

December 2013

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

Secretary of Labor, MSHA v. Oak Grove Resources, LLC, Docket Nos. SE 2009-261-R, SE 2009-487. (Judge Moran, November 13, 2013)

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

Secretary of Labor, MSHA v. Prairie State Generating Co., Inc., Docket Nos. LAKE 2009-711-R, LAKE 2009-712-R and LAKE 2010-171. (Judge Miller, October 25, 2013)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

December 11, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-4-M
v.	:	A.C. No. 13-00125-197511
	:	
LAFARGE NORTH AMERICA	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). It involves four citations issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Lafarge North America for violations of 30 C.F.R. § 56.14100(c).¹ The subject of the alleged violations was the condition of ball joints in the steering linkages of trucks. All four citations were vacated by an Administrative Law Judge. 33 FMSHRC 1621, 1624 (July 2011) (ALJ). We granted the Secretary of Labor’s subsequent petition for discretionary review. For the reasons that follow, we vacate the Judge’s decision and remand the case for further proceedings.

¹ That standard provides that:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

I.

Factual and Procedural Background

MSHA Inspector Howard Wood, in the course of inspecting all of the mobile equipment at Lafarge's Portland cement facility in Davenport, Iowa, inspected five to eight haul trucks, seven to ten pickup and service trucks, and some other mobile equipment. 33 FMSHRC at 1622-23; Tr. 23, 63, 113. He issued a number of citations as a result of his inspection, including the four at issue here. They alleged excessive movement in one or more ball joints in the steering linkages of three of the pickup trucks and one of the haul trucks. 33 FMSHRC at 1622; Tr. 24-25; Gov't Exs. 2, 6, 9, 12. The operator was cited for significant and substantial ("S&S") violations of section 56.14100(c).² The citations were terminated when Lafarge replaced either the ball joints or tie-rod ends.

At the hearing, Inspector Wood and Ronald Medina, an MSHA Mechanical Engineer, testified on behalf of the Secretary. Lafarge's lone witness was Kenneth Oliver, a mobile equipment mechanic at its Davenport plant.

Hearing testimony indicated that, in a steering assembly, the steering wheel turns a shaft that goes into the steering gear box. Tr. 135-36. Different ball joints connect the steering box to a tie rod, which permits the tires to turn in controlled, coordinated movement, to the right and left and to move up and down through the suspension system. Tr. 30, 136. The ball is supposed to rotate or swivel within its socket but should not otherwise move within it. Tr. 32, 136-38. When the ball becomes loose inside its socket, the resulting movement can adversely affect the steering of the vehicle. Tr. 40, 138-39.

Inspector Wood testified that any movement greater than one-eighth inch indicated that a hazardous defect existed. Tr. 39. Wood estimated that the ball joint movement he observed had been approximately one-quarter inch in each instance. Tr. 31, 43, 52, 54-55. His estimates were obtained while he looked underneath each of the trucks, from a distance of about two feet from each ball joint. Tr. 42, 82. The estimates were based on the amount of movement he observed relative to the width of the ink pen he held up for contrast, which he estimated to be over one-quarter inch but less than three-eighths inch in width.³ Tr. 31, 45-46, 51, 80-81.

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

³ Wood asked a Lafarge employee to get in the truck and turn the steering wheel back and forth, in order to "rock" it. Tr. 30, 45, 51, 84. In the case of the three pickup trucks, Wood held onto a tire as well and testified that he felt a "little bit of knocking" or "slapping" and heard a clicking noise he attributed to the ball moving in the socket. Tr. 30-32, 51, 79.

Lafarge mechanic Oliver admitted at the hearing that the movement of one-quarter inch in a steering linkage ball joint would be hazardous. Tr. 243; *see also* L. Br. at 16. In addition, Oliver agreed that observing movement in the ball joint while the steering wheel was being turned with the vehicle on the ground, as Inspector Wood had done, was one accepted method of determining how much a steering linkage ball joint was moving. Tr. 240.

However, Oliver stated that, in replacing the cited ball joints after the issuance of the citations, he looked for excessive movement. He reported that he and a fellow employee could see “very, very, very little movement, if any,” and that a couple of the ball joints did not move at all. Tr. 222.

In his decision, the Judge did not address the amount of movement in the ball joints, which goes to the issue of whether Lafarge violated the standard. Instead his sole focus was on the issue of whether the operator had adequate notice of what the standard required.

In his discussion of the adequate notice issue, the Judge recited Wood’s testimony that, in issuing the citations, he relied in part upon a standard in the Commercial Vehicle Safety Alliance (“CVSA”) manual as a reference point for establishing that movement of greater than one-eighth inch in a ball joint meant that there was a violation of section 56.14100(c). 33 FMSHRC at 1623 (citing Tr. 39; Gov’t Ex. 4, at 8). The Judge then found that the Secretary’s other witness, Medina, disavowed that the CVSA (and thus the one-eighth inch standard used by Wood) was applicable to vehicles as small as the four cited in this case. *Id.* (citing Tr. 171). According to the judge, Medina was unable to state any measurement or standard that would be considered objective or reasonable to test the ball joints. *Id.* (citing Tr. 194).

The Judge held that the Secretary “has the burden of demonstrating some consistent and objective measure of establishing a violation of the cited standard.” *Id.* at 1624. Accordingly, he concluded that the disagreement between the Secretary’s two witnesses on what constituted consistent and objective criteria resulted in a denial of fair notice and due process in this instance. *Id.* Consequently, the Judge vacated the four citations. *Id.* He thus did not make a finding as to how much movement occurred in the ball joints or whether any such movement was so excessive that it constituted a violation of the regulation.

II.

Disposition

The Secretary contends that the Judge erred in holding that the Secretary is obligated to establish an objective measure or reasonable standard which provides notice to operators that certain actions or inactions would result in non-compliance with section 56.14100(c). PDR at 6-8. The Secretary argues that the appropriate inquiry involves instead the Commission’s “reasonably prudent person test,” i.e., whether a reasonably prudent mine operator would have understood that a specific condition violated the regulation. *Id.* Lafarge essentially agrees that

the reasonably prudent person test is the appropriate test but contends that the Judge's ruling constituted application of that standard. L. Br. at 8-10.

There is no dispute that, at some point, movement in steering linkage ball joints can rise to the level of a hazardous defect under section 56.14100(c). The issue presented by the four citations is whether there was movement in the cited ball joints that constituted a hazardous defect requiring corrective action.

However, as noted above, the Judge made no factual findings on the amount of movement in the ball joints, if any, and whether such movement was so excessive that it constituted a defect in any of the four cited instances. For example, he failed to address in any respect the inspector's testimony that the ball joint movement was approximately one-quarter inch in each instance. Instead, he immediately looked to whether the Secretary had carried a burden imposed by the Judge of "demonstrating some consistent and objective measure of establishing a violation of the cited standard." 33 FMSHRC at 1624. The Judge focused only on whether Lafarge had been provided adequate notice of the minimum amount of movement in the cited ball joints that MSHA considered to constitute a hazardous "defect" under the standard.

Before a civil penalty may be imposed, due process considerations preclude the adoption of an agency's interpretation which "fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). In this case, the interpretation of the regulation involves the amount of ball joint movement that constitutes a "defect" under the standard. The Commission, however, has never held that adequate notice can only be established upon a showing by the Secretary of the exact criteria for noncompliance with the standard, as the Judge appears to have required in this instance.

First, the notice requirement is considered satisfied when a party has received actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard against the party. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996); *see also General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (reasoning that agency's pre-enforcement warnings to bring about compliance with its interpretation may provide adequate notice to regulated party). In this case the Judge made no finding regarding whether the operator had actual notice that the movement in the ball joints was sufficient to constitute a violation. However, Lafarge's witness testified that a ball joint would be hazardously defective if it moves more than one-quarter inch. Therefore, the operator did have actual notice that at some point the movement of a ball joint makes a piece of equipment defective.

Second, in the absence of sufficient evidence of actual notice, the Commission applies the "reasonably prudent person" test for adequate notice. The test is particularly appropriate to determine if a condition or practice violates a broadly worded mine safety standard, such as the

“hazardous defect” prohibition at issue here.⁴ See *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Under the reasonably prudent person test, “the violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with *the factual circumstances surrounding the allegedly hazardous condition*, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982) (emphasis added); see also *Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement*, “the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement,” but whether a reasonably prudent person, familiar with the protective purposes of the standard, would have ascertained the specific prohibition of the standard and concluded that a hazard existed in that “particular factual setting[.]” 12 FMSHRC at 2415-16. Therefore, with respect to a broadly worded safety standard, if a reasonable person with knowledge of the particular facts, including facts peculiar to the mining industry, would recognize the existence of a defect constituting a hazard requiring corrective action within the purview of the applicable regulation, the operator has sufficient notice of the standard.

Although the Judge focused solely on “a consistent and objective measure,” here the “reasonably prudent person test” must be applied to determine whether or not a reasonable person would have recognized a defect requiring corrective action. *Alabama By-Products*, 4 FMSHRC at 2131. Because the Judge did not make the necessary factual findings regarding the “circumstances surrounding the allegedly hazardous condition” in the first instance, it is not possible to apply the reasonably prudent person test. As an initial matter, there is the critical question of the amount of movement in the cited ball joints. The Judge made no finding regarding the conflicting testimony of Inspector Wood and Lafarge’s mechanic Oliver regarding how much, if any, movement there was in the ball joints. Without findings on this question, the Commission cannot perform its review function. See *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1675-76 (Dec. 2010) (remanding for Judge to make finding on key factual predicate of citation).⁵

⁴ “[C]ourts have recognized that . . . ‘specific regulations cannot begin to cover all of the infinite variety of . . . conditions which employees must face.’” *Freeman United Coal Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997) (quoting *Ray Evers Welding Co. v. OSHRC*, 625 F.2d 726, 730 (6th Cir. 1980)). At the same time, we have acknowledged that “in order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be ‘so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.’” *Ideal Cement*, 12 FMSHRC at 2416 (quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)).

⁵ Commission Procedural Rule 69(a) requires that a Commission Judge’s decision “shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record.” 29 C.F.R. § 2700.69(a). Without findings of fact and some justification for the conclusions reached by a Judge, the
(continued...)

Consequently, we are remanding this case to a Judge to apply the reasonably prudent person test on the basis of findings that are necessarily antecedent to the ultimate question of whether a reasonably prudent person familiar with the hazards of movement in a ball joint and the use of surface equipment in the mining industry would have recognized a defect requiring corrective action with the purview of 30 C.F.R. § 56.14100(c).⁶

If the Judge finds that there was movement in the ball joints of one-quarter inch, as the citations allege, a violation has been established by Lafarge's concession that such movement in the ball joint constitutes a hazard. Tr. 243. That concession would also obviate any need to address whether Lafarge had adequate notice that MSHA considered a ball joint in such condition to constitute a violation of section 56.14100(c). The Judge would need only to determine whether the Secretary had established that the violations were S&S and to assess penalties.

If the Judge credits Oliver's testimony and finds that for some of the ball joints there was no movement, he would vacate those citations.

If the Judge finds that there was some movement in the ball joints, but that the amount was something less than the one-quarter inch that Wood estimated (if, for instance, he credited Oliver's testimony that he could see little, if any, movement), a different analysis would be necessary. The Judge would have to consider the different views of the witnesses regarding the amount of movement that existed and the amount of movement that constitutes a defect making continued operation hazardous. The Judge must apply the reasonably prudent person test to determine whether this amount of movement violated the regulation. The judge's application of the reasonably prudent person test in the context of determining the existence of a violation obviates the need for the judge to apply that test again to determine whether Lafarge had adequate notice of what the standard required.

⁵(...continued)

Commission cannot perform its review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981).

⁶ Similarly, in *Ideal Cement*, which involved the allegation that the operator violated a standard requiring the correction of "equipment defects affecting safety," the case was remanded "[b]ecause the Judge did not make the requisite findings of fact with regard to the issue of whether the absence of the side screens affected safety." 12 FMSHRC at 2409, 2416.

III.

Conclusion

For the reasons set forth above, we hereby vacate the decision below and remand this matter to the Chief Administrative Law Judge for further proceedings consistent with this decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 11, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2009-403
v.	:	A.C. No. 46-08808-169080-02
	:	
SPARTAN MINING COMPANY, INC.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006). At issue is whether the Administrative Law Judge correctly upheld the significant and substantial (“S&S”)¹ designations for two violations of emergency escapeway standards by Spartan Mining Company, Inc. Unpublished Decision Approving Partial Settlement and Decision on Stipulated Record (June 23, 2010) (ALJ). Spartan filed a petition for discretionary review challenging the Judge’s S&S determinations, and the Commission granted review.

We affirm the decision of the Judge and hold that, in determining whether escapeway standard violations are S&S, a Judge must consider the violations in the context of emergency conditions.

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

I.

Factual and Procedural Background

This case involves two citations issued to Spartan at its Ruby Energy Mine in Mingo County, West Virginia. On September 24, 2008, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 8071651, alleging that Spartan violated the escapeway requirements contained in 30 C.F.R. § 75.380(b)(1).² That citation alleged that Spartan had failed to provide separate primary and secondary escapeways when removing equipment as required by the standard.³

On October 1, 2008, an MSHA inspector issued Citation No. 8065652 to Spartan, alleging a violation of the escapeway requirements contained in 30 C.F.R. § 75.380(d)(1).⁴ That citation alleged that a primary escapeway was not being maintained in a safe condition in violation of the standard.⁵

Spartan contested both citations.⁶ Before the Judge, the parties entered into a number of stipulations, including the following:

² Section 75.380(b)(1) states:

Escapeways shall be provided from each working section, and each area where mechanized mining equipment is being installed or removed, continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface.

³ The citation alleged that ventilation controls separating the ventilation on the primary and secondary escapeway on the section were removed, making the primary and secondary escapeway common. It noted that during that time period, equipment was being removed from the section.

⁴ Section 75.380(d)(1) states:

Each escapeway shall be – maintained in a safe condition to always assure passage of anyone, including disabled persons.

⁵ The citation stated that the primary escapeway was not being maintained in a safe condition to always assure safe passage of anyone, including disabled persons, and that it had water measuring at least 17 inches deep. It also noted that there were tripping hazards in the form of loose rock, coal ribs, a pump and a discharge line located in the water.

⁶ Docket No. WEVA 2009-403 consisted of 19 separate citations and orders issued under the Mine Act. The parties agreed to settle all but the two citations at issue in this proceeding.

(1) the citations set forth above accurately describe the conditions that existed at the mine at the time the citations were issued. Dec. at 2-3; Stips. 13, 19;

(2) the conditions set forth in both citations constitute violations of the respective standards. Dec. at 3; Stips. 14, 20;

(3) the violations contributed to a discrete safety hazard, “because in the event that an emergency requiring the use of the escapeway[s] was to occur, the failure to provide the required escapeway[s] would have impeded the evacuation of miners trying to leave the mine.” Dec. at 3-4; Stips. 15, 21;

(4) at the times of the violations, an emergency requiring evacuation was not reasonably likely to occur. Dec. at 3, 4; Stips. 16, 22;

(5) in the event of an emergency requiring the use of the escapeways described in the two citations, it was reasonably likely that “injuries resulting in lost workdays or restricted duty” would occur. Dec. at 3, 4; Stips. 17, 23.

Based on the stipulations, the parties submitted the matter to the Judge for a decision on the issues of gravity and the S&S nature of the violations. The Judge found: “By its very nature, the mandatory standard found at 30 C.F.R. [§] 75.380, and at issue here, is designed to protect miners only in the event of a mine emergency. The only purpose of the escapeway is to quickly evacuate all persons, including disabled persons, in the case of a fire, explosion, smoke or other emergency.” Dec. at 5. Thus, the Judge concluded that “[s]tandards that are designed to protect miners in emergency situations must be analyzed in the context of an anticipated emergency.” *Id.* at 6. Accordingly, the Judge concluded that both violations were S&S and assessed a penalty of \$2,976 for each. *Id.* at 6-7.

In petitioning for review of the Judge’s S&S determinations, Spartan argued that the Judge erred by “[presuming] that a hazardous condition was reasonably likely to occur.” PDR at 1. We now address the issues raised by Spartan in this case.

II.

Disposition

Under Commission case law, a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat’l Gypsum Co.*, 3

FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set forth the following four-part test to evaluate whether a violation is properly designated as S&S:

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

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). The analysis should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

The governing legal principles for applying the *Mathies* test in this case are controlled by our decision in *Cumberland Coal Resources, LP*, 33 FMSHRC 2357 (Oct. 2011), and by the D.C. Circuit’s decision affirming our ruling. *Cumberland Coal Res., LP v. FMSHRC*, 717 F.3d 1020 (D.C. Cir. 2013). The *Cumberland* case involved the similar issue of whether, in determining if violations of emergency lifeline standards are S&S, the violations should be considered in the context of a contemplated emergency.⁷ In *Cumberland*, we held that the “hazard contributed to by defectively placed lifelines necessarily involved consideration of an emergency situation.” 33 FMSHRC at 2364. This is because “[e]vacuation standards are different from other mine safety standards. They are intended to apply meaningfully only when an emergency actually occurs.” *Id.* at 2367.

Similarly, in affirming the Commission’s decision in *Cumberland*, the D.C. Circuit instructed that the S&S nature of a violation of a lifeline standard must be evaluated in the context of an emergency:

[A] violation of the lifeline standard could only contribute to the delayed evacuation from emergency hazard if there is an emergency, but the likelihood of an emergency will usually have nothing to do with the violation of the emergency safety standard. Thus, if the decisionmaker does not assume the existence of the emergency, then

⁷ In the instant case, the parties moved to suspend briefing before the Commission pending our issuance of a decision in *Cumberland*. We stayed briefing until after our *Cumberland* decision was issued.

his focus must necessarily shift away from the nature of the violation to the likelihood of the emergency.

717 F.3d at 1027.

Just as the need for a lifeline in *Cumberland* would arise only in the event of an emergency, the need for adequate escapeways will only arise in the context of an emergency evacuation from the mine. Accordingly, we reject Spartan's contention that the escapeway violations were not S&S because the parties stipulated that an emergency was not reasonably likely to occur.

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

As the Judge noted, the first *Mathies* element is satisfied by the parties' stipulations of violations. Dec. at 4-5.

With regard to the second *Mathies* element, the Judge determined in accordance with the parties' stipulations, that "a discrete safety hazard . . . contributed to by the escapeway violations is that of impeding the evacuation of miners in the event of an emergency." Dec. at 5; Stips. 15, 21. We conclude that this statement is an accurate description of the relevant hazard contributed to by the violations in this case. The judge's finding of a discrete safety hazard is consistent with our holding in *Cumberland*. As the D.C. Circuit noted in *Cumberland*, "the hazard here is delayed escape from emergency, but there can be no delayed escape, unless there is an emergency in the first place." 717 F. 3d at 1027.

In addressing the third *Mathies* element, the Judge determined that the escapeway standards are specifically designed to protect miners in the event of a mine emergency and therefore that the standard "must be analyzed in the context of an anticipated emergency." Dec. at 5-6. The Judge's conclusion that it is not necessary for the Secretary to prove the likelihood of an emergency is fully consistent with our analysis and that of the D.C. Circuit in *Cumberland*. Indeed, the text of the *Mathies* test specifically requires the Judge to consider if there is a "reasonable likelihood that the hazard contributed to" – i.e., the danger of impeded evacuation in the event of an emergency – will result in an injury. The parties stipulated with respect to both citations that "[i]n the event that an emergency requiring the use of the escapeways described in [the citations] was to occur, it was reasonably likely that injuries resulting in lost workdays or restricted duty to [11 and 16] miners, respectively, would occur." Dec. 3-4, Stips. 17, 23. Thus, the third *Mathies* element of reasonable likelihood of a resultant injury is satisfied.

The fourth element of *Mathies* also is established by the parties' stipulations of the reasonable likelihood of injuries resulting in lost workdays or restricted duties. Dec. 3-4, 6; Stips. 17, 23. We conclude that the record establishes that the hazard contributed to by the violations would be reasonably likely to result in an injury of a reasonably serious nature as required by our S&S analysis. Thus, the Judge correctly determined that all four elements of the *Mathies* test had been satisfied.

In rejecting Spartan’s arguments, we note that the Commission has never required the establishment of a reasonable likelihood of a fire, explosion, or other emergency event when considering whether violations of evacuation standards are S&S. *Cumberland*, 33 FMSHRC at 2366. *See Maple Creek Mining, Inc.*, 27 FMSHRC 555, 563-64 & n.5 (Aug. 2005) (where the Commission found that the failure to maintain an escapeway in safe condition was an S&S violation, noting that “in those circumstances [when] miners would be seeking quick exit from the mine in an emergency[,] . . . the potential for slips and falls would therefore be even greater during a mine evacuation.”)

III.

Conclusion

For the foregoing reasons, we affirm the decision of the Judge in all respects.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura
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/s/ William I. Althen
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December 23, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2007-600
ADMINISTRATION (MSHA)	:	A.C. No. 46-08791-120481-01
	:	
v.	:	Docket No. WEVA 2008-247
	:	A.C. No. 46-08791-130758
WOLF RUN MINING COMPANY	:	

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners¹

DECISION

BY: Jordan, Chairman, and Nakamura, Commissioner

This case, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012), arose from a citation and an order issued by the U.S. Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Wolf Run Mining Company for its failure to immediately notify MSHA and mine rescue teams of an accident occurring at its Sago Mine. The Administrative Law Judge reduced the negligence finding in the citation and reduced the negligence finding and vacated the unwarrantable failure finding in the order. 32 FMSHRC 1317, 1331, 1336 (Sept. 2010) (ALJ). The Commission granted the Secretary of Labor’s petition for discretionary review of the judge’s decision. For the reasons that follow, we reverse the judge’s decision in part and assess the original penalties proposed by the Secretary for both violations.

I.

Factual and Procedural Background

On January 2, 2006, at 6:26 a.m., an explosion occurred at Wolf Run’s Sago Mine, located in Upshur County, West Virginia. 32 FMSHRC at 1318, 1320. At that time, the mine had two

¹ Commissioner Robert F. Cohen Jr. is recused in this case. Commissioner William I. Althen assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Althen has elected not to participate in this matter.

active working sections called 1st Left and 2nd Left. *Id.* at 1320. Beyond the active working sections was an abandoned area referred to as 2 North. A set of seals was constructed across nine entries to seal 2 North from the active areas of the mine. *Jt. Stips.* 27, 28.

The explosion occurred in 2 North and blew out all of the seals. *Jt. Stip.* 29. There were 29 miners underground at the time of the explosion. 32 FMSHRC at 1318. The 2nd Left crew had already reached the 2nd Left face, but the 1st Left crew was still in transit in a mantrip to 1st Left face. *Id.* at 1319.

Meanwhile, on the surface, at 6:26 a.m., the same time as the explosion, a flash of lightning and loud thunder occurred as dispatcher William Chisolm was speaking on the phone with Mine Superintendent Jeffrey Toler, who was located in a building next to the dispatcher's office. *Id.* at 1320. Alarms on the Atmospheric Monitoring System ("AMS"), which monitors carbon monoxide, began to sound which Toler could hear over the mine phone. Chisolm told Toler that he had lost the AMS and that the belts were down. *Id.*

At 6:32 a.m., Belt cleaner Pat Boni, who was located underground outby the 1st Left crew when the explosion occurred, called Chisholm on the mine phone located near the No. 4 Belt and asked what had happened. *Id.* at 1321. He informed Chisholm that dust was moving in an inby direction rather than outby, the opposite direction in which the air normally flowed. *Id.*

At 6:36 a.m., while Toler, Chisholm, and Maintenance Superintendent Denver Wilfong were on the phone together, they received a phone call from underground from Owen Jones, a foreman of the 1st Left crew who had felt the force of the explosion when he was knocked down off the mantrip, lost his hard hat, and encountered the resultant smoke, dust, and debris. *Id.* Jones told management that "we had a mine explosion or something in here" and to "get mine rescue here right now." *Id.* No call was made to mine rescue or MSHA at that time.

Nothing had yet been heard from the 2nd Left crew. Thereafter, Toler, Wilfong, Maintenance Foreman Vernon Hofer, and Safety Director James (Al) Schoonover went underground to assist in the evacuation of miners and to determine the nature and extent of the accident. *Id.* Sometime between 7:15 a.m. and 7:23 a.m., while underground, after encountering the 1st Left crew, Wilfong called Chisholm on the surface and told him to call authorities. *Id.*; *Jt. Stips.* 113-14. During that call, Toler was patched into a call with John B. Stemple, Jr., the company's Assistant Director of Safety and Employee Development, from his home phone. 32 FMSHRC at 1322. Toler also advised Stemple to notify the authorities. *Id.*

However, Stemple still did not immediately make those calls. Instead, between 7:24 and 7:28 a.m., Stemple left messages on the home answering machines of several members of the company's upper management. *Id.* at 1323. At 7:46 a.m., Stemple left a message on the home answering machine of an official of the state mine safety agency. *Id.* at 1324. Stemple's first attempt to contact MSHA did not occur until approximately 7:50 a.m. when he left a phone message at the home of an MSHA supervisor. *Id.* At no time did Stemple call the toll-free

telephone at MSHA headquarters.² Tr. 579. He initially unsuccessfully attempted to contact a mine rescue team member at his home at approximately 8:04 a.m. 32 FMSHRC at 1324. At 8:32 a.m., Stemple successfully contacted MSHA Supervisor James Satterfield at his home. *Id.* at 1325. Satterfield immediately issued a verbal order under section 103(k) of the Mine Act, 30 U.S.C. § 813(k), prohibiting anyone from entering the mine. *Id.* Stemple successfully contacted mine rescue at 8:37 a.m. *Id.*

After being notified, MSHA personnel arrived at the mine at 10:30 a.m. Jt. Stip. 166. The Barbour County mine rescue team assembled at their Volga, West Virginia station, prepared equipment and headed for the mine at approximately 10:30 a.m. and arrived between 11:40-11:45 a.m. Jt. Stip. 169; Tr. 176-77, 181-83. Monitoring of the mine atmosphere was commenced and continued throughout the day. Jt. Stip. 173. Air quality measurements indicated a downward trend in the levels of dangerous gases. Jt. Stip. 174. At 5:25 p.m., MSHA permitted the first mine rescue team to enter the mine. Jt. Stip. 175. The 2nd Left crew members were discovered in the face area of the section. Jt. Stip. 177. Eleven miners were found dead and one miner was found alive. Jt. Stip. 178. Another deceased miner was found outby the 2nd Left section. Jt. Stip. 179.

As a result of these events, MSHA issued the citation and order involved in this case to Wolf Run. Citation No. 7100919 alleged that Wolf Run violated 30 C.F.R. § 50.10 because it failed to immediately notify MSHA of the explosion. 32 FMSHRC at 1326. Order No. 7100920 alleged that Wolf Run violated 30 C.F.R. § 75.1502(a)³ because it failed to comply with the

² At the time the citation was issued, section 50.10 explicitly required that in the event that a mine operator is unable to contact the local MSHA District Office *immediately* after an accident has occurred, it “shall *immediately* contact the MSHA Headquarters Office in Arlington, Virginia” and provided a toll free phone number. 30 C.F.R. § 50.10 (emphasis added). There was a subsequent amendment to the regulation eliminating the requirement that the operator immediately contact the MSHA District Office. 71 Fed. Reg. 71430-01 (Dec. 8, 2006). In this case, Wolf Run clearly failed to comply with this mandated procedure.

³ Section 75.1502 provides:

Each operator of an underground coal mine shall adopt and follow a mine emergency evacuation and firefighting program that instructs all miners in the proper procedures they must follow if a mine emergency occurs. (a) Program approval. The operator shall submit this program of instruction, and any revisions, for approval to the District Manager of the Coal Mine Safety and Health district in which the mine is located. Within 30 days of approval, the operator shall conduct training in accordance with the revised program.

30 C.F.R. § 75.1502(a).

mine's emergency evacuation and firefighting program and immediately contact the mine rescue team.⁴ *Id.* at 1332. MSHA alleged that both violations involved high negligence and that the emergency plan violation was significant and substantial ("S&S") and constituted an unwarrantable failure to comply.⁵ MSHA subsequently proposed penalties of \$1,500 for Citation No. 7100919 and \$13,000 for Order No. 7100920. *Id.* at 1326, 1332.

In his decision, the judge affirmed both violations and the S&S designation for the emergency plan violation. *Id.* at 1330-34. He reduced the negligence levels for both violations from high to moderate, reduced the penalties for both violations from \$1,500 to \$1,000 and from \$13,000 to \$10,000 respectively, and vacated the unwarrantable failure designation associated with the emergency plan violation. *Id.* at 1331, 1334-37.

The judge found that the operator's duty to contact MSHA did not begin until 7:23 a.m., when Toler first told Stemple to report the incident, rather than at 6:36 a.m., as the Secretary asserted, when Jones first reported the circumstances of the explosion to Chisolm, Toler, and Wilfong. *Id.* at 1330-31. The judge concluded that Commission case law permitted the operator a reasonable opportunity to investigate the event prior to being required to contact authorities. *Id.* at 1327-28. He also reasoned that the operator's negligence in not immediately reporting the incident was mitigated by mine management's wish to execute a rescue attempt and to not be barred from entering the mine. He also took into account the fact that the event occurred on a national holiday when MSHA and state offices were closed, making it difficult to reach authorities. *Id.* at 1331, 1336.

⁴ The mine's emergency evacuation plan states "[i]n the event of a mine fire or explosion the Barbour County Mine Rescue team is to be notified immediately at 457-2745." G. Ex. 6 at 12; G. Ex. 2.

⁵ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

MSHA could not designate the violation of section 50.10 as S&S and unwarrantable failure because, at the time, section 50.10 was a "regulation" rather than a "standard." *See Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45-46 (D.C. Cir. 1999). In December 2006, MSHA promulgated a new section 50.10 as a "standard." *See* 71 Fed. Reg. 71430-01 (Dec. 8, 2006).

II.

Disposition

On appeal, the Secretary argues that the judge erred in his negligence and unwarrantable failure analyses by failing to correctly determine the amount of time the operator delayed in reporting the explosion; by treating the operator's intentional delay in reporting the explosion as a mitigating factor, as opposed to an aggravating factor; by failing to take into account the fact that the delay in reporting the explosion posed a significant degree of danger; and by holding that the operator's negligence was mitigated because the explosion occurred on a national holiday. He asks the Commission to reverse the judge's decision on negligence and unwarrantable failure and to assess the penalties proposed by MSHA.

A. The Judge Erred in Reducing the Degree of Negligence Associated with the Violations from High to Moderate.

1. The judge incorrectly concluded that Wolf Run's duty to report the accident arose at 7:23 a.m. rather than at 6:36 a.m.

The judge made a critical error in his analysis of the violations by concluding that Wolf Run's duty to contact MSHA and mine rescue teams began at 7:23 a.m. rather than at 6:36 a.m. The record clearly shows that mine management knew about the accident as early as 6:36 a.m. when Owen Jones, the foreman underground at the time of the incident and closest to the location of the explosion, called up to the surface to inform Mine Superintendent Jeffrey Toler that a forceful blast of air had struck him and his crew while on the mantrip. 32 FMSHRC at 1327; Tr. 85, 87, 88, 130-32, 448-50, 468. Jones testified that when he initially spoke with Chisholm and Toler, at 6:36 a.m., he stated that "we had a mine explosion or something in here" and "get mine rescue here right now." Tr. 87-88. The judge credited Jones' testimony. 32 FMSHRC at 1327. In fact, the judge himself concluded that mine management "knew, or should have known, as early as 6:36 a.m. that an explosion had occurred." *Id.*

While Jones' testimony by itself shows that management should have known by 6:36 a.m. that a reportable accident had occurred, other circumstances add further support to that conclusion. The lightning strike at 6:26 a.m. had concurrently caused the carbon monoxide monitors to set off alarms, signaling elevated readings of carbon dioxide, before completely shutting down. *Id.* at 1320-21. The phone call from Pat Boni, who was located outby the 1st Left crew at the time of the explosion, at approximately 6:32 a.m., informing Chisholm that dust was moving in the opposite direction of normal airflow, inby instead of outby, indicated that there had been a disruption in the ventilation system. *Id.* at 1321. The 2nd Left crew, located further inby the mine, closer to the location of the explosion, could not be contacted either by Jones underground or by the dispatcher at the surface. *Id.* at 1321-23.

Despite these circumstances, Wolf Run did not immediately attempt to contact MSHA and mine rescue teams. No one tried to contact authorities until Stemple attempted to contact MSHA at 7:50 a.m. and the mine rescue team at 8:04 a.m. *Id.* at 1324, 1330. This was a time lag of

approximately 75 minutes and 90 minutes, respectively, after mine management first knew or should have known of the reportable incident. After Stemple spoke with Toler, he waited approximately 25 minutes before he attempted to contact MSHA, and approximately 40 minutes before he tried to call mine rescue. Clearly, substantial evidence⁶ does not support the judge's conclusion that Wolf Run's duty to "immediately contact" MSHA arose at 7:23 a.m.

Not only is there a lack of substantial evidence supporting his conclusion, but the judge also erred as a matter of law by relying on *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989) ("*Consol*"). Citing *Consol*, the judge stated that "the Commission has acknowledged that mine operators must be accorded a degree of discretion in investigating accidents prior to notifying MSHA." 32 FMSHRC at 1327. The judge misinterpreted the Commission's decision in *Consol*. In *Consol*, an unplanned roof fall had occurred in an underground coal mine. The Commission was careful to explain that an operator's opportunity to investigate is tempered by the urgent need to notify MSHA *immediately* once it is clear that an accident has occurred:

Section 50.10 therefore necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. Such internal investigation, however, must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous action. The immediateness of an 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.

11 FMSHRC at 1938.

In *Consol*, even though it was not readily determinable whether the roof fall occurred above the anchorage zone,⁷ the Commission concluded that the operator violated the reporting standard because: (1) the responsible management official should have known that a reportable accident had occurred when he received a phone call from the longwall section informing him that conditions in the entry impeded passage, and (2) after his investigation at the site, he could have reported the accident to MSHA using the underground mine phone instead of waiting 20 to 25

⁶ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁷ An "accident" is defined as including "[a]n unplanned roof fall at or above the anchorage zone in active workings . . . or an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage." 30 C.F.R. § 50.2(h)(8).

minutes to call from the surface. *Id.* Thus, *Consol* stands for the proposition that although an operator should be afforded a reasonable opportunity to investigate, once it is determined that a reportable accident has occurred, an operator must act immediately to report the incident.

Thus, the judge's reduction of the degree of negligence based on a finding that Wolf Run's duty to report the accident began at 7:23 a.m. rather than 6:36 a.m. was error.

2. The judge erred by considering Wolf Run's intentional delay in reporting the accident to MSHA and mine rescue teams as a mitigating factor.

Further evidence of high negligence is Wolf Run's apparently intentional delay in contacting MSHA and mine rescue teams. The judge erred in treating Wolf Run's intentional delay in contacting authorities as a mitigating circumstance, stating that "Wolf Run's delay was not motivated by a desire or reluctance to avoid notification. Rather, the delay is attributable to the fact that Wolf Run was conflicted over its concern for evacuating survivors, its preoccupation with establishing contact with the missing victims, and its responsibility to notify MSHA." 32 FMSHRC at 1331.

