as just a mode of transportation, to and from. Depending on the operation working, some days it's used for doing oil changes, some days they made need the air compressor, some days they may never touch the air compressor. It's used for a myriad of different things.

Q: So you are saying that this truck is a service truck and it's used to perform work?

A: Yes, sir.

Tr. 99.

No mitigating circumstances were presented to Hall when he issued the citation, and it was terminated after Respondent cleaned up the truck bed. Tr. 28, 29. When asked to describe the difference between the state of the truck bed before and after the termination, Hall remarked that “some things were removed and other things were simply placed in order to provide passageway up through the middle of the bed of the vehicle.” Tr. 31.

At the closeout conference Richards disagreed with Hall’s determinations. Tr. 33, 93. According to Hall, Richards contended that the truck was “haul[ing] stuff” on the morning of the inspection and at the time of the inspection was on its way to a dump site. Tr. 70-71. At trial, Hall testified that he didn’t believe that the truck was going to a dump site to throw out usable parts, including “a creeper[,],...air hoses[,], and equipment.” Tr. 70-72. Respondent then asked Hall at what point a truck bed could become citable. Tr. 72. Hall answered that there was no specific time frame; as long as the truck bed was being used as a working space, it needed to be clean and orderly. *Id.* Respondent pressed further by asking, for instance, if a miner did not need to access the compressor, and stayed closer to the rear end of the truck bed, whether it would still be a violation. Tr. 72-74. Hall answered that if “there are articles in [the truck bed] that are going to remain in the truck[,], they sure shouldn’t be [there] in [a] way [that] present a slip, trip and fall hazard for somebody that needed to get to the compressor.” Tr. 73.

Discussion

The issue in this case is whether the truck bed can reasonably be construed to be a “working place” under 30 C.F.R. § 56.20003. Standard 30 C.F.R. § 56.2, the definitional section applicable to the cited standard, provides that a “working place” is “any place in or about a mine where work is being performed.”

In enacting the Federal Mine Safety and Health Act of 1977, Congress intended to ensure safe working conditions for miners. The Commission and Courts of Appeal have construed the application of the Mine Act liberally.² One Circuit Court held that “[s]ince the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is

² In *St. Marys Sewer Pipe Co. v. Dir. Of U.S. Bureau of Mines*, 262 F.2d 378, 381 (3d Cir. 1959), the Court held that:

This statute is remedial, with a humane purpose in view and is therefore entitled to a liberal construction. But, in the circumstances of this case, there is yet another principle that must be taken into account. We are dealing with a situation where there has been a construction of a remedial statute by the administrator charged with its execution and by the Board established by Congress to review his actions. Congress provided in detail for a Board of Review to be composed of experts in the field of coal-mining. These administrative interpretations should be recognized as having peculiar persuasiveness and weight. Ordinarily, such constructions should be accepted by the courts unless they could not be reasonably or soundly made under the terms of the statute.

Id. at 381 (citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)). See *Reliable Coal Corp. v. Morton*, 478 F.2d 257, 262 (4th Cir. 1973); *Freeman Coal Min. Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974); *Emery Min. Co. v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (“A safety standard “must be interpreted so as to harmonize with and further [the objectives of the Mine Act.]”) (citation omitted); *Int’l Union, United Mine Workers of Am. v. Kleppe*, 532 F.2d 1403, 1406 (D.C. Cir. 1976).

the type of enactment as to which a narrow or limited construction is to be eschewed.”³ The Commission, too, has held in multiple cases that the Mine Act, as a remedial statute, must be interpreted broadly to further the Act’s remedial goals.⁴ Thus, close cases of interpretation of safety standards are to be resolved in favor of furthering the goals of the Mine Act.

In applying the cited standard to the facts, the Court notes that 30 C.F.R. § 56.20003 requires that workplaces be kept clean and orderly and that the intent behind the standard is to prevent, among other hazards, slip, trip, and fall injuries. While a truck bed does not usually come to mind as a typical working place, if it is shown that work is being performed in the bed, the area comes under safety standard 56.20003.⁵ Accordingly, if the truck bed was used as a working place, the Court must then decide whether the state in which Inspector Hall found the truck violated the cited standard.

The Court finds that the truck bed was a working place under standard 56.20003. Accessing the truck bed in any way—whether to retrieve tools or access the compressor—constitutes work under the broad definition of working place. Using the air compressor in the truck required that a worker enter the space of the truck bed to access it, an action that constitutes “work,” under any definition of that term. The Court credits the inspector’s testimony that the service truck traveled around the mine to conduct various jobs and that work was performed, at least in part, by having to access the truck bed. Completion of these tasks would have required accessing the cluttered truck bed, as workers would have needed to obtain items such as hoses, blocks, and the creeper. Furthermore, assuming that LaFarge would be performing the prescribed maintenance on the air compressor, a LaFarge worker would have needed to enter the truck’s bed at least once a day. Therefore, the truck bed, as found, was a working place.

The photographs in the record are consistent with Inspector Hall’s testimony and independently establish that the truck’s bed was not clean and orderly, and therefore ran afoul of the standard’s requirement. The risk of entanglement with the various items in the bed exposed miners to a slip, trip, and fall hazard. To access the machinery, workers would have been required to navigate a disorganized, unsecured pile of parts. Any one of the parts alone in the

³ *Freeman Coal Min. Co.*, 504 F.2d at 744 (quoting *St. Marys Sewer Pipe Co.*, 262 F.2d at 381 (discussing predecessor to the Mine Act, the Coal Act)).

⁴ *See, e.g., Hanna Min. Co.*, 3 FMSHRC 2045, 2048 (Sep. 1981); *Cleveland Cliffs Iron Co., Inc.*, 3 FMSHRC 291, 293-94 (Feb. 1981); *Allied Chemical Corp.*, 6 FMSHRC 1854, 1859 (Aug. 1984); *S. Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) (“[I]n light of the underlying purpose of the Mine Act, mandatory standards are to be construed in a manner that effectuates, rather than frustrates, their intended goal.”); *Am. Coal Co.*, LAKE 2007-139 et al., 2012 WL 4026649 at *14 (FMSHRC) (Aug. 30, 2012).

⁵ The parties agreed to the definition suggested by the Court at the hearing, which is consistent with those found in dictionaries. “Work” has been defined as: “Physical and mental exertion to attain an end, esp. as controlled by and for the benefit of an employer; labor.” *Black’s Law Dictionary* 1742-44 (9th ed. 2009); “1. Physical or mental effort or activity directed toward the production or accomplishment of something.” *The American Heritage Dictionary* 1981 (4th ed. 2009).

position that the inspector found them, including the chock blocks or hoses, could pose a tripping hazard.⁶

Although the Respondent has contended that the standard is ambiguous as applied to a truck bed, the Court has found otherwise.⁷ Further, the low penalty imposed takes into account the novelty of the application.

Likelihood of Harm

Hall rated the likelihood of the injury as “unlikely.” Hall opined that because the truck was probably used infrequently and only on a need-to-use basis, an injury was unlikely to occur. Tr. 26. The Court affirms this determination.

Type of Injury

Hall determined that if an injury was to occur, it would be one that would cause “lost work days or restricted duty.” Tr. 26. Hall estimated a likely scenario would be where a miner slips and falls, causing “a serious cut” or if he trips, a sprained ankle or broken bone. *Id.* The Court affirms this determination.

Negligence

Hall rated the negligence as “moderate,” a determination made because he had no information that any of Respondent’s managers were aware of the situation. Tr. 27. As noted, considering a truck bed to be a working place is not a well-established application of the standard and for that reason, the Court finds the negligence in this instance to be “low.”

Civil Penalty Assessment

The Court, upon taking into account the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i), finds that the appropriate civil penalty here is \$20.00 (twenty dollars).

⁶ Respondent argued that the materials in truck bed were merely being transported for disposal at a trash dump. When asked what percentage of the items in the bed was *actually* thrown away when the citation was terminated, Richards estimated “[p]robably around 20 percent.” Tr. 98. Since a clear majority of the parts were *not* trash, Richards’ testimony supports Hall’s finding that the truck bed’s contents were not destined for a dumpsite and, therefore, the disorderly condition of the truck bed’s contents posed a hazard. *See* Tr. 70-72.

⁷ It is noted that the Secretary pled a violation of standard 30 C.F.R. § 56.11001 in the alternative. Tr. 12. That standard provides that a “[s]afe means of access shall be provided and maintained to all working places.” The Commission has held that standard 56.11001 embodies the dual requirement of providing and maintaining safe access to working places. *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (Jul. 2002) (citation omitted). Having found that the original basis for the citation was established, the alternative basis is not an essential determination. However, the Court finds that this alternative theory of liability was also established. As noted above, the truck bed contained no easily traversable path, and therefore lacked a safe means of access to items such as the compressor.

ORDER

It is **ORDERED** that Citation No. 8631203 be **MODIFIED** to reduce the level of negligence from “moderate” to “low.”

Within 30 days of the date of this decision, Respondent **IS ORDERED** to pay a civil penalty of \$20.00 (twenty dollars) for the violation of standard 30 C.F.R. § 56.20003, as set forth in Citation No. 8631203. Upon payment of the penalty, this proceeding **IS DISMISSED**.⁸

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

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⁸ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 20, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MSHA, on behalf of	:	PROCEEDING
YERO PACK,	:	
Complainant,	:	Docket No. CENT 2013-79-D
	:	SE-MD-13-01
v.	:	
	:	
CIMBAR PERFORMANCE MINERALS,	:	
And its successors,	:	Mine: Houston Plant
Respondent,	:	Mine ID: 41-04038

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Michael Schoen, Office of the Solicitor, U.S. Department of Labor, Dallas, TX, for the Complainant;
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, PA, for the Respondent.

Before: Judge Miller

This case is before me on an application for temporary reinstatement filed by the Secretary of Labor, (“Secretary”) acting through the Mine Safety and Health Administration (“MSHA”), against Cimbar Performance Minerals and its successors, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (the “Act” or “Mine Act”). On November 12, 2012, pursuant to 29 C.F.R. § 2700.45(c), Respondent requested a hearing on the application. A hearing was held on December 13, 2012 in Houston, Texas.

I. ANALYSIS AND FINDINGS

a. Background

Cimbar Performance Minerals (“Cimbar”) is engaged in the production and packaging of barite ore and is an “operator” as defined in Section 3(d) of the Mine Act. The Respondent’s operations affect interstate commerce. As such, Respondent is subject to the jurisdiction of the Mine Act, and the presiding Administrative Law Judge has the authority to hear and issue a decision regarding this case. Complainant, Yero Pack, is a miner as defined by the Mine Act. Stip.1-6.

Complainant was employed by Cimbar at its plant located in Houston, Texas. Pack began his employment with Cimbar on February 18, 2011. He first worked as a temporary

employee and then as a full time, permanent production employee, primarily on the afternoon shift. Pack was laid-off from his employment on June 29, 2012. Because there was a dispute as to jurisdiction, Pack originally filed his discrimination complaint with OSHA. Cimbar no longer disputes jurisdiction and, on September 26, 2012, Pack filed a discrimination complaint with MSHA pursuant to section 105(c) of the Mine Act. Pack's complaint alleges that he complained about the lack of personal protective equipment and was subsequently terminated. Cimbar alleges that Pack was terminated as a part of a plant wide lay-off. Pack's complaint was investigated by the Secretary, and the special investigator found that Pack's complaint was not frivolous.

b. Findings of Fact

Pack was hired on February 18, 2011 as a temporary employee, and was later hired as a full time employee in August or September of 2011. Pack worked on the afternoon shift, packing and stacking material for shipment to customers. For a short time, Pack was the lead man until a new supervisor for his shift was hired, and the temporary supervisor was returned to the lead man position. At the time of his termination, Eugene Torres was Pack's direct supervisor, Adam Martinez was the first shift supervisor, and Tab Kellough was the plant manager. Pack worked forty hours per week, but, early in his employment with Cimbar, he often worked overtime hours. He worked with nine other production employees for a period of time, but, at the time he was laid off, four production employees remained on the shift. Pack earned \$11.00 per hour and received no other benefits.

Beginning in September 2011, Pack made safety related complaints to various supervisors. His first complaint involved a complaint against Adam Martinez, the first shift supervisor and the overall safety director. Pack spoke to Martinez about the use of personal protective equipment ("PPE"), specifically dust masks and ear plugs. Martinez did not provide the equipment and told Pack that they didn't use it correctly anyway. At hearing, Martinez denied that he had a conversation with Pack about PPE and explained that there is an unlocked cabinet containing PPE for employees to access at any time. Pack indicated that he also spoke to Kellough, the plant manager, about the need for PPE.

Pack continued to make safety complaints to Martinez, his supervisor, Torres and directly to Kellough for several months. The complaints included bad brakes and brake lights on a forklift, keeping training up to date, an employee bringing a minor to work, and persons falling asleep at work. Specifically Pack complained about his supervisor, Torres falling asleep on the forklift. On June 21, 2012, Pack complained about having to work with dust and dirt that had accumulated when the bags were being filled. Even though the two company witnesses testified that it was Pack's duty to clean up the area, Pack asserts that Torres told him that production was more important. Shortly thereafter, Pack, along with two of the remaining three permanent production employees on his shift, was laid off from his job. Two temporary employees remained on the third shift and, several days after Pack was laid off, the mine hired more temporary employees to continue the work on the second shift. According to Cimbar Ex. 2, one employee was hired just days before Pack was laid off, and remained working.

Cimbar asserts that Pack was terminated as a part of a planned lay-off. The mine had decided to eliminate the second shift workers as an economic measure, given its tumbling sales. Cimbar asserts that business began to decline in January 2012 and the mine began systematic lay-offs. In March 2012, Cimbar stopped the third shift production and laid off the third shift production employees. In May 2012, Cimbar reduced the second shift and laid off all of the temporary production employees on that shift. Pack and two other production employees remained. In June 2012, Pack was laid off with the other second shift production employees. After Pack was laid off, Cimbar hired temporary workers on the second shift in the production department. Cimbar asserts that, a number of times, temporary workers were hired to fill orders when the need arose.

Tab Kellough and Adam Martinez testified on behalf of Cimbar. Both denied ever hearing or learning that Pack had made any complaints about “safety violations.” Hence, Cimbar denies that there is a causal connection between the safety complaints made by Pack and his termination. Kellough explained that, as plant manager, he made the decisions regarding the lay-offs at the mine. He agrees that temporary employees were hired after Pack was laid-off but asserts that they were only hired for a short time and only when needed to fulfill orders. Eugene Torres was not laid off of the second shift, nor were employees whose jobs did not include production. Kellough explained that Cimbar does the majority of its hiring through a temporary agency, and that at least one laid-off employee was hired back through that agency. Cimbar also hires a large number of employees who have criminal backgrounds.

c. Applicable Law

Section 105(c)(1) of the Mine Act states, in pertinent part, as follows:

No person shall discharge or in any manner discriminate against . . .
. . . or otherwise interfere with the exercise of the statutory rights of
any miner . . . because such miner . . . has filed or made a
complaint under or related to this Act, including a complaint
notifying the operator or the operator’s agent . . . of an alleged
danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c)(1)(Emphasis provided by the Commission in *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982)).

Pursuant to 105(c)(2), if the “Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2). The Commission has noted that the parameters of a temporary reinstatement hearing are narrow, being limited to a determination with respect to whether a miner’s discrimination complaint has been frivolously brought. *See Sec’y of Labor o/b/o Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d.*, 920 F. 2d 738 (11th Cir. 1990). Accordingly, it is only necessary to determine whether the Applicants’ complaints appear to have merit. *See S. Rep. No. 181*, at 36 (1977), *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, 94th

Cong., 2d Sess., at 624 (1978). In *Jim Walter Resources, Inc. v. FMSHRC*, the Eleventh Circuit found the “not frivolously brought” standard comparable to a “reasonable cause to believe” standard. *Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). The Eleventh Circuit concluded that the low burden imposed by the “not frivolously brought” standard reflects clear Congressional intent to make temporary reinstatement relatively easy to obtain. *Id.* at 748.

The Commission has consistently found that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act. See *Sec’y of Labor o/b/o Charles H. Dixon et. al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997) (citing *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (Feb. 1994) (“the anti-discrimination section should be construed ‘expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.’”)(quoting S. Rep. No. 181, at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94th Cong., 2d Sess., at 624 (1978) (emphasis added)).

Although the Secretary is not required to present a prima facie case in a temporary reinstatement proceeding, the Commission has determined it useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceeding meets the non-frivolous test. See *Sec’y of Labor o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009). In order to establish a prima facie case under Section 105(c), a miner must show: (1) that he engaged in a protected activity; and (2) that his termination was motivated, at least in part, by the protected activity. See *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980).

The Commission has held that evidence of motivation may be shown by circumstantial evidence. See, e.g., *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), rev'd on other grounds sub nom., *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983) (holding that illegal motive may be established if the facts support a reasonable inference of discriminatory intent); *Schulte v. Lizza Industries, Inc.*, 6 FMSHRC 8 (Jan. 1984). Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include: (1) knowledge by the operator of the protected activity, (2) hostility toward the miner because of his protected activity, (3) coincidence in time between the protected activity and the adverse action, and (4) disparate treatment of the complaining miner. *Jungers v. Borax*, 15 FMSHRC 300, 308 (Feb. 1993).

d. The Secretary Has Met Her Burden of Proof to Establish a Non-Frivolous Allegation

Pack explained that he made numerous safety complaints directly to his supervisors and to Kellough. While Kellough and Martinez testified that they were not aware of a single complaint, I credit Pack’s testimony for the limited purpose of temporary reinstatement. I find, therefore, that Pack has engaged in protected activity. Further, Pack was the subject of an adverse action when he was terminated from his employment in June of 2012.

I agree that mine management, including Pack’s supervisor and the plant manager, Kellough, were aware of Pack’s complaints about unsafe conditions. Pack was terminated a very

short time after he made the June complaint. Given the timing of the termination, and the knowledge of the supervisors at the mine, there is sufficient evidence to support a causal connection between the protected activity and the adverse action. Therefore, for purposes of this proceeding, the Secretary has sufficiently demonstrated the elements of a prima facie case of discrimination and I find that the complaint was not frivolously brought.

The Secretary must demonstrate that the discrimination complaint made by Pack “appears to have merit,” i.e., that there is reasonable cause to believe that the miner was discriminated against *in part* due to protected activity in which he has engaged. *Sec’y of Labor v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000); *CAM Mining* at 1088. I find that Pack made a safety complaint to his supervisor, that the complaint was known to his supervisors, and that there is adequate circumstantial evidence to connect Pack’s complaint to his termination. Therefore, the complaint filed by Pack is not frivolous and he must be reinstated.

e. Respondents’ Economic Feasibility Argument

The Respondent argues that reinstatement of Pack is barred because, due to a reduction in sales, on June 29, 2012 Cimbar laid off the three remaining full-time production workers on the second shift. The layoff was one of a series that began in March, 2012. In addition, Cimbar challenges Pack’s return to work because he testified that he has found other employment. I find both arguments to be without merit. First, the mine employs at least 35 persons at the present time, many of whom are production employees. In addition, temporary employees have been hired each month since the lay-off to work on the second shift to do the work for which Pack was trained. The Commission has recognized that in remedial contexts, an operator has the burden to show that circumstances exist which would mitigate their liability. *Ken-American Resources*, 31 FMSHRC1050, 1054 (Oct. 2009); *see also Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 779 (May 1989). The Commission has stated that, “[s]pecifically, the burden of showing that work was not available for a discriminatee, whether through layoff, business contractions, or similar conditions, lies with the employer as an affirmative defense to reinstatement and backpay.” *Ken-American* at 1054-1055 (quoting *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 779 (May 1989) (alteration in original)). “In such circumstances, the operator must make such a showing by a preponderance of the evidence.” *Id.* Cimbar did not make such a showing. Therefore, I find that there are positions available to which Pack can return as a full time permanent employee.

Next, the fact that Pack may be employed is not a bar to his reinstatement. The Commission addressed the issue in *Sec’y of Labor on behalf of Mark Gray v. North Fork Coal Corp.*, 33 FMSHRC 589, 592 (March 2011) and found that other income is not relevant in the context of temporary reinstatement. In *North Fork*, the mine argued that the miner’s earnings while employed elsewhere during his economic reinstatement should offset any amount owed by North Fork. The Commission explained that the legal principles that apply to back pay awards are separate from those in a temporary reinstatement proceeding and rejected the arguments of North Fork. Given the Commission’s decision, I find that any other employment held by Pack is not relevant for purposes of temporary reinstatement but the issue may be addressed in the discrimination proceeding.

II. ORDER

For all of the reasons listed above, I find that the Secretary presented sufficient evidence at hearing to find the discrimination complaints non-frivolous. Accordingly, it is **ORDERED** that Respondent immediately re-instate the Complainant, Yero Pack, as of today's date, December 20, 2012, at the same rate of pay and benefits that he was earning at the time of his termination. The parties may elect to economically reinstate Mr. Pack if they so agree. The Secretary shall provide an update regarding the status of the discrimination investigation to the parties and to me, within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 20, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. WEST 2009-208
	:	A.C. No. 42-02074-168807-01
	:	
	:	Docket No. WEST 2009-209
	:	A.C. No. 42-02074-168807-02
	:	
	:	Docket No. WEST 2009-210
	:	A.C. No. 42-02074-168807-03
	:	
v.	:	Docket No. WEST 2009-342
	:	A.C. No. 42-02074-171897-01
	:	
	:	Docket No. WEST 2009-591
	:	A.C. No. 42-02074-177140
	:	
	:	Docket No. WEST 2009-916
HIDDEN SPLENDOR RESOURCES, INC.,	:	A.C. No. 42-02074-185463
Respondent.	:	
	:	Docket No. WEST 2009-1072
	:	A.C. No. 42-02074-188416-02
	:	
	:	Docket No. WEST 2009-1162
	:	A.C. No. 42-02074-191367
	:	
	:	Docket No. WEST 2009-1451
	:	A.C. No. 42-02074-197393
	:	
	:	Horizon Mine

DECISION

Appearances: Alicia A. W. Truman, Esq., and Matthew Cooper, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Willa Perlmutter, Esq., and Daniel Wolff, Esq., Crowell & Moring, LLP, Washington, DC, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Hidden Splendor Resources, Inc., (“Hidden Splendor”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Price, Utah, and filed post-hearing briefs.

Hidden Splendor operates the Horizon Mine (the “Horizon Mine”) in Carbon County, Utah. A total of twelve section 104(a) citations and eleven 104(d)(2) orders of withdrawal were adjudicated at the hearing. The Secretary proposed a total penalty of \$278,393.00 for these citations and orders.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial (“S&S”) nature. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is most difficult to apply. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010)).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S&S. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575. With respect to citations or

orders alleging an accumulation of combustible materials, the question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965, 970-71 (May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-03.

B. Negligence and Unwarrantable Failure

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995). Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

C. Changes in Mine Management

At the hearing and in its post-hearing brief Hidden Splendor maintained that changes it made in high level management significantly improved its safety practices and policies. These changes went into effect just prior to the issuance of the citations and orders at issue in these cases. Hidden Splendor hired Joseph Fielder as the new mine manager and he instituted changes at the mine. Hidden Splendor believes that these changes should be considered in evaluating the negligence and the history of previous violations criterion in assessing a civil penalty. The Secretary contends that a change in a mine manager is not a factor that should be considered.

I agree with the Secretary's position on this issue. I must consider the *operator's* negligence and the *operator's* history of previous violations. The operator of the Horizon Mine has not changed. Hidden Splendor Resources, Inc. is a fully owned subsidiary of America West Resources, Inc. America West Resources has operated the Horizon Mine since 2003. There has been no recent change in the operator that would warrant reducing penalties based on a change in the mine manager. Although it is true that Hidden Splendor hired Fielder as the new mine manager, it also hired Joseph Fielder's predecessor. Consequently, even if I were to assume that Fielder made changes that improved safety at the mine, it does not change the fact that the citations and orders in these cases were issued against an operator that has been in control of the conditions at the mine since 2003.¹

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation Nos. 8457214 and 8457215; WEST 2009-1072

On April 30, 2009, MSHA Inspector Donald Durrant issued Citation No. 8457214 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation states, in part:

The mine roof near the 3rd West headings, cut short by the presence of a major fault, where the weekly examiner travels during his 7 day required route, was not being maintained to protect persons from the hazards of roof falls. The area where the examiner must negotiate and back track is literally cluttered with roof falls, both large and small, roof cutters are present all around the area, broken roof bolts and sagging roof also exist, and existing floor to roof support, mostly timber, are taking much weight and some are broken.

(Ex. G-46). The inspector also found similar conditions at the First West seals, which are preshifted each day. Inspector Durrant determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in a fatal accident. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 75.202(a) of the Secretary's regulations requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a). The Secretary proposed a penalty of \$1,412.00 for this citation.

¹ Hidden Splendor relies, in part, upon my decision in *Georgia Marble Corp.*, 21 FMSHRC 456, 461 (Apr. 1999) (ALJ). That case was based on a stipulated record, only the amount of the penalties was at issue, and the parties stipulated that new management had made a "concerted effort to focus on safety." *Id.* at 457. I took this fact into consideration when assessing the penalties by giving less weight to the history of previous violations criterion. *Id.* at 461. That case is distinguishable from the present cases.

On April 30, 2009, Inspector Durrant also issued Citation No. 8457215 under section 104(a) of the Mine Act, alleging a violation of section 75.364(a)(1) of the Secretary's safety standards. The citation states, in part:

The weekly examinations being conducted in the area of the 3rd West heading that were terminated due to a major fault are inadequate. The mine roof where the examiner must travel to examine this area is not adequately supported and poses hazards to persons who would need to be there.

(Ex. G-51). Inspector Durrant determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in a fatal accident. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 75.364(a) requires, in part, that at least "every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered by traveling to the area of deepest penetration. . . ." 30 C.F.R. § 75.364(a)(1). The Secretary proposed a penalty of \$4,689.00 for this citation.

1. **Background Summary of Testimony**

Inspector Durrant testified that during his inspection on April 30, 2009, he determined that the mine roof in the Third West and First West areas was not being adequately supported according to section 75.202(a). (Tr. 26-27). He made this determination based upon discovering roof falls throughout the area, weight on existing vertical support, broken timber, roof cutters running down the rib lines, and sagging roof. (Tr. 27-28). He also testified that the area was cut by a major fault, which generally makes roof conditions more challenging. On cross-examination, Inspector Durrant testified that the existence of roof cutters does not always mean there will be a roof fall and that it was possible that the company disagrees with his position that the area was cut by a major fault. (Tr. 59, 62).

Inspector Durrant testified that he designated the citation as S&S because the conditions he observed made it reasonably likely for an accident to occur and that the accident would likely be fatal due to the general nature of roof falls. (Tr. 30-32). In addition, he testified that one person would be affected in a potential accident since he was primarily concerned with a mine examiner traveling through the area. On cross-examination, Inspector Durrant testified that there were many roof falls in the area that was cited and yet he was unaware of any fatalities or injuries that have resulted from these falls. (Tr. 63-64).

Addressing the citation's negligence designation of moderate, Inspector Durrant testified that the condition was obvious and extensive and that it had likely existed for months or even a couple of years. (Tr. 34-35). He also testified that the mine had a history of roof falls and had been cited for similar conditions at least 42 times since 2007. (Tr. 37). Inspector Durrant added that in March of 2009 he attended a meeting with several managers of the company concerning a potential pattern of violations. (Tr. 38). He referenced a letter dated March 12, 2009 sent to the mine operator notifying it that MSHA was considering it for a potential pattern of violations. (Tr. 40-41, Ex. G-49). Inspector Durrant testified that at this meeting the operator was told that the mine would be inspected in two or three weeks. At this later inspection Inspector Durrant testified that the roof control issues were not properly addressed. (Tr. 41-42). On cross-

examination, Inspector Durrant testified that despite being reviewed for a potential pattern of violations, the company was never actually put on a pattern of violations. (Tr. 65).

Inspector Durrant also testified that the examinations made by the Horizon Mine examiner Larry Kulow on April 25 and on May 2 failed to meet the requirements of section 75.364(a)(1). (Tr. 46-50, Ex. G-52). Inspector Durrant explained that the deficiencies he found in the area were not recorded in the mine's record books by Kulow. As in the previous citation, Inspector Durrant designated the citation as S&S, the potential for an accident as reasonably likely, and the level of injury as fatal. (Tr. 51-52).

Addressing the citation's negligence designation of high, Inspector Durrant testified that Kulow either knew or had reason to know of the conditions and that there were no mitigating circumstances of any substance. (Tr. 52-53). On cross examination, Inspector Durrant testified that the only mitigating evidence that Kulow provided was that he did not think the conditions were that bad. (Tr. 65-66). Inspector Durrant testified that, while he generally respects Kulow, in this particular instance he did not respect Kulow's judgment. (Tr. 71).

Inspector Durrant testified that he performed a root-cause analysis and determined that poor examination habits and improper incentives were root causes of the violations. (Tr. 54-55). Inspector Durrant explained that he felt strongly that poor performance may have been rewarded.

On cross-examination, Inspector Durrant testified that on April 30, 2009, he traveled alone and that he is the only person that can claim to have observed the conditions that he cited. (Tr. 57-58). Inspector Durrant further testified that someone who spent more time at the mine and had more experience with the conditions of the mine would be in the best position to judge the conditions of a particular mine. (Tr. 60-61). He stated that before he wrote the two citations, he had only visited the area two times while Kulow had visited the area approximately 150 times. (Tr. 62).

Joseph Fielder testified that Hidden Splendor had many safety problems in the past but it had improved 100 percent in the last three years. (Tr. 77). He testified that he enacted a disciplinary system at Hidden Splendor that will implement the culture of safety that he wants to build there. (Tr. 78).

Fielder testified that Hidden Splendor's roof control plan currently requires one of the best types of roof support used in mining today. (Tr. 83). According to Fielder, Hidden Splendor monitors roof conditions using roof bolters, by drilling test holes, and by making sure the anchorage point to the roof bolt is accurate. Fielder went on to explain that successfully monitoring roof support requires the observation of change over time. (Tr. 83-84). He also testified that roof conditions are monitored weekly and continuously inspected during work. Regarding Inspector Durrant's citation, Fielder testified that he did not feel that additional roof support was needed at the time of the citation. (Tr. 85-86). On cross examination, Fielder testified that the Third West heading area was not using the improved roof support system that he mentioned earlier. (Tr. 93).

Fielder testified that Larry Kulow was the weekly examiner in April 2009 and that he trusted Kulow's expertise. (Tr. 87-88). Fielder testified that Kulow would make sure that management was aware of any hazards that he found. (Tr. 89). On cross-examination, Fielder

testified that Kulow was employed at the mine when it had numerous safety problems, but that Kulow was only one of four or five examiners working at the mine. (Tr. 92).

Hidden Splendor weekly examiner Larry J. Kulow testified that he did not notice the conditions noted in Inspector Durrant's citation. (Tr. 101; Ex. G-46; Ex. G-51). He noticed the floor heave and he noticed hazards on the sides, but he did not notice any hazards along the walkway. Kulow testified that if a hazard does not impede his walkway, he will simply hang danger tape, and not report it as a hazard. (Tr. 99-100). Kulow testified that it is important for him to do a conscientious job because he is responsible for the safety of the men. (Tr. 101-102).

Regarding his routine examinations, Kulow testified that, because he looks at such a large area of the mine, he might overlook specific details but that he would notice anything in the travelway that would be a hazard. (Tr. 103). Kulow testified that the examination practices of the mine do not differentiate between big hazards and small hazards. (Tr. 104).

2. Summary of the Parties' Arguments

The Secretary argues that Hidden Splendor violated section 75.202(a) by failing to adequately support and control the roof in the Third West headings of the Horizon Mine. The Secretary cites Inspector Durrant's testimony that there were roof falls, weight on existing support, broken timber, roof cutters, and sagging roof and mesh as evidence of the violation. (Sec'y Br. at 9). Testimonial evidence from mine employees Larry Kulow and Joseph Fielder confirms the existence of hazards in the area. (Sec'y Br. at 9-10). While Kulow alleges that he found a path to get through the headings, Durrant testified that he could not find a path that was safe to travel. Furthermore, Kulow admitted that if a roof fall had occurred in the area, he does not know if it would have been contained in one specific area. (Tr. 106).

The Secretary argues that the violation was S&S because it met the four elements of the S&S standard. There was a violation of the mandatory safety standard section 75.202(a), the violation contributed to the discrete safety hazard of a roof fall, roof falls are highly dangerous, and the extent of the roof conditions created a reasonable likelihood that the hazard would have resulted in an injury. (Sec'y Br. at 10-11). Additional factors include Durrant's testimony of feeling uneasy in the area and the Horizon Mine's history of roof falls.

The Secretary argues that the violation was the result of Respondent's high degree of negligence because the roof conditions were obvious and extensive and Hidden Splendor should have known about them. (Sec'y Br. at 11-12). The Secretary explained that this mine had a history of roof falls (at least 42 previous citations), that Hidden Splendor received a potential pattern of violations notice regarding roof falls, and that it had received a specific notice that the roof in the Third West headings needed monitoring. According to the Secretary, since Hidden Splendor knew of the inadequate roof support and lacked mitigating evidence, the violation was the result of a high degree of negligence.

Regarding Citation No. 8457215, the Secretary argues that Hidden Splendor violated 30 C.F.R. § 75.364(a)(1) by failing to conduct an adequate weekly examination of the Third West headings. (Sec'y Br. at 31). According to the Secretary's analysis, Kulow did not satisfy the safety standard because he would omit hazards that did not directly affect travelways, but the standard requires the examiner to record all hazards. The Secretary suggests that this violation

was S&S and resulted from a high degree of negligence for the same reasons that the underlying violation was S&S and resulted from a high degree of negligence. In response to mitigating evidence that Kulow was an expert in the field and that Fielder trusted his opinion, the Secretary points out that the mine had significant examination and roof control problems while Kulow was in charge of examinations for the past decade. (Sec’y Br. at 32).

Hidden Splendor argues that to determine whether section 75.202(a) is violated, the Court must apply the “reasonably prudent miner” standard. (H.S. Br. at 15). This standard asks whether a reasonably prudent miner would have acted differently under the circumstances. Under Hidden Splendor’s analysis, Larry Kulow was the “reasonably prudent miner,” and had much more experience with the mine than Inspector Durrant did. Kulow had been to the mine about 150 times over three years while Inspector Durrant had only been there twice. Kulow testified at trial that he ensures the safety of his men and Durrant agreed that it was in Kulow’s own interest to keep the area he travels safe. (H.S. Br. at 16).

Regarding the floor heaves, Kulow explained that they are common at the Horizon Mine and not a cause for concern. (H.S. Br. at 17). Mr. Fielder agreed that the cited area was prone to floor heaves but that he did not think that additional ground support was needed. Despite Durrant’s respect for Kulow’s expertise, Durrant completely dismissed Kulow’s opinion that he did not believe the conditions underground were hazardous. Hidden Splendor argues that Durrant should have used Kulow’s differing opinion about the underground conditions as a mitigating factor in designating the violation as high negligence.

Regarding the alleged violation of § 75.364(a)(1) in Citation No. 8457215, Hidden Splendor argues that even if the inspector and the mine examiner disagree as to whether hazardous conditions existed, there is no dispute about whether Kulow conducted the examination that the standard required. (H.S. Br. at 14-15). The standard does not require the examiner to walk a specific route as long as he gets to the necessary points. Hidden Splendor argues that evidence proves that Kulow examined the necessary areas and any roads not taken were not areas “where persons work or travel” so as to trigger the regulation’s requirements.

Furthermore, Hidden Splendor argues that Durrant’s testimony is unreliable because Hidden Splendor was not allowed any opportunity to observe the purported conditions when he issued the citation. (H.S. Br. at 18-19). Since Kulow walked the area before Durrant did and underground conditions can change quickly, Hidden Splendor argues that no violations occurred.

3. Discussion and Analysis

I find that the Secretary established both violations. I credit the testimony of Inspector Durrant as to the conditions he found during his inspection. The requirements of the safety standard, as applied to the roof, can be broken down into three parts: (1) the cited area must be an area where persons work or travel; (2) the area must be supported or otherwise controlled, and (3) such support must be adequate to protect persons from falls of roof. In considering whether roof support is adequate, the Commission has held that “[t]he adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. *Cannon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987).

It is well recognized that roof falls pose one of the most serious hazards to miners in the coal mining industry. *United Mine Workers of America v. Dole*, 870 F. 2d 662, 669 (D.C. Cir. 1989). The Commission has noted the inherently dangerous nature of mine roofs, and attributed the leading cause of death in underground mines to roof falls. *Consolidation Coal Co.*, 6 FMSHRC 34, 37 (Jan. 1984); *Eastover Mining Co.*, 4 FMSHRC 1207, 1211, n.8 (July 1982); *Halfway Incorporated*, 8 FMSHRC 8, 13 (Jan. 1986).

A representative of Hidden Splendor did not accompany Inspector Durrant during his inspection. The inspector had this to say about the conditions he observed:

The area was in rough shape. It had changed quite a bit since my last inspection of this area. There were roof falls throughout the area, large and small roof falls. There was weight on existing vertical support timber. There was broken timber. There [were] roof cutters running down the rib lines. There were sagging roof and mesh.

[A] lot of the conditions observed were likely there the last time I inspected . . . but there was no question that there had been more activity, more problems that were developing over time. I felt very uneasy traveling that area that night.

(Tr. 28-29). I credit this testimony. Inspector Durrant also testified that, although he could not determine the exact route that the weekly examiner uses to perform the required examination, he could not find a “path that night that a person could travel to try to get through these headings, particularly on the Third West end, that was safe to travel.” (Tr. 31-32). Based on his 38 years of experience in the mining industry and with MSHA, Durrant testified that he would have found a safe route if such a route existed. (Tr. 32).

In applying the reasonably prudent test to the facts, I find that the Secretary established that the roof was not adequately supported. The cited area is also an area where the weekly examiner must travel. I therefore find that Respondent violated section 75.202(a).

Based upon the same facts, I also find that Respondent violated section 75.364(a)(1). An adequate examination would have identified the unsafe conditions identified by Inspector Durrant. Respondent contends that Kulow managed to avoid the hazards during his examinations and that the cited hazards were not violations due to the fact that they were not located in areas “where persons work or travel.” Crediting Inspector Durrant’s testimony that there was no safe route through the cited area, the fact that Kulow claims that he avoided the roof hazards simply exposes the fact that, due to an inadequate examination, he did not notice the hazards.

I find that Citation Nos. 8457214 and 8457215 are both S&S. Each citation is a violation of a safety standard that contributed to the discrete safety hazard of a roof fall. Both violations are also reasonably likely to lead to an injury based upon the conditions of the cited area and Inspector Durrant’s testimony. The various problems with the roof, including roof falls, broken timbers, supports taking weight, sagging roof, sagging mesh and rib cutters all combine to make a roof fall very likely to occur, and reasonably likely to cause an injury. Additionally, continued

inadequate examinations of the roof could lead to more hazardous violations in the future, making the conditions similar to those cited in Citation No. 8457215 even more likely to cause an injury. Roof falls, furthermore, are one of the leading causes of fatalities in mining, which along with the deteriorated condition of the cited area, leads me to hold that the fatal designation is appropriate for both citations. Citation Nos. 8457214 and 8457215 are violations of mandatory safety standards that contributed to the discrete safety hazard of roof falls, which are reasonably likely to lead to a serious injury.

Citation Nos. 8457214 and 8457215 were the result of Respondent's high negligence. In addition to the Inspector's description, I credit his testimony that the roof conditions were obvious and extensive even to the most casual observer. Hidden Splendor was clearly on notice that greater efforts were necessary to comply with roof control standards due to numerous violations and the discussions about the potential of being placed on a pattern of violations. Inspector Durrant had even alerted Hidden Splendor to the fact that the roof in Third West headings needed to be monitored, which not only shows that Respondent was on notice, but also suggests that it failed to make any effort to correct the conditions. Respondent should have known of these roof conditions due to the obviousness of the conditions and the fact that it should have been on alert to look for such conditions based upon the notice that it received. Based upon the extent of the violative conditions, and Inspector Durrant's testimony that the violative conditions could have existed for months or years, I find that the hazards existed for a significant amount of time. Also, the roof falls threatened by these violative conditions pose a high degree of danger to miners. Moreover, I reject Hidden Splendor's argument that a difference of opinion between mine management and Inspector Durrant is a mitigating circumstance in this situation. The hazards were obvious, extensive and posed a high degree of danger. Based upon these facts, Hidden Splendor cannot successfully argue that their opinion differed from that of Inspector Durrant and therefore it was not negligent, only mistaken. Respondent acted with high negligence in regard to the violative conditions cited in Citation Nos. 8457214 and 8457215. A penalty of \$5,000.00 for each of these violations is appropriate.

B. Citation No. 8457229; WEST 2009-1072

On May 12, 2009, MSHA Inspector Durrant issued Citation No. 8457229 under section 104(a) of the Mine Act, alleging a violation of section 75.1722(b) of the Secretary's safety standards. The citation states:

The welded wire screen at the #3 headroller on the walk side of the belt, did not extend a sufficient distance to prevent persons from reaching over the guard and being caught between the head pulley and the belt. The top of the pulley was measure[d] to be 70 inches from the mine floor. After the belt was removed from service, a miner was able to reach over the guarding and contact the pulley. Injuries suffered from these types of hazards generally are permanently disabling at the least.

(Ex. G-57). Inspector Durrant determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in a permanently disabling injury. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 75.1722(b) of the Secretary's regulations requires that

“[g]uards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.” 30 C.F.R. § 75.1722(b). The Secretary proposed a penalty of \$499.00 for this citation.

1. **Background Summary of Testimony**

Inspector Durrant testified that he issued Citation No. 8457229 on May 12, 2009, because the wire screen on the Number 3 belt conveyor did not sufficiently guard the head roller to satisfy section 75.1722(b) and to prevent people from sustaining injury by contacting the belt. (Tr. 195). Durrant, who is 5’8” tall, was able to reach up and touch the pulley. (Tr. 196-197). He estimated that the pulley was 70 inches off of the mine floor, and that he could reach about 84 inches if he stood flatfooted. (Tr. 197). On cross-examination it was determined that due to the additional lateral distance of the head roller from the walkway, it was about an 82 to 84 inch reach. (Tr. 204, 210). Inspector Durrant also asked maintenance supervisor Paul Wilmonen, who is over 6’ tall, to reach up and touch the pulley, which he did easily. (Tr. 198).

Inspector Durrant designated the citation as S&S because he judged that the inadequate guard made it reasonably likely that an accident could occur and that the accident would likely result in a permanently disabling injury. The Inspector reasoned that an accident was reasonably likely to occur because the violation was in a busy part of the mine. (Tr. 198). Inspector Durrant was especially concerned about an injury occurring during maintenance, considering that to access the sprinkler and sensors for the deluge system a miner would have to reach beyond the guarded area. (Tr. 199-200, 210). On cross-examination, Inspector Durrant admitted that when maintenance is performed the head roller would usually be shut off, but that it was still reasonably likely that someone would neglect to do so. (Tr. 205, 211). Furthermore, if a miner used a ladder to perform maintenance on the deluge system, he would be even closer to the unguarded area. (Tr. 212). Inspector Durrant also believed that the likelihood of an accident increased due to the number of inexperienced miners at the Horizon Mine. (Tr. 200).

Inspector Durrant testified that he designated the negligence as moderate because the operator knew or had reason to know of the violation. (Tr. 201-202). He testified that a preshift examiner walked through the area three times per day on a normal operating day. (Tr. 202). Although he theorized that the condition might have existed for weeks or even months, Inspector Durrant gave the operator the “benefit of the doubt” because he did not know for sure. *Id.* Inspector Durrant testified that he was aware of previous citations concerning guarding being issued at the Horizon Mine. (Tr. 203).

Maintenance Foreman Paul Wilmonen confirmed Inspector Durrant’s testimony that he was able to reach up and contact the head pulley. (Tr. 216). Both Wilmonen and Safety Technician Larry Murdock testified that maintenance would never be performed on the head roller without the roller being locked and tagged-out. (Tr. 217, 308). Furthermore, Wilmonen did not believe that a miner could contact the pulley by accident, especially considering that a person had to reach up to get to the pulley; Murdock agreed. (Tr. 217, 305).

2. Summary of the Parties' Arguments

The Secretary argues that the head roller on the #3 conveyor belt violated section 75.1722(b) because it was inadequately guarded. She asserts that the language of the standard clearly addresses accidental and intentional conduct. The guard was not sufficient because both Inspector Durrant and Paul Wilmonen could reach behind the guard.

The Secretary further argues that Respondent's violation of section 75.1722(b) was S&S because a serious hazard was identified that was reasonably likely to cause a serious injury. The tension between the head pulley and belt would lead to a crushing or amputating type of injury that would be permanently disabling. The violation occurred in a busy area of the mining operation, and the presence of the deluge system components made it likely that a miner would reach into the unguarded area. The risk of an accident occurring is exacerbated by the fact that many inexperienced miners work at the Horizon Mine.

Respondent's negligence was moderate. The area of the violation is examined by a preshift examiner three times a day, and Inspector Durrant testified that the violation could have existed for months. Furthermore, Respondent should have been on heightened notice concerning proper guarding because the mine has a history of receiving guarding violations.

Respondent argues that no violation existed because the standard only applies to inadvertent contact and an accident was unlikely to occur in the cited area; therefore, the citation should be vacated. The standard did not consider intentional contact, and any contact that occurred during maintenance would happen when the belt was de-energized and locked out. Furthermore, accidental contact with the head roller is highly unlikely to occur due to the fact that the cited head pulley is 70" above the ground and 84" from the walkway itself.

3. Discussion and Analysis

Unguarded or inadequately guarded machine parts pose a serious hazard to miners, making section 75.1722(b) an important safety standard. The Commission has held that guarding should protect miners from "a reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Furthermore, "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

I find that the Secretary established a violation of mandatory safety standard 75.1722(b). I credit the testimony of Inspector Durrant as to the conditions he found during his inspection. The requirements of the safety standard, as applied to the guarding of the head roller, can be broken down into two parts: (1) the cited guarding must protect a piece of equipment including any conveyor-drives, conveyor-heads, or conveyor-tail pulleys, and (2) such guarding must extend a sufficient distance to prevent a miner from contacting the equipment.

This citation meets both requirements of a violation of section 75.1722(b). It is undisputed that the #3 headroller on the walk side of the belt is the type of equipment covered under section 75.1722(b). Further, both Inspector Durrant and Paul Wilmonen could contact the head roller from the walkway, clearly showing a violation of the cited standard. If either the

inspector or Mr. Wilmonen could touch the headroller, then the guarding did not “extend a sufficient distance to prevent a miner from contacting the equipment,” which is violation of the standard on its face. 30 C.F.R. § 75.1722(b).

I also find that the violation was S&S. Inspector Durrant testified that it was reasonably likely that a miner could contact the headroller, causing an accident. The cited guarding was located in a busy area of the mine with inexperienced miners present. (Tr. 198). If Inspector Durrant or Paul Wilmonen could contact the headroller from the walkway, it is reasonably likely that one of the many miners traveling through this area could do so as well. The likelihood increases due to the undisputed fact that parts of the deluge system, which may require maintenance, were beyond the headroller. (Tr. 199-200, 210). A miner performing maintenance on the deluge system might contact the head roller while reaching around it, if he were bumped while performing maintenance or if he reached to steady himself and contacted the headroller while working on the deluge system. Although the head roller should be de-energized, tagged and locked out while any maintenance is being performed in the area, I find it reasonably likely that it would not be. The “human factor” or the “vagaries of employee conduct” make it likely that even an experienced miner, and certainly an inexperienced one, may neglect to properly de-energize the head roller. *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (Nov. 1983). Furthermore, the use of a ladder to perform maintenance on the deluge system would only make it easier for a miner to contact the headroller. (Tr. 212). I credit Inspector Durrant’s testimony that a miner was reasonably likely to contact the headroller considering the state of the guard at the time of the citation.

Respondent argues that the cited standard does not apply to intentional contact; I reject this argument. The language of the standard itself states that a guard should “prevent a person from reaching behind the guard.” C.F.R. § 75.1722(b). This language does not reference preventing only accidental contact with the head roller. Instead, it considers the deliberate, although misguided, action of a miner due to “momentary inattention,” or “ordinary human carelessness.” *Thompson Brothers Coal*, 6 FMSHRC at 2097. In *Mainline Rock and Ballast*, furthermore, the 10th Circuit considered a similar argument, stating that “[t]o the extent Mainline Rock attempts to equate intentional conduct with intentional contact, its interpretation is absurd.” *Mainline Rock and Ballast, Inc.*, 693 F.3d 1181, 1185 (10th Cir. 2012). The standard focuses on preventing the harm that can occur when a miner contacts an inadequately guarded piece of equipment, and not on whether that contact was accidental or not.

I credit Inspector Durrant’s uncontroverted testimony that if a miner’s limb were to become stuck in the active headroller, it would result in a serious injury in the form of the crushing or amputation of a limb. I therefore find that Citation No. 8457229 was S&S because Respondent’s violation of section 75.1722(b) contributed to the discrete safety hazard of a miner’s limb being caught in the headroller, which was reasonably likely to occur and could lead to the crushing or amputation of that miner’s limb.

I find that the negligence designation of moderate is appropriate because Respondent knew or had reason to know of the violation. A pre-shift examiner walked through the area three times per day on a normal operating day and there is a history of guarding citations at the Horizon Mine. I credit the Inspector’s testimony that the condition existed for some time. I find that a penalty of \$500.00 is appropriate for Citation No. 8457229.

C. Order No. 8460169; WEST 2009-916

On April 10, 2009, MSHA Inspector Richard Boyle issued Order No. 8460169 under section 104(d)(2) of the Mine Act, alleging a violation of section 48.5(a) of the Secretary's safety standards. The citation states:

Two new miners, Daniel Lopez and Hennery Lopez were not given the required 8 hour on-site training prior [to] being assigned work duties on March 30, 2009. The required training was not provided to these men until the following day, March 31, 2009. Statements from the mine operator revealed that persons were aware of the men's schedule, but could provide no rationale as to why the required training was not given, thus demonstrating a serious lack of reasonable care.

(Ex. G-38). Inspector Boyle determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, two people would be affected, and the violation was the result of the operator's unwarrantable failure. Section 48.5(a) of the Secretary's regulations requires that "[e]ach new miner shall receive no less than 40 hours of training as prescribed in this section before such miner is assigned to work duties. Such training shall be conducted in conditions which as closely as practicable duplicate actual underground conditions, and approximately 8 hours of training shall be given at the minesite." 30 C.F.R. § 48.5(a). The Secretary proposed a penalty of \$5,645.00 for this order.

1. Background Summary of Testimony

Inspector Boyle testified that he issued Order No. 8460169 because two new miners, Daniel Lopez and Hennery Lopez, were not given the eight-hour on-site training required by section 48.5(a). (Tr. 647).

Inspector Boyle designated the violation as S&S because it was reasonably likely that a serious injury would occur as a result of the cited violation. (Tr. 655). He stated that the mine had a history of roof falls, the miners would not know what to do in an emergency, and that the miners were untrained and unfamiliar with the machinery in the mine. (Tr. 652, 654). For instance, the belt line that the miners were using could catch a shovel and push it violently back at a miner if the miner shovels in the wrong direction. (Tr. 653).

Believing that mine management had actual knowledge that the new miners were untrained, Inspector Boyle designated this order as an unwarrantable failure with high negligence. (Tr. 656, 63). Management told him that they thought it "would be OK" to have the new miners work underground if they were accompanied by experienced miners. (Tr. 661). Inspector Boyle admitted on cross-examination that the new miners did have their first 32 hours of training and that it would be permissible for a visitor or other untrained person to enter a mine with an experienced miner. (Tr. 669).