Although the operator denies intentionally delaying contacting MSHA, the record strongly suggests that Wolf Run management was motivated not to contact MSHA immediately in order to avoid MSHA enforcement. Toler could have called MSHA and mine rescue teams as soon as he received the call from Jones verifying that an accident had occurred underground. Instead, he chose to go underground, and delayed efforts to contact MSHA and the mine rescue team. Toler testified that Stemple had mentioned the prospect of receiving a section 103(k) order, which would have prevented the operator from sending anyone back into the mine. Tr. 452. Gary Marsh, a supply motorman, also testified that Stemple told him that "once we notified MSHA, that they would shut us down." 32 FMSHRC at 1335; Tr. 142. We agree with the Secretary that an intentional delay in contacting MSHA in an effort to deliberately avoid MSHA enforcement action, for whatever reason, cannot be construed as mitigating its negligence, but is rather evidence of high negligence.⁸

The operator's intention to assist underground personnel during this emergency, while admirable, is exactly the type of conduct that the Mine Act and the Secretary's regulations are intended to address and avoid. The moments after a mining accident are difficult and frantic, but crucial to an effective response is strict adherence to an operator's emergency plan and to the relevant MSHA standards governing conduct after an accident occurs. We laud the miners' deep concerns for their colleagues trapped underground. However, emergency response plan procedures are crafted and put in place to counteract the intense pressures of this type of high-stress incident in the most rational, calmest, and safest manner for all involved. *See* 30 U.S.C. § 876 (granting MSHA oversight authority in the execution and enforcement of emergency response plans).

⁸ The Commission has held that intentional misconduct supports a high negligence finding. *See, e.g., Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992).

Sending miners underground in the aftermath of an explosion puts additional miners at risk before a mine is secured and deemed safe to enter. *See Consolidation Coal Co.*, 14 FMSHRC at 970 (“no operator is free to take the law into its own hands by deciding for itself what the law means and how it can best be applied”); *IO Coal Co.*, 31 FMSHRC 1346, 1359 (Dec. 2009). This exact circumstance has resulted in dire consequences in other cases. *See, e.g., Jim Walter Res., Inc.*, 28 FMSHRC 579, 583 (Aug. 2006) (13 miners perished in a secondary explosion when they attempted to rescue an injured miner unable to escape).⁹ Congress has made a policy decision by requiring mine operators to contact MSHA *immediately* in the aftermath of an accident and granting MSHA the authority to direct rescue and recovery efforts. *See* 30 U.S.C. § 813(k) (granting MSHA broad authority to “issue such orders as [it] deems appropriate to insure the safety of any person in the . . . mine” in the event of an accident). The deliberate contravention of this requirement is not a mitigating factor.

3. The judge erred in concluding that the fact that the accident occurred on a Federal holiday was a mitigating factor.

The judge also concluded that the operator’s negligence in delaying any actions to contact MSHA was mitigated by the fact that the event occurred on a Federal holiday, making it difficult to contact members of Wolf Run’s upper level management and MSHA’s employees. 32 FMSHRC at 1331. We disagree.

The fact that the date of the accident was a national holiday is irrelevant to a negligence determination.¹⁰ The correct analysis is based on a review of the operator’s actions in *attempting* to contact MSHA. The judge incorrectly focused on why the operator did not succeed. It was incumbent on the operator to ensure that efforts were made to notify MSHA and mine rescue teams *immediately*, especially if circumstances, such as a holiday, might make it difficult to reach individuals.

4. The manner in which Wolf Run tried to contact authorities was highly negligent.

Even when it finally did make the attempt to contact the authorities, Wolf Run’s management relied solely on one off-site management official (Stemple), who had very limited knowledge of the accident and limited resources and information available to him at his home. While Stemple testified that he made diligent, yet unsuccessful, attempts to contact numerous

⁹ We note that after the explosion in this case the initial management party entered the mine while the AMS system was not functioning and without the aid of personal gas detectors. 32 FMSHRC at 1322; Jt. Stip. 102.

¹⁰ An emergency plan should be self-executing in order to avoid the pitfalls that may arise, such as difficulties in contacting upper management and authorities should an emergency event occur after business hours or during the weekend or on a holiday, when individuals may be difficult to contact.

MSHA officials and mine rescue team members, he was not in the best position to take on that responsibility, as he was not at the mine site and did not have the contact information necessary. *Id.* at 1323-25. Wolf Run could have had multiple individuals attempt to contact required personnel and authorities. Furthermore, it was highly negligent for Wolf Run not to have clearer lines of communication established during such an emergency. With 13 miners unaccounted for, the delay caused by the absence of an effective contact plan was serious and highly negligent.

In sum, the record compels the conclusion that the operator's delay in contacting MSHA and the mine rescue team amounted to a high degree of negligence. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

B. The Judge Erred in Concluding that Order No. 7100920 Was Not the Result of an Unwarrantable Failure to Comply.

For the same reasons, we conclude that the evidence compels the conclusion that the operator's conduct amounted to an unwarrantable failure to comply with the mine's emergency evacuation and firefighting program as required by section 75.1502(a). *See Midwest Material Co.*, 19 FMSHRC 30, 36-37 (Jan. 1997). The mine's plan required it to notify *immediately* the local mine rescue team in the event of a fire or explosion at the mine. G. Ex. 6 at 12; G. Ex. 2.

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).

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. These factors often include (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal*, 31 FMSHRC at 1351-57; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors are viewed in the context of the factual circumstances of a particular case, and as in the present case, some factors may be irrelevant to a

particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).¹¹ Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

In making his unwarrantable failure determination, the judge either failed to consider several of the relevant factors or misconstrued the evidence relevant to those factors. We address the four relevant factors in turn.

(1) Length of Time. Because the operator's duty to contact the mine rescue team began at 6:36 a.m. when Jones contacted mine management at the surface, instead of at 7:23 a.m. as the judge determined below, the operator's delay of approximately 90 minutes before contacting mine safety teams after mine management first knew or should have known of the accident was substantial and should have been considered by the judge as an aggravating factor. Because the judge erred in determining the time at which the operator was required to contact the mine rescue team, he also erred in failing to take into account the aggravated nature of the operator's delay in reporting the accident. The plan's requirement to contact the mine rescue team *immediately* clearly indicates that the duration of the violation was aggravated conduct for unwarrantable failure purposes.

(2) Knowledge and (3) Obviousness. The evidence establishes that Wolf Run knew about the violation and that it was obvious. Toler, a member of Wolf Run's management, knew about the incident shortly after it occurred at 6:26 a.m., 32 FMSHRC at 1327, and should have ensured that the mine rescue team was called immediately. As previously noted, the evidence indicates that Wolf Run intentionally delayed in contacting the mine rescue team, in favor of attempting its own rescue. *Id.* at 1335; Tr. 452. This clearly constitutes aggravating conduct in support of an unwarrantable failure determination. See *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 194. The judge's consideration of this evidence as mitigating is clear error.

(4) Degree of Danger. Given the high degree of danger and the immense risk of injury and potential death posed to the miners, Wolf Run's failure to immediately contact the mine rescue team amounted to a serious lack of reasonable care. The judge even noted the high degree of danger involved in the operator's failure to immediately notify mine rescue after the accident in his analysis concluding that the violation was significant and substantial. 32 FMSHRC at 1333-34 (finding it "reasonably likely that the existing hazards posed by an

¹¹ Because of the nature of the violation in this case – a failure to immediately contact the mine rescue team – we do not think that certain factors are relevant to the consideration of whether the violation resulted from the operator's unwarrantable failure to comply and do not address them. Specifically, three of the seven factors are not relevant: the extent of the violation, the operator's efforts in abating the violative condition, and whether the operator was placed on notice that greater compliance efforts were needed.

underground mine emergency will be exacerbated by a delay in the arrival of rescue personnel . . . [and] also reasonably likely that this increased exposure to danger will result in serious or fatal injuries of would be rescuers or the victims of an accident”). The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See, e.g., Midwest Material*, 19 FMSHRC at 34-35 (concluding that foreman’s negligent conduct resulted in highly dangerous situation to miner supporting an unwarrantable failure finding).¹²

III.

Conclusion

For the foregoing reasons, we vacate and reverse the judge’s decision reducing the negligence of both violations, removing the unwarrantable failure designation of Order No. 7100920, and modifying it from a section 104(d)(1) order to a section 104(a) citation. We uphold the citation and order in all respects and assess the penalties originally proposed by the Secretary of \$1,500 for Citation No. 7100919 and \$13,000 for Order No. 7100920.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

¹² The judge erred in applying the so-called *Nacco* defense when he concluded that the operator’s negligence was mitigated because only management officials (rather than hourly miners) entered the mine immediately after the accident and were put at risk. 32 FMSHRC at 1335. In *Nacco Mining Co.*, 3 FMSHRC 848, 850 (Apr. 1981), the Commission held that when an operator has taken reasonable steps to avoid a particular type of accident and the erring supervisor unforeseeably exposes only himself to risk, the operator should not be penalized for the supervisor’s negligence. As the judge himself acknowledged, 32 FMSHRC at 1335, in *Capitol Cement Corp.*, 21 FMSHRC 883, 893 (Aug. 1999), the Commission clarified that it would not extend the *Nacco* defense to violations that result from an operator’s unwarrantable failure to comply. Nonetheless, the judge wrongly considered as a mitigating circumstance the fact that only mine management was exposed to danger by entering the mine in the aftermath of the accident prior to the mine rescue team being contacted. The judge also failed to consider that the delay in contacting mine rescue put hourly miners still underground after the explosion at risk.

Commissioner Young, dissenting:

I dissent from my colleagues because I believe substantial evidence supports the Administrative Law Judge's ultimate conclusions on the negligence and unwarrantable failure issues. While some of the judge's factual determinations are not entirely consistent with the evidence, application of the law to the facts of record nonetheless compels us to respect his decision, which is yet supported by substantial evidence.

While I would affirm the judge, I acknowledge that the gaps in the operator's pre-accident planning and preparation, and in its delegation of tasks and coordination in the aftermath of the tragedy, are deeply troubling. The majority correctly notes that pre-accident planning and preparation are essential to avoiding panic under the stress of a mine disaster. The absence of such planning in this case, and the fact that the disaster fell on a major holiday, contributed greatly to the confusion and poor coordination in the wake of the explosion.

Nonetheless, I would affirm the judge's conclusion that the operator's violation did not arise from an unwarrantable failure to obey the command of the law, due to mitigating factors. Because the issue of whether conduct rises to the level of unwarrantable failure necessarily involves a subjective inquiry into the actions and intentions of the operator's personnel, as well as the surrounding circumstances, to determine whether their conduct was reckless, indifferent, or aggravated, I believe that it was proper for the judge to account for the operator's intent here, which was not to avoid compliance, and to consider mitigating factors, such as the fact that it was a national holiday. The judge took into account all of the extraordinary facts and circumstances of this case in making his decision, heard the evidence, and evaluated the operator's culpability based on that evidence. He found that the operator's negligence was moderate, and therefore did not amount to an unwarrantable failure to comply with the cited standards. 32 FMSHRC at 1331, 1334-37. In general, the judge's decision is well-reasoned and thoughtful on issues that require an insight into human nature under extraordinary stress.

The exigencies of that stress may explain, but do not excuse, the operator's conduct. As we are required to respect the judge's other factual findings, I concede that the evidence supports his conclusion that the operator knew, at 6:36 a.m., that there had been an explosion in the mine. However, due to the poor coordination and confusion in the ensuing moments after the incident, there was never a clear line of responsibility or a sharing of knowledge, and hence direct delegation and assignment of responsibilities based on that knowledge.

Thus, it is beyond question that the operator did not report the accident to MSHA without delay upon being presented with facts that provided *constructive* knowledge of the accident. However, the operator's management personnel did not receive all of the available information and process it as part of an integrated plan. While the lack of clear and effective communication is not itself a mitigating circumstance, it is a fact that affected the ability of the operator to act as promptly as it should have in notifying authorities after the explosion. The issue, then, is the operator's culpability for its failures, and whether they constitute aggravated conduct as a matter of law.

In considering this, I am mindful that it was reasonably likely that failing to notify MSHA immediately and permitting management personnel to enter the mine placed those miners in

danger in the aftermath of events in an unknown, and probably unstable, mine environment. As a purely legal matter affecting the significant and substantial nature of the violation, the fact that these were management personnel subjecting themselves knowingly to the risk, as opposed to rank-and-file miners, matters not at all.¹ Their motivations in subjecting themselves to peril, however, carry much greater significance in determining whether their conduct was “aggravated.”

Even the Solicitor’s counsel, in arguing this case before us, acknowledged that the operator’s actions were simply the result of basic human nature taking over. When asked how conduct she herself had characterized as “commendable” could be simultaneously condemned as unwarrantable, she replied:

It’s commendable from a human perspective because it’s understandable that they want to help. I’m sure everybody in this room would want to help if somebody is hurt. . . . [I]t’s the human aspect that we’re all thinking about, but it’s not a reasonable person standard. A reasonable person would know that there are dangers in this mine and they shouldn’t go into this mine without the expertise that MSHA brings.

Oral Arg. Tr. 52-53.

The Solicitor is undoubtedly correct that the law holds mine management accountable for failure to do what a reasonable person would have done in this context. But the absence of reasonable care is garden-variety negligence. Unwarrantable failure requires more than that. It requires aggravated conduct approaching a reckless disregard for the law. Here, reason was shunted aside by the basic commands of human nature. The operator’s personnel ignored their responsibility to call MSHA immediately, but only because they were commanded by a more fundamental instinct – one universally recognized, and in other contexts, applauded² – to go to the aid of their fellow miners.

Accordingly, the judge did not absolve the operator for its failure to notify MSHA immediately. He found that Wolf Run’s conduct violated sections 50.10 and 75.1502(a), the accident reporting requirements, and affirmed the S&S designation for the emergency plan violation. However, he also held that the surrounding circumstances mitigated the high level of

¹ The majority’s refutation of the *Nacco* defense is somewhat circular, in that it uses the exception to the defense (the operator’s unwarrantable failure) to support a showing that the exception should apply in the first place. However, while the Judge discusses *Nacco*, he does not use it to excuse management’s conduct here, and any imputation to the contrary would be harmless error, given the record support for his finding of moderate negligence and the lack of evidence to support an unwarrantable failure determination. 32 FMSHRC at 1335.

² See Medal of Honor Citation, Sgt. Gary B. Beikirch, U.S. Army, (April 1, 1970) (Sgt. Beikirch, “with complete disregard for his personal safety, moved unhesitatingly through the withering enemy fire to his fallen comrades”). *Medal of Honor Recipients, Vietnam War*, www.history.army.mil/html/moh/vietnam-a-1.html#BEIKIRCH (last visited Dec. 23, 2013).

negligence charged by the Secretary and concluded that Wolf Run exhibited moderate negligence in its failure to timely report the accident to MSHA and mine rescue teams. 32 FMSHRC at 1331.

He therefore concluded that the operator's conduct in violation of section 75.1502(a) did not amount to an unwarrantable failure. *Id.* at 1334-37. Substantial evidence supports the judge's conclusion. While the mine management personnel on the scene were almost certainly guided by emotion more than reason in some of their actions, they did not display an absence of care – except, perhaps, for their own safety – and appeared to be motivated by a desire to locate and help evacuate miners.³ The judge was entitled to consider this motivation as a factor in mitigation, and he did so.

In fact, the record in this case is replete with examples of safety consciousness, even in this terrible setting. Owen Jones, for example, began immediate withdrawal of his 1st Left crew upon experiencing the accident. Tr. 84; Jt. Stips. 69-71, 74, 105. He contacted mine management on the surface as soon as he was able to get his crew to safety in the primary escapeway, and reported to dispatcher William Chisolm and Mine Superintendent Jeffrey Toler the circumstances underground. 32 FMSHRC at 1321; Jt. Stips. 74, 92; Tr. 84-85, 87-88.

Mine management also did not travel underground with full knowledge of the nature or extent of the explosion. Toler, who entered the mine after the incident with two other fellow miners, Safety Director Al Schoonover and Maintenance Superintendent Denver Wilfong, testified that they did not know of the explosion upon entering the mine. All he knew is that the AMS had alarmed and then shut down. 32 FMSHRC at 1321; Tr. 447-50; Jt. Stips. 78-82. Before entering the mine, Denver Wilfong checked the mine fan pressure recording gauge and did not notice anything unusual. Jt. Stips. 99.

Furthermore, there was no reckless procession into the mine. While Toler and the other miners who entered the mine after the incident should have been aware that their decision would expose them to significant and unknown danger, their response otherwise showed safety consciousness, given the circumstances. For example, Toler instructed Wilfong to take the 1st Left crew outside, while he, Schoonover and Jones remained underground. 32 FMSHRC at 1322; Jt. Stip. 121. Because Jones had lost his hard hat during the explosion, upon meeting him at crosscut 25, Toler instructed him to stay at the phone while he and Schoonover traveled inby to assess the damage. 32 FMSHRC at 1322; Jt. Stip. 124.

Only after meeting Jones and the 1st Left crew did Toler learn of the conditions, and at that point determined that a reportable accident had occurred. This was reported immediately to Safety Director John Stemple, who was on the phone with Toler between 7:15 and 7:23 a.m. 32 FMSHRC at 1322; Tr. 453-54. At Toler's direction, Stemple proceeded to make the round of

³ I am of course aware of the high degree of danger that miners may confront in such an environment. *See Jim Walter Res., Inc.*, 28 FMSHRC 579 (Aug. 2006) (thirteen miners killed or fatally injured in an attempt to rescue miners after an explosion in September, 2001).

calls to inform upper level management and authorities. Jt. Stips. 113-116, 120.⁴ At the same time, Stemple told Chisolm that he, Stemple, would make the necessary calls to outside parties while Chisolm continued efforts to reach the 2nd Left Crew. Tr. 526-27.

Additionally, Stemple continued to search for phone numbers of agency officials who lived in the local area, and at 7:46 a.m. was able to leave a message on the home answering machine of state inspector John Collins, informing him of the situation at the mine. 32 FMSHRC at 1324; Tr. 539-41; G. Ex. 7. At 7:50 a.m., he was able to leave a similar message on the home answering machine of MSHA Field Office Supervisor Ken Tenney. 32 FMSHRC at 1324; Tr. 538-39; G. Ex. 7. The Judge held that this was the first attempt to contact MSHA. 32 FMSHRC at 1330.

Stemple testified that he was on the phone or searching for phone numbers continuously for nearly an hour, trying to reach State and Federal officials – partially due to the difficulties in reaching authorities because Federal and State offices were closed due to the holiday – before he was able to speak personally with James Satterfield of MSHA at 8:28 a.m. Satterfield issued a verbal order under section 103(k) at 8:32 a.m. 32 FMSHRC at 1325; Tr. 542-46, 552. Stemple immediately called the mine to relay the 103(k) order and to request other phone numbers for mine rescue personnel. 32 FMSHRC at 1325; Tr. 546-48. He was able to reach Chris Height, Vice President of Barbour County Mine Rescue Association at 8:37 a.m. 32 FMSHRC at 1325.

While Stemple was trying to alert Federal and State regulators and upper-level mine management, Toler's party continued to try to locate the 2nd Left Crew. Importantly, they proceeded further into the mine only as far as conditions permitted, noting the damaged and blown stoppings at crosscut 32 and at about 42 or 43, and decided not to proceed further because they did not have detectors. Jt. Stips. 125-27.

Toler thus called outside and gave instructions for Wilfong and Hofer to bring necessary supplies into the mine to repair the stoppings, as well as detectors and a hard hat for Jones. Jt. Stip. 128. They did not proceed until they had received the requested supplies, at which point they began repairing damaged curtains in an effort to improve ventilation and facilitate their rescue

⁴ Stemple testified that he made his first attempt to contact MSHA at 7:30 a.m., but was unable to reach anyone at the agency's Bridgeport Field Office. Tr. 536-37. Stemple said he then tried to call the WVOMHST Fairmont office, but was not able to reach anyone. Tr. 537. He did not leave a message at either office. Tr. 536-37. Because this was a major holiday, Stemple said he did not see the point in leaving a message that would not be retrieved until the next day. Tr. 539-40. He instead called the offices again at approximately 7:40 to retrieve other phone numbers from the recorded messages. Tr. 537-38. The judge found that the contemporaneous log of phone calls made by Stemple was the best evidence of the calls that were actually made, and thus held that Stemple did not attempt to contact MSHA until 7:50. 32 FMSHRC at 1330. While I am aware of the deference due to the judge's findings of fact, this period of time when Stemple claims he made the calls is virtually the only time not otherwise accounted for in his contemporaneous record. Furthermore, it seems wholly unreasonable that Stemple would have made the extraordinary effort to contact agency officials at home without first attempting to contact the field offices, for which he had numbers.

efforts. However, when they reached the 58 crosscut, conditions became too hazardous due to heavy smoke, and they withdrew from the mine. Jt. Stips. 142, 149-50.

The judge found that MSHA's local offices and mine rescue teams' offices were not open on the day of the accident because it was a national holiday, which added to the operator's delay in finally reporting the accident.⁵ 32 FMSHRC at 1331. Concerning the operator's motivations, no bad faith was asserted on the part of the operator, nor did the judge find any evidence of bad faith. 32 FMSHRC at 1331, 1336. As the judge held, "the Secretary fails to distinguish between imprudent or ill-advised conduct, and aggravated or unjustified conduct. Wolf Run's delay was not motivated by a desire to avoid notifying MSHA of the accident. Nor was it an attempt to alter an accident scene. Rather, Wolf Run's delay was caused by its preoccupation with determining the condition of its miners who were underground at the time of the explosion." *Id.* at 1336.

The agency asserts before us, and the majority has held, that Wolf Run delayed notification to MSHA because it feared that a 103(k) order would require it to abandon the 2nd Left Crew. However, while Stemple did raise this issue with Toler, Toler told Stemple to make the calls anyway. The judge did find that the delay in making the calls was a violation, but properly held that it was driven not by a "reluctance to avoid notification," *id.* at 1331, but by concern for their fellow miners, particularly family members:

Toler was concerned about the safety of his uncle who was a 2nd Left crew member. Jones was motivated by a concern for the well being of his brother, also a member of the 2nd Left crew. Toler and his associates were also motivated by a concern for their colleagues. The subordination of their personal safety in an attempt to save others instead of relinquishing their ability to go underground by immediately calling MSHA, given the circumstances in this case, is understandable, if not admirable. Their actions are not attributable to intentional misconduct, or a manifestation of indifference. Their behavior manifested a conscious awareness of an exigent situation rather than a reckless disregard of it. Simply put, it is obvious that the facts surrounding their conduct mitigates their negligence. There was no unwarrantable failure.

Id. at 1336. I find no basis for overturning this credibility determination made by the judge. *See Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992) (stating that a judge's credibility determinations are entitled to great weight and may not be overturned lightly).

⁵ The majority and MSHA would hold that the holiday does not mitigate the operator's failure. Slip op. at 8. The operator, however, was confronted with significant resource limitations that refute the majority's position. Furthermore, the difficulty of an expeditious response is evident in the fact that MSHA did not approve mine rescue to enter the mine until approximately 5:25 p.m., nearly 11 hours after the explosion. Jt. Stip. 175. I'm not going to second-guess the agency's response under the circumstances, but I am going to take issue with the majority's second-guessing of the operator's response, which anticipated significant impediments to prompt relief for the miners on the 2nd Left Crew.

Based on the foregoing, I conclude that the facts of record support the judge's decision. Substantial evidence supports the judge's finding of moderate negligence. Accordingly, based on the particular circumstances in this case, substantial evidence supports his finding that the operator's failure to immediately contact MSHA and mine rescue did not amount to an unwarrantable failure.

This is an extraordinary and difficult case, which was a primary driver in the first major overhaul of the Mine Act in nearly 30 years. Some of the specific failures and shortcomings exhibited here have been the impetus for changes in the law, and I question whether the majority and the Secretary view the events on that date in their proper context, before those changes were made. I believe the Judge evaluated the operator's actions correctly in that context, and I would therefore agree with him that there was no unwarrantable failure here.

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 5, 2013

HIBBING TACONITE COMPANY,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. LAKE 2013-236-RM
v.	:	Citation No. 8665985; 1/4/2013
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Hibbing Taconite Company
Respondent,	:	Mine ID: 21-01600
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2013-406-M
Petitioner,	:	A.C. No. 21-01600-314860-01
	:	
v.	:	
	:	
HIBBING TACONITE COMPANY,	:	
Respondent.	:	Mine: Hibbing Taconite Company

DECISION

Appearances: Barbara Villalobos, Office of the Solicitor, Chicago, Illinois and James Michael Peck, Mine Safety and Health Administration, Duluth, Minnesota, for Petitioner;
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

These cases are before me on a notice of contest filed by Hibbing Taconite Company and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Hibbing, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820. Hibbing operates the Hibbing Taconite Company mine located in St. Louis County, Minnesota. These cases involve one 104(d)(1) citation. The parties presented evidence and testimony at a hearing in Minneapolis, Minnesota on September 25, 2013.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Hibbing Taconite Company is a large mine operator located in St. Louis County, Minnesota. The parties stipulated at hearing that Hibbing is engaged in mining operations that

affect interstate commerce, is the owner and operator of the mine, is subject to the jurisdiction of the Mine Act, and that the Commission has jurisdiction in this matter. Jt. Ex. 1. The parties further agreed that the penalties, as proposed, will not impair Hibbing's ability to continue in business. The history of assessed violations, Sec'y Ex. 12, accurately reflects the history of violations at this mine.

MSHA inspector Thaddeus Sichmeller has been a mine inspector since 2003 and is trained as an accident investigator. On January 4, 2013, Sichmeller traveled to the mine to conduct an inspection and as a result issued Citation No. 8665985, pursuant to section 104(d)(1) of the Act, to Hibbing for an alleged violation of section 56.14105 of the Secretary's regulations.¹ The cited standard reads as follows:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

30 C.F.R. § 56.14105. The citation described the alleged violative condition, in pertinent part, as follows:

A miner was working on the placement of guards on the head and tail ends of the Green Pellet conveyor [The miner was] working on placement of the pulley guards while the conveyor was in operation and was exposed to the hazard of accidental contact of the moving machine parts.

Sichmeller determined that a permanently disabling injury was reasonably likely to occur, that the violation was significant and substantial, that one employee was affected, that the negligence was high and that the violation was a result of an unwarrantable failure to comply. A civil penalty in the amount of \$6,458.00 has been proposed for this violation.²

Hibbing contests the fact of violation, and the inspector's findings regarding significant and substantial, unwarrantable failure, and negligence. Any failure to provide detail on each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433,436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

¹ Sichmeller originally issued the citation under section 56.12016. Prior to hearing, the Secretary moved to modify the cited standard to section 56.14105. The motion was granted.

² The citation also indicates that the mine was in the process of placing guards after receiving citations earlier in the week, and that the welder was instructed by management to place the guards in the manner he did, resulting in the unwarrantable failure designation.

i. The Violation

In 2010, MSHA gave notice to the taconite facilities that tail pulleys and other parts of conveyors would require guards and instructed the mines to begin the process of installing the guards. Hibbing began to install guards but, while conducting an inspection of the Hibbing Taconite mine in January, 2013, Inspector Sichmeller observed a number of areas along a conveyor that had not been properly guarded. As a result, he issued a number of guarding citations. One of the citations, No. 8665977, was issued for an unguarded tail pulley on the Line 3 Conveyor. The tail pulley on the Line 3 Conveyor was located alongside an elevated walkway with a handrail and toe guard. The handrail, which was located between the walkway and conveyor, was approximately four feet tall, with a mid-rail approximately twenty inches off the ground.

The inspector, in issuing the guarding citation, determined that a pinch point existed and that a miner walking on the elevated walkway near the conveyor would fall or come into contact with the moving parts of the conveyor and be pulled in. The moving machine parts were about twenty inches from the walkway. In order to abate the guarding citation, the mine decided that, to prevent contact with the conveyor, a guard would be placed on the walkway handrail.

On January 4, 2013, Sichmeller traveled to the tail pulley area and observed evidence to suggest that someone had been installing mesh guards along the open areas of the handrail. Sichmeller observed guarding material affixed to the handrail, welding leads, and a cart nearby with the mesh guarding material. Sichmeller questioned the miner who had just completed the welding and learned that the job was undertaken without shutting down the conveyor. Moreover, the miner informed Sichmeller that the assignment had been given to him by a supervisor. After questioning the miner, Sichmeller met with Tim Angelo, the pellet plant operations manager, members of the safety department, and others, and explained that he was issuing a violation for failing to lock and tag out the conveyor while conducting maintenance.

Sichmeller took photographs, Sec'y Ex. 3, which show the conveyor line and guard. The guard consisted of wire mesh which had been affixed to the walkway side of the handrail. Sec'y Ex. 3-3 shows the puck that protruded from the conveyor which Sichmeller explained could catch someone on the walkway and pull them into the pulley. It is twenty inches from the mesh guards that were being installed to the tail pulley in the photograph. Sichmeller saw a hazard of falling into the belt while walking or working on the walkway or hitting the protruding pucks and being pulled into contact with the moving machine parts.

Craig Borbiconi, a welder, who has worked at the mine 29 years and was installing the guards when the citation was issued. On the morning of January 4th, Steve Seykora, along with Mike Ouke, assigned Borbiconi the task of installing guards. Borbiconi reviewed the assignment and decided to install a guard similar to that on the other rails along the walkway. He located the cart that contained the wire mesh material needed to construct the guards and traveled to the area to install the guards. He took two pieces of mesh, cut one near the drum area, and carried it to the handrail where he kneeled down, placed the mesh up against the opening, flipped down his welding mask, and tacked the wire mesh in place. Borbiconi then pushed up the welding mask

so that he could see before beginning the next phase of the guard installation. After tacking the mesh into place, he snipped off the top of the mesh to fit it to the railing.

Borbiconi testified that he walks through this area routinely, as do other miners, and assumed that, since he was on the walkway with the handrail between him and the conveyor, there was no need to shut down the conveyor. The walkway has toe boards and a handrail with two bars, one in the middle and one on top. Borbiconi did not believe he was exposed to the hazard of the moving parts of the conveyor.

After finishing welding the mesh guards in place, Borbiconi began grinding, and it was during this activity that the inspector appeared and began to question him about the job. Borbiconi told the inspector that he thought it was safe to install the guards as he had done. He believed that, because he was in a safe area, the conveyor could remain in operation as he worked. As Borbiconi installed the mesh, he had no indication that he might stumble into the conveyor belt because both the mesh and handrail were between him and the belt. A number of Hibbing witnesses agreed with Borbiconi that the area was safe and that miners safely walk along this walkway with the handrail each day. While Borbiconi does sometimes lock/tag out equipment, he didn't think it was necessary to do so for this job. When he does need to de-energize and lock out the equipment, he contacts the foreman or operations office and asks to have the equipment shut down. He has no problem getting the conveyor shut down and locked out when he deems it necessary.

While there is no dispute that the conveyor was in operation and that it had not been shut down, locked or tagged out, Hibbing argues that, since the wire mesh guard was being placed on the rail next to the conveyor, and not directly on the conveyor, the conveyor was not required to be shut down. Specifically, Hibbing argues that the rails, which were being worked on, are not "machinery or equipment" and, therefore, the standard is not applicable to this situation and there was no need to shut down the conveyor.

The Secretary, on the other hand, argues that a violation existed and working on the railing adjacent to the moving conveyor is included in the meaning of the standard. The Secretary alleges that the welder was on the walkway next to the moving conveyor while working and he could slip and fall into the moving parts. For the reasons that follow, I find that the violation occurred as alleged, but I do not find enough evidence to demonstrate that the violation was S&S, or the result of an unwarrantable failure or high negligence on the part of the mine.

In *Walker Stone Co. Inc.*, 19 FMSHRC 48 (Jan 1997); *aff'd* 156 F.3d 1076 the Commission defined the terms "repairs" and "maintenance" in the context of section 56.14105 as follows:

The term "repair" means "to restore by replacing a part or putting together what is torn or broken: fix, mend ... to restore to a sound or healthy state: renew, revivify" *Webster's Third New International Dictionary, Unabridged* 1923 (1986). The term "maintenance" has been defined as "the labor of keeping something (as buildings or equipment) in a state of repair or

efficiency: care, upkeep ...” and “[p]roper care, repair, and keeping in good order.” *Id.* at 1362; *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968).

Id. at 51.

I find that the placement of the guard amounted to “maintenance.” The inspector determined that the tail pulley was not properly guarded and issued a citation to reflect that finding.³ In essence, while the conveyor and tail pulley were in operation, they were not being maintained in a safe state. To rectify the situation, and abate the guarding citation, the mine decided to guard the tail pulley by way of installation of a guard on the handrail, so as to maintain the conveyor in a safe state. The concern that prompted the issuance of the guarding citation was the hazard of a miner getting caught in the conveyor. That same hazard existed at the time Borbiconi began installing the guarding. Borbiconi’s actions were meant to bring the conveyor and tail pulley into a safe state of repair and compliance.

Further, contrary to Hibbing’s argument, I accept the Secretary’s interpretation and find that that the standard contemplates the installation of the guards on the handrail next to the conveyor and tail pulley, even if the handrails are not directly attached to the conveyor. Sichmeller testified that that the guards are an integral part of the conveyor. In *Climax Molybdenum Co.*, 30 FMSHRC 886 (Aug. 2008) (ALJ), Judge Manning addressed a somewhat similar issue. There, the mine operator had been cited for a violation section 57.14105⁴ where miners were cleaning the inside walls of a chute with a scaling bar while the conveyor was in operation. The operator argued that, even if the act of scraping the chute could be considered “repairs or maintenance,” there was no violation because the chute did not have any moving parts, and the only moving parts were that of the conveyor, which was not being maintained or repaired. In finding that the Secretary’s regulation contemplated maintenance of the chute, the judge noted that the chute was “an important part of the conveyor system” and an “integral part of the entire process.” *Id.* at 897; *See U.S. Steel Group, Minnesota Ore Operations*, 15 FMSHRC 1153 (June 1993) (ALJ).

Just as the judge in *Climax* found that the chute was an “important” and “integral” part of the conveyor system, I find that the guard that was being attached to the handrail was an integral part of the conveyor system at the Hibbing Taconite mine. Absent the guard, which was in sufficiently close proximity to the moving machine parts, the conveyor and tail pulley would not have been in compliance, the guarding citation would not have been abated, and, presumably, any operation of the conveyor would have resulted in a failure to abate order shutting down the conveyor. If Hibbing’s interpretation were accepted, miners would be able to work in close proximity to moving machine parts in order to abate the hazard of entanglement in unguarded moving machine parts as long as there is no physical connection between the guard and the

³ The mine initially contested the guarding citation, but eventually accepted it as issued. Unpublished Decision Approving Settlement dated September 25, 2013.