Carl Martinez, the shift foreman for the crew on the graveyard shift that included the new miners, testified that he did not know that the miners did not receive the required training at the time he took them underground. (Tr. 687). Initially, Martinez assumed that the new miners had

been trained, based upon the fact that they were sent to him to work. (Tr. 687). He had one of the new miners working as the third man on the roof-bolting crew and the other assisting a mechanic. (Tr. 682). He kept both miners close to his person at all times, and within sight of an experienced miner. (Tr. 682-683). He did, however, admit that he could not personally watch the new miners at all times. (Tr. 689). Toward the end of the shift, however, Martinez realized that the miners had not been trained when one asked him what a lifeline was for. (Tr. 683-684). At this point, Martinez removed the entire crew from the mine as quickly as possible. (Tr. 685).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent's violation of 30 C.F.R. § 48.5(a) was S&S because sending untrained miners underground is highly likely to result in a serious injury. The miners were not familiar with the mine or the equipment in it, exposing them to an array of hazards ranging from getting body parts caught in a belt to being unable to find escapeways in the event of an emergency. Other miners may also be endangered.

Due to aggravated conduct, the Secretary argues that the cited violation was a result of high negligence and constituted an unwarrantable failure on the part of Respondent because management knew that the miners were untrained and also knew that sending the new miners underground was a violation. Section 48.5(a) is unambiguous and the fact that management thought that it was permissible to send untrained miners underground is not a mitigating factor. In fact, it is an indictment of the management, because it suggests that they knew their actions would violate the standard ahead of time. Furthermore, management tried to conceal the violation from Inspector Boyle.

Respondent concedes the violation of section 48.5(a), but disputes the findings of S&S, high negligence and unwarrantable failure. It argues that the findings of high negligence and an unwarrantable failure are inappropriate due to mitigating circumstances. Although section 48.5(a) is clearly a strict liability provision, the fact that Joe Fielder believed that he was in compliance with the regulation should be considered a mitigating factor. Further, Carl Martinez removed the miners from the mine as soon as he learned that they had not finished their training. During the next shift, before Inspector Boyle came to the mine to investigate, the miners received their training. The combined facts and circumstances do not support findings of either high negligence or unwarrantable failure.

Respondent argues that Order No. 8460169 was not reasonably likely to lead to an injury and is therefore not properly characterized as S&S. The new miners had 32 of the required 40 hours of training, and the duties they performed underground were similar to what they would have done for the final 8 hours of training. They remained within sight of their co-workers and in close proximity to Martinez at all times. Visitors enter mines and are not reasonably likely to be injured, and therefore these two miners were not likely to be injured either.

3. Discussion and Analysis

Failing to train new miners in accordance with section 48.5(a) can pose a threat to both new miners and everyone working within a close proximity to them. *See Mingo Logan Coal Company*, 19 FMSHRC 246, 250 (Feb. 1997).

I find that the cited violation of section 48.5(a) was S&S. It was reasonably likely that untrained miners performing underground work duties could cause a serious injury to themselves or others or be unable to escape in the event of an emergency due to the fact that they were unfamiliar with the mine and mining equipment. Respondent conceded the finding of the underlying violation of a mandatory safety standard. I credit Inspector Boyle's testimony that an untrained, new miner faces a wide array of discrete safety hazards. These hazards include sustaining serious injuries through the misuse of equipment, an example of which the inspector provided was a shovel catching on a belt and being forced back at the miner. Further, Inspector Boyle testified that a new miner would not know what to do in the event of an emergency.

It is reasonably likely that the various hazards contributed to by the cited violation would result in an injury, especially considering the danger of a new miner being unable to find an escapeway or being slowed while trying to escape during an emergency. Carl Martinez's testimony verified the likelihood of this hazard when he said that one of the new miners did not even know what a lifeline was. Thus, the new miner was not only unfamiliar with the Hidden Splendor Mine's escapeways, but he was also unfamiliar with mine safety and emergency equipment. In the event of an emergency, a miner who cannot identify a lifeline would certainly be slowed trying to escape, and it is doubtful whether a miner with so little knowledge of a mine would be able to escape at all. This lack of emergency preparedness coupled with other hazards facing an untrained miner underground leads me to agree with Inspector Boyle's designation that an injury due to the cited violation was highly likely. Furthermore, it is clear that the inability to escape in the event of an emergency could cause serious and permanently disabling injuries.

I also find that the violation constituted a high degree of negligence because the mine management knew or should have known that they were in violation of the standard. As Inspector Boyle testified, section 48.5(a) is an unambiguous standard that mandates that "approximately 8 hours of training shall be given at the minesite." 30 C.F.R. § 48.5(a). The fact that Joe Fielder thought it would be permissible to send the new miners into the mine supports the fact that management knew before the violation that these new miners had not completed training. Regardless of what management told Inspector Boyle at the outset of his investigation, it is management's job to know this standard and train miners accordingly. In this situation, Hidden Splendor management did not do so.

Inspector Boyle's designation of the violation as an unwarrantable failure is a closer question. I find that the Secretary established that this violation was the result of an unwarrantable failure to comply with the safety standard. The training provisions of Part 48 have been in effect since the passage of the Mine Act. Section 115(a)(1) of the Act mandates 40 hours of training for new miners at underground coal mines. 30 U.S.C. § 825(a)(1). That Hidden Splendor believed that it could send miners underground without first providing this training defies common sense and demonstrates, at least, a serious lack of reasonable care. This violation was obvious and posed a high degree of danger. I acknowledge that as soon as

Martinez discovered that the miners had not completed their training, he immediately pulled them out of the mine. For that reason, the penalty is reduced to \$4,000.00.

D. Order No. 8457577; WEST 2009-1451

On August 3, 2009, MSHA Inspector Durrant issued Order No. 8457577 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.1914(a) of the Secretary's safety standards. The citation states:

The Wagner diesel powered scoop, company # 407, S.N. . . . was not being maintained in approved and safe operating condition on July, 30, 2009, during the swing shift. The afternoon shift supervisor was operating the machine on the evening in question and had boarded the unit that was located in the A-West Mains section return, with the intention of bringing the machine to the surface, via the return travelway alternate escape route. A statement made by the supervisor during a hazard complaint investigation revealed the following: While operating the scoop in his attempt to get the machine to the surface, the scoop shut down on several occasions, possibly indicating low or no water in the machine's scrubber system or a water transfer issue from the make-up tank to the scrubber. Wanting to disrupt the annoying shut downs of the equipment, the foreman made the conscious choice to block out the scoop's safety system to prevent further shut downs, which in itself poses multiple safety risks, including potential fire at the exhaust filter and subsequent fire within the mine. Shortly after bypassing the machine's safety system, the diesel particulate filter ignited, likely from an overheating condition where the temperature exceeded the 185 degrees Fahrenheit limit, dispersing sparks and embers into the mine atmosphere. Overheating at the particulate filter of permissible machines is generally caused by no cooling water available to cool the engine's hot exhaust gasses.

(Ex. G-77). Inspector Durrant determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence showed reckless disregard, seven people would be affected and the violation was the result of the operator's unwarrantable failure. Section 75.1914(a) of the Secretary's regulations requires that "Diesel-powered equipment shall be maintained in approved and safe condition or removed from service." 30 C.F.R. § 75.1914(a). The Secretary proposed a penalty of \$32,810 for this citation.

1. Background Summary of Testimony

After receiving a hazard complaint concerning an unreported fire on a diesel scoop, Inspector Durrant testified that he began his investigation on July 31, 2009, by speaking with Joe Fielder. (Tr. 367). The incident that instigated the investigation took place on July 30, 2009.

(Tr. 367). Joe Fielder told Inspector Durrant that Josh Fielder was operating the scoop at that time, but he did not offer additional information. (Tr. 368).

The next day, Inspector Durrant interviewed Larry Murdock, who said that he saw the scoop inby the portal with flames or embers coming from what appeared to be the exhaust filter on the scoop. (Tr. 370). Next, Murdock saw that the operator, Josh, had shut off the machine and was using bottled drinking water to extinguish the fire. (Tr. 370). Murdock brought more bottles of water to extinguish the filter fire and eventually removed the filter from the scoop and brought the scoop back to the surface. (Tr. 370). Murdock also stated that the fire lasted about five minutes; it did not burn long enough that Respondent was required to report the fire to MSHA. (Tr. 371, 385).

Inspector Durrant further testified that he then spoke with Josh Fielder, the operator of the scoop. (Tr. 371). After doing a preoperational check on the scoop in the A West section, Josh attempted to bring the scoop to the surface for repairs. (Tr. 371). Josh told Inspector Durrant that the scoop shut down several times on his way to the surface, convincing him to “wire out” the safety system in the engine compartment. (Tr. 372, 375). Shortly after starting the machine, Josh noticed sparks or embers coming from the filter. (Tr. 372). Inspector Durrant testified that the principle danger of bypassing the safety systems in the scoop is the chance that it will cause a filter fire, which is exactly what happened. (Tr. 375). It is likely, Inspector Durrant believed, that the fire was caused by a lack of water in the scrubbing system. (Tr. 374).

Inspector Durrant testified that he is very familiar with Josh Fielder and described him as a “bright” young man with “vast knowledge” of the machines in the mine. (Tr. 376). He believes that Josh knew the dangers of his actions and chose to bypass the safety systems anyway. (Tr. 376).

Considering the presence of all three points of the fire triangle, Inspector Durrant believed it was highly likely that this incident could lead to a full-blown mine fire. (Tr. 377). Although the scoop eventually stopped close to the portal, Inspector Durrant believed that the filter could easily have begun burning farther down the portal, within the actual coal seam. (Tr. 379). If that were to happen, the fuel, fluids, oils and other flammable components of the scoop that presented a fire hazard in the rock tunnel at the portal could join with the combustible coal mine itself. (Tr. 380). Furthermore, if a fire had started in the coal seam, extinguishing the fire would be difficult because it would take time to move men and equipment to the scoop. (Tr. 381).

Inspector Durrant testified that miners could sustain serious, permanently disabling injuries in the form of burns, smoke inhalation and CO exposure. (Tr. 382). He also believed that seven people would be affected by either being inby the area or going to the area to fight the fire. (Tr. 382-383).

Inspector Durrant testified that he designated the negligence for the cited violation as reckless disregard. (Tr. 383). The Inspector explained that he viewed the violative conduct as intentional conduct that was done without considering the safety of anyone present in the mine at the time. (Tr. 383). He was especially influenced by the fact that the operator of the scoop was a shift supervisor. (Tr. 384).

Clark Atwood, safety director for Hidden Splendor, testified that there was a problem with the scoop at the time of the accident. (Tr. 401). He agreed with Inspector Durrant that it probably stemmed from a lack of water in the scrubber safety system. (Tr. 401). Atwood asserted that bringing water to the scoop was not possible, because no water source was available. (Tr. 606-607). He stated that a full-blown mine fire was not possible because the incident happened in the portion of the tunnel that is made of rock, but he also did not see at what point the sparks or fire began. (Tr. 403, 408). Although Atwood claimed that Josh Fielder made the right decision when he bypassed the safety system of the scoop to move it, he also stated that Josh was disciplined for his actions. (Tr. 402, 404, 408).

2. Summary of the Parties' Arguments

Hidden Splendor's shift supervisor bypassed the safety system on a diesel-powered scoop, which Respondent admits. This violation was S&S because not only could a fire have started, but a fire actually did start and it was highly likely that a serious injury would occur. All components of the fire triangle were present, which could have led to a mine fire. In the event of a mine fire, numerous miners would be affected when they attempted to fight the fire.

The cited violation of section 75.1914(a) was the result of reckless disregard that constituted an unwarrantable failure. Respondent designated Josh Fielder as a shift supervisor, making him a leader within the mine. As a supervisor, Josh made the decision to intentionally bypass a critical safety system on a scoop and did so without any regard for the safety of himself or his fellow miners. This direct action by Josh Fielder, a supervisor, exhibited an absence of care that supports a finding of an unwarrantable failure to comply with a mandatory safety standard and a negligence designation of reckless disregard.

Respondent argues that Order No. 8457577 was not an unwarrantable failure, should not have been designated S&S, was not the result of reckless disregard, and that fewer than seven miners would have been affected.

Bypassing the safety system on the scoop was Josh Fielder's only option to remove the scoop, which was blocking return air from leaving the mine. Josh did not act with reckless disregard, but rather he made a difficult choice to protect the safety of himself and his fellow miners.

Josh Fielder's actions were not reasonably likely to lead to an accident. The air in that section was traveling outby, which would exhaust any fumes. There is no methane at the Hidden Splendor Mine. The scoop was situated in a portion of the mine composed completely of incombustible rock. The scoop had both a fire suppression system and an extinguisher on board. Furthermore, it is mere speculation that seven people would be required to fight a fire under these conditions, especially when drinking water was all that was required to extinguish the fire that actually occurred. The S&S designation in the cited violation is unwarranted because an accident that could lead to the injury of miners was not reasonably likely.

3. Discussion and Analysis

I find that the cited violation of section 75.1914(a), Order No. 8457577, was properly designated as S&S. Respondent conceded the underlying violation of the safety standard. The discrete safety hazard contributed to by the violation is the injury to miners caused by a fire. The

likelihood that a fire could start is not an issue in this situation, because a fire actually did start. Although no miners were injured, it remains highly likely that such a fire could lead to the injury of a miner. I credit Inspector Durrant's testimony that all of the elements of the fire triangle were present. The small fire in this instance could easily have become a larger fire, which, as Inspector Durrant testified, would require several men to extinguish. In the time required to bring firefighting men and equipment to the scene, the fuel source, oil and fluids of the scoop could all catch fire. Next, the fire-resistant tubes and tires may burn as well. Even more perilous is the reasonable likelihood that this fire could have occurred within the coal seam and ignited the mine itself. A mine fire can obviously lead to the serious, permanently disabling or even fatal injury of any number of miners, through smoke inhalation or burns. At least two miners were exposed to the hazard.

I also find that the negligence designation of reckless disregard and the finding of an unwarrantable failure are appropriate in this situation. Inspector Durrant believed that Josh Fielder had intimate knowledge of mining equipment; as a result, Inspector Durrant believed that Josh knew exactly the risk he was taking by bypassing the safety scrubber in the diesel scoop. Although I am sure that Inspector Durrant's characterization of Josh Fielder is correct, any supervisor should recognize that overriding safety systems on a piece of equipment is inherently dangerous. This proposition is highlighted in the violative conduct at issue because the anticipated hazard that could result from the override of the safety system, a filter fire, actually occurred. I do not credit Respondent's argument that it was safer to bypass the safety systems on the scoop than to take the proper steps to safely remove the scoop. The cited violation was quite dangerous, as I credit Inspector Durrant's testimony that a mine fire was at least reasonably likely to occur and was reasonably likely to cause serious injury to several miners. Clearly, management knew of the violative conduct. Not only was this violation obvious, but a mine supervisor actually created the violative condition on purpose. When Josh Fielder intentionally disabled a safety system, he acted with reckless disregard and his behavior supplied the aggravated conduct required for an unwarrantable failure designation.

Therefore, I find that Order No. 8457577 was properly designated as S&S with a negligence designation of reckless disregard and a finding of unwarrantable failure. A penalty of \$30,000.00 is appropriate for this violation.

E. Order No. 8457576; WEST 2009-1451

On July 31, 2009, MSHA Inspector Durrant issued Order No. 8457576 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.1914(f) of the Secretary's safety standards. The citation states:

The weekly tests and maintenance for the Wagner diesel powered scoop, company # 407 . . . have not been adequate to assure safe operation of the machine.

(Ex. G-73). The order listed a number of deficiencies including an unguarded drive shaft and an inoperable exhaust back pressure gauge. Inspector Durrant determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, seven people would be affected and the violation was the result of the

operator's unwarrantable failure. Section 75.1914(f) of the Secretary's regulations requires, in part, that "[a]ll diesel-powered equipment shall be examined and tested weekly by a person qualified under § 75.1915" and that "(1) [e]xaminations and tests shall be conducted in accordance with approved checklists and manufacturers' maintenance manuals." The Secretary proposed a penalty of \$4,440.00 for this order.

1. Background Summary of Testimony

Inspector Durrant issued this order under section 75.1914(f) because the scoop had undergone its weekly test and maintenance within the last few days, but numerous defects and deficiencies remained. (Tr. 310). When Inspector Durrant arrived at the mine, he had received a hazard complaint concerning the cited scoop. (Tr. 308). The scoop was parked on the surface. (Tr. 309). The scoop was tagged out and the information on the tag indicated that the scoop needed to be washed. (Tr. 313). Inspector Durrant testified that Darwin Stansfield, who at that time was the maintenance foreman at Hidden Splendor, had tagged the machine out, but only because of coal accumulations. (Tr. 313-314). Darwin was busy at the time, however, and was only with the inspector intermittently. (Tr. 314). Although Inspector Durrant found many problems with the scoop, the most severe was a missing panel that exposed miners to crushing injuries through contact with the drive shaft and U-Joint. (Tr. 316).

Inspector Durrant testified that he cited the scoop because it was scheduled to return to the mine shortly, according to Tomas Hernandez, who was a laborer at the time. (Tr. 323). The scoop was taken out of service on July 29th, fixed on the 30th, and then taken out of service again on the 31st. (Tr. 344). The scoop was tagged out of service just fifteen minutes before Inspector Durrant arrived at the mine. (Tr. 342).

2. Summary of the Parties' Arguments

Hidden Splendor violated Section 75.1914(f) by failing to conduct adequate examinations on a diesel powered scoop and a penalty of at least the assessed amount of \$4,440.00 is appropriate. The scoop was inspected two days earlier, yet Inspector Durrant found numerous problems. Although the scoop was tagged out before Inspector Durrant arrived at the mine, the inadequate examination was done two days prior, and the scoop went back into the mine.

Order No. 8457576 was S&S because a mandatory safety standard was violated when Hidden Splendor failed to perform adequate examinations, and that violation could contribute to numerous injuries. Mr. Hernandez was readying the scoop to return to the mine, which would put the scoop back in service. It is reasonably likely that the unguarded U-joint could cause crushing injuries and the inoperative exhaust back-pressure gauge is reasonably likely to contribute to a fire that could lead to serious injuries.

Respondent's violation of Section 75.1914(f) is an unwarrantable failure to comply with a mandatory safety standard. There were numerous, obvious violations on the scoop. The mine received notice on several occasions that it needed to conduct more thorough examinations of its diesel-powered equipment. Inspector Durrant found no mitigating circumstances that affected his unwarrantable failure determination. The inadequate inspections constitute a serious lack of reasonable care on Respondent's behalf.

Respondent argues that Order No. 8457576 should be vacated because the cited piece of equipment was removed from the mine and tagged out for service at the time the citation was written. Respondent questions the credibility of the inspector and references his dearth of notes concerning the citation. Further, the numerous problems with the scoop, combined with the fact that it had been removed from the mine because it could not run continuously, make it unlikely that this scoop was simply meant to be cleaned and returned to service. In any event, a permissibility exam would be performed on the scoop before it could be returned to the mine, and the defects would likely have been noticed and repaired at that time.

3. **Discussion and Analysis**

Commission precedent establishes that when equipment or facilities are available for use by miners, such equipment and facilities must comply with MSHA safety standards. *See W.J. Bokus Industries, Inc.*, 16 FMSHRC 704, 707 (Apr. 1994); *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843, 844 (Apr. 1981). Where nothing precludes the use of a piece of equipment, and that equipment could be used, even inadvertently, that equipment can be inspected and cited. *Ideal Basic Indus., Cement Div.*, 3 FMSHRC at 844. As long as the cited safety standard does not stipulate otherwise, a piece of equipment can be inspected as long as it is not tagged out and parked for repairs. *Alan Lee Good, an individual doing business as Good Construction*, 23 FMSHRC 995, 997 (Sept. 2001).

I find that there was no violation of Section 75.1914(f) because the scoop in question was not “available for use.” The scoop was on the surface and tagged out at the time of the inspection. Although the Secretary argues that the scoop would simply be cleaned and returned to the mine immediately, and was therefore available for use, I find that to be unlikely or at least speculative. This is the same scoop that caught fire the previous day. (Tr. 372). In fact, the scoop had so many problems that it never returned underground at the Hidden Splendor Mine. I find, therefore, that there was no violation of Section 75.1914(f). Order No. 8457576 is hereby **VACATED**.

F. Order No. 8457509; WEST 2009-1162

On June 1, 2009, MSHA Inspector Durrant issued Order No. 8457509 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.364(a)(1) of the Secretary’s safety standards. The citation states, in part:

The weekly examinations being conducted in the 4th East inactive section for examination of the deepest points of penetration are incomplete and inadequate due to deep water, silt and mud accumulations at [several] locations. . . .

Discussions with mine management have taken place, dating back to about May 14, 2009, of the weekly examination requirements in this area or the available option to submit a sump evaluation, including sump evaluation points in lieu of traveling all points of deepest penetration. The water had not been pumped to allow for adequate examinations of these areas nor had a plan been submitted to the District Manager for approval.

(Ex. G-65). Inspector Durrant determined that an injury was unlikely to occur and that, if there were an injury, it would result in no lost workdays. Further, he determined that the violation was not S&S, the operator's negligence was high, one person would be affected and the violation was the result of the operator's unwarrantable failure. Section 75.364(a)(1) of the Secretary's regulations requires that, concerning weekly inspections in worked-out areas:

At least every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered by traveling to the area of deepest penetration; measuring methane and oxygen concentrations and air quantities and making tests to determine if the air is moving in the proper direction in the area. The locations of measurement points where tests and measurements will be performed shall be included in the mine ventilation plan and shall be adequate in number and location to assure ventilation and air quality in the area. . . . An alternative method of evaluating the ventilation of the area may be approved in the ventilation plan.

30 C.F.R. § 75.364(a)(1). The Secretary proposed a penalty of \$4,000.00 for this citation.

1. **Background Summary of Testimony**

Inspector Durrant issued this order because Larry Kulow was not getting to the established evaluation points ("EP") of inspection in the east and north entries of the Four East section. (Tr. 152). Deep water in the East headings was impossible to negotiate, preventing Kulow from reaching the EPs. (Tr. 154). This water had been present for months. (Tr. 193). Kulow was taking oxygen and methane readings at the farthest point he could reach. (Tr. 156).

Inspector Durrant designated this order as unlikely with no lost workdays because he did not believe there was any hazard posed by Kulow's failure to reach the EPs. (Tr. 156). He designated one person affected because the inspector was likely the only person who could be affected by the cited violation. (Tr. 156). Furthermore, Inspector Durrant believed that Kulow's conduct was prudent, and once Hidden Splendor filed a new ventilation plan, the new EPs were simply the points where Kulow had reached prior to the new plan. (Tr. 165). Kulow believed that he was able to adequately determine the direction of airflow, oxygen readings and methane readings from the edge of the water in the flooded areas. (Tr. 191).

Inspector Durrant designated the negligence of this order as high with an unwarrantable failure to comply with a mandatory safety standard. (Tr. 156). Respondent knew or should have known that it was required to reach the EPs in accordance with its ventilation plan, but they failed to do so. (Tr. 157). Furthermore, Inspector Durrant had warned Respondent a few weeks prior to the violation that it either had to remove the water and reach the EPs or submit a new plan with different EPs. (Tr. 157). Inspector Durrant found no mitigating circumstances and believed that the speed with which Respondent submitted a new plan after receiving the order showed the ease with which they could have avoided the citation. (Tr. 158, 160).

Joe Fielder testified that he was familiar with the ventilation plan in place before Inspector Durrant issued Order No. 8457509. (Tr. 186). Although he was aware that water had filled the route to the EPs, he claimed that through an oversight on his part, he did not realize Kulow could not reach the EPs. (Tr. 187). He also asserted that Hidden Splendor was using pumps to remove water from the flooded areas. (Tr. 179).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent's failure to conduct adequate examinations was the result of high negligence and was an unwarrantable failure to comply with a mandatory safety standard because Respondent engaged in aggravated conduct. This violation was extensive and obvious. According to Kulow, It existed for months. Further, Respondent received notice that a greater effort was required to comply with the cited safety standard when Inspector Durrant warned mine management weeks before writing the citation. Even after this warning, Respondent made no effort to abate the violation, even though filing a new ventilation plan could have been done in a day. Due to aggravated conduct, this violation was properly designated as an unwarrantable failure with high negligence.

Although Respondent does not contest the violation, it does contest the high negligence and unwarrantable failure designations. Neither party disputes that the paths to the EPs in the K-north section were "roofed-out" with water and were therefore impassable. Neither party disputes the fact that Kulow's actions posed no hazard. Conditions making examinations impossible should be considered when the Commission determines negligence.

Further, Inspector Durrant's testimony that he notified Respondent of the violation and Respondent chose to do nothing is unreliable. Although Inspector Durrant claims that mine management told him pumping water out of the sections was too expensive, Respondent was in fact pumping water out of the section in question. Kulow and mine management were doing what they thought was the safest examination practice while trying to pump the water out. Although Respondent misunderstood the safety standard, it was not highly negligent, and this order should not be designated an unwarrantable failure.

3. Discussion and Analysis

There is no dispute that Respondent violated section 75.364(a)(1). Both Inspector Durrant and Larry Kulow agree that Kulow could not reach the EPs in K North because the passageways were "roofed-out" with water. (Tr. 154, 191).

Considering all of the facts and circumstances, I find that Order No. 8457509 constituted a high level of negligence, but was not an unwarrantable failure on the part of Respondent. I find that the negligence designation should remain at high because the violative condition existed for months and the violation was obvious. Both Kulow and Fielder admit that they were aware that high water blocked the route to the EPs. Although both testified that they thought having Kulow take measurements from the water's edge instead of from the EPs was acceptable, they both were also aware that the mine was putting forth a significant effort to pump the water out, suggesting that the knew the presence of the water was unacceptable. That the water was present in such large quantities and had been present for months make Hidden Splendor's inability to reach the checkpoints in the mine's ventilation plan obvious. These same facts show that the violation was

extensive, because Kulow could not reach any of the EPs for multiple weekly inspections. Furthermore, I credit Inspector Durrant's testimony that he put Respondent on notice that it needed to remove the water or submit a new ventilation plan; Respondent failed to do either. If mine management did not know that they were in violation of section 75.364(a)(1), they certainly should have known.

I find that Hidden Splendor's violation did not constitute an unwarrantable failure due to mitigating circumstances, especially the fact that the violation posed no danger to miners. Although impossibility of conducting an exam is not a defense to a section 75.364(a)(1) violation, the Commission may consider it when evaluating negligence or an unwarrantable failure designation. *See Basin Resources, Inc.*, 19 FMSHRC 1391, 1401 (Aug. 1999) (ALJ). Inspector Durrant testified that Respondent's violation of section 75.364(a)(1) did not pose a hazard to any miners. (Tr. 156). The "roofed-out" sections prevented any miners from wandering into the uninspected sections. I also credit Larry Kulow's unopposed testimony that he was able to take adequate readings of oxygen, methane and airflow from the edge of the water, the performance of which is the primary purpose of the cited standard. (Tr. 191). The new MSHA-approved ventilation plan changed the EPs to the water's edge, which supports Kulow's testimony that he took adequate readings from those points. Furthermore, despite the fact that Respondent failed to correct the condition for a long period of time, mine management did employ pumps with the intent of removing the water, hoping it would allow them to correct the violative condition by resuming inspections at the established EPs. Considering the entire facts and circumstances of the situation, I find that Respondent did not engage in aggravated conduct and the order is hereby modified to a section 104(a) citation. A penalty of \$1,000.00 is appropriate for this violation.

G. Citation No. 8457222; WEST 2009-1072

On May 7, 2009, MSHA Inspector Durrant originally issued Citation No. 8457222 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.360(a)(1) of the Secretary's safety standards, which would later be amended to a violation of section 75.360(b)(1), under section 104(a). The citation states:

The preshift examinations being conducted in the 1st West travelway, which also serves as A West Mains section alternate escapeway, are inadequate and have been for some time. Two areas between x-cuts 26 and 27 were found to be unsupported and should have been identified by the mine examiners. This is the seventh issuance since July of 2007 for this standard. Additionally, this Authorized Representative has repeatedly put the operator on notice regarding the importance of thorough mine examinations, therefore, has once again demonstrated a serious lack of reasonable care.

(Ex. G-55). Inspector Durrant determined that an injury was reasonably likely to occur, which was later changed to a finding that an injury was unlikely to occur. The Inspector found that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, which was later changed to non-S&S. Inspector Durrant found that the operator's negligence was high, which was later amended to a negligence designation of

moderate. Originally, Inspector Durrant found that seven people would be affected and the violation was the result of the operator's unwarrantable failure, but later he amended the citation to remove the unwarrantable failure designation and reduced the number of persons affected to two. Section 75.360(b)(1) of the Secretary's regulations requires:

(b) The person conducting the preshift examination shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (b)(11) of this section, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:

(1) Roadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.

30 C.F.R. § 75.360(b)(1). The Secretary proposed a penalty of \$1,795.00 for this order.

1. **Background Summary of Testimony**

Inspector Durrant testified that he issued Citation No. 8457222 because he believed that the preshift examiner failed to notice several damaged roof bolts and roof plates in the area that included crosscuts 26 and 27. (Tr. 113-114). In the area at crosscut 27, there were four severely damaged roof bolts, affecting a section of the roof that measured 9.75 feet wide by about 8 feet long. (Tr. 115). Between crosscuts 26 and 27 there were five severely damaged roof bolts, which affected a section that measured 9.5 feet wide by 11 feet long. *Id.* The area of the mine involved in the citation is a main thoroughfare, and is also used as an alternate escapeway. (Tr. 113).

Although the inspector initially believed that the violative conditions underlying this citation had existed for several days, upon further inspection he realized that the damage to the roof had probably happened only hours before his inspection. (Tr. 114).

Inspector Durrant modified Order No. 8457222 to reflect that an injury was unlikely to occur because the violative condition did not exist for as long as he originally presumed and the roof area underlying the order was fairly small in size and did not show signs that a roof fall was likely. (Tr. 118-119). He testified that although a minor roof fall was unlikely, if it were to occur, crushing type injuries could result. (Tr. 119).

Originally, Inspector Durrant believed that the refuge chamber had damaged the roof bolts several days before his inspection. (Tr. 120). After interviewing several miners, including Carl Martinez and Dwayne Gilbert, the inspector was convinced that a head roller that was brought in during the shift immediately preceding the inspection had damaged the roof in the area where the cited violation occurred. (Tr. 121-122). Although he cannot remember the specifics of his conversation with Carl Martinez, Inspector Durrant's notes indicate that the headroller arrived in A West during the graveyard shift and likely damaged the roof bolts. (Tr. 122). Martinez denied telling Inspector Durrant that he thought the head roller damaged the roof bolts. (Tr. 145).

Inspector Durrant estimates that the damage to the roof happened shortly after 1:00 a.m. (Tr. 124). The preshift exam took place between 4:00 and 7:00 a.m., and Inspector Durrant's inspection occurred at 9:30 a.m. (Tr. 124).

Inspector Durrant's notes also indicate that Roger Tuttle believed that the damage to the roof was done when bringing in the refuge chamber because the chamber was the only thing tall enough to cause the damage. (Tr. 129-130). Although he could not remember an exact date, Inspector Durrant was sure that the refuge chamber had been brought into the mine before the day in question, and prior to the headroller being brought in. (Tr. 135). He discounted Tuttle's assertion that only the refuge chamber could have caused the damage. (Tr. 136).

Carl Martinez, however, testified that although the refuge chamber was brought into the mine days before the headroller, it was only transported to somewhere near crosscut 8. (Tr. 140). The chamber could not be brought past crosscut 8 until the floor was dredged, because the chamber was too tall to fit through the travelway. (Tr. 141). Although he could not remember the date, Martinez testified that the refuge chamber was not transported through crosscuts 26 and 27 until the morning that Order No. 8457222 was written. (Tr. 142). Giving a detailed breakdown of the process of moving the chamber through the mine, Martinez also estimated that the chamber would have traveled through crosscuts 26 and 27 sometime between 6:45 and 7:00 a.m. (Tr. 145). The preshift examination that morning concluded at 6:39 a.m. (Tr. 145, 151, GX-56). Roger Tuttle also testified that the refuge chamber was moved through the area in question the morning of the inspection and he believes that the chamber damaged the roof bolts. (Tr. 150).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.360(a)(1) by failing to conduct an adequate preshift examination of the 1st West roadway/alternate escapeway. Inspector Durrant found extensive damage to the roof between crosscuts 26 and 27 and at crosscut 27, which Kulow did not record in the preshift examination records. Two miners told Inspector Durrant that a headroller had been moved into the area during the graveyard shift and the inspector's notes indicate that Carl Martinez said that the roller likely damaged the roof. Although Martinez denies having said the roller damaged the roof, Inspector Durrant is a more reliable source of information because he has notes and not merely two-year-old memories. The damage to the roof occurred about three hours before the preshift exam began, but the examiner did not notice the damage, which is a violation of section 75.360(a)(1).

Further, the Secretary asserts that Respondent was moderately negligent because it knew or should have known of the violation. Although the negligence designation is mitigated by the short period of time that the violation existed, the violation was both extensive and obvious.

Respondent argues that the Secretary did not satisfy her burden of proof with regard to this citation. Roger Tuttle told Inspector Durrant that the only thing tall enough to damage the roof bolts was the refuge chamber and at trial he testified that the refuge chamber had damaged the roof bolts. Carl Martinez explained the route by which the refuge chamber moved into the mine and testified that the chamber would have passed through the area where the roof was damaged on the day of the inspection, between 6:45 and 7:00 a.m.

3. Discussion and Analysis

I find that the Secretary did not show by a preponderance of the evidence that Respondent failed to conduct an adequate preshift examination; therefore, Respondent did not violate section 75.360(a)(1). The Secretary must prove by a preponderance of the evidence that a violation occurred. *See Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006). The primary factual question before me is whether the roof bolts between crosscuts 26 and 27 and at crosscut 27 damaged before or after the preshift examination. To answer this question, I must decide (1) what piece of equipment damaged the roof bolts and (2) at what time did that damage occur? Based upon the testimony and the exhibits before me, the Secretary did not show by a preponderance of the evidence that the Respondent violated section 75.360(a)(1) on May 7, 2009.

The Secretary failed to show that the headroller was responsible for damaging the roof bolts. Inspector Durrant found that the roof suffered damage during the transportation of a head roller, sometime around 1:00 a.m. (Tr. 124). The preshift examination, which occurred between 4:00 a.m. and 7:00 a.m., did not record this damage. His findings were primarily based upon interviews with miners, including statements from Carl Martinez and Dwayne Gilbert. (Tr. 122). Gilbert only told the Inspector that he saw a miner transporting the headroller around 1:00 a.m. (Tr. 122). Inspector Durrant's notes indicate that Carl Martinez said that the headroller likely caused the damage to the roof bolts, but Inspector Durrant cannot remember the specifics of the conversation. (Tr. 122). Although he did witness the movement of the headroller, Martinez testified that he did not tell the inspector that the headroller likely caused the damage. (Tr. 122). It was undisputed that the refuge chamber is a large piece of equipment and the travelway had to be enlarged just to transport it through the mine because it is so tall. (Tr. 141). It took two scoops working simultaneously to move the chamber through certain portions of the mine. (Tr. 142, 144). In his notes, Inspector Durrant included Roger Tuttle's statement that the refuge chamber was the only thing tall enough to damage the roof and Tuttle testified to this fact at the hearing. Initially, even Inspector Durrant himself believed that the refuge chamber had damaged the roof bolts in question. (Tr. 120). Although the headroller did move through the damaged area around 1:00 a.m., there is no clear evidence to show that it caused the damage to the roof. \

The Secretary failed to show by a preponderance of the evidence that the damage to the roof bolts occurred before the preshift examination on May 7, 2009. Inspector Durrant testified that although he had no notes or specific facts to relate, he was sure that the refuge chamber entered the mine days or even a week before his inspection took place. (Tr. 135). Therefore, even if the refuge chamber, and not the headroller, caused the roof bolt damage, that damage occurred before the preshift examination on May 7, 2009. I credit the testimony of both Tuttle and Martinez, who testified that the refuge chamber did not move into the area of crosscuts 26 and 27 until the morning of May 7, 2009. (Tr. 142, 150). Based upon Inspector Durrant's testimony, it seems that his information about the refuge chamber concerned the date when the chamber entered the mine, but not the particular section in question. The refuge chamber had in fact entered the mine days before, but Martinez credibly testified that it was delayed from reaching the area including crosscut 26 and 27 for several days due to its large size.

Martinez, furthermore, gave a detailed and plausible account of how long it would take to move the refuge chamber through the mine, estimating that it would not reach the area in question until 6:45 to 7:00 a.m. on the day of the inspection. (Tr. 145). Although his estimate

was not nearly as precise as that given by Martinez, Tuttle's testimony supported Martinez's timeline. (Tr. 150). Preshift examination records show that the examination was completed at 6:39 a.m. (Ex G-56). Even if Martinez's estimate was slightly off, it is reasonably likely that the examination had either finished by the time the damage occurred, or the examiners had already examined the portion of the mine containing the damage before the damage actually occurred. The Secretary did not show by a preponderance of the evidence that the damage to the roof bolts in crosscuts 26 and 27 occurred before the preshift examination and therefore failed to meet her burden to show that Respondent violated section 75.360(a)(1). Citation No. 8457222 is hereby **VACATED**.

H. Citation No. 8457231: WEST 2009-1072

On May 13, 2009, MSHA Inspector Durrant issued Citation No. 8457231 under section 104(a) of the Mine Act, alleging a violation of section 75.1103-1 of the Secretary's safety standards. The citation states:

The automatic fire sensor warning at the # 3 drive unit is not provided with both an audible and visual warning signals that are required to permit rapid location of fire.

The audible functions over the mine communication phones but there is no visual warning whatsoever. A malfunctioning phone at the manned surface location would not alert the attendant as to a fire on a flight of belt.

(Ex. G-59). Inspector Durrant determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and twelve persons would be affected. Section 75.1103-1 of the Secretary's regulations requires that "[a] fire sensor system shall be installed on each underground belt conveyor. Sensors so installed shall be of a type which will (a) give warning automatically when a fire occurs on or near such belt; (b) provide both audible and visual signals that permit rapid location of the fire." 30 C.F.R. § 75.1103-1. The Secretary proposed a penalty of \$1,304.00 for this citation.

1. Background Summary of Testimony

Inspector Durrant testified that during the fire sensor warning test at the drive, he determined that although the audible system worked, there was no visual warning at the surface. (Tr. 220). Inspector Durrant believes that the visual signal should either alert a manned surface location or all underground working sections to allow rapid location of a fire. (Tr. 221). It is not sufficient to only have warnings at the belt. (Tr. 221).

Inspector Durrant determined that an injury was reasonably likely because if the audible signal failed there would be no warning of a fire. (Tr. 222). He designated the injury as resulting in lost workdays or restricted duty due to injuries that were reasonably likely to result from a fire, including the threat of burns, CO exposure or smoke inhalation. (Tr. 223). The deluge system would not necessarily extinguish a fire, which would necessitate rapid location of the fire by miners to use fire suppression equipment. (Tr. 224). Inspector Durrant determined that 12 people would be affected, because that was the number of miners working inby the

location. (Tr. 224). Miners would also come to the location in the event of a fire to fight the fire or evacuate. (Tr. 241). The cited belt is not in the primary escapeway, but it is adjacent to and shares airflow with the secondary escapeway. (Tr. 241).

Inspector Durrant designated the negligence as medium because he believes that Respondent should have known of the violative condition. (Tr. 224-225). The cited standard is specific and unambiguous and it is mine management's job to know and comply with the standard. (Tr. 225). He also noted that he believed the violative condition could have existed for years, but admitted that it had never been cited. (Tr. 234).

Dennis Dodds, who was Hidden Splendor's maintenance supervisor at the time, testified that the system had been in place since the late 1990s and as far as he knew had been inspected every quarter since without receiving a citation. (Tr. 255, 257). Dodds also testified that there had never been a belt fire at the Horizon Mine. (Tr. 256).

2. Summary of the Parties' Arguments

The Secretary argues that Hidden Splendor violated section 75.1103-1 by failing to have a visual warning for the #3 belt drive at a location that would permit rapid location of a fire and a penalty of at least the assessed amount of \$1,304.00 is appropriate. When Inspector Durant tested the system, the visual warning occurred only at the belt. A light at the belt does not help to actually locate a fire; if you can see the light, you can see the fire. The Secretary's interpretation that a sensor providing visual signals to permit rapid location of the fire must be in a manned location away from the belt is reasonable, consistent with the purpose of the Act and is therefore entitled to deference.

Respondent's violation of section 75.1103-1 was S&S. If the audible system somehow failed, the lack of a visual warning at a separate manned location could result in injuries from a delay in discovering a fire. Such injuries include burns, carbon monoxide exposure, and smoke inhalation. These injuries could affect miners traveling the alternate escapeway. The Secretary asserts that Respondent should have known that its system was non-compliant because it was Respondent's responsibility to know and therefore Respondent's negligence was moderate.

Respondent argues that the citation must be vacated because Respondent did not violate section 75.1103-1. It is undisputed that the audible warning system was acceptable and that there was a strobe light at the belt. The cited standard does not mandate the specific location of the visual warning system; it only requires that it "must permit rapid location."

Furthermore, Respondent argues that the citation should be vacated because Respondent did not have fair notice that the cited standard requires a visual warning on the surface. The #3 drive had been inspected at least four times a year every year and no MSHA inspector ever found it to be non-compliant.

The Secretary's claim that the violation was S&S is too attenuated to uphold, Respondent asserts. There has never been a fire at the Horizon Mine and it was unlikely that a fire would start at this location. Even if a fire did start, ample fire-suppression and fire-fighting systems were in place. Most importantly, the audible system would alert the entire mine of the fire. In the unlikely event that a fire started, the audible system and the fire suppression system would

have to fail before the lack of a visible system created a hazard. It is unlikely that an injury would occur in such an instance.

3. Discussion and Analysis

In *Mainline Rock and Ballast*, the Tenth Circuit Court of Appeals ruled that “MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator,” and that “regulations provide adequate notice of the regulated conduct, and thus satisfy due process requirements, “so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.” *Mainline Rock and Ballast, Inc.*, 693 F.3d 1183, 1185 (10th Cir. 2012); *See also Walker Stone Co.*, 156 F.3d 1076, 1083–84 (10th Cir. 1991).

I must also apply the reasonable person standard to this case. For these particular facts, a reasonably prudent person would have fair warning that section 75.1103-1 required more than a visual warning at the belt drive itself. Both parties agree that the purpose of the visual signal is to permit rapid location of a fire, but Respondent contends that having the strobe underground by the belt drive fulfills the purpose of the standard. A visual signal placed at the belt, however, would not permit rapid location of the fire in a large mine. Only the miners within the direct vicinity of the belt would see the light. At many underground coal mines, a visual signal is sent to the manned control center on the surface. Therefore, a reasonably prudent person would know that the standard must contemplate persons in other parts of the mine being able to rapidly locate the fire. I find that the Secretary established a violation of section 75.1103-1.

I also find that the violation was not S&S. The Secretary established the first two elements of the *Mathies* test but did not prove that it was reasonably likely that the hazard contributed to by the violation would result in an injury. Although it is possible that the insufficient visual signal could result in fire-related injuries, it is not reasonably likely to do so. In order for any injury to occur there must be (1) a fire and (2) a failure of the audible warning system. The Horizon Mine has never had a belt fire and it does not emit methane. The Secretary did not establish that a fire was reasonably likely as a result of the cited violation.

Inspector Durrant testified that the audible signal should serve to warn miners of a fire at the belt. (Tr. 222). Although the Secretary contends that loud machinery may hinder miners from hearing the audible signal, this signal goes to every part of the mine and it is reasonably likely that such a signal would be heard. Therefore, even if I were to assume that a fire was to occur, the audible system would have to fail in order for an injury related to this violation to be likely. I find, therefore, that it is not reasonably likely that the hazard contributed to by the violation would result in an injury. Moreover, it is unlikely that 12 miners would be affected by this violation.

I find that the violation was the result of Hidden Splendor’s low negligence. Hidden Splendor had not previously been cited for this condition and it did provide a visual warning at the belt itself. A penalty of \$100.00 is appropriate.

I. Order No. 8457488: WEST 2009-1162

On May 21, 2009, MSHA Inspector Durrant issued Order No. 8457488 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.512 of the Secretary's safety standards. The order states, in part:

The Eimco battery powered scoop, company # 1, used on the A West Mains development section, MMU 002-0, was not being maintained to assure safe operating condition. The machine was observed in x-cut 2 at the charging station, still connected to the machine's batteries and the cover over the X/P enclosure within the operator's compartment had been removed and left off during maintenance and/or repair work, exposing miners to energized leads within the compartment and X/P enclosure that, when tested, read 120 volts DC. The opening in the compartment measured to be 11 ½ inches by 8 inches. Damp conditions were present within that compartment, increasing the shock potential with this confluence of factors.

Many newly employed, inexperienced miners, work at this mine and in this area, again increasing the risk of serious, even fatal injuries.

(Ex. G-61). This order was issued in conjunction with an imminent danger order. Inspector Durrant determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, twelve persons would be affected, and the violation was the result of an unwarrantable failure on the part of Respondent. Section 75.512 of the Secretary's regulations requires:

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

30 C.F.R. § 75.512. The Secretary proposed a penalty of \$9,122.00 for this order.

1. Background Summary of Testimony

Inspector Durrant wrote Order No. 8457488 under section 75.512 because there were exposed conductors and wires in the control cab due to a missing controller cover. (Tr. 263-64). The scoop was plugged into the on-board batteries. (Tr. 264). Inspector Durant believed that a qualified person must have been doing maintenance on the controls within the cab. (Tr. 262). A volt meter showed that there were 120 volts in the controller, which posed a shock hazard. (Tr. 266-67).

Inspector Durrant designated the order as S&S. (Tr. 271). He determined that an injury was highly likely because the compartment is to the left of anyone who enters the cab and the

inspector believes a miner might put his hand on the controller to steady himself while entering the cab. (Tr. 267). When seated, the controller is just to the left of the operator of the scoop, at about elbow height. (Tr. 282). The opening was about 8 by 11.5 inches. (Tr. 283). There were also wet and damp conditions in the scoop, which increases the hazard of shock. (Tr. 268). The scoop was not tagged-out and was available for use for a variety of tasks, including cleanup and hauling work. (Tr. 269). Inspector Durrant asserted that scoops are frequently used and young, inexperienced miners are employed at the Horizon Mine. *Id.* The inspector designated this order as fatal because 120 volts carries enough amperage to cause a fatal shock. (Tr. 270). Inspector Durrant also stated that the cited violation only affected one person. (Tr. 271).

Order No. 8457488 was the result of both high negligence and an unwarrantable failure on the part of Respondent. *Id.* The Inspector made these designations because the condition was obvious, the danger to miners could be fatal, the mine operator knew or had reason to know about the condition and there were no mitigating circumstances. (Tr. 272-23, 283).

Charles William Bordea, an MSHA electrical inspector, also testified for the Secretary. He was generally familiar Eimco scoops, although he had no knowledge of the specific events surrounding this particular order. (Tr. 292). Mr. Bordea's testimony confirmed much of what Inspector Durrant previously testified to, including the position of the box, the risk of contacting the live leads when entering the cab, and the risk of a miner receiving a fatal shock. (Tr. 294-95). He also testified that a miner's foot, clothing or metal tools on a tool belt could contact the energized components in the controller, leading to a shock. (Tr. 294, 298).

Dennis Dodds, who took readings of the controller with his volt meter for Inspector Durrant, testified that only one component in the controller, was electrified. (Tr. 300). To contact that component, the main control input, Dodds reached into the box and curled his hand around a terminal. *Id.*

2. Summary of the Parties' Arguments

The Secretary argues that Hidden Splendor violated 30 C.F.R. § 75.512 by failing to maintain a battery-powered scoop to assure safe operating conditions and a penalty of at least the assessed amount is appropriate. The scoop was plugged in, available for use, and the cover of the controller was missing, which exposed conductors and wires. These components were energized, carrying 120 volts. The scoop was not being maintained to assure safe operating conditions.

The uncovered controller was highly likely to cause an injury and was S&S. Scoops are regularly used in the mine and this one was available for use. The opening of the controller was large and miners often contact it when entering the cab of the scoop. The electrified components were not deep within the controller and both Inspectors Durrant and Bordea described numerous plausible ways to contact them. Furthermore, a shock could be fatal.

The Secretary also maintains that the violation was the result of high negligence and an unwarrantable failure. Inspector Durrant testified that the cover had been removed by a qualified electrician. Qualified electricians responsible for conducting required exams are considered agents of the operator for negligence and unwarrantable failure determinations. The failure to close the compartment was obvious, which means that Respondent knew of the condition. The

operator knew or should have known of the condition, there were no mitigating circumstances, and the violation was extremely hazardous, resulting in the existence of aggravated conduct.

Respondent argues that it did not violate Section 75.512 because the scoop was being repaired and therefore was ineligible for inspection. Inspector Durrant admitted that an electrician must have removed the controller for maintenance or repairs. Inspector Durrant also issued Order No. 8457490 for failing to lock and tag-out the scoop during repairs. Although that order was subsequently vacated, it establishes that the scoop was in fact under repair. If it were under repair, it would not be subject to 30 C.F.R. § 75.512.

Even if a violation occurred, the Secretary's conclusion that an injury was highly likely is untenable. The energized conductor was out of reach of a miner. It was inside of the controller and on the back of a switch, meaning a miner would have to curl his hand around a switch to contact it.

The Secretary's case for an S&S violation is not based upon reasonable likelihood. The Secretary's witnesses concluded that fatality was possible in this situation, but they did not prove that it was reasonably likely. Furthermore, neither witness was properly qualified to speak about these topics.

3. **Discussion and Analysis**

As I stated before, Commission precedent establishes that when equipment or facilities are available for use by miners, such equipment and facilities must comply with MSHA safety standards. See *W.J. Bokus Indus.*, 16 FMSHRC at 707; *Ideal Basic Indus., Cement Div.*, 3 FMSHRC at 844. Where nothing precludes the use of a piece of equipment, that equipment can be inspected and cited. *Ideal Basic Indus., Cement Div.*, 3 FMSHRC at 844. As long as the cited safety standard does not stipulate otherwise, a piece of equipment can be inspected as long as it is not tagged-out and parked for repairs. *Alan Lee Good*, 23 FMSHRC at 997.

I find that the cited scoop was available for use and therefore could be cited for a violation of section 75.512. Respondent argues that repairs or maintenance were underway on the cited scoop and therefore it was not subject to a citation for a permissibility exam violation because that exam would be conducted once the repairs were completed. The scoop, however, was in an active area of the mine. More importantly, it was not tagged-out. Inspector Durrant testified that he did not see anyone who may have been working on the scoop for the hour-long period he was at or near the scoop. In fact, there were no markings, signs, barriers or designations of any kind that indicated that this scoop should not be used. The second sentence of the safety standard requires removal of equipment when a "potentially dangerous condition is found." Clearly, the qualified miner who had been working on the scoop was aware that he left the scoop with the energized leads exposed and energized. Thus, the dangerous condition was known to the operator. The scoop could have been used, which means it presented a danger to miners. The scoop was, therefore, subject to an inspection and the order concerning a violation of Section 75.512.

I find that Respondent violated section 75.512. The fact that the controller cover was missing while a component behind that cover was electrified presents a potentially dangerous condition. As I found above, the scoop was not removed from service. Therefore, a violation of

section 75.512 was established because the examiner of the electric scoop failed to correct a potentially dangerous condition.

I also find that the order was S&S. I credit the testimony of Inspectors Durrant and Bordea that there are numerous scenarios that are likely to cause a miner to reach into the controller and contact the energized component. These scenarios include contacting a component with a hand while steadying oneself in the process of entering the cab, or with a foot or tool while in the cab, as the compartment is adjacent to where the operator must sit. The opening into the controller was quite large, measuring 8 inches by 11.5 inches. I also credit, however, the testimony of Mr. Dodds that only one component was electrified, and he therefore had to curl his hand around a switch to contact it. I find, therefore, that an injury is reasonably likely as opposed to highly likely.

If an injury were to occur, I find that a 120 volt shock is reasonably likely to be fatal. I credit the testimony of both Inspectors Durrant and Bordea on this issue. Although Respondent argues that neither of the Secretary's witnesses is qualified to testify that a 120 volt shock is likely to be fatal, this court has routinely held that it is. *See Carmeuse Lime and Stone*, 33 FMSHRC 1654, 1663 (July 2011) (ALJ); *Nelson Brothers Quarries*, 24 FMSHRC 167, 170 (Feb. 2002) (ALJ); *United Nuclear – Homestake Partners, Now Homestake Mining Company*, 3 FMSHRC 1552, 1559 (June 1981) (ALJ).