⁴ Section 57.14105 is an identical standard applicable to underground metal and nonmetal mines.

conveyor. This result and narrow interpretation of the Act would not be “consistent with the safety promoting purposes of the Mine Act.” *Walker Stone Co. Inc. v. Sec’y of Labor*, 156 F.3d 1076, 1082 (10th Cir. 1998). Accordingly, I find that the placement of the guards on the handrail amounted to maintenance of the conveyor system. Given that there is no dispute that the conveyor was not shut down at the time the guard was being installed, I find that the Secretary has established a violation of section 56.14105.

ii. Significant and Substantial

A “significant and substantial” violation is described in section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term “significant and substantial” to be:

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

I have already found that there was a violation of the mandatory standard. I further find that a discrete safety hazard existed as a result of the violation, that the danger of entanglement in moving machine parts while conducting maintenance or repairs. However, I find that the Secretary has not satisfied the third element of the *Mathies* formula. Specifically, I find that the Secretary has not established that the failure to shut down the conveyor when working on the opposite side of the hand rail was reasonably likely to result in an injury.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission explained that “the third element of the *Mathies* formula ‘requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.’” The Commission “emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial.” *Id.* (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984)).

It is important to distinguish the exposure associated with the violation from that which was associated with the guarding violation that prompted Borbiconi to be in the area attaching

the guard. Here, the hazard was entanglement in moving machine parts while conducting repairs or maintenance, in an area along the walkway, whereas the hazard associated with a guarding violation was the general threat of entanglement in moving machine parts in any area near the pinch point.

While it is true that a miner would be seriously injured if they fell into the belt while conducting maintenance or repairs in the area, even with other safety devices in place, the Secretary has not demonstrated that it is reasonably likely for that to occur. There was little to no discussion on the Secretary's part regarding the level of exposure to the hazard or how an individual would come in contact with the moving machine parts, other than the fact that there was a puck protruding. The Secretary did not put forth sufficient evidence as to, among other things, why an individual in the area conducting maintenance or repairs with the conveyor running, would fall over or through the handrail, from what height they would fall, and into what area of the conveyor. Given the lack of evidence, I find that the Secretary has not established the necessary level of exposure under this element of the *Mathies* test to sustain an S&S violation.

In addition to the Secretary failing to establish the third element of the *Mathies* test, I find that Hibbing set forth compelling evidence regarding the lack of exposure. Borbiconi credibly testified that he felt safe when installing the guards while the conveyor was running. He was outside the handrail, the welding leads were against the toe board and did not present a tripping hazard, and he was handling a large sheet of fairly rigid wire mesh that would not have been able to fit through the gap in the handrails while he was on his knees tacking it to the handrail. While Borbiconi may have worn a mask that limited his visibility while tacking the mesh to the rail, I credit his testimony that he only has the helmet down while actually making the weld, and not while traveling or otherwise moving on the walkway. Other than Borbiconi's work installing the guard, the record reflects no other evidence of miners maintaining or repairing equipment or machinery in the subject area. The extremely limited exposure that Borbiconi may have experienced in the few seconds before he made his first tack weld makes it less than "reasonably likely" that an incident would occur that resulted in an injury. I find that the Secretary has failed to establish the third element of the *Mathias* test and, accordingly, find that the violation is not significant and substantial designation.

iii. Unwarrantable Failure and Negligence

Citation No. 8665985 was originally issued as a 104(d)(1) "unwarrantable failure," "high" negligence citation. In order to sustain a 104(d)(1) "unwarrantable failure" citation, the Secretary must establish that the violation was of an S&S nature. 30 U.S.C. § 814(d)(1). Here, as set forth above, the Secretary failed to establish that the violation was S&S. Accordingly, the Secretary's "unwarrantable failure" finding is not substantiated and therefore the violation is modified to a 104(a) citation. Further, while Inspector Sichmeller designated the citation as being the result of "high" negligence, for the reasons set forth below, I find that Hibbing was only "moderately" negligent.

Sichmeller indicated that he based his negligence determination on his finding that Borbiconi's supervisor had instructed Borbiconi to install the guards and the supervisor had

come down to the area with Borbiconi and knew, or should have known, that Borbiconi did not de-energize the conveyor prior to installing the guard. Further, the guarding citation issued the prior day made the mine aware of the hazardous condition and the need to install guards due to the possibility of accidental contact with the moving machine parts.

Steve Seykora, who has been a supervisor for 23 years and is currently the maintenance coordinator at the pellet plant, along with Mike Ouke, the fill-in foreman on the day the citation was issued, assigned the welding job to Borbiconi. Ouke showed Borbiconi the area of the plant where he would be working on the day the citation was issued. Borbiconi had been in the area many times and he, like many miners, used the stairway and elevated walkway daily when traveling to and from the balling area. Based upon his familiarity with the area, and the fact that a railing protected walkers from the conveyor, Borbiconi did not see a need to lock and tag out the conveyor. Seykora did not discuss shutting down the conveyor with Borbiconi, and didn't believe there was a need to do so. However, if Borbiconi had asked to have the conveyor shut down, Seykora would have assisted and followed the procedure for shutting it down.

Each witness for the mine indicated their belief that the elevated walkway was a safe area, and that work could be done on the walkway side of the handrail with no danger of contacting the conveyor. I find that the Borbiconi, as well as the supervisor who had assigned Borbiconi to do the work, had a reasonable good faith belief that there was no need to lock and tag out the conveyor prior to beginning work on the guard. It was not entirely obvious that the conveyor needed to be shut down, nor did any supervisor neglect their duty in failing to shut it down. It was a routine assignment for Borbiconi in an area where he and everyone else felt safe. Given these mitigating factors, I find the negligence to be moderate.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 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). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is “bounded by proper consideration of the statutory criteria and the deterrent purpose[s] ... [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. Sec’y Ex. 12. The mine is a large operator. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence of for the violation are discussed above. The operator demonstrated good faith in abatement. Based on my findings set forth above and the criteria in section 110(i), I assess a penalty of \$2,000.00 for Citation No. 8665985.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$2,000.00. Hibbing Taconite Company is hereby **ORDERED** to pay the Secretary of Labor the sum of \$2,000.00 within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 6, 2013

SIGNATURE MINING SERVICES, LLC,	:	EQUAL ACCESS TO JUSTICE
	:	PROCEEDING
Applicant	:	
	:	
v.	:	Docket No. EAJ 2012-02
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine: Coalburg No. 1
Respondent	:	Mine ID: 46-09082:

AMENDED DECISION AND ORDER

Before: Judge McCarthy

The decision and order issued August 30, 2013, is hereby amended pursuant to Commission Rule 69(c), 29 C.F.R. 2700.69(c), to read as set forth below.¹ The case is before me is on an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA) (5 U.S.C. § 504). Signature Mining Services, LLC filed its application against the Secretary of Labors Mine Safety and HealthAdministration based upon a negotiated settlement that the parties reached in the underlying contest proceedings.

I. Factual Background

On August 25, 2011, adverse roof and rib conditions developed at the Coalburg No. 1 Mine at the 003 MMU-2 East Panel, a retreat mining section. Order No. 8139507; Signature App. at 1-2. These conditions initially affected several entries on the right side of the section

¹ On November 25, 2013, the Secretary filed a Motion for Modification of this Decision and Order issued August 30, 2013. The Secretary seeks clarification on whether Signature was eligible for EAJA fees and costs incurred defending 107(a) Order No. 8139507. During a conference call with the parties on November 21, 2013, Signature informed the undersigned that it agreed that a clarification was warranted and conceded that its application for fees was limited to 103(k) Order No. 7267539 and 107(a) Order No. 8126005. While the Secretary may have lacked substantial justification for 107(a) Order No. 8139507, Signature did not apply for fees related to this order within thirty days of the Commission’s final disposition of the underlying proceeding, Docket No. WEVA 2011-2299, and thus is ineligible to be awarded fees incurred in its defense. 29 C.F.R. § 2704.206. Accordingly, the August 30th decision is amended to clearly state that Signature may only be eligible to be awarded fees and costs related to 107(a) Order No. 8126005.

along and inby the last open crosscut. Order No. 8139507. After MSHA inspectors observed pillars taking weight on the 2 East Panel, MSHA issued imminent danger Order No. 8139507 pursuant to Section 107(a) of the Act. Order No. 8139507; Sec'y Answer at 3. This order covered the #6 and #8 entries along and inby the last open crosscut. Order No. 8139507.

Signature and the Secretary both represent that the conditions began to spread from the mouth of the 2 East Panel to the Mains. Signature App. at 3; Sec'y Answer at 3. In response to this development, Signature began withdrawing miners from the affected area, removing equipment, danging off the affected area, and setting Heintzman jacks along the roadway at break 15 along the Mains, which was outby the area affected by the adverse roof conditions. Richmond Dep. 30:9-31:10; Canterbury Dep. 11:21-12:13; Mackowiak Dep. 60:11-14, 65:2-5, 66:14-15; 75:11-19. At 1:30 a.m. on August 27, 2011, the Coalburg No. 1 foreman reported that the pillars at the mouth of the 2 East Panel were taking weight. Richmond Dep. 18:21-19:8. Randel Richmond, Signature's President, was then informed by his representatives that the ground failure had migrated into the Mains. Richmond Dep. 19:6-21:8. Before 10 a.m., Richmond spoke with Terry Price, MSHA's Field Office Supervisor, and John Kinder, a representative of the West Virginia Miner's Health, Safety, and Training, to inform them about the adverse ground conditions. Richmond Dep. 30:20-32:2. Richmond told Price that Signature had stopped production and pulled out all its miners still working in the area. Richmond Dep. 30:22-31:3. He also provided Price with assurances that Signature had taken steps to monitor and correct the conditions. Richmond Dep. 31:5-10, 36:14-22.

Approximately fifteen minutes later, Joe Mckowiak, MSHA Assistant District Manager, called Frank Canterbury, a mine foreman at Signature, to further inquire about the adverse conditions. Mackowiak Dep. 57:8-12. Canterbury informed Mackowiak that the ground failure had migrated into the Mains and that men were underground setting jacks to prevent further migration of the adverse ground conditions. Mackowiak Dep. 73:22-74:20, 97:3-13. Mackowiak was also told that an abandoned mine existed 75 feet below the Coalburg No. 1, the ventilation controls had been crushed, and the water sumps had gone dry. Order No. 8126005; Mackowiak Dep. 81:16-82:19. The subsidence led Mackowiak to conclude that the pillar failures and ground conditions created regional instability. Mackowiak Dep 92:14-94:8. As a result, Mackowiak orally issued imminent danger Order No. 8126005 pursuant to Section 107(a) of the Act over the phone. Mackowiak Dep. 87:12-14. He also emphasized that the situation was so dangerous that everyone ought to be withdrawn, without exception. Mackowiak Dep. 99:16-19, 103:2-5.

After issuing Order No. 8126005 orally, Mackowiak contacted Price about dispatching inspectors to Coalburg No. 1 to reduce the Order to writing. Mackowiak Dep. 87:21-88:11. Mackowiak then spoke with Price and faxed him instructions to issue the imminent danger order with "[n]o exceptions," which meant that no one was allowed to be in the mine site. Mackowiak Dep. 102:8-15; Price Dep. 54:10-20, dated Nov. 8, 2011. When Price and James Jackson, another MSHA employee, arrived at Coalburg No. 1, they reduced the Order to writing. Price Dep. 56:19-57:4. At the time they arrived at the mine, fourteen men were underground. Price Dep. 60:22-61:6. Although none of these individuals were involved in running coal, Price and

Jackson did not conduct any further investigation as to the reason why these men had been underground. Price Dep. 60:7-15. Price then provided further instruction that the entire mine site was to be closed and no one was to be permitted underground without first receiving MSHA's approval. Price Dep. 62:14-18, 63:4-64:8; *see* Richmond Dep. 36:15-20, 38:16-39:1. Price and Jackson did not travel underground to further examine the adverse conditions. Price Dep. 64:14-65:5.

On August 29, 2011, MSHA inspectors, Signature personnel, and Alpha Engineering traveled underground to observe the adverse conditions and check to see if the ground failure event had stopped. Richmond Dep. 40:23-41:13. Their inspection revealed that it was primarily the 2 East Panel and approximately ten crosscuts inby break 15 that had been affected by the roof and rib conditions. *See* Appl. For Fees and Other Expenses, at 3, dated Jan. 6, 2012. Mackowiak heard pillars breaking and continued to express concern that the ground failure posed a regional threat given the conditions of the underlying mine. Mackowiak Dep. 141:22-144:17. As a result, the imminent danger order remained in effect for the entire mine site. Order No. 8126005; *see* Mackowiak Dep. 140:7-21. Signature filed a Notice of Contest to Order No. 8126005.

On August 30, 2011, MSHA issued withdrawal Order No. 7257539 pursuant to Section 103(k) of the Act. Order No. 7257539. In this Order, MSHA alleged that "coal and floor rock outburst accident" had occurred and all mining activities inby had been disrupted. *Id.* The order covered the entire mine due to hazards presented by the crushed ventilation controls and the instability of the mine pillars. *Id.* MSHA claims that the agency was still unsure of the extent of damage at the Coalburg mine site or the need to conduct an accident investigation. Sec'y Answer at 4. On August 31, 2011, Signature filed a Notice of Contest to Order No. 7257539.

II. Procedural Background

Six days before the scheduled hearing of the contest proceedings, the parties entered into settlement negotiations. On December 2, 2011, the Secretary of Labor, MSHA, and Signature filed a "Joint Motion to Continue" in which the parties presented the terms of settlement reached with respect to the two Section 107(a) imminent danger orders and the Section 103(k) withdrawal order. Jt. Mot. to Continue at 3-4. With respect to the Section 107(a) imminent danger orders, Signature agreed to withdraw its Notice of Contest to Order No. 8139507 in exchange for MSHA's promise to vacate Order No. 8126005. *See* Jt. Mot. to Continue, at 3. While negotiations on Order No. 7257539 were still ongoing at the time the Joint Motion was filed, MSHA had agreed to narrow the area of the mine affected by Order No. 7257539 and to approve Signature's ventilation plan. Jt. Mot. to Continue, Ex. 2. On December 5, 2011, the undersigned granted the parties' Joint Motion to Continue. Order Granting Continuance.

On December 16, 2011, the undersigned granted Signature's motion to partially withdraw its Notice of Contest to Order No. 8139507. My Order also noted that the Secretary had promised to vacate Order No. 8126005 and directed the matter to be addressed in either a

subsequent settlement motion or during the hearing. On January 4, 2012, I granted the Secretary's motion to vacate Order No. 8126005.

On January 20, 2012, Signature filed a motion to dismiss its Notice of Contest to Order No. 7257539. By Order dated January 26, 2012, I granted Signature's motion.

III. Disposition and Analysis

A. Prevailing Party Status

1. Legal Background

The Supreme Court has rejected the “catalyst theory” as a basis for achieving “prevailing party” status, which had previously enabled a plaintiff to prevail if he achieved any favorable change in a defendant’s conduct in the course of litigation. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 605 (2001). To be a prevailing party, the Court determined that a plaintiff must be “awarded some relief by the court,” which results in a “material alteration of the legal relationship of the parties’ necessary to permit an award.” *Id.* (internal citations omitted). In holding that consent decrees constitute such judicial relief, the Court distinguished consent decrees from private settlements and stated, “[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees. . . unless the terms of the agreement are incorporated into the order of dismissal.” *Id.* at 604, n.7 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994)). While *Buckhannon* dealt with the question of prevailing party status under the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA), courts have consistently applied its rationale to the EAJA. *See USA Cleaning Serv. & Bldg. Maint.* (“*USA Cleaning*”), 33 FMSHRC 2264, 2268, (Sept. 2011), (ALJ).²

Although the Supreme Court held that consent decrees are sufficient to satisfy the prevailing party requirement, courts have differed in the way they examine settlement agreements lacking a formal consent decree designation. Notably, the Fourth Circuit developed a functional approach for assessing such settlement agreements. *See Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002). The court resisted the idea that *Buckhannon* set out a formalistic rule and stated, “[w]here a settlement agreement is embodied in a court order such that the obligation to comply with its terms is court-ordered, the court's approval and the attendant judicial oversight . . . may be equally apparent.” *Id.* A settlement agreement under these circumstances “may

² This decision was upheld by the Seventh Circuit after the Commission declined to review the case. *Jeroski v. FMSHRC*, 697 F.3d 651, 655 (7th Cir. 2012) (“The Court's approach in *Buckhannon* supports the position that eight circuits have taken with respect to the meaning of ‘prevailing party,’ and we bow to this heavy weight of authority.”).

be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs.” *Id.* The majority of Circuit Courts of Appeal have adopted a similar approach.³

The Eastern District Court of Virginia has held that a voluntary dismissal with prejudice is sufficient to confer prevailing party status. *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 440 F. Supp. 2d 495, 509, 512 (E.D. Va. 2006). Significantly, the court held that the decision to grant voluntary dismissal under Rule 41(a)(2) of the Federal Rule of Civil Procedure “is committed to the discretion of the district court.” *Id.* at 508. Although the court’s holding was limited to voluntary dismissals with prejudice, the court indicated that other conditions imposed on Rule 41(a)(2) dismissals can confer prevailing party status. *Id.* at 511, n.15. (“In many cases, conditions short of a dismissal with prejudice may be sufficient to confer prevailing party status.”). The court went on to suggest that the central factor in assessing conditions imposed on voluntary dismissal is the “nature of the terms and conditions that district courts can impose” *Id.*

Another influential opinion comes from the Seventh Circuit, which also held that a voluntary dismissal with prejudice made a movant a prevailing party. *Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir. 2005) (applying prevailing party to the FHA fee shifting scene in accordance with the principles set forth in *Buckhannon*). Most notably, the court determined, “[t]he critical fact is not what prompted the district court to act; it is instead what the district court decided to do.” *Id.* at 719. Therefore, consistent with *Samsung* and *Claiborne*, I find that the level of discretion a court exercises, rather than a merits determination, is most relevant for purposes of the prevailing party inquiry.

Courts have also applied *Buckhannon* to fee-shifting provisions in the context of administrative proceedings. Because *Buckhannon* refers to “judicial action,” courts have determined that *Buckhannon*’s principles cannot be applied literally when differentiating between “purely administrative . . . proceedings that give rise to a plaintiff’s ‘prevailing party’ status” since doing so would prevent fee-shifting provisions from being applied to administrative proceedings. *A. R. Ex rel R.V. v. N.Y.C. Dep’t of Educ.*, 407 F.3d 65, 76 (2d Cir. 2005). For

³ See, e.g., *Aronov v. Napolitano*, 562 F.3d 84, 90 (1st Cir. 2009); *Perez v. Westchester Cnty. Dep’t of Corr.*, 587 F.3d 143, 151-52 (2d Cir. 2009); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003); *Am. Disability Ass’n, Inc. v. Chmielarz*, 289 F.3d 1315, 1317 (11th Cir. 2002); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 166 (3rd Cir. 2002); *DiLaura v. Twp. of Ann Arbor*, 471 F.3d 666, 670 (6th Cir. 2006) (determining that the “touchstone” for the “prevailing party” requirement is whether there was a “material alteration of parties’ legal relationship” arising from “an enforceable judgment . . . or comparable relief through a consent decree or settlement.” (citations omitted); *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1134, n.5 (9th Cir. 2002) (determining that a party prevailed after obtaining a settlement agreement that is legally enforceable); *but see Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (holding that a party can only prevail if it receives either an enforceable judgment on the merits or a formal consent decree).

example, the Second Circuit recognized that the Individuals with Disabilities Education Act's (IDEA) fee-shifting provision required the court to "give effect to the IDEA's intent to permit awards to winning parties in administrative proceedings even where there has been no judicial involvement." *Id.* As a result, the Second Circuit concluded that the combination of an adjudicative official's exercise of administrative imprimatur, a change in the legal relationship of the parties arising from such exercise of discretion, and subsequent judicial enforceability conferred prevailing party status on an IDEA plaintiff. *Id.* In applying these three criteria to settlements achieved in the course of administrative proceedings, the court determined that a party is entitled to "prevailing party status" where they achieve the "administrative analog of a consent decree." *Id.* at 77. The Third Circuit has also adopted this approach. *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 854 (3d Cir. 2006).

For the implementation of the EAJA in Commission proceedings, "[a]n eligible party may receive an award when it prevails over MSHA, unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust." 29 C.F.R. § 2704.103(a). Applicable adversary adjudications include, "[c]ontests of citations or orders issued under section 104 or 107 of the Mine Act (30 U.S.C. 814, 817)." 29 C.F.R. § 2704.103(a)(1).

In applying the standard set out in *Buckhannon*, the Commission's rules require the undersigned to "give effect" to the EAJA's intent to permit the award of attorney's fees to parties that "prevail" in the course of Commission proceedings. *See A.R.*, 407 F.3d at 77; *P.N.*, 442 F.3d at 854. The purposes underlying the administration of the Mine Act thereby support adoption of the functional approach set out in *Smyth* to examine settlement agreements reached in the course of contest proceedings. 282 F.3d at 281.

Parties in contest proceedings may present the terms of a settlement arrangement to a judge through a motion. In deciding whether to approve the motion, a judge may decide to substantively review the terms of the settlement agreement. Where a judge provides such review, exercises discretion in granting the parties' motion, and incorporates the reasons set forth by the parties in their motion into an administrative order, the parties' "obligation to comply" with the terms of settlement is made part of the administrative order. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. at 381; *Smyth*, 282 F.3d at 281. In this way, the judge's "oversight" and "approval" becomes the basis for which the parties will carry out the terms of their settlement. *See Buckhannon*, 532 U.S. at 604, n.7. Additionally, the issuance of the order reveals a change in the legal relationship between parties arising from the exercise of a judge's administrative imprimatur and further permits parties to have their agreement subsequently enforced. *See A.R.*, 407 F.3d at 77; *P.N.*, 442 F.3d at 854. In determining whether a judge has afforded an EAJA plaintiff adequate administrative relief, the "critical fact" becomes the level of discretion a judge exercises in permitting parties to carry out the finalized terms of a settlement. *See Claiborne*, 414 F.3d at 719; *Samsung*, 440 F.Supp.2d at 511 n.15.

Therefore, an EAJA plaintiff achieves the functional equivalent of a consent decree in Commission proceedings where a judge substantively reviews settlement terms presented by

parties in the underlying proceeding and conditions the issuance of a dispositive order on the parties' decision to be bound by the terms of the settlement agreement.

2. The Parties' Arguments

The Secretary argues that Signature is not a prevailing party because *Claiborne* requires a voluntary dismissal with prejudice. Sec'y Resp. to Signature's Reply, at 3, dated May 31, 2012. Because there was no such judgment, the Secretary claims that the dismissal of Order No. 8126005 and Order No. 7257539 amounted to "judicial housekeeping." Sec'y Resp. to Signature's Reply, at 4. The Secretary also contends that the settlement negotiations were distinct from any court order or judicial pronouncement. *Id.*

In response, Signature argues that the dismissal of Order No. 8126005 and Order No. 7257539 resulted in a court-ordered change in the parties' legal relationship. Signature's Answer in Opp'n, at 2, filed April 23, 2012. While Signature admits that the Secretary has discretion to vacate Order No. 8126005, it argues that the dismissal order resolved all issues relating to the August 2011 incident, deprived the Commission of its jurisdiction to consider any related citations or orders,⁴ and precluded the Secretary from pursuing any other 107(a) Orders. *Id.* Signature also claims that the undersigned had discretion to approve Signature's motion to Withdraw its Notice of Contest to Order No. 7257539, and such approval was necessary to end the parties' litigation. *Id.* at 3.

3. Analysis of Parties' Settlement Negotiations

While the parties only examine the dismissal orders related to Order No. 8126005 and Order No. 7257539, the undersigned examines the totality of circumstances in the underlying proceeding consistent with the functional approach in *Smyth*. Accordingly, I begin with analyzing the parties' Joint Motion to Continue.

With respect to the 107(a) Orders, the Joint Motion stated, "Signature *will* withdrawal (sic) its contest of Order No. 8139507. . . MSHA *will* vacate Order No. 8126005 issued August 27, 2011." Joint Mot. To Continue at 3 (emphasis added). The use of the word "*will*" indicates that Signature and the Secretary reached a final agreement and decided to be bound by the terms set forth in the Joint Motion. This language is particularly notable since the discretion to vacate an order is vested in the Secretary. *RBK Constr. Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993). By presenting a *quid pro quo* styled arrangement in finalized terms, the parties apprised the Commission as to the fundamental bargain agreed to in resolving the 107(a) Orders.

With respect to the 103(k) Orders, the Joint Motion states, "[t]he parties *anticipate* that Signature will complete the work required by the plan in approximately three weeks. The parties will report the *progress* of these negotiations on December 21, 2011." Joint Mot. To Continue at

⁴ The Commission's discretion to retain jurisdiction and grant declaratory relief after the Secretary has vacated an enforcement action need not be addressed in the case at bar. Signature did not seek declaratory relief or request additional relief following the dismissal of Order No. 8126005. *See Sec'y v. N. Am. Drillers, LLC*, 34 FMSHRC 352, 357 (Feb. 2012).

7 (emphasis added). Although the Joint Motion presented an attached version of Signature's ventilation plan and evidence that the Secretary had narrowed the scope of the area affected by Order No. 7257539, the language that the parties used indicates that the negotiations were still ongoing at the time the Joint Motion was filed.

When presented with the parties' Motion to Continue impending litigation, I had discretion to approve the Joint Motion. Under Commission Rule 55, the undersigned possesses broad administrative discretion to dispose of procedural requests or similar matters and make decisions in the underlying proceeding. 29 C.F.R. § 2700.55. In issuing an Order Granting Continuance, I exercised administrative discretion. The Order states, "[t]he Court hereby **GRANTS** the parties' Joint Motion to Continue *for the reasons set forth in the motion*" (emphasis added). The "reasons set forth in the motion" include the final terms of settlement reached on the 107(a) Orders and the parties' intention to settle the 103(k) Order.

Looking next at the dismissal order granting Signature's Motion to Partially Withdraw its Notice of Contest to Order No. 8139507, my administrative approval was required for Signature to execute its side of the bargain. Commission Rule 11 states that "[a] party may withdraw a pleading at any stage of a proceeding *with the approval* of the Judge or the Commission." 29 C.F.R. §2700.11. In this way, I had the administrative discretion to alter the parties' legal posture and substantively review the terms of Signature's Motion to Partially Withdraw its Notice of Contest.

In deciding to grant this Motion, I incorporated the parties' settlement terms into a dispositive order. Signature's Motion directly refers to the agreement the parties reached on the 107(a) Orders. Pl. Mot. to Partially Withdraw Notice of Contest, at 4. Signature moved for leave to Partially Withdraw its Notice of Contest based on this agreement, noting that the Secretary had promised and agreed to vacate Order No. 8126005 in exchange. Pl. Mot. to Partially Withdraw Notice of Contest, at 5-6. Central to my decision to grant Signature's motion was my endorsement of the parties' settlement arrangement. The Order Granting Respondent's Motion to Partially Withdraw its Notice of Contest states, "The court hereby **GRANTS** the Contestant's Motion to Partially Withdraw Notice of Contest in that docket *for the reasons set forth in the motion.*" Order Granting Resp't. Mot. to Partially Withdraw Notice of Contest (emphasis added). The Order reveals that I actually examined the terms of agreement and conditioned my approval on these terms, which in turn made the parties' settlement part of my dispositive order. *See Smyth*, 282 F.3d at 280-81.

My Order also imposed an additional condition on the parties' settlement arrangement. The Order states, "[t]he Motion also notes that the Secretary has agreed to vacate Order No. 8126005. . . That matter *should be addressed* in any subsequent settlement motion or hearing in Docket No. WEVA 2011-2346R." Order Granting Resp't. Mot. to Partially Withdraw Notice of Contest (emphasis added). In directing the Secretary to address his promise to vacate Order No. 8126005, the parties were mutually obligated to comply with the terms of the negotiated settlement. Furthermore, this Order provided Signature with a means through which it could have its settlement arrangement judicially enforced. The incorporation of settlement terms and

the imposition of conditions requiring the parties to address their obligation to comply with the agreement amounted to administrative relief.

Having granted Signature relief on the 107(a) Orders, my Order granting Signature's Motion to Partially Withdraw its Notice of Contest to Order No. 8139507 materially altered the legal relationship between the parties. The undersigned set the terms of dismissal, afforded Signature the benefit of its bargain, indicated that the parties were obligated to comply with the terms of settlement, and provided Signature with a basis for subsequent administrative review and judicial enforceability. In satisfying the three criteria set out in *A.R.* and *P.N.*, Signature achieved the administrative equivalent of a consent decree sufficient to confer "prevailing party" status. *A.R.*, 407 F.3d at 76; *P.N.*, 442 F.3d at 854.

The Secretary's insistence that a dismissal with prejudice is required misconstrues the standard set forth in *Claiborne*. Although the court in *Claiborne* held that a merits determination had been rendered, the court did not address the issue of a court imposing conditions short of dismissal with prejudice. This issue was the precise question left open in *Samsung*, where the court indicated that the proper focus in analyzing a voluntary dismissal is "the *nature of the terms and conditions* that district courts *can impose*." *Samsung*, 440 F. Supp. 2d at 511, n. 15 (emphasis added). In concluding that "conditions short of a dismissal with prejudice may be sufficient" under *Buckhannon*, *Samsung* shows that the determining factor is the court's exercise of discretion. *Id.* Although I did not dismiss the case with prejudice, I exercised sufficient judicial imprimatur when I incorporated the terms of settlement into a dispositive administrative Order and required the Secretary to address its obligation to comply with the terms of the negotiated settlement. Because these terms of agreement were entered into the administrative Order, the agreement became "embodied" into the dispositive Order. See *Smyth*, 282 F.3d at 280-81.

It should also be noted that the Secretary's discretion to vacate an order does not cast doubt on this analysis. As the dismissal order in Docket No. WEVA 2011-2300R indicates, "the Secretary's discretion to vacate a citation or order is not subject to review." Order Granting Mot. to Withdraw Contest. Nevertheless, the exchanging of terms relating to the underlying 107(a) orders deals with a distinct issue: *the obligation* of the Secretary to vacate an order *once the Secretary has already exercised his discretion and determined to be bound* by the parties' settlement terms. Although the Secretary is correct that the dismissal order following the Secretary's decision to vacate Order No. 8126005 was a procedural formality, Signature had already obtained administrative relief in the form of a favorable *quid pro quo* arrangement stamped with the undersigned's administrative "approval and oversight." See *Buckhannon*, 532 U.S. at 604 n. 7.⁵ Therefore, the Secretary's discretion to vacate an order is distinguishable from

⁵ Signature appears to confuse this point as well in arguing that "all issues relating to the August 2011 incident were resolved" and "the Secretary was precluded from pursuing any other 107(a) orders" once the Secretary vacated Order No. 8126005. Under *Buckhannon*, a party must show that it achieved "some relief" that results in a material change in the parties' legal relationship. *Buckhannon*, 532 U.S. at 603. *Claiborne* then clarifies that the "critical fact" is

(continued...)

the issue of whether the undersigned provided Signature with administrative relief and exercised administrative discretion in a way that brought about a material change in the parties' legal relationship.

Before examining the dismissal order granting Signature's motion to withdraw its Notice of Contest to Order No. 7257539, it should be noted that the Order Granting Continuance only approved of the parties' mutual decision to engage in settlement negotiations. While this Order permitted the parties to continue talks and report on the progress of settlement at a later date, the parties were not bound to participate in these negotiations, nor were they obligated to comply with any specific set of terms. Before the Joint Motion for Continuance was filed, the Secretary already narrowed the area covered under Order No. 7257539. Additionally, the Joint Motion did not indicate that the Secretary was required to modify the "Condition and Practice" section of Order No. 7257539. *See* Order Granting Continuance. Whether Signature would withdraw its Notice of Contest was dependent on the progress of the parties' negotiation. The Order Granting Continuance merely postponed trial so that they could further attempt to reach settlement. Such procedural relief does not amount to a consent decree or an exercise of judicial imprimatur sufficient to confer prevailing party status.

The dismissal Order Granting Signature's Motion to Withdraw its Notice of Contest to Order No. 7257539 further confirms that Signature failed to obtain administrative relief. In granting this motion, all the undersigned "decided to do" was grant Signature leave to withdraw its Notice of Contest and have the case dismissed. *Claiborne*, 414 F.3d at 719. Because the parties had never presented the undersigned with a finalized settlement arrangement, the dismissal order was silent on the content of the parties' agreement and the substance of the terms that the parties had reached. As a result, the terms that the parties reached could not be entered into as an order of the court.

Finally, the Secretary's decision to modify the 103(k) Order had been secured before Signature filed its Motion to Withdraw its Notice of Contest to Order No. 7257539. While the prospect of Signature withdrawing its Notice of Contest likely enticed the Secretary to modify the Order, incentives and good litigation tactics do not amount to administrative relief arising from a judge's exercise of imprimatur. Without such relief, the Secretary's compliance with settlement of the 103(k) Order was completely voluntary. *Buckhannon* thus requires the undersigned to reject Signature's claim that it prevailed on the 103(k) Order, as a voluntary change in conduct of the sort encompassed by the "catalyst theory" cannot be a basis for achieving "prevailing party" status. *Buckhannon*, 532 U.S. at 605.

⁵(...continued)

"what the district court decided to do." *Claiborne*, 414 F.3d at 719. Achieving a favorable outcome in the course of an underlying proceeding is distinct from achieving administrative relief that arose from a judge's exercise of administrative discretion. It was only upon receiving the administrative equivalent of a consent decree that Signature "prevailed." Had the Secretary decided to vacate the order as a result of private negotiations or its own internal review, the dismissal of Order No. 8126005 would merely return the parties to the legal position they held prior to these administrative proceedings. *See USA Cleaning*, 33 FMSHRC at 2268.

B. Substantial Justification

1. Legal Background

Under the EAJA, a prevailing party is entitled to an award of attorney's fees and expenses "unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make the award unjust." 29 C.F.R. § 2704.100. Therefore, a court must, "examine... the Government's litigation position and the conduct that led to litigation." *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986). The government's position is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967 (Sept. 1998)(quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The agency bears the burden of establishing that its view of the facts was reasonable. *Id.* at 967 (citing *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C.Cir.1992)).

An imminent danger exists whenever "the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992). For an imminent danger order to be issued under section 107(a), there must be some degree of imminence such that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time. *Id.* The Secretary bears the burden of proving the reasonableness of the imminent danger order by a "preponderance of the evidence." *Island Creek Coal Co.*, 15 FMSHRC 339, 346 (Mar. 1993).

In assessing the actions of an inspector, a judge "must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority." *Wyoming Fuel*, 14 FMSHRC at 1291 (quoting *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 31 (7th Cir. 1975)). An inspector is considered to have abused his discretion "if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners." *Island Creek*, 15 FMSHRC at 345. The abuse of discretion standard also "includes errors of law." *See, e.g., Utah Power*, 13 FMSHRC 1617, 1623, n. 6 (Oct. 1991).

2. Validity of Order No. 8126005

Signature's contention that there was no imminent danger is without merit. Although Signature had withdrawn its miners from the affected area and took steps to mitigate the adverse conditions at the time it contacted MSHA, the adverse roof and rib conditions could reasonably be expected to place miners in immediate danger were "if normal mining operations were permitted to proceed" *See Wyoming Fuel Co.*, 14 FMSHRC at 1290. The ground failure establishes that there was an imminent danger.