Considering all the facts and circumstances, I find that the violation of Section 75.512 was the result of both high negligence and an unwarrantable failure on Respondent's behalf. The operator knew or should have known of the obvious violation. The violation posed a high degree of danger, even the possibility of death. Although only one panel of the controller was missing, the relatively large size of the opening and the position of the opening in the small cab make this violation extensive. Neither party presented evidence of whether the operator had been placed on notice concerning this type of violation. Furthermore, it is unclear how long the condition existed. I find that Respondent acted with high negligence and with aggravated conduct that constituted an unwarrantable failure. A penalty of \$7,000.00 is appropriate.

J. Order No. 6686024: WEST 2009-208

On January 30, 2008, MSHA Inspector Boyle issued Order No. 6686024 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.1914(f) of the Secretary's safety standards. The citation states, in part:

An inadequate examination has been made on diesel machinery at this mine as indicated by the obvious and extensive conditions that were found and citations written on 01-30-2008. 26 citations were written on the three machines. 15 of these citations were S&S. The citations referred to in this order are 7288429 and 7288430. Also include citations 6686001 through 6686024. All of the issues are specific requirements of CFR and are required on the weekly examinations of this machinery. A regimented inspection using approved checklist was implemented when this mine was last cited for this same issue. Reasonable efforts have not been made to maintain and inspect this machinery, and management has allowed

a [remedy] that was defined as a settlement of a previous order to no longer be the standard that dictates how these inspections will be carried out. These conditions should be obvious to any casual observer.

(Ex. G-1). Inspector Boyle determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, that eleven persons would be affected, and that the violation was the result of Respondent's unwarrantable failure. Section 75.1914(f) of the Secretary's regulations requires:

All diesel-powered equipment shall be examined and tested weekly by a person qualified under § 75.1915.

(1) Examinations and tests shall be conducted in accordance with approved checklists and manufacturers' maintenance manuals.

(2) Persons performing weekly examinations and tests of diesel-powered equipment under this paragraph shall make a record when the equipment is not in approved or safe condition. The record shall include the equipment that is not in approved or safe condition, the defect found, and the corrective action taken.

30 C.F.R. § 75.1914(f). The Secretary proposed a penalty of \$20,032.00 for this order.

1. **Background Summary of Testimony**

Inspector Boyle, who is a diesel specialist, issued Order No. 6686024 because numerous problems with three diesel powered machines convinced him that regimented inspections were not being performed on the Horizon Mine's diesel equipment. (Tr. 599, 620). Inspector Boyle issued this order under section 75.1914(f)(1), but later modified the order to a section 75.1914(f) violation because he wanted to include the entire inspection process. (Tr. 600). Inspector Boyle believed that the permissibility issues were obvious and extensive. (Tr. 599). He also believes they had existed for a long period of time because, with so many issues, it was unreasonable to believe that the machines could have deteriorated so much within a week or two. (Tr. 601). The violations Inspector Boyle issued were associated with oil accumulations, oil accumulations near ignition sources, electrical wiring with fuses bridged out, compromised fire suppression, compromised fire extinguishers, faulty brakes, and defective steering; many of these conditions were obvious even to untrained observers. (Tr. 601-02). In total, there were 25 underlying violations written, about half of which were S&S. (Tr. 602). Respondent paid some of these citations and orders, challenged others and some are proposed. (Tr. 603).

Inspector Boyle also detailed a few of the most serious conditions, including faulty brakes on a mantrip, which were reasonably likely to lead to a serious, perhaps crushing, injury. (Tr. 604). Another piece of equipment had a broken steering shaft, which Inspector Boyle believed was also reasonably likely to cause serious injury to a miner. (Tr. 608). He testified that both mantrips had various accumulations and missing fire suppression devices. Considering the presence of all three elements of the fire triangle, these violations were reasonably likely to lead to a mine fire. Such a fire would likely result in serious injuries such as smoke inhalation. (Tr. 610). The inspector believed that the operator should have known of all of these conditions,

which he described as obvious, extensive, and dangerous. (Tr. 601, 604, 607, 611). Although none of the underlying citations or orders was designated as “high negligence” and only one as “highly likely,” Inspector Boyle designated Order No. 6686024 as S&S because he believed that the faulty exams were highly likely to lead to a permanently disabling injury. (Tr. 609, 621, 636). The number of violations suggested to Inspector Boyle that there was a serious problem with the diesel equipment examinations at the mine. (Tr. 637).

The Horizon Mine was previously issued citations for inadequate equipment inspections. The inspector referenced a citation written under section 75.1914(f)(2) on May 10, 2006, for inadequate diesel inspections. (Tr. 617). After issuing the citation, Inspector Boyle met with mine management to reinforce proper inspection protocols and provide checklists. (Tr. 618). The checklists address all of the problems underlying Order No. 6686024 except for the accumulation violations. (Tr. 619). Inspector Boyle believed the accumulations to be obvious, stating that they should have been detected by weekly inspections or preshift exams. (Tr. 620).

Inspector Boyle testified that he determined that there were 11 miners affected by the violations on the mantrip. (Tr. 622). The underlying citations ranged from one to eight persons affected. (Tr. 636).

Order No. 6686024 constituted both high negligence and an unwarrantable failure on the part of Respondent, according to Inspector Boyle’s testimony. The underlying conditions were obvious and extensive to the point that no training was required to detect them and any sort of preoperational checks should have detected them. (Tr. 622). Supervisors sometimes used the equipment. *Id.* Previous citations gave mine management notice of the underlying violative conditions as well as the deficient inspections. *Id.* There were no mitigating factors in Inspector Boyle’s opinion. (Tr. 640).

2. Summary of the Parties’ Arguments

The Secretary argues that Respondent violated section 75.1914(f) by failing to conduct adequate weekly examinations on multiple pieces of its diesel equipment and an increased penalty above the assessed penalty of \$20,302.00 is appropriate. There were 25 underlying violations that were extensive, obvious, and had existed for a period of time that began before the most recent weekly examination. Collectively, these violations show that Respondent was not conducting adequate inspections in violation of section 75.1914(f) and Respondent presented no affirmative evidence to the contrary.

Respondent’s violation of section 75.1914(f) was S&S. The numerous violations created a situation that led to a high likelihood of serious injury. The combination of various hazards increases the risk of serious injuries as a result of events including equipment crashes and mine fires. An inadequate examination has a broader effect than the individual violations that it creates. Although each citation was only reasonably likely, the combination of at least 15 reasonably likely events makes it highly likely that, due to an inadequate inspection, a miner could sustain a serious injury.

The Secretary also urges that Respondent’s failure to adequately examine diesel-powered equipment was the result of high negligence and constituted an unwarrantable failure. The

underlying violations were extensive, obvious and had existed for a long period of time. Further, Respondent was clearly placed on notice concerning the violation.

Respondent argues that the order should be vacated because section 75.1914(f) only requires that examinations be performed and Respondent performed the exams. If the order is not vacated, it should be modified. The 104(d)(2) order is inappropriate due to a mistake in the D chain made by the Inspector. None of the underlying citations allege permanently disabling injuries and the only one that designated an injury as highly likely was settled as reasonably likely. The highest number of persons affected in any citation was only eight and those citations settled as only one person affected. None of the underlying citations was designated as being the result of high negligence. The previous citation that put Respondent on notice was too attenuated to serve as notice and mine management has changed since that time.

3. **Discussion and Analysis**

Order No. 6686024 was issued as a 104(d)(2) order, but Respondent argued that there was no 104(d)(1) citation to complete the D chain for Order No. 6686024. At the hearing, I asked the Secretary to file a report on the D chain issue raised by counsel for Hidden Splendor. In a report received on April 6, 2011, the Secretary set forth the chain that led to the issuance of Order No. 6686024 (the “report”), which is incorporated herein by reference. Multiple mistakes were made by MSHA inspectors all along the chain when they incorrectly listed the underlying (d)(1) citation in box 14E. In her report, the Secretary convinced me that these mistakes were corrected by subsequent modifications to the underlying orders. These modifications were attached to her report. Consequently, I reject Hidden Splendor’s argument on this issue.

I also reject Respondent’s argument that section 75.1914(f) only requires that weekly examinations be performed without regard for the adequacy of those exams. Section 75.1914(f) has two subsections, which are clearly included in 75.1914(f). Therefore, when considering a citation written under section 75.1914(f), I will also consider subsections 75.1914(f)(1) and 75.1914(f)(2). The requirements of the safety standard can be broken down into four parts: (1) a qualified examiner (2) shall examine and test all diesel-powered equipment every week (3) in accordance with approved checklists and maintenance manuals, and (4) a record of these exams must be kept and must include identification of defective equipment, identification of defects found and corrective actions taken.

I find that the Secretary established a violation of mandatory safety standard 75.1914(f). Respondent violated both the third and fourth elements set forth in subsections 75.1914(f)(1) and 75.1914(f)(2). I credit the testimony of Inspector Boyle as to the conditions he found during his inspection. Excluding the accumulation violations, Inspector Boyle testified that all of the citations he issued were addressed by the checklists that he personally gave Respondent. If Respondent had followed the checklists correctly, there would not be such a high number of violative conditions.

Although Respondent did keep records to show examinations were being done, these records did not list the defects that Inspector Boyle found. Even if Respondent did not follow the checklists Inspector Boyle gave them, the inspector testified that many of the violations were obvious, even to someone without training. The accumulation violations, which were not on the checklists, would be difficult for any person performing an examination to miss.

I also find that Order No. 6686024 was S&S. The Secretary established a violation of 75.1914(f). There are multiple discrete safety hazards that the violation contributed to, including crushing type injuries as a result of faulty brakes or steering, carbon monoxide poisoning or smoke inhalation as the result of a fire. Although Respondent opines that none of the underlying violations were designated as highly likely to lead to an injury, Inspector Boyle testified that the cumulative effect of the underlying violations convinced him that an injury was in fact highly likely. I agree with Inspector Boyle and I credit his testimony that the hazard contributed to by the cited violation would reasonably likely be a serious, permanently disabling injury.

Furthermore, the neglect that Respondent's examiners demonstrated relates to the violation Inspector Boyle cited, not an amalgamation of the underlying violations. The state of the diesel equipment suggests that it is highly likely that an injury would occur because Respondent's examiners were unable or unwilling to identify and correct hazards. The citations themselves are proof of this conduct and they provide a starting point for evaluating the likely outcome of the conduct, but they do not define the parameters of the likely outcome of the conduct. For this reason, among others, the Mine Act enumerates violations for faulty inspections separate from underlying conditions. Order No. 6686024 is highly likely to lead to a serious injury and is an S&S violation of section 75.1914(f).

Looking at all the facts and circumstances, I find that Order No. 6686024 was the result of Respondent's high negligence and an unwarrantable failure to comply with section 75.1914(f). Every factor used in evaluating the existence of an unwarrantable failure weighs against Respondent in this instance. Respondent was on notice that greater efforts were necessary for compliance due to Inspector Boyle's previous citations and his attempt to train Respondent's examiners on proper examination techniques, including the use of approved checklists. Despite this training, the continued failure to properly examine diesel equipment or record defects found during those examinations shows that Respondent made little or no effort to correct the violative conduct. The condition was extensive, as the inadequate examinations led to a large number of violations and safety hazards. I also credit Inspector Boyle's testimony that the extensive deterioration of the diesel equipment did not happen in a one- or two-week period, which means that the violative examinations existed for a substantial period of time. As Inspector Boyle noted, the underlying conditions were all obvious. Due to the sheer number and extensiveness of the underlying violations, the fact that the diesel examinations were inadequate was obvious and Respondent should have known that its examinations were inadequate. Consequently, I hold that of Order No. 6686024 constituted both high negligence and an unwarrantable failure on behalf of Respondent. A penalty of \$20,000.00 is appropriate for this order.

K. Citation No. 8454049; WEST 2009-208

On June 19, 2008, MSHA Inspector Tain Curtis issued Citation No. 8454049 under section 104(a) of the Mine Act, alleging a violation of section 75.1101-1(a) of the Secretary's safety standards. The citation states:

When the #6 Belt drive fire deluge was activated only 4 of the 16 nozzles discharged any water. The belt was off, but only on sequence, it would start when the preceding belt would start. The hazard is [that] only 25% of the system worked on a drive that usually runs continuously and is not attended regularly by a miner.

The area was rock dusted and no accumulations were in the drive area. This has been an ongoing problem with the deluge systems on the belt drives at this mine, 5 citations have been issued since 3/2007, on 75.1101-3(a).

(Ex. G-16). Inspector Curtis determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, and six persons would be affected. Section 75.1101-1(a) of the Secretary's regulations requires:

Deluge-type spray systems shall consist of open nozzles attached to branch lines. The branch lines shall be connected to a waterline through a control valve operated by a fire sensor. Actuation of the control valve shall cause water to flow into the branch lines and discharge from the nozzles.

30 C.F.R. § 75.1101-1(a). The Secretary proposed a penalty of \$3,996.00 for this citation.

1. **Background Summary of Testimony**

On June 19, 2008, Inspector Tain Curtis issued Citation No. 8454049 because only four of 16 fire deluge sprays worked. (Tr. 767). Inspector Curtis designated the citation as S&S. (Tr. 771). He marked this citation as reasonably likely to lead to an injury because the belt drive creates heat and a fire would not be extinguished by only 4 deluge sprays. (Tr. 767). Inspector Curtis also testified that a fire could start in the gear boxes or the gear reducers and consume the belt and any coal on the belt. (Tr. 770). He testified that although there was no coal present at the time of his inspections, during normal mining operations there would be coal on the belt. *Id.* A fire would expose miners to asphyxiation through noxious smoke, carbon monoxide, burns, slips, trips and falls while fighting the fire. (Tr. 768). Inspector Curtis was not sure whether a deluge system was supposed to extinguish or slow down a fire, but he testified that the system would barely slow down a fire in the cited condition. (Tr. 769).

Inspector Curtis designated this hazard as lost workdays or restricted duty because it would take a while for a miner to recuperate from carbon monoxide poisoning or burned lungs. (Tr. 770). He designated that six persons would be affected because that was the number of miners working in the cited section. (Tr. 771).

Inspector Curtis designated Respondent's negligence as high. (Tr. 773). The mine was on notice that their deluge system required more attention due to three 75.1101-3(a) citations issued between March 2007 and when Inspector Curtis issued Citation No. 8454049. (Tr. 772). The condition was extensive, as only four of 16 nozzles sprayed water due to clogs from debris. (Tr. 775). One of those four only dribbled water. *Id.* Respondent should have known of the condition, as detecting it only required turning on the water. (Tr. 776). The system, however, is only required to be turned on and tested once a year. (Tr. 777).

Joseph Fielder testified that there had never been a belt fire at the Horizon Mine and that the cited area has a fire hose, a water source, fire extinguishers and rock dust. (Tr. 785-86). He asserted that if mine management knew the deluge system was clogged, management would have fixed the system. (Tr. 787).

2. Summary of the Parties' Arguments

The Secretary argues that Citation No. 8454049 is S&S. Respondent stipulated to the violation. There is a discrete safety hazard of a fire spreading rapidly without suppression, which leads to a reasonable likelihood of serious injuries that include carbon monoxide asphyxiation and burned lungs. Only 25% of the system activated, which is not sufficient to control a fire. The additional firefighting equipment in the area was all handheld and would require a miner to move close to the fire to extinguish it.

According to the Secretary, the cited violation was a result of Respondent's high negligence. Respondent should have known of the condition and prevented it, but Respondent failed to do so. Respondent should have been on heightened alert concerning problems with the cited system because five citations were issued on the system in the preceding year.

Respondent disputes the finding that Citation No. 8454049 was the result of high negligence. The Inspector does not allege that examinations were not being performed and the system is only required to be actually tested once a year. Respondent could not have known about the clogs in the system because they developed after the last yearly test and could not be discovered through the weekly examination.

Respondent also asserts that the S&S designation is unjustified. The deluge system does not present a hazard because it cannot cause a fire. For any injury to occur, a fire must start, which is unlikely based upon the mine's history and condition. Heat and fuel were not even present. A fire was unlikely to start; therefore, an injury is unlikely to occur.

Furthermore, it is unfair to assume that a fire would occur in order to decide if an injury is likely to occur. If a fire did occur, however, the area was equipped with a warning system, a water source, extinguishers, and rock dust to fight a fire. Even if a fire occurred, this equipment would mean that injury as a result of that fire is not reasonably likely because the fire would be contained.

3. Discussion and Analysis

I find that the citation was not S&S. Respondent stipulated to the violation. A discrete safety hazard was present; a fire could start and serious injuries, including asphyxiation and burns, could occur as a result of the violative condition. Although the cited violation satisfies three of the four *Mathies* criteria, the third element is the most difficult to apply. In this instance, there is not a reasonable likelihood that miners would be unable to control a fire that would result in serious injuries as a result of the violation.

The fire prevention system has many built in redundancies so that the partial loss of the deluge system was unlikely to make a fire reasonably likely to cause injury due to an inability to control it. First of all, the Horizon Mine had never experienced a belt fire and has no history of dangerous methane levels. The area where this belt was located posed no increased risk of fire. It seems unlikely, therefore, that a fire that miners could not control would occur.

Even if a fire did occur, however, the absence of a fully functional deluge system is not reasonably likely to have contributed to a hazardous fire. The occurrence of a fire at the #6 belt would produce an audible alarm that would notify the entire mine of the fire. The area of the belt

is also equipped with a firehose, a water source, rock dust and fire extinguishers, all of which could be used by miners to fight a fire. The deluge system is a fire suppression system that is not designed to extinguish a fire on its own. (Tr. 224). Miners, therefore, would be forced to use the firefighting tools at their disposal whether the deluge system was operational or not. Due to the array of firefighting and suppression tools located at the belt, along with the conditions that make a fire unlikely, I find that Citation No. 8454049 was not S&S.

Considering all the facts and circumstances, I find that Respondent's negligence was moderate. Numerous citations issued in the previous year placed Respondent on notice that greater efforts were necessary for compliance. Even though the Act requires the system to be tested once a year, the Horizon Mine's previous problems with its deluge system demanded vigilance on the part of mine management. The violation itself was extensive, considering only four out of 16 nozzles worked and one only dribbled. Respondent, therefore, should have known about this violation.

There are, however, mitigating factors that show this citation was not the product of high negligence on the part of Respondent. Neither party presented evidence pertaining to how long the violation existed, but I find that it is likely that the condition occurred after the yearly test of the system. The violation was not obvious, as weekly examinations, even when conducted perfectly, could not detect it. The violation did not pose a high degree of danger. A penalty of \$500.00 is appropriate for this violation.

L. Citation No. 8457087: WEST 2009-591

On December 23, 2008, MSHA Inspector Curtis issued Citation No. 8457087 under section 104(a) of the Mine Act, alleging a violation of section 75.220(a)(1) of the Secretary's safety standards. The citation states:

The operator was not following their approved roof control plan. Found a cross-cut that was mined prior to 12/13/2008, that was not bolted. The roof control plan states that places would be bolted within 24 hours. The hazardous condition has existed since 12/13/2008 today is 12/23/2008. Cross-cut # 3 K-north MMU 001-0, between #1 and #2 entry. The unbolted cross-cut had an area of immediate roof that fell 1 foot high by 1 foot. The fall was not deemed reportable.

(Ex. G-36). Inspector Curtis determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. Section 75.220(a)(1) of the Secretary's regulations requires that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." 30 C.F.R. § 75.220(a)(1). The Secretary proposed a penalty of \$2,473.00 for this citation.

1. Background Summary of Testimony

On December 23, 2008, Inspector Curtis responded to a hazard complaint in the K-North section of the Horizon mine. (Tr. 747). Inspector Curtis issued Citation No. 8457087 under

section 75.220(a)(1) because a section of the roof had not been bolted within 24 hours as the roof control plan requires. (Tr. 748). The roof plan requires that “for cuts of ten foot or greater, roof bolts [be] installed within 24 hours after the area is mined,” excluding “extraordinary circumstances such as mechanical breakdown of the bolter.” (Tr. 749, Ex. G-81 at 5). A new crosscut had been broken through and the preshift showed that it had not been bolted. (Tr. 750).

Inspector Curtis designated the citation as S&S because it was reasonably likely that the unbolted roof would lead to a roof fall that would cause an injury of a serious nature. (Tr. 756). A cubic foot of roof had already fallen. (Tr. 750). Roofs must be bolted within 24 hours due to air slack, which occurs gradually when air gets between the layers of coal or rock, making roof falls more likely. *Id.* Although air slack is more likely in coal roofs, it can also occur in rock roofs. The roof in the cited area was rock, not coal. (Tr. 751). Inspector Curtis believed that the small roof fall was a sign that air slack had already occurred and, if left unbolted, the whole roof would eventually fall. *Id.* He also testified that after air slack occurs, even bolting the roof may be ineffective to prevent roof falls. (Tr. 755). The longer the roof is allowed to slack, the more dangerous it becomes and this condition was left unabated for 10 days. (Tr. 757). Joe Fielder testified, however, that a roof fall was unlikely. (Tr. 764).

There were no miners working in the crosscut at the time, but Inspector Curtis testified that it was an open crosscut that was active, although it was outby the busiest sections of the mine. (Tr. 752). There was also a roofbolter in the section, with the power on. *Id.* The inspector was not sure if the section was blocked off, but he did not believe that it was. (Tr. 754). He reasoned that miners from the adjacent section or travelway could enter the cited section, as well as the miner who intended to use the powered roofbolter. (Tr. 752-753). He believes that hazard flags were in place because he did not cite the mine for their absence. (Tr. 154). The flags would not physically keep a miner out of the section. *Id.*

Inspector Curtis testified that he designated the citation as permanently disabling because falling rocks from the roof could break bones and cause contusions. (Tr. 754). He said that only one person would be affected because it was unlikely more than one person at a time would go through the area. (Tr. 755). Inspector Curtis believed that Respondent knew about the violation, because it was marked in the preshift book, dated December 13. (Tr. 78).

Although Inspector Curtis acknowledged that the roof bolting machine may have broken down and the floor was wet with deep mud, he testified that these were not mitigating circumstances because the section had been unbolted for ten days. (Tr. 757). In Inspector Curtis’ opinion, ten days is enough time to fix the bolter or to use the section’s other bolter, which could be brought in through the other side. (Tr. 758-759). Inspector Curtis, therefore, did not believe this to be an extraordinary circumstance referred to as an exception in the roof plan. (Tr. 759).

Joe Fielder testified that the roof bolter in the cited section had lost a traction planetary gear on the cat system, which prevented the bolter from moving. (Tr. 760). The replacement part had to be purchased in the eastern United States and it took several days to find and several days to ship. (Tr. 761). Fielder testified that, as soon as the part arrived, it was put on the roof bolter and the cited roof was bolted. (Tr. 761). Fielder also testified that the other roofbolter could not be brought into the cited section because one side was blocked by the broken down bolter, and the other was blocked by mud that was up to four feet deep. (Tr. 762).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.220(a)(1) by failing to comply with its approved roof control plan when it did not install roof bolts within 24 hours after mining at crosscut 3 in K-North, between the #1 and #2 entries. Ten days after mining the area, Respondent still had not bolted the roof.

Respondent's violation of section 75.220(a)(1) was S&S because it exposed miners to roof falls. Leaving the roof unbolted exposes the roof to air slack, which can create an increased risk of roof falls even after the roof has been bolted. A piece of roof had already fallen. There was a reasonable likelihood of injury because Inspector Curtis determined that the roof would eventually fall and miners were likely to be in the area.

The Secretary asserts that Respondent's violation of section 75.220(a)(1) was the result of high negligence. The condition was obvious and Respondent clearly knew of the condition, because it was recorded in the preshift exam book. The area was not blocked off, even though the violative condition had existed for at least ten days. The argument that the roof bolter was broken down is not a mitigating factor because Respondent had plenty of time to repair the bolter or use the section's other bolter; there were no other mitigating factors.

Citation No. 8457087 should be vacated because the roof control plan exempted the 24-hour roof bolting requirement in the event of the mechanical breakdown of a roofbolter. The bolter was clearly broken down due to a mechanical failure and it took 17 days to obtain replacement parts and complete repairs. Hazard flags warned miners not to enter the unbolted area until the roofbolter was fixed and able to bolt the roof. No other bolter could be brought to bolt the roof due to the muddy conditions of the section. Respondent did not violate its roof control plan because its actions fall within an enumerated exception of the plan.

3. Discussion and Analysis

Considering the roof control plan in its entirety, I find that Respondent did not violate section 75.220(a)(1) because it falls within an enumerated exception of the roof control plan. When interpreting a roof control plan, each section shall not be read in isolation; rather, the entire plan as a whole must be considered. *Mettiki Coal Corporation*, 13 FMSHRC 3, 7 (Jan. 1991). Considering the cited portion of the plan on page three, subsection six, it is clear that Respondent did not violate 75.220(a)(1). The exception in subsection 6 is for extraordinary circumstances, but the enumerated example of an extraordinary circumstance that excuses the 24-hour requirement is the "mechanical breakdown of the bolter." (Ex. G-81 at 5).

When considering the entire plan, there is no language that suggests that Respondent's conduct violated the plan or that there is a specific period of time in which a roof must be bolted when extraordinary circumstances are present. I credit the testimony of Fielder as to the problem the mine was having getting the part for the roof bolter and the impossibility of using the other roof bolter. Respondent flagged-off the area and it repaired the roof bolter as quickly as was feasible. Respondent's conduct plainly fell within an exception to the 24-hour roofbolting requirement of the roof control plan, and therefore Respondent did not violate section 75.220(a)(1). Citation No. 8457087 is hereby **VACATED**.

M. Order No. 6685990; WEST 2009-210

On September 17, 2008, MSHA Inspector Devere Smith issued Order No. 6685990 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.360(a)(1) of the Secretary's safety standards, which was later amended to be a violation of 75.360(b). The citation states:

An adequate pre-shift exam was not completed on the 1st West travelway in that two (2) areas of insufficient roof support were found by this inspector. (reference citation #'s 6685989 and 6685988). The pre-shift exam book indicated NONE OBSERVED for this travelway. Had this top failed, serious injury or a fatality could have occurred.

(Ex. G-31). Inspector Smith determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that six persons would be affected, and that the violation was the result of Respondent's unwarrantable failure. Section 75.360(b) of the Secretary's regulations requires, in part, that "[t]he person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations: . . . (1) Roadways [and] travelways." 30 C.F.R. § 75.360(b). The Secretary proposed a penalty of \$14,743.00 for this order.

1. Background Summary of Testimony

On September 17, 2008, Inspector Smith issued Order No. 6685990 because he observed dangerous roof conditions in two areas. (Tr. 421). In the First West area, between crosscuts 9 and 10, 16 bolts were taking weight, seven of which he deemed were near failure; these conditions affected an entryway that was about 20 feet wide. (Tr. 424, 427). At crosscut 27, in an intersection, Inspector Smith viewed six bolts that were either bent or missing heads. (Tr. 427). Both areas were bolted with 5 foot bolts, which do not support the "trouble zone" of the roof. (Tr. 429).

Inspector Smith designated the order as S&S. (Tr. 431). The preshift examiner in this instance failed to "protect the safety and health of the coal miners." (Tr. 430). The inspector believed that the cited roof conditions, if left unabated, would have led to a roof fall that could cause fatal injuries. (Tr. 425, 432). Based on the damaged roof bolts and the fact that the mine has a history of roof control violations and a "trouble zone" at the 5 foot depth of the roof, Inspector Smith believed that these roof conditions were reasonably likely to result in an injury (Tr. 428-29, 433). Furthermore, the cited area is both the secondary escapeway and the main entrance of the mine. (Tr. 436-37).

Inspector Smith testified that the order was the result of the operator's high negligence and unwarrantable failure to comply with the standard because the operator knew or should have known of the condition and there were no mitigating factors. (Tr. 433). Mine management should have known about the conditions because foremen traveled the cited area every day and the preshift examiner is the agent of the operator and should have found and recorded the roof control problems. (Tr. 434, 437). He also noted that MSHA had warned the Horizon Mine's

management on at least two occasions that their roof examinations were inadequate. (Tr. 435). The conditions were both obvious and extensive. (Tr. 436). Usually, a weight shift like the one that caused the damage in this area would also cause dust or debris to fall, but the Inspector did not observe any in the area, which led him to estimate that the underlying conditions existed for at least a day. (Tr. 438). Inspector Smith designated that six miners would be affected because that was the number of miners in the section. (Tr. 434).

Roger Tuttle testified that the plates at crosscuts 9 and 10 were showing a small amount of deflection, but that he did not believe the conditions were severe enough to constitute a hazard. (Tr. 469). At the time of the inspection, Tuttle had looked at the cited area twice a day, five days a week for about a year. (Tr. 467-68). Tuttle did believe that there were three bolts that were damaged, but he stated that there was already supplemental roof support in that area. (Tr. 479). He further testified that the bolts in the cited sections were fully-grouted bolts, which can support a roof even without a head or plate. (Tr. 464). According to Tuttle, the plates in question looked the same at the time of the trial as they did at the time of the inspection. (Tr. 472).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.360(b) by failing to adequately examine for and report hazardous conditions along two separate crosscut sections and a penalty of at least the assessed amount of \$14,743.00 is appropriate. At crosscuts 9 and 10, Inspector Smith observed 16 bolts taking weight, seven of which were near total failure. Six bolts were damaged quite badly at crosscut 27 as well. The preshift examiner in this area should have observed, recorded and fixed these roof problems, but he did not.

Hidden Splendor's failure to conduct an adequate preshift examination was S&S because the violation of section 75.360(b) was reasonably likely to lead to a roof fall that could cause fatalities, argues the Secretary. The Horizon Mine has a history of roof falls. Also, although in compliance with the roof control plan when installed, 5 foot bolts were not ideal to stabilize the roof in this area. The combination of the damaged bolts, history of roof falls in the mine, and the use of 5 foot bolts made a roof fall in either of the cited areas reasonably likely.

Respondent's high negligence and unwarrantable failure caused its violation of section 75.360(b), according to the Secretary. The conditions were obvious, extensive, and should have been noted by the preshift examiner, who is an agent of the operator. There was a high risk of danger associated with a roof fall in this area due to the extent of the conditions and its location in a main travelway. These conditions also existed for some time, at least before the preshift examination. Previous citations placed Respondent on notice that more effort needed to be placed into preshift examination to comply with the Secretary's standards. There were no mitigating factors.

Respondent admits the violation of section 75.360(b), but disputes the designations of S&S, high negligence, unwarrantable failure. The S&S designation was unsupportable because an injury was not reasonably likely to occur as a result of the violation. Although Respondent should have identified the hazard at crosscut 27, the conditions at 9 and 10 did not present a hazard in Respondent's opinion. The fact that the plates were showing deflection was not a hazard, but simply something that required attention. The fully grouted resin bolts present in the

cited sections could stabilize the roof even with damaged or missing heads or plates. Furthermore, the inspector based this designation on the history of roof falls at the Horizon Mine, but failed to consider that the cited section did not have a history of roof falls and that the Horizon mine has never had an injury due to a roof fall. Furthermore, the underlying citations were both designated as non-S&S.

Respondent believes that there was a difference of opinion between mine management and MSHA rather than a situation where designations of high negligence and unwarrantable failure are appropriate. Supplemental supports that Respondent erected in the First West travelway show that mine management monitored and addressed roof control issues. The Secretary failed to show either that the conditions had existed for a long period of time or that the conditions were obvious. Furthermore, the bolts could have been recently damaged when equipment was moved through the area. Respondent's culpability in regard to the cited conduct was neither highly negligent nor aggravated because Respondent was not ignoring hazards; rather, Respondent identified the conditions and disagreed with the Inspector as to the severity of, and danger posed by, those conditions.

3. Discussion and Analysis

It is well recognized that roof falls pose one of the most serious hazards in underground coal mines. *United Mine Workers of America v. Dole*, 870 F. 2d 662, 669 (D.C. Cir. 1989). A mine examiner must be unceasingly vigilant when inspecting the roof to protect miners who work or travel in the area. It is critical that preshift examiners conduct thorough and detailed examinations of the mine and that they pay particular attention to the condition of the roof.

I find that Respondent's violation of section 75.360(b) was S&S. Respondent admitted the violation. The discrete safety hazard contributed to by the violation is the danger of a roof fall occurring in an area that was not adequately examined. Clearly, a roof fall in any of the cited areas could be fatal for a miner and I credit Inspector Smith's testimony in this regard. Finally, I also find that there is a reasonable likelihood of injury due to a roof fall contributed to by the inadequate examinations at Horizon Mine. Regardless of the history of roof falls in the Horizon Mine, unsupported roofs lead to roof falls. The negligent examination practices that allow unsupported roofs to occur are even more dangerous and more likely to lead to injury than any single unsupported roof. Every time that an examiner fails to recognize a problem area in the roof, a roof fall becomes more likely, and an injury resulting from such a fall becomes more likely. I credit Inspector Smith's testimony that a roof fall would actually have occurred without correction of the cited condition. Respondent's violation of section 75.360(b) contributed to the potentially fatal hazard posed by roof falls, which are reasonably likely to result in an injury.

Considering all the facts and circumstances associated with the cited violation of section 75.360(b), I find that the order was not an unwarrantable failure and was the result of moderate negligence. Some aggravating factors do exist. Respondent admits that it should have known of at least one of the underlying conditions and Smith testified that this condition was obvious due to the severe damage to the bolts. MSHA warned Hidden Splendor that greater efforts were necessary for achieving adequate inspections. The risk of roof falls poses a high degree of danger. Respondent failed to improve its preshift examinations despite MSHA's warnings.

I find that Respondent mitigated its negligence due to its honest, good faith belief that the conditions in crosscuts 9 and 10 did not pose a hazard to miners. This area was the main entryway. Roger Tuttle testified that he walked beneath the cited section of roof ten times a week, looking at the roof support every time. If Roger Tuttle, or anyone else at the Horizon Mine, had believed this condition was a hazard, I believe Respondent would have further supported the roof. According to Tuttle, the bolts in the cited area with the most damage were already buttressed with supplemental support. Also, the high traffic in this area suggests that the violation was not obvious, as most of Respondent's employees had an opportunity to see the roof in that area. The order is hereby modified to a section 104(a) citation. A penalty of \$5,000.00 is appropriate for this violation.

N. Order No. 8457347: WEST 2009-1451

On July 29, 2009, MSHA Inspector Smith issued Order No. 8457347 under section 104(d)(2) of the Mine Act, alleging a violation of section 77.202 of the Secretary's safety standards, which was later amended to be a violation of section 77.1104. The citation states:

The area around #1 surface belt tailpiece and magnet had dangerous accumulations of float coal dust and coal fines on/around the structure. Coal fines were measured at 4 ft in width by 10 ft in length and up to 9 inches deep and were rubbing the belt and out-by bottom belt roller. In addition accumulations under the belt at the magnet were measured 3 ft wide by 8 ft in length and up to 4 inches deep. Float coal dust was in the air around these areas and on the structure. The belt was in service at this time.

(Ex. G-69). Inspector Smith determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, one person would be affected, and the violation was the result of Respondent's unwarrantable failure. Section 77.1104 of the Secretary's regulations requires that "[c]ombustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard." 30 C.F.R. § 77.1104. The Secretary proposed a penalty of \$4,000.00.

1. Background Summary of Testimony

Inspector Smith first noticed a suspended cloud of float coal dust by the #1 tail piece. (Tr. 497). Next, he viewed a roller turning in dry coal fines and producing both the float coal dust and heat. (Tr. 498). The accumulations under the belt measured 4 feet wide by 10 feet in length by 9 inches deep. (Tr. 502). There were also accumulations outby but not touching the roller that measured 3 feet wide by 8 feet long and 4 inches deep. *Id.* The accumulations were composed of dark black coal sized anywhere from fines to 2 inch nut coal. (Tr. 502-03).

Inspector Smith designated the order as S&S because it was reasonably likely that a serious injury would occur. (Tr. 510). The presence of an ignition source, oxygen, and fuel led Inspector Smith to believe that the accumulations could contribute to a fire. (Tr. 503).

The Inspector designated the hazard as reasonably likely to cause an injury because the friction between the roller and the coal fines produced heat. *Id.* Inspector Smith stated that the

movement also produced float coal dust, which convinced him that the cloud was not created by the wind. (Tr. 516). Inspector Smith had seen fires start in this way at several different locations. (Tr. 504). The roller, the area under the tail piece, and passing non-permissible equipment were all ignition sources. *Id.* The combination of the roller and tail piece was Inspector Smith's main concern, as he envisioned an ignition of the coal fines due to the roller turning in the fines. (Tr. 506). He was also concerned about the ignition of the float coal dust by the non-permissible equipment. He testified that the coal dust was far enough into the roadway that the electrical systems of the equipment could ignite the cloud, which would lead to a flash that would injure any miner in its vicinity. (Tr. 505). In a worst-case scenario, the float coal, the fines, and any grease on the belt drive would all catch fire. (Tr. 508).

Inspector Smith designated the injuries resulting from such a fire as lost work days or restricted duty injuries. He worried about smoke inhalation and possible burns stemming from the fire itself. (Tr. 509). Due to the materials stored in the area, he also believed that injuries from slips, trips and falls, as well as cuts and abrasions could occur while fighting the fire. (Tr. 510).

Inspector Smith designated Respondent's negligence as high. (Tr. 511). Respondent knew or should have known of the condition because a supervisor walked through the area 15 minutes before Inspector Smith issued the citation. *Id.* The supervisor should have seen the large cloud of float coal dust, as it was obvious. (Tr. 512). Based upon the size of the accumulations and cloud, this condition was extensive. (Tr. 511-12). Further, Inspector Smith testified that Respondent had noticed that greater efforts were necessary to address accumulations because the same area had been cited for accumulations 12 days earlier when the inspector issued Order No. 8457347. (Tr. 513). Based upon the size of the accumulations and the fact that the mine had just completed a down shift, Inspector Smith believed that the accumulations had been there for longer than a shift, but no more than 48 hours. He did not believe that the accumulations resulted from a recent spill because it took two hours of work with a power washer to remove the hard-packed accumulations. (Tr. 523).

Roger Tuttle testified that due to a 15-foot drop where coal dumps from the #2 belt to the #1 belt, there is a cloud of coal dust at the cited location when dry coal is being produced. (Tr. 534). Upon activation, the belt usually produces a cloud of coal dust as well. (Tr. 535). Tuttle did admit that the belt rolling on accumulations could produce coal dust and eventually lead to a fire. *Id.*

2. Summary of the Parties' Arguments

Respondent's violation of section 77.1104 is S&S. Inspector Smith testified that the cited conditions could lead to a large fire or a coal dust flash, which could result in smoke inhalation, burns, and slip-and-fall type injuries. The accumulations were reasonably likely to lead to injury because they were extensive and could have been ignited by the tailpiece roller rubbing on the coal fines, the belt rubbing in the coal fines, or non-permissible equipment traveling in the area. At least one miner would be in the area and if a fire started it could grow quickly and would require miners to fight the fire by hand. Sustained operation of the belt would further increase the likelihood of a fire-causing injury.

Respondent's high negligence and unwarrantable failure led to its failure to comply with a mandatory safety standard. An accumulation citation was issued in the same area about a week earlier, which put Respondent on notice that greater efforts were required to comply. The condition was obvious and extensive. The cloud of coal dust was 10 to 15 feet wide and high, was visible from the office, and was directly in the route of anyone traveling into the mine. The accumulations were large and Inspector Smith noticed them immediately. The accumulations existed for a period of time greater than one shift because, during the previous shift, the belt had been idle and the accumulations were compacted and difficult to remove. The fire hazard makes this violation highly dangerous. The fact that Mr. Cisneros, a supervisor, passed the accumulations and coal dust cloud shows that Respondent knew or should have known of the condition.

Respondent asserts that the cited conduct violated section 77.1104, but did not constitute high negligence or an unwarrantable failure. Belt spills and accumulations can occur very quickly and the Secretary did not show that this particular accumulation existed for any length of time. The dust cloud could have appeared suddenly due to the 15-foot drop at the coal transfer point, or could have occurred due to the belt beginning to move. In either situation, a dust cloud would be normal and might not alarm a supervisor. Either scenario could also have occurred after the supervisor walked through the area. The supervisor's conduct should not be considered highly negligent simply because he failed to turn his head and look at the accumulations. The Secretary's evidence is speculative and Respondent's negligence should be no more than moderate.

The cited condition is not S&S because a fire was unlikely to begin and unlikely to injure miners if it did. Common sense dictates that a fire beginning as the result of a passing vehicle is a remote possibility. Moreover, since the conveyor belt moved continuously, it would not generate or retain enough heat in any one place to ignite the accumulations. The belt was flame resistant and there was fire equipment in the area. This belt area is on the surface, rather than underground, allowing both smoke and miners to exit the area quickly in the event of a fire, which makes an injury as the result of a fire unlikely. The order should be modified to a non-S&S, section 104(a) citation based upon the operator's moderate negligence.

3. Discussion and Analysis

Respondent stipulated to the violation, but I find that the Secretary did not meet her burden to show that the violation was S&S. To prove a finding of S&S, the Secretary is required to show that a fire is reasonably likely to occur and cause a serious injury. Although the Secretary showed that the violation contributed to a discrete safety hazard of causing a fire, which could cause serious injuries, she did not show that a fire was reasonably likely to occur and cause an injury. The Secretary did not show that the main ignition sources, the roller and belt rolling in the accumulations, were likely to lead to a fire. I find that the ignition of the float coal dust from non-permissible machinery is possible, but not reasonably likely.

If a fire did occur, furthermore, the location of the belt makes serious injuries less likely. Generally, the most serious repercussions of fires in coal mines are smoke inhalation and carbon monoxide poisoning. As the cited belt was outside, smoke and carbon monoxide are less likely to accumulate in the event of a fire.

Considering all the facts and circumstances before me, I find that the designations of high negligence and unwarrantable failure are appropriate. The violation existed for at least a shift and based upon the difficulty of removing the accumulations, possibly longer. The accumulations and the cloud of float coal dust were large, prompting me to call the condition extensive. The size of the accumulations and cloud, as well as their location within sight of the office and anyone entering the mine, make this violation obvious. The operator was cited less than two weeks prior to the issuance of Order No. 8457347 and was surely on notice that greater efforts were necessary for compliance. Respondent did abate the previous citation, but it did nothing to correct the current violative condition or prevent further accumulations. Furthermore, based upon the location of the cloud and accumulations, coupled with the fact that a supervisor passed through the area 15 minutes before Inspector Smith issued the citation, I find that the operator knew or should have known about the violation. Although the violation was not reasonably likely to cause an injury and therefore did not pose a high degree of danger, Respondent's aggravated conduct shows that Order No. 8457347 was the result of high negligence and an unwarrantable failure on the part of Respondent. A penalty of \$500.00 is appropriate for this violation.

O. Citation No. 8454109; WEST 2009-210

On September 4, 2008, MSHA Inspector Charles Bordea issued Citation No. 8454109 under section 104(a) of the Mine Act, alleging a violation of section 75.512 of the Secretary's safety standards. The citation states, in part:

After the electrical inspection of equipment in the K-North Section (MMU-001), it is determined that an inadequate weekly exam is being allowed on one of the permissible equipment. Mainly involved is the ARO roof bolter (2G-4136A-0) which has been in operation here since June 2008. No one noticed that fire suppression protection had not been installed for the cable reel compartment. No entry was made at any time by any examiner in the weekly record of examination about this.

(Ex. G-28). Inspector Bordea determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, and that six persons would be affected. The Secretary proposed a penalty of \$6,996.00 for this order.

1. Background Summary of Testimony

Inspector Charles "Bill" Bordea issued the citation under section 75.512 because he found obvious safety hazards that the examiner did not record in the examination book. (Tr. 544-45). One such hazard was a 4-inch gash in the outer protective armor of a trailing cable on shuttle car #6, which created a shock hazard in the damp mine conditions. (Tr. 546-47). Inspector Bordea testified that this condition should have been found during a weekly exam. (Tr. 548). Another hazard on the shuttle that worried Inspector Bordea was that the unused holes on the backs of headlights were not plugged with a standard plug and tack-welded into position. *Id.* This condition should have been corrected in a weekly examination, as the inspector stated that electrical examiners learned this in a "101" type of class. (Tr. 549). It is also a high priority

because these unplugged holes produce heat and arcs that can ignite coal dust or other flammable substances. *Id.* Inspector Bordea testified that failure to find this hazard shows that the weekly examination failed in its primary purpose, which is to prevent fires and fire-related injuries such as burns and smoke inhalation. (Tr. 550).

Shuttle car #5 lacked the required insulation that prevents a shock hazard on the cable reel. (Tr. 551). This condition is easy to notice visually by opening a hinged door, and examiners should be trained to do so. (Tr. 551-52). This condition occurs over time with wear. (Tr. 551). A lack of insulation could lead to a ground fault and excess voltage on the reel, which poses a shock hazard to the machine operator and anyone touching the machine. (Tr. 553). Electrocutation is the worst case scenario, as the miner could contact 500 volts in damp conditions. (Tr. 553).

Inspector Bordea also found hazards on the ARO roof bolter. (Tr. 554). He testified that the protective conduit that went around the number 14-3 120-volt cable that was connected to the light at the top of the TRS had a gash in it. (Tr. 555). The underlying cable was undamaged, but it was exposed. (Tr. 556). If the cable were to be cut, any miner contacting it would be exposed to 120-volt electric power. *Id.* A visual examination should have revealed this defect. *Id.*

The cable reel on the roof bolter, furthermore, did not have any fire suppression, a hazard that could easily be identified by a visual examination. (Tr. 557). The Inspector testified that 40% of electrical machine fires on machines with cable reels begin at the cable reel because the cable generates large amounts of heat and is a conductor. (Tr. 559-60). The inspector found that a cable reel without fire suppression was reasonably likely to cause a serious injury to a miner and was indicative of a high level of negligence on behalf of the operator. (Tr. 561-63).

Inspector Bordea concluded that all these defects showed that the operator was not adequately conducting electrical examinations at the mine in accordance with section 75.512. (Tr. 566). He believed that the inadequate inspections were reasonably likely to lead to an injury because over time they would lead to more numerous and possibly more dangerous hazards. *Id.* The fact that some hazards were found and corrected while some went unnoticed for weeks worried the inspector and led him to believe that other serious issues would occur. (Tr. 567). He believed six persons would be affected because six was the minimum number of miners in a section. (Tr. 568).

The inspector also testified that the citation was the result of Hidden Splendor's high negligence. (Tr. 568). First, all the defects were obvious upon the completion of a simple visual examination, but none were marked in the permissibility log book. (Tr. 565-66). Inspector Bordea believes that the lack of required insulation on shuttle car #5, the unwelded packing glands on #6, and the cable reel on the roof bolter existed for at least several weeks. (Tr. 554). The possible hazards were dangerous and should have been spotted by Respondent. (Tr. 553, 566-69).

Dennis Dodds testified that between July 15 and September 4, 2008, the bolter was out of service because the bolter's temporary roof support broke. (Tr. 586). The bolter was, however, in service on September 4. (Tr. 588). Although a functional test would not be performed on the bolter until it had been in the mine for six months, Dodds admitted that when the bolter returned to service, the Act required a permissibility exam to check the fire suppression. (Tr. 589-90).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent violated 30 C.F.R. § 75.512 by failing to conduct an adequate weekly electrical examination on multiple pieces of permissible equipment. Respondent's examiner failed to "identify, report and correct five obvious hazardous conditions on three pieces of equipment," which is a violation of 30 C.F.R. § 75.512. (Sec'y Br. at 43). Shuttle car #6 had a damaged trailing cable that contributed to a risk of electrocution and lacked proper tack-welding that contributed to a risk of burns and smoke inhalation from fire, both of which were obvious hazards that existed prior to the last weekly inspection. The cable reel on shuttle car #5 lacked the required insulation, which exposed miners to the hazards of a ground fault on the reel, fire-related injuries and even electrocution. The missing insulation hazard existed prior to the most recent inspection and was obvious. The ARO roof bolter had a damaged protective conduit on its lighting system and was missing fire suppression on its cable reel compartment. The damaged protective conduit posed hazards associated with both fire and shock and the examiner should have detected the obvious defect.

Respondent's violation of section 75.512 was S&S. Each hazard that Inspector Bordea identified could result in serious injuries and as a group all of the hazards are even more likely to do so. Furthermore, Respondent's failure to identify and correct these defects suggests a haphazard approach to examinations. It is reasonably likely that this approach to examinations would lead to serious injuries through Respondent's continued failure to identify hazards.

Respondent's failure to perform adequate examinations on permissible equipment was the result of high negligence. All these defects were obvious upon a visual inspection. At least three of the hazardous conditions existed for a substantial period of time. Multiple examiners, however, failed to report these conditions and there were no mitigating factors.

Respondent argues that the citation was only based upon the defects of the ARO roof bolter. The inspector did not find any notations in the permissibility examination records concerning the roofbolter's missing fire suppression system because the piece of equipment was out of service between July 15, 2008, and September 4, 2008, and therefore no permissibility examination was necessary. The citation alleging inadequate permissibility examinations was issued on September 4, 2008, which means Respondent did not perform permissibility exams upon the equipment prior to Inspector Bordea's inspection. Thus, Respondent did not violate section 75.512 and Citation No. 8454109 should be vacated.

If the court upholds the citation, Respondent argues that the negligence designation should be reduced to low. An outside company performed the preparatory work on the bolter and delivered the bolter to the mine without a fire suppression system. Since the system had never been present, it was difficult for an examiner to detect the absence of, opposed to a defect of, the system.

3. Discussion and Analysis

I credit Inspector Bordea's testimony that Respondent performed inadequate permissibility exams upon its electric-powered equipment in violation of section 75.512. The inspector referenced five different concerns on three different pieces of equipment. He further testified that all of these defects were obvious and had "time factors," suggesting they existed for

several weeks. (Tr. 565). Respondent's examinations failed to address multiple, obvious violation that existed for a period of time.

Respondent argues that the Inspector based the citation upon the hazardous conditions of the ARO roofbolter only and that the citation should be vacated because the roofbolter was out of service during the permissibility exams. The record, however, does not support these arguments. Inspector Bordea testified that various defects on two shuttle cars and the ARO roof bolter convinced him that Respondent had not been performing adequate examinations. (Tr. 546). Although the body of the citation states that it "mainly involved" the fire suppression on the ARO bolter, it also references inadequate examinations on "some of the permissible equipment." (Ex. G-28). Both the language of the citation and the inspector's testimony support the conclusion that the missing fire suppression system on the roof bolter was Inspector Bordea's most important consideration when writing the citation, but it was not the only condition that he considered.

It is immaterial that the roofbolter was out of service from July 15, 2008 to September 4, 2008. When the bolter was returned to service on September 4, Dennis Dodds testified that a permissibility exam was conducted. That exam did not find either of the defects on the ARO roof bolter, which were obvious and only required a visual inspection to be found.

I find that this citation is S&S. The violation contributed to a variety of discrete safety hazards including a shock hazard that could cause electrocution and a fire hazard that could cause smoke inhalation. The potentially fatal effects of electrocution and smoke inhalation are serious injuries. The fact that there are multiple violations supporting this citation, one of which is reasonably likely to cause injury on its own, suggests that the conditions caused by the inadequate examinations at the mine are reasonably likely to cause an injury. When I consider the effect of Respondent continuing to conduct inadequate exams combined with the number of underlying violations, the reasonable likelihood of an injury becomes even easier to predict.

I also find that Citation No. 8454109 was the result of Respondent's high negligence. I credit Inspector Bordea's testimony that the defects upon which he based this citation were obvious, dangerous, and had existed for some time. Respondent should have known that its examiners performed inadequate examinations because finding the violative conditions was apparent upon a visual inspection. A penalty of \$7,000.00 is appropriate for this citation.

P. Citation No. 8454042 and Order No. 8454043; WEST 2009-208

On June 2, 2008, MSHA Inspector Curtis issued Citation No. 8454042 under section 104(a) of the Mine Act, alleging a violation of section 75.220 of the Secretary's safety standards, which was later amended to be a violation of section 75.202. The citation states:

The top in section 2nd West MMU 002-0, in the belt entry in front of the feeder breaker, between cross cut #14 and #15 was showing signs of taking weight. The area had recently been re-bolted and several of the new bolts were pulling through the mesh into the roof, several old bolts were broken and also pulling through the mesh into the roof. This area is traveled by a shuttle car and [is]

just inby the travel way for every one traveling in and out of the section along the belt entry.

(Ex. G-8). Inspector Curtis determined that an injury was highly likely to occur and that such an injury could reasonably be expected to result in a permanently disabling accident. Further, he determined that the violation was S&S, the operator's negligence was high, and six persons would be affected. Section 75.202 of the Secretary's regulations requires:

- (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock burst
- (b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

30 C.F.R. § 75.202. The Secretary proposed a penalty of \$15,570.00 for this citation.

On June 2, 2008, Inspector Curtis also issued Order No. 8454043 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.360(a)(1) of the Secretary's safety standards, which was later amended to be a violation of section 75.360(b). The order states:

The pre-shift that was done and phoned out for section 2nd West, MMU 002-0 on 6-2-08, was inadequate in that the examiner failed to identify the hazard of bad top that was in the belt entry between cross cut # 14 and # 15. This area is just inby w[h]ere everyone travels in and out of the section through the belt entry. It is also a haulage way used by one shuttle car. This area had been re-bolted recently so the area had been identified once as a bad top area. This section has a history of unintentional roof falls.

(Ex. G-13). Inspector Curtis determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be permanently disabling. Further, he determined that the violation was S&S, the operator's negligence was high and six persons would be affected. Section 75.360(b) requires that "[t]he person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations." 30 C.F.R. § 75.360(b). The Secretary proposed a penalty of \$7,774.00 for this order.

1. **Background Summary of Testimony**

On June 2, 2008, Inspector Curtis issued Citation No. 8454042. (Tr. 693). Inspector Curtis testified that he modified Citation No. 8454042 from a section 75.220 violation to a section 75.202 violation because there were "bad circumstances" in the belt entry area between crosscuts 14 and 15. (Tr. 695-96). The newer bolts in the area were taking weight and coming through the mesh, while the mesh itself was taking weight, causing it to hang down between the bolts from four to six inches. *Id.*

Inspector Curtis issued Order No. 8454043 based upon the same roof conditions as Citation No. 8454042. (Tr. 711). Although the preshift examiner conducted the examination, he

did not record any of the roof problems and Inspector Curtis believed that the examiner should have seen and addressed the roof conditions in the cited area. (Tr. 712, 714).

Inspector Curtis designated Citation No. 8454042 as S&S. (Tr. 701). He believed that the roof conditions were highly likely to result in an injury because he believed that this roof would eventually fall if not corrected. (Tr. 700). Furthermore, this specific section of the mine had a history of roof falls and this area was in front of a feeder breaker, which meant that shuttle cars would pass through two shifts a day, and anyone could walk to the entry. (Tr. 702-03). The area is also a production section and miners worked in the area on three shifts a day, causing miners to be in the area for 24 hours a day. (Tr. 703). He found that an injury caused by a roof fall would be permanently disabling, causing at least broken bones or contusions and at worst fatalities. (Tr. 701).

Order No. 8454043, Inspector Curtis asserted, was also S&S. The same rationale applies to the S&S nature of Order No. 8454043 and Citation No. 8454042. (Tr. 713-14). Inspector Curtis, however, made it clear that he issued Citation No. 8454042 due to the condition of the bolts while he issued Order No. 8454043 because the preshift examiner failed to notice the hazard posed by the bolts. (Tr. 714). He did testify, however, that an examiner would not necessarily be expected to note and address the failure of old bolts after new bolts were installed. (Tr. 724).

Inspector Curtis designated Respondent's negligence as high in regard to both Citation No. 8454042 and Order No. 8454043. (Tr. 706,715). Inspector Curtis testified that MSHA previously issued a citation for this area. (Tr. 704). He also stated that despite the fact that the roof control plan required 8-foot bolts in the area, he only observed 7-foot bolts. (Ex. G-94; Tr. 716). The top was unstable for 8.5 feet, a condition that the roof control plan required the operator to test for. When the operator rebolted the area, it only used 7-foot bolts. (Ex. G-94; Tr. 708). The inspector believed that Respondent should have known that the roof support in this area was insufficient because the 7-foot bolts failed to support the roof, but Respondent used 7 foot bolts again when it rebolted the area. (Tr. 710). He also believed that since Respondent installed new bolts, it had actual knowledge of the insufficient roof support, but failed to sufficiently address the hazard. (Tr. 715). He designated that six persons would be affected because there are six miners on a crew, although Joe Fielder testified that it was likely that only one person would be affected. (Tr. 710, 743).

Roger Tuttle testified that he was in the belt entry area between crosscuts 14 and 15 on a daily basis and that he habitually checked roof conditions wherever he went. (Tr. 738). He further testified that while there were older, damaged bolts in the cited area, the newer bolts adequately supported the roof. (Tr. 735). He also disagreed that the mesh was taking weight, claiming that it sagged due to the roof and the way that it was bolted. (Tr. 734). Tuttle agreed with Inspector Curtis that an examiner should not be required to note damaged old bolts if satisfactory new bolts were in place. (Tr. 736). Although he testified that the bolts worked, he referred to the roof in the cited area as "an area to watch" and he was not sure whether he would have recorded the conditions in the preshift book. (Tr. 736). He also testified that he recalled that the mine used 8- to 10-foot cable bolts in the rebolting process. (Tr. 736).

2. Summary of the Parties' Arguments

Respondent violated section 75.202 by failing to adequately support and control the roof in the belt entry between crosscuts 14 and 15. Inspector Curtis issued Citation No. 8454042 due to obvious safety hazards. Many roof bolts in the area "were either loaded up, pulling through the mesh, broken and/or missing heads." (Sec'y Br. at 12). The mesh was sagging four to six inches from the roof, and the roof itself was sagging between rows of mesh. Miners traveled in the area.

Respondent's violation of section 75.202 is S&S. Inspector Curtis found that if left unaddressed, the roof would in fact fall. For this reason, as well as the section's history of roof falls, the extent of the bolt damage, roof sag, and the fact that miners traveled through the area, the inspector decided that an injury was highly likely to occur. The citation designated that the injuries would be permanently disabling and the inspector testified that the injuries could even be fatal.

The same conditions that constituted a violation of section 75.202 also led to Respondent's violation of section 75.360(b) for inadequate preshift examinations because the examiner did not record the hazardous roof conditions. Respondent's failure to record the hazardous roof conditions in the cited area was S&S. Inspector Curtis testified that the roof would have fallen if left unattended and he determined that the conditions themselves were highly likely to cause an injury.

The violations described in Citation No. 8454042 and Order No. 8454043 were the result of the operator's high negligence and unwarrantable failure. The violative condition was obvious and extensive. Respondent knew of the roof conditions and rebolted the roof, but did not adequately address the hazard because the new bolts were in bad condition as well. The new bolts were 7-foot bolts. Seven-foot bolts had already failed to support the roof, and the roof control plan at that time required at least 8-foot bolts.

Respondent argues that Citation No. 8454042 should be vacated because the roof was adequately supported to protect miners from roof-related hazards. Roger Tuttle traveled through the cited area on a daily basis at the time of the citation and he testified that the roof required continued monitoring, but was not a hazard. The mesh was not taking weight, but it appeared that way due to the installation of the new roof bolts. Tuttle also thought that the new bolts were 8- or 10-foot cable bolts, and not 7-foot bolts. Order No. 8454043 should be vacated for the same reasons as Citation No. 8454042, as a reasonably prudent miner would not have recognized that the cited roof conditions were hazardous.

Roger Tuttle's testimony should be given greater credit than that of Inspector Curtis. The inspector testified that the older bolts were 7 feet long, but the previous roof control plan only called for 5 foot bolts. The roof control plan at the time of the citation called for 8- to 12-foot cable anchor bolts, but the inspector did not cite the mine for using 7-foot bolts. Inspector Curtis also admitted it was possible that he may have not seen the longer bolts.

An injury was not reasonably likely to occur as a result of these roof conditions and, therefore, neither Citation No. 8454042 nor Order No. 8454043 should be designated as S&S. Inspector Curtis testified that if Respondent did not fix the roof, it would eventually fall, but he

did not say that the fall was highly likely to cause an injury. The miner most likely to be affected in a roof fall would be the shuttle car operator and the shuttle car canopy would protect him. An injury was unlikely. Joe Fielder testified that there would rarely be more than one miner present in the area at any time. Also, the inspector designated Order No. 8454043 as reasonably likely, which undermines the highly likely designation of Citation No. 8454042.

The inspector's high negligence designation for the citation and order, as well as the unwarrantable failure designation of Order No. 8454043, erroneously relied upon the fact that the operator used the same size bolt to supplement the roof support in the cited area. The original plan called for 5-foot bolts and the amended plan called for 8- to 12-foot bolts. Basically, Inspector Curtis was mistaken about what size the old bolts and the new bolts were, as well as the fact that they were the same size. The negligence determination, furthermore, should consider that the operator was doing what it was supposed to do in this situation: supplementing the roof support. Respondent contends that it had been monitoring and supporting the roof conditions in the cited area.

3. **Discussion and Analysis**

The Secretary's roof-control standard 30 C.F.R. § 75.202(a) is broadly worded. Consequently, the Commission held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided in order to meet the protection intended by the standard." *Harlan Cumberland Coal Co Company*, 20 FMSHRC 1275, 1277 (Dec. 1998) (citing *Helen Mining Company*, 10 FMSHRC 1672, 1674 (Dec. 1988)).

I find that the Secretary established a violation of section 75.202. I credit Inspector Curtis' testimony that the old bolts, the new bolts, and the mesh in the area between crosscuts 14 and 15 were in bad condition and therefore did not adequately support the roof in the cited area. When even the newly installed roof bolts are in bad condition and taking weight, a reasonably prudent person familiar with the mining industry would find that the roof conditions were dangerous.. Much of the testimony that Respondent uses to try to discredit Inspector Curtis' testimony, furthermore, is not based upon actual observations of the cited area, but rather general knowledge of the "rebolting process" or the roof control plan. (Tr. 733, 736). Generally stating what size bolts were supposed to be used in the cited area does not prove what size bolts and roof-control measures were actually used. For these reasons, Inspector Curtis' observations and notes concerning the problems with the roof establish a violation of section 75.202.

I also find that the Secretary established a violation of section 75.360(b). I credit Inspector Curtis' testimony that a preshift examiner should have recorded the hazardous condition of the roof. Even Respondent's witness, Roger Tuttle, was not willing to testify that these conditions were not a violation of 75.360(b). When asked if the cited roof conditions were hazardous, he was equivocal. (Tr. 736).

I find that Citation No. 8454042 is S&S. Having already established the violation of 75.202, I find that Citation No. 8454042 contributed to the discrete safety hazard of a roof fall that could lead to serious, crushing, permanently disabling injuries. I credit Inspector Curtis' testimony that an injury is reasonably likely, but not highly likely, to occur as a result of the

violation. Respondent's argument that the Secretary does not provide evidence to show that an injury was highly or even reasonably likely to occur as a result of the violation is a mischaracterization of the testimony given at hearing. Inspector Curtis testified that the roof would eventually fall and he also testified that there were ample opportunities for a miner to be in the area. (Tr. 700-03). Roof falls are one of the most serious hazards in underground coal mines and Respondent's suggestion that this violation is unlikely to result in an injury is not credible given that miners frequent the area.

I find that Order No. 8454043, the failure to record the roof conditions in a preshift exam, is S&S. This violation contributed to the discrete safety hazard of a roof fall leading to serious, crushing, permanently disabling injuries. I credit Inspector Curtis' testimony that the failure to notice, record or fix the underlying roof problems was reasonably likely to lead to a serious injury. Inadequate preshift examinations, moreover, are likely to lead to more hazards being left uncorrected and injuring miners. I find that this order contributed to the discrete safety hazard of a roof fall and was reasonably likely to lead to serious, perhaps even fatal, injury.

Looking at all the facts and circumstances, I find that Respondent acted with moderate negligence with respect to both the citation and order. I also find that Respondent's conduct with respect to the violation set forth in Order No. 8454043 was not an unwarrantable failure to comply with section 75.360(b). Inspector Curtis testified that the hazardous roof conditions were both obvious and extensive, and I credit his testimony. The threat of a roof fall posed a high degree of danger. A previous citation placed the operator on notice that greater efforts were required for compliance. Neither side explicitly addressed how long the violative condition existed.

Respondent should have known that the roof conditions presented a hazard even after its attempts to support the roof. Respondent's efforts to correct the hazardous condition, however, mitigate Respondent's negligence. Although the supplemental roof bolts were inadequate, it showed that Respondent made an attempt to address the hazard. Roger Tuttle's testimony suggests that Respondent believed its efforts to correct the hazard were sufficient. I find that Citation No. 8454042 and Order No. 8454043 were the result of moderate rather than high negligence and that Order No. 8454043 did not rise to the level of an unwarrantable failure. The order is hereby modified to a section 104(a) citation. A penalty of \$5,000.00 is appropriate for Citation No. 8454042 and a penalty of \$5,000.00 is appropriate for Order No. 8454043.

Q. Citation No. 6685835; WEST 2009-209

On August 19, 2008, MSHA Inspector Russell Bloomer issued Citation No. 6685835 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation states:

An area of unsafe roof was allowed to exist in the North Sub-Mains at crosscut 4, between #1 and #2 entries. The high-side rib has a cutter extending the entire length of the pillar, and there were 2 severed roof bolts and 21 bearing plates showing excessive weight.

This area is traveled by the Weekly Examiner, and this hazardous condition exposes him to fatal crushing injuries in the event of a roof fall.

(Ex. G-26). Inspector Bloomer determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. The Secretary proposed a penalty of \$2,282.00 for this order.

1. Background Summary of Testimony

Inspector Bloomer issued Citation No. 6685835 due to a roof fall hazard in an entry to the Third North section that violated section 75.202(a) of the Secretary's safety standards. (Tr. 793). Two roof bolts had severed heads, but the Inspector could not determine if a lateral shift caused the damage or if the bolts had exceeded their yield. *Id.* There were also 21 bearing plates that were starting to deflect or deform. (Ex. G-27, Tr. 795). Two cutters in the ribs, one extending 80 feet and the other 20 feet, also suggested to Inspector Bloomer that a roof fall hazard existed. (Ex. G-27, Tr. 794).

Inspector Bloomer designated Citation No. 6685835 as S&S. (Tr. 798). The inspector designated this citation as reasonably likely based "largely" upon the mine history, but the conditions also "greatly influenced" his determination. (Tr. 796). He believed that the conditions suggested that the roof was unsafe, and that the entire crosscut between one and two could fall. (Tr. 796-97). Roof falls are one of the leading causes of fatalities in mining, which is why the inspector designated this citation as fatal. (Tr. 797). Generally, this area was only traveled by the weekly examiner, so only one person was likely to be affected. *Id.* The inspector admitted, however, that this route was not necessary for the examiner to travel. (Tr. 804). Although he did not know whether the examiner would travel through the cited area, there was nothing preventing the examiner from doing so. (Tr. 805-06).

Inspector Bloomer testified that Respondent's moderate negligence caused the violation. (Tr. 798). He based his negligence designation upon the fact that the Horizon mine had 13 violations of its roof control plan and 12 75.202(a) violations within the 12 months prior to the issuance of this citation. (Tr. 800). Based upon the number of damaged plates, the inspector also believed that the violative condition was obvious. *Id.* Using his prior observations and experience, he believed the condition lasted for several shifts, but less than a week. (Tr. 801). He also believed it was possible that these conditions occurred after the weekly examiner's last examination. (Tr. 802).

2. Summary of the Parties' Arguments

The citation is S&S because the violation contributed to the discrete safety hazard of a roof fall and a fatal injury was reasonably likely to occur as a result of this violation. Respondent admitted that the cited area was an area where persons work or travel. Nothing prevented the examiner from walking through this area and Respondent did not produce the examiner to testify. The fact that the Horizon Mine has a history of roof falls also makes an injury more likely to occur.

The failure to adequately support the roof was the result of Respondent's moderate negligence. Inspector Bloomer thought not only that the operator should have known of these conditions, but also that they were obvious. Respondent was clearly on notice that greater efforts were required to comply with roof control standards, as Inspector Bloomer discussed greater compliance efforts with management just over two weeks before issuing Citation No. 6685835. Respondent also had an extensive history of roof control violations in the preceding year.

Hidden Splendor admitted to the violation, but contests the gravity and negligence determinations. The cited condition is not reasonably likely to lead to an injury. Miners did not work in the cited area on a daily basis. Only the weekly examiner would pass through the area, and it was not necessary for him to do so. Inspector Bloomer did not know whether any miner had actually traveled through the area during the short period that the condition existed. The inspector's assertion that the Horizon Mine's history of roof falls makes an injury reasonably likely in this situation is erroneous; if there is no miner in the area, no injury can occur even if a roof fall occurs.

The fatal designation is not supported by the facts. Many roof falls occur that do not produce fatalities or even injuries. Despite the history of roof falls at the Horizon Mine, there has never been a roof-fall-related injury reported. Even if the examiner had been in the area at the time of the fall, Inspector Bloomer failed to explain why a roof fall would result in a fatality. The Secretary did not prove any negligence on the part of Hidden Splendor. Inspector Bloomer inappropriately assumed that the citation was the result of high negligence, and worked down from that starting point.

3. Discussion and Analysis

I find that Citation No. 6685835 is not S&S because the Secretary failed to meet her burden to show that an injury was reasonably likely to occur as a result of the violation. Respondent stipulated to the violation, which contributed to the discrete safety hazard of a roof fall that could cause serious injuries. The Secretary failed to prove, however, that an injury had a reasonable likelihood of occurring as a result of the violative conditions because she was unable to show that any miner was reasonably likely to be in the cited area. The cited area was not an active section, and the only person who could possibly be in the area would be the weekly examiner. Inspector Bloomer, moreover, was not even sure that the weekly examiner passed through the area. An injury resulting from a roof fall cannot be reasonably likely if no one is present during a roof fall. Despite the fact that an injury is unlikely to occur, I still find that such an injury is appropriately designated as fatal. The inspector feared that the entire roof would collapse, which is an event that could easily cause a fatality if a miner were present. I find that an injury was unlikely to occur but the violation was serious.

I find that Respondent's negligence was moderate. This condition posed a very high degree of danger to miners, with the possibility of causing fatalities. The history suggesting that Respondent was on notice is extensive. Inspector Bloomer thought that the violative conditions were obvious, which suggests that the operator should have known of the conditions.

Respondent did nothing to abate the hazard.² The condition existed for at least a few shifts, but less than a week. A penalty of \$1,000.00 is appropriate for this violation.

R. Citation No. 6685827 & Order Nos. 6685828 & 6685829; WEST 2009-208 & -342

On July 31, 2008, MSHA Inspector Bloomer issued one citation and two orders that involved alleged violations in both the primary and secondary escapeways of the K North Section. Citation No. 6685827, issued under section 104(a) of the Mine Act, alleged a violation of section 75.380(d)(1) of the Secretary's safety standards. The citation states:

The primary escapeway, located between crosscuts 21 to 23 of the K North CM development section – MMU 001-0, was not being maintained to assure safe passage of persons.

An area of thick mud, which measured up to 16" deep and extended from rib to rib for a distance of 200 feet, would impede the rapid evacuation of miners in the event of an emergency.

(Ex. G-19). Inspector Bloomer determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost work days or restricted duty. He determined that the violation was S&S, the operator's negligence was high, and that six persons would be affected. Section 75.380(d)(1) of the Secretary's regulations requires that "[e]ach escapeway shall be-- (1) [m]aintained in a safe condition to always assure passage of anyone, including disabled persons." 30 C.F.R. § 75.380(d)(1). The Secretary proposed a penalty of \$3,996.00 for this citation.

On July 31, 2008, Inspector Bloomer also issued Order No. 6685828 under section 104(d)(2) of the Mine Act, alleging another violation of section 75.380(d)(1) of the Secretary's safety standards. The order state, in part:

The K North secondary escapeway, from the intake overcast to crosscut 23, was not being maintained in safe condition. There were numerous areas of loose top, exposed roof bolts, and rock accumulations in the walkway. These conditions, especially the roof hazards, expose the miners that travel this secondary escapeway to a high degree of danger. The last weekly examination was performed on 07/30/2008.

(Ex. G-35). Inspector Bloomer determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that six persons would be affected, and that the violation was the result of the operator's unwarrantable failure. The Secretary proposed a penalty of \$63,000.00 for this order.

² Respondent's argument that it did not act negligently because it is not responsible for the "geology of the mine" fails. The Mine Act imposes strict liability on mine operators.

Finally, Inspector Bloomer issued Order No. 6685829 under section 104(d)(2) of the Mine Act, alleging a violation of section 75.364(b)(5) of the Secretary's safety standards. The order states:

An inadequate weekly examination was performed on the K North secondary escapeway. The exam was performed on 07/20/2008, and the record book did not contain any entries regarding hazardous conditions. The hazards observed were extensive and obvious. (References order #6685828.

(Ex. G-22). Inspector Bloomer determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, that 12 persons would be affected, and that the violation was the result of the operator's unwarrantable failure. The Secretary proposed a penalty of \$27,959.00 for this order.

1. **Background Summary of Testimony**

Inspector Bloomer issued Citation No. 6685827 on July 31, 2008, for a violation of section 75.380(d)(1) due to an accumulation of mud in the main escapeway of the K North Section. (Tr. 816-18). Up to 16 inches of mud covered a length of 200 feet of the travelway. (Tr. 819). This mud impeded the safe and rapid passage of miners through the escapeway by presenting stumbling and tripping hazards. *Id.*

In the event of an emergency, Inspector Bloomer reasoned that the cited hazard was reasonably likely to impede the escape of miners. (Tr. 820). The Inspector designated the potential injury as a lost time injury due to the possibility of leg injuries as well as smoke inhalation that would slow escape. (Tr. 820-21). The likelihood of the mud impeding escaping miners is increased by the fact that in an emergency there may be poor visibility. (Tr. 822). He also believed that six miners, the number who were present in the section that day, could all be affected because they would all need to escape. (Tr. 821).

This citation was the result of Respondent's high negligence because preshift examiners traveled this escapeway every day, yet none recorded or addressed the hazard. (Tr. 823). The condition was obvious. *Id.* Based upon the consistency of the mud, the inspector reasoned that the hazard had existed for a week. (Tr. 824). He also testified that the Horizon Mine had 14 escapeway violations in the previous 12 months. *Id.*

On July 31, 2008, Inspector Bloomer also issued Order No. 6685828 for a violation of section 75.380(d)(1) based upon multiple problems throughout the entire secondary escapeway in the K North Section. (Tr. 826-27, 833). The section of roof posing a roof fall hazard was 3 feet wide, 12 feet long and 12 inches thick and was "weighted" to the point that the bearing plates were deformed and showing signs of deflection. (Tr. 829). At crosscut 13 there were accumulations from a roof fall on the walkway that were 5 feet long, 13 feet wide and contained rocks that were up to 8 inches in size. (Tr. 830). These accumulations posed a tripping or stumbling hazard. *Id.* At crosscut 17 there were an exposed bolt and accumulations as a result of a roof fall. (Tr. 831). Another tripping or stumbling hazard existed at crosscut 18, where accumulations measured 7 feet long, 12 feet wide and 15 inches deep. *Id.* Individual rocks were

up to 5 inches in size. *Id.* Between crosscut 21 and 22 there was an area of unsupported roof where four roof bolts were exposed and the roof had fallen parallel to the walkway for a distance of 30 feet. (Tr. 832).

Inspector Bloomer testified that Order No. 6685828 is S&S. (Tr. 836). The multiple conditions and various hazards were reasonably likely to lead to a fatal injury. (Tr. 835). During an escape, miners could be crushed or have their escape stopped by a roof fall, could suffer smoke inhalation due to a slow escape, or could stumble and lose the mouthpiece of their SCSR. (Tr. 835, 820). He also believed that six miners, the number who were present in the section that day, could all be affected because they would all need to escape. (Tr. 825, 836).

A variety of factors led Inspector Bloomer to believe that Citation No. 6685828 was the result of Respondent's high negligence and unwarrantable failure. The hazards were extensive, obvious and dangerous, and a preshift examination had been performed on the area just the day before. (Tr. 837, 835). In December 2007, Inspector Bloomer warned mine management that the roof in this area was taking weight; between December and July, Respondent did nothing to correct this hazard. (Tr. 838). Inspector Bloomer marked these problem areas with flagging on December 17, 2007. That flagging remained until the day he issued Citation No. 6685828 and Respondent had not done anything to address the conditions. (Tr. 839). Based upon his prior observations and the presence of rock dust on the accumulations, Inspector Bloomer surmised that the violative condition existed for an extended period of time. (Tr. 840-41). Inspector Bloomer believed that mine management knew about the conditions, and says that Larry Kulow stated that management "just wanted to mine coal." (Tr. 841). Additionally, the mine had a history of roof falls and MSHA issued 14 escapeway violations to Respondent in the 12 months preceding the issuance of Order No. 6685828. (Tr. 842).

The weekly examiner did not record the conditions described in Order No. 6685828, which prompted Inspector Bloomer to issue Order 6685829 for a violation of section 75.364(b)(5). (Tr. 845). Inspector Bloomer also considered the conditions in the primary escapeway. (Tr. 848).

Inspector Bloomer designated Order No. 6685829 as S&S because he believed that an injury was reasonably likely to occur. (Tr. 848-49). The inspector believed an injury could reasonably be expected to be fatal for the same reasons stated regarding Order No. 6685828. (Tr. 835, 848). He surmised that 12 persons would be affected because two crews worked in this area, although not simultaneously. (Tr. 849).

Respondent's negligence in regard to Order No. 6685829 was high, and Respondent's conduct also represented an unwarrantable failure. (Tr. 849-50). The violative conditions were obvious and extensive. (Tr. 850). The examiner, who is the agent of the operator, made no effort to abate the hazardous conditions. *Id.* MSHA issued the Horizon Mine a total of 14 violations pertaining to examinations in the 12 months prior to the issuance of Order No. 6685829 and conducted training on proper examinations in February of 2008. *Id.*

Inspector Bloomer also recalled a conversation with Larry Kulow where Larry Kulow mentioned "having people mad because he put things in the books." (Tr. 870). The inspector asserted that this conversation pre-dated these citations, but he could not give a specific time frame during which it occurred. (Tr. 871). On cross-examination, Inspector Bloomer admitted

that man doors would allow egress between the escapeways in the event of a blockage. (Tr. 872).

Joe Fielder testified that he knew of the mud problem, but that the mud could not totally be removed, even though they removed the mud as they advanced. (Tr. 880). Miners traveled the muddy area on a daily basis as they went to the faces. (Tr. 882). Fielder believed that the overflow of a storage tank quickly created the mud. *Id.*

2. Summary of the Parties' Arguments

Respondent admitted that it violated section 75.380(d)(1) in Citation No. 6685827 by failing to maintain its primary escapeway in safe condition. Respondent stipulated to the violation of Order No. 6685828 and disputes only the special findings, but Respondent disputes both the violation and the special findings associated with Order No. 6685829.

The Secretary argues that Respondent violated section 75.364(b)(5) when it did not perform an adequate weekly examination of the secondary escapeway. Respondent did not produce a single witness to testify as to the adequacy of the exam. Although the examiner conducted the weekly exam the day before the inspection, Respondent did not record any of the numerous hazards that the Inspector found in the secondary escapeway.

Respondent's failure to maintain safe primary and secondary escapeways was S&S; the same logic applies to Citation No. 6685827 and Order Nos. 6685828 and 6685829. In the event of an emergency, the extensive build-up of mud in the primary escapeway and the numerous hazards in the secondary escapeway would be reasonably likely to lead to an injury by slowing the escape of miners. Hazards in these areas include stumbling and tripping hazards, smoke inhalation, and the loss of an SCSR mouthpiece. The conditions during an emergency situation would both exacerbate these hazards and make them more likely to occur. Miners could be carrying other miners, visibility would be poor, and there could be disorientation and panic among the escaping miners. The conditions in the secondary escapeway also pose a crushing hazard from roof falls, which is why Order Nos. 6685828 and 6685829 were also likely to lead to a fatality. Numerous, serious injuries are reasonably likely to occur as a result of these violations and each order and citation should therefore be designated as S&S.

Respondent's violation of section 75.380(d)(1) resulted from its high negligence. The conditions in the escapeway were obvious and Respondent was aware of the conditions. Joe Fielder testified that he was aware of the presence of mud in the escapeway. This escapeway was also the primary haulageway, which means that preshift examiners traveled this route on a daily basis, but none recorded the hazard. Inspector Bloomer determined that the mud had existed for about a week. Respondent had notice that greater efforts were required to comply with this standard because the mine received 14 escapeway citations in the preceding 12 months. The resulting hazards posed a high level of danger to the safety of any miners working in the section. A high negligence designation is appropriate for Citation No. 6685827.

Respondent's high negligence and unwarrantable failure resulted in the conditions underlying Order No. 6685828. The violative conditions were extensive and obvious, and Inspector Bloomer testified that they had existed for an extended period of time. As discussed in the S&S analysis, these conditions posed a high degree of danger. Respondent had notice of

these hazards based upon Inspector Bloomer's previous discussion about the exact same conditions as well as the 14 escapeway violations that the mine had been cited for in the last 12 months. Mine management knew about these conditions, based upon Inspector Bloomer's conversation with them and Kulow's admission that Respondent "just wanted to mine coal." (Sec'y Br. at 81). Respondent did not produce any testimony to refute this evidence and could not present any mitigating factors. Both designations of high negligence and unwarrantable failure on the part of Respondent are appropriate with regard to Order No. 6685828.

Order No. 6685829 was a result of Respondent's high negligence and unwarrantable failure for the same reasons as Order No. 6685828. Additionally, the Horizon Mine received 14 examination violations in the 12 months before the inspector issued this order, and the mine received additional training in February 2008 on proper examinations.

Respondent maintains that Citation No. 6685827 and Order Nos. 6685828 and 6685829 were not S&S, because an emergency was not reasonably likely to occur. Assuming that an emergency will occur in escapeway violations inappropriately removes the Secretary's *Mathies* burden and offends due process. Practically, this assumption makes every violation of an escapeway provision S&S. Instead, the Secretary must prove as a threshold matter that an emergency was reasonably likely to trigger the need for miners to escape. Conditions that suggested a potential emergency did not exist in the cited area. By the inspector's own admission, the K-North Section did not have high methane content, exposed current or any other fire risks. The Horizon Mine has never had an emergency evacuation before. The violative conditions in Citation No. 6685827 and Order Nos. 6685828 and 6685829 were not reasonably likely to cause an injury and the citations are not S&S.

The fatal designations for Order Nos. 6685828 and 6685829 are also unjustified. The Secretary failed to prove that a fatality is a likely outcome of the cited hazard. The scenarios given by the inspector are too speculative and although Citation No. 6685827 has similar hazards associated with it, the inspector only designated lost workdays or restricted duty as the likely injury.

The high negligence designation of Citation No. 6685827 is unjustified. Hidden Splendor did not ignore the problem of mud in the escapeway. Mine management was aware of the hazard and attempted to dispose of the mud by pumping water out of the section and therefore it stipulated to the violation. Hidden Splendor's efforts to correct the hazard show that Citation No. 6685827 does not warrant a high negligence finding.

Likewise, Order Nos. 6685828 and 6685829 were not the result of Respondent's high negligence or unwarrantable failure. The inspector's testimony that the conditions existed for a "period of time" is too vague, especially when Kulow believed that the conditions had deteriorated between July 30 and July 31. Although Inspector Bloomer relied upon Kulow's purported statement that management only wanted to mine coal, he did not believe it himself.

The Secretary failed to carry her burden of proving that Order No. 6685829 was a violation of 75.364(b)(5). The violative conditions worsened in the time between when Kulow completed his examination and Inspector Bloomer performed his inspection. Inspector Bloomer admitted he should have investigated Kulow's claim that the conditions worsened, but did not. Order No. 6685828 should be vacated because the conditions were not a hazard during Kulow's

examination. The finding that 12 persons would be affected for Order No. 6685829 has no basis in fact. The Horizon Mine does not hot seat its employees so there would never be 12 miners in this section at the same time.

3. Discussion and Analysis

I find that Order No. 6685829 is a violation of section 75.364(b)(5) of the Secretary's safety standards because Respondent performed an inadequate weekly examination of the secondary escapeway in the K North Section. I further find that Citation No. 6685827 and Order Nos. 6685828 and 6685829 are all S&S and all were the result of Respondent's high negligence. Also, Order Nos. 6685828 and 6685829 were both the result of Respondent's unwarrantable failure.

I reject Respondent's argument that Order No. 6685829 should be vacated. Respondent maintains that between Kulow's examination on July 30 and Inspector Bloomer's inspection the next day, conditions in the secondary escapeway worsened to create the violative conditions cited in Order No. 6685828. To argue that five separate hazardous conditions all appeared between July 30 and July 31 is simply unbelievable. I credit Inspector Bloomer's testimony that there were numerous hazards that would impede the escape of miners in the event of an emergency and those hazards existed before Kulow's examination on July 30. Any one of the violative conditions in the secondary escape-way could constitute a violation of section 75.380(d)(1) and the cumulative effect of all five certainly suffices to do so; Respondent violated section 75.380(d)(1) by failing to maintain the secondary escapeway in the K North Section.

Respondent's core argument that an S&S finding for Citation No. 6685827 and Order Nos. 6685828 and 6685829 requires a showing that an emergency is likely to take place fails. The Commission has explicitly ruled to the contrary. In *Cumberland Resources*, the Commission stated that "[t]he Commission has never required the establishment of the reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of evacuation standards are S&S." *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2366 (Oct. 2011). The Commission went on to specifically state that for "the failure to maintain an escapeway in safe condition . . . the applicable analysis under *Mathies* involves consideration of an emergency." *Id* (Internal citations omitted).

Citation No. 6685827 met all the criteria required by *Mathies* to be designated S&S. Respondent conceded the underlying violation, which contributed to the discrete safety hazard of impeding the escape of miners in the event of an emergency. The mud was deep and covered a large section of the escapeway, which would almost surely impede miners in the event of an emergency. This mud would be difficult to traverse in the best of conditions and could be disastrous in an emergency situation where miners may be carrying other miners, visibility would be poor, and there could be disorientation and panic among the escaping miners. I credit Inspector Bloomer's testimony that this hazard could have caused serious injuries, at least lost workdays or restricted duty, in the form of leg injuries due to tripping or stumbling or smoke inhalation in the event of a fire. Respondent's violation of section 75.380(d)(1) contributed to the hazard of impeding the escape of miners in the event of an emergency and was reasonably likely to lead to serious injuries; therefore, Citation No. 6685827 is S&S.

I find that Order No. 6685828, issued for Respondent's failure to maintain the secondary escapeway, is also S&S. Respondent conceded the underlying violation, which contributed to the discrete safety hazard of impeding the escape of miners in the event of an emergency. Every violative condition in the secondary escapeway was, individually, reasonably likely to impede escaping miners. When considered as a whole there is little doubt that Respondent's violation of section 75.380(d)(1) in Order No. 6685828 was reasonably likely to lead to a serious injury. I credit Inspector Bloomer's testimony that this hazard could have caused serious injuries and even fatalities in the form of miners being crushed by falling roof, leg injuries due to tripping, stumbling, or smoke inhalation in the event of a fire. Respondent's violation of section 75.380(d)(1) contributed to the hazard of impeding the escape of miners in the event of an emergency and was reasonably likely to lead to serious injuries; Order No. 6685828 is S&S.

I find that that Order No. 6685829 is also S&S. The same analysis that applies to Order No. 6685828 applies here. Additionally, the fact that the weekly examiner did not identify so many serious hazards reveals a fundamental problem with the way Respondent performs weekly examinations on its escapeways. Poor examinations present a danger that goes beyond the hazards posed by the underlying conditions because they suggest that Respondent lacks the ability or desire to find and address future hazards to the health and safety of miners. I find, however, that fewer than 12 people would have been affected by this violation.

Citation No. 6685827 was the result of high negligence on the part of Respondent. The conditions in the escapeway were obvious and Respondent knew or should have known about the violative conditions. Joe Fielder acknowledged that mud in the primary escapeway of the K North Section had been a continuing problem for the mine and management should have been monitoring the escapeway closely for the hazard as a result. Joe Fielder himself testified that preshift examiners traversed this route every day, which lends even more credibility to the contention that Respondent should have known of the muddy conditions. I also credit the testimony of Inspector Bloomer that the mud had existed for about a week. Respondent had notice that greater efforts were required to comply with this standard because the mine received 14 escapeway citations in the preceding 12 months. The area and depth of the mud, which was up to 16 inches deep and covered the entire passage for a length of 200 feet, was extensive. It posed an impediment to escaping miners that created a high level of danger due to the serious injuries that could occur. A high negligence designation is appropriate for Citation No. 6685827.

Order Nos. 6685828 and 6685829 resulted from Respondent's high negligence and unwarrantable failure. Respondent's aggravated conduct demonstrated greater than ordinary negligence with respect to these violations. The violative conditions were extensive and obvious, and Inspector Bloomer testified that they had existed for an extended period of time. All three of these conclusions are supported by the number of conditions present that violated safety standards. Both orders are appropriately designated as having the reasonable likelihood to cause a fatal injury, which shows that the violative conditions pose a high degree of danger to miners. Respondent had notice of these hazards based upon Inspector Bloomer's previous discussion about the exact same conditions as well as the 14 escapeway violations and 14 examination violations that the mine had been cited for in the last 12 months. Regardless of whether Inspector Bloomer accurately recorded statements made by Larry Kulow, it is clear that the operator knew or should have known of these conditions. There were no mitigating factors.

The weekly examiner's failure to record a single one of these numerous, serious hazards is indicative of aggravated conduct by itself.

The following penalties are appropriate for these violations: \$4,000.00 for Citation No. 6685827, \$60,000.00 for Order No. 6685828, and 25,000.00 for Order No. 6685829.

S. Citation No. 6685833: WEST 2009-209

On August 11, 2008, MSHA Inspector Russell Bloomer issued Citation No. 6685833 under section 104(a) of the Mine Act, alleging a violation of section 75.202(a) of the Secretary's safety standards. The citation states, in part:

This citation is issued upon further review of Order #6685828.

The K North return/ secondary escapeway had an area of bad roof located near the bottom of the intake overcast ramp. The loose rock measured 36" wide x 144" long and up to 12' in thickness. Inby, near crosscut 17, an area of unsupported top existed where material had fallen from the roof, exposing a corner roof bolt. Between crosscuts 20 and 21, for a distance of approximately 30 feet, material had fallen parallel to the walkway, which exposed four roof bolts.

(Ex. G-24). Inspector Bloomer determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The Secretary proposed a penalty of \$6,458.00 for this order.

1. Background Summary of Testimony

Inspector Bloomer did not issue Citation No. 6685833 until August 11, 2008, because he decided to issue it after conferring with MSHA superiors and specialists about the roof conditions that he witnessed on July 31, 2008. (Tr. 854). Although it addresses the same roof conditions in the secondary escapeway described in Citation No. 6685828, Citation No. 6685833 pertains to protecting miners from roof falls, while Citation No. 6685828 deals with maintaining the escapeway. (Tr. 855, 859).

Inspector Bloomer testified that Citation No. 6685833 is S&S. (Tr. 856). Based upon the previously described roof conditions and the mine's history, the inspector deemed an injury reasonably likely to occur. (Tr. 855). Although there were maintenance crews inby the area, the inspector believed that only the weekly examiner would be affected. (Tr. 854-855, 858). Crushing injuries resulting from roof falls are the main cause of fatalities in mining. (Tr. 856).

Inspector Bloomer testified that Citation No. 6685833 was the result of Respondent's high negligence. (Tr. 856). The conditions were obvious, yet the examiner failed to record them. *Id.* The Horizon Mine also received repeated roof control violations. *Id.* The Inspector found no mitigating factors with regard to negligence. (Tr. 857).

2. Summary of the Parties' Arguments

Hidden Splendor violated section 75.202(a) by failing to adequately support the mine roof in the Mine's secondary escapeway. Two separate areas of roof in the secondary escapeway of the K North Section, one at crosscut 5 and one at crosscuts 21 and 22, were unsupported.

The Secretary argues that the citations are not duplicative as long as they impose separate and distinct duties upon an operator. Although the roof conditions cited in Citation No. 6685833 are the same as the underlying conditions previously discussed as part of the basis for Citation No. 6685827, these citations were issued as violations of different safety standards that impose separate and distinct duties upon the operator. Citation No. 6685827 was a violation of section 75.380(d)(1) for failure to maintain an escapeway, and Citation No. 6685833 is a section 75.202(a) roof control violation.

Respondent's failure to adequately control the roof in the secondary escapeway is S&S. Respondent's violation of section 75.202(a) contributed to the hazard of a roof fall and it was reasonably likely that such a roof fall would fatally injure the weekly examiner.

Respondent's violation of section 75.202(a) in Citation No. 6685833 was the result of Respondent's high negligence. Inspector Bloomer concluded that Respondent knew or should have known of the violation and that there were no mitigating circumstances. The roof conditions were obvious and the area was examined on a weekly basis. Respondent was also on notice due to the mine's history of roof control violations.

Hidden Splendor maintains that Citation No. 6685833 should be vacated because it is duplicative of Order No. 6685828. Inspector Bloomer issued Citation No. 6685833 based upon three areas of unsupported roof. Order No. 6685828 was based upon five conditions, three of which were the exact same instances of unsupported roof cited in Citation No. 6685833. The Inspector, furthermore, abated these conditions on August 2, nine days before he issued Citation No. 6685833. The duties imposed under section 75.202(a) as cited in Citation No. 6685833 are subsumed within the duties imposed by section 75.380(d)(1) as cited in Order No. 6685828.

3. Discussion and Analysis

I find that Citation No. 6685833 and Order No. 6685828 are not duplicative. The fact that two citations may be abated with the same actions is not the focus of the Commission's analysis in determining if citations are duplicative. *See Spartan Mining Company, Inc.*, 30 FMSHRC 699, 718 (Aug. 2008). The Commission has held that citations are not duplicative if "the standards involved impose separate and distinct duties" upon an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993)).

Citation No. 6685833 and Order No. 6685828 are not duplicative because they impose separate and distinct duties upon Respondent. Section 75.202(a) imposes upon Respondent the duty to maintain safe roof conditions, while section 75.380(d)(1) requires that Respondent maintain escapeways. Although the underlying conditions in Citation No. 6685833 are also cited in Order No. 6685828, every violation of section 75.202(a) will not inexorably constitute a violation of section 75.380(d)(1), which was the case with the safety standards in *Western Fuels-Utah, Inc.*, 19 FMSHRC at 1004. In *Western Fuels*, section 75.1101-15(d)

“simply specified a particular method of carrying out the broadly worded obligation contained in section 75.1101-14(a).” *See Id.* at 1003.

Neither of the safety standards cited here provides a method for fulfilling the duty set forth by the other. Citation No. 6685833 only considers the danger posed to the weekly examiner, while Inspector Bloomer designated that six miners would be affected by Order No. 6685828. This difference is directly related to the fact that these two violations impose separate and different duties upon Respondent. Despite referencing the same violative conditions, Citation No. 6685833 and Order No. 6685828 impose separate and different duties upon the operator.

I also find that Citation No. 6685833 is S&S. The cited roof conditions violated section 75.202(a) and contributed to the discrete safety hazard of a roof fall, which was reasonably likely to lead to a fatal injury. I credit Inspector Bloomer’s testimony about the conditions he observed as well as the history of roof falls in the section. I find that such a roof fall was reasonably likely to be fatal.

Further, I find that Respondent’s high negligence resulted in Citation No. 6685833. The conditions were obvious and extensive, as there were three different areas where the roof support was insufficient and bolts were exposed. A roof fall poses a high risk of danger to miners, with potentially fatal consequences. Respondent made no effort to correct the violative conditions, and had notice due to a history of roof control violations. The hazards had existed for quite some time. Respondent knew or should have known about the violative conditions. Considering all the facts and circumstances, I find that Citation No. 6685833 was the result of Respondent’s high negligence. A penalty of \$5,000.00 is appropriate for this violation.

III. SETTLED CITATIONS

A number of the citations and orders at issue in these cases settled, either prior to the hearing or at the hearing. I approved these settlements by orders dated February 18, 2011, and April 13, 2011. In WEST 2009-208, I approved the settlement of 14 citations/orders and assessed a penalty of \$18,067.00. In WEST 2009-209, I approved the settlement of 18 citations/orders and assessed a penalty of \$12,616.00. In WEST 2009-210, I approved the settlement of 12 citations/orders and assessed a penalty of \$10,187.00. In WEST 2009-342, I approved the settlement of 5 citations/orders and assessed a penalty of \$2,460.00. In WEST 2009-591, I approved the settlement of 4 citations and assessed a penalty of \$3,423.00. In WEST 2009-1072, I approved the settlement of 7 citations and assessed a penalty of \$5,355.00. In WEST 2009-1162, I approved the settlement of 4 orders and assessed a penalty of \$10,490.00. In WEST 2009-1451, I approved the settlement of 1 order and assessed a penalty of \$4,000.00.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Report, which is not disputed. (Ex. G-89). At all pertinent times, Hidden Splendor Resources, Inc. was medium in size. The violations were abated in good faith. The gravity and negligence findings are set forth above.

Prior to the hearing, Hidden Splendor stipulated that “[i]f paid in equal monthly installments over 12 months, the proposed penalties would not affect Hidden Splendor’s ability to remain in business.” (Stip. ¶ 7, Respondent’s Preliminary Statement, p. 2). The Secretary’s total proposed penalty in these cases was \$403,302.00. About nine months after the close of the hearing, Hidden Splendor, through an informal oral motion, asked that the record in these cases be reopened so that it could introduce financial information that it considered relevant to the “effect on the ability to continue in business” criterion set forth in section 110(i) of the Mine Act. The Secretary opposed the motion.

By order dated December 12, 2011, I denied Hidden Splendor’s motion. 33 FMSHRC 3249. My order denying the motion is incorporated herein by reference. Hidden Splendor based its motion on the fact that, in a filing with the Securities and Exchange Commission (“SEC”), it was revealed that the company’s financial condition had deteriorated since the date of the hearing. My reasons for denying the motion are set forth in my order. I noted that:

[i]t is the nature of the mineral extraction industry that profits earned or losses incurred by coal mining companies are often very volatile. A coal mining company can earn record profits one quarter and report a large loss in another quarter.

33 FMSHRC at 3251. I held that even if a SEC quarterly report showed a net loss for the quarter or for the year to date, such information would not show that the assessed penalties would have an adverse effect on the company’s ability to continue in business. I find that the penalties I have assessed below will not adversely affect Hidden Splendor’s ability to continue in business if the penalty is paid in installments over at least a year.

V. ORDER

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

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2009-208		
6686024	75.1914(f)	\$20,000.00
8454042	75.202(a)	5,000.00
8454043	75.360(b)	5,000.00
8454049	75.1101-1(a)	500.00
6685827	75.380(d)(1)	4,000.00
6685829	75.364(b)(5)	25,000.00
WEST 2009-209		
6685835	75.202(a)	1,000.00
6685833	75.202(a)	5,000.00

WEST 2009-210		
6685990	75.360(b)	5,000.00
8454109	75.512	7,000.00
WEST 2009-342		
6685828	75.380(d)(1)	60,000.00
WEST 2009-591		
8457087	75.220(a)(1)	Vacated
WEST 2009-916		
8460169	48.5(a)	4,000.00
WEST 2009-1072		
8457214	75.202(a)	5,000.00
8457215	75.364(a)(1)	5,000.00
8457222	75.360(b)(1)	Vacated
8457229	75.1722(b)	500.00
8457231	75.1103-1	100.00
WEST 2009-1162		
8457509	75.364(a)(1)	1,000.00
8457488	75.512	7,000.00
WEST 2009-1451		
8457576	75.1914(f)	Vacated
8457577	75.1914(a)	30,000.00
8457347	77.1104	500.00
TOTAL PENALTY		\$190,600.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above. Hidden Splendor Resources Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$190,600.00 in 12 monthly installments. The first payment of \$15,887.00 shall be due 30 days from the date of this decision, the remaining payments of \$15,883.00 each shall be due the last day of each succeeding month. The parties are hereby authorized to negotiate a different payment plan as long as the total amount paid is \$190,600.00.³

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

Distribution:

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RWM

³ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 21, 2012

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of Vicki LaRue,	:	Docket No. SE 2013-112-DM
Complainant	:	MSHA Case No.: SE-MD-12-12
	:	
v.	:	
	:	
NYRSTAR GORDONSVILLE, LLC,	:	Mine: Elmwood/Gordonsville Mine
Respondent	:	Mine ID: 40-00864

DECISION AND ORDER
REINSTATING VICKI LARUE

Appearances: Samuel Charles Lord, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, representing the Secretary of Labor (MSHA) on behalf of Vicki LaRue.

Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, D.C., representing Nyrstar Gordonsville, LLC.

Before: Judge Andrews

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, the Secretary of Labor (“Secretary”) on November 23, 2012, filed an Application for Temporary Reinstatement of miner, Vicki LaRue (“LaRue”) to her former position with Nyrstar Gordonsville, LLC, (“Nyrstar” or “Respondent”) at the Elmwood/Gordonsville Mine pending final hearing and disposition of the case. This Temporary Reinstatement proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge (“ALJ”) pursuant to Sections 105 and 106 of the Act.

On June 6, 2012, LaRue initially filed a Discrimination Complaint alleging, in effect, that her termination was motivated by her protected activity.¹ In the Secretary's application, she represents that the complaint was not frivolously brought, and requests an Order directing Respondent to reinstate LaRue to her former position as a Safety Advisor in the Nyrstar Mine's Safety, Health, and Environmental Department. This case was assigned to the undersigned ALJ on December 3, 2012.

Respondent filed a request for hearing on December 3, 2012. Concurrent with this request, a Prehearing Brief in Opposition to the Application for Temporary Reinstatement was submitted. Respondent argued that the Secretary was without authority to file the Application since her investigation had already concluded with a determination that there was no 105(c) violation. The Secretary filed a Pre-Hearing Memorandum of Law addressing both issues raised on December 6, 2012. Respondent filed a Reply on December 7, 2012.

An expedited hearing was held in Nashville, Tennessee on December 13, 2012. The Secretary presented the testimony of LaRue and the Respondent did have the opportunity to cross-examine the Secretary's witness and present testimony and documentary evidence in support of its position. 29 C.F.R. § 2700.45(d). Both parties offered exhibits, and all were marked and admitted without objection.²

Reopening a Temporary Reinstatement Determination

The Respondent contends:

That the Secretary's unprecedented reopening of a closed Section 105(c)(2) investigation to file for a Temporary Reinstatement based on "new information" is beyond her statutory authority;

The reversal of the prior final decision not to seek Temporary Reinstatement was four months after the miner had already filed a section 105(c)(3) action;

That within ninety days of the miner's complaint, the Secretary must complete her investigation and she cannot insert herself back into the case;

The Secretary's jurisdiction over the miner's complaint ended when she issued her notification to the miner that she would not proceed under 105(c) and she is without standing to rescind that determination, resume her investigation, and file for Temporary Reinstatement; and

¹ Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981).

² The Secretary's exhibits are marked as "GX," and Respondent's exhibits are marked as "RX."

There is no express or implied grant of power to the Secretary to revisit a closed investigation and then file an Application for Temporary Reinstatement particularly where a Section 105(c)(3) action is pending.

The Secretary contends:

That the statutory design and purpose of Section 105(c), as well as the basic principles of justice, support the conclusion that Congress could not have intended MSHA be precluded from reopening a Section 105(c) investigation upon receipt of new information;

There is no basis to read into statutory silence a rule that the Secretary may not reopen a Section 105(c) investigation and seek Temporary Reinstatement upon receipt of new information;

That even if there are filing delays or other noncompliance with the procedures set forth in Section 105(c) a Complainant should not be prejudiced because the government did not meet its time obligations when the Secretary comes into possession of new information and wishes to reopen the discrimination case and perform a more thorough investigation; and

It would be unjust to sacrifice investigatory accuracy for any finality due to the premature “no violation” letters sent to the Complainant.

By letter dated July 12, 2012 LaRue was informed that her complaint of discrimination under Section 105(c) of the Act had been investigated and the information gathered had been reviewed. Based on that review it was determined that discrimination within the confines of the Mine Act did not occur. Exhibit 1, Respondent’s Opposition to Application for Temporary Reinstatement.