Signature's contention that the issuance of an imminent danger order required MSHA to go underground to physically examine the adverse conditions must also be rejected. The Commission has "resisted previous invitations to give the Mine Act a technical interpretation at

odds with its obvious purpose.” *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987); *see also Clintwood Elkhorn Mining Co., Inc.*, 35 FMSHRC 365, 369 (Feb. 25, 2013). Although Signature argues that words “upon inspection or investigation” in Section 107(a) require MSHA to conduct a physical inspection, “common usage does not limit the meaning of ‘inspection’ to an observation of presently existing circumstances nor restrict the meaning of ‘investigation’ to an inquiry into past events.” *Id.* at 1547-48. Rather, “[b]oth words can encompass an examination of present and past events and of existing and expired conditions and circumstances.” *Id.* at 1548. Therefore, the meaning assigned to the words “investigation or inspection” depends on the particular provision within which it appears. *See Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 55 (D.C. Cir. 1988) (finding that the Mine Act “resists . . . tidy construction” of the words “inspection” and “investigation”).

With respect to an imminent danger order issued under Section 107(a), the critical fact is whether an inspector “finds that an imminent danger exists.” 30 U.S.C.A. § 817(a). While this language indicates that an imminent danger order must address an existing danger, the word “finds” is “not confined to the mere accidental discovery of things but extends as well to detection by effort, analysis and study.” *Emerald Mines Co.*, 863 F.2d at 55 (quoting *Nacco Mining Co.*, 9 FMSHRC at 1550). Therefore, so long as an inspector acquires a level of information sufficient to enable an imminent danger finding, off site contacts are a permissible method of “inspection or investigation.”

Having collected information about the ground failure at Coalburg No. 1 through ongoing phone contacts with Signature, MSHA conducted an “investigation” consistent with Section 107(a). MSHA need not place its inspectors in the midst of imminent dangers at the time they occur, as doing so would undermine the provision’s goal of correcting existing adverse conditions and ensuring the safety of individuals at an affected mine site.

To assess the scope of Order No. 8126005, the undersigned must evaluate the conduct of the inspectors that issued the Order and the validity of MSHA’s decision to defend the Order in the underlying contest proceeding. While inspectors possess broad authority to issue an imminent danger order, Section 107(a) grants an operator a statutory right to maintain individuals in an adversely affected area for abatement purposes. Under Section 107(a), an inspector can issue an imminent danger order “to cause all persons, *except those referred to in Section 104(c) of this title*, to be withdrawn from, and to be prohibited from entering, such area . . .” 30 U.S.C.A. § 817(a) (emphasis added). Section 104(c) includes, “any person whose presence in such area is necessary, *in the judgment of the operator* or an authorized representative of the Secretary, to eliminate the condition described in the order.” 30 U.S.C.A. § 814(c)(1) (emphasis added). Because the 104(c) exception takes effect upon MSHA’s issuance of an imminent danger order, an operator may not be deprived of its statutory rights under 104(c). Therefore, MSHA cannot withdraw or inhibit persons an operator determines to be necessary for abatement efforts at a mine site affected by an imminent danger.

In his deposition, Mackowiak revealed that he intended to deprive Signature of its statutory rights under the 104(c) exception. Although he made brief reference to the Section

104(c) exception when he spoke to Canterbury, he mentioned the exception in passing and did not otherwise explain the provision. Mackowiak Dep. 99:16-19. He also emphasized his preference that everyone be withdrawn from the mine, without exception, despite being informed that production had been halted, all miners had been withdrawn, and Signature had only kept individuals underground to prevent the further spread of conditions. Mackowiak Dep. 101:9-10; 103:2-5. His deposition provides, in relevant part:

Q: So there was nothing to stop him from going in the mine, after 10:50 a.m. on August 27th, 2011?

A: The 107(a) imminent danger order as written probably led him to believe that no one could go in the underground coal mine.

Q: Well –

A: Which was my preference, absolutely, was my preference.

...

Q: Okay. You wrote the order to give the impression that nobody could go in; is that what you are saying?

A: Yeah, but not purposely ...

...

Q: When you sent Terry Price out to the mine, did you tell Terry Price when he issued this to explain that the company had the right to go in and abate the condition?

A: Absolutely not.

Q: And why did you make that obtuse?

A: I told Terry I didn't want anyone going in that underground mine at all. And in doing so I quite likely infringed upon 104(c).

Mackowiak Dep. 101:3-10, 101:15-18, 102:8-15.

Although the Secretary contends that Mackowiak equivocated as to whether he knowingly obscured the 104(c) exception, an inspector's motives are irrelevant. Sec'y Answer 4. Instead, the undersigned must examine "*the conduct* that led to litigation." *Fed. Election Comm'n v. Rose*, 806 F.2d at 1090 (emphasis added). Mackowiak's deposition establishes that he took concrete steps towards withdrawing all individuals from the Coalburg No. 1 – both in the way he designed the written order and in the way he gave instructions to Price. In acting to deprive Signature of its statutory rights, Mackowiak abused his discretion.

The way in which Price relayed Mackowiak's instructions to Signature is also of particular relevance in determining whether Signature was deprived of its statutory rights. In relevant part, Price's deposition states:

Q: Did you give any instructions or did you tell anyone at Signature that no one was allowed underground?

A: I think Joe already had and I probably confirmed it. I don't know – they had already pulled everybody out and it was understood.”

...

Q: Okay. Does the operator need the government's permission to correct an imminent danger, when an imminent danger order has been issued?

A: I think if I've got it closed, yeah. Then I need to modify and allow him to do what he needs to do with the consultants or whoever is going to do whatever he is going to do.

Q: So in order to exercise his right under section 104 of the Act, to abate the imminent danger, the operator needs the Government's permission?

A: He needs a plan and I need to modify it to allow people in the mine. [My notes] now says, “No one in the mine.”

Price Dep. 62:14-18, 63:21-64:8.

Price indicates that both he and Mackowiak gave direct instructions to Signature that it withdraw all persons from the mine site. Even after Signature had been required to close off the entire site, the company received further instructions that it was required to get approval from MSHA if it planned to send anyone underground to correct the adverse conditions. Such instructions and contacts are in direct contravention of the 104(c) statutory exception prescribed by Congress. In prohibiting Signature from exercising its rights under the 104(c) exception, Price carried out an illegal order under Mackowiak's instruction. As a result, Order No. 8126005 was overbroad and amounted to an abuse of discretion.

Price's improper understanding of the 104(c) exception also confirms why he and Jackson did not conduct a further investigation at the time they arrived at the Coalburg No. 1. At the time Richmond contacted Price, Price was aware that production had been halted, all miners had been withdrawn, and Signature had taken steps to monitor the situation. Richmond Dep. 30:22-31:10. When Canterbury spoke with Mackowiak, Mackowiak was informed that men were kept underground to prevent the spread of the pillar failure. Mackowiak Dep. 75:11-16. Despite Signature's statutory right to keep individuals underground to abate the adverse ground conditions, Mackowiak indicated to Canterbury that these men should be withdrawn and directed

Price that all persons were to be withdrawn from the area, without exception. Mackowiak Dep. 102:8-15; Price Dep. 54:7-20, 62:14-18. As a result, when Price arrived at Coalburg No. 1 and found fourteen of Signature's representatives still underground, he chose not to further investigate why Signature had kept individuals underground, directed Signature to withdraw these individuals, and further instructed Signature that it was required to get MSHA's approval before anyone was permitted to reenter the site. Price Dep. 60:16-61:11, 63:21-64:8. As a matter of law, Price was obligated to investigate whether the men remaining underground were involved in abatement efforts and abused his discretion when he placed additional requirements on Signature's ability to exercise its statutory rights.

This conclusion finds further support from Richmond's deposition. When Price and Jackson arrived at the Coalburg No. 1, Richmond expressed his desire to reenter the site to further investigate the adverse conditions. Richmond Dep. 35:23-36:7. Richmond also expressed his opposition to closing off the entire site to its representatives, explaining that Signature had halted production efforts, withdrew its miners from the affected area, monitored the progression of the situation, and taken steps to correct the conditions. Richmond Dep. 36:14-22, 38:14-39:1. Despite Richmond's objections, Price further advised Richmond to follow MSHA's instructions. R. Richmond Dep. 38:14-39:1. By failing to address Richmond's objections and advising Richmond to follow Mackowiak's improper instructions, Price transgressed the 104(c) exception.

On August 29, 2011, the facts also show that Richmond engaged in discussions with Mackowiak after returning from an underground inspection of the adverse conditions. With respect to these discussions, Richmond stated, "Rather than us send a plan over and them send it back a couple days later and having both agencies that *we needed to get approval from any rehab or recovery*, I was asking if we could draw up a plan and agree to have a meeting." Richmond Dep. 45:4-8. It is no coincidence that Richmond, after receiving direct instructions from Price to this effect, shared Price's improper understanding of the 104(c) exception at the time the Order was issued.⁶

⁶ It should be noted that Mackowiak and Richmond present contradictory accounts of the meeting they had after the underground inspection. While Mackowiak claims that Richmond only asked about recovering the affected equipment, Richmond claims that he had asked about setting up a meeting to establish a plan to recover equipment and rehabilitate the adverse conditions. Mackowiak Dep. 105:3-15, 109:1-4, 109:14-110:14; Richmond Dep. 45:21-46:13. Although it seems improbable that an experienced mine operator would not bring up the issue of rehabilitation following an underground inspection of an imminent danger (and the burden is on the Secretary to establish its view of the facts by a "preponderance of the evidence"), the facts still reveal that Mackowiak abused his discretion in the course of these conversations. Both accounts indicate that Richmond was primarily concerned with the length of time it would take Signature to get approval from MSHA in submitting a plan to reenter the mine. This is particularly significant because Price had relayed Mackowiak's instructions that no one could reenter the mine without MSHA's prior approval. Because Mackowiak was constructively

(continued...)

The text of Order No. 8126005 also reveals that MSHA's officials intended to circumvent the 104(c) exception. On August 27, 2011, Signature received a modification that reads, "This order is hereby modified *only* to allow the operator to travel approximately 2 breaks underground for the purpose of charging their mantrips." Order No. 8126005. (emphasis added). On August 31, 2011, Signature received an identical modification when it was permitted to travel 2 breaks underground under the supervision of a mine foreman. Order No. 8126005. The use of the word "only" is suggestive, as it confirms that Signature was only allowed to reenter the mine to take these trips, and could not exercise its statutory rights under the 104(c) exception. This conclusion finds additional support in Jackson's deposition, as it was Jackson who was responsible for drafting the order and drew up the modification to allow mantrips under Price's direction. Jackson Dep. 22:11-21, 24:4-7. Specifically, Jackson testified that the Order precluded all persons from entering the mine at the time he wrote and modified it. Jackson Dep. 28:11-23. These findings are further corroborated by Mackowiak's own admission that the written order was designed to give Signature the impression that no person was permitted to enter the mine, and by the fax that Price received indicating that the mine was to be closed off to all persons, with "no exceptions." Mackowiak Dep. 101:5-11; Price Dep. 54:16-20.

MSHA and its representatives may not issue imminent danger orders that seek to deprive an operator of its statutory rights under the 104(c) exception. As the Commission has held, "[w]hile safety must be the paramount concern, the extraordinary measure of shutting down a mine with a withdrawal order compels safeguards to ensure that an inspector's discretion is not abused." *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 556 (Aug. 2006). To ensure that MSHA inspectors do not abuse their discretion, I find that inspectors must be evenhanded in explaining the 107(a) statutory requirements. Although there is no affirmative duty to remind an operator of its statutory rights under the 104(c) exception, MSHA inspectors cannot mislead, misrepresent, or circumvent Section 107(a) statutory requirements.

Having examined the conduct that led to the litigation, the undersigned is required to examine "the Government's litigation position." *Fed. Election Comm'n v. Rose*, 806 F.2d at 1090. Despite the fact that the breadth of Order No. 8126005 was an abuse of discretion, MSHA set out to defend the validity of the Order in the underlying contest proceeding. Further, MSHA used its promise to vacate this overbroad Order as a bargaining chip in settlement negotiations with Signature. The Secretary's decision to defend Order No. 8126005 was without merit and cannot be substantially justified.

The undersigned need not address the additional issue of whether Order No. 8126005 was overbroad in terms of the area affected.

⁶(...continued)

aware that Signature had been provided improper instructions regarding its right to reenter the mine for abatement purposes, Mackowiak was required to inform Signature of its rights under the 104(c) exception. In failing to adequately address the operator's concerns and requests following the underground inspection, Mackowiak abused his discretion.

V. Order

The Secretary has requested an evidentiary hearing on the adequacy of Signature's balance sheet and on the issue of whether Signature is acting as a proxy for Patriot Coal Co. ("Patriot"). Although the Secretary's arguments appear to be without merit as a matter of first impression, the Secretary has a right to request further proceedings. 29 C.F.R. 306(b).

Further proceedings shall address: 1) whether Signature's balance sheet meets EAJA's financial eligibility requirements; 2) whether Patriot controlled the underlying contest proceedings; and 3) the amount of attorney's fees to which Signature is entitled to after prevailing on Order No. 8126005.

IT IS ORDERED that the parties advise the undersigned within fifteen days how they intend to proceed.⁷

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

Distribution:

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/dsg

⁷ The issuance of this amended decision shall not toll the time for any deadlines imposed by the original decision. Deadlines are to be calculated from the date the original decision was issued, August 30, 2013.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 6, 2013

DOMINION COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. VA 2011-335-R
	:	Citation No. 8179158; 03/07/2011
	:	
	:	Docket No. VA 2011-336-R
	:	Citation No. 8179159; 03/07/2011
v.	:	
	:	Docket No. VA 2011-337-R
	:	Citation No. 8179160; 03/07/2011
	:	
	:	Docket No. VA 2011-405-R
SECRETARY OF LABOR	:	Citation No. 8182676; 04/04/2011
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine: No. 36
Respondent	:	Mine ID: 44-06759
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2012-163
Petitioner	:	A.C. No. 44-06759-275366-01
	:	
v.	:	
	:	
	:	
DOMINION COAL CORPORATION,	:	Mine: No. 36
Respondent	:	

DECISION

Appearances: David J. Hardy, Esq. & Wm. Scott Wickline, Esq., Hardy Pence PLLC,
Charleston, WV for Respondent

Winfield J. Wilson, Esq, Jacob Hargraves, Esq., & Jason Grover, Esq.,
U.S. Department of Labor, Office of the Solicitor, Arlington, VA for the
Secretary

Before: Judge Steele

STATEMENT OF THE CASE

This civil penalty proceeding is conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). This matter concerns Order Nos. 8179158, 8179159, 8179160, and 8182676. Order No. 8179158 was issued under Section 104(d)(1) for failure to comply with 30 C.F.R. § 75.1700. Order No. 8179159 was issued under Section 104(d)(1) for failure to comply with 30 C.F.R. § 75.1200. Order No. 8179160 was issued under Section 104(d)(1) for failure to comply with 30 C.F.R. § 75.372. Finally, Order No. 8182676 was issued under Section 104(d)(2) for failure to comply with 30 C.F.R. § 75.360(a)(1). All four Orders were served on Dominion Coal Corporation (“Dominion” or “Respondent.”). The Secretary seeks civil penalties in the amount of \$216,400.00. A hearing was held in Grundy, VA between February 20, 2013 and February 22, 2013 where the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs.

Order Nos. 8179158, 8179159, and 8179160 concern an incident in which a continuous miner intersected a gas well and will be considered together. Order No. 8182676 concerns an unrelated pre-shift examination and will be considered separately.

STIPULATIONS

The parties have stipulated to the following:

1. Dominion is an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), at Mine No. 36.
2. Respondent’s Mine No. 36 is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 803(h).
3. Operations at Respondent’s Mine No. 36, where the instant Orders were issued, are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designed Administrative Law Judges pursuant to §§ 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
5. The total proposed penalty for the Orders in this proceeding will not affect Respondent’s ability to continue in business.
6. The Orders at issue in this proceeding were issued by an authorized representative of the Secretary.
7. Timothy “TJ” Howington was an “agent” of the Respondent for Mine Act purposes at the time Order No. 8182676 was issued.

GAS WELL ORDERS

1. Order No. 8179158

a. Contents of the Order

On March 7, 2011 at 9:45 a.m., Inspector John A. Hughes (“Hughes”) issued to Respondent Order No. 8179158. Hughes found:

The Mine Operator’s failure to establish and maintain a 300 foot safety barrier around a known gas well resulted in an accident on February 24, 2011 that had the reasonable potential to cause death. At approximately 12:55 p.m. an inundation of methane gas occurred on the 004-0 MMU. The continuous mining machine located in the No. 4 heading unintentionally cut into an active gas well damaging the well casings. An explosive mixture of 8.9% methane was released from the well, detected by the continuous mining machine and observed by the miners working on the 004-0 MMU. An emergency evacuation of the mine was initiated and all miners were safely removed from the mine. Evidence gathered during the accident investigation shows the Operator was aware of the well’s presence but failed to keep track of it. The Operator’s projection map which was submitted prior to mining and received by MSHA on May 18, 1994 has the affected well’s location plotted. On subsequent annual maps the well’s location is not shown and disappears from the record. The accident that resulted from this condition was a near miss and could have resulted in a catastrophic event affecting all of the miners underground on February 24, 2011. The Operator’s inattention to the well’s location is a serious impediment to the safety of the miners placed under his care. The Operator’s inadvertence toward such a serious safety hazard and the potential consequences for failing to do so shows a serious lack of care or due diligence on the Operator’s behalf. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. This D-1 Order is being issued in conjunction with D-1 Orders No. 8179159 and 8179160 for failure to plot a known gas well on the Operator’s Certified Annual Mine Map required by 30 CFR sub-part 75.1200 and the Operator’s Certified Mine Ventilation Map required by 30 CFR sub-part 75.372.

Government’s Exhibit 15 (Hereinafter GX-15). Hughes noted that the gravity of this violation was “Highly Likely,” “Fatal,” and would affect ten persons. *Id.* The Order was marked as Significant and Substantial (“S&S”). *Id.* He further marked that Respondent exhibited “High” negligence with respect to this violation. *Id.*

b. Legal Standards

Order No. 8179158 was issued under Section 104(d)(1) of the Mine Act. That provision provides the following:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

The Order deals with an alleged violation of 30 C.F.R. § 75.1700 (titled “Oil and gas wells”). That section provides the following:

Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier.

30 C.F.R. § 75.1700.

2. Order No. 8179159

a. Contents of the Order

On March 7, 2011 at 9:46 a.m., Inspector John A. Hughes (“Hughes”) issued to Respondent Order No. 8179159. Hughes found:

The Operator’s official, certified mine map located in the mine foreman’s office does not show the location of active gas well No. 2559. The well’s location was left off the mine map and on February 24, 2011 at approximately 12:55 p.m. an inundation of methane gas occurred on the 004-0 MMU when the continuous

mining machine located in the No. 4 heading unintentionally cut into the gas well, damaging the well casings. An explosive mixture of 8.9% methane was released from the well, detected by the continuous mining machine and observed by the miners working on the 004-0 MMU. An emergency evacuation of the mine was initiated and all miners were safely removed from the mine. Evidence gathered during the accident investigation shows the Operator was aware of the well's presence but failed to keep track of it. The Operator's projection map which was submitted prior to mining and received by MSHA on May 18, 1994 has the affected well's location plotted. On subsequent annual maps the well's location is not shown and disappears from the record. The accident that resulted from this condition was a near miss and could have resulted in a catastrophic event affecting all of the miners underground on February 24, 2011. The Operator's inattention to the well's location is a serious impediment to the safety of the miners placed under his care. The Operator's inadvertence toward such a serious safety hazard and the potential consequences for failing to do so shows a serious lack of care or due diligence on the Operator's behalf. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. This D-1 Order is being issued in conjunction with D-1 Orders No. 8179158 and 8179160 for failure to plot a known gas well on the Operator's Certified Mine Ventilation Map required by 30 CFR. sub-part 75.372 and failure to establish and maintain a 300 foot safety barrier around a known gas well required by 30 CFR sub-part 75.7100.

(GX-16). Hughes noted that the gravity of this violation was "Highly Likely," "Fatal," and would affect ten persons. *Id.* The Order was marked as S&S. *Id.* He further marked that Respondent exhibited "High" negligence with respect to this violation. *Id.*

b. Legal Standards

Order No. 8179159 was also issued under Section 104(d)(1) of the Mine Act. It deals with an alleged violation of 30 C.F.R. § 75.1200 (titled "Mine Map"). That section provides, in pertinent part, the following:

The operator of a coal mine shall have in a fireproof repository located in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, an accurate and up-to-date map of such mine drawn on scale. Such map shall show...

(k) Either producing or abandoned oil and gas wells located within 500 feet of such mine and any underground area of such mine; and,

30 C.F.R. §75.1200.

3. Order No. 8179160

a. Contents of the Order

On March 7, 2011 at 9:47 a.m., Inspector John A. Hughes (“Hughes”) issued to Respondent Order No. 8179160. Hughes found:

The Operator’s official, certified mine ventilation map located in the mine foreman’s office does not show the location of active gas well No. 2559. The well’s location was left off the mine map and on February 24, 2011 at approximately 12:55 p.m. an inundation of methane gas occurred on the 004-0 MMU when the continuous mining machine located in the No. 4 heading unintentionally cut into the gas well, damaging the well casings. An explosive mixture of 8.9% methane was released from the well, detected by the continuous mining machine and observed by the miners working on the 004-0 MMU. An emergency evacuation of the mine was initiated and all miners were safely removed from the mine. Evidence gathered during the accident investigation shows the Operator was aware of the well’s presence but failed to keep track of it. The Operator’s projection map which was submitted prior to mining and received by MSHA on May 18, 1994 has the affected well’s location plotted. On subsequent annual maps the well’s location is not shown and disappears from the record. The accident that resulted from this condition was a near miss and could have resulted in a catastrophic event affecting all of the miners underground on February 24, 2011. The Operator’s inattention to the well’s location is a serious impediment to the safety of the miners placed under his care. The Operator’s inadvertence toward such a serious safety hazard and the potential consequences for failing to do so shows a serious lack of care or due diligence on the Operator’s behalf. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. This D-1 Order is being issued in conjunction with D-1 Orders No. 8179158 and 8179159 for failure to plot a known gas well on the Operator’s Certified Mine Map required by 30 CFR sub-part 75.1200 and failure to establish and maintain a 300 foot safety barrier around a known gas well required by 30 CFR sub-part 75.7100.

(GX-17). Hughes noted that the gravity of this violation was “Highly Likely,” “Fatal,” and would affect ten persons. *Id.* The Order was marked as S&S. *Id.* He further marked that Respondent exhibited “High” negligence with respect to this violation. *Id.*

b. Legal Standards

Order No. 8179159 was also issued under Section 104(d)(1) of the Mine Act. It deals with an alleged violation of 30 C.F.R. § 75.372 (titled “Mine Ventilation Map”). That section provides the following:

(a) (1) At intervals not exceeding 12 months, the operator shall submit to the district manager 3 copies of an up-to-date map of the mine drawn to a scale of not less than 100 nor more than 500 feet to the inch. A registered engineer or a registered surveyor shall certify that the map is accurate.

(2) In addition to the informational requirements of this section the map may also be used to depict and explain plan contents that are required in §75.371. Information shown on the map to satisfy the requirements of §75.371 shall be subject to approval by the district manager.

(b) The map shall contain the following information:

(1) The mine name, company name, mine identification number, a legend identifying the scale of the map and symbols used, and the name of the individual responsible for the information on the map.

(2) All areas of the mine, including sealed and unsealed worked-out areas.

(3) All known mine workings that are located in the same coalbed within 1,000 feet of existing or projected workings. These workings may be shown on a mine map with a scale other than that required by paragraph (a) of this section, if the scale does not exceed 2,000 feet to the inch and is specified on the map.

(4) The locations of all known mine workings underlying and overlying the mine property and the distance between the mine workings.

(5) The locations of all known oil and gas wells and all known drill holes that penetrate the coalbed being mined.

(6) The locations of all main mine fans, installed backup fans and motors, and each fan's specifications, including size, type, model number, manufacturer, operating pressure, motor horsepower, and revolutions per minute.

(7) The locations of all surface mine openings and the direction and quantity of air at each opening.

(8) The elevation at the top and bottom of each shaft and slope, and shaft and slope dimensions, including depth and length.

(9) The direction of air flow in all underground areas of the mine.

(10) The locations of all active working sections and the four-digit identification number for each mechanized mining unit (MMU).

- (11) The location of all escapeways and refuge alternatives.
- (12) The locations of all ventilation controls, including permanent stoppings, overcasts, undercasts, regulators, seals, airlock doors, haulageway doors and other doors, except temporary ventilation controls on working sections.
- (13) The direction and quantity of air—
- (i) Entering and leaving each split;
 - (ii) In the last open crosscut of each set of entries and rooms; and
 - (iii) At the intake end of each pillar line, including any longwall or shortwall.
- (14) Projections for at least 12 months of anticipated mine development, proposed ventilation controls, proposed bleeder systems, and the anticipated location of intake and return air courses, belt entries, and escapeways.
- (15) The locations of existing methane drainage systems.
- (16) The locations and type of all AMS sensors required by subpart D of this part.
- (17) Contour lines that pass through whole number elevations of the coalbed being mined. These lines shall be spaced at 10-foot elevation levels unless a wider spacing is permitted by the district manager.
- (18) The location of proposed seals for each worked-out area.
- (19) The entry height, velocity and direction of the air current at or near the midpoint of each belt flight where the height and width of the entry are representative of the belt haulage entry.
- (20) The location and designation of air courses that have been redesignated from intake to return for the purpose of ventilation of structures, areas or installations that are required by this subpart D to be ventilated to return air courses, and for ventilation of seals.
- (c) The mine map required by §75.1200 may be used to satisfy the requirements for the ventilation map, provided that all the information required by this section is contained on the map.

30 C.F.R. §75.372.

4. Summary of Testimony

a. Testimony of Daniel Lee Shortridge:

At the time of the hearing Daniel Shortridge was employed as an outby foreman at Dominion Coal. (Transcript Vol. I, p. 185).¹ He was foreman on the U-Section day-shift the day the gas well was struck in February of 2011. (Tr. I, 185-186). There were seven people on the section and over 30 people in the mine in total. (Tr. I, 185-186).

Before Shortridge started mining that shift he checked the Section 75.1200 mine map, as he always did to see what had been mined the day before. (Tr. I, 194-195). He does not check the mine map for hazards, not even gas wells because they are usually recorded. (Tr. I, 195). The map is located in the foreman's office and the gas well was not on that map. (Tr. I, 195).

There was quite a bit of air on the section that day because all the air that was on the line was going past the four heads. (Tr. I, 200). There had to be over seven or eight thousand, but maybe more because there was a "twenty-some thousand" line at the crosscut.² (Tr. I, 200).

Shortridge was 15-20 feet from the gas well when he heard the continuous miner hit something. (Tr. I, 188). He was in a closed space in the mine. (Tr. I, 194). The continuous miner raised up at the front when it hit the gas well. (Tr. I, 188). The collision resulted in steel-on-steel contact, between the miner and the pipe. (Tr. I, 193-194). He could not tell how deep the well case was cut because the ripper head was still against the miner. (Tr. I, 199). He later learned it just cut into the outer casing, not into the production line. (Tr. I, 199). It is common for there to be sparks when a miner is operating. (Tr. I, 194). However, when they cut into the well, water was released and also the miner had 27 water sprays. (Tr. I, 200).

The collision caused the continuous miner to "gas off," shut down, as a result of methane release. (Tr. I, 190-191). Miners will gas off at 1.5% methane. (Tr. I, 191). The miner will also produce a reading, but Shortridge did not see the reading here. (Tr. I, 191-192). However, he later learned that Kevin Stiltner, a miner, saw a reading of 8.9% methane. (Tr. I, 192). The explosive range for methane is 5-15%. (Tr. I, 205). Shortridge did not know if the monitor on the continuous miner could accurately read 5%. (Tr. I, 200, 204-205). He knew that during calibration it was tested at 2.5%. (Tr. I, 204-205). He recalled the methane reader on the continuous miner went as high as 2.5%, but he did not recall it testing at 5%. (Tr. I, 204). He was also aware that water can cause a false reading. (Tr. I, 201). Sometimes when the "sniffer" is located right up against the coal it will gas off even if no gas is detected. (Tr. I, 201). He had not read the manual for the monitor. (Tr. I, 205).

¹ Hereinafter the transcript be cited as "Tr." followed by the volume and page number.

² It is unclear from the transcript what these numbers mean.

The collision liberated enough methane to set off Shortridge's spotter.³ (Tr. I, 188-189). Shortridge was sure that methane was released into the mine. (Tr. I, 189, 194). He was wearing his spotter on his shirt and his alarm went off, as did Electrician Roger Clark's. (Tr. I, 189). The spotter has a "low and high" alarm, a low alarm has a slow beep at 0.5% of gas and a high alarm at 1%. (Tr. I, 189-190). The alarm after the well was struck sounded like a high alarm. (Tr. I, 190). The spotters produce a reading for methane, but Shortridge never looked at his because he was trying to evacuate. (Tr. I, 190). Other people reported methane readings. (Tr. I, 194).

After the collision, Shortridge evacuated everyone from U-Section. (Tr. I, 192-193). Later, after he called outside, the rest of the mine was evacuated. (Tr. I, 192-193). Respondent evacuated the mine because a well was struck, which is very dangerous and not a normal situation. (Tr. I, 193).

After the evacuation Shortridge, James Stacy, and Greg Ratliff went back in to check the mine and view the gas well. (Tr. I, 195-196). Respondent was issued an imminent danger order for this incident, which means that no one is supposed to go back into the mine to work. (Tr. I, 196, 203). It would be permissible to go into the mine with a certified person or if directed to do so by a federal official. (Tr. I, 203).

As they went into the mine, Shortridge checked the return for methane and he did not detect any. (Tr. I, 196-197). They went to the gas well, he got a gas reading by holding the detector up against the outer casing of the gas well, and he found that it was liberating a small amount, but not enough to set off an alarm. (Tr. I, 197, 201). Inside the outer casing was a smaller pipe and water was bubbling up and he would not get a gas reading unless he held it close. (Tr. I, 201). Holding the monitor that close is not a legal check; he was just seeing what was coming out.⁴ (Tr. I, 202). He found about three or four tenths of a percent of methane. (Tr. I, 202-203). That is not much; it is possible to get more at the coal seam. (Tr. I, 203). He then took a legal check and did not measure any methane. (Tr. I, 202). However, these checks were hours after the accident. (Tr. I, 204).

At the time of this accident, the mine was on a 10-day spot inspection. (Tr. I, 198). A spot inspection sets a schedule for inspecting methane and dust parameters based on how much gas is liberated. (Tr. I, 198).

b. Testimony of Robert Earl Weaver, Jr.

At the time of the hearing Robert Weaver was employed by SunCoke, the parent company of Jewell Smokeless. (Tr. I, 206-207). At the time of the accident, he was chief

³ A methane detector, in this case an M-20 methane detector, is interchangeably referred to as a "spotter." (Tr. I, 189).

⁴ A "legal check" of methane is one in which the monitor is held 12 inches back from the source. (Tr. I, 202).

engineer of Respondent's engineering department, also a SunCoke subsidiary.⁵ (Tr. I, 206-207). As chief engineer Weaver managed a staff of seven people. (Tr. I, 210). He had the power to hire and fire employees and direct the workforce. (Tr. I, 208-209). He held that position from May 2006 to July 2010. (Tr. I, 208). Weaver was then general manager of Jewell Coke Company. (Tr. I, 207).

Weaver had a bachelor's degree in mining engineering from Penn State University, a bachelor's degree in inter-disciplinary studies, and a master's degree in education with an emphasis on math and science from Old Dominion University. (Tr. I, 238-239). After receiving his engineering degree, he worked for two years under two other professional engineers ("PEs") for Consolidation Coal Company. (Tr. I, 239). Weaver sat for the Virginia professional engineer examination with a focus on mining engineering in 1983. (Tr. I, 239). He passed the exam on his first attempt. (Tr. I, 239-240). He was also licensed in Pennsylvania. (Tr. I, 240). He was not a licensed professional in surveyor in Virginia. (Tr. I, 240). Professional engineers have to renew their licenses; every year in West Virginia and every other year in Virginia. (Tr. II, 5). To renew the license, an engineer must take at least eight professional development hours of continuing education, including AutoCAD applications.⁶ (Tr. II, 5).

Weaver first worked for Consol's Renton Mine from 1979 to 1983. (Tr. I, 240). He was then transferred to Bailey Mine as chief engineer for the initial layout of the mine and worked there for two years. (Tr. I, 241). After that he began production work. (Tr. I, 241). In 1993 he went to Enlow Fork as a mine foreman in charge of underground operations and in 1996 he went to VP-8 as an assistant superintendent. (Tr. I, 241). When working for Consol he certified maps. (Tr. I, 241). He would work with the engineering department on future mine plans. (Tr. I, 241-242). At VP-1 engineering department was under his supervision. (Tr. I, 242).

In 2006, Weaver went to work for Respondent. (Tr. I, 242). There were 8 people in the engineering department including Weaver. (Tr. I, 247). Respondent also contracted with an outside surveying and engineering firm: D.R. Price Engineering of Virginia. (Tr. I, 247, Tr. II, 17-18). Respondent was working with D.R. Price before 2006 and was still working with them at the time of the hearing; they had been working together for over 20 years. (Tr. I, 247-248). D.R. Price is a well-respected engineering firm, familiar with the standard of care in Virginia, and it has a lot of experience in mining. (Tr. I, 248, Tr. II, 18). They have policies and procedures for certifying mine maps and locating/plotting gas wells. (Tr. II, 18-19). Weaver oversaw the work conducted by D.R. Price. (Tr. II, 27).

In his time working for Respondent Weaver certified all of Respondent's mine maps and was responsible for mapping at six Dominion mines and five contractor mines. (Tr. I, 207, 211, 214, 243). He handled hundreds of maps. (Tr. 243). This task included preparing the maps,

⁵ Weaver is not sure how much coal the mine produced. (Tr. I, 209-210). SunCoke is a medium-sized company with between 1,000 and 2,000 employees. (Tr. I, 210). The mine is a big mine and it is currently "hot idle," meaning it is not producing right now. (Tr. I, 238).

⁶ CAD stands for "computer-aided drafting." (Tr. III, 18).

checking accuracy, and certification.⁷ (Tr. I, 207, 211). MSHA requires mine maps to be certified by a professional engineer or surveyor. (Tr. I, 213). Weaver was a professional engineer in Virginia. (Tr. I, 213, 237). There are several ways to get a professional engineering license. (Tr. I, 213-214). Those methods include getting a bachelor's degree in engineering and passing an exam or engineering training with a mentorship program for four years and taking an exam. (Tr. I, 213-214). Weaver was familiar with the standard of practice for certifying mine maps in Virginia and felt that he complied with that standard, as well as state and federal rules. (Tr. II, 7, 11).