On September 21, 2012 a letter was sent to inform LaRue that new evidence had been obtained and as a result the determination of July 12, 2012 had been rescinded and her case had been reopened. This letter also informed her that based on a review of the subsequent information the facts disclosed did not constitute a violation of Section 105(c). Exhibit 2, Respondent’s Opposition to Application for Temporary Reinstatement.

A third letter was sent to LaRue on November 21, 2012. She was informed that the letter of September 21, 2012 was being rescinded since new information had been presented to MSHA. As a result, her case was being reopened for additional investigation and further consideration. Exhibit 3, Respondent’s Opposition to Application for Temporary Reinstatement.

As an initial matter, it should be noted that the Respondent’s claim that the Secretary’s resumption of a 105(c)(2) investigation after a determination is “unprecedented,” is inaccurate. Respondent’s Reply to Secretary’s Pre-Hearing Memorandum of Law, 1. On at least one recorded prior occasion, the Secretary revoked a letter of determination and resumed a 105(c)(2) investigation even after a 105(c)(3) action had been filed. In *Lawrence L. Pendley v. Highland Mining Co.*, 29 FMSHRC 119 (Feb. 2007) (ALJ), the Secretary reopened a 105(c)(2)

investigation after a determination letter had been sent stating that the evidence did not disclose a violation of 105(c), and after a 105(c)(3) claim was filed by the miner.³ The Secretary's authority to reopen the investigation was not at issue in *Pendley*, as it appears that all parties recognized the Secretary's authority. Hence, reopening a 105(c)(2) investigation and adverse determination has occurred before with no indication that the Secretary's authority to do so was an issue.

The Respondent's argument is primarily a jurisdictional one. The Respondent argues that the Secretary lacked jurisdiction to reopen a Temporary Reinstatement investigation after she had already concluded that there was no 105(c) violation. However, the legislative history of the Act makes clear that the timeframes in 105(c) were not considered to be jurisdictional. The Senate Committee stated:

It should be emphasized, however, that these time frames are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations.

S. Rep. No. 181, 95th Cong., 1st Sess. 24 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 3401, 2436 (1978).

The Commission has echoed this view, stating that it “has determined that the time limits in sections 105(c)(2) and (3) ‘are not jurisdictional’ and that the failure to meet them should not result in dismissal, absent a showing of ‘material legal prejudice.’” *Sec’y of Labor ex rel. Nantz v. Nally & Hamilton Enterprises*, 16 FMSHRC 2208, 2215 (Nov. 1994). In *Nally & Hamilton*, the Secretary filed the Temporary Reinstatement with the Commission more than eight months after the miner filed his discrimination complaint. *Id.* Furthermore, the Commission noted that the “record disclose[d] no reason for the delay.” *Id.* Even under these more egregious circumstances, where the Secretary failed to adequately investigate within the timeframes in 105(c), with no apparent excuse, the Commission did not dismiss the case.

The Respondent cites *North Fork Coal Co. v. FMSHRC*, 691 F.3d 735 (6th Cir. 2012), and *Vulcan v. FMSHRC*, 2012 WL 5259008 (7th Cir. Oct. 25, 2012), for the proposition that a temporary reinstatement cannot be ordered in a 105(c)(3) action. However the holdings of these cases do not apply here. In both these cases, the Sixth and Seventh Circuits held that a temporary reinstatement dissolved after the Secretary determined that no discrimination occurred. However, at issue here is the different scenario where the Secretary seeks to reopen an

³ The parties were informed of the *Pendley* decision at the hearing, and at the conclusion of the hearing did discuss potential impact on pending 105(c)(3) claims. The court, on the record, made it clear that its jurisdiction is limited to the instant Temporary Reinstatement proceeding.

investigation into *whether* discrimination occurred. Neither of these cases addresses this question.

Section 105(c)(2) grants the Secretary authority to file a complaint for temporary reinstatement of a miner who was discriminated against for exercising his statutory rights. Nothing in the Act, Regulations or prior Commission cases prevents the Secretary from reopening prior adverse determinations that are not final orders of the Commission.⁴ Furthermore, the Respondent has not alleged any prejudice stemming from the Secretary reopening the discrimination investigation.⁵ The Secretary has a special duty—articulated in the Act and legislative history—to provide expedited relief to miners suffering discrimination at work. Ideally, the Secretary would discharge this duty expeditiously. However, in cases like this, it would serve an added injustice against the very miners the Act sought to protect if they were punished because the Secretary failed to act within the prescribed timeframes.

Since the 90 day period in 105(c) is not jurisdictional, and in the absence of any statutory or regulatory prohibition, there is nothing to prevent the Secretary from reopening an initial adverse determination in the interest of justice. Therefore, I specifically find that the prior investigations and administrative determinations of July 12, 2012 and September 21, 2012 may be reopened, reinvestigated, and readjudicated.

Temporary Reinstatement

Relevant law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine Act]” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 95-181, at 35, 1977 U.S.C.C.A.N. at 3435.

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” S. Rep. No. 95-181, at 36-37, 1977 U.S.C.C.A.N. at 3436-3437. In addition to Congress’ “appears to have merit” standard, the Commission and the courts have also equated “not frivolously brought” to “reasonable cause to believe” and “not insubstantial.” *Sec’y*

⁴ This does not mean that there is no point beyond which the Secretary may not reopen an investigation. However, the question of when the Secretary is precluded from reopening an investigation is not before the court at this time.

⁵ As the Respondent notes, LaRue filed her 105(c)(3) action on 7/12/2012, and it has not yet come before an ALJ. Therefore, there should be no surprise or loss of evidence relating to the Secretary’s investigation.

of Labor on behalf of Price v. Jim Walter Res., Inc., 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.⁶ *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources*, 920 F.2d at 744.

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, LaRue need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

⁶ "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

The evidence

On June 6, 2012, Ms. LaRue filed a Discrimination Complaint, which included a handwritten Discrimination Report. In her Complaint, she reported that on May 31, 2012, she was terminated from her job as a Safety Advisor for Nyrstar TN Mines.

In the Summary of Discriminatory Action she listed three reasons:

1. Defending a miner in a 105(g) [sic] complaint.⁷
2. Raising safety concerns with management.
3. Discussing safety concerns and hazards with a miners' representative in which I was discharged the next day.

Exhibit A, Application for Temporary Reinstatement.

Following the filing of the complaint on June 6, 2012, the Secretary performed the investigations and determinations set forth in the reopening section above in July, September and November. Then, on November 23, 2012 the Secretary's Application for Temporary Reinstatement of Vicki LaRue was filed.

Submitted with the Application for Temporary Reinstatement was the November 23, 2012 Affidavit of Carolyn James ("James"). The affidavit, in pertinent part, is as follows:

1. I am the Assistant Director in the Technical Compliance and Investigation Office of the Mine Safety and health Administrative ("MSHA") of the United States Department of Labor. I am charged with the national supervision and oversight of special investigations arising under the Federal Mine Safety and Health Act, 30 U.S.C § 801 *et seq.*, including investigations of complaints of discrimination made by miners under Section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

....

3. I have reviewed the above-captioned discrimination complaint involving Vicki LaRue and Respondent's Elmwood/Gordonsville Mine ("the Mine"). I find that there is reasonable cause to believe that Mrs. LaRue was terminated because of her exercise of statutory rights.

4. Mrs. LaRue states that she complained about specific health and safety hazards at the Mine to Respondent's personnel. Mrs. LaRue also states that she complained to Respondent's personnel regarding their failures to adequately respond to safety and health complaints made by other miners. Such complaints are protected activities under Section 105(c).

⁷ This mistake was in the original document, and should be either 103(g) or 105(c).

5. On May 30, 2012, Mrs. LaRue voluntarily met in private with a designated representative of miners in order to discuss how internal safety and health complaints might be better handled by Respondent and its personnel. The designated representative of miners with whom Mrs. LaRue voluntarily met was also a Section 105(c) complainant with a pending complaint against Respondent. Voluntary association with a designated miner's representative or discrimination complainant is protected activity under Section 105(c).

6. Respondent's personnel subsequently learned of Mrs. LaRue's private meeting with the designated representative of miners and Section 105(c) complainant. On May 31, 2012, one day after Mrs. LaRue's voluntary meeting with the designated miner's representative and Section 105(c) complainant, she was fired by Respondent, an adverse employment action. Respondent claims that Mrs. LaRue was fired [sic] because, during her May 30 meeting with the designated representative of miners and Section 105(c) complainant, she allegedly attempted to dissuade him from making Section 105(g) [sic]⁸ hazard complaints to MSHA. Mrs. LaRue disputes this characterization of the May 30 meeting.

7. There is reasonable cause to believe that Respondent's discharge of Mrs. LaRue was motivated in at least some part by her exercise of protected activities. Respondent's personnel had actual knowledge of Mrs. LaRue's safety complaints and voluntary association with the representative of miners and Section 105(c) complainant. There is reasonable cause to believe that Respondent was dismissive of and bore animus towards Mrs. LaRue's efforts to ensure that safety complaints were adequately handled at the Mine. Mrs. LaRue's protected activities were also proximate in time to her discharge, especially her May 30th meeting with the designated representative of miners and Section 105(c) complainant, a meeting that occurred just one day before her May 31st discharge and which the company admits caused her discharge. Based on these facts, I find that Mrs. LaRue's case is not frivolously brought.

Exhibit B, Application for Temporary Reinstatement.

Testimony of Vicki LaRue

Vicki Jones LaRue began working at Nyrstar on June 1, 2011 as a safety advisor. Tr. 11, 12. Her responsibilities were to follow the safety programs and policies and ensure compliance. Tr. 12. She reported to a superintendent named Gerald Lira ("Lira") and a manager of safety and health. Tr. 12. LaRue was not considered a management employee, she had no power to discipline others, and no one reported to her. Tr. 13. Her job profile is included as GX-1. Prior to working at Nyrstar, she worked for MSHA in the Nashville, Tennessee office as a mine inspector for metal/nonmetal. Tr. 11-12. In that capacity, she was responsible for inspecting the Nyrstar mine. Tr. 12.

⁸ This mistake was in the original document, and should be either 103(g) or 105(c).

At Nyrstar, LaRue's daily activities included reporting to the office early in the morning, reviewing the RIMS database where miners reported safety and health hazards, performing site training for contractors, and performing safety audits as needed. Tr. 15. The RIMS program allowed miners to report hazards in a book they carried, and then to either fix the hazards or pass the books along to their supervisors or team leads. Tr. 15. The team lead would then enter the hazard into the database and assign it to the department who would be responsible for repairing the hazard. Tr. 16. After that individual resolved the problem, he would close it out in the computer by indicating what he did to correct the problem. Tr. 17. LaRue testified that she was not notified when an incident was entered into the RIMS database. Tr. 17. The only way she and others in the safety department knew of RIMS was by going into the system and pulling them up. Tr. 17.

The Nyrstar mine is an underground zinc mine that miners enter through a mile-long decline with a hoist that runs approximately 1,200 feet underground. Tr. 17-18. A skip, or hoist, is used to bring materials into and out of the mine. Tr. 18. LaRue testified that the hoistman made her aware of problems with the sensors, cameras, and skip on the hoist. Tr. 18. LaRue asked the hoistman if the problem had been entered into the RIMS database, and the hoistman confirmed that it had. Tr. 19. She proceeded to go to the hoist so she could better understand the problem. Tr. 19.

The primary problem was on the skip, which is a large bucket with a door used to carry materials. Tr. 19-20. The sensors and camera, if working properly, indicate when the door is open or shut. Tr. 21. However, LaRue testified that the sensors and cameras often broke at the same time. Tr. 21. If the sensors and cameras were not working correctly, there are times when the door hangs open, which leads to damage on the skip. Tr. 20. The hoistman, who was at the surface, and the underground skip level would radio each other back and forth in order to communicate if the door was open. Tr. 21. But LaRue testified that this process was usually inefficient and problematic. Tr. 21.

In order to fix the skip, several tons of materials must be dropped from the skip down to the bottom of the shaft. Tr. 21. LaRue testified that this process puts miners at risk who must fix the skip and clean the accumulations that result from the dumping of materials. Tr. 20.

After better understanding the problem with the skip, LaRue went to the electrical department to talk to the electrical foreman, Danny Bean ("Bean"), about the problems with the hoist. Tr. 19, 22. LaRue testified that she spoke with Bean and he responded that it was either not an issue or not a safety issue. Tr. 22.

After continuing complaints, LaRue talked to another electrician, in order to determine if the issue was more serious than Bean stated. Tr. 23. LaRue proceeded to file RIMS on the issue in the hopes that it would be taken more seriously if the complaint originated in the safety department. Tr. 24; GX-2A, 2B, 2C. Bean closed out the RIMS on 10/10/2011, and wrote that the sensor was replaced. Tr. 28. However, LaRue testified that the issue with the hoist had not

been fixed, so she spoke with the electrician who worked on the problem, Paul Denius (“Denius”). Tr. 30.

LaRue also testified about the RIMS complaint that she filed concerning the continuous running of the blowers, stating that it constituted a fire hazard. Tr. 29-30. She testified that she spoke with Denius because he worked on the electrical problems, but stated that she did not know at the time that Denius had filed RIMS on the problems. Tr. 31-32. During her conversations with Denius, he stated that he had been submitting a large number of RIMS. Tr. 32. However, upon searching the system, LaRue noticed that many of his RIMS had not been entered into the system. Tr. 32. She testified that Denius would have submitted his RIMS to Bean, and she did not know at the time why they were not being entered into the system. Tr. 34.

LaRue testified that she reported this issue to her manager, Wes Cruea (“Cruea”), and that he and Denius’s supervisor, Bill Cole (“Cole”), met to discuss the issue. Tr. 34-35. LaRue and Denius went underground for her to observe and take photos of some of the problems that Denius had reported. Tr. 35-36. LaRue made a Powerpoint presentation of the photos and distributed it to Greg Bowkett (“Bowkett”), Bean, Tim Zuroweste (“Zuroweste”), Cole and Nathan Wright (“Wright”), all individuals responsible for correcting the hazards. Tr. 36-38. The only response that LaRue received was from Zuroweste asking her to further pinpoint one of the hazards. Tr. 38.

LaRue testified that after all this happened, Denius came to her and told her that he was being demoted by being transferred from working underground to the mill, which meant a loss of possible overtime and loss of use of the company truck. Tr. 39-40. LaRue spoke with Cole, and Cole told her that Denius was needed in the mill and that it was not a demotion. Tr. 40-41. LaRue told Cole that if Denius felt it was retaliation, it would likely be interpreted as such, and Cole became upset. Tr. 41. LaRue testified that Cruea received an email from Cole complaining about her conversation with Cole, saying that she threatened Cole “with MSHA.” Tr. 41. As a result of this email, Cruea wrote LaRue a slip that said she needed to work better with supervisors, and a new program of communication between employees and supervisors was implemented. Tr. 42; GX-E.

LaRue testified that one of the complaints in the final months of employment that drew her attention was dust control on-site. Tr. 44. The problem was caused in the mill from lime buildup on the travelways. Tr. 44-45. LaRue talked with James Jerman (“Jerman”) about getting a water truck on-site to remediate the dust problem. Tr. 46. She found out later that the issue was still not resolved when, during a meeting with Cruea, Joe Anderson (“Anderson”) dropped by to tell her that the problem was still not being fixed. Tr. 47. Hearing this, Cruea told LaRue to make sure she took care of the problem. Tr. 47. LaRue contacted Bowkett and the mill manager, James Armstrong (“Armstrong”), and had a tense discussion with them to figure out who was responsible for the matter. Tr. 47. She testified that because of budgetary limitations, neither wanted to take charge of fixing the problem. Tr. 48. After the meeting, Bowkett said that he’d handle the problem, and the result was that a water truck was procured. Tr. 48. However,

this did not resolve the problem because they did not get the manpower needed to operate the truck. Tr. 48-49.

LaRue testified that on May 30, 2012, the day before she was fired, MSHA inspectors came to the mine to investigate hazard complaints. Tr. 50-51. LaRue called Denius to serve as the miner's representative. Tr. 50-51. By this time, Denius had been fired, but still served as a miner's representative. Tr. 51-52. Denius had some free time, and LaRue testified that she wanted to get his advice about some electrical issues, so they spoke outside in the breezeway. Tr. 54-55. After speaking for a little while, LaRue told Denius that she was on her way to McDonald's for iced tea and invited him along. Tr. 54-55.

LaRue testified that at the time, the mine was getting a lot of 103(g) complaints. Tr. 55. LaRue was concerned because the proper procedure was for the miner to first bring complaints to his supervisor, then the superintendent, then the safety department, and then to MSHA. Tr. 55. Instead, complaints were going straight to MSHA, so LaRue placed suggestion boxes outside her door in order to allow miners to submit anonymous complaints. Tr. 56. LaRue told Denius that management believed he was the one turning in many of the complaints to MSHA, but denied ever telling him that he should not be filing complaints with MSHA. Tr. 56-57, 59. Denius denied submitting the complaints, and told her that the boxes would not help because the miners had been told not to come to the safety department with their complaints. Tr. 57-58.

After she returned from McDonald's, LaRue went back to the mine and Sherri Allen ("Allen") came to her and asked why she called Denius in as a miner's representative. Tr. 59-60. LaRue responded that she was instructed to call Denius first if MSHA inspected. Tr. 60. LaRue described Allen as a "coworker, [and] very nice lady," who she talked with frequently. Tr. 62. Allen asked LaRue what was happening, and LaRue responded that she had just come back with Denius Tr. 62. LaRue told Allen that Denius told her that he was not the one turning in the hazard complaints to MSHA. Tr. 62. Allen suggested that Denius was lying. Tr. 63. LaRue responded that she would likely get fired for talking with Denius because Denius was considered a troublemaker at the mine. Tr. 63.

LaRue went to talk to Bowkett to tell him that miners were being told not to come to the safety departments with complaints. Tr. 60. Bowkett asked her who provided her with this information, and she refused to tell him. Tr. 60-61. Bowkett told LaRue that miners were told to use the chain of command with any complaints. Tr. 61.

On May 31, Todd Hale ("Hale"), the superintendent from East Tennessee, asked LaRue to meet him and Bradley Bishop, the human resources superintendent. Tr. 63. Bishop asked LaRue if she went off-site with Denius, and she responded "yes." Tr. 64-65. Then Bishop asked LaRue if she was aware that Denius had a discrimination case pending against Nyrstar, and she responded "yes." Tr. 65. Bishop then told LaRue that until further notice and until an investigation was complete, she was on administrative leave. Tr. 65.

LaRue went home, and there was a message on her phone from a safety advisor named Danny Williams (“Williams”), asking her to come back to talk with Bishop. Tr. 66. She came in and met with Bishop, Hale, and Will Ames (“Ames”), who is now the superintendent for Middle Tennessee. Tr. 66. Bishop told LaRue that they were letting her go and when she asked for a reason for her dismissal, he said it was because she jeopardized their case with Denius. Tr. 66-67. He characterized her meeting with Denius as a violation of the code of conduct. Tr. 67. They said that they did not talk with Denius because she had already admitted what she had done. Tr. 67.

On cross-examination, LaRue testified that her responsibilities included identifying safety hazards at the mine. Tr. 69. She also testified that during her orientation she reviewed and understood the company code of conduct. Tr. 71. The Respondent admitted that LaRue was a miner under the Act. Tr. 75-76.

Testimony of Sherri Allen

Sherri Allen has been working as a wellness coordinator for Nyrstar for two years. Tr. 77-78. Her responsibilities include administering health and wellness programs, providing support for workers’ compensation claims, participating in MSHA reporting, and supporting the health and safety team. Tr. 78. She worked with LaRue in the safety department and reported to Ames. Tr. 78.

Allen testified that she had a friendly relationship with LaRue and talked with her often. Tr. 78-79. Allen testified that on May 30, 2012, she and LaRue were standing outside the change house when they had a two to five minute casual conversation about LaRue’s discussion with Denius. Tr. 79. According to Allen, LaRue told her, “I may get fired for it, but I took Paul Denius off site and talked to him and told him that enough was enough with the MSHA complaints.” Tr. 80. LaRue also stated that Denius swore that he didn’t make the complaints to MSHA. Tr. 80. Allen testified that she interpreted the “enough is enough” statement to indicate that LaRue told Denius to stop making complaints. Tr. 80. Allen did not recall making any comments back. Tr. 80.

Following this conversation, Allen went back to her office and called Hale, who was acting manager of safety and health, and reported the conversation with LaRue. Tr. 81. She testified that she did so because she believed that LaRue’s discussion with Denius was a violation of the Act and a “threat to the business.” Tr. 81, 82. Hale thanked Allen and said that he would take care of the situation. Tr. 82.

Later in the day, Allen was in the hall outside of Bishop’s office, when he asked her to come in to discuss her conversation with LaRue. Tr. 82-83. She testified that she told Bishop the same thing she had told Hale, and Bishop thanked her. Tr. 83. On the following Monday or Tuesday, Bishop asked Allen to send him an email stating what LaRue told her. Tr. 83. The email, which was admitted as Respondent’s Exhibit C, incorrectly states the date of LaRue’s

conversation with Denius as May 31. Tr. 84; RX-C. Allen testified that other than the date mistake, it is an accurate account of her conversation with LaRue. Tr. 84.

On cross-examination, Allen testified that she did not remember anything else about the conversation with LaRue other than what she stated in her direct testimony. Tr. 87-88. She further stated that she is not certain if she knew at the time that Denius was a 105(c) complainant. Tr. 89.

Testimony of Anthony Todd Hale

Anthony Todd Hale has worked as the safety and health superintendent at East Tennessee mines since January 2012. Tr. 92. His responsibilities include overseeing all safety and health matters, producing safety and health policies and procedures, performing safety review meetings with teams, conducting safety walks, and educating employees about safety and health issues. Tr. 92. Hale has three people that report to him, and he in turn reports to Cruea. Tr. 92.

Hale testified that he was working at East Tennessee on May 30, and at Middle Tennessee on May 31. Tr. 92-93. At the time, he was the acting safety and health manager, filling in for Cruea, who was away on vacation. Tr. 93.

Hale testified that on May 30, he received a telephone call from Allen, stating that there was a situation at the Mid-Tennessee location. Tr. 93. Allen told Hale that “LaRue had come into her office and told her that she had taken Paul Denius off site and had a conversation with him, and she told him not to call in any more MSHA complaints because it wasn’t doing him any good nor the company any good.” Tr. 93-94. Hale thanked Allen, and said that he would pass the matter along to human resources. Tr. 94. Hale testified that he took no notes during or after his conversations with Allen. Tr. 102-103. Hale then proceeded to discuss the matter with the human resources manager, Clint Milner (“Milner”), who said that he would handle the matter. Tr. 94. Hale testified that he understood this to mean that Milner would investigate and get in contact with the human resources department at Mid-Tennessee. Tr. 95.

Hale testified that on May 31, he had a meeting with LaRue and Bishop in Cruea’s office. Tr. 95. In this meeting, Bishop told LaRue that there were “reports that she had taken Denius off site in her personal vehicle,” and he asked her for her side of the story.⁹ Tr. 96. Hale testified that LaRue responded that she and Denius went off site to have some iced tea, and that she told Denius “to quit calling in the MSHA complaints because it wasn’t doing the company any good or him any good and to knock it off.” Tr. 96. She also stated that she felt like she was looking after the best interest of the company. Tr. 96.

⁹ It should be made clear that according to the Respondent, the report that Bishop conveyed to LaRue did not constitute improper conduct. In later testimony, Hale admitted to the Court that taking a former colleague off site and having a conversation concerning the work environment would not constitute harassment. Tr. 107-108. Presumably use of a personal vehicle does not transform the situation into harassment.

Bishop then told LaRue that she was being “stood down pending an investigation,” and that they would call her. Tr. 97. Hale testified that this was standard company procedure in such a situation. Tr. 97. He stated that Bishop and Milner had several discussions, and that he was part of one of them. Tr. 97. This meeting took place in the office of the general manager of Nyrstar Tennessee, Craig Jetson (“Jetson”). Tr. 97-98. Hale described Jetson as the individual who would be responsible for terminating an employee. Tr. 98. Present in this meeting was Hale, Bishop, Milner, Jetson, and Archie Eksteen (“Eksteen”), the deputy general manager. Tr. 98. They characterized LaRue’s conduct as a “serious offense” and stated that she violated the code of business conduct. Tr. 98-99. They stated that LaRue should be terminated because she had harassed a miner’s representative in violation of the code of business conduct for harassment. Tr. 99-100. On cross-examination, Hale testified that no one took notes at this meeting while he was present. Tr. 105.

On cross-examination, Hale testified that at the time he knew that Denius was an electrician and miner’s representative who had been terminated and had a discrimination complaint against Nyrstar. Tr. 101. However, Hale did not know anything about Denius’s 105(c) complaint or any of his prior complaints against Nyrstar. Tr. 102. Hale further stated that he never spoke with Denius, and that he did not know if anyone at the company had spoken with him. Tr. 104.

Hale stated on cross-examination that Bishop was taking notes during the May 31 meeting with him, Bishop and LaRue. Tr. 105. Hale described how after LaRue admitted to taking Denius off site in her personal vehicle for iced tea and telling him to stop making complaints to MSHA, Bishop read to LaRue his notes to ensure accuracy. Tr. 105-106. Hale testified that LaRue agreed to the accuracy of the notes, but that she had not been asked to sign the document. Tr. 106.

Hale testified that LaRue had violated the code of conduct because she engaged in harassment. The Code of Business Conduct was admitted as Respondent’s Exhibit B, and Hale located the harassment policy on the first page under the heading, “Our People.” Tr. 107. This provision states, “We are committed to maintaining a work environment that is free from discrimination or harassment.” Tr. 107; RX-B. Hale testified that this is the only mention of a policy on harassment. Tr. 107. He further testified that no one consulted the code of conduct during the meeting with Eksteen and Bishop. Tr. 111. Hale first looked at the code of conduct after LaRue had been stepped down. Tr. 111. In response to questions by the court to interpret the policy, Hale testified that the only thing that LaRue did that constituted harassment was her allegedly telling Denius to stop calling in complaints. Tr. 108-109.

Testimony of Wesley Adam Cruea

Wesley Adam Cruea has worked as the safety and health manager for all Nyrstar Tennessee mines since October 2011. Tr. 114. In this capacity, he manages all the safety management systems for the six mines of Nyrstar Tennessee and coordinates between all the safety managers. Tr. 114.

Cruea explained that the RIMS system is a database used to manage hazards and incident reports, safety statistics, trend analysis, equipment damage, and near-miss reporting. Tr. 115. The safety department uses the RIMS system for trend analysis and reporting. Tr. 115. Cruea described several persons to which one can report safety issues, including team leaders, step-ups, and supervisors. Tr. 115-116. Follow up of a report made to the RIMS system occurs through safety meetings, pre-shift meetings, and through supervisors. Tr. 116-117.

Cruea testified that in regard to Denius's complaints that were not in the RIMS system, Cruea met with Denius to discuss the matter. Tr. 117-118. Cruea brought these concerns to Cole and Bean, and they followed up with questions and feedback for Denius. Tr. 118. Cruea testified that Denius's reports were entered into the RIMS system as soon as they were made aware of them. Tr. 119. In response to the question of whether Denius's transfer from working underground to the mills was a demotion, Cruea responded, "I'm not aware of that." Tr. 119.

Cruea described LaRue's position at Nyrstar as including educating the workforce on health and safety matters, and identifying hazards. Tr. 119-120. Part of her responsibilities included handling safety issues that came to her attention, and working with miners, supervisors and managers in resolving those issues. Tr. 120. Cruea referred to LaRue as an "expert inspector," and "among the best" at distributing miner's rights materials. Tr. 120-121. Cruea also testified that LaRue's job performance and work ethic were "among the best," referring to her as "very dedicated." Tr. 121-122. Cruea said that LaRue's only problem was "follow-through" and "getting people to hook on and had some trouble with getting things corrected the way she was approaching individuals." Tr. 122. Cruea discussed briefly LaRue's Individual Performance Review, where she was given a 3/6 score, defined as "Threshold." Tr. 123; RX-D. Cruea repeatedly described LaRue having difficulty interacting with people. Tr. 124-125.

Cruea testified that he was impressed by the document she sent him cataloging the problems that Denius was complaining about. Tr. 126. He described the effusive praise he gave her for her photos and presentation. Tr. 126. Cruea testified that he was not involved in the decision to terminate LaRue. Tr. 129.

On cross-examination, Cruea testified that LaRue was in large part responsible for starting the miner's representative program at Nyrstar Tennessee. Tr. 132-133.

Findings and conclusions

Contentions

The Respondent contends:

That Complainant did not engage in any protected activity and her termination was not motivated in any part by any protected activity;

That Complainant was a member of the Safety Department and there are no facts to support any claim that she engaged in safety activities outside of her normal job duties;

That she told the miner's representative and 105(c) complainant to stop filing hazard complaints with MSHA, an unauthorized and serious violation the Mine Act and company policy; and

That she admitted on investigation she had done this, and the employment action was entirely appropriate and the complaint of discrimination was frivolously brought.

The Secretary contends:

That Complainant engaged in protected activity by complaining to Respondent's personnel about specific conditions and practices at the mine that posed safety and health hazards to miners;

Complainant also engaged in protected activity by complaining about failures by Respondent's personnel to adequately respond to safety complaints made by other miners at the mine;

Complainant further engaged in protected activity by meeting with a recently discharged representative of miners, who was also a Section 105(c) complainant, about the unsatisfactory handling of safety concerns at the mine;

That when Respondent's personnel learned of this meeting, they interrogated and then discharged Complainant from her employment the day after the meeting; and

There is reasonable cause to believe Complainant was discriminated against for the exercise of statutory rights and the Application for Temporary Reinstatement was not frivolously brought.

Decision

As set forth in more detail below, I find that any one of the three alleged instances of protected activity is supported by substantial evidence, and that taken together with the discussion of each element of the analytical framework the Application for Temporary Reinstatement of Vicky LaRue should be granted.

Protected activity

Section 105(c)(1) states, in relevant part:

No person shall discharge or in any manner discriminate against...or otherwise interfere with the exercise of the statutory rights of any miner...in any coal or other mine subject to this chapter because such miner...has filed or made a complaint under or related to this chapter, **including a complaint notifying the operator or the operator's agent...of an alleged danger or safety or health violation in a coal or other mine.**

30 USC § 815(c)(1)(**Emphasis added**)

1. Complaints Concerning the Hoist:

LaRue testified that she made numerous complaints concerning safety problems with the sensors, cameras, and the skip on the hoist. Tr. 18-30. She complained that these problems put miners at risk, and sought to get the hoist repaired. Tr. 21-22. She testified that she went to the electrical department and spoke with foreman Bean several times, but he refused to fix the problems. Tr. 19-22. On September 30, 2011, she filed reports in the RIMS system, and though the complaints were closed out, she reported that the problems had not been fixed. Tr. 28-30; GX-2A, 2B, 2C.

2. Complaints Concerning the Dust Problem:

Within the last few months of her employment, LaRue also complained about the hazard of dust control on site. Tr. 44. She testified that she received complaints and was concerned about piles of lime that built up and blew around. Tr. 45-46. LaRue discussed the issue with James Jerman from Operations, and suggested utilizing a water truck to remedy the dust issue. Tr. 46. A short time later, Cruea witnessed a miner named Joe Anderson tell LaRue that the problem had not been fixed. Tr. 46-47. LaRue sent an email to the operations manager, Bowkett, and the mill manager, Armstrong, inviting them to meet to take care of the problem. Tr. 47. The result was that they got a water truck, but did not get the personnel to operate the truck. Tr. 48. Because the problem was still not fixed, LaRue told Bowkett again that the matter needed to be resolved. Tr. 49. He responded that he did not have time to worry about dust. Tr. 49.

3. LaRue's Meeting with Denius:

On May 30, 2012, LaRue went off site with Paul Denius and discussed conditions at the Nyrstar mine. Denius was a miner's representative and had a discrimination complaint against Nyrstar. Tr. 52. LaRue testified that in the course of her conversation with Denius, she told him that management believed he was the person submitting many of the complaints to MSHA. Tr. 56-57. Denius denied submitting the complaints and told her that miners had been told not to bring complaints to the safety department. Tr. 57-58. LaRue testified that upon returning to her

office, Allen asked LaRue what was happening. Tr. 62. LaRue responded that she had gone off site with Denius and that he had told her that he was not the person filing complaints with MSHA. Tr. 62. LaRue also added that she would likely get fired for talking with Denius because he was widely considered a troublemaker at the mine. Tr. 63.

Allen testified LaRue told her that while out with Denius she told him “enough is enough with the MSHA complaints.” Tr. 80. Allen quickly relayed her conversation with LaRue to Hale, the acting manager of safety and health. Tr. 81. Hale testified that upon receiving the information from Allen, he spoke with Milner in human resources. Tr. 94. Hale then had a meeting with LaRue and Bishop, and on the day following her conversation with Denius, LaRue was “stood down pending an investigation.” Tr. 97. Later that day, LaRue was terminated. Tr. 99-100.

Though there are inconsistencies in the testimony concerning the conversation between LaRue and Allen and the meeting between LaRue, Hale and Bishop, these inconsistencies need not be resolved in this proceeding. The Commission has stated that it is “not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings.” *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). LaRue’s testimony concerning her complaints and conversations provide sufficient evidence that she engaged in protected activities.

I also note Investigator James found that LaRue’s complaints about specific health and safety standards to mine personnel and their failure to adequately respond to those complaints were protected activities under Section 105(c). James also found that the voluntary, private meeting with a designated representative of miners and Section 105(c) complainant against Respondent was protected activity. Exhibit B, Application for Temporary Reinstatement.

Nexus between the protected activity and the alleged discrimination

Having concluded that LaRue engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus to the subsequent adverse action, namely the May 31, 2012 termination.

The Commission has recognized that a nexus between protected activity and a subsequent adverse action is rarely supplied exclusively by direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. More often, the determination of nexus is made by the trier of fact drawing an inference from circumstantial evidence. *Id.* In the instant case, inferences may be drawn from the evidence presented.

Knowledge of the protected activity

The record shows that management at Nyrstar had knowledge of all three instances of protected activities described above. With regards to LaRue’s complaints concerning the hoist, she made repeated complaints to the electrical foreman about the hazard, and nothing happened.

Tr. 19-22. LaRue filed RIMS reports on the hazards, which proceeded up the chain of command. Tr. 115-117; GX-2A, 2B, 2C.

With regards to LaRue's complaints about dust hazards, LaRue similarly first spoke with individuals at the appropriate department to remedy the hazard. Tr. 46. During a meeting with Cruea, someone came to her to complain that the problem was still not resolved. Tr. 47. Cruea told LaRue to take care of the problem, and she met with Bowkett and the mill manager, Armstrong. Tr. 47. The hazard was ultimately addressed by getting a water truck, but LaRue testified that they did not provide the personnel necessary to operate the truck. Tr. 48-49.

Management at Nyrstar were also aware that LaRue met off-site with the miner's representative, Denius, to discuss safety and health matters. Allen testified that she called the acting manager of safety and health, Hale, to tell her that LaRue had met with Denius. Tr. 82-83. Allen also recounted the events to Bishop, and Bishop asked her to send an email documenting what LaRue allegedly told her. Tr. 83. Allen sent the email, which described her conversation with LaRue concerning Denius, on June 5, 2012 to Bishop and Cruea. RX-C. Hale also testified that Allen told him about LaRue's conversation with Denius. Tr. 93-94. Hale testified that it was because of LaRue's meeting with Denius that LaRue was "stood down" and terminated the following day. Tr. 97, 99-100.

Accordingly, I find the evidence on this record establishes Respondent had knowledge of LaRue's protected activities.

Coincidence in time between the protected activity and the adverse action

LaRue was suspended and terminated on May 31, 2012, and she engaged in protected activity at multiple times during the final nine months of her employment at Nyrstar. Her complaints concerning the hoist hazards occurred in September 2011, and the RIMS reports were filed on September 30, 2011. GX-2A, 2B, 2C. Her complaints concerning the dust hazards were made in the final few months of her employment. Tr. 44. And her meeting with Denius occurred on May 30, 2012, which was the day prior to her suspension and termination. Tr. 54-55.

The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999)(quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). The Commission has noted, "[a] three week span can be sufficiently close in time", especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC*, 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the

miners' notification of a violation and that recall failure. *Secretary of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999).

Investigator James, in her affidavit, found LaRue's protected activities to be proximate in time to her discharge, especially the meeting with Denius just one day before. Exhibit B, Application for Temporary Reinstatement.

I find that the time span between each instance of protected activity and the adverse employment action is sufficient to establish a coincidence in time.

Hostility or animus towards the protected activity

"Hostility towards protected activity--sometimes referred to as 'animus'—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted). Here, Respondent attempted to show by testimony that there was no animus toward LaRue or the protected activity. The safety and health manager for Nyrstar Tennessee mines, Cruea, testified that LaRue was an exemplary employee. Tr. 120-122. He repeatedly indicated that she is an "expert" in various areas of safety, Tr. 120-121, and "was among the best" at distributing miners' rights materials, Tr. 120-121. He described her job performance and work ethic as "among the best," and referred to her as "very dedicated." Tr. 121-122.

However, the job performance that he referenced in his testimony indicates that LaRue was not held in as high regard as Cruea indicated. LaRue's Individual Performance Review rates her as 3/6, which is labeled "Threshold," and defined as "All or most performance standards/objectives met with opportunities for some improvement to bring performance up the standards required for the role." RX-D.

LaRue testified that after she met with Cole concerning hazards and Denius's demotion, she was told that Cruea received an email stating she had threatened Cole. Tr. 41. Cruea drafted Opportunity for Improvement paperwork criticizing LaRue for her conversation with Cole. GX-4. Furthermore, Hale testified that the reason LaRue was terminated on May 31 was due to her meeting with Denius on May 30. Tr. 97-100.

Investigator James found there was reasonable cause to believe Respondent was dismissive of and bore animus towards LaRue's efforts to ensure safety complaints were adequately handled at the mine. Exhibit B, Application for Temporary Reinstatement.

Considering the record as a whole, I find an inference may be drawn that Respondent had hostility or animus towards LaRue's protected activities.

Disparate Treatment

Mine management relied on a single term, harassment, in the Nyrstar Code of Business Conduct. However, also in the Code is the framework for a graduated type of disciplinary scheme:

Those who fail to comply with the Code or Nyrstar policies and procedures will be subject to *a range of disciplinary actions*, up to and including dismissal, depending on the seriousness of the action. (emphasis added).

RX-B, Tr. 110, 111.

Management seized upon Allen's version of the conversation between LaRue and Denius, disregarding the fact that neither Allen nor any other mine employee was present at the private conversation. Denius was not consulted. Despite the meetings Hale recounted in his testimony, no full and complete investigation by Respondent appears to have been conducted; rather, there was reliance on hearsay. I am aware of Hale's testimony that LaRue admitted to Allen's version, Tr. 96, but also note there was available to management a variety of disciplinary actions designed to correct behavior while avoiding the most drastic consequence of termination of employment.

Thus, the speed with which General Manager Jetson decided to fire LaRue without a full investigation into *all* of the circumstances, and without first utilizing a disciplinary action that would provide opportunity for improvement suggests she was treated differently from employees who could routinely receive the benefit of a graduated disciplinary policy.

Having considered all of the factors above, I find that the Secretary has established a nexus between LaRue's protected activities during the period from September 2011 through May 30, 2012 and the Respondent's adverse action on May 31, 2012.

Conclusion

In concluding that LaRue's complaint herein was not frivolously brought, I refer to the evidence of record that she had a history of and engaged in a number of protected activities including the private conversation with a representative of miners who had been fired by Nyrstar and had a current discrimination complaint against Nyrstar. I also conclude that Respondent showed animus toward LaRue's protected activities and that there was a close enough connection in time between her first protected activity, a close connection in time between her second incident of protected activity, and an immediate connection in time between the final incident of protected activity and her May 31, 2012 discharge.

Respondent asserts that its discharge of LaRue was based on violation of company policy on harassment, and that the performance of her job related duties may not be considered protected activity. Although Respondent may, in any subsequent proceedings, prevail on the

merits, I find that Respondent's evidence on this record is not sufficient to demonstrate that LaRue's complaint of discrimination was frivolously brought. To the contrary, since the allegations of discrimination have not been shown to be lacking in merit, I find they are not frivolous.

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Nyrstar Gordonsville, LLC, is **ORDERED** to provide immediate reinstatement to Vicki LaRue, at the same rate of pay for the same number of hours worked, and with the same benefits, as at the time of her discharge.

I retain jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall provide a report on the status of the underlying discrimination complaint **as soon as possible**. Counsel for the Secretary shall also **immediately** notify my office of any settlement or of any determination that Nyrstar did not violate Section 105(c) of the Act.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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Ms. Vicki LaRue, 118 Falcon Pointe, Baxter, TN 38544

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
WASHINGTON, DC 20004
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December 27, 2012

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on	:	Docket No. KENT 2007-383-DX
behalf of LAWRENCE L. PENDLEY,	:	MADI CD 2007-05
Complainant.	:	
	:	Mine: Highland No. 9 Mine
v.	:	Mine ID: 15-02709
	:	
HIGHLAND MINING COMPANY, LLC	:	
Respondent.	:	

Before: Judge Barbour

DECISION ON REMAND

This discrimination proceeding has a long and tortured history. It is before me on remand from the Commission (*Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC ___, KENT 2007-383-D (August 30, 2012) (hereinafter *Pendley*, slip op.), which in turn received the case from the United States Court of Appeals for the Sixth Circuit. *Pendley v. FMSHRC*, 601 F. 3d 417 (6th Cir. 2010). The Sixth Circuit reversed the prior decision of the Commission (*Sec’y on behalf of Pendley v. Highland Mining Co., LLC*, 31 FMSHRC 61 (Jan. 2009)), a decision affirming my underlying decision on the merits. *Sec’y on behalf of Pendley v. Highland Mining Co, LLC*, 30 FMSHRC 459 (May 2008) (ALJ). Pursuant to its reading of the Sixth Circuit’s opinion, the Commission returned the case to me to determine whether Highland Mining Co. (“Highland”) discriminated against Lawrence Pendley (“Pendley”) in violation of the Mine Act when it: (1) fired him in March 2007, and (2) changed his work assignments and conditions when he returned to work upon an order of reinstatement.¹ *Pendley*, slip op. at 15.

¹ Given the litigious history of the case and mindful of the possibility of yet another appeal, upon receiving the Commission’s directive I ordered counsels to confer to determine if they could reach a mutually beneficial settlement. Order on Remand at 2 (September 28, 2012). They discussed the matter but could not resolve their differences.

PENDLEY'S MARCH 21, 2007 TERMINATION

FACTUAL BACKGROUND

In my initial decision I noted an incident that occurred on March 19, 2007 during which Pendley confronted an office employee regarding his overtime pay. Pendley was credibly described as loud and “very upset.” 30 FMSHRC at 476. His emotional outburst made the employee feel “very nervous.” *Id.* Pendley was so loud, in fact, that another employee thought the employee whom Pendley confronted, “might need some help.” *Id.* I further noted that two days later, on March 21, Pendley returned to the office and engaged in another “heated” conversation about his overtime pay. This time Pendley was so “agitated” and out of control that when he left the office, management employees locked the doors to prevent his re-entry. 30 FMSHRC at 495. Pendley was, I found, an “employee utterly lacking in self-control to the point of disrupting [other employees’] work and making them very nervous for their own well being.” 30 FMSHRC at 494.

I also noted that on March 21, Pendley was involved in a physical altercation with another miner, Pendley’s long-time nemesis, Jack Creighton. 30 FMSHRC at 479-483. The altercation took place at the slope shack. There was conflicting testimony as to who first pushed whom. Pendley maintained Creighton pushed him away from the man load control panel in the slope shack. 30 FMSRHC at 479. Creighton maintained that Pendley charged, shoved him and in doing so interfered with an ongoing test of the hoist. 30 FMSHRC at 480. Pendley stated that there was no indication that a test was being conducted when he advanced to the slope shack. 30 FMSHRC at 479; *See also* 30 FMRHRC at 479, n. 32.

The decision to fire Pendley was made by mine superintendent Larry Millburg, who was informed of the incidents of March 19 and 21 prior to acting. 30 FMSHRC at 481. Pendley had already been warned that “verbal abuse” could lead to his discharge (30 FMSHRC at 495; Resp. Exh. 10), and shortly after the March 21 incidents, Millburg decided to suspend Pendley with intent to discharge.

In a March 21, 2007 letter to Pendley, Millburg informed Pendley that he was being suspended with intent to discharge due to:

Harassment of Office Staff[;]

Interference with Safety check
of Hoist Potentially Endangering
Safety of those conducting the
Test[;]

Assaulting Another Employee[.]

Gov’t Exh. 4.

In upholding Highland's discharge of Pendley, I concluded that the office incidents of March 19 and March 21 played "critical roles in Millburg's decision." 30 FMSHRC at 494. I found that Pendley was "disruptive, irrational and orally aggressive" and further that an employer need not "brook a situation where a group of employees rationally believe they [have] to lock their doors against a fellow employee." 30 FMSRHC at 494-495. In sum, I found that Highland's contention that it suspended and ultimately discharged Pendley in part because of his "Harassment of Office Staff" was credible and fully supported by the record. *Id.*

With regard to Highland's third reason for ending Pendley's employment, I concluded that although it was impossible to establish with any certainty whether Pendley first pushed Creighton or vice versa (30 FMSHRC at 495), there was no doubt that an altercation happened. I found it reasonable to conclude that Pendley, who charged the slope shack, purposefully placed himself in a situation where a physical conflict between him and Creighton was likely to occur and that the altercation would not have occurred but for Pendley deliberately rushing into the slope shack. *Id.*

Very shortly after the slope shack incident, Superintendent Millburg spoke with some of Highland's employees (Creighton, miner Lap Lewis and foreman Rodney Baker) about what happened. They told Millburg that they believed that Pendley first shoved or pushed Creighton. 30 FMSHRC at 481. Regardless of who actually "started it," there was no doubt in Millburg's mind that Pendley was involved in a work-site altercation, and I concluded that Pendley's involvement in the altercation was a valid reason for his dismissal. 30 FMSRHC at 495.

I also found that Highland's second reason for suspending and discharging Pendley – Pendley's alleged interference with the safety check of the hoist – was "not crucial to the validity of the disciplinary action" and that Mr. Pendley's oral and physical altercations of March 19 and March 21 were in and of themselves sufficient to warrant his dismissal. 30 FMSHRC at 495, n. 43.

When the decision was appealed to the Commission, a majority of the Commission upheld this approach. The majority stated, "[T]he Mine Act does not require . . . [a judge to] adopt every reason given by the operator in order to sustain the discipline" meted out by an employer. 31 FMSHRC at 79. The Sixth Circuit, however, found that the Commission erred. It concluded that under Commission precedent a judge may not disbelieve part of the operator's justification, but hold that the remaining part or parts justify the discipline. 601 F.3d at 426. Therefore, in the Court's view, the law requires an analysis of what Highland actually believed at the time with regard to the hoist test. *Id.* The Commission therefore remanded the matter to me to determine the role that the hoist test played in motivating Millburg to punish Pendley. *Pendley*, slip op. at 8-9.

FINDINGS AND CONCLUSIONS

THE SLOPE SHACK INCIDENT

I conclude that Superintendent Millburg honestly and reasonably believed that Pendley interfered with the hoist test, an action that clearly endangered other miners, and that the superintendent based his decision to suspend and fire Pendley on his honest and reasonable belief. Millburg disciplined Pendley for interfering with the hoist test regardless of whether Pendley's interference with the test was intentional or was done inadvertently. As I stated previously, "[t]o Millburg, the important thing was Pendley shoved Creighton and interfered with the test." 30 FMSHRC at 481.

Millburg was a credible witness and while he had reason to view Creighton's account of Pendley's actions as self-serving, the fact that Pendley interfered with the test was independently related to Millburg by both miner Lap Lewis and by foreman Rodney Baker.² Tr. 1029-30. The reasonableness of Millburg's belief was buttressed by the fact that before he drafted the letter advising Pendley he would be suspended with intent to discharge, Millburg heard from Sheila Gains about Pendley's disruptive and aggressive behavior on March 19 and about his similar behavior on March 21, prior to the hoist incident. It was reasonable for Millburg to believe that someone who had already orally disrupted the workplace would engage in disruptive behavior in another form. For these reasons I conclude that the reasons offered by Millburg for suspending Pendley were not pretextual, but rather represented legitimate reasons for the discipline Highland imposed. Therefore, I hold that Highland successfully rebutted the Secretary's and Pendley's prima facie case by establishing that Pendley's termination was in no part motivated by protected activity.

PENDLEY'S POST-REINSTATEMENT WORK ASSIGNMENTS

FACTUAL BACKGROUND

The Secretary alleged that after Pendley returned to work as a result of his temporary reinstatement, he was the victim of discrimination, interference, and disparate treatment by the company. According to the Secretary, Pendley was given additional duties, was "bird-dogged" by management officials and had his work assignments posted on the mine bulletin board, a practice that was allegedly carried out by the company with regard to only those miners who complained about safety. *See* 30 FMSHRC at 496. In rejecting the Secretary's allegations, I found that the tasks Pendley was assigned "fit squarely within the labor agreement" and his job classification and that "the record [did] not support finding Pendley was assigned more tasks than

² I note that Baker told Millburg the test was "just finishing" when Pendley advanced upon and confronted Creighton. Tr. 1029-1030. Baker did not say that the test was "just finished." The logical conclusion for Millburg to derive from Baker's words was that the test was in progress.

he reasonably could accomplish in an eight-hour work day.” *Id.* at 497. I also found that the posting of Pendley’s job duties by Highland was a mistake, one that was rectified by Pendley’s supervisor as soon as Pendley complained about it, and that Highland’s close supervision (*i.e.*, its alleged “bird-dogging”) of Pendley reflected legitimate concerns about the slow pace of Pendley’s work after his return. *Id.*

On appeal, the Commission sustained my finding that Highland’s close supervision of Pendley was not improper. 31 FMSHRC at 81. A majority of the Commission also upheld my finding that there was no evidence the duties assigned Pendley were given to him as punishment for engaging in protected activity or for seeking temporary reinstatement. *Id.* The Commission further agreed that the company’s mistake in posting Mr. Pendley’s job duties on the mine bulletin board did not constitute an “adverse action.” *Id.* However, the Sixth Circuit found that the Commission majority did not correctly applied its own precedent when it affirmed the finding that Pendley’s post-reinstatement job duties were not outside his job classification and could be completed within an eight hour shift. 601 F.3d at 426-427. The court stated that on remand the Commission should re-examine its holding regarding Mr. Pendley’s post-reinstatement duties in light of the Commission’s ruling in *Secretary on behalf of Glover v. Consolidated [sic.] Coal Co.*, 19 FMSHRC 1529, 1531-37 (September 1997).³ The Sixth Circuit also reminded the Commission of its prior holding in *Secretary on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (April 2002).⁴

The Sixth Circuit returned the case to the Commission and the Commission remanded it to me. The Commission stated that *Glover* stands for the proposition that “the assignment of new job duties within a job classification can nevertheless still constitute adverse action under the anti-discrimination provisions of the Mine Act.” *Pendley*, slip op. at 12. The Commission noted that the Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53,

³ In *Glover* employees were held to be subject to adverse action when they were transferred to “less desirable and more hazardous work.” 19 FMSHRC at 1534, quoting Administrative Law Judge Gary Melick, *Secretary on behalf of Glover v. Consolidation Coal Company*, 17 FMSHRC 957, 961 (June 1995). In upholding Judge Melick, the Commission emphasized that the work to which the miners were transferred was more dangerous than their previous assignments. 19 FMSHRC at 1534-1535.

⁴ In *Colorado Lava* the Commission addressed whether certain adverse actions were motivated by protected activity. It reiterated its holding in *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), that indicia of discriminatory intent may include: (1) knowledge of the protected activity; (2) hostility or animus towards protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment (3 FMSHRC at 2510) and that if adverse action is established, the judge must address the issue of illegal motivation, a process in which the drawing of inferences based on circumstantial evidence is permissible. 24 FMSHRC at 354.