Respondent's mine maps were made in a software program called AutoCAD, which is a type of drafting software. (Tr. I, 211-212). The mining industry started to use AutoCAD in the 1980's. (Tr. I, 212). The maps print primarily in 2D, but it allows for different layers to be placed on the map and removed when needed. (Tr. I, 212). These layers included ventilation or topographic features. (Tr. I, 212). The AutoCAD is a complex system but a person trained in it can transfer the skills to mining from any other industry. (Tr. I, 213). When Weaver started to work for Respondent, he took courses on the AutoCAD so he would be up to speed. (Tr. I, 251)

Operators are required to produce various maps. (Tr. I, 214-215). Ventilation maps are required by §75.372 ("372 map") and must include gas wells and be submitted to MSHA annually. (Tr. I, 215, Tr. II, 37). "Wall Maps" are required by §75.1200 ("1200 map") and are used whenever any trouble occurs in the mine. (Tr. I, 215). The wall map is similar to the 372 map, but is required under a different section of the Act. (Tr. I, 215-217). It must be kept on the surface, is required semi-annually, and serves a different function. (Tr. I, 215-217). To update the 1200 map, the engineering department would review new workings, changes in ventilation, new or removed stoppings, overcasts, and other ventilation control. (Tr. I, 217). The law allows for the 1200 map to serve as the 372 map, but Respondent produced both. (Tr. I, 216).

Both kinds of maps required gas wells to be shown. (Tr. I, 219). On the mine maps, gas wells are marked with bulls-eyes. (Tr. I, 260). The outer circles show the 200 foot and 500 foot radii and, if it was a proposed well, the symbol in the middle would be different. (Tr. I, 260). These radii requirements are more rigorous than those required by MSHA. (Tr. I, 260). The symbols used to identify gas wells vary from state to state. (Tr. I, 262). In addition to the circles there would be other information like coordinates. (Tr. I, 264). There were 400 or 500 wells at Dominion 36. (Tr. I, 264, Tr. II, 25).

There were legally required checklists for certification of mine maps. (Tr. I, 255-257, Tr. II, 37). One checklist was for 1200 maps and one was for 372 maps and they followed the points of the law (RX-1: the 1200 checklist and RX-2: the 372 checklist). (Tr. I, 255-257, Tr. II, 37). Map certification was an ongoing process, starting in October or November. (Tr. I, 257-258). Certifying a map is a team effort. (Tr. I, 254). A month before it was due, Weaver would print a

⁷ Besides mine maps, Weaver's duties as chief engineer included mine, roof control, ventilation, fire-fighting and evacuation plans, keeping up escapeway maps, and showing the location of self-contained self-rescuers on maps. (Tr. 246). In addition, he looked for the coal seam and checked its thickness, brought in drillers and contractors, checked the thickness of the seam, and created closure maps and conducted reclamation. (Tr. I, 246-247).

copy of the map out and then make sure it looked right. (Tr. I, 258, Tr. II, 7). When certifying the mine map, he did not redo the map every six months. (Tr. II, 24). Instead, he would start with new features, focusing on ventilation controls and new entries. (Tr. I, 258-259, Tr. II, 7-8, 24). They would build on previous submissions; old section of the map did not change. (Tr. II, 8, 24). The checks would include looking to see if the gas well file was overlaid on the map. (Tr. II, 38). When he had questions about something he would call down to the mine or even go look himself. (Tr. I, 259). Weaver took certifying maps seriously and did not want something to go wrong when he was underground. (Tr. I, 252). The people who worked underground were his friends, neighbors, and co-workers. (Tr. I, 252).

In addition to the 372 and 1200 maps, there were other maps, including escapeway maps, that would be located at the surface and in refuge chambers. (Tr. I, 217-218). There are also five year projection maps, which were company maps rather than MSHA-required maps. (Tr. I, 218). A projections map would not necessarily show the gas wells but, because it shows projected future mining, would be made with considerations of the location of wells. (Tr. I, 218-219). Respondent only looked ahead to one year projections to check for wells. (Tr. II, 36).

Weaver read from GX-11 (December 23, 2008 mine map), showing that in certifying a map, an engineer attests that he believes the map to be correct to the best of his knowledge and belief. (Tr. II, 28).

In May of 2008 Weaver hired Stacy Harris as a mine plan specialist partially because of his extensive AutoCAD experience. (Tr. I, 220, 224). Weaver believed Harris had no mining experience when hired and had never worked with mine plans. (Tr. I, 220). To train people in the engineering department, Respondent had “on-boarding” process. (Tr. I, 248). This was a mentoring program that paired new and experienced employees. (Tr. I, 248). Some of the training was on map work and AutoCAD and some was actual underground training. (Tr. I, 248-249). Harris was trained by Roger Van Dyke and Bobby O’Quinn on the AutoCAD. (Tr. I, 249-250). They gave him small projects and double-checked his work. (Tr. I, 250). Harris also did some channel sample work and worked on the seal project. (Tr. I, 250). Weaver wanted Harris to understand the process from start to finish and they spent numerous shifts underground on a couple of sets of seals so he would know what the symbols on the map really meant. (Tr. I, 250).

The people hired in 2008 were primarily hired for their expertise in AutoCAD and ServeCAD. (Tr. I, 251). “ServeCAD,” was a program that sped up the use of AutoCAD. (Tr. I, 251). Whenever ServeCAD or AutoCAD was updated, a representative would come and teach the new features. (Tr. I, 251). Harris was the most skilled AutoCAD user in the department. (Tr. II, 9). He knew more about AutoCAD’s capabilities than anyone else. (Tr. II, 9).

When the 2008 hiring occurred, the mine file in the AutoCAD was very large; it actually encompassed three separate files and was slow to open. (Tr. I, 221, Tr. II, 11). The map had various layers: ventilation controls, property boundaries, mineral properties, and one-line diagrams for mining projections. (Tr. II, 12). Harris approached Weaver and suggested combining the map into one file. (Tr. I, 221-222, Tr. II, 12). Weaver approved and Harris completed the task. (Tr. I, 222). Weaver had heard it referred to as a “file reduction effort.” (Tr. I, 222). The AutoCAD would use the coordinates to line up merger points on the map and sew

the sheets together. (Tr. II, 12-13). If they did not line up, something obvious would have occurred on the map. (Tr. II, 13). Weaver was not involved in merging the files, he delegated it to Harris. (Tr. I, 222-224, Tr. II, 29). Weaver was confident that Harris was competent and did not direct him to take any specific steps. (Tr. I, 223). Weaver knew Harris' mining experience. (Tr. I, 224).

One gas well that was on the April 2008 map was not on the December of 2008 map. (Tr. I, 228-229). Harris told Weaver that the maps were accurate so Weaver certified them as accurate. (Tr. I, 235). The missing gas well was not on any maps that Weaver certified between December 2008 and the time he left the department in May 2010. (Tr. I, 229-230). As far as he knew, the gas well was not on any map from that time until the accident. (Tr. I, 229-230). The last annual map he certified for MSHA at the mine was in January 2010. (Tr. II, 8-9).

Weaver believed the gas well was on the map from the time he started in May 2006 through April 2008. (Tr. I, 232, Tr. II, 33). He did not know if the well was on the initial project map in 1994, however old mine maps were available. (Tr. I, 232). The well was not surveyed when Weaver was there and he did not know if it was in 1991. (Tr. II, 33). None of those maps were checked for gas wells nor did anyone check with the state. (Tr. I, 233). No one checked the surface for wells because the AutoCAD produced the same map every time. (Tr. I, 233-234).

Respondent learned about the locations of gas wells in numerous ways. (Tr. I, 243). It spoke with gas companies regarding planned wells and applications. (Tr. I, 244). The gas companies would tell Respondent where wells would go and Respondent would decide if the location worked or if the plan needed to be moved. (Tr. I, 244). The gas companies would then send a proposed location and Respondent would have 15 days to object to the Division of Gas & Oil. (Tr. I, 244-245). If Respondent did not object, it would sign a letter with rules and guidelines on how the well would be drilled to assure safety. (Tr. I, 245). The companies then provided 48-hour notice before drilling. (Tr. I, 245). If the well was close to the active working, the mine would be evacuated during that time or other steps were taken. (Tr. I, 245-246).

Once Respondent learned about a well, several checks were made to ensure the well's location was certain. The first check was plotting. (Tr. II, 6). The initial plotting of gas wells would be done with the final location coordinates provided by the gas well company. (Tr. I, 246, Tr. II, 6, 19). The state required gas companies to inform anyone with an interest including surface owners, mineral-interest owners, and the state via certified mail. (Tr. I, 19-20). Those surveys were completed by registered surveyors. (Tr. II, 6). When Respondent received the coordinates they would plot them on the map. (Tr. I, 246, Tr. II, 6). Weaver was more concerned with gas wells ahead of the mining than those behind the mining. (Tr. II, 36-37).

The second check cross-referenced the wells on the mine's maps with the Buchanan County topographic maps. (Tr. I, 226, 233, Tr. II, 6, 22). These maps were the most accurate and up-to-date cross check. (Tr. II, 22-23). The certification process was a month-long process, but the only thing that relates to the gas wells was cross-referencing the gas wells with the topographic map. (Tr. I, 235, Tr. II, 38-39). Topographic maps showed anything that could be seen in a flyover. (Tr. I, 234). The topographic map was used for many things and was more accurate than the old USGS maps. (Tr. II, 34). Harris did not introduce the topographic maps;

he was just the first to use them to check for gas wells. (Tr. I, 234). Weaver never asked what the topographic maps were for; he just used them because they were used when he started at Respondent. (Tr. I, 234).

In this case, no one checked the accuracy of the county topographic map and it did not have the subject gas well either. (Tr. I, 235, Tr. II, 34). The topographic maps were not the “gold standard” for determining whether a well exists, but an additional resource used to locate wells. (Tr. II, 23). Sometimes the mine map had wells that the topographic map did not. (Tr. II, 23). MSHA never objected to the use of the topographical maps. (Tr. II, 23). However, he conceded that he never called MSHA to ask if they had objections and did not know if they knew. (Tr. II, 31). MSHA does not have requirements about the maps or files to use. (Tr. II, 31-32). In this case, the topographic map did not have the missing well on it, which Weaver learned when the well was intersected. (Tr. II, 23, 35). He did not know if others were missing. (Tr. I, 235).

The third check occurred, pursuant to company policy, when mining came within 1,000 feet of a gas well. (Tr. I, 243, Tr. II, 6). Respondent would resurvey the location to check that it was in the right place in the mine. (Tr. I, 243, Tr. II, 6).

The fourth check on the checklist was the state Division of Mines’ survey of locations. (Tr. II, 6). The state would use the same maps the company used as they submitted certified maps to the state. (Tr. II, 7, 35). The state would not provide advance notice of these checks. (Tr. II, 7). On cross examination he conceded that the gas well was not on the maps they gave to the state, though it was on the earlier maps. (Tr. II, 35-36).

Weaver later learned that the Virginia Division of Mine, Minerals, and Energy also had the oil and gas well coordinates available to the public, but did not know of this at the time. (Tr. I, 231, Tr. II, 20-21, 30-31). He was not familiar with this “shape file” because he did not have it when he was in the department and had never inquired about other maps. (Tr. I, 231, Tr. II, 20). Weaver knew that gas and oil wells existed in Virginia, but he did not know their coordinates were available as a public record. (Tr. I, 231-232). He believed the shape file was a coordinate map that could be overlaid over Respondent’s maps to show the location of all gas wells that the department has in its database. (Tr. II, 20). No one in the engineering department ever mentioned to him the shape file. (Tr. II, 20-21).

Further, Danny Price of D.R. Price certified a map after Weaver left, in December 2010. (Tr. II, 18). That map was two months before the accident. (Tr. II, 18). D.R. Price also did not discover the gas well was missing from the mine map. (Tr. II, 19). No one at D.R. Price ever mentioned that Weaver should get a copy of the shape file either. (Tr. II, 21-22)

Weaver had worked in places that were “like Swiss cheese” with gas wells and at Bailey they mined on top of an abandoned gas storage field. (Tr. I, 252-253). He knew what could happen if a well is cut into in an uncontrolled manner. (Tr. I, 253). He used the best data available to locate wells on the mine map. (Tr. I, 253). He had never before had a gas well go missing. (Tr. I, 254). They had people triple check gas wells when close so they knew how important they were. (Tr. I, 255).

The gas well should have been on the map, but somehow it was deleted. (Tr. I, 236, Tr. II, 38). A user name and password were required to access the computers containing the AutoCAD in the engineering department. (Tr. II, 10). All AutoCAD users in the engineering department had access to the map and gas files without password protection. (Tr. I, 227, Tr. II, 9-10). This did not include the Secretary and an employee who generally worked outside. (Tr. II, 10). The mine maps were located in a locked folder on the server. (Tr. II, 10). Only one person could make changes to the AutoCAD at a time, once it was open others could only open it as a “read-only” file. (Tr. II, 10).

When Harris merged the maps some duplicate items in the files were deleted. (Tr. I, 224-225). They looked at the map afterward and it appeared unchanged. (Tr. I, 225). No safeguard was in place to ensure nothing was erroneously deleted. (Tr. I, 226). There may have already been safeguards in the AutoCAD. (Tr. I, 226). He was confident only duplicates were to be removed. (Tr. I, 226).

Further, the gas well files were in a totally separate file from the map files. (Tr. II, 13). That is why they did not check the merged files for gas wells. (Tr. II, 13-14). The gas wells are not a layer of the mine map, they are a separate file. (Tr. II, 14). To place the gas wells on the mine map, Weaver would use an application called “ex-reference” on the AutoCAD that would overlay the gas well files onto the mine map. (Tr. II, 14-15). If the gas wells were ex-referenced onto the mine map and someone accidentally pushed “delete,” all of the gas wells from the “quadrangle file” would disappear. (Tr. II, 15-16). There were four or six quadrangle files for the mine map, so deleting would eliminate fifty or sixty wells. (Tr. II, 16). When Weaver certified the map it showed gas wells. (Tr. II, 24). It would have been obvious if a quad was turned off and gas wells were missing. (Tr. II, 25). Further, deleting these gas wells from the map would not delete the separate gas well file. (Tr. II, 17). The overlaid ex-referenced file could not be modified on the mine map. (Tr. II, 17). No modifications were made to the gas well files in the summer of 2008. (Tr. II, 29-30). Weaver knew this because they are certain files and Harris did not ask him anything about working on the well files. (Tr. II, 29-30).

It might take more mouse clicks to accidentally delete a gas well. (Tr. I, 227-228). Deleting this information would take several different steps. (Tr. II, 38). Someone would have to delete separate files that contained the gas well symbol, the number of the well, its date, the two-hundred foot radius, and the five-hundred foot radius. (Tr. I, 228, Tr. II, 38). If a gas well were deleted from the quad file it would be deleted. (Tr. II, 29). Weaver had a strict policy in place to prevent deletion of any wells, even preview wells, unless there was a letter from the company saying the area would not be used. (Tr. I, 254-255). There was no process to place a deleted well back on the map other than cross-referencing with the topographic map because no well had been deleted, until this one. (Tr. II, 39).

No one ever complained about the AutoCAD malfunctioning or deleting wells. (Tr. II, 32). Weaver never called AutoCAD to explain the situation or ask them to investigate. (Tr. II, 32). He did not know if anyone else did. (Tr. II, 32). Weaver was not involved in the investigation and did not know why the well was deleted. (Tr. I, 236, Tr. II, 32).

Weaver learned that Respondent intersected the gas well while working at the Coke plant. (Tr. II, 25, 230-231). He believed it was on the same day as the incident but could not recall how he got the news. (Tr. II, 25). When he heard, he drove the engineering office and got the maps out to try to determine what happened. (Tr. II, 255). He felt that it was terrible news and was relieved that no one got hurt. (Tr. II, 25). Mining into a gas well could be catastrophic, including causing an explosion and fatalities. (Tr. II, 40). The most important function of the engineering department is to ensure all hazards are on the map; to ensure the safety of those at the mine. (Tr. II, 40). Everyone followed procedures after the incident and got out without injury. (Tr. II, 26). He did not know how it happened. (Tr. II, 26).

Weaver was not involved in the MSHA investigation and was not interviewed by Inspector Hughes. (Tr. II, 26). John Kegley from the company asked him a series of questions about the mine map and gas wells. (Tr. I, 230-231, Tr. II, 26, 40-41). He and Harris also looked at the old maps. (Tr. II, 26, 40-41). Weaver reviewed Bobby O'Quinn's "notes" (GX-12). (Tr. II, 41). Weaver did not agree with Weaver's conclusion that the well was accidentally deleted when the mine map was reduced from three files to one. (Tr. II, 42-43). He did not believe that O'Quinn took everything into account. (Tr. II, 43).

The Virginia Board of Professional Engineers has the authority to sanction Virginia engineers for negligence or gross negligence. (Tr. II, 22). Weaver has never been so sanctioned. (Tr. II, 22). Weaver did not know if the Board investigated this incident. (Tr. II, 22). He also did not know if anyone reported this incident to the Virginia Board of Engineering and did not report it himself. (Tr. II, 31).

c. Testimony of Herman Stacy Harris

At the time of the hearing, Herman Stacy Harris was employed in the engineering department of Jewell Smokeless, Respondent's parent company. (Tr. II, 45). He was hired as a mine plan specialist by Weaver in May 2008. (Tr. II, 46-47, 49, 61, 64). In that capacity he worked on mine, ventilation, and roof control plans, as well as maps. (Tr. II, 46). Before Dominion, he worked as an estimator for Cleco Corporation in Rosedale, Virginia. (Tr. II, 62).

Respondent's engineering department was responsible for both the 75.372 ventilation maps and the 75.1200 wall maps. (Tr. II, 46-47). Harris used AutoCAD and Microsoft Office for maps. (Tr. II, 47). Harris first took AutoCAD classes at Southwest Virginia Community College in 1992-93.⁸ (Tr. II, 47, 63). He took four or five classes related to the program. (Tr. II, 63). This job was Harris' first using AutoCAD. (Tr. II, 47, 62). Prior to this, he had no mining experience and had not seen a mine map or mine plan. (Tr. II, 48-49). When he started with Respondent he was paired up with someone from the engineering department who had been there for several years to review and approve his work. (Tr. II, 62-63). He obtained a miner's card through the Safety Department. (Tr. II, 63-64).

⁸ He had an associate's degree in engineering from Southwest, a four-year degree from Bluefield State in civil engineering, and a master's degree from Virginia Tech in curriculum and instruction, specializing in distance learning. (Tr. II, 61).

Harris reviewed the December 2008 map (GX-11), which he helped certify. (Tr. II, 76). They began to prepare such a map about a month before it was due, perhaps in this case starting in October 2008. (Tr. II, 76-77, 81). They update older maps with new ventilation controls. (Tr. II, 77). They would take part of the map underground and take new air readings and consider anything that needed to be changed. (Tr. II, 77). The people underground then sent that information to the engineering department where they would put the new air readings on the mine map and make the corrections. (Tr. II, 77-78). Then they would use checklists (RX-1 and RX-2) to ensure that all of the CFR requirements were met. (Tr. II, 78). This process would include several people at the mine, the draftsman, and drafting personnel. (Tr. II, 78-79). Several copies would be reviewed and two or three checks would occur. (Tr. II, 79). At the end, Weaver would meticulously go over the checklist and map and then sign it. (Tr. II, 79-80).

Weaver signed the maps until he left, then Danny Price took over that responsibility. (Tr. II, 86). Price was also responsible for the underground survey for the mine maps. (Tr. II, 86). Price was a seasoned engineer who had done a lot of survey work in the county. (Tr. II, 87). Price used the same process of sending out maps with minor stylistic differences. (Tr. II, 87). Price died in fall of 2012. (Tr. II, 88). After Price, John Kegley certified the maps for a while and now Wayne Holley and Pat Atrip review the maps.⁹ (Tr. II, 86-87).

The December 2008 map was covered in “yellow stick-ons.” (Tr. II, 81). When MSHA reviews a map, they request changes and Harris marks those corrections so future maps will more accurately reflect what MSHA requires. (Tr. II, 82, 84). Respondent learns about these corrections during a two to three hour discussion with an inspector after the map is completed. (Tr. II, 83). Harris would later make the changes electronically. (Tr. II, 84). These meetings generally dealt with ventilation, but MSHA also had to be notified of all the wells. (Tr. II, 96-97). Harris conceded that MSHA did not have access to Respondent’s well files and he did not know if they surveyed the wells. (Tr. II, 96). Harris was not aware of the process MSHA used to evaluate maps. (Tr. II, 97).

When Harris began working for Respondent, the mine files were large and divided into three separate documents. (Tr. II, 49-50, 64). The mine file included the works, ventilation, and the stoppings. (Tr. II, 64). Harris worked to combine these into one document during the summer of 2008. (Tr. II, 50-52). Weaver did not give a direct order to merge the files, but he was working on the project and wanted the files combined. (Tr. II, 50). As they worked, they installed new computers and upgraded the system to manage the larger file. (Tr. II, 50). Harris was the one responsible for combining the files. (Tr. II, 50). The task was not very large and it took about a day. (Tr. II, 50-51). Harris did not recall the computer malfunctioning during the process. (Tr. II, 51). During the merge, Harris did not believe anything duplicative was deleted; they were just combined together. (Tr. II, 51). He described the process as lining up three pieces of a puzzle to make one. (Tr. II, 51). After they combined the file they double-checked it. (Tr. II, 52-53). The gas wells were not part of the mine file; they were separate and not consolidated.

⁹ The court reporter’s notes indicate that she was not positive if Wayne Holley and Pat Atrip were the correct names. I include the names as recorded because the record was not changed to reflect any correction.

(Tr. II, 64-65). The well files were only combined into one file after the accident. (Tr. II, 93). Before that, the gas well file was only altered by adding more gas wells. (Tr. II, 93).

The gas well at issue in this case was on the map certified in April 2008, but not on the next certified map in December 2008 or any map thereafter. (Tr. II, 53-54, 75). From December 2008 through February 2011 six 75.1200 maps were made. (Tr. II, 54-55). Harris cannot say how the well disappeared; he just knows that it was there in April and gone in December. (Tr. II, 88-89).

When Harris began to work on the December 2008 map, there were approximately 430 wells in the gas well file. (Tr. II, 66). There were about 8,000 gas wells at all the Dominion sites. (Tr. II, 66-67). To plot gas wells, well files must be “externally referenced” onto the map. (Tr. II, 65, 80). The gas wells were like an electronic transparency sheet or an animation cell. (Tr. II, 65-66). Generally, when someone using the AutoCAD presses “delete” with respect to a well, all of the wells disappear. (Tr. II, 80). “It’s an all or none thing.” (Tr. II, 80). Weaver was adamant regarding his policy that gas wells were not to be removed and that everything was to stay on the map. (Tr. II, 68-69, 94-95). However, the file was not password protected; anyone with AutoCAD privileges could access it. (Tr. II, 93-94, 104). It was possible to erase a well from the gas file, but to do so an AutoCAD user would also have to delete the barriers around it and the name. (Tr. II, 94-95). In order to highlight the multiple data points related to the gas well at once, a user would have to highlight all of the relevant data. (Tr. II, 95). Once a gas well was deleted, the data would be gone from the overlay and only exist on the topographic sheet. (Tr. II, 96).

The only thing cross-referenced against the December 2008 map during certification was the Buchanan County topographical map. (Tr. II, 56, 74). Respondent began using the topographic map when Harris started there. (Tr. II, 72). The topographic map for the area was called “H-11” and it was a grid that corresponded to Dominion 36 (RX-3). (Tr. II, 72-73). The map was used to check surface structures, creeks, and hollows. (Tr. II, 56-58, 72-73). He used the map to determine the amount of cover and, therefore, the size of pillars. (Tr. II, 73-74). Sometimes they would also survey the surface. (Tr. II, 57). Respondent’s maps always had more wells than the County map because it had more data: preview locations, applications, and drilled wells. (Tr. II, 57-58). Sector H-11 did not show the well at issue. (Tr. II, 58, 74). A well would be marked with the word “well” and a black circle. (Tr. II, 74-75).

At hearing, Harris was aware that a “shape” file with gas well coordinates was available from the Division of Oil and Gas, but in 2008 he was not. (Tr. II, 55, 70). Price never mentioned this file, despite the fact that it surveyed wells for CNX. (Tr. II, 88). He learned about the file from Daniel Kessner, who works in Virginia’s mapping department. (Tr. II, 70-71). The file can be downloaded, but it is not easy to access. (Tr. II, 55). There is no link on a website or an easy URL. (Tr. II, 55-56, 71). There is a long path that must be typed. (Tr. II, 56).

Harris learned there was an omission on the map when Roger Van Dyke called into the Vansant office and said he believed they hit a gas well. (Tr. II, 67). Harris immediately went to the engineering department to see what happened. (Tr. II, 67). He was surprised and shocked to

find a gas well was omitted and was very concerned about the safety of those underground. (Tr. II, 67-68). He immediately checked to see where the well was located, if it was active, and if it was “a cover hole.” (Tr. II, 68). The engineering department checked all 8,000 wells at 36, 26, 30, and the contract mines. (Tr. II, 69, 91). They did not find any more missing wells, though there was one in the well file that was not in the shape file. (Tr. II, 69, 71-72, 91). After the accident, Respondent considered creating a program to proceed forward. (Tr. II, 58). Harris now also checks the shape file often to cross-reference it with his files. (Tr. II, 71).

Harris was familiar with Bobby O’Quinn’s notes (GX-12). (Tr. II, 59). O’Quinn works in Harris’ department. (Tr. II, 89). O’Quinn was part of the investigation of the gas well plotting. (Tr. II, 59). The investigation looked at the process of plotting gas wells, precautions to use going forward, and new procedures. (Tr. II, 59). O’Quinn looked to see how the well was deleted. (Tr. II, 59). O’Quinn’s notes represent only his theories on the issue. (Tr. II, 59-60, 92). He disagreed with O’Quinn that the well was lost because of personnel changes. (Tr. II, 89, 92). He felt that all of the employees were well trained and had college courses on AutoCAD. (Tr. II, 90). Property engineer Mike Lewis’ retirement in September 2008 did not cause the gas well to disappear. (Tr. II, 90). The new draftsman, John Mullins and Joe Rose, were both trained and went to vocational school. (Tr. II, 91). However, Harris was only expressing his opinion on O’Quinn’s report; he did not investigate the gas well incident. (Tr. II, 92). Also, Harris never spoke with John Hughes regarding his investigation. (Tr. II, 104).

During the time Harris was in the engineering department, Respondent received citations for “inaccurate maps.” (Tr. II, 97). However, he could not recall specifics. (Tr. II, 103). He also did not recall a 104(b) order for failing to submit accurate maps. (Tr. II, 103).

d. Testimony of Roger Van Dyke

At the time of the hearing Roger Van Dyke was employed in Jewell’s engineering department. (Tr. II, 110). He had worked there for 32 years, including in 2008. (Tr. II, 111). He had used AutoCAD since it hit the market in 1988 or 1989. (Tr. II, 126). He has been working in mine mapping and surveying for about thirty years. (Tr. II, 126). The engineering department included chief engineer Weaver, Van Dyke, O’Quinn, the property man, an environmental man, a draftsman, an environmental engineer, and Harris. (Tr. II, 112). Harris was hired in part because of his AutoCAD experience. (Tr. III, 112). He had no mining experience. (Tr. II, 112). Harris was one of the most computer literate people they could have hired and had worked at a construction company as a civil engineer. (Tr. II, 112).

Shortly after Harris came on board there was a project to update mine maps. (Tr. II, 112-113). They surveyed spads underground to ensure they were on line with the mining. (Tr. II, 113). They also had surface surveys to find and record cores, gas wells, and houses. (Tr. II, 113). Harris headed up the effort to combine the three AutoCAD mine map files into one. (Tr. II, 113). The gas wells were maintained on separate files at the time and were overlaid onto the mine maps. (Tr. II, 114). The mine maps did not have any gas wells on them. (Tr. II, 114).

Van Dyke expressed concerns about the file project to Weaver and Stacy. (Tr. II, 114-115). Van Dyke was friends with the people in the mine. (Tr. II, 115). He felt that given the

sizes of the files that they needed to be careful. (Tr. II, 115). He believed that Weaver was a professional and worked through those concerns. (Tr. II, 115, 128). They were deliberate, did not rush, and checked on things. (Tr. II, 115, 127). He felt confident with the people on the project, their ethics, and their work habits. (Tr. II, 115-116). He also felt that Harris was the best AutoCAD user they could have. (Tr. II, 128).

Van Dyke was aware that Respondent mined into a gas well in 2011. (Tr. II, 111). He did not know why the well was deleted. (Tr. II, 118, 128-129). He had never experienced a situation when one well disappeared at any time before 2011. (Tr. II, 127). They did not believe a gas well would disappear because it had never happened before. (Tr. II, 127). At first he thought the well disappeared because the map files were on business computers that occasionally crashed. (Tr. II, 118-119). It was the policy of the engineering department that absolutely nothing was taken off the map. (Tr. II, 128). That was why the file was so big and why Van Dyke was concerned. (Tr. II, 128). He also noted that when something is deleted on a computer file, there is no record unless there is a backup. (Tr. II, 119). He does not know of any complaints people made about the computers or the AutoCAD or lawsuits. (Tr. II, 120).

The missing well was located on the April 2008 mine map. (Tr. II, 111, 120). There was no reason to cross check the April map with the December map as they were not mining in the same area. (Tr. II, 118, 120-122). Van Dyke conceded that if they compared those maps they probably would have seen the missing well and avoided the accident. (Tr. II, 121-122, 124). But even if they had compared the maps, the focus would have been on the future projections. (Tr. II, 125). They may have seen the issue on a five-year projection map, but it would depend on where the mining was projected. (Tr. II, 125-126). The well was also not on the aerial photography. (Tr. II, 118). They had no reason to do any checks beyond normal diligence. (Tr. II, 117-118).

The Virginia Division of Oil and Gas maintains information and coordinates about gas wells. (Tr. II, 116). This file is a spreadsheet that is entered into AutoCAD. (Tr. II, 120-121). When someone pushes "update," it will add in the wells automatically. (Tr. II, 121). If they had the access to the shape file in 2008, when they updated the map the well would have returned. (Tr. II, 121). Van Dyke did not know if they had this information in 2008. (Tr. II, 116). In his deposition Van Dyke said he was familiar with the shape file, but in fact he was talking about an incident in the 1990's where an engineer named Doug Mullins from the state came and scanned old mine maps and sent them to the state. (Tr. II, 116). His belief that he was aware of the shape file was a misunderstanding. (Tr. II, 116-117). If he had been aware of the shape file, the missing well would have been present and the hearing would not have occurred. (Tr. II, 117).

Intersecting a gas well can cause loss of life and catastrophic explosion. (Tr. II, 122, 127-128). Any wells in the vicinity of the mine are considered a danger and are not taken lightly. (Tr. II, 122-123). At the time of the hearing, Respondent would send surveyors to the surface with the projections to make sure they do not hit a gas well again. (Tr. II, 123). Van Dyke wishes they had done this at the time. (Tr. II, 123). When Van Dyke heard about the incident he was "pretty tore up" and "devastated" because the incident affected his job, his friends, and his community. (Tr. II, 126-128).

e. Testimony of John Hughes

At the time of the hearing Inspector John Hughes worked at the Vansant office of MSHA as a coal mine inspector, a position he held for about eight years. (Tr. II, 130). He was an authorized representative, meaning he could conduct inspections and investigations and cite violations. (Tr. II, 130-131). MSHA has an extensive training program at the Beckley Mine Academy involving around two years of three-week modules. (Tr. II, 131). His training included mine accident investigations. (Tr. II, 160-161).

Before being hired by MSHA, Hughes worked in the mining industry from December 1991 through April 2005 as an underground miner. (Tr. II, 131). He was certified as a general mine foreman, electrician, emergency medical technician, hoist operator, shot firer, and solid blaster, but most of those certifications expired. (Tr. II, 132). He was a high school graduate and had never taken engineering or college courses and was not an engineer. (Tr. II, 153, 160). Engineering and map certification are not his areas of expertise. (Tr. II, 160).

In 2011, Hughes had conducted five to seven accident investigations. (Tr. II, 132). In February 2011 he was involved with the instant accident investigation. (Tr. II, 132). On the day of the incident, Hughes had been at another mine site and was called by Supervisor Donnie Phillips. (Tr. II, 133). Phillips requested Hughes get an emergency sampling kit (pumps, multi-gas detectors, and other items) and bring it to the mine site. (Tr. II, 133).

The first action MSHA took on site was to issue a K-Order and a 107(a) imminent danger Order. (Tr. II, 134). The 107(a) Order was issued because a foreman told the company that there was an 8.9% methane mixture; an amount in the explosive range. (Tr. II, 134). The explosive range is between five to 15 percent, with 10 being the most violent. (Tr. II, 134). A 103(k) Order is issued any time there is a reportable accident and constitutes a withdrawal order. (Tr. II, 134-135). The purpose of a K-Order is to secure the scene until MSHA investigates and makes the area safe. (Tr. II, 135). After Respondent struck the well they evacuated all 34 miners. (Tr. II, 133). The K-Order was modified many times after the company submitted action plans regarding how to re-enter the mine, return to the area where the accident occurred, resume production, and get the mine back to normal. (Tr. II, 136-137). These actions occur in steps approved by the district manager. (Tr. II, 137). The K-Order was terminated when the investigation was complete and the mine got back to normal. (Tr. II, 137).

When Hughes arrived at the mine, he met Phillips and Inspector Keith Ray, traveled to the West Virginia Portal, and set up a sampling station at the fan. (Tr. II, 133, 137-138, 169). The highest reading he found was one-tenth of one percent methane. (Tr. II, 170). The air reading at the portal was 197,400 CFM, which is normal. (Tr. II, 173). The velocity was 1,645 which is also normal. (Tr. II, 173). The oxygen was 20.4%, which is good. (Tr. II, 173-174). Respondent was not cited for the ventilation or for methane. (Tr. II, 174). He did not know the readings at the actual accident site, but no citations were issued for air at the face. (Tr. II, 170).

Hughes did not go underground to investigate the well but his supervisor, Dale Hess and Inspector Jason Skiens did so with company officials. (Tr. II, 143, 163). Hughes role in the investigation was to put a report together (GX-19) and issue the violations. (Tr. II, 134, 144).

The report dealt with the facts surrounding the investigation, including the events and company information. (Tr. II, 144). It included a description of the accident and a conclusion on the cause of the accident. (Tr. II, 144).

Hughes began the investigation on March 2 by interviewing the miners present on the section during the accident. (Tr. II, 138, 141-142). He interviewed seven people including James Stacy, Kevin Stiltner, Brian Cyphers, Robert Clark, Jeff Helbert, and Craig Stollings. (Tr. II, 140). The miners were interviewed in the bathhouse with company representatives Greg Ratliff, Allen Hilbert, and J.P. Richardson present. (Tr. II, 140-141). The interviews were recorded and he reviewed them for the hearing. (Tr. II, 142-143).

In the interviews, Hughes learned the miners were cutting into the number four heading and cut into an active gas well releasing 8.9% methane, as observed by the miner's methane monitor. (Tr. II, 142, 172). Hughes did not believe that the monitor would be in default at 8.9%. (Tr. II, 164-165). The miner operator stated that the miner shut down after the ripper heads struck the pipe and was thrown back. (Tr. II, 142, 152). Hughes had no reason to disbelieve the miners when they said it gassed off, but he did not see it occur. (Tr. II, 171-172). The miner was supposed to shut down at 1.5% methane. (Tr. II, 170-171). The regulations state 2.0%, but most mines set it at 1.5%. (Tr. II, 171). Hughes did not look at the calibration readings or review the miners' owner's manual, and he was not familiar with the manufacturers specifications for the miner, but he was familiar the methane monitor.¹⁰ (Tr. II, 164-166). Hughes made no attempt to understand how the monitor worked. (Tr. II, 166-167).

In addition to the miner, James Stacy reported an 8.5% methane reading. (Tr. II, 142). Clark also saw his hand-held detector go off. (Tr. II, 142). After the readings, the crew then immediately and properly evacuated the area. (Tr. II, 172). MSHA then evacuated the mine and started the investigation. (Tr. II, 172).

Hughes assumed the continuous miner sprayed water, but none of the miners said so in the interviews and he did not ask. (Tr. II, 177). Someone, probably Clark, stated that the well casing produced water when it was cut into and sprayed. (Tr. II, 177-178).

The well had three pipes, an 11-inch pipe, a 7-inch pipe, and a 3-inch pipe, all of which were metal. (Tr. II, 151-152). The teeth on the miner were also metal and cut through the two outer casings and scratched the inner casing. (Tr. II, 152). He saw the well casings in photographs but not in person. (Tr. II, 164).

On cross examination, Hughes conceded that part of accident investigation is speaking to all parties that may have relevant knowledge. (Tr. II, 161). In his March 7, 2011 notes, Hughes wrote "the operator failed to establish policies, practices, or procedures that would keep track of the gas well." (Tr. II, 176). He determined this without talking to the engineers; it was obvious because an accident occurred. (Tr. II, 162, 176). There was no relevant information to gather

¹⁰ Hughes was ambivalent about whether he had read the manual for the methane monitor, first saying he had done so and then saying he had not. (Tr. II, 165). He then conceded he was not sure what type of monitoring system the miner used. (Tr. II, 165).

from the engineers as the facts were known. (Tr. II, 162). He also did not interview the engineers because he would not have understood what they said about the AutoCAD. (Tr. II, 161-163). Further, a policy that prevented intentional deletion of the wells would not be a mitigating factor. (Tr. II, 176-177).

Hughes also reviewed the 372 and 1200 maps Respondent filed with MSHA as part the investigation. (Tr. II, 141). The maps showed that the well went missing from the operator's records in 2008 and were present on the map as early as 1994. (Tr. II, 143). Hughes interviewed Superintendent Rick Lawson and Foreman Allen Hilbert and they were unaware the well was deleted. (Tr. II, 169). Respondent's employees were surprised it was missing. (Tr. II, 169). However, Hughes did not believe it was his job to find out how the well was deleted. (Tr. II, 178-179). Nothing in Hughes' investigation changed the fact that Respondent mined into a gas well. (Tr. II, 179). "I can say, sitting her two years later, that the company don't know how they lost the thing. And that worries me more than me knowing." (Tr. II, 168).

As a result of this investigation, and the fact that the company was already on the "D-Sequence," three D-Orders were issued.¹¹ (Tr. II, 144-145). Order No. 8179158 was issued for failure to maintain a three-hundred-foot barrier around the gas well. (Tr. II, 145-146, 149-150). MSHA requires these barriers to keep miners away from the methane. (Tr. II, 150). Operators could petition the district manager under Section 101(c) to mine closer if the method was as safe as a barrier. (Tr. II, 150-151). That was not done here before Respondent mined into the well. (Tr. II, 151). The Order was marked as "highly likely" to occur before the operator could abate because it was a miracle that 34 men were not killed. (Tr. II, 146). The Order was marked "fatal" because a machine cutting into a gas well would likely cause a fatal explosion or irrespirable condition. (Tr. II, 146-147). However, he conceded there was no ignition here. (Tr. II, 172-173). The Order was marked as "highly negligent." (Tr. II, 147).

Order No. 8179159 was issued for the failure to include the gas well on the 1200 map. (Tr. II, 147-148). The 1200 is the wall map that is updated daily or after every shift. (Tr. II, 148). This map was certified and submitted to MSHA. (Tr. II, 148). Hughes marked this citation as Highly Likely, Fatal, S&S, and high negligence for the same reasons as Order No. 8179158. (Tr. II, 148). Section 75.1700 of the regulations requires that operators locate, track, and map gas wells on the wall map. (Tr. II, 149).

Order No. 8179160 was issued for the failure to include the gas well on the 372 ventilation map. (Tr. II, 148-149). The 372 map is made pursuant to a newer regulation and requires more information than the 1200 map. (Tr. II, 149). Hughes marked the citation's gravity and negligence the same as the other citations. (Tr. II, 149).

¹¹The D-Sequence occurs when there has been a violation of a mandatory standard that is S&S and an unwarrantable failure. (Tr. II, 145). The first issuance is a d(1) Citation and if the company goes 90 days without another D issuance, then the D-Sequence ends. (Tr. II, 145). If they get a d(1) Order in conjunction with the (d)(1) Citation, then there must be a clean inspection before the mine comes off the D-Sequence. (Tr. II, 145). From February 11 to February 24 there had been three D-Orders at the mine, placing the company on the D-Sequence. (Tr. II, 145).

Hughes issued the Orders as “high” negligence without input from MSHA. (Tr. II, 162-163). MSHA knew what he would issue, but he was not ordered to issue anything. (Tr. II, 163). Hughes believed Respondent had plenty of reasons to know the violation of the mine map standard occurred. (Tr. II, 167). He did not know of anyone who had specific knowledge of the condition, but management was responsible for safety and for keeping the map up to date and the wells tracked. (Tr. II, 167-168). He conceded that that he did not have any idea of the practices and procedures of the engineering department in certifying maps. (Tr. II, 168).

The unwarrantable failure designations were not just because the well was missing, but because the careless tracking of the well could have led to deaths. (Tr. II, 174-175). Further, the projections were sent in without the well. (Tr. II, 175). The operator did not have a fail-safe system to keep the well on the map. (Tr. II, 175). There is nothing more important at the mine site than to map wells and prevent intersections. (Tr. II, 175).

f. Testimony of Gary Hartsog¹²

Gary Hartsog attended Woodrow Wilson High School and West Virginia University. (Tr. III, 12). He received a bachelor’s degree in elementary education in 1976, a bachelor’s degree in mining engineering in 1979, a master’s degree in mining engineering in 1985, and a master’s degree in business administration in 2005. (Tr. III, 12-13). Hartsog became a professional engineer in 1984 in West Virginia. (Tr. III, 14). He passed the mining engineering examination on his first attempt. (Tr. III, 14-15). He has since been certified in 11 other states. (Tr. III, 14). He is a professional surveyor with an underground endorsement. (Tr. III, 14).

Hartsog began his mining career in May of 1976 as a surveyor (or “rodman”). (Tr. III, 13). He also performed drafting and preparation of maps and checks surveys. (Tr. III, 13). From 1976 to 1987 he worked for Eastern Associated Coal Corporation. (Tr. III, 13). He then worked for Peabody from 1987-1991 when it acquired Eastern Associated. (Tr. III, 13). During that time he worked as a rodman, draftsman, mining engineer, division safety inspector, division engineer, chief engineer at a coal mine, and general troubleshooter. (Tr. III, 13).

In September, 1991 Hartsog resigned from Peabody to start Alpha Engineering, a consulting engineering firm that provides engineering services. (Tr. III, 13-14). Hartsog was the owner of Alpha Engineering at the time of the hearing. (Tr. III, 14). Alpha mostly provides services in the coal industry but not exclusively. (Tr. III, 14). When Alpha opened, Hartsog was the only employee but by the time of the hearing it employed 14 people. (Tr. III, 19). There were two other professional engineers and one professional surveyor. (Tr. III, 19). Alpha currently does some work for Respondent. (Tr. III, 134). They work for the same engineering department that is at issue in the proceeding. (Tr. III, 135).

Hartsog certified his first mine map in 1984 and that process has remained an important part of his work in all of the position he has held since. (Tr. III, 15). At the time of the hearing

¹² Hartsog was accepted as an expert witness, with the caveat that his testimony was not dispositive to be considered as an expert. (Tr. III, 19).

Hartsog would certify anywhere from six to fifty maps per year. (Tr. III, 15). He routinely certified 75.1200 maps for clients. (Tr. III, 15-16, 91).

In 1980 Hartsog began plugging and mining through gas wells. (Tr. III, 16). He helped write the first 101(c) petition for multiple gas well cut throughs, a petition that is now a template. (Tr. III, 16). He has also searched for wells, done well audits, located wells on the surface, and plugged them underground after accidental intersections. (Tr. III, 16). There are between 70-80,000 gas wells in Virginia and hundreds of thousands in West Virginia. (Tr. III, 16-17). Hartsog researched Virginia gas wells while preparing for professional seminars. (Tr. III, 17). One section of his seminar discusses searching for and finding gas wells, different ways of mapping wells, different ways to permit, and different ways to treat gas wells. (Tr. III, 17).

Hartsog was first exposed to AutoCAD between 1988 and 1990. (Tr. III, 17). When he started Alpha, one of his first steps was to buy “generic CAD,” a less expensive program, and begin a tutorial. (Tr. III, 17-18). Over the years he purchased AutoCAD and ServeCAD (which is specific for mining) and used them daily. (Tr. III 18).

Hartsog had been an expert witness three or four times in the four years before the hearing and 15-20 times in the last twenty years. (Tr. III, 132-133). He had helped with the investigations at Aracoma, Upper Big Branch, and Sago. (Tr. III, 133). He “mostly” testified for the coal companies, occasionally machinery or land companies. (Tr. III, 133). He sometimes agreed with the regulatory agency, but he was not sure how many times. (Tr. III, 134). Once he takes a position in opposition to a client, they tend not to call him as an expert. (Tr. III, 134).

Respondent’s counsel retained Hartsog to review company records and give an opinion regarding the law and practice and write a report (RX-5). (Tr. III, 20-23). Hartsog listed the items he reviewed in Appendix X. (Tr. III, 20-21). After he wrote his report, he spoke with people involved in the incident and searched the State website for well sites. (Tr. III, 20-21). He spoke with Foreman Shortridge and people in the engineering department, specifically Van Dyke, Weaver, and Lacy. (Tr. III, 21). Lacy was very familiar with the continuous miner monitors. (Tr. III, 21). Hartsog also reviewed the MSHA investigative record, some additional notes and documents. (Tr. III, 22). He also listened to the testimony in the courtroom. (Tr. III, 22).

In his investigation, Hartsog learned that as the miner moved into place for its first cut, it hit a pipe which turned out to be outer casings of a gas well. (Tr. III, 23). The danger of mining into a gas well is a release of water or methane, though water is usually limited. (Tr. III, 100). The foreman and the miner operator were standing next to one another and miner operator was the first to realize they hit something. (Tr. III, 27). There was a considerable amount of water released and some methane detected. (Tr. III, 23). The miner shut down as it was designed to do but the monitor stayed on. (Tr. III, 23, 28). When the monitors started to sound, the foreman immediately gathered people on the section together, shut down the power, and evacuated the area. (Tr. III, 23, 27-28, 127-128). The mine did everything by the book. (Tr. III, 28). MSHA did not allege that the company acted improperly after the accident. (Tr. III, 132).

A monitor is a device that is designed to shut a machine down if it reaches a certain level of methane. (Tr. III, 29). Monitors are designed to give a warning at one percent and then shut down the miner at two percent, but Respondent's miner was set to shut down at 1.5%. (Tr. III, 29-30). Hartsog was not sure if the miner here shut down because there was 1.5% methane or because the monitor was completely underwater. (Tr. III, 30, 127). However, several handheld monitors went off for some reason other than water. (Tr. III, 127). It could have been methane or some other, possibly explosive, property in the natural gas. (Tr. III, 127). Hartsog did not agree with Hughes that there was an "inundation" of methane. (Tr. III, 31). He believed there was some methane, as shown by the monitors, but it was immediately diluted and rendered harmless and the inundation prevent worked correctly. (Tr. III, 31-32, 127, 129).

According to the foreman there was more than enough air on the section. (Tr. III, 29). The MSHA inspector's notes listed 6,300 CFM, which is about 2,000 CFM more than required. (Tr. III, 29). There was curtain in the area that directed air to the last open break where they were mining. (Tr. III, 30). This was correct under the ventilation plan. (Tr. III, 30-31).

The shuttle car operator was 70 feet away and said his methane monitor showed 8.9%. (Tr. III, 28, 39). Stiltner stated that he saw an 8.9% reading but could not say whether it was flashing or if there was an indicator light. (Tr. III, 128). This is the only first-hand reading in this case. (Tr. III, 129). The explosive level of methane is between 5-15%. (Tr. III, 104, 128). However, Hartsog did not believe there was an 8.9% reading of methane at the site. (Tr. III, 33). While he believes that the miner saw "8.9%" on the display, the machine is not designed to detect levels of methane above 2.5%. (Tr. II, 38, 128). It is not calibrated for higher amounts and is not accurate to read them.¹³ (Tr. III, 38, 42, 103). The monitor may show a number over 5%, but may not be accurate. (Tr. III, 102-103). It is possible, but very unlikely, that the monitor could read 8.9% methane accurately. (Tr. III, 103, 105). When he stated it could read this amount in his deposition he was mistaken, he later learned it was very unlikely. (Tr. III, 107). He conceded that there was no proof it could read this amount because he did not run tests. (Tr. III, 107).

Methane levels greater than 5% will start to burn the sensor. (Tr. III, 38). Further, water will short out the monitor and Shortridge stated that water splashed into the spotter. (Tr. III, 33, 39). Finally, a monitor tests the air by burning a small amount of it and if there is ethane, propene, or butane present, the gas will burn hotter and give false high methane readings. (Tr. III, 38-39).

Hartsog reviewed the owner's manual for the 140B remote methane monitoring system (RX-6). (Tr. III, 34). Page 2, under "Digital Readout," states, "The digital readout will continue to show increasing methane concentrations up to about five percent, at which point both digits will begin flashing on and off. The flashing will continue as long as the methane concentration remains above five." (Tr. III, 40, 104). It also says a yellow light comes on at 1% and a red

¹³ A monitor is calibrating by setting it at zero with no methane and then taking a known calibration of gas, which in this case was 2.5%, and put a cup over the top of the monitor head. (Tr. III, 42-43). This gives a span of 0-2.5%. (Tr. II, 43).

light at 2%. (Tr. III, 40-41). Page 3 under troubleshooting lists several displays that indicate re-calibration is necessary. (Tr. III, 41-42).

The volume of methane necessary to show 8.9% would be 140 cubic feet (0.089 multiplied by 6,300 CFM).¹⁴ (Tr. III, 43). Hartsog did not believe there was never anything close to that here. (Tr. III, 43). There was no definitive and reliable reading of methane being that high. (Tr. III, 43-44). They just know there was some level over 1% for some period of time, because several personal monitors went off. (Tr. III, 44). When asked if they had higher readings, the miners either did not know or did not look. (Tr. III, 44).

Hughes testified that Jamie Stacy, the miner operator, said he saw an 8.5% reading on the continuous miner. (Tr. III, 39, 105-106). Hartsog had never heard anything about this until Hughes' testimony. (Tr. III, 39, 128-129). Hughes interviewed all the miners on the section and taped the interviews. (Tr. III, 106). Hartsog had read Hughes notes and they only indicated the numbers from the shuttle car. (Tr. III, 40). However, he conceded that he did not listen to the entire recording of Hughes' interview with Stacy. (Tr. III, 106-107). Hughes notes did not mention the 8.5% amount. (Tr. III, 106).

There were two readings after the incident, a 0% reading with a legal check and a 0.2% reading against the pipe. (Tr. III, 130). Hartsog reviewed Keith Ray's inspection notes from February 24, 2011 and on page 10 those notes state, "Talked to J.P. Richardson, He informed me that he had just come from the gas well site. He stated the well was still producing CH₄ at low pressure, at ninety-eight percent pure methane. Left mine property and returned to office." (Tr. III, 130-131). Hartsog knew the well was still producing methane when he wrote his report. (Tr. III, 131). These notes show that it was producing as late as 6:00 p.m. on the 24th, long after the accident occurred, but he does not know if it was after Respondent asked the gas company to turn off the well. (Tr. III, 131, 135). Hartsog never interviewed J.P. Richardson, but he gave no credence to that percentage as to what the well was actually producing. (Tr. III, 131). Generally, it is hard to say what the constituent parts of a particular gas are and 98% methane would be very high considering it was natural gas. (Tr. III, 135-136). Further, that percentage of methane was alleged to be in the production string, which was not breached. (Tr. III, 136).

According to a document found at page 3 of Hartsog's report, the well was drilled in 1957 and went down roughly 5,000 feet. (Tr. III, 23-24). The well had multiple casings, three of the casings went through the coal seam, and two stopped above the coal seam. (Tr. III, 24, 100). The casings are designed to provide a warning. (Tr. III, 100). The annulus, or open area between the casing and the hole, was filled with ground water that came out when the well was intersected. (Tr. III, 26, 105). This is typical for a drilled well in 1957. (Tr. III, 26). He did not know how much water came out. (Tr. III, 104-105). Shortridge said the water came out over the boom of the miner and the foreman, fifteen feet away, said it came out of the well. (Tr. III, 105). State gas well production statistics showed that the well produced 25-CFM of gas, which is very

¹⁴ The formula suggested by Hartsog in his testimony is unclear. The equation $0.089 \times 6,300$ equals 560.7, not 140. However, it is not clear if there are additional variables that he did not discuss in his brief testimony on this matter.

low. (Tr. III, 25). A typical well produces 1-2,000 CFM. (Tr. III, 25). However when the well disappeared and when it was struck, they did not know the production statistics. (Tr. III, 124).

The cut through did not intersect the production stream. (Tr. III, 25). Hartsog first believed that the continuous miner had cut through two casings and left two uncut, however, he later learned that there were two casings cut and the production string was scratched but not cut. (Tr. III, 25-27, 131-132). Because the production string was not breached, the methane came from the coal seam and from the natural gas formations below. (Tr. III, 32). Coal-bed methane is more pure than natural gas methane and the two kinds can affect spotters differently. (Tr. III, 32-33). Natural gas methane will have ethane, propane, or butane in it. (Tr. III, 32-33).

During his investigation, Hartsog spoke with Weaver about Weaver's methods, concerns, background, past, time as chief engineer, mining experience, hiring, and goals. (Tr. III, 44-45). Hartsog often performs the same tasks as Weaver, including certifying maps. (Tr. III, 46). In order to certify a map a signature and stamp are affixed. (Tr. III, 46). Competent engineers, including Weaver, take this task seriously. (Tr. III, 46). No map is perfect and they often rely on the maps certified earlier by other engineers. (Tr. III, 46-47). Hartsog worked at several old mines and relied on work done a hundred years in the past. (Tr. III, 74-75). Hartsog has found errors on maps that he has certified. (Tr. III, 76).

Hartsog spoke with and sat in on the testimony of Harris, Van Dyke, and Weaver. (Tr. III, 77-78). He felt he had a good understanding of the process they engaged in before certifying the December 2008 map. (Tr. III, 78). The process that Weaver used is typical and done in the way that Hartsog teaches in seminars. (Tr. III, 78). They printed out a map and went over it, they put airways in color, they checked stoppings, and they sent it to the mine to check at the actual sites. (Tr. III, 78-79). Respondent used USGS quad sheets to "ex-reference" well information and never had any problems. (Tr. III, 79-80). The use of the topographical maps as a point of reference was also a good practice to double check surface features like wells, structures, and creeks. (Tr. III, 81-82, 122). The topographic map was accurate, though not for all gas wells. (Tr. III, 123).

However, somewhere between April and October 2008 one of the wells disappeared or was deleted. (Tr. III, 80, 108). The gas well was on the map when Weaver took over the engineering department. (Tr. III, 107-108). The December 2008 mine map was never checked against an old map to ensure all the gas wells were on it. (Tr. III, 121). It is not typical to double-check map items every six months; they only double-check the new information. (Tr. III, 80-81). Respondent had information from the State of Virginia and updated the map as they learned of wells. (Tr. III, 121). Weaver, Harris, and Van Dyke all testified that they did not know about the shape file. (Tr. III, 122). Respondent's methodology in preparing their maps seemed sound. (Tr. III, 69). At some point Respondent had double-checked a map against an old map but Hartsog did not know when or what map was used. (Tr. III, 123-124).

Originally gas well numbering was conducted by the state but in the 1970s the USGS created a national system. (Tr. III, 136-137). That system is called API, but Hartsog did not know what that stood for. (Tr. III, 137). The API number has a two-digit number indicating the state, a three-digit number for the county or jurisdiction, and a serial number. (Tr. III, 137). The

December map did not have the API number, it had company numbers. (Tr. III, 138). Hartsog crossed referenced the map with other information to get the missing well's API number: 2559. (Tr. III, 138-139). Hartsog believed that the number for this well would be in a filing cabinet or record. (Tr. III, 139). In the old days there would have been a record for each of the 420 wells in the file cabinet, but Hartsog did not ask about it. (Tr. III, 140). Any mining company that Hartsog had would have some written form of record for the gas wells on the property. (Tr. III, 140-141).

Hartsog spoke with Respondent's engineering department regarding their experience with AutoCAD and Harris was very experienced. (Tr. III, 67-68). Harris told Hartsog he used AutoCAD as a tool in bridge estimates, which is difficult and tedious. (Tr. III, 68-69).

The AutoCAD allows an engineer to work faster and be more precise, but it also allows little details like stoppings and arrows to disappear or move. (Tr. III, 47). It is a great program but it is very complex and this can create problems. (Tr. III, 66). It is helpful to have multiple people working on a map and looking at it. (Tr. III, 48). Often, the makers of AutoCAD and SurvCAD do not fix a problem when there are complaints, but instead patch it on the next software update. (Tr. III, 66-67). An AutoCAD customer does not purchase the software but instead a license. (Tr. III, 115). The licensing agreement will include a "hold-harmless" provision making a law suit difficult and so AutoCAD is used at your own risk. (Tr. III, 67, 116). AutoCAD does not have meaningful competition. (Tr. III, 67). There is no set standard for mine mapping the United States; it varies by company and region. (Tr. III, 67).

Hartsog believed the issue arose because Weaver never removed wells, even wells that were proposed but never drilled, so the map looked very cluttered with things not present. (Tr. III, 69-70, 112). No one deletes drilled wells, but this policy addressed more and sought to avoid accidentally removing a drilled well. (Tr. III, 112-114). Some companies will remove well permits that are rescinded or abandoned, but Respondent does not. (Tr. III, 114). Hartsog believed there were two possible reasons why the gas well disappeared. (Tr. III, 70-71). One is that it was accidentally erased. (Tr. III, 71, 110). He believed this was unlikely because it would take several keystrokes and people are trained not to do it. (Tr. III, 71, 110).

The second possibility is that there was a glitch or file malfunction with the AutoCAD. (Tr. III, 71, 110). Usually when there is a malfunction with AutoCAD it is caused by a corrupted file. (Tr. III, 71). A corrupted file can sometimes be corrected, but Hartsog did not know if Respondent tried. (Tr. III, 71). In his twenty years of experience, sometimes things happen with AutoCAD that cannot be explained. (Tr. III, 71). However, he had no evidence of any particular incident with the AutoCAD here. (Tr. III, 109-110). He did not believe anything malicious occurred. (Tr. III, 71-72). However, Hartsog did not know what happened to the well, he just knows it was deleted. (Tr. III, 109). Further, he did not say that AutoCAD malfunction was highly likely to be the cause; it could have been something else. (Tr. III, 111-112).

Hartsog had seen the O'Quinn's investigation but could not remember if O'Quinn stated the well was accidentally deleted and he did not speak with O'Quinn. (Tr. III, 114-115).

The Mine Act is a strict liability statute and Respondent could/should be issued a 75.1700 citation. (Tr. III, 101-102, 124). Hartsog dealt with 30 CFR Part 75 on a daily basis and was familiar with 75.1700, a basic mine mapping regulation. (Tr. III, 91). It requires that reasonable measures be taken to locate the gas wells and that a barrier be placed around the well of 300 feet. (Tr. III, 92). Reasonable efforts were made to locate the well, because they found it, probably based on a survey. (Tr. III, 92). However, they did not provide a barrier and the well was not on the mine map after April 2009. (Tr. III, 92, 102).

Sections 75.1200 requires a mine map and 75.372 requires a ventilation map. (Tr. III, 94). The ventilation map is almost identical to the mine map but requires more detailed information regarding ventilation and mine evacuation. (Tr. III, 94). Section 75.372(c) states “the mine map required by 75.1200 may be used to satisfy the requirements for the ventilation map, provided all the information required by this section is contained by the map.” (Tr. III, 95). The well was not on the ventilation map after April 2009. (Tr. III, 102).

No violations were issued for ventilation or for the miner malfunctioning. (Tr. III, 132).

Hartsog reviewed an article by Joshua Kardon, SE, presented at the OEC International Conference on Ethics in Engineering and Computer Science in March 1999 (RX-7). (Tr. III, 72). The second paragraph of that article states, “[t]he fact that an engineer makes a mistake that causes injury or damage, is not sufficient to lead to professional liability on the part of an engineer.” (Tr. III, 73). Further, “[w]hen one hires an engineer, one accepts the risk, and the liability of the professional making a mistake similar to mistakes other normally competent engineers make, using reasonable diligence and their best judgment.” (Tr. III, 73).

The article also notes that the local practices are part of reasonable care. (Tr. III, 73-74). It states, “[s]tandard of care is not a fixed standard in the way of other standards, such as standards for sampling and testing concrete. The standard of care of engineers varies with time, locale, and circumstances, and depends on the specific practice being examined.” (Tr. II, 77). Hartsog practices in Virginia and the greater Appalachian Region. (Tr. III, 74). To certify a map in Virginia, an engineer signs, “I the undersigned, hereby certify this map is correct and shows all the information to the best of my knowledge and belief required by the laws of this state.” (Tr. III, 75). An engineer relies on his best knowledge and belief because he is relying on his work, the work of others, and there is an understanding that he is “duplicating.” (Tr. III, 75-76). Unless an engineer has reason to believe something is wrong, it is proper to certify. (Tr. III, 76). If there is reason to believe something is wrong, then it must be checked. (Tr. III, 76).

As a professional engineer, Hartsog did not believe that there was high negligence in this case. (Tr. III, 83, 118). The mine map is probably the single most important document at the mine. (Tr. III, 119). Respondent exercised considerable care in the preparation of the maps. (Tr. III, 119). There are many steps in making a mine map and there was a huge amount of data to use. (Tr. III, 83). Certifying mine maps is an ongoing process and he believed that Respondent’s engineering department were constantly working, not just on gas wells but on workings, ventilation, environmental concerns, roof control, and abandoned mines. (Tr. III, 83). He has not learned anything that is troubling about Respondent’s conduct. (Tr. III, 118). The information he had when he made his report, and what he has learned since, indicates that

Respondent followed the standard of care. (Tr. III, 119-120). That includes the “work that was done” on the map in 2008. (Tr. III, 119-120). Hartsog read Van Dyke’s deposition about his concerns regarding the file update. (Tr. III, 120-121). However, he never spoke to Van Dyke before issuing the report. (Tr. III, 121).

Hartsog’s opinion that Respondent behaved properly may have been different if there had been an explosion. (Tr. III, 124-125). It would be the first such explosion and he would have to re-analyze the situation, but he did not know how his opinion would differ. (Tr. III, 125). He conceded that if an explosion had occurred, Respondent’s conduct would not have been any different. (Tr. III, 125). Other factors, including the number of persons affected and the fatality level, would change and he would have to analyze those changes. (Tr. III, 125-126).

Price Engineering was established for many years in the area and has worked in mining and civil engineering. (Tr. III, 84). They had a good professional reputation. (Tr. III, 84, 116-117). In fact, Price went to some of Hartsog’s seminars in the early 2000s. (Tr. III, 84). Price Engineering is headquartered locally in Honaker, Virginia and has 20 years of experience in the region. (Tr. III, 84, 117). The map certified by Price did not have the gas well. (Tr. III, 117). The fact that Price did not notice the well was missing does not excuse it. (Tr. III, 117). It simply shows that two different registered engineers did not catch the problem. (Tr. III, 117). “[I]t’s a little disturbing to me that he didn’t catch it. I wish he had.” (Tr. III, 117).

Hartsog would not agree that mining into a well is “very, very dangerous.” (Tr. III, 100-101). It is not the most dangerous thing that could happen in a mine, roof conditions can be more dangerous. (Tr. III, 101). He looked at other mines where similar events occurred. (Tr. III, 85). In December 2004 Newtown Energy mined into a gas well at Coalburg No. 1 Mine in Kanawha County, West Virginia. (Tr. III, 85). A week later they struck another well in the same mine. (Tr. III, 85). MSHA shut the mine down and ordered an audit. (Tr. III, 85). Alpha was hired to do that audit and MSHA relied on that audit, even citing it in the K-Order, in allowing the mine to get back to work. (Tr. III, 85-86). In that case the CAD operator had simply failed to put a new well permit on the map. (Tr. III, 86). Hartsog also reviewed MSHA’s website and spoke with “old hands” and no one could recall an incident in which there was an ignition or explosion from intersecting a gas well. (Tr. III, 88, 101). However, an ignition is always a possibility when mining. (Tr. III, 101). The miner bit and the pipe were both steel, which may have created sparks. (Tr. III, 126-127). Intersecting a gas well is common. (Tr. III, 88). However, he did not believe it was “minor thing” or that losing one well among many was “no big deal.” (Tr. III, 107-108). The number of wells is no excuse; they should have mapped them. (Tr. III, 108-109).

Hartsog did not believe that this event was likely to cause the death of 10 people. (Tr. III, 89). This is because the production of the gas well was not touched and there were precautions in place and no inundation or ignition was likely. (Tr. III, 89). In reaching this conclusion he relied on the airflow, the production of the well, the observations of the people, and the instruments immediately after the occurrence. (Tr. III, 89). The investigators only found 0.2% methane when they returned to the mine and the legal check showed 0.0% methane. (Tr. III, 89-90). Further he relied on the fact that people observed water in the area. (Tr. III, 90).

The conclusions in Hartsog's report represent a reasonable degree of professional engineering certainty. (Tr. III, 98-99). He would not have given an opinion that did not reflect that level of certainty.¹⁵ (Tr. III, 99).

g. Rebuttal Testimony of David Steffey

At the time of the hearing Dave Steffey was a mining engineer for MSHA, a position he held since June 1, 2005. (Tr. III, 148-149). He received bachelor's degrees in biology (1995) and mining engineering (1999) from the University of Kentucky. (Tr. III, 149). In 1999 he also received an "environmental option," a specialized program beyond the mining engineering degree. (Tr. III, 149-150). It included classes in chemistry and engineering and labs on microbiology and ecology. (Tr. III, 150). The engineering classes included maps, minerals processing. (Tr. III, 150).

Steffey started at Massey Energy as a summer student, went to Marshall Miller as a summer student, and then worked there full-time after college. (Tr. III, 160-161). He worked there for five months, but was not a licensed professional engineer. (Tr. III, 161). He then went to Sidney Coal Company for about three-and-a-half years, but not as a licensed professional engineer. (Tr. III, 161). He then worked for the Kentucky Division of Mines, but not as a licensed professional engineer. (Tr. III, 161-162). In that position he did some engineering tasks, like reviewing mine permits and permits for slurry impoundments. (Tr. III, 162). He did so under the supervision of a licensed professional engineer. (Tr. III, 162).

A professional engineer is someone who completed a degree in engineering, typically from an ABET (Accreditation Board of Engineering) accredited school. (Tr. III, 151). There is

¹⁵ In making his report, Hartsog had a copy of the February 2012 AutoCAD form. (Tr. III, 48). He produced an aid with that file to show how the maps form together (RX-8). (Tr. III, 55). The first map shows the gas wells in yellow (except for the struck well in blue one). (Tr. III, 55). There were around 420-430 wells in the mine footprint. (Tr. III, 55-56). The second maps shows the same area but with the workings included. (Tr. III, 56). Anything done on one map is separate from what is done to the other, just as the well data was different from the map. (Tr. III, 56-57). If someone were working on the map and highlights the well data and pushed "delete," then all of the wells would disappear. (Tr. III, 57). The wells are kept on a separate file so they can easily be removed and create a less cluttered map. (Tr. III, 58).

Hartsog also created a map that superimposed the mine over the city of Charleston, WV. (Tr. III, 58-59). This map was based on the February 2012 data. (Tr. III, 59). Between 2008 and 2012 the workings had gotten larger, but they had not removed gas wells. (Tr. III, 59-60).

A final map created by Hartsog showed all of the gas wells in the shape file for Mine 36 (RX-9). (Tr. III, 63). The existing wells were yellow and the missing well was blue. (Tr. III, 63). The map shows the gas wells on all of Respondent property in Buchanan County and the black square shows the mine footprint. (Tr. III, 63-64). There were a total of about 8,000 wells, 420 of them on the mine property and only one missing. (Tr. III, 64).

also an exam on the fundamentals of engineering and a four year apprenticeship under a professional engineer. (Tr. III, 151). Finally, there is a professional engineer's exam. (Tr. III, 151-152). He started with MSHA as a Mining Engineer during the UBB investigation before he was a licensed professional engineer. (Tr. III, 162-165). "Mining Engineer" was an MSHA title for people with degrees in mining engineering. (Tr. III, 162-163). He was not a licensed professional engineer or surveyor in Virginia. (Tr. III, 165-166). Steffey has never been a licensed professional engineer while working in a mine and has never published peer reviewed literature. (Tr. III, 166-167). Steffey eventually became a licensed professional engineer in Kentucky. (Tr. III, 151). Steffey passed the mining engineering test and passed the environmental engineering test on his second try. (Tr. III, 177-178).

A methane monitor usually sits at the right (intake) side of the continuous miner, but occasionally on the return. (Tr. III, 152, 178). Steffey did not know what side the monitor was on February 24, 2011. (Tr. III, 179). It is on the side frame and mounted for protection. (Tr. III, 178). It consists of a platinum wire wrapped in a metal oxide container, known as a catalytic sensor. (Tr. III, 152). This sensor allows combustion of gases at a lower temperature, around 400 degrees (rather than 1,000 degrees typical for methane) to detect methane. (Tr. III, 152-153). When a methane monitor goes above 5%, it will flash. (Tr. III, 153). The ideal condition for combustion is 10 moles of air for each mole of methane, or around 9.09% methane. (Tr. III, 153-154). Steffey did not have experience with monitors; he talked to experts to ensure his understanding was correct. (Tr. III, 167-168). During the hearing he also reviewed Respondent's documents, a paper on catalytic bead monitors, a 1913 paper from the U.S. Bureau of Mines, spoke with the Division of Mines, and reviewed the AutoCAD ex-reference section. (Tr. III, 168-170). He gave the documents he reviewed to the attorney. (Tr. III, 169).