57 (2006), a Title VII retaliation case, that discrimination includes employer actions taken against an employee that are “materially adverse to a reasonable employee.” *Id.* The Supreme Court further stated that “the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Id.* Even though not required to do so by the Sixth Circuit (601 F.3d at 417), the Commission majority adopted the Supreme Court’s *Burlington Northern* approach, declaring it to be “eminently workable in section 105(c) cases.” *Pendley*, slip op. at 14. The Commission instructed me to apply *Burlington Northern* and find whether or not post-reinstatement work assigned to Pendley was materially adverse to him. *Id.* (“The judge shall look anew at the evidence and arguments . . . and apply the *Burlington Northern* standard to reach a conclusion regarding whether those conditions were materially adverse to Pendley.”*Id.*)⁵

Pursuant to the Commission’s directive, the question before me is whether Pendley’s work assignments following his reinstatement were “harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.” *Pendley*, slip op. 14 (quoting *Burlington Northern* 548 U.S. at 57). The Commission instructed that when considering the issue, I look at the facts particular to the No. 9 Mine at the time Pendley came back to work. (“Determinations as to whether an adverse action was taken must be made on a case-by-case basis.” *Pendley*, slip op. at 12 (quoting *Sec’y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2).) The Commission also directed that the circumstances surrounding the alleged adverse action(s) be closely examined. 34 FMSHRC ___, at 12.

⁵ The majority’s application of *Burlington Northern* to section 105(c) Mine Act cases no doubt has raised eyebrows. Perhaps sensing that the cases’s principles do not “fit” an act regulating the mining industry, an industry in which many necessary jobs are necessarily disagreeable to a reasonable miner, the Sixth Circuit declined to hold *Burlington Northern* applicable to the Mine Act. 601 F.3d 417, 428-429 (2010). Instead, it returned the matter to the Commission so that the Commission could use its expertise and that of the Secretary’s to evaluate the question. The Sixth Circuit’s reticence to institute what it termed a “fundamental change in interpretation of the Mine Act” was not shared by the Commission majority. 601 F.3d 417, 428 (2010). As the Commission dissenters point out, acting on their own and seemingly at the behest of Pendley’s representative, the majority did not afford the Secretary’s and the operator’s counsels the opportunity to brief the legal applicability of the case. Nor were counsels given a chance to apprise the Commission of their views as to *Burlington Northern*’s practical consequences. See 34 FMSHRC ___, slip op. at 25 n.9. The majority’s resulting assurance that the standard is “eminently workable” in section 105(c) cases is not reassuring and at the very least is open to serious question. 34 FMSHRC, slip op at 14.

Pendley complained that following his reinstatement, he was given more work than he could complete during the course of his work day. MSHA special investigator Kirby Smith testified Pendley told him that following his reinstatement the company gave him:

an increased workload . . . to the point where other miners
. . . went to their union officials and asked for relief for
. . . Pendley . . . stating that . . . [mine management was]
. . . requiring . . . [Pendley] to do two jobs.

Tr. 40.

Pendley stated that when he came back he was given a written work assignment that contained duties different from those he was previously assigned, one of which was to wash equipment, a task he claimed he had “never been assigned before.”⁶ Tr. 184. He also maintained that he had to make the delivery of the oil his number one priority to keep the units from running out of oil. Tr. 185. The oil deliveries “absolutely” affected his ability to complete delivery of supplies and parts. Tr. 186. He simply could not do everything he was assigned.⁷ Tr. 186.

The difference [is that] I was assigned to wash
equipment that I had never been assigned before
. . . and to take oil to each unit which normally
I took it if they needed it.

Tr. 184.

Pendley could not recall for sure, but he believed it possible that Steve Bockhorn, Pendley’s shift foreman, told him to let the equipment washing go if he could not get to it and that Bockhorn then would assign another miner to wash the equipment. Tr. 259. Bockhorn testified that Pendley never told him that he, Pendley, was overloaded with work assignments. Tr. 874-875. Bockhorn also stated that if equipment did not get washed daily, he did not take any action against mine personnel. Tr. 875. However, he emphasized that washing equipment was important. If equipment was not kept clean, Highland could be cited for a violation of the mandatory standards, something that happened in the past. *Id.*

⁶ Pendley’s statement was not accurate. As he acknowledged a short time later, prior to being reinstated he was told that if the equipment he was using (a “service ride”) needed cleaning, he should clean it. Tr. 185.

⁷ Pendley testified that when he was asked by a miner why he was not getting supplies delivered, he replied, “I’ve got an oil ride and I’ve got a parts ride When I’m gone on the oil ride, then I cannot be delivering parts.” Tr. 255.

Pendley believed that he was the only mechanic who was assigned to wash equipment and to deliver oil and parts and supplies. (“Mechanics can be asked to do many of these things, but . . . I’m the only mechanic that has been assigned anything special like this that I know of.” Tr. 257.) He noted that one of the other mechanics who washed equipment told him that when he (the other mechanic) washed equipment, another miner delivered parts and oil. Tr. 1082. For this reason Pendley believed that he was “a focus” after he went back to work. Tr. 1082.

James Baxter, Pendley’s maintenance foreman, explained that in general each miner was responsible for washing the equipment he operated. In addition, there were “several” miners who were “assigned daily tasks of washing equipment.” Tr. 438. However, Baxter agreed that prior to his reinstatement, Pendley was not responsible for washing all of the equipment he was assigned to wash after he came back to work. Tr. 439. According to Baxter, after he came back Pendley was given additional pieces of equipment to wash, and it was a “time-consuming process.” Tr. 440.

Pendley testified that he complained to Ron Shaffner, the union local president, about his work assignments and although nothing came of the complaint, Shaffner told him that “there ought to be at least two people doing what you’re doing.” Tr. 1082. None the less, Pendley agreed that the assigned duties came within his job classification and that management could tell a miner what to do, as long as the duties were within the miner’s job classification and “as long as they [did] it in an appropriate way and everybody [was] treated the same.” Tr. 1083.

Pendley’s work habits also were the subject of much testimony. David Howell, a shift foreman at the mine, testified without dispute that prior to his reinstatement Pendley chose to work overtime on a regular basis. Tr. 911. After he returned, Pendley chose to only work a regular shift. *Id.* Pendley agreed with Howell. Tr. 290-291. He implied that he was afraid if he worked overtime, he would get even more duties. Tr. 291. Bockhorn thought that Pendley did his work well before he was discharged but when he came back he did not get done “as much as before.” Tr. 887.

Another supervisor, assistant superintendent Scott Maynard, described Pendley’s pre-reinstatement job performance as “excellent.” Tr. 931. Maynard stated, “He was always hustling, getting parts in as quick as he could, helping anybody that needed any help.” *Id.* Maynard added that prior to Pendley’s reinstatement he “never had any complaint about his work.” *Id.* However, almost immediately after Pendley was reinstated Maynard testified that he began receiving complaints from all of the mine managers about Pendley’s work:

[T]hat he was driving slow, wasn’t get[ting]
parts delivered in a timely manner. . . was
disappearing for periods of time [and
was] argumentative.

Tr. 931.

Maynard believed that neither he nor any other supervisor “made it tough” on Pendley. Tr. 932. Maynard stated that he talked to the mine managers and told them that they should “just have [Pendley] do what he was supposed to do.” Tr. 931. In Maynard’s opinion, “[E]veryone is supposed to be treated the same and that’s what we try to do.” *Id.*

Howell described Pendley after his reinstatement as, “a completely different employee as far as work habits.” Tr. 899. Howell testified from his contemporaneous notes. He stated that on June 14 parts were brought into the mine that Pendley was supposed to deliver. Pendley did not deliver them. Tr. 901. Rather, a miner on the incoming shift had to deliver the parts. According to Howell, Pendley’s failure to deliver the parts caused the miner who had to do Pendley’s job to throw “a bit of a fit.” Tr. 904.

Howell further observed that prior to his reinstatement, Pendley “delivered parts very well,” in a rapid, organized manner. Tr. 905. However, after he returned he drove “extremely slow like he ha[d] no urgency whatsoever to get anything delivered.” Tr. 906. There was, he maintained, a “big difference” in Mr. Pendley’s work habits. *Id.*

Pendley’s deteriorating work habits resulted in a discussion between Howell and Pendley. Howell told Pendley that if he did not have time to get his work done, Pendley should speak up so that Howell would have “an idea of what . . . the problem [was.]” Tr. 902-903. Howell stated that he told Pendley, “I can get someone else to do . . . [it] or whatever . . . but we’ve still got to get the work done.” Tr. 903. Despite this discussion, Pendley never spoke with Howell about work assignments. *Id.* Howell stated, “I never did . . . get a call . . . from him.” Tr. 907.

FINDINGS AND CONCLUSIONS

Having looked anew at the evidence, I find that Pendley and the Secretary have not established that Pendley was subject to an adverse action when he returned to work. I reach this conclusion because I find that the conditions under which Pendley worked were not such as would “dissuade a reasonable worker [at the No. 9 Mine] from making or supporting a charge of discrimination.” *Burlington Northern*, 548 U.S. at 57. It is clear that after Pendley returned to work, the particular jobs he was assigned – washing equipment, delivering oil, and delivering parts and supplies – were neither more dangerous nor more difficult to carry out than work he was assigned prior to his discharge. In fact, the record fully supports finding that they were jobs he was called on to do prior to his reinstatement. It is not the nature of the jobs that is at issue. Rather, the essence of Pendley’s and the Secretary’s complaint goes to the amount of work he was assigned. Essentially, they maintain that he was given more work than he could complete in an eight-hour shift.

The record fully establishes that after he returned to the mine, Pendley was assigned to wash equipment, to deliver oil to mining units and to deliver parts and supplies. Pendley asserted that he was the only miner assigned to these three duties at the same time – washing equipment, delivering oil, and delivering parts and supplies. Pendley also contended that when he was assigned to wash equipment he could not complete his other assignments. Tr. 184. In this regard,

there is credible testimony that prior to being reinstated Pendley was required from time to time to clean his own equipment (Tr. 185), but the record also confirms that the assignment to wash other equipment was new. Tr. 440. There is conflicting testimony as to how extensive the new assignment was. Maintenance Supervisor Baxter thought that Pendley might have been assigned to wash several pieces of equipment. *Id.* However, Bockhorn's testimony that he explained to Pendley that two of the service cars were not his responsibility, that he was responsible for washing at most his own equipment and one other piece of equipment, was more specific and persuasive.⁸ Tr. 874.

There is much evidence that cuts against the reasonableness of a miner concluding that Pendley was assigned the new washing duties as punishment for seeking and obtaining temporary reinstatement. First, as already noted, I credit Bockhorn's testimony that Pendley's washing assignment was neither as extensive nor as burdensome as Pendley contends. This conclusion is buttressed by Bockhorn's unrefuted testimony that Pendley never complained to Bockhorn that he (Pendley) was overloaded with work, something that one would expect if in fact Pendley really found the washing duties to be too arduous. Tr. 874-875. Moreover and as Highland points out, while Pendley in fact was assigned to wash an additional piece of equipment after his reinstatement, the equipment was new, and Highland equally divided all extra washing duties between Pendley and two others. *See* Highland's Position Statement 10.

Second, although Smith stated that he was told "miners . . . went to their union officials and asked for relief for . . . Pendley . . . stating that they're requiring this man to do two jobs" (Tr. 40) and although Pendley claimed that union president Shaffner told him in effect that he was doing the work of two miners, I find it noteworthy that Shaffner was not called as a witness. Moreover, miner Bernard Alvey, who at times worked on the same shift as Pendley, testified that he complained to Shaffner that Pendley was "being harassed by all of these extra assignments," and that Shaffner told him that he (Shaffner) would speak with Millburg. Tr. 523. However, nothing came of the complaint, and Alvey did not know if Shaffner ever followed up with Millburg. *Id.* Nor is there any indication that Alvey ever attempted to find out if Shaffner spoke with Millburg, something that reflects adversely on the reasonableness of Alvey's concern. Tr. 523. Further, when Alvey was asked why he thought that Pendley was "given more than [he] could physically do," Alvey answered that he was "not sure." Tr. 521. Alvey added that he could only recall one instance in which Pendley was given work that Alvey thought was unreasonable and that involved an assignment to "pick up a pallet of glue that was along the side track"(Tr. 521), an incident that is not before me. *See Pendley*, slip. op. at 25 (*citing* 601 F. 3d at 428; 31 FMSHRC at 81-82 n. 24.)

⁸ The "other" equipment was a new nurse car. It was equipment that, as Bockhorn explained, "somebody [had] . . . to wash." Tr. 874.

In addition, although foreman James Baxter testified that “a lot” of hourly workers thought that mine management had “added some duties” to Pendley’s work assignment (Tr. 433), I do not find that this was something that “could dissuade a reasonable [miner] from making . . . a charge of discrimination.” *Burlington Northern*, 548 U.S. at 57. Rather, the record confirms that although Pendley had duties added to his daily tasks, they were not as extensive as he claimed, nor were the individual jobs more arduous. In addition, from all that appears on the record, Pendley’s job assignments did not become the subject of a union complaint.

Third, I credit the testimony of Bockhorn that after returning to work, Pendley’s “work ethic” showed a marked decline. Scott Maynard’s testimony that miner managers complained about the slow nature of Mr. Pendley’s job performance, his occasional disappearances and his argumentative nature was not refuted.⁹ Tr. 931. The slow pace of Pendley’s job performance was also noted and contemporaneously documented by on-site foreman David Howell. Tr. 902-903, 906. I fully credit Howell’s testimony that in at least one instance Pendley’s poor job performance resulted in another miner having “a fit” after he was adversely affected by Pendley’s failure to get needed parts delivered. Tr. 904. I also note that although Howell invited Pendley to discuss his job performance problems, Pendley did not respond. Tr. 903, 907. Nor did Pendley complain to his shift foreman, Steve Bockhorn, that he was overloaded with work. Tr. 804-805.

It must also be mentioned that Pendley’s duties following his reinstatement did not affect his job title, his hours of work, his salary, his benefits or cause him a diminution in prestige. *See Aryain v. Wal-Mart*, 534 F.3d 473 (5th Cir. 2008). Nor was there a drastic reduction in Pendley’s responsibilities. *See Kessler v. Westchester County*, 461 F.3d 199 (2d Cir. 2006). Rather, taken as a whole the record shows that there was a moderate increase in the amount of work Pendley was expected to do and that because of his diminished work ethic he could not always complete it.

⁹ I find the latter complaint to be entirely consistent with Pendley’s pre-termination run-ins with other Highland employees.

I therefore conclude that a reasonable miner (who would have known all of the facts relating to Pendley's post-reinstatement work assignments) would not have been dissuaded from making or supporting a charge of discrimination because of the post-reinstatement work assignments. *Burlington Northern*, 548 U.S. at 57. In sum, I find that Pendley and the Secretary did not bear their burden of establishing that Pendley's work assignments were materially adverse to a reasonable miner, and I conclude that Pendley was not discriminated against after he was temporarily reinstated.¹⁰

This matter is **DISMISSED**.

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

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/db

¹⁰ In reaching this conclusion I am mindful that Pendley's work hours were not changed and that he elected not to work overtime. I am further mindful that my conclusion the record does not support finding Pendley was assigned more tasks than he reasonably could accomplish in an eight-hour work day was not overturned. 30 FMSHRC at 497. Nor was my conclusion overturned that the record does not support finding Pendley was punished in any way for failing to accomplish all of the tasks he was assigned. 30 FMSHRC at 497.

The Significant and Substantial designation.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained that “In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard;³ (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation;⁴ (3) a reasonable likelihood that the hazard

³ The first requirement, a violation of a standard *or* a violation of the Mine Act itself, is straightforward. Inclusion of violations of the Act itself, not simply safety and health standards promulgated under it, makes sense because the Act has its own safety and health provisions established in its text.

⁴ The second requirement, the identification of a discrete safety hazard, means that there is a measure of danger to safety contributed to by the violation. For each violation alleged to be “significant and substantial,” the relevant hazard associated with the violation must be identified. Accordingly, to provide a few illustrative examples, in a case involving a violation for the lack of berms on a roadway, the judge cited the hazard of a vehicle veering off the roadway and rolling or falling down the incline. *Black Beauty Coal*, 2012 WL 3255590, (Aug. 2012). So too, in *Cumberland Coal*, 33 FMSHRC 2357, 2366 (Oct. 2011), the Commission held that an operator’s failure to install lifelines that could not be used effectively contributed to *the hazard* of miners not being able to escape quickly. Accordingly, in *Cumberland Coal* the Commission made a point of emphasizing that the Secretary need not show a reasonable likelihood that the violation itself will cause injury. Therefore, one does not analyze whether *the violation* will cause injury, because the violation is distinct from the hazard. This means that one is to determine if there is a reasonable likelihood that the hazard would cause injury. As applied in that case, that meant that an analysis of the likelihood of a mine emergency actually occurring is not part of the analytical equation. Thus, it is not the absence of a berm or the improper positioning of hooks along a lifeline that is the focus. Rather, for the second element, it is *the hazard* associated with the absence of those devices that is the subject for this part of the S&S analysis. Accordingly, an inspector, in determining if a matter is S&S would, upon finding a violation, identify the hazard associated with that violation by articulating the underlying hazard that was the genesis for the standard’s creation and then inquiring whether there is a *reasonable* likelihood, given the violation’s contribution to the risk, that the hazard will occur and cause injury and, if so, whether it would be a reasonably serious injury. As noted in *Topper Coal* there may be circumstances when it is impossible to determine the particular hazard contributed to by the violation. *Sec. v. Topper Coal* 20 FMSHRC 344, 1998 WL 210949 (1998). *Topper*
(continued...)

contributed to will result in an injury;⁵ and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.⁶ *Id.* at 3-4 In *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“PBS”), affirming an S&S violation for using an inaccurate mine map, the Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury. . . . [and that] the “Secretary need not prove a reasonable likelihood that the violation itself will

⁴(...continued)

focused on the applicability of an S&S finding in the context of an MSHA spot inspection where mine management alerted a working section that the inspectors were present. Thus, one could not tell, because of the warning, what violations the inspectors might have uncovered had there been no advance warning given. It is noted that although three Commissioners agreed that the violation was S&S, only two of them did so on a “presumption theory,” that is, some violations may be deemed “presumptively” S&S. Those two Commissioners then cited other examples in which such a presumption had previously been applied in S&S matters. For example, those Commissioners noted that all violations of the respirable dust standard are presumed to be S&S, *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986) *aff’d*, 824 F.2d 1071 (D.C. Cir. 1987) and that an S&S presumption has been applied to the preshift standard. *Manalapan Mining Co.*, 18 FMSHRC 1375, 1394-95 (Aug. 1996).

⁵ As for the third element, the Mine Act itself requires only that the violation of a standard make a significant and substantial *contribution* to the cause and effect of the identified mine hazard. It therefore may be thought of as a violation which has the effect of advancing matters towards the creation of a hazard and therefore moving events towards a hazard’s emergence. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). While this third element, that there be a reasonable likelihood that the hazard contributed to will result in an injury seems, in practice, to be the most difficult to apply, the applicable test, that there be “a reasonable likelihood” that an injury will result, is not as complex as it seems. It also may be helpful when viewed from the perspective of what is not required. Thus, the test does not require that it be demonstrated that it is more probable than not that an injury will result. Instead, only a reasonable likelihood is required to be shown. Whether that reasonable likelihood of an injury occurring has been shown is evaluated in the context of assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

⁶ Regarding the “continued normal mining reference” for S&S determinations, the evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984). The determination of “significant and substantial” must be based on the facts existing at the time the citation is issued but also in the context of continued normal mining operations without any assumptions as to abatement, *Secretary of Labor v. U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984). Thus, it cannot be inferred that the violative condition will cease. *Secretary of Labor v. Gatliff Coal Company*, 14 FMSHRC 1982, 1986 (December 1992).

cause injury.” It also observed that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* at 1281.

Finally, the fourth element, that the injury must be a reasonably serious one, has not been difficult to apply. Another way to express this is that negligible mining mishaps, such as bumps, bruises and small cuts, do not constitute reasonably serious injuries. It’s important to appreciate that when a standard is violated, the absence of an injury producing event actually occurring does not mean that the violation was not S&S. Restated, no injury need occur for the violation to be S&S. *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005).

The inspector’s opinion in determining S&S.

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

Citation No. 8501137

As noted, Highland concedes the violation but contends that it was not “S&S.” MSHA Inspector Coburn cited 30 C.F.R. § 75.370(a)(1), entitled, “Mine ventilation plan; submission and approval,” and its provision under (a)(1) that “The operator shall develop and follow a ventilation plan approved by the district manager.”

Inspector Coburn issued Citation No. 8501137 on September 11, 2010. Tr. 672. Exhibit P31 and P 33, his associated notes. Coburn was traveling with Brad Carlisle and Barney Alvey at the time and the citation was issued at 9:10 that morning. Upon traveling to the Number 4 MMU and arriving at the number 6 entry, Coburn observed the roof bolter and then took a reading behind the curtain. Tr. 676. This is done with an anemometer and it was taken at the end of the line curtain. The anemometer, an air reading device, measures feet per minute of air movement. Tr. 676. The device is used to measure the cubic feet per minute (CFM) of air behind the line curtain. At any rate, Coburn took a measurement with the device, recorded as 48 feet per minute. Tr. 679. With the correction factor accounted for, Coburn’s calculation was 60 feet per minute at 5.9 times 3 feet. Tr. 679-680. The bottom line was that Coburn found 1,115 CFM and the Respondent does not dispute either that reading nor that the plan requires 3,000 CFM behind the line curtain. Tr. 680, P 19, the mine’s then approved ventilation plan, as reviewed March 30, 2010. Tr. 682. Coburn confirmed that the roof bolter was working when he took the reading. Tr. 684.

It wasn’t simply the Inspector’s reading which informed him that not all was right, as he “felt the heat off the roof bolter, from 15 feet away.” Tr. 687. That told him there was insufficient air to dissipate the heat from the bolter machine. Tr. 687. Two miners operate that machine. Accordingly, Coburn cited the mine for a violation of 75.370(a)(1) and its requirement for 3,000 CFM.

Coburn marked this violation as “reasonably likely” because if normal mining were to continue, there could be an ignition if the roof bolter machine hit a pocket of gas and there also would be exposure to dust coming out of the drill shields. Coburn firmly believed that the heat should have prompted the miner to realize that he had insufficient air and therefore there was a need to take another reading. The right side roof bolter should have realized this. Tr. 688. The Court finds this to be the fact. He also marked it as “lost work days or restricted duty,” and based on the lack of air and his concern that methane could build up, he felt there was a risk of an ignition off the pinner steel while drilling a hole and spinning the steel up. Tr. 689. Coburn also stated there was a health factor, as dust comes down off the steel when they first start them up. Tr. 689. He later modified his citation to reflect low negligence, down from his initially marking it as moderate negligence. Tr. 690. Aware of the mine’s practice in these matters, Coburn concluded that this was a personnel problem, as the operator had made diligent efforts to avoid this problem. Tr. 690.

The condition was abated by extending the line curtain out into the last open crosscut and it was moved away from the rib to get a bigger area. This was effective as the air increased to 4,831 feet behind the line curtain. Tr. 691. Still, Coburn considered the violation to be S&S. Tr. 691. His view was that “[b]ecause of the possibility of the methane - - you can hit a pocket of gas at any time, plus when you have got the long-term exposure to dust when . . . you start the steel up, it had a spit of dust coming out and the personnel are exposed to this.” Tr. 692. Thus, Coburn felt there was a reasonable likelihood of those things occurring. Tr. 692.

Coburn stated that it takes 20 to 30 minutes to bolt a given spot and then the bolter would go to a different area and re-establish the line curtain. The line curtain is necessary to ensure that an appropriate amount of air comes up to the roof bolter. Tr. 696. Coburn accepted that the air was sufficient when the bolter first started but that the amount of air became insufficient at some time during the bolting of that particular area. Tr. 699. It was determined that the source of the problem was that the rib had not been cut straight and this meant that the curtain was not running exactly parallel to the rib. Tr. 699. Coburn also agreed that the bolters would have been exposed for about another 10 to 20 minutes before they completed that area and moved to the next area to be bolted. Tr. 700. Coburn agreed that the bolters have spotters on the bolting machine and those devices will alarm when a certain methane level is reached, which Coburn believed were set to alarm at 1% methane. Tr. 701.

Coburn informed that his S&S designation was based on both a methane ignition risk and exposure to respirable dust. Tr. 703. However, he did not mark any health concern on his citation. Instead he marked only safety. Tr. 704. Nor did his notes reflect anything about dust exposure. Tr. 703-705. Coburn agreed that Highland had conducted safety re-training or additional training so that roof bolters would be more aware of the need to have line curtains properly set and that the air coming through was appropriate. However, that said, it seems fair to comment that, at least in this instance, the training was not effective.

Regarding Coburn's statement that the roof bolter told him his anemometer reading showed sufficient air, Coburn did not dispute that assertion. Instead, Coburn's point was that the 3,000 CFM has to be maintained the entire time, not just when they start roof bolting an area. Tr. 709. This air flow has to be maintained at the end of the line curtain at all times. Coburn's notes for this violation reflect that the inadequate air had been present for at least an hour. Tr. 710.

The roof bolt operators should have known about the low air because "[a]s far as the operator on the intake side, the air coming up hitting in the face while you were pinning - - I run a pinner for a year and a half. You can tell when the air gets below. The operator on the other side, his helper, he should have felt the heat as far as the dust." Tr. 711. Thus, one doesn't need a device to be informed of the problem.

In terms of justifying his S&S finding on safety grounds, Coburn added that "Any time when you are drilling a roof, you can hit a pocket of gas. I myself have had a blue flame while I have been pinning. You can hit a pocket of gas at any time. You got heat off your bit [which] can cause a methane ignition." Tr. 712. Thus, Coburn believed that his S&S determination was justified solely on safety concerns. Tr. 712. He added that in fact he failed to account for the health aspect at the time he issued the citation, but that he should have done so. MSHA's health department has so recommended that inspectors consider both safety and health aspects in such matters. Tr. 713. Now, he would check both boxes, safety and health, upon finding such a problem. Tr. 714.

Coburn has never encountered methane at 5 to 15 percent at the face at Highland. Tr. 715. Further, installing pins, such as with the situation he cited, is considered to be at the face. Tr. 715.

As Coburn stated that pinning a given area would take 20 to 45 minutes, he was asked how he could state that inadequate air had lasted for an hour. He explained that it was only an estimate, based upon his experience and then coming upon the situation, and that he was factoring that a bolter will need to do various things before actually starting the pinning process. Tr. 717, 721. Coburn then stated that he *has* seen methane at 2% or more at the face at Highland. Tr. 719. However, this was not during roof bolting but rather when mining was occurring. (i.e. a continuous miner operating). Tr. 720. However, with float coal dust present, methane is ignitable, even at 1%. Tr. 720. Further, upon reflection, Coburn revised downward the amount of time he estimated the condition to have existed from an hour to 10 to 20 minutes. Tr. 722. Yet, he still believed it was S&S because of the possibility of a methane ignition and the need to have 3,000 CFM *at all times*. Tr. 723. This is because at any time one could cut into a pocket of gas and have an ignition. Tr. 723. Thus, Coburn maintained that the risk of a methane ignition is not limited to mining coal but can occur during roof bolting too. Tr. 723. Further, Coburn expressed that, if he had not detected the problem the roof bolting process would have continued and that the low air would have continued. Tr. 724. Coburn stated that methane is being liberated *all the time* out of the roof, rib and bottom. Tr. 724.

The Respondent called Brad Carlisle, who at the time of his testimony was employed by as the mine's maintenance planner. Tr. 870. At the time of the matters in dispute he was employed in their safety department. He has significant underground mine experience, starting in August 2001, and is a certified mine foreman. Tr. 872.

Shown Ex P 31, Citation No. 8501137 and the Inspector's notes related to that, P 33, issued in September 2010, Carlisle described his interaction with Inspector Coburn. Tr. 873. This pertained to Coburn's inspection of the Number 4 unit and the amount of air issue. They had the bolters stop their work. Carlisle stated that both bolters were surprised that there wasn't sufficient air because they had taken air readings before bolting and it was adequate. Tr. 874. Carlisle also asserted that there were no indications that should have alerted the bolters to the issue as the curtain looked good. Tr. 874. At the time of the citation, the bolters were about half way through their task at that location. Tr. 875. An area like that would take about 30 minutes to bolt. Tr. 876. Though wearing a spotter, which will signal if there is a problem with methane, CO, or insufficient oxygen, Carlisle stated that it did not alarm. Tr. 877. Nor has Carlisle ever encountered a situation when his spotter has alarmed around roof bolters, signaling a methane problem. Tr. 877. Carlisle, after offering his understanding of the term "S&S"⁷ stated he did not view the violation as of that nature. Tr. 878. This was based upon believing that the pinner took the air readings, that there were no methane or CO issues and that the curtain was in good shape. Tr. 878. On cross-examination, Carlisle admitted that there was not sufficient air at the time the Inspector took his air reading. Tr. 879. He believed that it would be hard to judge by feeling the amount of air if there is sufficient air. Tr. 880. Besides, he noted there was some air movement. Still, Carlisle admitted that he had never operated a roof bolter. Tr. 880. Therefore, he could only respond with "possibly" as to whether one would feel more heat coming off the bolter if there was not enough air. Tr. 880. As to whether low air also presents a respirable dust concern too, Carlisle agreed it was also a hazard in that regard. Tr. 881. However, he added that the roof bolting machine itself will suck the dust out, regardless of the amount of air flow and that feature has nothing to do with the amount of air flow behind the curtain. Tr. 881.

Highland's Contentions

As noted, Highland admits that the Inspector's air reading, found to be below the air flow required under the ventilation plan, was a violation of the cited provision. In support of its contention that it was not "S&S," Highland contends that this is a safety, not a health standard, noting in this regard that the Inspector marked box 9(A) on his citation as a "safety," not as a "health" violation. Although it acknowledges that the Inspector spoke of the citation as a health violation because of the potential for the inhalation of respirable dust, Highland contends that this was an after the fact basis and therefore not part of the inspector's thinking at the time he issued the citation. It therefore contends that as it was simply an afterthought on the inspector's part, the Court should not consider that as a basis now. R's Br. at 27. The Court rejects this

⁷ Carlisle incorrectly described it as "a reasonably likely that a significant or substantial accident or injury is fixing to happen - - getting ready to occur. Tr. 878.

argument. Afterthought or not, the issue is whether the violation was S&S, not the timing of the Secretary's basis for its claim. Beyond that, Highland contends the miners had sufficient air when they began the bolting in the area and it insufficient air only arose later, exposing the miners to a maximum of 20 minutes of such insufficient air, which is too short a time to cause injury. Finally, based on the testimony of Highland witness Carlisle, the bolter machine itself eliminates all of the dust by its operation. That last contention, Highland asserts, was uncontested. *Id.*

Highland maintains that the Secretary failed to meet her burden of proof. For this violation, it maintains that the sole concern is methane liberation and a subsequent ignition of that. R's Br. at 27. This means there must be methane present but MSHA presented no evidence of methane being present, much less at a level of sufficient concentration to cause an ignition. Further, Highland submits that Inspector Coburn effectively conceded that methane liberation was not to be expected during roof bolting. R's Br. at 28. As methane liberation can occur during cutting coal, but as roof bolting does not involve that, the risk of methane liberation was not established. Accordingly, the violation was not shown to be S&S. R's Br. at 29. The Court rejects Highland's characterization of Inspector Coburn's testimony.

The Secretary's Contentions

The Secretary takes note of the circumstances under which Inspector Coburn identified the admitted violation, namely that he was preparing to do an imminent danger run, and was not about examining air flow, but that he then noticed heat coming from the roof bolter. From experience, he knew that if air movement is low, heat from the roof bolter will not be dissipated. It was then that the Inspector took an air reading, finding only 1,115 cfm where 3,000 cfm was required. Sec. Br. at 55,56. The Secretary takes the position that the Inspector should have marked the citation as *both* a safety and a health problem because the air flow dilutes any gases but it also controls dust. Accordingly it contends that the diminished flow was reasonably likely to result in a methane ignition as well as exposing the roof bolt operators to a health hazard. Sec. Br. at 56. Regarding the safety claim, the Secretary concedes although no methane was found at the time of the citation, methane can build up "in an instant," as when a pocket of gas is hit. Further, the machine itself can provide the ignition source from sparks occurring during roof bolting. As to the health issue, as the roof bolter machine operates, there is exposure to dust from that activity, including silica and coal dust. The Secretary also contends that the Inspector correctly marked the injury which could result as lost work days or restricted duty. *Id.* at 58. Last, the Secretary, noting that the Inspector originally marked the violation as of "moderate" negligence, does not take issue with the Inspector's later determination to list it as "low" negligence, as he considered that the operator was trying to comply with the air requirement and that the failure was with the roof bolt operators themselves. *Id.* 59. The Secretary asserts that a \$745.00 penalty is appropriate under these circumstances.

Discussion.

The Court finds that the violation was not S&S, but this determination does not rest upon Respondent's assertions. Rather, the Court simply finds that there was no reasonable likelihood of a serious injury occurring here because it is unlikely that the inadequate air would be continued as the miners advanced to their next pinning location. Here, the rib had not been cut straight and that caused the curtain issue, which in turn resulted in the insufficient air. However, there is no testimony of record that the next area to be pinned had or would have the same issue. As to the penalty assessment however, while not S&S, the Court believes that the testimony establishes greater negligence as this had been an ongoing issue at this mine. Upon consideration of all the statutory criteria, the Court imposes a civil penalty of \$370.00 for this admitted violation.

Citation No. 8491142

For this Citation, Highland is alleged to have violated 30 C.F.R. § 75.1731(b), a standard entitled, "Maintenance of belt conveyors and belt conveyor entries." At subsection (b) that standard provides: "Conveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components." Highland concedes that the standard was violated but does challenge the S&S designation and MSHA's assertion that moderate negligence was involved. R's Br. at 29.

Here, Inspector Coburn stated that he smelled belt smoke from the supply road. Tr. 621. He then went to the belt entry, a distance of some 50 feet and, arriving at the belt entry, he observed smoke suspended in the atmosphere. Traveling the belt line, he then observed the belt rubbing in 13 different locations. This impacted about four crosscuts, for a distance of about 288 feet. The belt line in question is traveled only by mine examiners and this occurs twice a day. The individuals are authorized by management and are "fire bosses." Tr. 622-623. After conferring with the section foreman, the Inspector determined that the condition had existed for a slightly more than 2 hours. Tr. 624. However, he believed that it originated when there was a belt move on the third shift and that the belt then became out of alignment. Tr. 624. The belt was rubbing on the belt frames and was curved up with pressure, with more curving towards the backup curtain where there was more pressure on the belt stands. Tr. 624. Despite the short time of the presence of the condition, Coburn believed that there was still the hazard of a potential ignition from the friction that was created. Tr. 624. Coburn stated that the belt frames were warm to the touch, a condition he detected upon placing the back of his gloved hand on the belt frames. Tr. 625.

The potential injuries from the condition if an ignition occurred would be smoke inhalation to those miners working on the unit. Tr. 625. Coburn advised that some smoke can pass through the air lock, as that device is not a total barrier to smoke travel. The condition was abated by adjusting the bottom belt rollers to allow the belt to track properly, a task that took about a half hour to accomplish. Tr. 626. Coburn stated that he saw smoke where the belt was bent up and rubbing and, as one came closer to the unit, there was more pressure and more

smoke. Tr. 626. Coburn's notes include that he expressed that the belt smell should have been noticed. Tr. 627. He added that the smoke was enough to see and that it put a haze in the air in the whole area. Tr. 627. Inspector Coburn informed that he walked the 288 feet, a distance of four crosscuts, and that the smoke was visible the whole distance and 10 feet out from the belt along the whole way. Tr. 628. As Coburn stated, "The whole 20 foot pillar line was involved, the whole belt entry, . . . and where the belt was rubbing, where you walk inby the crosscut, you are looking at all the areas of smoke coming out of the belt line. Of course it was coming over up to there and going over to the return." Tr. 630. Augmenting his testimony, Coburn then made a drawing, essentially visually confirming his oral testimony concerning the extent of the smoke he observed.⁸ Tr. 635, Ex. P 39. The Court finds the Inspector's testimony credible.

Air locks function to move air, including any smoke or smell in that air, to the return and from there out of the mine. Tr. 637. Coburn agreed that he did not go past the air lock to sense if there was any smoke. Tr. 637. He also agreed that, if working properly, the air locks will prevent smell and smoke from getting inby and he also agreed that he did not cite the Respondent that day for a defective air lock. Tr. 637.

The belt had been shut down prior to the Inspector's entering the mine, as it was the night shift and the belt will typically be started back up around 6 a.m. Tr. 639. Thus, Inspector Coburn agreed that the belt would have been running before the day crew, and Coburn as well, had entered the mine that day. Tr. 639. As Coburn wrote his citation at 8:57 am, and the workers would not have arrived at the section until shortly before that, at 7:30 or 8:00 a.m., not much time had elapsed. Tr. 640. However, Coburn added that "[o]nce [he] entered the entry, [he] saw the smoke in suspension and [he] knew that [there was] a violation." Tr. 640.

Respondent's Counsel, aware that Coburn had opined that the condition of the misaligned belt had been that way for 2 hours, received the Inspector's acknowledgment that no face boss had told him that the problem had been present for 2 hours. Tr. 640. Coburn's basis for his time estimate was that the section foreman⁹ had advised him that they had done a belt move on the 3rd shift. Tr. 641. Accordingly, he reasoned that, while 2 hours had not elapsed from the time the shift started, *the section foreman was on the section before he issued the citation* and that fact was a consideration in his arriving at his 2 hour time estimate. Tr. 642. The Inspector reaffirmed that his concern was a potential ignition. Tr. 642. The 13 out-of-alignment rubbing points were all on the same side of the belt. Tr. 643. Coburn added that the affected area was 13 stands *in succession* with each stand 10 feet apart. Tr. 643.

⁸ In an attempt to diminish the gravity of the violation, Coburn was asked about the mitigating effect of the nearby airlock.

⁹ The Inspector viewed the terms section foreman and face boss as synonymous. No one disputed that view.

Asked about the potential fuel source, Coburn stated that one always has material underneath the low framing as an ignition source and there is no way to clean up under low framing until the belt is again moved forward. Tr. 644. Significantly, he informed that the mine was actually running coal at the time he observed the problem. Tr. 645. The Inspector agreed that at the time he discovered the problems, there were not, as yet, any belt ravelings, nor was the belt otherwise fraying or cutting into the stand yet. Tr. 646. He also acknowledged that the belt walker would be the individual who would observe this condition and Coburn agreed that when he issued his citation that person had not yet arrived at that location. Tr. 646. That person would arrive at the cited area at some point during the eight hour shift.¹⁰ As the condition was obvious the belt walker would have seen it when he arrived, but Coburn could not say that belt fraying or shavings would *not* have occurred by then. Tr. 647. Thus, such problems could have developed by that time.¹¹

Upon questioning by the Court, Coburn affirmed it was his view that someone should have detected the condition prior to his arrival at the site. When asked why he held that view, Coburn repeated that the foreman on the unit for the 3rd shift should have noted it when they did the belt move and then started up the belt. At that time they should've ensured that the belt was in proper alignment. Tr. 658. Had they done that, Coburn believed they would have seen the rubbing. Tr. 658. Coburn expressed that the rubbing would not have begun later, that it would have occurred as soon as the belt was started. Tr. 658. Thus, they would have known immediately about the problem. Tr. 658. Further, Coburn stated that it is standard practice to observe the belt, upon start-up, do a full rotation to make sure that the alignment is okay. Tr. 658. Also, Coburn confirmed that, even where air locks are working perfectly, there are still safety hazards present in that the friction from the bottom belt as it goes through the air lock and where it is out of alignment, the belt is still hot where the rubbing is occurring, and just a short distance inby, the low framing runs basically on the ground, where there are accumulations underneath that low framing. He added that there are accumulations "all the time" underneath the low framing and one has the heat source. Ultimately, the ravelings have a place underneath for them to catch fire. Tr. 660. Coburn's point was that, eventually, the belt will become hot enough from the rubbing and there is the fuel source present below the low framing. Tr. 660. Those problems are completely separate from any air lock issues. Tr. 660.

¹⁰ Inspector Coburn could only speculate when belt walker would arrive and whether that would be before noon. Tr. 647.

¹¹ Coburn, responding to questions about the fuel source he noted, agreed that he did not cite the mine for coal accumulations in that area. Tr. 648. He reaffirmed that the belt frames were warm to the touch, but not hot at that point, and that the temperatures were therefore not sufficient, at least then, to ignite anything. Tr. 649. He also agreed that methane was not a concern at the location of his citation in the belt entry nor, at least when he issued his citation, was there any spark issue present. Tr. 651. While he advised that methane can ignite at concentrations less than 5 %, where coal dust is present, he found no such coal dust present. Tr. 665.

Coburn then confirmed that he marked the violation as “S &S.” Tr. 660. He did so because “[i]f the condition were to continue prior to the belt examiner getting up there between 11:00 [a.m. to noon], . . . and a fire would occur, the smoke would travel through the air lock and up to the working section.” Tr. 661. Asked if it was reasonably likely that the problem could have developed before the examiner arrived, the Inspector asserted that the belt could have been rubbing for some 3 to 4 hours before that individual’s arrival. It was therefore his opinion that if 3 hours were to elapse before the examiner arrived, a belt fire could develop during that time. Tr. 662. Tr. 661.

In terms of the Inspector marking the violation as “moderate negligence,” the fact that the belt examiner had not yet been to the location was considered by Coburn to have been a mitigating circumstance. Tr. 666. Coburn’s ultimate concern associated with the violation was a belt fire. Tr. 666. If that were to occur, that issue *would not be limited* to miners working at the face as, even if no smoke were to travel to the face, anyone traveling the belt, as well as anyone traveling the supply road, could be affected if there were a belt fire. Tr. 667.

Brad Carlisle testified for the Respondent regarding this Citation. However, at the outset of his testimony on this, he advised, “I don’t remember a whole lot about the inspection day in detail.” Tr. 886. He did acknowledge that at the Number 3 unit on the 3 C belt line they “found several places that were rubbing - - the belt was rubbing the frame,”¹² agreeing that the belt was rubbing in 13 locations and that the problem was abated by aligning the belt train. Tr. 886-887, 889-890. As to whether there was also smoke present, Carlisle stated, “I do not recall any smoke in this area.” Tr. 888. Nor did he “remember it smelling either.” Tr. 888. He took temperature readings of the frames and the hottest temperature he could get was 125 degrees Fahrenheit. Tr. 888. He saw no accumulations nor other source of fuel present. Tr. 890.

Carlisle did not view the violation as S&S. Tr. 892. This view was based upon, in his estimation, the lack of any chance of a belt fire occurring. He noted the belts are fire-resistant, and that it takes a minimum temperature of 750 degrees for one to ignite. Further, no methane or CO issues were detected. Tr. 892. He saw no accumulations. In his view, the belt simply needed to be “trained a little bit.” Tr. 892. When asked if he disagreed with Inspector Coburn’s statement that he saw smoke in the beltway, Carlisle could only offer that he couldn’t remember. Tr. 899.

Highland’s contentions.

Highland asserts that the Secretary failed to demonstrate that “the cited condition was reasonably likely to result in injury.” It adds that the sole safety concern is that a belt fire could

¹² As an aside Carlisle stated that Inspector Coburn was wrong about the amount of air per minute required along that belt line and that 50 cubic feet per minute is the required amount. Tr. 887. Coburn apparently believed it was 18 cubic feet per minute.

have started. R's Br. at 30. Respondent observes that ignition and fuel must come together for a fire to occur but that neither was present when the citation was issued. Fuel sources, it argues, could only be derived from combustible accumulations, methane, or float coal/ coal dust, but the government presented no proof of any of these as present. Methane readings were 1/10 percent and, at that, found only with two readings. Nor, it adds, was Highland cited for any accumulations in the cited area. While the Inspector stated that methane can ignite at less than a 5% concentration, coal dust must be present for that to occur, but the Inspector made no finding about any coal dust presence.

Highland goes on to add that no adequate ignition source was present either. Though the Inspector spoke of the belt being warm to the touch, that was insufficient to ignite coal accumulations even had they been present. R's Br. at 31. If methane were deemed to be the fuel source, one would still need a spark but the Inspector found no sparking. For those reasons, Highland contends that no S&S finding can be sustained.

Highland also argues that the citation was only low negligence and that no persons were affected. For the former, it contends that, as no inspection was due in the cited area for some three hours after the citation was issued, it can be presumed that the condition would have been found and corrected. When considered with the short time to correct the problem, about 30 minutes, Highland believes those factors constitute mitigation sufficient to reduce the negligence to "low." R's Br. at 32. As for the latter, Highland maintains that the air locks would prevent any smoke from a fire from reaching the face and it views Inspector Coburn's claim that leakage around the air locks would cause at least some smoke to make its way past the air locks as insufficient because there was no evidence that such small amounts of smoke as could make it past the air locks would be of a degree so as to injure such miners at the face.

The Secretary's Contentions

Speaking to the Inspector's marking this citation as S&S, the Secretary notes that the conveyor was out of alignment and rubbing the metal frames. As that condition continued, the frames would become hotter. In time shavings and ravelings would be created and accumulate. These are combustible and they can ignite. Such accumulations under low framing are a frictional source. Further, the Inspector advised that as the belt passes through the air lock, it would still be hot and the framing at this location runs very low to the ground. Sec. Br. at 52. The Secretary discounts Highland witness Carlisle's view that as the temperature was only measured as 125 degrees Fahrenheit and because the belt itself is fire-resistant, there was insufficient heat to create a fire.¹³

¹³ The Secretary also had issues with the temperature Carlisle measured, suggesting he was too far away and only measured the temperature on the outside of the frame. She also generally questions Carlisle's credibility given that, though he was a member of the mine's safety committee, he didn't know there had been a belt fire at the mine only a month earlier.

(continued...)

The Secretary also points out that smoke was present in the belt entry. Though Highland asserts that the regulator will direct air to the return and therefore any smoke from a fire would not reach the working section, Inspector Coburn disputed that claim, stating that at least some smoke would still reach the working section and that this can be as much as 20% of such smoke. Sec. Br. at 53. In addition, persons at the working section are not the only ones who could be affected in the event of a fire, as miners escaping using the adjacent supply road and those called upon to deal with such a fire, would encounter such smoke.

In terms of the “moderate negligence” designation, the Secretary notes that the Inspector stated that the condition had existed for at least two hours and he believed that Highland should have been aware of the problem as the alignment problem would have been immediately apparent and because the alignment problem would have been displayed in just one rotation of the belt after it had been moved. Sec. Br. at 54. Thus, Coburn believed that, as the maintenance shift had the responsibility to ensure the belt was aligned after it was moved, and because the belt line is traveled at least twice a day and because the belt rubbing smell is distinctive, Highland was moderately negligent in not correcting the problem. *Id.* at 54.

Discussion.

On its face, Highland’s position is untenable. Highland acknowledges the violation. In terms of the discrete hazard – the measure of danger to safety contributed to by the violation – there was present, not imagined or merely possible, smoke, produced by the rubbing of the misaligned belt in 13 (thirteen) separate locations. It could be argued that the smoke in itself presented a measure of danger to safety. However, it is unnecessary to rule on that basis because the underlying source of that smoke satisfies the second *Mathies* element. Belts, misaligned to the point that they produced unplanned and unwanted friction, were warm to the touch and, from that friction, were producing smoke when discovered by the Inspector. That friction with its heat and smoke, presented the discrete safety hazard of a fire potential.

Respondent’s only real challenge is not whether that hazard could result but rather that its contention that it would have been discovered before it reached the point of a fire erupting. The contention that a smoke-filled area created by 13 belt rubbing points covering a distance of some 288 feet, with the belt being warm to the touch, is not S&S and that someone would have found and corrected the problem before it got to the point of an ignition, essentially applies a quasi-imminent danger standard to such matters. That is not the test for determining S&S violations. It was simply unknown exactly when the belt examiner would have arrived at the location, nor how quickly the then warm belt would go from warm to hot. Fortunately, the *Mathies* test does not require such a certain predictability that such dire circumstances would

¹³(...continued)

Sec. Br. at 53. As between Mr. Carlisle and Inspector Coburn, the Court finds the Inspector to have been more credible in this instance.

arise before a problem is corrected. Instead, the *Mathies* requirement is that there be a *reasonable likelihood that the hazard contributed to will result in an injury*. Based on the evidence of record as well as the issuing Inspector's opinion, the Court finds that the third element was established. There is no real assertion that any such injury would not be reasonably serious and most any fire in a mine presents such a reasonable likelihood that would be the case. Accordingly, the Court finds that the violation was S&S.

The Court also finds that the negligence was moderate. The analysis by Highland ignores that the source of the problem was a shoddy practice after a belt has been moved. As Inspector Coburn explained, simply running the belt a full rotation would have disclosed the problem and it could have, *and should have*, been corrected as a routine final step, once the belt had been moved. By not following that non-burdensome practice, Highland was only inviting the misaligned belt condition to occur. Upon consideration of the statutory criteria, the Court imposes a civil penalty of \$1,304.00 for this violation.

ORDER

The Court finds that the admitted violation for Citation No. 8501137 was not significant and substantial and imposes a civil penalty of \$370.00 and that the admitted violation for Citation No. 8491142 was significant & substantial and assesses a civil penalty of \$1,304.00. Respondent is **ORDERED** to pay a total civil penalty in the amount of \$1,674.00.

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

Distribution (E-mail and Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 31, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2010-1632
Petitioner	:	A.C. No.: 15-02709-231678
	:	
v.	:	
	:	
HIGHLAND MINING COMPANY, LLC	:	Mine Name: Highland # 9 Mine
Respondent	:	

DECISION

Appearances: Brian D. Mauk, Esq., Rachel E. Levinson, Esq., Office of the Solicitor,
 U.S. Department of Labor, Nashville, Tennessee, for the Petitioner
 Jeffrey K. Phillips, Esq., Steptoe & Johnson, Lexington, Kentucky
 for the Respondent

Before: Judge Moran

Six citations are at issue in this Docket. For three of these, Highland challenges the claim that the cited standards, 30 C.F.R. § 75.1909(a)(8)¹ and 30 C.F.R. § 77.1607(cc)², were violated. In the alternative, Highland asserts that they were not “significant and substantial” (“S&S”) violations. For the two citations³, involving 30 C.F.R. § 75.1725(a) and 30 C.F.R. § 75.370(a)(1), Highland admits the standards were violated but challenges the significant and substantial designations for them. The last citation, No. 8497413, is addressed by the Court, by agreement of the parties, with no post-hearing briefing.

¹ These are Citation Nos. 8497415 and 8497416

² Citation No. 8497715.

³ Citation Nos. 8501059 and 8501103.

The Significant and Substantial designation.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained that “In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard;⁴ (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation;⁵ (3) a reasonable likelihood that the hazard

⁴ The first requirement, a violation of a standard *or* a violation of the Mine Act itself, is straightforward. Inclusion of violations of the Act itself, not simply safety and health standards promulgated under it, makes sense because the Act has its own safety and health provisions established in its text.

⁵ The second requirement, the identification of a discrete safety hazard, means that there is a measure of danger to safety contributed to by the violation. For each violation alleged to be “significant and substantial,” the relevant hazard associated with the violation must be identified. Accordingly, to provide a few illustrative examples, in a case involving a violation for the lack of berms on a roadway, the judge cited the hazard of a vehicle veering off the roadway and rolling or falling down the incline. *Black Beauty Coal*, 2012 WL 3255590, (Aug. 2012). So too, in *Cumberland Coal*, 33 FMSHRC 2357, 2366 (Oct. 2011), the Commission held that an operator’s failure to install lifelines that could not be used effectively contributed to *the hazard* of miners not being able to escape quickly. In *Cumberland Coal* the Commission made a point of emphasizing that the Secretary need not show a reasonable likelihood that the violation itself will cause injury. Therefore, one does not analyze whether *the violation* will cause injury, because the violation is distinct from the hazard. This means that one is to determine if there is a reasonable likelihood that the hazard would cause injury. As applied in that case, that meant that an analysis of the likelihood of a mine emergency actually occurring is not part of the analytical equation. Thus, it is not the absence of a berm or the improper positioning of hooks along a lifeline that is the focus. Rather, for the second element, it is *the hazard* associated with the absence of those devices that is the subject for this part of the S&S analysis. Accordingly, an inspector, in determining if a matter is S&S would, upon finding a violation, identify the hazard associated with that violation by articulating the underlying hazard that was the genesis for the standard’s creation and then inquiring whether there is a *reasonable* likelihood, given the violation’s contribution to the risk, that the hazard will occur and cause injury and, if so, whether it would be a reasonably serious injury.

contributed to will result in an injury;⁶ and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.⁷ Id. at 3-4 In *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (“PBS”), affirming an S&S violation for using an inaccurate mine map, the Commission held that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury. . . . the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” It also observed that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” Id. at 1281.

Finally, the fourth element, that the injury must be a reasonably serious one, has not been difficult to apply.⁸ Another way to express this is that negligible mining mishaps, such as

⁶ As for the third element, the Mine Act itself requires only that the violation of a standard make a significant and substantial *contribution* to the cause and effect of the identified mine hazard. It therefore may be thought of as a violation which has the effect of advancing matters towards the creation of a hazard and therefore moving events towards a hazard’s emergence. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984). While this third element, that there be a reasonable likelihood that the hazard contributed to will result in an injury seems, in practice, to be the most difficult to apply, the applicable test, that there be “a reasonable likelihood” that an injury will result, is not as complex as it seems. It also may be helpful when viewed from the perspective of what is not required. Thus, the test does not require that it be demonstrated that it is more probable than not that an injury will result. Instead, only a reasonable likelihood is required to be shown. Whether that reasonable likelihood of an injury occurring has been shown is evaluated in the context of assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

⁷ The determination of “significant and substantial” must be based on the facts existing at the time the citation is issued but also in the context of continued normal mining operations without any assumptions as to abatement, *Secretary of Labor v. U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984). Thus, it cannot be inferred that the violative condition will cease. *Secretary of Labor v. Gatliff Coal Company*, 14 FMSHRC 1982, 1986 (December 1992).

⁸ As noted in *Topper Coal* there may be circumstances when it is impossible to determine the particular hazard contributed to by the violation. *Sec. v. Topper Coal 20* FMSHRC 344, 1998 WL 210949 (1998). *Topper* focused on the applicability of an S&S finding in the context of an MSHA spot inspection where mine management alerted a working section that the inspectors were present. Thus, one could not tell, because of the warning, what violations the inspectors might have uncovered had there been no advance warning given. It is noted that although three Commissioners agreed that the violation was S&S, only two of them
(continued...)

bumps, bruises and small cuts, do not constitute reasonably serious injuries. It's important to appreciate that when a standard is violated, the absence of an injury producing event actually occurring does not mean that the violation was not S&S. Restated, no injury need occur for the violation to be S&S. *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005).

The inspector's opinion in determining S&S.

The Commission and courts have observed that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

The S&S determination where health standards are involved.

Where health standard violations are in issue, the *Mathies* test applies upon finding, (1) the underlying violation of a mandatory health standard; (2) a discrete health hazard--a measure of danger to health--contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature. *Consolidation Coal Co.*, 8 FMSHRC 890, 897 (June 1986), *aff'd* 824 F.2d 1071 (D.C. Cir. 1987). The Commission elaborated: "[G]iven the nature of the health hazard at issue [i.e., respirable dust induced disease], the potentially devastating consequences for affected miners, and strong concern expressed by Congress for eliminating respiratory illnesses in miners, ... if the Secretary proves an overexposure to respirable dust in violation of § 70.100(a), based upon designated occupational samples, has occurred, a presumption arises that the third element of the "significant and substantial" test - - a reasonable likelihood that the health hazard contribute or will result in an illness - - has been established." *Id.* at 899.

⁸(...continued)

did so on a "presumption theory," that is, some violations may be deemed "presumptively" S&S. Those two Commissioners then cited other examples in which such a presumption had previously been applied in S&S matters. For example, those Commissioners noted that all violations of the respirable dust standard are presumed to be S&S, *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986) *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987) and that an S&S presumption has been applied to the preshift standard. *Manalapan Mining Co.*, 18 FMSHRC 1375, 1394-95 (Aug. 1996).

FINDINGS OF FACT

Citation No. 8497415, involving the number 42 mini-track and Citation No. 8497416, involving the number 22 mini-track.

MSHA Inspector Archie Coburn was at the Highland mine on July 26, 2010 and was accompanied by Randy Wolfe, mine manager and James Wilham, the miners' representative. Tr. 1257. Just prior to issuing this citation, Coburn had issued a citation for an accumulation of oil and coal dust on the number 42 mini-track. A "mini-track" is relatively small motorized piece of mining equipment. Coburn then cited *the same* number 42 mini-track for having an exhaust pipe which was not connected to the exhaust diffuser, invoking 30 CFR § 75.1909(a)(8). Tr. 1257. Exhibits P 49 and P 50. That section of the cited standard, entitled "Nonpermissible diesel-powered equipment; design and performance requirements," provides: (a) Nonpermissible diesel-powered equipment, except for the special category of equipment under § 75.1908(d), must be equipped with the following features: . . . (8) A means to direct exhaust gas away from the equipment operator, persons on board the machine, and combustible machine components."

Inspector Coburn's citation described the exhaust pipe as "not connected to the diffuser due to the support bracket being broken and the exhaust pipe being pushed back from the diffuser." The diffuser's purpose is to cool exhaust fumes off the mini-track and to help dilute the carbon monoxide coming out of the motor. With no clamp present, the exhaust was not completely moving into the diffuser. Tr. 1262. Instead, exhaust was coming out around the broken bracket. Tr. 1262. The problem meant that some exhaust fumes would not travel to the diffuser and instead would exit the exhaust system prematurely, a phenomenon created by the exhaust pipe flopping loose. Coburn stated that he could see exhaust smoke coming through the top of the engine hood. Thus, the whole time the mini-track was running, carbon monoxide ("CO") and heat would be produced and those combustion by-products would not be completely passing, contrary to its design, through the diffuser in order to dissipate them. Tr. 1263. Ultimately, the condition was abated by the installing a new exhaust system on the equipment.

Inspector Coburn's concerns were amplified because, as noted, he had just found accumulations of oil and coal dust on the motor frame and underneath the pan of the engine compartment. These accumulations were 2 to 2 ½ inches from the exhaust. Tr. 1262. With the exhaust pipe being unhooked from the diffuser, the Inspector believed that this created a risk of a fire. In addition, the CO fumes could travel to the location where the operator sits. Tr. 1264. Coburn determined that the oil and coal dust accumulations had been present for at least 3 days. Although his immediate concern was the possibility of a fire, he expressed that, over the long term, there would be health concerns too. Having observed that, for one of the mini-tracks, the diffuser had been bent back, he concluded that someone had likely backed the mini-track into a rib and then tried to bend it back to its original position. In that process, he speculated, the diffuser had been pulled loose. Tr. 1265.

Coburn marked the violation as reasonably likely to result in an injury or illness because of the possibility of a fire. Smoke inhalation and dust would be generated if a fire occurred. The Inspector also stated that the exhaust pipe, being broken from the diffuser, would allow sparks from the exhaust to exit prematurely, as some combustion related sparks move through the motor exhaust. Therefore, according to the Inspector, both fumes and exhaust sparks were not contained, as they would be if the diffuser were properly connected to the exhaust piping. The exhausts are supposed to travel along the exhaust piping to the diffuser. Inspector Coburn stated there were a lot of carbons, and a lot of “trash and stuff” on the motor, and one could see sparks come out of the exhaust pipe. Tr. 1268. This was the basis for his concern that those sparks would ignite the oil and gas he observed to be present on the mini-track. Tr. 1269.

As noted, CO was another concern for the Inspector. No one disputes that CO is hazardous, to the point of being potentially lethal, as it replaces oxygen in one’s blood, and the Inspector maintained that the operator of the equipment would be exposed to CO which was not exiting the exhaust at its intended location. Tr. 1270.

Coburn believed that the pre-operational check, a weekly examination requirement, would have disclosed this problem. Factoring that examination duty, Coburn marked the violation as moderately negligent. Tr. 1270-1272. He also marked it as S&S because, if mining were to continue, he believed that there was a possibility of a fire. Tr. 1274. Coburn added that MSHA has noted several pieces of equipment have caught fire in his mining district due to “exhaust” issues, although later he more particularly described the hazard as equipment catching fire from overheating. Tr. 1273.

Citation, No. 8497416; the number 22 mini-track.

Inspector Coburn then spoke about a related citation, No. 8497416, also issued on July 26, 2010. Exhibit 51. This one involved a different mini-track, the number 22. For both machines, the exhaust piping starts at the motor and is connected to the diffuser at its end. Fumes then exit the vehicle from the diffuser. Tr. 1288. For this second machine, the Inspector observed that the exhaust pipe had been connected by two pieces of wire, instead of with exhaust clamps. Tr. 1274. The citation noted that the wire was used at two connection points, instead of exhaust clamps. The Inspector saw that exhaust soot had come out at the location where the improper connection existed, at the diffuser. Tr. 1274. Thus, the exhaust system was leaking. Tr. 1274. Accordingly, the problem was similar to the problem he found on the other mini-track he had cited; an exhaust system in a state of disrepair from improper connections. Tr. 1275. Every time the machine was running it was leaking in this manner. The presence of the make-shift wire “repair” told Coburn that the mine knew of the problem and that it had simply been rigged that way instead of installing a proper connection for the exhaust. Tr. 1275. Because of the amount of soot he observed, Coburn did not think this had been a problem for simply one shift and instead that it had been an issue “for a while.” Tr. 1276. As with the other mini-track, Coburn was concerned about exposure to CO, though he listed it as a “safety” issue for the machine’s operator. Understandably, he did not test for CO because he was unwilling to expose himself to the risk associated with such testing. Consequently, he had the machine shut off right

away. Tr. 1314. Had he used his spotter to take a reading, it would have taken a minute or two to obtain a reading. Tr. 1314. The violation was abated by installing the proper clamps. Tr. 1278.

Upon the Respondent's cross-examination, which covered both of the mini-track citations, Coburn advised that neither of the cited vehicles were in operation when he came upon them. Instead, he asked that the vehicles be turned on. In terms of how long the equipment had been idle, Coburn stated he did not know; it could have been a couple of days or recently. Tr. 1279. Coburn agreed that such mini-tracks are not used with the frequency of a shuttle car or a roof bolting machine. Still, he believed that a proper pre-exam check would have disclosed the problem. He reaffirmed that, when that equipment was started up, he observed smoke or fumes emanating from them but he acknowledged that this would occur with any start-up of such equipment. Coburn never took any temperature readings of the exhaust or areas around that and he did not know how hot they would get. He stated that the ignition temperature of oil is between 100 and 140 degrees, while reminding that he observed the presence of motor oil and coal dust accumulations. Those accumulations were on the side of the motor, on its frame and also on a panel underneath it. Tr. 1282-1283. The exhaust pipe runs from the motor all the way to the diffuser. Coburn agreed that the exhaust pipe problem itself was not in the area of the motor nor was there an exhaust line problem until it reached the diffuser. Tr. 1284. Therefore, the problem was limited to where the exhaust pipe connected to the diffuser, which is at the rear of the mini-track. However, the accumulations were "all over," as the whole compartment had oil down the side of the motor. The Inspector's notes did not state that there were any accumulations of combustible material on the exhaust pipe or on the diffuser and Coburn affirmed there were no accumulations on those areas. Tr. 1285.

Inspector Coburn also reaffirmed that, due to rust and general wear of the equipment, there will be sparking, which would shoot out at the end of the exhaust line. Carbon and debris from the motor will also contribute to the sparking. Tr. 1287. However, he added that this does not mean that such sparking will occur continuously or every time the equipment is running. Tr. 1288. Repeating his earlier testimony on direct, he advised that the connecting point from the diffuser to the exhaust was present, but disconnected. Instead, the diffuser had been bent back and the lower bracket had been broken loose and it had been pulled back, pushing the exhaust pipe back. The connecting point of the diffuser, a 2 to 3 inch protrusion, was not lined up and there was a gap at the bottom part which was large enough for him to put his finger through it, that is, a gap of a half to three-quarters of an inch was present. Tr. 1291. The temperature of the exhaust before it reaches the diffuser would be several hundred degrees. Tr. 1293. Coburn added that diesel fuel ignites at 190 degrees. Coburn did agree that there was adequate ventilation in the area; he indicated it was a little over 3,000 CFM, which is the required amount. Tr. 1294. In sum, the leakage was present only at the very rear of the mini-track and the operator, while located on the other end of the equipment, sits in an open top. Tr. 1295.

As noted above, Coburn cited the mine for violations of 30 C.F.R. § 75.1909(a)(8), which requires that there be a means to direct exhaust gas away from the equipment operator, persons onboard machine and combustible machine components. While there was such a "means" to

direct exhaust gases away, Coburn pointed out that it was not being maintained. Tr. 1298. He added that he could have cited the condition as a “failure to maintain.” To the suggestion that he cited the wrong provision, Coburn’s view was that he could have cited the mine for either, or both provisions, not simply the one he issued. Tr. 1298. The Court advised Respondent’s Counsel that it would not buy into the notion it suggested that, as there was a “means” to direct exhaust gas away from the equipment operator, the standard was satisfied. This is because it is implicit that such exhaust must be *maintained* to effectively direct such gasses away. Tr. 1299.

Referring to the other mini-track, regarding Citation No. 8497416, Coburn did not contend that it also had oil and grease accumulations on it. Therefore, he did not believe that it posed an ignition or fire concern. Tr. 1299. For that one, although the exhaust pipe was connected to the diffuser, his concern was that the clamps were not installed. He advised that such failure disturbed the integrity of the exhaust pipe, noting that where the clamps were absent he saw soot after the diffuser, as well as out by the muffler. Tr. 1299-1300. Clamps, he advised, do more than simply ensure that the exhaust pipe does not rattle. Rather, they are there to press everything down so that the exhaust exits as designed. Absent a proper clamp, there is no proper seal between the two. Tr. 1301. Coburn affirmed that his concern was the equipment operator’s inhalation of exhaust gases, and specifically CO exposure. Tr. 1306.

Coburn stated that once a miner started up the equipment that person should have observed the exhaust smoke coming up through the baffling on top of the motor and that it was not exiting through the back of the equipment, as designed. Tr. 1309. In terms of the spotter alarming, Coburn noted that about half of the time the operator of the equipment will be downwind of those fumes. Tr. 1309. Speaking to the relative severity of the two, similar, violations, Inspector Coburn remarked that he considered the violation where the dust and oil were present to be the more serious of the two. Tr. 1310. Neither piece of equipment had been tagged out nor marked as out of service and Coburn believed that they should have been. Tr. 1313.

Brad Carlisle testified for the Respondent. At the time of the issuance of these citations, Carlisle was employed in the mine’s safety department. Tr. 1423. However, Carlisle wasn’t with Inspector Coburn when the citations were issued. Instead, his testimony was based upon his familiarity with the mini-tracks because, as he was then a mechanic at the mine and had worked on them. Carlisle stated that the diffuser’s purpose is to allow the exhaust to react with more air. While he noted that the operator of the mini-track is on the end opposite from the diffuser, he conceded that the operator would be exposed to fumes, depending primarily upon the direction of the air flow. He has never heard of sparks traveling out the exhaust pipe or out the diffuser. Tr. 1427. As noted during cross-examination, Mr. Carlisle was not present for the inspection of the mini-tracks, didn’t see how long they were operated and of course did not see the direction of the fumes’ travel at that time. As to whether he considered fumes coming out the top of the mini-track as normal, Carlisle responded: “Probably not.” Tr. 1430. Since mini-tracks are not permissible pieces of equipment, they cannot be used in return air, but they can be used in neutral and intake air. Tr. 1431. Carlisle could not say for sure if diffusers were required

by law or not, but he added that there are mini-tracks at the mine with no diffusers at all. Tr. 1431.

Contentions, Analysis and Conclusions regarding Citation nos. 8497415 and 8497416.

As noted, both these mini-tracks were cited for failing to have a means to direct exhaust gas away from the equipment operator, persons on board the machine, and combustible machine components. Both violations were established by the unrefuted testimony of the Inspector describing the exhaust line defects.

The differences between the two similar problems can be briefly summarized. For the Number 42 mini-track, the problem was the exhaust pipe being disconnected from the diffuser. The Inspector observed that this part of the exhaust system had been bent and that someone had tried to bend it back to its normal position. Thus, based on the Inspector's testimony, which the Court finds to have been credible, the operator knew of this problem. However, bending it back did not correct the defect, as the clamp to secure the diffuser to the exhaust was not present or, at least, not secured. The Inspector was of the view that the accumulation of oil and coal dust on that mini-track made the situation more serious. Critical to the analysis for this citation, the Inspector observed exhaust smoke coming through the top of the hood, instead of being directed out the exhaust piping and with no contradictory evidence on that point, the Court finds that to be the fact.

For both mini-tracks, Coburn was concerned about the equipment operator's exposure to carbon monoxide, albeit, for one, his uppermost concern was that the accumulations would ignite from exhaust fumes exiting prematurely. For the Number 22 mini-track, while that equipment did not have the accumulation of oil and coal dust issue, it did have a similar defect in the exhaust line where it met the diffuser. In terms of operator knowledge, for both mini-tracks, the nature of the half-baked means to repair the exhaust line defects meant there was awareness of the problems. Plainly, these were an improper, and ineffective, way to deal with the defects.

Somewhat incredibly, the Respondent contended that because a *means* to direct exhaust gas away was present, there could be no violation. As noted earlier, the Court rejects this strained interpretation. Where, as here, there is a demonstrated defect in the means to direct exhaust gases away from the operator, the standard is violated. It is inherent, though implied, in the requirement that the means must be effective or the standard would become meaningless.

Respondent's alternative argument to vacating the citations is that both should be reduced to "unlikely" and "non-significant and substantial." Initially at least, the analysis of the two citations must be addressed separately. For Citation No. 8497415, Respondent notes that this citation had the additional issue of oil and coal dust accumulations but it disputes that there was any fire issue associated with that violation. It contends that, as these accumulations were not on the exhaust pipe or the diffuser, but rather only in the equipment's motor area, there was no risk that the exhaust fumes could ignite the accumulations. Additionally, the Respondent contends that the Inspector's view that the exhaust temperatures could be hot enough to ignite the engine

oil accumulations is unsupported by credible testimony. It also maintains that the Inspector's belief that sparks from the engine could exit the exhaust pipe and ignite the accumulations is equally unsupported.

The Court agrees that, at least on this record, the Secretary failed to establish either the accumulations or the sparking theory as plausible ignition sources for the oil accumulations.

However, this was not the sole basis for the Secretary's contention that the violation was S&S because that finding was also asserted on the basis of the risk of carbon monoxide exposure. The Respondent contends that "because exhaust fumes may have been escaping the mini-track prior to reaching the diffuser does not mean that the operator was at any more risk of being exposed to an elevated level of carbon monoxide." R's Post Trial Memorandum at 9. Respondent argues that the exhaust fumes were moving the CO away from the operator's cab *unless the air flow were to move in a different direction*. Thus, Respondent argues that the "fumes would not have gone towards the operator . . . absent air flow moving [] in that direction."⁹ R's Br. at 10. Accordingly it is the Respondent's contention that "because exhaust fumes may have been escaping the Mini-Track prior to reaching the diffuser does not mean that the operator was at any more risk of being exposed to an elevated level of carbon monoxide." R's Br. at 9. Respondent argues that because the equipment requires pre-operational checks and because operators of such equipment wear "gas spotters," which would alert them to elevated levels of such gas, the conditions were not S&S. However, the Commission has rejected the idea that such other practices are to be considered in making an S&S determination. As noted by Judge Bulluck in *Secretary v. Marshall Mining, Inc.*, 2012 WL 4753928, Sept. 6, 2012, the Commission has "rejected the operator's reliance on the additional safety measures as factors that would prevent an S&S finding," citing *Cumberland*, 33 FMSHRC at 2369 which, in turn, cited *Buck Creek Coal*, 52 F.3d 133, 136 (7th Cir. 1995). Judge Bulluck added that the "Commission explained further that adopting [the] argument that redundant, mandatory safety protections provide a defense to a finding of S&S would lead to the anomalous result that every protection would have to be nonfunctional before a S&S finding could be made [and that] [s]uch an approach directly contravenes the safety goals of the Act." *Marshall* at *7, citing *Cumberland* at 2369-70. The Court agrees with Judge Bulluck's observations.

A related contention, Highland asserts that diffusers, even when properly connected, don't reduce CO, because they are not converters. However, this argument is a straw man. Of course a diffuser is not a converter. Rather, as its name suggests, it is a diffuser. As noted, the Court rejects this argument because it is simply a distraction from the essence of the problem. It can hardly be argued that an exhaust system with improper or defective connections does not present problems. Certainly such exhaust systems are plainly intended, by design, to

⁹ The Respondent's interpretation of the Inspector's testimony that a diffuser reduces the amount of carbon monoxide is another distraction from the pertinent analysis and accordingly is disregarded. Similarly, the Respondent's focus on the order in which certain items on the mini-track were checked and whether the engine was or was not running when the Inspector was examining the equipment is a diversion from the appropriate analysis.

have sound connections right from the engine to the end of the exhaust line. Here, in both instances, the exhausts were not secured as intended. In one, the clamp was not connecting the diffuser to the exhaust pipe. In the other the exhaust was connected to the diffuser improperly, being jerry-rigged with wire. Accordingly, it needs to be remembered that both connections were not proper and, for one of the mini-tracks, the Inspector saw the exhaust exiting where it should not.¹⁰ For the other, the Inspector observed evidence of exhaust leakage at the improper connection point.

Regarding the Respondent's contentions that the problems would have been detected in the preoperational check; that the operator's spotters would have alarmed if any harmful CO level had occurred; that the *same amount* of CO was still exiting the equipment,¹¹ despite the improper connections; and that there was no evidence that any increased level of CO exposure had occurred or was likely to occur,¹² the Court has already rejected the interpretation of the standard suggested by the Respondent.

Given what is undisputed, that neither connection was proper, and that, in one case it was deliberately connected improperly, the question is whether such an arrangement was S&S. In applying the analysis, it should be noted that the Respondent has conceded that some exhaust gas fumes would move towards the direction of the equipment operator, depending on the air flow direction at a given time. Here, the Court applies the *Mathies* test, as modified for health violations, because the issue is whether the CO associated with the defective exhaust presented an S&S situation.

Upon consideration, the Court concludes that both violations were established and that both were significant and substantial.¹³ The Court's S&S determination is based solely on the

¹⁰ Highland would have the Court reject Inspector Coburn's testimony on the basis that he made inconsistent statements about the details of his examination of the equipment. This involved such matters as *the order* in which he checked things, including, for example, if the lights and brakes were checked *before* the equipment was turned on. This distracts the analysis from what was undeniably present: improper connections between the exhaust and the diffuser. In place of this, the Respondent would substitute Mr. Carlisle's view that the mini-track "would have been running for four or five minutes in a preoperational check." R's Post Trial Memorandum at 12.

¹¹ This contention overlooks that at least some of the CO would not be exiting its designed terminus point.

¹² Highland repeats its argument, earlier rejected by the Court in this decision, that the exhaust fumes were still being taken away per the regulation. As noted earlier, the Court has rejected the untenable idea that having such a system, *even when not properly connected*, satisfies the standard.

¹³ Not every standard fits exclusively into either a safety or a health designation. The
(continued...)

health risk of CO exposure, as it has determined that the Inspector insufficiently supported the basis for his other concerns relating to a risk of a fire occurring for one of the mini-tracks. The standard was violated. The discrete health hazard was the risk of CO poisoning from exhaust fumes not being fully directed out the exhaust, as designed and intended. That defective exhaust system presented a measure of danger to health because it contributed to the risk of carbon monoxide poisoning.¹⁴ The Court's conclusion regarding the "reasonable likelihood" element is also supported by the Inspector viewing, for one of the machines, exhaust fumes exiting the top of mini-track's hood.¹⁵ Accordingly, it is not mere supposition that such fumes can exit near the operator's compartment when the exhaust system is in a state of partial disrepair. It must also be taken into account that CO is insidious. Being odorless and colorless, it does its harmful work silently and often before one can recognize its potentially deadly effects.¹⁶ It would be unreasonable to suggest that MSHA, having found an insufficiently, and or, an improperly connected exhaust line, must then conduct an inquiry to determine if the fumes are sufficient to cause harm. Nor should the Agency have to figure into its analysis the ventilation in the area and assess how fumes would exit when the vehicle is moving. If such requirements were imposed as part of the evidentiary burden, as a practical matter no exhaust defect violations with CO concerns could be shown to constitute S&S violations. As Respondent's witness conceded, there could be exposure to such fumes and the fumes are not intended to exit through the top of the mini-track. Accordingly, the Court finds that both exhaust system defects associated with the two mini-tracks were S&S.

¹³(...continued)

standard in issue has both safety and health aspects and the Inspector recognized both aspects in this instance. His health concerns were valid and the *Mathies* test for health issues is appropriately applied to this circumstance.

¹⁴ It is fair to also note that breathing exhaust fumes, apart from the CO issue, cannot be healthful.

¹⁵ This does not mean that all exhaust issues would be S&S. For example, an intact and non-leaking exhaust system missing a clamping bolt, would need the bolt missing installed but would be unlikely to be S&S. Here, there was undeniable leakage in both mini-tracks.

¹⁶ The Secretary points to an analogous situation involving a refuse truck that had a leak in its exhaust system at the point where the exhaust pipe connected to the muffler. *Sequoia Energy, LLC*, 32 FMSHRC 1361, 1367. Sec. Br. at 77. In finding the violation to be S&S, the judge in *Sequoia* noted that continued exposure to CO fumes is dangerous, particularly in view of its odorless nature, and concluded that the *defective muffler clamp alone* provided an adequate basis for designating the cited violation as S&S.

Negligence associated with the mini-tracks.

On this issue, the Respondent again raises its claim that, as a means to direct exhaust gas away from the equipment operator was present, and, as a corollary argument, that as there is no requirement for a diffuser to be installed on such exhausts, there was no, or only low, negligence. It also contends that the defects would have been detected during the next pre-operational check of the equipment. R's Br. at 13. However, the methods employed to correct the defects suggests that such proper repairs would not be forthcoming. Respondent addresses the use of wire to attach the diffuser by asserting that there is no requirement to use clamps. This deserves no further comment.

The Secretary maintains that the Inspector properly designated the negligence as moderate. The Inspector, while recognizing that the individual performing the pre-operational check may not be a maintenance specialist, asserted that the exhaust exiting through the motor top should have alerted anyone that something was amiss. For the No. 42 mini-track, the amount of accumulations observed by the Inspector informed him that the defect had been present for at least three days and, for the No. 22 vehicle, the wire used to connect the diffuser to the exhaust pipe bespoke knowledge of the problem. The Court concludes that the negligence in both cases was at least moderate.

Based upon all the evidence of record, and consideration of each of the statutory penalty criteria, the Court concludes that Citation No. 8497415 and for Citation No. 8497416, *each* warrant a penalty of \$400.00, instead of the \$807.00 proposed for each.

Citation No. 8497715¹⁷, citing 30 C.F.R. § 77.1607(cc).

This Citation was issued by Inspector Keith Ryan. The cited provision states: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length." Inspector Ryan was unable to testify at the hearing and for that reason this matter was addressed initially by the Respondent's witness, Rodney Barker. Mr. Barker has been working in the coal mining industry for 41 years. Tr. 1155.

Barker was familiar with the cited condition, which pertained to the "A belt." Tr. 1169. The A belt is the first belt leaving the mine, with the destination for the coal carried on it being the preparation plant. As needed, the belt has crossovers, where it goes over a highway, for example. Tr. 1169. At such locations, the belt passes overhead via a tunnel and at those locations the belt will have a pull cord. In this instance, which involved an overpass which crossed a highway, there was a pull cord. Pulling on that cord stops the belt running. Tr. 1170. According to Barker, the citation asserted that the pull cord was "laying on the structure and wasn't made [for] easy access." However, he noted that the circuit was working. The inspector's concern, Barker acknowledged, was that the pull cord was not accessed freely enough to shut it off. Tr. 1170. Barker agreed that the standard cited, 30 C.F.R. § 77.1607 (cc),

¹⁷ Exhibits P 56 and P 57 pertain to this Citation. Tr. 1169.

provides that unguarded conveyors with walkways are to be equipped with emergency stop devices or cords along their full length. Tr. 1171. Looking to the words employed in the standard, Barker noted that, literally speaking, the provision says nothing about easy access to the stop cord. Tr. 1171.

Mr. Barker stated that he was involved with the original installation of these stop cords, in 2001 or 2002. Tr. 1172. Furthermore, he often travels these belt lines daily, or at least has people who walk them weekly, to make sure the cords work and that the switches operate to shut down the belts. Tr. 1172. Over the years since their installation, Barker maintained, these cords have not had their location changed. That is also to say that no MSHA Inspector had ever before had an issue with the cords' location.

The walkway in issue is 2 feet wide and the top of the belt structure would be just a little below waist high. The cord is right beside it, that is, between the person and the belt. Tr. 1174. When one walks through the tunnel, there is only the cord next to the walkway; there is no railing present. Tr. 1174. Barker agreed that one walking along this area could fall onto the belt and he was sure that is why pull cords are required. Tr. 1174. They would then have the cord to grab hold of and thereby shut off the belt. Tr. 1174. One could also stumble into the belt. Tr. 1175.

Barker had no knowledge as to how the citation was abated. Tr. 1176. However, it was abated by a different inspector and Barker maintained that the abating inspector told the mine they could leave the cords as they were. Tr. 1176. That inspector, according to Barker, didn't want things changed out of a concern that the pull cords would then be too tight.¹⁸ Tr. 1177. He reiterated that the cords "had a little bit of slack in them and [were] laying on the structure. They were still in operation though." Tr. 1177. The government attorney noted that the citation states that the cord was found laying on or under the main belt structure and, upon cross-examination, Barker acknowledged that the pull cord was touching the structure that supports the belt. Tr. 1178. Barker agreed that the cable hangs or droops down but he maintained that it would be hard to have the cable be so tight from one end to the other so that it would not touch anything and still have the switch operate. Tr. 1179. He added that even if the cord were laying up against a roller, one could still get a hold of it. Tr. 1179. When government counsel suggested that a cord which is on or under the structure could be hard to reach if one is standing on the walkway, Barker responded that the cord would be on the structure itself in more than one location because "that's just the way the rope is." Tr. 1180. However, he also maintained that the cord would never sag so much that it would be underneath the structure. Tr. 1180.

When questioned by the Court, Barker stated that the cord should be installed just underneath the plane that would be the top of the belt. Tr. 1186. He stated that one has the belt on top of the roller and the pull cord laying on the structure and reiterated that if one is laying on the belt, one could reach over and get a hold of it. If the cord is too tight, he maintained, it will

¹⁸ Subsequent testimony from the MSHA Inspector who terminated the citation conflicted with those claims.

trigger a belt stoppage for something as innocuous as the wind. Tr. 1187. However, Barker conceded that he was not present when the citation was issued nor present at the location when it was abated, though he was in the area. Tr. 1188.

It was Inspector Coburn who terminated the pull cord citation on July 30, 2010. Tr. 1201, and Ex. P 64, Coburn's notes relating to that abatement. Those notes, pertaining to the A belt line state: "Tunnel pull cords have been moved up half the belt structure." Tr. 1202. This involved moving the cord probably some 4 to 8 inches.¹⁹ Tr. 1215. The cord was then between the top and bottom of the belt, in the middle between those two locations, and it was taut. Tr. 1204. New eyelets had been installed on the side of the belt line. As the cord runs through the eyelets, Coburn knew it had been moved. Tr. 1204. The old eyelets were still present and thus provided a frame of reference from its original position to the new one. The cord itself is a high tensile industrial aircraft wire which has a plastic or rubber coating. Tr. 1205. Coburn stated that the cord needs to be in the middle of the belt so that if one falls into the belt, they will trigger the cord. Thus, one can physically pull the cord or, if one falls onto the belt, the stop mechanism will be activated and the belt will stop. Tr. 1206. Coburn stated that if the belt is hanging loose and one falls into it, the belt will not stop.

Inspector Coburn did not agree that the likelihood of one falling into the belt was remote, remarking that "[a]nyone walking on the side of the belt line could trip on coal, they slip on ice in the wintertime." Nor did he agree that one would have to fall up and over the railing to get into the belt. Instead, he noted that "[a]ll you have is a small rail. The railing is part of the belt framing. You could fall in between. You could fall between the belt line. You could fall on top of the belt line. While shoveling you could be pulled into the bottom of the belt. They are required to shovel the belt line too." Tr. 1216. Upon questioning by the Court, Coburn agreed that one would have to fall through the railing or somehow get past that railing in order to come in contact with the belt. Tr. 1218. Thus, ultimately Coburn agreed that it was likely that the railing would protect one from getting hurt if one were to fall. Tr. 1219. However, Coburn expressed that the trip cord's function was to activate the stop switch before one fell on to the belt, and thus before one contacted the railing. Thus, there is the cord and then inside of that is the railing and then one encounters the belt itself. Tr. 1220.

The Respondent also called Thomas Witherspoon on this issue. Witherspoon has been working in coal mining for some 21 years. Tr. 957. He has his mine foreman papers and is familiar with the way belt exams are performed. Tr. 958. Witherspoon stated that he checked with several others at the mine and all advised him that the pull had always been the way it was since Highland started mining.²⁰ Tr. 1462. This was around 2001 or 2002. Tr. 1468. No one

¹⁹ The Inspector described the distance at one point as 4 to 6 inches and at another point as 4 to 8 inches. This difference is inconsequential.

²⁰ By their testimony, Respondent's witnesses suggested that the pull cord was always fine and would not, over time, have deteriorated. This contention reminds the Court of the poem by Oliver Wendell Holmes, father of the famous Supreme Court justice, about the wonderful
(continued...)

could understand why the cord was cited, given this history and the lack of previous citations for it. He maintained that the same inspector had seen the cord and not cited it in earlier inspections. Tr. 1463. Witherspoon was with Inspector Ryan on the day he issued the citation. He noted that the pull cord was functional at that time.

As to the critical issue of the cord's location, in the Court's view, Mr. Witherspoon's testimony was so vague as to be non-informative. Tr. 1464-1465. Unlike the other witnesses, Witherspoon maintained that one could not fall into the belt. He expressed that if one fell up against the belt, one's hand would still be "right there at [the cord]." Tr. 1466. Witherspoon did not believe it was a violation, given all the previous occasions it had not been cited and that, if a violation, it was not S&S. The latter was based on his view that the cord was "right there" to be pulled if needed. Tr. 1466. On cross-examination, Witherspoon stated that the pull cord was about 8 to 10 inches below the belt. Tr. 1468. As to whether the cord was straight or sagging, Witherspoon stated that it varied: "It was in different areas. Part of it had eye bolts sticking up on the rail and it was through it. Part of it would be looped down a little bit. Then some of it would be laying on the side of the - - of the piece of steel that the rollers were sitting on, you know, right on top of the piece of steel." Tr. 1469, 1472. Regarding why the Inspector issued the citation, Witherspoon stated that the Inspector "gave [him] a book and told [him] this is the way that things ought to be - - that it was a book on guarding and a book on pull cords, safety lines and stuff, and this is the way that things need to be done." Tr. 1470. Witherspoon took the book the Inspector gave him and advised that it is now "in the office in there somewhere." Tr. 1471. Witherspoon repeated that the pull cord was sagging in some areas and in some it "would be laying there." Tr. 1472. To the best of his memory, the book the Inspector gave him shows a picture of a pull cord. Tr. 1473. The book example does not show a pull cord lying on a piece of steel. Tr. 1473. Nor does the book depict the cord sagging. Tr. 1473.

Counsels' Contentions

Respondent resurrects the tenor of the argument it made regarding the exhaust system for the mini-tracks. In this context, it asserts that the belt was so "equipped" with an emergency cord. It maintains that as long as the cord is "functional" there is no violation. Respondent maintains that this is true even if the cord is "on or under" the belt. For the reasons set forth in

²⁰(...continued)

one horse shay:

Have you heard of the wonderful one-hoss shay,
That was built in such a logical way
It ran a hundred years to a day,
And then, of a sudden, it — ah, but stay,
I'll tell you what happened without delay, . . .

You see, of course, if you're not a dunce,
How it went to pieces all at once, —
All at once, and nothing first, —
Just as bubbles do when they burst.

the treatment of this contention for exhaust systems, further discussion of this argument is unwarranted here. It is rejected.

Turning to its alternative arguments, the Respondent asserts that, as the cord was operable, it was not reasonably likely to cause an injury. This contention deserves little comment as well. Under this argument a cord lying along the floor or ten feet above the walkway would meet the Respondent's "test" for compliance.

The Respondent next turns to aspects of the testimony from witnesses Barker, Witherspoon, and even Inspector Coburn, all to show that it was not "S&S." Finally, Respondent argues that only low negligence was present, noting that the cord had not been previously cited.

The fact that the cord was moved "4 to 6 inches," Respondent asserts, shows only the issuing Inspector's preference for, but not any deviation from, the required standard of care. R's Br. at 16.

From the Secretary's viewpoint, it notes that the citation described the emergency pull cord as "found laying on or under the main belt structure and [because of that location it] would not allow easy access if a person were to fall or be pulled into the belt." In its gravity analysis, the Secretary contends that one must assume that an emergency has occurred; that is, that someone has fallen into the belt. On that premise, it argues that the likelihood is not based on the chances of one falling into the belt. Sec. Br. at 71. Instead, working from the presumption that one has fallen onto the belt, the cord must be in place such that the belt will stop running before landing on the belt. From that, it contends that the cord must be taut, and not hanging loose as it was, to shut down the belt. It therefore argues that, in this instance, it was reasonably likely that the cord would not trip the belt shut off feature. The Court agrees with the Secretary's gravity analysis, but as explained *infra*, evidentiary issues dictate the outcome. In terms of negligence, the Secretary argues that Highland should have known of the condition, as personnel walk the belt weekly. However, because the testimony was that the Respondent did walk the area, but it was unknown how long the emergency cord had been in the condition cited by the inspector, the Secretary, believing those were mitigating factors, maintains the negligence was moderate and urges a civil penalty of \$807.00 be imposed.

In the Court's view, the violation was neither S&S nor was the negligence moderate. The standard, requiring unguarded conveyors with walkways are to be equipped with emergency stop devices or cords along their full length, requires that the cords be positioned so as to be effective. This cannot occur where, as here, the cord was found laying on or under the main belt structure because such locations would not allow easy access if a person were to fall or be pulled into the belt. Accordingly, the standard was violated. The discrete hazard is the harm that would occur if one were to fall and come into contact with the moving belt without the cord performing its shut down feature. Such an event would produce a reasonably serious injury but as to the third element, the reasonable likelihood that an injury would result, the Secretary failed to provide sufficient proof. This deficiency arose because the issuing inspector was not available to testify and therefore it was unknown how extensive, or limited, the insufficient areas of cord

were. Nor could the inspector who abated the citation offer useful information because he did not view the cord in its condition when it was cited, seeing it only after corrections had been made.

In terms of the negligence associated with the violation, the Court must consider the absence of any previous issues about the cord placement by MSHA Inspectors. Therefore, on this record it is unknown whether the condition had developed during a relatively recent time frame or whether the mine had been lulled by the lack of previous citations over the issue. The record simply does not disclose these circumstances. On these facts, the negligence must be considered to be low.

Considering the record as a whole, the Court determines a penalty of \$100.00 is appropriate.

Citation No. 8501059, citing 30 C.F.R. § 75.1725(a)

MSHA Inspector Paul Hargrove testified about Citation No. 8501059, issued July 28, 2010 and citing § 75.1725(a). Tr. 1021, and Exhibits P 44 and P 45. The standard provides: “Machinery and equipment; operation and maintenance. (a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

On that date Inspector Hargrove was performing an E01 inspection. With him were Brad Carlisle, Tommy Witherspoon, Bernie Alvey and Lawrence Penly. During his inspection of outby equipment he determined that the mine’s No. 29, 14 man diesel mantrip, was not being maintained in safe operating condition in that 6 of the 14 canopy post welds were broken and the posts were not attached to the mantrip. Further, the Inspector found that two of the posts were bent. Tr. 1022. This was observed in the mine’s bottom area, near crosscut 5 or 6, which is a staging area where mantrips line up for the next shift to come in. Tr. 1023. Typically, 10 to 12 miners will be on a mantrip.

Ironically, if the mantrip comes without a canopy, there is no need to install one. However, here, there was one, and so it must be properly maintained. Tr. 1024. Thus, it is simply immaterial that some mantrips may not have a canopy and considering that fact only serves to blur the analysis. The canopy itself covers the area where miners sit. It is supposed to be able to support 18,000 pounds of weight on it, spread out evenly over its surface. Tr. 1024. Hargrove described the canopy as having 14 square tubing posts, with each being approximately 2 by 2 inches. Tr. 1025. The posts are welded onto the steel frame and, as noted, for six of them the weld was broke loose and, for two, the posts were bent forward. The bent posts were located in the back, or rear, of the mantrip. Thus, as he stated, the canopy was angled forward because of the defect. Tr. 1032. The bent posts in the rear had pushed the canopy forward. Tr. 1032. He noted that the canopy had been bent for a while because it had rusted over and accumulated dirt and other material was present where it had rusted in the crack. Tr. 1026. Obviously the Inspector couldn’t know how the canopy came to be damaged; it could have occurred upon

contact with another piece of mobile equipment or perhaps by striking the roof at a low point. The main point is that it was damaged and had not been maintained by correcting the defects. The hazard stems, plainly, from having a canopy that can't perform as designed. Tr. 1027. The canopy itself, by not being maintained, is a hazard in its own right. Tr. 1028. The mantrip in issue had not been tagged-out, so it was available for service. Tr. 1029.

Section 75.1725(a) pertains to mechanical equipment not being maintained in safe operating condition. Tr. 1030. Hargrove stated that the condition was obvious as, when he walked up to it and began inspecting it, he noticed the problems right away. Tr. 1030. Another standard, 75.1914, applying to diesel equipment, requires, among other provisions within it, a visual examination is to be performed weekly before placing such equipment in operation, to make sure it is safe to operate. If that had been done here, Hargrove advised, the mantrip would have been placed out of service. In retrospect, Hargrove believed he should have cited the mine for that failure as well. Tr. 1031. Based on the rust he observed, Hargrove expressed that the condition had existed for several shifts at least, if not more. Tr. 1032.

In marking the gravity as reasonably likely to result in an injury, Hargrove stated that, as one had a canopy which was not properly secured to the metal frame of the mantrip, the canopy can get knocked off and injure miners. As it had already been hit by something, it would not be unreasonable to think that it could get hit again. Tr. 1033. The Court certainly agrees with that observation. Marking the injury as lost work days or restricted duty, Hargrove was considering crushing injuries, broken bones and the like, as risks. Tr. 1034. As he noted, "[I]t do[esn't] take a very big piece of metal to hurt somebody." Tr. 1034. While up to 14 miners could be on this mantrip, he conservatively estimated the number affected as ten.

In terms of his S&S designation, he believed it was reasonably likely to cause injury. Further, as just noted, the operator was capable of being aware of the problem, as it could have been detected through the weekly examination and because the defects were plain and obvious. Tr. 1035-1037. To abate the problem, the mine welded the posts up at the frame of the mantrip and it replaced the two bent posts. Tr. 1037. In repairing the welds, one must take out the old weld, that is, cut it out, then weld it back to do the job correctly. Tr. 1037. Providing further detail about the pieces with defective welds, Hargrove stated that those pieces could be moved around and that the gap was between the weld and the metal all the way around it. Tr. 1038. If one were riding on the mantrip the defective areas would rattle, making the problem all the more obvious and detectable. Tr. 1038.

On cross-examination, Hargrove admitted that he made no tests or calculations concerning how much the canopy could withstand. Tr. 1039. Nor did he know how much force would be required to move the canopy. Tr. 1039. While an event involving a canopy at another mine²¹ heightened Hargrove's awareness of the safety concern here, his concerns also included

²¹ The event at another mine was referred to as the "Dodge Hill" incident. Tr. 1041.

the effect of a roof fall on the canopy. Tr. 1040.²² The risk presented by the defects was real.²³ As the Inspector noted, when the frame of the mantrip hits the rib, the canopy hits the rib also. He added, "These [mantrips] are so long that when they make a turn, a lot of times that canopy and that side frame is rubbing against the rib. You can look at the ribs and tell down there." Tr. 1053. Further, as he noted, the travelways were wet, damp and bumpy.²⁴ Tr. 1055.

Inspector Hargrove's point was that the posts had separated from the frame of the mantrip and that they were no longer connected. Tr. 1066. Thus, the 1/16 of an inch gap existed at the locations where the weld was located. Tr. 1066. He noted that the canopy was compromised by these conditions. Because of that, it is weakened and therefore it would not

²² The problem with Respondent's efforts at cross-examination regarding an incident at another mine is that the facts here stand on their own. For the same reasons, as mentioned earlier, questions posing a situation for a mantrip with no canopy installed on it were immaterial, as *this* equipment did have one. In a similar vein, were questions inquiring if the Inspector determined that broken welds made the canopy unsafe. Tr. 1045. There is no duty for the Inspector to perform tests, particularly when the obvious defects are sufficiently informative for one to conclude that the posts were in a state of disrepair. As the Inspector pointed out, the posts have to be attached to the frame of the mantrip and Counsel's challenge to the Inspector to point out where that is required does not merit further comment. In addition, as Inspector Hargrove noted, that is how the manufacturer installs them. Tr. 1045-1046. The Court was similarly unmoved by Respondent's observation that 8 of the 14 posts were not damaged. Tr. 1046. It is noted that two of the bent posts were part of the six that were not intact. Tr. 1047. Other aspects of the cross-examination were unpersuasive. Accordingly, questions as to why the Inspector did not include in his notes the presence of rust and dirt around the broken welds, how much the posts were bent and the lack of a calculation to reflect that, deserve no discussion. The Inspector succinctly noted, "[t]he posts were damaged," adding that, with square tubing, once it's bent, it's not as strong as it was." Other attempts to challenge the Inspector's testimony and opinion failed. The Inspector, who was well familiar with the mine, stated that in fact there are areas in the mine which are low enough so that the canopy top could contact the mine roof and that the mantrip could contact a rib as well. Tr. 1050-1052. The Court finds that both contacts could occur.

²³ Adding to his credibility, the Inspector informed that he is a qualified welder. He also noted that even if the weld bead is present it will not support anything. Tr. 1060.

²⁴ Shown Respondent Counsel's drawing of a post and adding that a weld bead would go around the post, Hargrove agreed that the weld bead was present for the cited matter, but he noted that it wasn't contacting the post. Tr. 1061. Counsel's point, about which the Inspector agreed, was that the post was still within the weld bead and that the posts had not moved sufficiently to break any part of the weld bead. Tr. 1061. Although Respondent Counsel's drawing was admitted as R 10, the Court noted that the drawing by Counsel depicted weld beads only in a very rough and general way and not for this particular situation. Tr. 1062. The Court further noted it was simply demonstrative evidence and it cannot be used to convey, with any sense of any accuracy, the space between the weld bead and the post here. Tr. 1062.

take a big piece of rock to make it come down. Tr. 1067. A similar worry exists if the canopy were to strike a rib. Hargrove advised that his experience at Highland has been sufficient such that he has seen mantrips rubbing on the side of the ribs when they are turning and he has seen the canopy running on the side of the ribs. Tr. 1067. He has observed the canopy hit the rib when backing up. Tr. 1067. As he summed up his view, he considered the violation to be “real serious . . . [and] significant and substantial . This [presents] the potential for not only [one] person but a group of men to be hurt.” Tr. 1069. While Hargrove agreed that the movement of the posts had not been, up to that point, sufficient to break the weld bead or chip it or damage it, he added that “any time you move a piece of metal around inside something like that, it’s actually going to start pushing your bead out. It’s going to keep getting worse is what I’m telling you.” Tr. 1069. Accordingly, while the posts themselves had not yet moved such that they were outside or pushed beyond the bead of the weld, they weren’t attached. Tr. 1072-1073.

Highland witness Mr. Carlisle testified on this matter. As noted, at the time of this citation’s issuance, Carlisle was also working in the mine’s safety department. Tr. 1435. On the date in issue, July 28, 2010, Carlisle was not directly with Inspector Hargrove. He did not know how it was decided which vehicles have canopies nor, as the Court has noted, does it matter. The cited mantrip travels down the main entries, the main haulage roads, and to and from each unit. Tr. 1438. As it is non-permissible, it does not travel to the face. Tr. 1438. Accordingly, most of the time these vehicles are in the supply or haul road. Tr. 1439. Typically, the roof height in these areas is 6.5 to 7 feet. As to the cited number 29 diesel, Carlisle could not recall which particular posts had an issue, but he did note that some six of the posts had weld cracks around them. He maintained that the posts themselves were still intact, despite the cracks. Tr. 1440. He also was aware that there were a couple of posts that were bent, but contended that the cracked ones were not bent. The cracks were right above the weld. Tr. 1440. The standard cited, Section 75.1725(a), requires that mobile machinery be kept in safe operating condition, and Carlisle agreed the cited condition was a violation. Tr. 1441. However, he did not see it as S&S because a *majority* of the posts were intact and welded and he believed they would support a weight from a vertical load (i.e. a roof fall). Further, he stated that there was no low top that the mantrips here would encounter. Tr. 1442. Mr. Carlisle did acknowledge the presence of “surface rust” on the bent posts but he maintained that there was no “deep” rust present and he asserted that in a coal mine fresh metal will rust in an hour or a couple of hours. Tr. 1443. He also acknowledged it was possible for the mantrip to come in contact with the ribs and therefore that roof was not the only source of canopy contact. He conceded that the posts were damaged

from hitting something but, based on his experience with metal,²⁵ his view was that the bent posts were only compromised to a very small degree. Tr. 1445.

The Court's Determinations

Respondent asserts that the admitted violation should be designated as “unlikely” and non-S&S. The Court decidedly does not agree with Respondent’s assessment.²⁶ Respondent’s argument that the roof was too high for the defective canopy to strike it, absent the mantrip hitting a bump in the supply road, avoids the testimony that the road would have such bumps and that ribs can be a source of contact as well. There is also the possibility that roof could fall and strike the man trip; it is not simply an issue of the mantrip itself striking the roof.²⁷

With the violation admitted, the second *Mathies* element, is the discrete safety hazard that the defective canopy may become completely dislodged from its broken welds, subjecting those ten or so miners in the mantrip to injury. Such an event could occur from the man trip’s canopy striking a rib, or the roof, or from a roof fall. While the Respondent submits that striking the roof is extremely remote, due to its height relative to the canopy height, that view ignores the fact that the canopy, which was already significantly compromised at the time it was observed by the Inspector, had been striking at least one of those contact sources, as evidenced by the 6 broken welds and the 2 bent posts. Certainly, it is no stretch to find that there was a reasonable

²⁵ In testimony that was largely cumulative, Mr. Thomas Witherspoon also testified for the Respondent. He acknowledged seeing some cracks in 5 or 6 of the posts. Though he agreed the standard was violated, he too did not believe that it was S&S. Witherspoon’s opinion was that no one would get crushed if the roof were to fall on it. Tr. 1452. It was his view that the canopy would only hit smaller objects, not the roof, although he admitted that there are bumps in the supply road. Tr. 1456. He did not notice the canopy being tilted forward, nor could he recall seeing any rust in bent posts. Witherspoon believed it would require a hit in a perfect spot to have cracking and splitting apart occur. Tr. 1457. So too, if it were to hit a rib, he believed the mantrip would have to hit it “just square” for damage to occur. Tr. 1458.

²⁶ It must be said that most of the Respondent’s arguments were off the mark. Its argument that the welds on the top of the posts were fine avoids the issue of the bottom welds. The idea that the problems were not obvious were contradicted by the Inspector’s immediate observation of the problem and the Court’s credibility determination, subscribing to Inspector Hargrove’s description of the defects. Similarly, the idea that the Inspector couldn’t quantify the “degree” of the bend in the posts is of no moment; even Respondent’s witness acknowledged they were bent. Other assertions were of the same ilk. For example, taking issue that the inspector could not “quantify the amount of pressure or impact . . . to dislodge the canopy posts,” suggests that MSHA should perform tests when the state of disrepair was clear.