The catalytic sensor is calibrated up to 2.5% and will accurately read up to 3%. (Tr. III, 154). From 3-5% the monitor becomes less accurate, reading less than is actually present, but not enough to be concerned. (Tr. III, 154-155). From 5-8.5%, the methane reading is no longer reading methane. (Tr. III, 155, 170). However, from 8.5-9.09% it becomes more accurate; it is fairly accurate to 10% and then it can no longer read. (Tr. III, 155, 170). At 8.9% the methane detector would either be accurate or give a low reading. (Tr. III, 155-156, 170). It is not possible to get a reading higher than the actual amount. (Tr. III, 156). According to information he read and received from an electrical engineer, a monitor does not stop reading at 5% and burn up. (Tr. III, 170-171). However, older methane sensors did not have metal oxide and would burn up and it is possible new ones would burn at high enough temperatures. (Tr. III, 171).

It is impossible to run the miner without water present to cool the cutting and tram motors and operate the sprays. (Tr. III, 156). There is often a water spray right next to the monitor and he has never seen that generate a problem anywhere. (Tr. III, 173-174). Water will render a monitor ineffective and it will fluctuate wildly. (Tr. III, 172). However, the monitor is on the side of the miner and the hole in the well would have been in the middle near the pan. (Tr. III, 172). The boom of the miner is waist high, so if water was running over the boom there would have been several feet of water and he did not believe that this happened. (Tr. III, 173).

It is dangerous to cut through the outer casing of the well because methane is present and sets off monitors on people standing far back. (Tr. III, 157). An explosive mix was possible,

Respondent was lucky it did not occur. (Tr. III, 157). There was 90% methane and some other gasses (butanes, isobutene, and propane) mixed in. (Tr. III, 157). Some of the other gases have a lower explosive limit. (Tr. III, 157). If the gas well had 90% methane and the man standing far back found 1.5%, somewhere in between was an explosive mix; it did not go from 90% to 1.5% without passing through the explosive range. (Tr. III, 157-158). He does not know how long the methane was present before it was taken away by the mine's ventilation, it could have been a matter of seconds. (Tr. III, 179, 180). Steffey could calculate the concentration of a known quantity, it would be the concentration multiplied by the CFM, but he does not have the actual number from that day.¹⁶ (Tr. III, 174-175).

h. Surrebuttal Testimony of Hartsog

The methane monitor is placed on the return side so it will pick up the maximum methane emitted in the face operation. (Tr. III, 182). The monitor is designed to measure the hazard where it is greatest. (Tr. III, 182). The monitors are accurate for their zone of calibration, 0%-2.5%, anything outside of that would be suspect. (Tr. III, 183). The owner's manual did not say the accuracy decreased from 5-8.5% and then increased at 8.5%. (Tr. III, 183-184). That does not comport with any mining engineering principle Hartsog has heard. (Tr. III, 184). No textbook or treatise on methane monitors would indicate this either. (Tr. III, 185).

5. Contentions of the Parties

The Secretary contends that all three Orders issued with respect to the gas well intersection were validly issued, were the result of high negligence and unwarrantable failure ("UWF"), were S&S, and had appropriate penalties. (*Secretary's Post-Hearing Brief* at 15-31). Specifically, the Secretary argues that Order No. 8179158 is valid because Respondent knew that a gas well existed from 1994 to 2008 but did not build a barrier. (*Id.* at 18). Further, he argues that Order No. 8179159 was valid because the gas well was not plotted on the mine map after 2008. (*Id.* at 19). He argues that Order No. 8179160 was valid because the gas well was not plotted on the ventilation map after 2008. (*Id.* at 20). The Secretary contends that all three alleged violations were S&S because mandatory standards were violated, a catastrophic explosion was possible, an explosion could cause injuries, and those injuries would be serious. (*Id.* at 22-25). The Secretary also contends that all three alleged violations were the result of high negligence and UWFs because of the high standard of care required given the extreme gravity of the danger and the fact that Respondent should have known about the cited conditions. (*Id.* at 25-31). The Secretary also argues that the three alleged violations are not duplicative as they impose separate and distinct duties on the operator. (*Id.* at 21-22).

Respondent contends that all three Orders issued with respect to the gas well intersection were invalid, were not the result of negligence, were not UWFs, were not S&S, and were duplicative. (*Respondent's Post-Hearing Brief* at 22-45). Specifically, Respondent argues that

¹⁶ Respondent's Counsel argued with Steffey that he was unable to conduct the calculation to determine the concentration of methane at the time of the accident. (Tr. III, 175-177). Steffey argued that there were too many unknown quantities to do the calculation. (Tr. III, 175-177).

the Orders were not valid because it took reasonable steps to locate the wells, as required by the standards cited. (*Id.* at 22-23). Respondent contends that the violations were not the result of high negligence because the engineers used in the preparation of the maps were highly regarded and met the standard of care in Virginia. (*Id.* at 24-25). Further, Respondent argues that the Secretary relies on irrelevant evidence in claiming high negligence and ignores mitigating circumstances. (*Id.* at 25-29). Respondent also argues that consideration of the alleged gravity of the violation in the context of the alleged negligence is inappropriate. (*Id.* at 29-33). Respondent also contends that the gravity designation was incorrect as an accident was unlikely in this situation. (*Id.* at 33-35). Similarly, Respondent argues that this situation meets none of the requirements for a UWF designation. (*Id.* at 36-38). Finally, Respondent argues that each standard cited in these three Orders deals with the same duty and serve the same purpose and are therefore impermissibly duplicative. (*Id.* at 38-45).

6. Findings and Conclusions

a. Validity

i. *Order No. 8179158*

Order No. 8179158 was validly issued. An operator may violate 30 C.F.R. § 75.1700 in two ways: 1) failing to take reasonable care in locating oil and gas wells penetrating an underground area of the mine or 2) upon location of a well, failing to establish and maintain a barrier around such well. In the instant case, it is undisputed that Respondent located the Clinchfield No. 2 gas well and, in fact, plotted that well on its map between 1994 and 2008. (Tr. II, 143). However, it is also undisputed that no barrier was ever placed around the well. (Tr. II, 145-146, 149-150, Tr. III, 92-93, 102). Respondent's witness, Hartsog, actually conceded that Respondent violated this standard. (Tr. III, 101-102, 124). Therefore, Respondent did not comply with §75.1700 and the instant Order was appropriate.

In its brief, Respondent cites to *Ohio County Coal Company*, 24 FMSHRC 502 (May 2002) (ALJ Melick) for the proposition that it took reasonable care with respect to this gas well. (Respondent's Post-Hearing Brief at 22-23). In *Ohio County Coal Company*, an operator intersected two previously unidentified oil wells. 24 FMSHRC at 503-504. The operator had hired an outside firm to locate and map the gas wells on its property. *Id.* at 505. That outside firm had created a CAD file with the requested information, but that file contained a "frozen layer" of information that contained the missing wells and was not visible on the map. *Id.* Judge Melick held that the operator had not violated 30 C.F.R. §75.1700 because it had taken "reasonable measures" to locate the wells when it contracted with a long-established, reputable firm to complete that task. *Id.*

However, the reasoning in *Ohio County Coal Company* is not applicable to this Order. That case dealt with the first requirement of § 75.1700; specifically the obligation to use "reasonable care" in locating gas wells. In this case, Respondent had already located the well and had plotted it on its maps from 1994 to 2008. Therefore, it appears that Respondent complied with the first requirement of § 75.1700. Respondent failed to comply with the second

requirement of the cited standard. Because the well was located, the operator was required to establish a barrier around the well. No such barrier was created in this case.

Even if the issue of “reasonable care” were pertinent to the inquiry here, Respondent’s reliance on *Ohio County Coal* would be misplaced. There, the operator hired the outside firm to conduct its entire mapping process, which Judge Melick believed was “reasonable care.” In the instant case, Respondent had conducted its own gas well mapping in its internal engineering department. (Tr. I, 207, 211, 214, 243, Tr. II, 46-47). An outside firm was only brought in later to certify maps based on Respondent’s internal data. (Tr. II, 18-19, 86-88). In fact, the gas well went missing before D.R. Price began certifying the maps. Therefore, any failure to properly track the well and build a barrier once its was located was the result of Respondent’s actions and Respondent cannot shift the blame to an outside engineering firm.

ii. Order No. 8179159

Order No. 8179159 was validly issued. An operator commits a violation of 30 C.F.R. §75.1200 if the mine map located on the surface does not show, among other things, producing or abandoned wells located within 500 feet of the mine. In the instant case, it is undisputed that the mine map did not show the gas well that was eventually intersected. (Tr. I, 228-231, Tr. II, 24- 53-54, 67, 88-89,111, 143). Therefore, Respondent did not comply with §75.1200 and the instant Order was appropriate.

Respondent’s brief treats all three Orders related to the gas well as a single issue (in fact, it claims that the Orders are duplicative, an assertion that is addressed *infra*). As a result, Respondent again relies on *Ohio County Coal Company* to argue that this Order is not valid. (*Respondent’s Post-Hearing Brief* at 23). This is unfortunate as *Ohio County Coal Company* did not deal with a violation of §75.1200. None of the reasoning in that case is applicable to the requirements of the mine map. As noted *supra*, *Ohio County Coal Company* interprets the term “reasonable efforts” contained in §75.1700. Section 75.1200 does not require operators to make reasonable efforts to plot gas wells on the mine map. It imposes an absolute duty to create and store a mine map that includes, among other things, gas wells. The standard states that the map “shall” show the active and abandoned wells, not that it “may” show the wells. Respondent’s arguments that it took reasonable efforts to accurately plot gas wells (that Bob Weaver is an experienced and reputable engineer; that D.R. Price is a well-regarded, licensed engineer that had never had an accident before; and that no one associated with Respondent knew of the “shape file”) are irrelevant to whether the standard was violated. Here, Respondent conceded that the gas wells were not on the map. As a result, Respondent violated the standard.

iii. Order No. 8179160

Order No. 8179160 was validly issued. An operator commits a violation of 30 C.F.R. §75.372 if its map showing the information contained in the ventilation plan under §75.371 does not contain, among other things, the locations of all known oil and gas wells that penetrate the coalbed being mined. In the instant case, it is undisputed that the ventilation map did not show the gas well that was eventually intersected. (Tr. I, 228-231, Tr. II, 24- 53-54, 67, 88-89,111, 143). Furthermore, it is undisputed that Respondent knew of that well and even placed it on its

maps between 1994 and 2008. (Tr. II, 143). Therefore, Respondent did not comply with §75.372 and the instant Order was appropriate.

Once again, Respondent's Brief relies on *Ohio County Coal* to argue that this Order was not valid. Once again, the issue of whether Respondent took reasonable care to create the ventilation map is irrelevant. Section 75.772 creates an absolute duty to place the known gas wells on a ventilation map. Respondent conceded that the well at issue here was known since 1994 and was not on ventilation the map. Therefore, regardless of Respondent's efforts at compliance, it violated the standard.

b. The Orders are Not Redundant

While each of the Orders related to the gas well incident are individually valid, Respondent also raises a related argument that the Orders are duplicative (or, actually, triplicative). Respondent contends that the three Orders are so closely related that the Secretary is, in essence, seeking to punish it three times for the same conduct. For the reasons set forth below, I find that the three gas well Orders are not redundant.

Under well-settled Commission case law violations are not duplicative, even if they emanated from the same events, when the cited standards impose separate and distinct duties on an operator. See *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1004 (June 1997); *Spartan Mining Company*, 30 FMSHRC 699, 716, (Aug. 2008).

Two standards do not impose separate and distinct duties when the obligations of one are completely "subsumed" within the obligations of the other. *Western Fuels-Utah, Inc.*, 19 FMSHRC at 1004). An ALJ described this concept as analogous to criminal law wherein "the lesser included offense merges within the greater offense and must be dismissed." *Peabody Coal Company*, 17 FMSHRC 1627, 1630 (Sep. 1995) (ALJ Melick) (citing due process for the analogy rather than double jeopardy). For example, in *Western Fuels-Utah, Inc.*, the Commission found that two violations were duplicative when one was issued for the failure to install a self-contained dry powder chemical system to protect belt components and another was issued for failure to provide the correct number of nozzles and reservoirs for this chemical system. 19 FMSHRC at 1004. The Commission found that violation of the narrower standard requiring sufficient nozzles was also necessarily a violation of the broader standard requiring the installation of the chemical system to protect the belt. *Id.* Therefore, the Commission held that these violations were duplicative. *Id.* In short, two violations are duplicative when, in all instances, a violation of one cannot be committed without also violating the other. *Spartan Mining Company*, 30 FMSHRC at 718.

In the instant case, each of the three Orders asserted violations of a distinct standard that imposed a separate duty on Respondent. Order No. 8179158 dealt with Respondent's failure to comply with §75.1700, which imposes a duty on an operator to make reasonable efforts to locate gas wells and, once gas wells were located, to establish a barrier around them. Order No. 8179159 dealt with Respondent's failure to comply with §75.1200, which imposes a duty on an operator to create a mine map and store it on the surface. Finally, Order No. 817160 dealt with

Respondent's failure to comply with §75.372, which imposes a duty to certify and submit a ventilation map every 12 months. Simply because it is possible to violate three regulations in a single event, or series of events, does not mean that the regulations are redundant.

Order No. 8179158 is obviously distinct from the other two violations. The obligations to seek out gas wells and, once they are found, to establish barriers around them are wholly different from the obligation to produce and submit maps. One can easily imagine a situation wherein a gas well is properly plotted on all mine maps but the operator fails to establish a barrier and mines within 300 feet of the well. Similarly, an operator may be aware from experience that a gas well exists and conscientiously establish a 300 foot barrier around it, but still fail to place that well on its mine or ventilation map. Therefore, unlike the situation in *Western Fuels-Utah, Inc.*, the obligations of §75.1700 are not subsumed by and do not subsume the obligations of §75.1200 and §75.372.

Order Nos. 8179159 and 8179160 are more closely related; however I find that they relate to separate and distinct obligations placed on Respondent. The similarities between the requirements of §75.1200 and §75.372 are superficial; they both require the production of maps. However, the differences between the two show that a violation of §75.1200 is not a "lesser included offense" within a violation of §75.372.

Section 75.1200 maps and §75.372 maps place different burdens on Respondent because they serve different purposes. In fact, Weaver conceded that these maps serve different functions. (Tr. I, 216). Section 75.1200 is the "wall map" kept at the surface and referred to whenever problems occur. (Tr. I, 215-217). The ventilation map must be certified and submitted to MSHA (wall maps do not need to be submitted). It would be possible for an operator to create a wall map but fail to create a ventilation map or vice versa.

Some of the confusion as to whether these two Orders are duplicative may stem from the fact that it is possible for the §75.1200 map to serve as the §75.372 map. (Tr. I, 216). However, it is only possible for the §75.1200 map to serve as the §75.372 map if it meets all of the requirements for both standards. It would be possible for an operator to create a map that is certified and submitted to MSHA and meets all of the requirements of §75.372 and §75.1200, except that the map is not posted at the surface. In such a situation, the map would conform to §75.372 but fail under §75.1200. Similarly, there could be a situation wherein a map meets all of the requirements of §75.1200 and §75.372 except that the map is not submitted to MSHA. In such a situation, the map would conform to §75.1200 but fail under §75.372. Each of the regulations require additional and distinct conduct from the other, thereby implying separate and distinct duties. In practical application it may be more efficient for an operator to conflate the requirements and treat them as one, however this does not mean that they are singular. Therefore, the fact that one map can be used under both standards does not show that the standards are duplicative.¹⁷

¹⁷ I would also note that while there was an option to use a single map, Respondent chose not to do so. (Tr. I, 216).

Respondent argues that these violations are not distinct because all three arise from the same “initial conduct,” specifically failure to plot the well on the December 23, 2008 map. (*Respondent’s Post-Hearing Brief* at 43). Specifically, Respondent argues that the duty to produce the §75.372 map subsumed all of the other requirements such that the violation in Order No. 8179160 necessarily entailed the violation of §75.1200 and §75.1700. (*Respondent’s Post-Hearing Brief* at 43-44).

However, as the Commission held in *Cyprus Tonopah Mining Corp.*, violations are not duplicative if they impose separate and distinct duties, even if they “emanated from the same events.” 15 FMSHRC at 378. Even if the same “initial conduct” resulted in all three violations and the condition or practice described was similar, the issue at hand was whether the duties were the same. Respondent’s reasoning that all three standards impose the same duty relies on a level of abstraction that cannot be supported. For example, Respondent notes, “the regulations all have the same purpose – protecting all those working at a mine by insuring that gas wells are properly located and identified on certified maps.” (*Respondent’s Post-Hearing Brief* at 44). That is the broad purpose of all standards that relate to gas wells. But, as explained *supra*, these standards impose different specific duties on Respondent to achieve the goal of safe mining near gas wells. Those duties relate to gas well plotting, but that does not mean they are the same duty. Any one standard can be violated without violating the others. At a certain level of abstraction, the purpose to the Mine Act is to provide a safe environment for miners. It would be absurd to state that, as a result, any two citations at a mine are duplicative because they all serve that broad purpose. However, that is the logical conclusion of Respondent’s understanding of “purpose.”

In a related argument, Respondent notes that “as it pertains to gas wells,” the §75.1200 map and the §75.372 map contain, “exactly the same information.” (*Respondent’s Post-Hearing Brief* at 44). Respondent argues that, regardless of whether the standards *as a whole* are duplicative, they *are* duplicative with respect to the requirement to plot gas wells. The essence of this argument seems to be that even if the standards require different things in general, as applied in this particular instance they both require a map with gas wells. As a result, Respondent argues these Orders are duplicative.

If Respondent’s previous argument was too abstract, this one is too focused. Respondent fundamentally misunderstands the nature of the distinct requirements of these standards, which serve important functions under the Mine Act. Nothing in the case law cited by Respondent suggests that the issue is whether two violations, in a given instance, are similar. The issue is whether violating one standard as a general matter necessarily implies violation of the other. The fact that in this particular instance the standard required, among other things, two maps that both required gas wells does not make these standards duplicative because those standards also each had other obligations that were distinct such that it was possible to violate one without violating the other. It would be entirely possible in this instance for Respondent to create a ventilation map that contained a gas well but also create a wall map that did not. The fact that Respondent duplicated its mistake on two separate maps does not mean that the standards are duplicative.

Finally, Respondent argues that these violations are duplicative in part because all three violations occurred at the same point: when the miner hit the gas well. (*Respondent’s Post-Hearing Brief* at 45). This is not correct. Respondent violated §75.1700 at the very latest the

instant it mined within 300 feet of the gas well; Respondent violated §75.1200 when it created and stored on the surface a mine map that did not show the gas well; and Respondent violated §75.372 when it certified and submitted a ventilation map that did not show the gas well. The fact that all three violations were discovered at the same time and through the same agency does not mean they occurred at the same time.

c. Gravity and S&S

With respect to gravity, all three gas well Orders were marked by Inspector Hughes as “Highly Likely,” “Fatal,” “S&S” and affecting 10 persons. These determinations are supported by a preponderance of the evidence.

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

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

30 C.F.R. §100.3(e).

With respect to Order No. 8179158, the event against which the standard, 30 C.F.R. §75.1700, is directed is explosion or methane inundation as a result of the intersection of a gas well. The standard seeks to prevent operators from mining into gas wells by requiring that those wells be located and that barriers be established around them. In the instant case, uncontroverted evidence shows that intersection was not only highly likely, but that a gas well actually was intersected and some amount of methane was released. (Tr. I, 188-191, 230-231, Tr. II, 25, 67, 111, Tr. III, 23, 127). No explosion occurred in this case, but if it were to occur, I credit Inspector Tuggle’s testimony that it would result in fatal injuries to 10 persons.

With respect to Order No. 8179159, the event against which the standard, 30 C.F.R. §75.1200, is directed is, amongst other things, explosion or methane inundation as a result of the intersection of a gas well. The standard seeks to prevent operators from mining into gas wells by requiring that those wells be plotted on the wall map used by the operator in planning. Again, uncontroverted evidence shows that intersection was not only highly likely, but that a gas well actually was intersected and some amount of methane was released. (Tr. I, 188-191, 230-231, Tr. II, 25, 67, 111, Tr. III, 23, 127). I credit Inspector Tuggle’s testimony that if the event occurred, it would result in fatal injuries to 10 persons.

Finally, with respect to Order No. 8179159, the event against which the standard, 30 C.F.R. §75.372, is directed is, amongst other things, explosion or methane inundation as a result of the intersection of a gas well. The standard seeks to prevent operators from mining into gas wells by requiring that those wells be plotted on the ventilation map used that is certified and submitted to MSHA. Again, uncontroverted evidence shows that intersection was not only highly likely, but that a gas well actually was intersected and some amount of methane was

released. (Tr. I, 188-191, 230-231, Tr. II, 25, 67, 111, Tr. III, 23, 127). I credit Inspector Tuggle's testimony that if the event occurred, it would result in fatal injuries to 10 persons.

Respondent argues that these Orders were not highly likely to result in fatalities to ten persons. (*Respondent's Post-Hearing Brief* at 33-35). First, Respondent notes that the production stream of this particular well had two protective casings. (*Id.* at 33-34 *citing* Tr. III, 24-25). It further noted that while the outer two casings were breached, the production casing was not ruptured (though the evidence suggests that it was scratched). (*Id.* at 34 *citing* Tr. III, 25, Tr. II, 152, Tr. II, 25-27, 131-132). Respondent supported its contention that the production line was not breached by noting that after the accident the legal check showed no methane and closer checks showed only 0.2% methane. (*Id. citing* Tr. I, 197). Respondent cited to the high level of air flow in the area to show that any dangerous levels of methane was quickly removed from the area. (*Id.* at 35 *citing* Tr. II, 170, 173). Similarly, Respondent questioned the reliability of the 8.9% methane reading by the miner spotter. (*Id. citing* Tr. III, 38-41). In making this claim, Respondent cited Hartsog's testimony and the fact that the water released by the intersection could have caused a false reading. (*Id. citing* Tr. III, 27, 30, 33, 107).

Respondent's arguments are not compelling. To state that an explosion was less than highly likely merely because Respondent was fortunate enough not to breach the production casing of the well would do a severe disservice to the health and safety of the miners. Even though the gas well was not breached and it was likely that the methane in the area was something less than 8.9%, that does not mean that an explosion was unlikely. The uncontested fact remains that Respondent mined into a producing gas well. Respondent was exceptionally fortunate that either water or the methane released from the outer casings caused the miner to shut off before the production stream was breached. Good luck in avoiding an actual explosion does not change the fact that a fatal explosion was highly likely. I credit Hughes' testimony, the metal bits on the miner and the metal casing of the production pipe could have easily caused sparks that resulted in an explosion. (Tr. II, 152). Hughes further credibly testified that the production well was scratched. (Tr. 152). Hartsog confirmed this fact. (Tr. III, 25-27, 131-132). If the miner had continued cutting for even a few more seconds, the production stream would have been breached with sparks flying.

In a related argument, Respondent claimed that even if the production string had been breached, the well was a low producing well, making explosion less likely. (*Respondent's Post-Hearing Brief* at 24 *citing* Tr. III, 25). I find that, even in light of the fact that this gas well was not producing at capacity, an explosion was still highly likely. Once again, I credit Hughes testimony. Following a rigorous investigation into the incident, Hughes believed that a fatal explosion was highly likely. (Tr. II, 146). Nothing in the evidence suggests that an explosion was impossible as a result of the lower amount of methane in the well. Perhaps the explosion would have been smaller than if Respondent had intersected a different well, but that hardly justifies a reduction in the cited gravity.

It should be noted that none of Respondent's witnesses, with the exception of Hartsog, were under the impression that this situation was anything but dire. All of Respondent's witnesses (except Hartsog) stated that intersection of a gas well constituted a real and grave

danger, even in light of the fact that the production stream was not intersected and the well was low producing. (Tr. I, 193, Tr. II, 25-26, 40, 67-68, 122, 127-128).

Finally, Respondent argues that only six miners were on the section and that only the miner operator would have been affected. (*Respondent's Post-Hearing Brief* at 35). I credit Inspector Hughes' testimony that there were 34 miners in the mine at the time of the intersection and that all of those miners were evacuated. (Tr. II, 133). In the event of a catastrophic explosion at least 10 miners would be affected, perhaps more. As Hughes testified, it was a miracle that 34 men were not killed. (Tr. II, 146).

The S&S nature of a violation and the *gravity* of a violation are not synonymous. The Commission has pointed out that the "focus of the *seriousness* of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) *emphasis added*. A violation is S&S "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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

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

In the instant case, Inspector Hughes' designation of S&S is clearly correct. The first prong of *Mathies* is satisfied with respect to all three violations, for the reasons discussed above.

The second prong, that a discrete safety hazard was contributed to by the violation, is also met. The law requires gas well barriers, plotting of gas wells on mine maps, and the submission of ventilation maps with gas wells for a reason. That is to prevent the intersection of producing gas wells causing explosions or gas inundations.

The Commission has recently clarified the third element of *Mathies*, stating the test "is whether there is a reasonable likelihood that the hazard contributed to by the violation... will cause injury." *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *see also Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not "prove a reasonable likelihood that the violation itself will cause injury..." *Id.* In this case, there is no question that the hazard contributed to by the each of the violations, specifically a catastrophic explosion or inundation of gas, would cause an injury.

Finally, the fourth prong of *Mathies* is met as injuries resulting from an explosion or inundation of gas would likely be fatal. Therefore, the S&S designations for each of the three violations related to the gas well are appropriate.

d. Unwarrantable Failure and Negligence

All three gas well Orders were marked as an high negligence and unwarrantable failure. In light of the evidence presented, I find that these designations were appropriate. I will discuss each designation in turn.

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

Therefore, the first issue is whether Respondent knew or should have known that violations at issue in this case existed. That is, whether it knew or should have known that its maps were incorrect and no barrier was placed around the well. Well-settled Commission precedent recognizes that the negligence of an operator’s agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. See *Wayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine’s operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000) see also 30 U.S.C. §802(e) (an agent is “any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine.”). In this case, there is no question that Weaver was Respondent’s agent. He testified extensively as to his responsibilities, his managerial power, and his actions in certifying the maps from May 2006 to

July 2010.¹⁸ (Tr. I, 206-209). If Weaver was negligent with respect to these violations, that negligence is imputable to Respondent.

A preponderance of the evidence shows that Weaver should have known that the well was not being accounted for in mapping and planning. It is uncontested that the well had been plotted on every map from 1994 to 2008, a period that encompassed two years in which Weaver himself was certifying maps. (Tr. I, 208, 232 Tr. II, 33, 143). It is also uncontested that this producing gas well simply disappeared from Respondent's planning and maps without explanation. (Tr. I, 228-230, 236, Tr. II, 26, 38, 53-54, 88-89, 118, 128-129, 169). The only precaution that Weaver took to prevent gas wells from disappearing was a verbal policy against deleting wells and a system to cross check the certified map against the Buchanan County topographic map. (Tr. I, 235, Tr. II, 56-57). There is no question that the topographic map was inaccurate and that no one ever checked it for accuracy. (Tr. I, 233-235. Tr. II, 56-57, Tr. III, 123). As supervisor, Weaver never took any of the various actions that could have revealed that the well was missing. He never compared the maps to state records, he never inspected the surface, he did not check Respondent's paper files (which Hartsog claimed any mine he worked at would have) and he did not compare new maps to older, more accurate maps. (Tr. I, 233-234, Tr. II, 56 Tr. III, 121-123). Respondent should have known of the violations because taking any of these reasonable actions would have revealed to Respondent that the well was not plotted or planned for and an obvious danger existed. Weaver, and therefore Respondent, was negligent.

The fact that Respondent had older files and maps on hand that would indicate that a gas well had gone missing raises a related issue. Respondent and the Secretary agree that none of the people working at the mine knew about the missing well. (*Respondent's Post-Hearing Brief* at 38 and *Secretary's Post-Hearing Brief* at 31). However, it cannot be said that the operator was unaware of the missing well. *See e.g. Alliance 3PL Corp. v. New Prime, Inc.*, 614 F.3d 703, 706-707 (7th Cir. 2010) *cert. den.* 131 S.Ct. 1477, 179 L.Ed.2d 302 (2011) (Court held that corporation, as an entity, can have knowledge about a subject. Further, "[a] corporation knows what its managers know, and it does not acquire amnesia when the management team changes.") (*citations omitted*). Essentially, there were old maps and old files that were readily available for use. Respondent possessed those files and maps and therefore "knew" the information. The negligent failure of the people working for Respondent to utilize this institutional knowledge does not mean that the knowledge did not exist. As a result, Respondent was negligent.

Having determined that Respondent was negligent, the next issue is whether there were any mitigating factors present. Respondent argues that there are several. In considering Respondent's arguments regarding mitigation, it is important to consider the standard of care. The Commission has held that an operator has a heightened standard of care when a condition poses a serious risk. *See Lafarge Construction Materials*, 20 FMSHRC 1140 (Oct. 1998). The

¹⁸ In his brief, the Secretary argued that, although Weaver worked for Jewell Smokeless rather than directly for Respondent, those companies constituted a unitary operator under *Berwind Natural Resources Corp.*, 21 FMSHRC 1284 (Dec. 1999). (*Secretary's Post-Hearing Brief* at 29, FN 9). Respondent did not address this issue in its brief. I find that Respondent and Jewell Smokeless constituted a unitary operator and, as such, Weaver acted as Respondent's agent.

amount of care demanded by the standard of reasonable conduct must be in proportion to the risk. *Musser Engineering, Inc.*, 32 FMSHRC at 1286. As the danger becomes greater, the actor is required to exercise caution commensurate with it. *Id.*; see also *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (holding that “[a]n operator must address a situation presenting a potential source of explosion, as here, with a degree of care commensurate with the danger”). In short, in considering whether the actions taken by Respondent mitigate its negligence, it is important to realize that the miners faced extremely grave danger and that Respondent was therefore held to a high standard of care.

Respondent argues that considering the gravity and the negligence of a violation is improper. (*Respondent’s Post-Hearing Brief* at 30). Specifically, Respondent notes, “the definition of ‘negligence’ set forth in the Code of Federal Regulations does not include, as a consideration for determining the level of negligence, the potential gravity of the hazard. If Inspector Hughes’ view is correct, then must all citations be marked high negligence, unwarrantable failure every time there is a potential for a mine fire or explosion? Such a position is not supported under the law.” (*Id.*). As shown above, Commission case law supports a heightened level of scrutiny for especially grave dangers. That is especially true, as here, where the danger was highly likely to be realized.

Respondent then goes on to distinguish the instant case from *Musser Engineering, Inc.*, by noting that the operator in *Musser* had actual knowledge that it was placing miners in grave danger, while in the present case Respondent placed miners in grave danger with only constructive knowledge of the hazard. (*Id.* at 30-33). This is a distinction without difference. An operator’s negligence is gauged by its failure prevent hazards it knows or should know, there is no lessening of the standard of care as a result of ignorance.

In a related argument, Respondent argues that it followed the standard of care for engineering in the Commonwealth of Virginia. (*Id.* at 24). This argument is based on Hartsog’s testimony to that effect. (Tr. III, 75-77). While I credit Hartsog’s testimony that Weaver would not be personally liable in Virginia with respect to his engineering license, the engineering profession does not dictate the operator’s standard of care with for these violations. The Mine Act sets the standard in this case. As noted previously, Respondent did not take the proper precautions to ensure that a gas well was not intersected; therefore Weaver’s personal liability with respect to his engineering license is not relevant.

Respondent further notes that in making the initial determination that Respondent did not meet the standard of care in this case, Inspector Hughes did not interview anyone from the engineering department. (*Respondent’s Post-Hearing Brief* at 25). As has already been noted, the testimony of several members of the engineering department reveals that Respondent was negligent, and whether Hughes conducted the interviews is irrelevant. Further, even if he had conducted the interviews, the general consensus of the engineering department is that no one knows what happened. It is hard to see what useful information Inspector Hughes could have gleaned from an interview.

Therefore, with the heightened standard of care in mind, I will now consider Respondent’s proposed mitigating factors. First, Respondent argues that it believed that its maps

were accurate and no one knew that the well could go missing. (*Respondent's Post-Hearing Brief* at 24, 26). As has already been noted, Respondent's reliance on its maps was clearly misplaced. It did not take reasonable measures beyond cross-checking its maps with inaccurate topographic information from the county to ensure that its maps were accurate. Simply believing something that is demonstrably false is not a mitigating factor.

Respondent also argues that only one out of 8,000 wells was unaccounted for on its maps and planning. (*Id.* at 24). The Secretary's characterization of this danger seems apt: one gas well in 8,000 (or actually around 450 in the area of the mine) was not a "needle in a haystack," but a "hand grenade." (*Secretary's Post-Hearing Brief* at 28). While it was a single gas well, that gas well contained the potential to explode and cause fatal injuries to ten miners. Given the heightened level of care necessary when dealing with highly likely explosive hazards, the excuse that "we only missed one" is not particularly compelling. The fact that only one well went missing is not a mitigating factor. This is especially true in light of the fact that no one knows how the well went missing. This leaves open the distinct possibility that more wells could just as easily have disappeared. Luck is not a mitigating factor.

Respondent further contends that Weaver and the engineering department were competent and took reasonable steps to ensure the accuracy of the maps. (*Respondent's Post-Hearing Brief* at 25-27). It notes that D.R. Price also did not notice the missing gas well. (*Id.* at 27). As has already been shown, regardless of the level of competence shown generally by Weaver, the engineering department, and D.R. Price, in this particularly instance they did not take all reasonable precautions to ensure that the gas well was properly plotted. Respondent did not check its old maps, it did not search its paper files (if it had them), and it did not survey the surface. Respondent presented evidence at hearing that such precautions were not customary and that additional precautions would be unduly burdensome. It should be noted that the customary precautions resulted in Respondent mining into an active gas well. Further, as Respondent notes in discussing abatement, after the accident occurred it took just the sorts of actions that had once been deemed unnecessary (checking old maps and communicating with the state). (*Respondent's Post-Hearing Brief* at 37). Nothing about Respondent's inadequate steps to ensure the accuracy of the maps mitigates its negligence.

In addition to the alleged mitigating factors above, Respondent also argues that the Secretary makes several "Red Herring" arguments with respect to negligence. Specifically it argues that it was unreasonable to believe the company should use the shape file from the state and that there is no evidence that the gas well went missing during the file merger. A preponderance of the evidence shows that no one was aware of the shape file and that there was no reasonable way to access this file unless the exact address was known. (Tr. I, 231, Tr. II, 20-21, 30-31, 55, 70, 116). Therefore, I find that Respondent is not negligent for failure to use the shape file. However, that does not in any way change the fact that Respondent was negligent for failure to police its own files or check the surface for gas wells.