²⁷ Highland’s reliance on another administrative law judge’s views about a *different shuttle car* with a forward lean on some front canopy posts *at another mine* is patently not instructive or persuasive for this case, nor does the Court accept the Respondent’s characterization that the posts were “marginally compromised.” R’s Br. at 19-20.

likelihood that an injury would result. The canopy's multiple defects made it ripe for either the canopy itself to injure any one of the multiple miners riding the mantrip or for it to fail to provide its intended protection from a roof fall. Given those factors, the last element, that any injury would be a reasonably serious one is obvious. Each of the *Mathies* factors, as found by the Court, were amply supported by the testimony of Inspector Hargrove as well.

Having found that the violation was clearly S&S, the Court next finds that Highland's negligence was, at a minimum, moderate. The condition was immediately obvious based on the bent posts alone. Further, it did not require any discerning assessment to realize that 43% of the posts had defective welds. No one could legitimately suggest that welds don't matter. Undeniably, the broken welds meant that the posts were not properly attached to the mantrip frame. Given the obvious nature of the multiple defects, the negligence on Highland's part in not attending to these problems is disconcerting.

Based on the foregoing discussion and findings and considering all the statutory criteria, the Court imposes a civil penalty of \$4,500.00 for this violation.

Citation No. 8501103, citing 30 CFR § 75.370

Inspector Archie Coburn testified about this Citation, which was issued on July 29, 2010. Exhibits P 52 and P 53. The cited section, 30 CFR § 75.370, entitled, "Mine ventilation plan; submission and approval," provides: "(a)(1) The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

Inspector Coburn was at Highland on that occasion to conduct an EO2 inspection, which refers to a 10 day methane liberation spot inspection. Tr. 1321. He was with the mine's Brad Carlisle and Steve Culver. Coburn had started on the intake side of the number 9 entry and worked his way across the unit. Thus, he was traveling the crosscut between the number 1 and the number 2 entry and he then started up the number 1 entry, moving behind the line curtain. It was at that point that he could see the methane mark, that is to say, the readout on the continuous miner. Thus, he was able to see the machine's methane reading. It was then that he observed that the methane monitor on the continuous miner was going up to 1 percent and then to 2 percent. Tr. 1322-1323. The continuous miner was operating at that time, making a cut of coal.

As noted, Coburn, seeing the readout, saw that the monitor was in excess of 1 percent and that the warning light was flashing. He noted that the miner operator made eye contact with him and that the miner operator then started walking towards him. It was then that Coburn observed the monitor go in excess of 2 percent. The light also came back on and a he saw a reading of 1.9 percent and that the level was then starting to go back down. Tr. 1323. The monitor, or "sniffer" as it is called, flashes as soon as a 1 % reading is made. Tr. 1324.

It was the Inspector's testimony that once the Inspector and the continuous miner operator made eye contact with one another, the operator stopped the continuous miner and began walking outby to check and adjust the backup curtains. Tr. 1327. Unless properly adjusted, there will not be sufficient air behind the line curtain. Tr. 1328. Methane can ignite at a level as little as 1 % when there is also coal dust in suspension and a spark occurs. Tr. 1329. Accordingly, the Inspector advised that, when methane reaches 1%, corrective action is required and mining has to stop. Ventilation may need to be adjusted or other steps taken to reduce the methane level. Tr. 1330. Here, Coburn cited the operator for insufficient air (i.e. an insufficient level of ventilation, which is measured in cubic feet per minute or "CFMs"). At least 5,000 CFMs are required behind the line curtain under Highland's ventilation plan but Coburn found there was only 3,605 CFM at the time of the violation. Tr. 1331 and P 19 the mine's ventilation plan, at page 6.²⁸ Coburn stated that an experienced miner operator will notice such a diminished amount of air. Tr. 1333, 1336.

Coburn reiterated that he noticed the methane monitor flashing at 1.3 % and it was then that he made eye contact with the miner operator. That continuous miner operator then stopped his machine and came towards the Inspector. Tr. 1337. Coburn's concern was a methane ignition and he believed that, at a minimum, there was a risk of burns should that event have occurred. The miner operator and the shuttle car driver would be the individuals potentially affected by such an event. Tr. 1337. Coburn listed the negligence as moderate. Tr. 1338. Of significance, the Inspector noted that the miner operator never volunteered his air readings to him. Thus, the operator never protested that he had sufficient air present. Instead, the operator told Coburn he "couldn't recall" how much air he had. Tr. 1339. The Court views both of these unchallenged statements by the Inspector to be probative. The Inspector also marked it as "S&S" because of methane underneath the head, and because there was coal dust where they were mining, so that if an ignition were to occur, burns would be the minimum result. Tr. 1340. The condition was abated by tightening all the backups and extending, that is, moving the curtain by extending it out. Tr. 1340. After those corrective actions were taken, Coburn took another reading and recorded 5,512 CFMs.²⁹ Tr. 1341.

²⁸ The Court inquired whether the such a shortfall in CFMs was a significant diminishment. Coburn explained that it was significant because the 5,000 CFMs represent the minimum air and because that amount is needed to have the scrubber work properly and to dilute the methane. Tr. 1334.

²⁹ As brought out during cross-examination, while a 2% methane level reading is not a violation, that level does require that the equipment has to be deenergized when that level is reached. Tr. 1342. Coburn stated that the miner operator, Mr. Sheppard, did not deenergize the miner when it reached around 1.3 %. Instead the operator turned it off, but that is distinct from de-energizing it. The miner did not de-energize his equipment. Tr. 1343. Coburn repeated that when he came into the entry the methane monitor started flashing past 1%. Tr. 1343-1345. It was never explained to Coburn what caused the insufficient air. Instead the mine had the curtain adjusted, though why they needed such an adjustment was not offered. Coburn did agree that he had no idea how long the insufficient air had been present. Tr. 1349. He repeated that corrective
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Although Respondent's Counsel suggested that the miner operator was just about to correct the problem at the moment the inspector arrived, the Court, upon weighing the credibility of those who testified on the issue, finds that was not the case here. As Coburn expressed the events, which recounting the Court finds to be the more accurate version, when the Inspector and the miner operator made eye contact with one another, the continuous miner's warning light was flashing, and based upon Coburn's interpretation of the miner's reaction, he concluded that the operator knew things weren't right and he was then fixing it because of the Inspector's arrival. Tr. 1354. Nor, as noted earlier by the Court, did the miner make any protest to the Inspector, such as contending that he was already attending to the issue when the Inspector arrived. Such a non-reaction is at odds with the Inspector's experience when a miner genuinely did not know that the air was insufficient. Accordingly, the key point here is that it was only when the miner operator saw the Inspector that the miner stopped his machine and then began coming towards the Inspector. Tr. 1358.

Carroll Browning testified for the Respondent regarding this matter. Mr. Browning has a long career in coal mining, and he has a mine foreman certificate. Tr. 1362. He stated that they had brought the continuous miner over to the number 1 entry and had set it up. The miner was then going to cut 40 foot of coal from that entry. Tr. 1362-1364. He found no methane problem during the set up and he obtained an air reading of 5,100. The curtain, bringing fresh air, is to be extended within 10 feet of the face. Tr. 1366. It seemed that Browning's action in testing the air was not part of his routine duties as, when asked why he took the measurement, he stated: "I was just trying to help the man out and I wanted to make sure everything was right." Tr. 1367. He then added, when prompted by a follow-up question, that he does that sort of thing all the time. The reading, he stated, was 5,100 CFM. Accordingly, Browning stated that he had adequate air present. Following that process, Browning stated that he then attended to other matters, as he is responsible for 13 to 18 people.³⁰ Browning asserted that only 10 to 15 minutes of mining had occurred before the citation was issued. Tr. 1369. He became aware of this because he did not hear the cars moving, so he knew they were not hauling coal. Tr. 1369. When the miner operator told Browning there was insufficient air, Browning asserted that he knew there was sufficient air because he had just taken a reading. Tr. 1370. In the short period between his reading and the Inspector's arrival, Browning asserted that a car had torn part of wing curtain down and a backup curtain had also come down. Tr. 1370. The miner operator told him that he knew the monitor was blinking and that he then shut the miner down went to

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actions are required under the ventilation plan when 1% methane is reached. Tr. 1350. *However, he made clear that the operator was cited for insufficient air.* Methane above 1% can be caused by a curtain issue but it can also be due to greater liberation of methane from the face. Tr. 1350. Apparently, there was a need to "tighten up everything" in order to restore the required level of CFMs. Tr. 1351.

³⁰ There were two continuous miners operating at that time, but they alternate so that when one is mining coal, the other is moving to set up for coal extraction at another place. Browning stated that he is the one doing the air checks some 80% of the time.

investigate the source of the air interruption. Tr. 1371. Browning did not believe that the miner operator was the type of individual who would continue operating the miner when the methane light was blinking. As noted, that light will start to blink at 1% methane. As Browning asserted that it takes time to correct a problem and that it was being addressed as soon as it was discovered, he believed that there should not have been a citation issued and certainly that it was not an S&S matter.³¹ However, he did concede that it is not a safe practice to run a continuous miner with less than the minimum air required under the ventilation plan and that if the air is less than the minimum and one gets a bleeder or gas, “it could blow up.” Tr. 1377-1378.

Brad Carlisle also testified about this Citation. At that time Carlisle was employed in the safety department. Tr. 1390. On July 29, 2010, he was accompanying Inspector Coburn and the two had just started making their way across the faces on the right side entry, as one looks inby. Tr. 1391-1392. Carlisle stated he was with Coburn the entire time of the inspection. As they came to the number 1 entry they “looked in the entry and the first thing we saw was the miner methane readout, noticed it was flashing. And I believe the readout was saying 1.1 was the first thing we saw.” Tr. 1394-1395. Carlisle contended that he then saw the miner operator walking out, towards them, “probably halfway between us and the miner.” Tr. 1395. It was Carlisle’s belief that the miner operator was reacting to the methane monitor reading, not to the presence of the Inspector and him. Tr. 1396. Carlisle also maintained that the miner operator was not coming towards them but rather was coming towards the wing curtain to check it.³² Tr. 1397. As with the foreman Browning, Carlisle believed there was no violation because the mine had followed the correct procedure and took immediate steps to correct the problem once it had been detected, which all happened to coincide with the inspector’s arrival at the scene. Carlisle also contended that the scrubber’s operation would mean that the operator probably would not notice the change in the air, as that device draws air itself. Tr. 1403. However, Carlisle did admit that he observed the methane detector reach 1.9% and he conceded that he has never run a continuous miner and therefore did not know about a miner’s ability to detect changes in the amount of air flowing during the operation of a continuous miner.³³ Tr. 1409.

³¹ Browning stated that the gas check he took was done before the miner was inby the last open breakthrough. Tr. 1374. At the time that he noticed that the cars had stopped running, that is, that coal production had stopped, and he was 6 to 7 crosscuts away, with a crosscut being 62 to 72 feet in length. Tr. 1376.

³² Carlisle did not elaborate how he determined that the miner operator was moving in a direction to correct the problem as opposed to moving to meet them. He added that the miner operator told him that the foreman had checked his air and found it to be adequate. Tr. 1401.

³³ On redirect, Carlisle stated that there was no issue with the water sprays. i.e. they were working and they serve to keep dust down. Tr. 1416. Redirect also revealed that Carlisle was a participant in the development of a statement which Highland created shortly after the citation, but which statement was not disclosed to the government, until the redirect occurred. The statement asserts that 5,100 CFM of air was found to be present before the miner began working the section. Tr. 1420. Thus, Carlisle agreed that Highland considered the citation to be an

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Contentions of Counsel

While conceding that the standard was violated, Respondent contends that the insufficient air flow did not last long, that it was abated in four minutes and that it was caused by the curtain being inadvertently hit by a shuttle car. R's Br. at 22. Respondent maintains that the condition should be found to be non S&S, with the gravity listed as "unlikely." Respondent notes that methane levels at 1.5 to 2 percent *may* be explosive and that Inspector Coburn's assertion on that did not take into account the other factors which need to be present for an explosion to occur. On that basis, Respondent urges that the Secretary failed to show that there was a reasonable likelihood that there would have been an ignition or an explosion. It submits that, if it were true that a methane ignition is reasonably likely to occur at 1.5 to 2 percent levels, MSHA would not let equipment operate in those circumstances. Respondent adds that a 1.5% level is the lowest possible level for a methane ignition to occur, and for that to occur there must be coal dust present, combining with that methane level. However, Respondent simultaneously notes that the continuous miner shuts down automatically at a methane level of 2 percent. R's Br. at 23.

Respondent lists other factors it views as reducing the likelihood of an ignition occurring in this instance. These include that: the violation occurred in the summer, a time when dust levels will be less because of higher humidity during those months; that there is no indication in the record that the water sprays were malfunctioning; and that there is no record of the presence of any other combustible gases. R's Br. at 24. This decision has already discussed the proper parameters to consider in determining if a violation is or is not S&S. Respondent also contends that citation should reflect "low negligence" because Inspector Coburn's "eye contact" assertion is dubious.

As discussed, additional testimony was taken on this Citation on October 9, 2012. At that time, Mr. Browning testified that he checked the air before the continuous miner operator began running his machine and that he obtained a reading of 5,100 cfm. However, the Secretary points out that this claimed reading did not surface until the hearing and Inspector Coburn confirmed that no one informed him of that claimed reading when he issued his citation. Sec. Reply at 2. Regardless of whether the Court buys into the Respondent's claimed air reading, the Secretary contends that it changes nothing in terms of the admitted fact of violation, nor the evaluation of the gravity or negligence, as the Inspector saw the continuous miner being operated while the methane monitor was showing 1.3 to 1.4 percent, and then rising to over 2 percent when the machine was shut off. In addition, air movement was recorded at 3,605 cfm, not the required 5,000 cfm. *Id.*

The Secretary also maintains that the Inspector's concern over a methane or coal dust ignition is in accord with MSHA's policy. Just as the Inspector expressed that methane above

³³(...continued)

important enough issue for it to create the writing shortly after the citation was issued, although he acknowledged that such statements are not typically created in these circumstances. Tr. 1420-1422.

1% is a concern, so too MSHA's policy requires corrective actions when that level is reached. Sec. Reply at 3. The Secretary asserts that, given the conditions found by Inspector Coburn, his S&S designation was appropriate. Those conditions consisted of the methane monitor flashing while the continuous miner was running, and a methane monitor reading of 1.3 to 1.4 percent. Importantly, the Inspector testified that the miner operator only shut off his machine when he appeared in the entry.³⁴

As noted, Respondent concedes the violation. Its dispute is over the S&S and "moderate negligence" designations. The continuous miner operator, Mr. Shepherd, stated, during his October 9, 2012 testimony, that he turned the machine off "within a second or so" after his methane monitor began flashing and that action was not prompted by the Inspector's arrival at his work location. While both the Inspector and Mr. Shepherd agreed that a miner operator will sense when air flow has dropped, the miner testified that he felt no such change on the day in issue. Instead, Mr. Shepherd maintained that in that instance he only knew there was an air flow issue because the methane monitor was triggered. R's Reply at 3. Respondent also points to the testimony of Carroll Browning that he had measured the air flow before Mr. Shepherd began his work operating the continuous miner and found it to be fine, at 5,100 c.f.m. Instead, Respondent traces the air flow shortage to the ventilation curtain which was accidentally torn down.³⁵

The Court agrees that this admitted violation was S&S and that Highland's negligence was moderate. Applying the remaining *Mathies* criteria, the discrete safety hazard was the risk of an ignition at this highly gassy mine. The foregoing discussion eliminates the need for any further discussion of this element. The remaining two elements of *Mathies* need only the briefest of mention. An inadequate level of air, escalating methane levels, and a continuous miner in the

³⁴ The Secretary disputes Highland's claim that the citation at hand is similar to that in *Peabody Coal Co.*, 17 FMSHRC 26 (1995), noting that no methane was referenced there, whereas here it was a factor. Instead, the Secretary argues that *U.S. Steel*, 7 FMSHRC 1125 (Aug. 1985), is more instructive because methane was present and that mine, as with Highland's, was considered "gassy." In that case, the inspector stated that arcing and sparking from the continuous miner's bits could ignite methane, and while the methane level was only .1%, the ventilation, being half the quantity required, increased the risk of an ignition. Sec. Br. at 3-4.

³⁵ Respondent puts forward a stark choice for the Court by suggesting that it must find that Mr. Browning and Mr. Shepherd "are liars" if it were to find that the air flow reduction did not happen just as the Inspector arrived. However, there are other conclusions possible. For example, it may be that an air reading was taken, as Browning stated, and that the problem occurred shortly after the miner began his cuts. It is also possible that Mr. Shepherd inaccurately recalled that he felt no diminished air flow. Accordingly, without applying such labels to the witnesses, the Court chooses to find that, as between Mr. Shepherd's recollection of the events, and the other witnesses for the Respondent and Inspector Coburn's, the Inspector's testimony is deemed to be the more reliable.

process of mining coal cannot be construed as anything less than a conclusion that there was a reasonable likelihood that the hazard contributed to will result in an injury. Should an ignition have resulted, it is an ineluctable conclusion that there was a reasonable likelihood that a reasonably serious injury would result.

In terms of the degree of negligence associated with this violation, the Court agrees that the continuous miner operator should have been aware of the low air level and that action was not initiated to address the flashing methane detector until the Inspector arrived. Upon consideration of the statutory criteria, the Court imposes a civil penalty of \$1,657.00 on Highland for this violation.

Citation No. 8497413, citing 30 C.F.R. §75.370(a)(1)

Inspector Coburn cited Highland for this alleged violation on September 21, 2010. Tr. 1226, Ex. P 46 and P47, the notes associated with the Citation. While traveling belt lines, the Inspector found a roller head spray not operating, although coal was running. The cited provision is part of the mine ventilation plan and that provision was discussed earlier in this decision.

The water was not running, as it is supposed to be, and it was determined that the cause was simply that the valve had been turned off.³⁶ Tr. 1228. Thus, there was no defect that had not been corrected. The water is applied to reduce the amount of dust as the coal runs on the belt. Under the ventilation plan, sprays are required at belt transfer points. Tr. 1242. The Inspector considered the violation to be S&S because the belt was running and that creates friction sources and respirable dust is generated. Coburn stated that belt examiners and shovelers would be exposed to such dust. He also asserted that the coal dust presented a possibility of an ignition source. Tr. 1236. In terms of any health hazard presented by such dust as would be present because of the absence of the water spray, the Inspector stated that this mine does not have miners assigned to man their headers, so exposure would be limited. Coburn concluded that the examiner had not yet reached the cited area. Tr. 1238. The Inspector added that it is the belt examiner's responsibility to make sure that the sprays are working when he makes his examination. Abating the condition took the few minutes to simply turn the water valve on. Tr. 1240.

The Respondent concedes the violation but challenges the S&S designation. The Inspector agreed that the violation did not occur as the result of any neglect or lack of repair on the mine's part. Rather, it was simply a failure to turn the water spray valve back on. Tr. 1243. The condition lasted for about 2 hours but, again, the belt examiner had not yet arrived at the location where the valve had not been turned back on. Importantly, Inspector Coburn advised that no miners would have been exposed to any dust in the two hour period involved because no miners would have walked in that area during that period of time. Tr. 1243. Further, the Inspector did not assert that anyone missed the problem in the time preceding the citation. Thus, there was no suggestion that the problem should have been detected earlier and was simply

³⁶ At the end of the second, which is the last, production shift on a given day, it is customary to shut off these valves to prevent flooding while production is halted. Tr. 1230.

ignored. The Inspector also affirmed that there were no other problems present such as stuck rollers or a misaligned belt. Tr. 1248.

The Court concludes that the violation was not S&S in this instance. This is because of several factors. First, there was no reasonable likelihood that the hazard would result in an injury. The Inspector testified that there would be no exposure, at least through the time of exposure, and that a belt examiner, performing his job, would have recognized the problem and corrected it with the simple process of turning the non-defective valve back on. Accordingly, under normal mining operations the problem would have been detected and corrected on the spot. With no reasonable likelihood that the hazard would result in an injury, one does not reach the reasonably serious injury issue.

Upon consideration of the evidence of record and the statutory penalty factors, including the conclusion that the gravity was “unlikely” and the negligence “low,” the Court imposes a civil penalty of \$100.00 for this non S&S violation.

Civil Penalty Assessments

Citation No. 8497415, and Citation No. 8497416 are found to be S&S, and of moderate negligence. A civil penalty of \$400.00 is assessed for *each* violation.

Citation No. 8497715 was not S&S nor was the negligence moderate. The negligence was low. A civil penalty of \$100.00 is assessed.

Citation No. 8501059 was S&S and the associated negligence was moderate. A civil penalty of \$4,496.00 is assessed.

Citation No. 8501103 was S&S and Highland’s negligence was moderate. A civil penalty of \$1,657.00 is assessed.

Citation No. 8497413 was not S&S, and the negligence was low. A civil penalty of \$100.00 is assessed.

ORDER

Within 40 days of the date of this decision, Highland Mining **IS ORDERED** to pay a civil penalty in the total amount of \$7,153.00 for the violations identified above. Upon payment of the civil penalty imposed, this proceeding is DISMISSED.

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

Distribution (E-mail and Certified Mail)

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-3577/FAX 303-844-5268

December 6, 2012

AGAPITO ASSOCIATES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	
v.	:	Docket No. WEST 2008-1451-R
	:	Citation No. 7697010; 07/24/2008
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Crandall Canyon Mine
Respondent	:	Mine ID No. 42-01715
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-1447
Petitioner	:	A.C. No. 42-01715-159799
	:	
v.	:	Crandall Canyon Mine
	:	
AGAPITO ASSOCIATES, INC.,	:	
Respondent	:	

ORDER DENYING AGAPITO’S MOTION FOR SUMMARY DECISION AND GRANTING THE SECRETARY’S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Manning

These proceedings are before me upon a notice of contest and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Agapito Associates, Inc., (“Agapito”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 et seq. (the “Act” or “Mine Act”). On November 1, 2012, Agapito filed a Motion for Summary Decision and the Secretary of Labor filed a Motion for Partial Summary Decision. The Secretary argued that Agapito is an operator under the Act, while Agapito argued that it was not an operator and that it was not subject to the jurisdiction of the Act. Both parties filed responses.

I. BACKGROUND

These cases arise out of the mine collapse at the Crandall Canyon underground coal mine in Emery County, Utah, which occurred during August 2007. The collapse led to the loss of the lives of six miners who were working in the South Barrier section of the Main West Barriers section during the collapse and subsequently three men working to rescue the trapped miners; several people also sustained serious injuries. The mine was operated by Genwal Resources, Inc.

("GRI"). Following the accident, GRI closed Crandall Canyon Mine and it remains closed. The Secretary and GRI settled the cases that were brought against GRI for violations related to the accident. The Secretary also issued Citation No. 7697010 to Agapito under section 104(d)(1) of the Act alleging a violation of 30 C.F.R. § 75.203(a), which is the subject of these proceedings.

Agapito is a Colorado-based geological engineering and consulting company that provided various services and analyses to GRI between the years of 1995 and 2007. (Agapito Mot. for Summ. Decision at 8-9). During that 12-year period, Agapito personnel spent 27 days at the Crandall Canyon Mine. *Id.* at 22. During the years of 2006 and 2007, Agapito billed GRI for approximately 320 hours of work in relation to plans for mining pillars in the North and South Barrier sections, which are located in the Main West Barriers section. (Sec'y Mot. for Partial Summ. Decision at 10).

In 2006, Agapito provided GRI with its analysis of the potential for retreat or pillar mining in the North Barrier section of the Main West Barriers section. (Agapito Mot. for Summ. Decision at 10; Sec'y Mot. for Partial Summ. Decision at 6). GRI was mining "barrier pillars," or the blocks of coal wedged between worked-out longwall panels and mains entries. The entire Main West Barriers section of the mine was also under deep cover, which made roof control engineering crucial. (Sec'y B. at 5). In a draft dated July 20, 2006, Agapito submitted to GRI that 60 by 72 feet would be the appropriate pillar dimensions for cover up to a depth of 2,200 feet for a period of time of less than one year. (Agapito Ex. A at F-1).

On August 9, 2006, Agapito sent an email to GRI detailing "preliminary analytical results" for the proposed retreat mining plan in the Main West Barriers section. (Sec'y Ex. C at 23). Agapito used computer modeling software to conclude that pillar mining in this section was viable. (Agapito Ex. A at G-1, G-2). Although Agapito's contact at GRI planned to communicate the preliminary findings mentioned in the email to MSHA, he did not plan to share the report itself. (Agapito Mot. for Summ. Decision at 11; Sec'y Mot. for Partial Summ. Decision at 7). On December 1, 2006, an engineer and vice-president from Agapito visited the North Barrier section to observe and photograph roof, rib and floor conditions. (Agapito Mot. for Summ. Decision at 13; Sec'y Mot. for Partial Summ. Decision at 7).

Following its submission of the analysis concerning the retreat mining plan in the Main West Barriers section to GRI, Agapito continued to provide consulting services. On March 16, 2007, after a bump caused GRI to abandon the North Barrier section, two Agapito managers visited the abandoned section to make observations and take pictures. (Agapito Mot. for Summ. Decision at 15; Sec'y Mot. for Partial Summ. Decision at 8). In April, 2007, Agapito and GRI discussed plans to perform retreat mining in the South Barrier section and Agapito provided GRI with another technical evaluation of the proposed plans for retreat mining. (Agapito Mot. for Summ. Decision at 17; Sec'y Mot. for Partial Summ. Decision at 9). GRI, however, began mining before receiving Agapito's report. (Agapito Mot. for Summ. Decision at 17).

In May 2007, GRI filed with MSHA a three-page proposed amendment to the roof control plan for the pillar mining of the South Barrier section. GRI referenced the report by Agapito without referring to Agapito by name. (Sec'y Ex. C at 71). This proposed plan was not identical to Agapito's recommendations. (Agapito Mot. for Summ. Decision at 17-20).

On August 6, 2007, a series of pillar outbursts and collapses in the South Barrier section of the Main West Barriers section resulted in the deaths of six miners and led to the deaths of three rescue workers on August 16, 2007.

II. PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that the meaning of the term “operator” in the Act is unambiguous and is meant to be construed broadly. The court in *Otis Elevator* held that the definition of operator covers any independent contractor performing services at a mine. *Otis Elevator Company*, 921 F.2d 1285, 1289 (D.C. Cir. 1990). Relying on *Otis*, the commission found that “any independent contractor performing more than *de minimis* services at a mine” is an operator. *Musser Engineering Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1268 (Oct. 2010).

Agapito’s internal documents show that it is clearly an independent contractor and therefore an operator under the Act. Before 2006, Agapito personnel visited the mine at least 19 times and generated at least 23 written reports for GRI’s Crandall Canyon Mine. Between 2006 and 2007, Agapito’s contacts with the mine became more extensive, including numerous communications between personnel of the two companies, two visits by Agapito personnel to the mine, and several technical analyses concerning roof and ground control provided to GRI by Agapito. In *Musser*, furthermore, the Commission found an independent contractor that had less extensive contact with a mine than Agapito to be an operator under the Act. Due to its extensive and sustained contacts with GRI, Agapito is an operator for the purposes of the Mine Act.

According to the *Musser* decision, the Mine Act does not require that work be performed on mine property to be considered work performed “at such mine.” The dictionary definition of the word “at” supports this reading as well. The Act refers to the location that will benefit from the services, not the physical location where the services were performed. An alternative interpretation would impair the Mine Act’s goals and lead to absurd results: Independent contractors performing the exact same services could be liable or not liable based upon their means of delivery, or contractors could forgo doing on-site inspections to avoid Mine Act jurisdiction.

Even if the Court were to hold that the Act’s definition of independent contractor requires that services be performed on mine property, the facts in this case would still support the conclusion that Agapito is an operator as defined by the Act. Before 2006, Agapito visited the mine at least 19 times, and between 2006 and 2007, Agapito worked at the mine on two occasions.

If, alternatively, the Act’s definition of operator is ambiguous, the Secretary’s definition of operator is reasonable based upon the Act’s plain meaning and should be given deference. The Secretary’s reading of the phrase “performing services at such mine” should also be given deference, as services that fundamentally impact mine safety are often performed away from the mine property.

Additionally, in her response to Agapito's motion, the Secretary argues that the court should not consider the merits of Citation No. 7697010 at this time. The Secretary believes that much of Agapito's motion focuses on facts and arguments that are irrelevant to the issue of jurisdiction. She believes that these portions of Agapito's argument should not be considered or addressed by the court.

Based upon its extensive performance of services at the mine, Agapito meets the statutory definition of "operator." The Secretary is therefore entitled to summary decision on this issue.

B. Agapito

Agapito argues that because the citation is not based upon services performed "at such mine," the plain language of the Mine Act excludes Agapito from being defined as an "independent contractor." The plain language of both the Act and MSHA's regulation require physical presence to show that services are performed "at such mine" or "at a mine." 30 U.S.C. § 802(d); 30 CFR § 45.2(c). The Act's jurisdiction is not based upon a company's connection to the extraction process. Interpreting the Act to give MSHA jurisdiction over contractors that did not perform their services at a mine would be an error.

Agapito did not perform services giving rise to the citation at the Crandall Canyon Mine. Agapito neither authored its reports nor conducted its modeling on the mine property. It did not even discuss the results of these efforts with GRI on mine property. Rather, Agapito performed all of its substantive work 150 miles away from the mine in Grand Junction, Colorado. The only physical contact between the mine and Agapito personnel was ad hoc, performed at the operator's request, and not part of the contract. Under the plain meaning of the definition of "operator" in the Act, Agapito is not an independent contractor because Agapito did not perform services "at such mine."

In addition, Agapito did not perform sufficient services at a mine through its incidental visits to be considered an operator under the Act. Congress did not intend for any presence at a mine to result in Mine Act jurisdiction when it drafted the Act. The overwhelming majority of courts, furthermore, have held that liability attaches under the Act only when the subject citations stem from services performed while on mine property. Based upon these precedents, in fact, even a contractor's presence on mine property should not guarantee Mine Act jurisdiction. *Musser* is the only decision that does not follow this pattern.

Even if Agapito's minimal actions of visiting and taking pictures at the mine constitute work performed at a mine, there was no nexus between Agapito's conduct and the violation it was cited for. Applying Mine Act jurisdiction to Agapito as an "operator" distorts the Act's plain meaning and runs contrary to the great weight of Commission and federal appellate precedent.

Musser does not apply to this case because section 3(d)'s language is unambiguous under controlling precedent. *Musser* is the only case on record to hold that work that was not performed at the actual mine location gives rise to independent contractor and therefore operator

status. The Commission provided no discussion in its decision to extend MSHA's jurisdiction in *Musser* despite the fact that the plain language and meaning of the Mine Act were unambiguous; therefore *Musser* should not apply.

The Secretary's interpretation of the phrase "at such mine" should not be given deference because the courts in *Joy Technologies* and *Otis Elevator* found the phrase to be unambiguous. *Joy Technologies Inc.*, 99 F.3d 991, 999-1000 (10th Cir. 1996); see also *Otis Elevator Co.*, 921 F.2d at 1290. The Secretary's interpretation can only be given deference in situations where a term or phrase in a statute is ambiguous. Agapito maintains that in both *Joy Technologies* and *Otis Elevator*, the courts found that services must be performed at the mine site to give rise to independent contractor liability. To the extent that this is inapposite to the ruling in *Musser*, *Musser* should be disregarded. Under the controlling precedent of the 10th and D.C. Circuit Courts of Appeal, the Secretary's claim should be dismissed because Agapito's services were not performed at the Crandall Canyon Mine.

Even if *Musser* applies, Agapito's activities were insufficient to render it an independent contractor under the Act. The activities of the independent contractor in *Musser* were more extensive in time and more substantial in content than those of Agapito. Agapito's services concerning pillar extraction in the Main West Barriers section, including the South Barrier section, occurred over a period of time shorter than a year, as opposed to Musser's seven-year-long effort that included activities such as water sampling, field investigations, surveying and working on the permitting process. Also unlike Musser, Agapito did not involve itself in the governmental review process. Under the standard developed in *Musser*, Agapito is not an independent contractor.

The crucial distinction between *Musser* and this case is the extent to which the operators and MSHA relied upon the analysis of the consulting companies. Musser submitted an unaltered map directly to the state permitting agency and that same map was subsequently submitted to MSHA. The operator also conducted its mining according to that map. Conversely, Agapito did not submit its work to any agency and GRI did not directly include that work with any filings to any agency. MSHA and GRI altered and disregarded Agapito's analysis when formulating a roof control plan, showing that Agapito's services represented the transmission of ideas and nothing further. Ideas do not give rise to Mine Act jurisdiction.

There is also no connection between Agapito's services and the tragic accidents that took place in August 2007. The lack of reliance on Agapito's work shows this lack of causality. Most important, however, is the fact that the causes of the accidents were the institutional failures at MSHA and GRI and the criminally negligent mining practices of GRI that Agapito was not even aware of.

Under the test adopted by the Commission in *Joy Technologies* and *Otis Elevator*, Agapito does not face independent contractor liability. The Commission's two part test in *Otis Elevator* considers the party's (1) proximity to the extraction process and (2) the extent of its presence at the mine. See *Otis Elevator Co.*, 11 FMSHRC 1896, 1902 (Oct. 1989). Since GRI disregarded Agapito's analysis, Agapito does not satisfy the first factor and Agapito did not spend enough time at the mine to satisfy the second.

For the foregoing reasons, Agapito believes that it is not an independent contractor or an operator under the Mine Act, and that Citation No. 7697010 should be vacated for lack of jurisdiction.

III. DISCUSSION AND CONCLUSIONS OF LAW

Under the Mine Act, the term “operator” is defined as “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). Although the Act does not provide a definition for independent contractor, MSHA regulations do, asserting that the term “means any person, partnership, and corporation, subsidiary of a corporation, firm, association or other organization that contracts to perform services or construction at a mine.” 30 CFR § 45.2(c). The Commission has held that any independent contractor that performs “more than *de minimis* services at a mine” is considered an operator under § 802(d). *Musser*, 32 FMSHRC at 1268; *See Northern Illinois Steel Co.*, 294 F.3d 844, 848 (7th Cir. 2002); *Joy Technologies*, 99 F.3d at 999-1000; *Otis Elevator Co.*, 921 F.2d at 1290.

The Commission held in *Musser*, furthermore, that even services performed away from mine property are considered to be performed “at a mine” if those services relate to the mine. *Musser*, 32 FMSHRC at 1269. Although jurisdiction is a legal question, it is highly influenced by factual considerations; the “totality of work” performed upon the pertinent project, not just the work relating to the underlying citations, “must be considered on the jurisdiction issue.” *Id.*

I must consider the above law in light of the fact that the motions before me seek a summary decision. Commission Procedural Rule 67 sets forth the grounds for granting summary decision as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has long recognized that “summary decision is an extraordinary procedure.” *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). The Commission has also analogized Commission Procedural Rule 67 to Federal Rule of Civil Procedure 56. *Hanson*

Aggregates New York, Inc., 29 FMSHRC 4, 9 (Jan. 2007); *See Also Energy West Mining Co.*, 16 FMSHRC at 1419 (citing *Celotex Corp v. Cartrett*, 477 U.S. 317,237 (1986)).¹

When the Commission reviews a summary decision under Comm. P. R. 67, it looks “ ‘at the record on summary judgment in the light most favorable to . . . the party opposing the motion,’ and that ‘the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion.’ ” *Hanson Aggregates New York Inc.*, 29 FMSHRC at 9 (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

I deny Agapito’s Motion for Summary Decision, while simultaneously granting the Secretary’s Motion for Partial Summary Decision. There are no genuine issues of material fact concerning the issue of jurisdiction and the Secretary is entitled to summary decision as a matter of law. I find that Agapito is an independent contractor and therefore an operator as defined by the Mine Act and is subject to the jurisdiction of the Act. There remain, however, genuine issues of material fact concerning the merits of this case. With this decision I do not, therefore, decide any issues beyond that of basic jurisdiction. The Commission’s *Musser* decision is applicable to this case, as it is binding Commission precedent that I must follow.

Furthermore, Agapito’s assertion that *Musser* conflicts with both *Otis Elevator* and *Joy Technologies* is incorrect. In both *Joy Technologies* and *Otis Elevator*, the courts held that the meaning of the term “operator” was plain; although the entire phrase “any independent contractor . . . at a mine” was considered, the phrase was only considered to ascertain the plain meaning of the term “operator.” *See Joy Technologies*, 99 F.3d at 999; *Otis Elevator*, 921 F.2d at 1290. In neither case did the operator challenge the meaning of the phrase “at such mine” and therefore neither court specifically considered the phrase “at such mine” or “at a mine.”² *See Id.*

¹ Federal Rule of Civil Procedure 56(c)(A) states, in pertinent part, that a motion for summary judgment should be granted if “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” shows that there is no issue of material fact and the movant is entitled to summary decision as a matter of law. Fed. R. Civ. P. 5(c)(A).

² The decisions in *Musser*, *Joy Technologies* and *Otis Elevator* all rely upon the same basic tenet: that the term “operator” in the Mine Act is meant to be construed broadly. In fact, the courts in all three cases agree that Congress added the phrase “any independent contractor . . . at such mine” to the Act to expand the Act’s jurisdiction. *Compare Musser*, 32 FMSHRC at 1269 with *Joy Technologies Inc.*, 99 F.3d at 999 and *Otis Elevator*, 921 F.2d at 1290. It would therefore be counterintuitive to claim that the failure of the courts in *Joy Technologies* and *Otis Elevator* to explain the meaning of “at a mine” or “at such mine” should serve to constrain the jurisdiction of the Act, especially when doing so would mean that “a mine owner performing the same work as an independent contractor would be covered, but the contractor would not.” *Musser*, 32 FMSHRC at 1269.

Musser is an extension of the holdings in *Otis Elevator* and *Joy Technologies*; it clarifies rather than contradicts the holdings in those cases.

Using the rationale from the *Musser* decision, I hold that Agapito is an operator under the Act. First, Agapito was clearly a contractor that performed services for GRI. Agapito's own records show that Agapito provided several analyses relating to retreat or pillar mining in the Main West Barriers section, and Agapito billed 320 hours of work to GRI for these services. (Ex G-A at 10). It is also worth noting that formulating an effective roof control plan is vital to protecting the health and safety of miners.

The main question before me, however, is whether Agapito's services were performed "at such mine." In *Musser*, the Commission held that "the words 'at such mine' are applicable if the services related to the mine site even if [the independent contractor] performed them somewhere else." *Musser*, 32 FMSHRC at 1269. Agapito's consulting services were intended to help formulate a roof control plan for pillar mining in the Main West Barriers section of the Crandall Canyon Mine. Clearly, these services were not intended to have an effect on Agapito's offices in Grand Junction, Colorado; they were intended to affect the method by which coal was extracted at the Crandall Canyon Mine. Although the parties dispute how GRI used Agapito's analyses, there is no dispute that the reports provided by Agapito pertained to the Crandall Canyon mine site and that Agapito intended those reports to influence the formation of the roof control plan of the Main West Barriers section of that mine. Also, the idea that contractors could forgo doing on-site inspections that are vital to both their analysis and their role in promoting mine safety to avoid Mine Act jurisdiction is clearly in opposition to the goal of protecting miners, which is "the primary purpose of the Mine Act." *Joy Technologies*, 99 F.3d at 996. Agapito qualifies as an independent contractor performing services or construction at such mine and therefore is an operator as defined by the Mine Act.

I also find that Agapito performed sufficient work at the Crandall Canyon Mine to qualify as an operator. The *Joy* court held that "[a]lthough Congress may have been specifically concerned with contractors who are engaged in the extraction process and who have a continuing presence at a mine . . . section 3(d) by its terms is not limited to these contractors." *Joy Technologies, Inc.*, 99 F.3d at 999-1000 (internal citations omitted). *Joy Technologies* and *Otis Elevator* held that the meaning of section 802(d) was "broad, but its meaning is clear[;]" if a contractor sends a "representative onto mine property, who, in carrying out his job, performed services at the mine," then that company "is subject to regulation as an 'operator' under the Mine Act." *Joy Technologies Inc.*, 99 F.2d at 1000; see *Otis Elevator*, 921 F.2d at 1290. Agapito did not have a regular presence at the Crandall Canyon mine site, but its own records show that its employees visited the mine twice between 2006 and 2007 to take pictures and examine the roof and ribs of the Main West Barriers section. Agapito sent its employees to the Crandall Canyon Mine and those employees, in carrying out their jobs, analyzed the roof conditions at the mine. While these visits were infrequent, they were taken for the vital purpose of helping GRI to formulate a roof control plan. The importance of an effective roof control plan to the health and safety of miners, which was illustrated by the accidents at Crandall Canyon, makes it difficult to argue that Agapito's services were minor or *de minimis*, even if only a small portion of that work was done at the mine site.

Agapito's argument that their visits to the mine were ad hoc and not part of their contract is an argument that the courts in *Joy Technologies* and *Otis Elevator* expressly denied. See *Joy Technologies*, 99 F.3d at 996. Furthermore, I reject Agapito's argument that its services were "wholly conceptual in nature" and therefore not regulated by the Mine Act. That issue is intertwined with the merits of the case and there are genuine issues of material fact concerning Agapito's role in the development of the roof control plan. In addition, Agapito's situation is dissimilar from the operator in *Paul* because the Crandall Canyon Mine was in existence and was a site where mining took place. See *Paul v. P.B.-K.B.B., Inc.*, 7 FMSHRC 1784, 1787-88 (Nov. 1985), *aff'd*, 812 F.2d 717, 720 (D.C. Cir. 1987); *Musser*, 32 FMSHRC at 1268.

Agapito argues that there is no connection between Agapito's services and the accidents and that Agapito lacked sufficient control over its work to be liable. It contends that GRI ignored some of its key recommendations when it submitted its roof control plan to MSHA. As a result, Agapito argues that it cannot be held liable for the alleged violation. This issue relates to the merits of the case and not to the narrow issue of jurisdiction before me. The facts underlying these issues have been contested by the Secretary. (Sec'y Opp. at 11).

Construing the facts in the light most favorable to Agapito, I find that there are no material facts in dispute as to the contested jurisdictional issues and therefore the Secretary is entitled to partial summary decision as a matter of law. Agapito is an independent contractor and therefore an operator under the Act; Agapito is subject to the jurisdiction of the Act. Many of the arguments raised by Agapito relate to the merits of the case and cannot be resolved upon a motion for summary decision because genuine issues of material fact remain.

IV. ORDER

I hereby **DENY** Agapito's Motion for Decision Judgment and **GRANT** the Secretary's Motion for Partial Summary Decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 13, 2012

SECRETARY OF LABOR, MINE SAFETY	:	CIVIL PENALTY PROCEEDING:
AND HEALTH ADMINISTRATION	:	
(MSHA),	:	Docket No. WEVA 2011-940
Petitioner,	:	A.C. No. 46-01968-243606
	:	
v.	:	Mine: Blacksville No. 2
	:	
CONSOLIDATION COAL CO.,	:	
Respondent.	:	
	:	

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER’S MOTIONS AND DENYING RESPONDENT’S MOTION TO COMPEL

This Civil Penalty Proceeding arises under § 105 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815. The case is scheduled to be heard in Morgantown, West Virginia beginning on Wednesday, January 23, 2013 at 8:30 a.m. At issue are one order and two citations. Order No. 8025378 was issued for a violation of 30 C.F.R. § 75.202(a); the proposed penalty is \$50,700.¹ Pet’r’s Ex. A. Citations Nos. 8025516 and 8025562 were issued for violations of 30 C.F.R. § 75.220(a)(1); the proposed penalty for each citation is \$1,900.² *Id.* The Secretary filed five motions in this matter- a motion to amend, a motion for adverse inference, a motion in limine to preclude any argument regarding whether violations of “Rules To Live By” standards are specially assessed as a matter of course, a motion in limine to exclude photographs, and a motion to permit leading questions. The Respondent filed a motion to compel a response by the Secretary to the Respondent’s second set of interrogatories. For the reasons that follow, the Court will grant the Secretary’s motions to amend and to permit leading questions and will deny the Secretary’s other three motions. The Court also will deny the Respondent’s motion to compel.

The Secretary’s first motion seeks to increase the negligence designation of Order No. 8025378 from high negligence to reckless disregard and correspondingly increase the proposed penalty from \$50,700 to \$70,000. Pet’r’s Mot. To Amend, 1-4. Order No. 8025378 was initially assessed as being a result of the Respondent’s high negligence and unwarrantable failure to comply with a mandatory standard. *Id.* at 1. The Secretary argues that this motion is not

¹ 30 C.F.R. § 75.202(a) requires an operator to support or otherwise control the roof, face and ribs of areas where persons work or travel so as to protect the persons from falls of the roof, face or ribs and from coal and rock bursts.

² 30 C.F.R. § 75.220(a)(1) requires an operator to adopt and follow a roof control plan approved by MSHA.

prejudicial to the Respondent since the facts the Secretary would present at the hearing to prove reckless disregard are the same facts the Secretary would have presented to prove high negligence and unwarrantable failure. *Id.* at 3. The Commission has stated that leave to amend is to be freely granted in the interest of justice so long as the party opposing leave is not prejudiced. *Secretary of Labor v. Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). The Respondent may be prejudiced if it is given inadequate notice of the Secretary's motion. The Secretary's motion was originally submitted on October 15, 2012, fifteen days prior to the hearing scheduled for October 30, 2012. However, a subsequent postponement of the hearing date from October 30, 2012 to January 23, 2013 has served to cure any issue of inadequate notice. *Consolidation Coal Co.* (Order Rescheduling Hearing), Docket No. WEVA 2011-940 (October 31, 2012). Accordingly the motion to amend the petition is **GRANTED**.

The Secretary's second motion seeks an adverse inference against the Respondent as a remedy for the Respondent's alleged spoliation. Pet'r's Mot. for Adverse Inference, 1. The Respondent failed to provide photographs of the hazard cited in Order No. 8025378 (the photographs were taken on June 22, 2010 during the relevant inspection of the mine), and failed to provide the pre-shift and on-shift exam records of June 4, 2010 to June 18, 2010 of the hazardous area. *Id.* at 3. The Secretary seeks an adverse inference that the photographs and shift exam records would demonstrate the existence of the hazard in order to counter the Respondent's argument that no hazard existed in the cited area. *Id.* at 1-3. The Secretary argues that spoliation results from negligent failure to preserve evidence or intentional destruction of evidence and that an adverse inference is an appropriate remedy for spoliation. Pet'r's Mem. Of Law in Supp. of Mot. For Adverse Inference, 4-5. The Secretary claims that the Respondent had an obligation, beginning on June 26, 2010 (when Respondent submitted a request to conference with MSHA regarding the negligence designation of the Order), to preserve the photographs and shift exam records. *Id.* at 6. The Respondent disputes the legal standard for spoliation, claiming that spoliation results only from intentional destruction of evidence, not negligent failure to preserve evidence. Consol's Resp. To the Sec.'s Mot. For Adverse Inference, 9. The Respondent disputes when it had an obligation to preserve the documents. *Id.* at 14-15. The Respondent also disputes other allegations by the Secretary regarding this motion. Disputes regarding the legal standard for spoliation, when the Respondent had an obligation to preserve the documents, and other evidentiary matters are better resolved during trial than on a pre-trial motion. Indeed, the purpose of a hearing is to resolve disputed legal and factual issues that bear on the issue at hand. Therefore, the Secretary's motion for an adverse inference is **DENIED**.

The Secretary's third motion seeks to preclude any argument or evidence by the Respondent regarding whether violations of "Rules To Live By" ("RTLB") standards are specially assessed as a matter of course. Pet'r's Mot. to Preclude any Arg. On Rules to Live By Standards, 1. The two standards at issue in this matter, 30 C.F.R. §§ 75.202(a) and 75.220(a)(1), are both included in MSHA's RTLB Initiative.³ Earlier in this matter, the Respondent submitted

³ In pertinent part the Initiative states, "*Rules to Live By*" is an initiative to improve the prevention of fatalities in mining. Through a first phase of industry outreach and education followed by enhanced enforcement, the focus will be on 24 frequently cited standards. *Rules to Live By* (last visited November 19, 2012), <http://www.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp>

a motion to compel discovery seeking to force the Secretary to release data regarding the number of alleged violations of these two standards that were specially assessed on a national and district wide level since implementation of the RTLB Initiative. The Respondent claimed that it needed this data for its argument that violations of RTLB standards are specially assessed as a matter of course, and therefore the RTLB Initiative is a substantive rule that requires notice and comment rule-making. *Consolidation Coal Co.* (Order Requesting Information and Rulings on Motions to Compel), slip op. at 4-5, Docket No. WEVA 2011-940 (June 15, 2012). However, in its Order of June 15, 2012, the Court denied the Respondent's motion to compel discovery regarding the number of alleged violations of the two standards that were specially assessed. *Id.* In the Order, the Court stated that it was not disposed to entertain an argument that the RTLB Initiative is a substantive rule requiring notice and comment rulemaking since such an issue is outside the bounds of a civil penalty case. *Id.* Therefore, the Court will not consider any argument regarding whether RTLB standards are specially assessed as a matter of course. The Secretary's motion is superfluous as the issue has been previously resolved in the Secretary's favor. Therefore, the motion is **DENIED**.

The Secretary's fourth motion seeks to exclude photographs taken by the Respondent's employees of the hazardous area cited in Order No. 8025378. Pet'r's Mot. to Exclude Photos Taken in 12/ 2011, 1. The Secretary makes this motion in anticipation of the Respondent introducing photographs taken in December 2011, a year after the June 22, 2010 inspection of the cited area, to demonstrate that the cited area did not contain the cited hazard. *Id.* at 2. The Secretary contends that the 2011 photos fail to accurately represent the condition of the hazard observed in 2010 due to the operator's corrective action and geological processes which occurred during the intervening year. Mem. Of Law in Supp. Of Pet'r's Mot. to Exclude Photos, 6. The Court finds that the photographs taken by the Respondent's employees in December 2011 of the cited area are relevant as they are a representation of the cited area. While their probative value may be minimal, the Secretary can challenge the evidence's probative value during the hearing. Therefore, the motion is **DENIED**.

The Secretary's fifth motion asks the court to permit the Secretary, at hearing, to ask leading questions, without a threshold showing of actual hostility, of the Respondent's employees during the Secretary's direct examination. Pet'r's Mot. To Permit Leading Questions, 1. In this court, leading questions are routinely allowed on direct examination of an opposing party's witnesses. Therefore, the motion is **GRANTED**.

The Respondent has filed a motion to compel response to its second set of interrogatories. Mot. To Compel Resp. to Resp't's Second Interrogs., 1. The Court ordered the Secretary on July 6, 2012 to disclose the information in the Special Assessment Review ("SAR") forms to the Respondent. *Consolidation Coal Co.* (Recognition of Compliance and Order to Produce Forms), slip op. at 3, Docket No. WEVA 2011-940 (July 6, 2012). However, in this motion the Respondent seeks the identity of the individual who made the final decision to use special assessments for the three violations and his basis for making such special assessments. The Respondent distinguishes between the recommendations of the inspector, his supervisor, the assistant district manager and the district manager (information present in the SAR forms) and the final binding decision of an upper level decision-maker (information absent from the SAR forms). Mot. To Compel Resp. to Resp't's Second Interrogs., 5-6. The Secretary opposes the

motion arguing that disclosing the basis for this individual's decision would necessarily involve a disclosure of the policy reasons behind the Secretary's choice of using special assessments for certain standards. Mem. Of Law in Supp. of Pet'r's Resp., 11-12. The Court finds that by disclosing the information within the SAR forms to the Respondent, the Secretary has disclosed the factual basis for the special assessment of the violations. *Consolidation Coal Co.* (Recognition of Compliance and Order to Produce Forms), slip op. at 3, Docket No. WEVA 2011-940 (July 6, 2012). Moreover, the enforcement priorities of an upper level decision-maker are irrelevant to this proceeding. Therefore, the motion is **DENIED**.

Accordingly, the Secretary's Motion to Amend and her Motion to Permit Leading Questions are **GRANTED**. The Secretary's Motion for Adverse Inference, Motion to Preclude Argument on Rules To Live By Standards, and Motion to Exclude Photographs are **DENIED**. The Respondent's Motion to Compel Response to Respondent's Second Set of Interrogatories is **DENIED**.

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

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