Both Respondent and the Secretary presented extensive evidence with respect to the AutoCAD file merger. The Secretary presented evidence that Respondent's internal review of the accident pointed to this merger as the cause of the lost well and further showed that the person in charge of the file merger, Harris, did not have any previous work experience with the

AutoCAD. (Tr. II, 47, 62). Respondent countered with evidence that the merger could not have caused the gas well to be lost and that Harris was competent with AutoCAD. (Tr. I, 223, Tr. II, 42-43, 89-92, 128). I believe that this argument is largely irrelevant. I am inclined to agree with Inspector Hughes, “I can say, sitting here two years later, that the company don’t know how they lost the thing. And that worries me more than me knowing.” (Tr. II, 168). It does not matter why or how the well went missing. Respondent was charged with making accurate maps and keeping a barrier around its well. It negligently failed to do so despite having the information necessary to keep track of the well. And that all Respondent can argue in response is that they do not know why the well is missing, but only that it was not the AutoCAD does not mitigate their negligence; it concerns me that this sort of event will happen again. Until Respondent learns why it lost the well, I am concerned that it will be unable to prevent future well disappearances.

None of the arguments presented by Respondent persuade me that the negligence was in any way mitigated. I find that a high negligence designation is appropriate.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) (remanded because a finding of high negligence without a corresponding finding of unwarrantable failure was “seemingly at odds.”). *Emery Mining Corp.*, defines an unwarrantable failure, as “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). Such conduct may be characterized as reckless disregard, intentional misconduct, indifference, or serious lack of reasonable care. *Id.* at 2004; *see also Buck Creek Coal*, 52 F.3d 133, 135-136 (7th Cir. 1995). The Commission formulated a six factor test to determine aggravating conduct.¹⁹ *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009). Before discussing the high negligence designation, I will consider each of those factors in turn:

1. Extent of the violative conditions

The missing gas well in this case was the only well missing out of over 8,000 gas wells monitored by Respondent and one of only 350-450 within the footprint of the mine. (*Respondent’s Post-Hearing Brief* at 36). Therefore, the three violations in this matter were not particularly extensive.

However, as noted by the Secretary, not all of the *IO Coal* factors are necessarily relevant in all factual scenarios. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). While the condition centered on a single gas well, I believe for the reasons discussed *infra* with respect to the other factors, that an unwarrantable failure designation is still appropriate.

¹⁹ While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal*, 31 FMSHRC at 1351

2. The Length of Time of the Violation Existed

The violations at issue here existed for years. With respect to Order No. 8179158, Respondent was required to establish a barrier around gas wells as those wells were discovered. Respondent knew about the Clinchfield No. 2 gas well at least since 1994. However, after the production of the December 2008 maps, Respondent no longer planned its mining with that gas well in mind. The coal around the gas well was no longer considered a barrier, but instead simply a resource to be mined. When the gas well was eventually intersected, Respondent had already failed to establish a barrier around the well for over two years.

With Respect to Order No. 8179159, Respondent had been creating and storing mine maps under §75.1200 without the subject gas well for over two years at the time of the intersection. This fact is not in contest.

With respect to Order No. 8179160, Respondent had been certifying and submitting ventilation maps to MSHA under §75.372 without the subject gas well for over two years at the time of the intersection. This fact is not in contest.

Respondent argues that the condition had not lasted for an extensive amount of time because it had found the well and still believed that it was part of its well file. Respondent's knowledge is irrelevant to this factor. Respondent may have taken proper care with the gas well at one time, but for two years it failed to do so.

3. Whether the violation is obvious or poses a high degree of danger

The violations at issue here posed an exceptionally high degree of danger. Even Respondent's witness testified that cutting into a gas well was "about the worst thing that could happen" in a mine and result in an explosion or fatality. (Tr. II, 127). As discussed in the gravity section, *supra*, Respondent was exceptionally lucky that this high degree of danger was not realized.

The degree of danger posed by mining into an active gas well are so grave that even if most of the other *IO Coal* factors did not point towards unwarrantable failure such a designation would still be appropriate. As the Commission has noted, "when violations have exposed miners to extremely dangerous conditions, the Commission has not always relied on most of the remaining factors." *Lafarge Construction Materials*, 20 FMSHRC at 1147 citing *Midwest Material Co.*, 19 FMSHRC 30, 34-37 (Jan. 1997).

4. Whether the operator had been placed on notice that great efforts were necessary for compliance or on notice that this was an issue.

The evidence supports Respondent's claim that it had never lost a gas well before and that MSHA had never cited it for this condition or stated that the mapping or barrier procedures were inadequate. I do not find this factor to be particularly relevant to this determination.

5. The operator's efforts in abating the violative condition

Respondent abated the condition shortly after the accident and also attempted to take steps to ensure that all other gas wells were present. However, the issue of abatement is not particularly important in this case. An accident had already occurred, and Respondent had failed to take action before miners were placed in danger.

6. Operator's knowledge of the existence of the violation

As noted previously, Respondent credibly argues that no one at the mine had actual knowledge of the violative condition. (*Respondent's Post-Hearing Brief* at 38). Further, the Secretary concedes this point. (*Secretary's Post-Hearing Brief* at 31). However as with negligence, "[i]t is well-settled that an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition." *IO Coal Co.*, 31 FMSHRC at 1356-1357 (*citing Emery*, 9 FMSHRC at 2002-2004). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) *citing (REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). Therefore, the issue with respect to knowledge is whether Respondent should have known the violative condition existed. As already shown in the negligence discussion, Respondent should have known that the violations existed and further, had documentary knowledge of the missing well.

In light of the length of time the cited conditions existed, the extremely high danger posed by the violations, the fact that Respondent did not abate this condition until an incident had occurred, and Respondent's knowledge of the condition, a finding of unwarrantable failure is appropriate.

e. Penalty

Under the assessment regulations described in 30 C.F.R. §100, the Secretary proposed penalties of \$70,000.00 for Order No. 8179158, \$70,000.00 for Order No. 8179159, and \$60,00.00 for Order No. 8179160. 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 evaluate each of those factors as follows:

(1) The Operator's history of previous violations – The operator had received mapping violations in the past. However, the record is not clear about how prevalent these particular violations were.

(2) The appropriateness of the penalty compared to the size of the Operator's business – The evidence shows that Respondent had between 1,000-2,000 employees and that this mine was very large. (Tr. I, 210). Therefore, it is a large business.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited high negligence and an unwarrantable failure to comply with all three standards

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

(5) The gravity of the violation – As previously shown, these violations were highly likely to result in fatal injuries to ten persons.

(6) The demonstrated good-faith of the person charged in attempting to achieve rapid compliance after notification of a violation – The evidence shows the condition was abated in good faith, but not until after an accident had already occurred.

In light of my affirmation of the Secretary's designations with respect to validity, negligence, and gravity, I hereby **AFFIRM** the originally assessed penalties of \$70,000.00 for Order No. 8179158, \$70,000.00 for Order No. 8179159, and \$60,000.00 for Order No. 8179160

PRE-SHIFT EXAMINATION ORDER

1. Order No. 8182676

a. Contents of the Order

On April 4, 2011 at 6:01 p.m., Inspector Mark A. Tuggle issued to Respondent Order No. 8182676. Tuggle found:

An inadequate preshift examination has been conducted along the #1 Mains belt and track area of this mine. The following conditions were found within 2 hours of the last belt preshift examination along this belt: 1) a loose bolt was found at crosscut 1 just inby the first air lock door immediately over the track (citation 8182670) 2) there are 3 pieces of belt structure located at cross cut 11, 16, and 30 that have been completely cut in two pieces by the belt which the belt is still contacting 2 of the stands and these stands are hot and/or smoking from friction with the belt. Additionally, 2 damaged rollers were found at cross cut 16 and cross cut 30 which had the bearings and ends missing on the top rollers with the roller outer shell contacting and grinding on the metal inner support shaft (citation 8182671) 3) There is a hole in the brattice which is used to separate the main return air course from the active T-Section and the belt/track neutral entry. This return was cited 2/14/11 for explosive methane mixture (citation 8182672) 4) a second brattice located at cross cut 37 used to separate the same return/neutral entry also has a hole in it. (citation 8182673) 5) a second roof bolt was found at crosscut 66 ½ where the draw rock has fallen from around the bolt leaving the bolt head 14 inches from the mine roof, located directly over the main line track (citation 8182674)

These conditions have existed between 1 day (rollers damaged) up to 1 week (holes in brattices, cut stands and roof bolts not supporting mine roof). This area is preshifted on every shift. No foreman has found these conditions, corrected the conditions, dangered these areas off or taken similar actions to prevent miners from being exposed to these hazards. The damaged belt components present a potential fire/smoke hazard, while the roof conditions present crushing injuries hazard to miners and the breached in the 2 brattices make the return/neutral stoppings not effective to isolate the two air course. By existing a week, there has been up to 21 preshift examinations of this area.

These conditions were easily visible from the track entry of this mine. The damaged rollers and air rushing through the brattices could also be heard from the track entry. All miners travel through this area as they enter or leave the mine. All miners are exposed to the hazards found during this period.

Standard 75.360(a)(1) was cited 10 times in two years at mine 4406759 (10 to the operator, 0 to a contractor).

(GX-2). Tuggle noted that the gravity of this violation was “Reasonably Likely,” “No Lost Workday/Restricted Duty,” and would affect six people. *Id.* The Order was marked as S&S. *Id.* He further marked that Respondent exhibited “High” negligence with respect to this violation. *Id.*

b. Legal Standards

Order No. 8182676 was issued under Section 104(d)(2) of the Mine Act. That provision provides the following:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2).

The Order deals with an alleged violation of 30 C.F.R. §360(a)(1) (titled “Preshift Examination”). That section provides the following:

(a)(1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified

examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

30 C.F.R. §360(a)(1)

2. Summary of Testimony

a. Testimony of Mark Adam Tuggle

At the time of the hearing, Mark Tuggle was employed by MSHA as a rig and impoundment specialist in Northern Virginia. (Tr. I, 30). He inspected longwall and conventional coal mines. (Tr. I, 30). He started at MSHA in August, 2006 and became an authorized representative in September 2007. (Tr. I, 30). He received training as a coal mine inspector. (Tr. I, 30). In April 2011, Tuggle was a CMI (coal mine inspector). (Tr. I, 31).

Tuggle received an Associate's Degrees in basic engineering from Southwest Virginia Community College, a civil engineering degree from the University of South Alabama, and a BSET in mining engineering from Bluefield State College. (Tr. I, 32). He was once certified in general and civil engineering. (Tr. I, 32). He began, but did not complete, engineering training in Virginia. (Tr. I, 33). He had miner's cards (now lapsed) in Virginia, Kentucky, and Pennsylvania. (Tr. I, 34). He was a certified blaster in Virginia and Kentucky. (Tr. I, 34).

Before MSHA, Tuggle worked in the mines. (Tr. I, 31). He started working summers for Consol and Alum Creek doing general utility. (Tr. I, 31). At Consol, Tuggle was a general laborer: shoveling, building stoppings, running the scoop, and moving belt. (Tr. I, 33). At Alum Creek he was an engineer, surveyed underground, made maps, and surveyed new shafts. (Tr. I, 33). After graduating from college he worked at Enlow Fork Mining in Pennsylvania from 1991 to 1993. (Tr. I, 31). At Enlow Fork he was general underground working on the longwall, belts, and maintenance and then worked in the safety department. (Tr. I, 31, 33). He then worked for Republic Energy and was an engineer from 1993 until 2006. (Tr. I, 31). At Rapoca, he was an engineer and surveyed underground. (Tr. I, 33). He was never a foreman. (Tr. I, 98).

Tuggle had experience in assessing the adequacy of roof control, mostly from experience underground and investigating roof falls. (Tr. I, 34-35). However, he did not work on roof control at any of his jobs. (Tr. I, 36). He also had experience in assessing stoppings and ventilations systems and building stoppings. (Tr. I, 35). To do so, Tuggle would look at the structure and see if it was leaning or leaking. (Tr. I, 35). He also made ventilation system plans for Rapoca's mine. (Tr. I, 35). Tuggle's experience with assessing the adequacy of belt structure came from doing belt moves, working general labor, and with MSHA. (Tr. I, 35-36).

Tuggle conducted an inspection of Dominion Number 36 on April 4, 2011. (Tr. I, 39). To prepare, Tuggle reviewed the Uniform Mine File and the mine plans. (Tr. I, 39). He reviewed the maps and locations where the sections were at, reviewed past citations and D-

sequence events, and prior accidents.²⁰ (Tr. I, 39). He also printed out a form for mine management to show percentage estimates and top citations. (Tr. I, 39-40).

On the day of the citations at issue here, there were three active working sections and three portals (the Virginia, West Virginia, and CJ&L portals). (Tr. I, 42-43). Tuggle entered the mine at the Virginia portal then traveled up the mainline belt and track entry, and then up the U-section. (Tr. I, 43). That was the only area he inspected that day, however he and another inspection (probably Steve Hale) eventually inspected the entire mine.²¹ (Tr. I, 43-44).

Tuggle reviewed a D-2 order²² he wrote and issued his first day at the mine (GX-2).²³ (Tr. I, 44-45). The Order was issued under §75.360(a)(1) for inadequate pre-shift examination conducted by T.J. Howington. (Tr. I, 45-46). Tuggle was not sure when Howington began his pre-shift examination, but it occurred three hours before the start of the next shift. (Tr. I, 46). Tuggle arrived at the mine at 1:50 p.m., which was before that shift. (Tr. I, 46). He was also not sure when Howington completed the pre-shift examination. (Tr. I, 46-47). Howington did not record any conditions or hazards on the pre-shift examination. (Tr. I, 50). On cross examination, Tuggle admitted that Howington said he examined the area between noon and 3:00 p.m. and there is no information to contradict that claim, just the missing DTI's. (Tr. I, 100). Howington had performed the examination, he just forgot to sign the book. (Tr. I, 128).

Pre-shift examinations are conducted to ensure the safety of miners entering or working underground, to make sure no hazardous conditions are present. (Tr. I, 52-53). It is essential to

²⁰ The ventilation map submitted by Danny Price MSHA on December 23, 2010 showed the areas, the pillars, and the entries, including belt entries, that this mine encompasses. (Tr. I, 40). The sealed areas were marked with a crosshatch and SCSR caches were marked "S." (Tr. I, 40-41). It was an accurate depiction of the area Tuggle inspected on April 4, 2011. (Tr. I, 42).

²¹ Tuggle eventually traveled the Number 2, 3, and 4 belt and turned off of U-Section. (Tr. I, 100-101). He believes the belt was around five to ten thousand feet. (Tr. I, 101). There was roughly two miles from Number 2 Belt to Number 5 Belt. (Tr. I, 101-102). On April 4, 2011 Tuggle traveled that 2 miles of belt and did not observe any conditions. (Tr. I, 102).

²² A D-2 order is issued after a mine has been established on the D-1-6 series. (Tr. I, 44). This occurs when there is a D-1 citation, a follow-up D-1 Order, and then a second follow-up inspection leads to the D-2 series. (Tr. I, 44). An operator remains on the D-2 series from that point until an inspection is completed without a D-citation. (Tr. I, 44). In this case, the predicate D-1 citation was Citation No 8179671, issued on February 14, 2011. (Tr. I, 45). Tuggle issued the underlying D-1 citation when he reviewed the pre-shift book and saw that Howington had not signed or put his official numbers in the book. (Tr. I, 47). According to his notes, the date, time, and initials (DTI's) at the Number 1 belt drive were at 2:06 p.m., however Tuggle issued the citation at the belt book at 2:02 p.m. (Tr. I, 48). Howington returned to sign the book, terminating the underlying citation. (Tr. I, 50-51).

²³ The transcript occasionally notes a "day-two" order instead of a "D-2" Order. However, it is clear from the context of the testimony that this is a scrivener's error.

the safety of men working in the mines. (Tr. I, 90). An outby preshift examination would include looking for roof and rent conditions in the belt and track entry, the belt itself, lifeline hazards, draw-rock, damaged rollers, damaged belt structure, accumulations of coal, float coal dust, hazardous tracking conditions, any travel mine, gas readings at power centers, methane, oxygen deficiency, damaged timbers, escapeways, fire suppression, and any hazard that could cause harm to a miner. (Tr. I, 36-38, 53, 99-100). A pre-shift would also cover refuge chambers; including the spotter, pressure readings, gas check, and conditions around it. (Tr. I, 37). However, Tuggle had no personal experience with pre-shift examinations. (Tr. I, 34, 98).

An inadequate pre-shift would prevent miners from noticing hazards and could lead to fire, crushing injury, roof fall, damaged track, lifelines not functional, unusable refuge chambers, and other issues. (Tr. I, 90). To write an order for failure to conduct a pre-shift examination, the inspector must find conditions present that a normal examiner should have seen. (Tr. I, 51-52). There must be reason to see the condition; obvious signs, sounds, or clear visibility. (Tr. I, 52). There can also be an order if the examiner obviously did not enter the area. (Tr. I, 52). On cross examination, Tuggle conceded that there is an element of judgment with a pre-shift examination and there is no definition of "hazardous condition." (Tr. I, 126-127). Of the 2,800 feet of belt, 80 stoppings, and 2,800 roof bolts Tuggle found only five conditions. (Tr. I, 127-128). But that is a lot for 2,800 feet. (Tr. I, 128).

In order to determine a violation is an unwarrantable failure there must be conditions that should have been seen or something that is obvious with no action taken. (Tr. I, 55). In this case, there were several: holes in stoppings that created audible air rushing, damaged rollers clanking like a cow bell, the smell of smoke on the track, visible smoke, structure bouncing, belt splices catching, and roof faults hanging from the top.²⁴ (Tr. I, 55). Tuggle testified at length about each condition he observed.²⁵ (Tr. I, 55-89).

The first condition Tuggle found was a loose roof bolt at cross-cut one, just inby the first airlock door immediately over the track (Citation No. 8182670). (Tr. I, 56, 58). All mine traffic passed through this area. (Tr. I, 58). He noticed the condition when they were closing the airlock door. (Tr. 58-59, 106-107). This was a recordable hazard. (Tr. I, 56). Tuggle was not sure how long this condition lasted but it was at least a couple of days. (Tr. I, 57). He knew this because several layers of rock dust had accumulated on the roof-bolt plate, a condition that takes

²⁴ The underlying citations, Citation Nos. 8182670, 8182671, 8182672, 8182673, and 8182674 were admitted into evidence as GX-6. (Tr. I, 59-60).

²⁵ The citations only covered the first 66 crosscuts because Tuggle was required to look at the active section that day. (Tr. I, 89). It was getting late and they did not have time to travel slowly, so he may not have been as diligent with the rest of the belt. (Tr. I, 89).

time.²⁶ (Tr. I, 57). The bolt was a glue bolt so it still provided some beaming properties in the strata above, but the immediate skin was not supported.²⁷ (Tr. I, 57-58, 107-108). The plate was 5.5 inches from the roof, meaning the draw rock had fallen and the bolt was never tightened. (Tr. I, 58, 106-108). This condition created an unsupported area measuring six feet by nine feet and could have resulted in a draw-rock fall that would injure miners. (Tr. I, 58-59). He did not know how long the bolt was. (Tr. I, 107). On cross examination, Tuggle conceded that bolts in the mine were close to a four-by-four bolting pattern, meaning four rows across, four bolts every four feet or 2,800 total bolts in the Number 1 Entry. (Tr. I, 105-106). He found only two damaged bolts amongst the 2,800 total. (Tr. I, 106).

Tuggle stated this condition was reasonably likely to result in “lost workday/restricted duty” injuries to two persons. (Tr. I, 59, 61). Injury was reasonably likely because the cited condition was located directly above the main track in an area where mantrips entering and leaving the mine must stop. (Tr. I, 61-62). The injuries would result from crushing, which could be fatal depending on the size of the rock. (Tr. I, 62-63). He marked this citation as Significant and Substantial (“S&S”) because most mining injuries are from lack of skin control. (Tr. I, 63). He also marked the citation for moderate negligence because every foreman (section foreman, pre-shift examiner, belt boss, mine superintendent, and mine foreman) had to go in that area when entering or exiting the mine. (Tr. I, 61-62). He believed two people would be injured if the fall struck the bus. (Tr. I, 62). This citation was not contested and was paid. (Tr. I, 56). Respondent abated by adding a header around the bolt to provide skin control. (Tr. I, 124-125). As far as Tuggle knows, the bolt is still there. (Tr. I, 125).

The second condition Tuggle observed consisted of three pieces of belt structure at crosscuts 11, 16, and 30 that had been cut in two by the belt (Citation No. 8182671). (Tr. I, 63-64). Two of the belts were still contacting the stands and were hot and/or smoking from the friction. (Tr. I, 63). Belt smoking can occur in a matter of minutes. (Tr. I, 126). There were two damaged rollers at crosscut 16 and 30. (Tr. I, 63). The rollers had bearings and ends missing from the top rollers and the outer shells were grinding on the metal support shafts. (Tr. I, 63).

At crosscut 11, the belt had completely cut through the structure. (Tr. I, 67). A stand is shaped like an “H” and the belt had cut into it on the right side rail and it was putting the belt in a bind. (Tr. I, 67). This condition lasted several hours, perhaps even a day or two, though there was no way to tell exactly how long. (Tr. I, 66, 121-122).

²⁶ Tuggle’s testimony regarding timing often dealt with the amount of rock dust present. Tuggle did not know when Number 1 was last rock-dusted. (Tr. I, 123-124). Lots of factors determine how quickly draw-rock weathers including airflow, humidity, temperature, and whether the entry is drying. (Tr. I, 124). In this case, Tuggle does not know any of those factors. (Tr. I, 124).

²⁷ In roof control, when the bolt binds the layers of material together it basically forms a beam, like a truss in the roof of a home. (Tr. I, 85). The actual skin control is the immediate rock that is visible. (Tr. I, 85).

At crosscut 16, the stand was ready to fall and there was a bad or damaged top roller. (Tr. I, 68). The bearing end of the roller was ground off and the roller was grinding on the inner support shaft. (Tr. I, 68). The structure was cut in two. (Tr. I, 68). The stand was taking weight and starting to twist. (Tr. I, 68). This created a sound like a clanging cow bell. (Tr. I, 69-70). Also, one top roller's bearings were completely gone the roller was grinding directly onto the support shaft. (Tr. I, 68). These conditions lasted several hours, perhaps even a day or two, though there was no way to tell exactly how long. (Tr. I, 66). He does not believe the twisting if the rails would happen in less time. (Tr. I, 120).

At crosscut 30 another structure was cut in two and was smoking. (Tr. I, 65, 70). Respondent had put up another piece of structure to allow production to continue without removing the damaged stand. (Tr. I, 65-66, 70, 125). All belt work and maintenance is done on the midnight shift. (Tr. I, 125-126). Further, the belt had pulled the damaged stand under the belt where it was cutting splices out of the belt. (Tr. 70). There was also a damaged top roller at this location. (Tr. I, 70). This condition had existed for several days as shown by the fact that Respondent added more structure rather than replacing the damaged structure and because there was rock dust and litter around the foot area. (Tr. I, 65, 72).

This condition was a fire hazard from belt friction and from metal-on-metal grinding at the rollers and also a carbon monoxide hazard. (Tr. I, 64, 70-71). This belt carried coal from all the sections, plus coal from the Chad Jolo Mine. (Tr. I, 64). A fire could occur from the belt heating up the coal or from damaged structure touching the belt. (Tr. I, 71). There was a fire suppression system (including water) on this structure, but only at the drives, not at the middle of the belt where the condition was located. (Tr. I, 71-72, 114). Tuggle could not say if the belt was or was not fire resistant as the regulation requiring such belts was not fully enacted at that time. (Tr. I, 114). In addition, with the belt moving, hanging, and twisting, there could be more problems inby and outby. (Tr. I, 71). Finally, if a miner was near the structure when it gave way, it could cause injury. (Tr. I, 71).

The reasonably likely injury from these conditions would be lost workday/restricted duty from fire, smoke, or crushing injury. (Tr. 71). Tuggle believed only a miner shoveling the belt would be affected, but if the fire was big enough it could affect everyone at the mine. (Tr. I, 72). Tuggle marked this condition as "reasonably likely" because there were three damaged stands, two of which were smoking, and two damaged rollers. (Tr. I, 72). He marked this condition as S&S because an accident was reasonably likely. (Tr. I, 73-74). Under normal mining conditions all of the splices would rip out and there could have been a fire. (Tr. I, 74). He marked the cited condition for "moderate negligence" because the conditions were located immediately beside the track entry where examiners travel in and out and all foreman would travel. (Tr. I, 73). Also, the damaged rollers were audible and the structure could be seen jumping. (Tr. I, 73).

The third condition Tuggle observed was a hole in a stopping at crosscut 16 (Citation No. 8182672). (Tr. I, 74, 77). The stopping was about six feet tall and eighteen feet wide, or about a hundred and twenty square feet. (Tr. I, 114-115). He could hear a loud rushing sound like a compressor two crosscuts before the condition. (Tr. I, 74-75). However, he would not disagree that Howington could not hear clearly on the manbus. (Tr. 119-120).

The hole in this stopping measured 16 inches long and three and a half inches wide where a wedging had fallen into the return from the top. (Tr. I, 115-116). However, this stopping was also leaning, ready to fail, and the plaster was cracked so air was leaking around each individual block as well, but there was no way to measure this amount. (Tr. I, 175, 116-117). This stopping separated the neutral air of the track entry from the main return. (Tr. II, 76, 115, 117). The condition short-circuited air into the return and adversely affected the return from the active T-section. (Tr. I, 75). The stopping was located 16 crosscuts in by the main return fan and, had it failed, it would have reversed the air going up the belt/track entry and eliminated all return on the active T-section where miners were working. (Tr. I, 75-76). However, Tuggle did not have a “pedo tube” to measure the pressure differential between the neutral and the return, did not do a smoke test, and did not do any other kind of test. (Tr. I, 116-117). Tuggle conceded that air in the neutral would go to the face and then come down the return. (Tr. I, 118).

The condition existed for several days because, in reviewing the mine history, Tuggle learned that the main return had been roofed out with water and the fan had created a giant vacuum that could pull out the stopping. (Tr. I, 77). It is possible for airflow to make a stopping bow; this is based on common sense. (Tr. I, 126). While he conceded he could say exactly when the condition occurred, there was no way that the condition occurred after Howington’s exam, because the area contained draw rock covered with rock dust. (Tr. I, 118-119).

Tuggle testified that this condition would lead to lost-workdays/restricted duty injury because the T-section had, in the past, had methane gas build up to explosive level and the return had previously filled with water. (Tr. I, 77-78). If the stopping failed, there would be no actual ventilation on the T-Section. (Tr. I, 78). This condition affected one person because the brattice was still intact, but if it failed it would affect everyone on the section. (Tr. I, 78). Tuggle believed that the condition was reasonably likely to create an injury because the stopping was already leaning and bowed, so it was not stable. (Tr. I, 79). The condition was S&S because it could have resulted in an explosion on the T-section. (Tr. I, 79). Also, there was a CO monitoring system along the belt-line. (Tr. I, 112-113). That system can pick up five parts per million (“PPM”) of CO and could issue an alert and sound an alarm at ten or fifteen PPM. (Tr. I, 113). While Tuggle conceded monitor was functioning on the day of the citation, Tuggle believed a short-circuit of air would have rendered the CO system useless and would eliminate warnings at the face. (Tr. I, 79-80, 112-113). This citation was marked for “moderate negligence” because the sound of air going through the stopping could be heard over the belt, people talking, and the equipment. (Tr. I, 79). Also, the condition was located right next to the track. (Tr. I, 79).

The fourth condition cited was another hole in a stopping at crosscut 37 (Citation No. 8182673). (Tr. I, 80). This was in the same return and entry as the last condition. (Tr. I, 81). The hole was sixteen inches long by three inches high from a missing wedge at the top of the stopping. (Tr. I, 81, 110). The stopping itself was five and a half feet to six feet tall and 18-20 feet wide and was plastered. (Tr. I, 110-111). The condition could be heard over the sounds of the belt and manbus. (Tr. I, 81). Anyone entering or leaving the mine passed this area. (Tr. I, 81-82). If there were an emergency, this would be the escape route. (Tr. I, 82).

The hazard here was loss of ventilation to the face of T-section and the loss of the CO system along the belt line. (Tr. I, 82). (Tr. I, 111). On cross examination, he conceded that there were two sources of air to the T-Section. (Tr. (111-112). There was just a small leak and if the air made it to the face it would go down that return anyway. (Tr. I, 112). This condition had existed several days because dust was visible inside the hole and pooling. (Tr. I, 82).

Tuggle marked the citation as lost-workdays/restricted duty because the condition could have short-circuited and allowed methane to build up or for CO to go unmonitored. (Tr. I, 83). Tuggle modified this citation from “reasonably likely” to “unlikely” and S&S to Not S&S because the brattice was till stacked properly, the cap wedges and half-headers (which create stability) were still there, and it was tight on the ends. (Tr. I, 83). Tuggle marked this citation as “moderate” negligence because it was located directly beside the track entry and it could be heard over a crosscut away over the belt and manbus. (Tr. I, 84). Every foreman would travel passed this area. (Tr. I, 84).

On cross-examination Tuggle conceded that the belt in the cited entry was roughly 2,800 feet long. (Tr. I, 102-103). If the mine had seventy-foot centers, there would be about forty stoppings on each side, so an examiner would pass 80 stoppings. (Tr. I, 103-104). The only light an examiner has is the two manbus lights and his headlamp. (Tr. I, 104-105). These were the only two problems noted in those stoppings. (Tr. I, 109-110).

The fifth condition was a roof bolt falling at crosscut 66 ½, 2,000 feet from the first bolt, directly over the main track (Citation No. 8182674). (Tr. I, 84, 87, 108). Draw rock had fallen from around the bolt leaving the bolt head 14 inches from the roof on a bolt that was 4-6 feet long. (Tr. I, 84-86, 108-109). Fourteen inches is a lot because it indicates the immediate area was pretty ratty and left an unsupported area seven feet six inches by seven feet six inches. (Tr. I, 86-87). This condition had existed for several days because the area where the draw rock had fallen was not fresh and the roof was dusted. (Tr. I, 84-85). This observation was not in his notes, just his recollection. (Tr. I, 85). As with the first bolt, this was a resin bolt, so there would be beaming, so the hazard would be limited to draw rock. (Tr. I, 109).

An accident was reasonably likely because every ride would travel this area. (Tr. I, 87-88). Two people sitting on the end of a manbus would be affected. (Tr. I, 87). This condition was S&S. Tr. (I, 88). This citation was marked for moderate negligence because there was obviously 14-inches of bolt hanging and every foreman traveled the area every shift. (Tr. I, 87). This condition was abated when the bolt was replaced. (Tr. I, 125).

In determining the violation existed, Tuggle considered the area the examiner was required to check, the conditions he found, and the fact that it was apparent that DTIs were being added but the conditions were not actually being observed. (Tr. I, 88, 94). The examiner was required to cover a vast amount of area and did not have time to conduct the exam properly. (Tr. I, 88). It would take “hours upon hours” to examine the “miles of belt” and other areas required to be checked by the examiner. (Tr. I, 94-95). Tuggle did not blame miners for these conditions. (Tr. I, 95). Two months before this Order, Tuggle told Respondent that it did not have enough miners to run the mine properly. (Tr. I, 95). Respondent did not correct this problem until after the D-2 order. (Tr. I, 95-96). Tuggle conceded that after the conversation a new superintendent,

Rick Lawson (“Lawson”), was brought in and there was a new foreman, but only because the previous superintendent was promoted. (Tr. I, 122). Tuggle referred to Lawson as a “superman” and stated that Howington was a good worker. (Tr. I, 122). He also agreed that mine foreman Ron Helton (“Helton”) was a good and conscientious man. (Tr. I, 123). He did not criticize mine management. (Tr. I, 123). He does not know why no violations were listed on the pre-shift. (Tr. I, 95). The adequacy of the pre-shift did affect the health and safety of miners as they were exposed to all these conditions every time they entered or exited the mine. (Tr. I, 96-97).

He marked the subject order as reasonably likely because there were so many conditions present. (Tr. I, 90-91). He also marked it as “lost workdays/restricted duty” because it paralleled the conditions noted in the underlying citations. (Tr. I, 90). Six persons would be affected because if the stoppings were to fail, then air would be lost to the six miners off of the T-Section. (Tr. I, 91). This condition was S&S because any of these conditions could have caused a fatal injury. (Tr. I, 92). There could have been a fire, a crushing injury, or an explosion. (Tr. I, 92).

Tuggle marked this order for “high” negligence because the damaged rollers were audible, the broken brattices were audible, and all of the conditions were along the main travelway where the examiner traveled. (Tr. I, 91). Also, all foreman and management would travel this same way, meaning there were opportunities for many people to see these conditions and danger them off or correct them. (Tr. I, 91-92).

Tuggle believed the condition had existed for several days. (Tr. I, 92). He was especially sure that several days had passed with respect to the bolt at 66 ½ and where a second piece of structure was placed but the damaged structure remained. (Tr. I, 93). This also showed that management was aware of the condition. (Tr. I, 93). However, the Order was written only for the immediate pre-shift prior to the inspection because there were no DTIs at the belt. (Tr. I, 93).

b. Testimony of Timothy J. Howington, Jr.

Timothy Howington graduated from high school in 1999 and began in the mines in 2001.²⁸ (Tr. I, 131). He began working for Abby Contract at Dominion 36 doing general manual labor. (Tr. I, 132). He became certified to conduct pre-shift examinations in 2010 and was trained to do belt examinations by David Adair. (Tr. I, 133-134). Adair got Howington familiar with the mine: showing him the mainline and each section, the belt drives, the power centers, and the face. (Tr. I, 134). Howington learned what to look for and where to travel. (Tr. I, 134). Adair knew his stuff and Howington felt properly trained. (Tr. I, 134-135). On cross examination, he conceded that he could not recall when in 2010 he was certified to do examinations, but it may have been less than a year at the time at issue. (Tr. I, 162-163).

²⁸ Howington did not work at Dominion 36 at the time of the hearing, he had worked for D&H Mining as a section box for around six months. (Tr. I, 135). He was subpoenaed for a deposition about his April 4, 2011 examination. (Tr. I, 135). After that deposition, he did not speak to Respondent’s attorney or anyone else about his testimony. (Tr. I, 137-138).

Howington recalled working the day shift on April 4, 2011 and the violation being issued. (Tr. I, 136, 138). However, he did not specifically recall the instant pre-shift. (Tr. I, 162). Generally, he conducted the pre-shift for the oncoming evening shift starting at around noon. (Tr. I, 136). He started then because it had to be completed by 3:00 or 3:30 p.m. when the evening shift arrived. (Tr. I, 136). It took three hours to conduct the pre-shift because the area was enormous, it was a mile long. (Tr. I, 163). He was probably in the area cited around 2:30 and 3:00 p.m., unless he had help. (Tr. I, 155). He only occasionally had help. (Tr. I, 163-165). When he received help, the task was easier. (Tr. I, 164). He was confident in his abilities, but it was a big mine. (Tr. I, 164).

He started the examination on T-section at the T-6 drive. (Tr. I, 138). He then left the T-section and dated everything on the T-section. (Tr. I, 138). He then went back towards U-Section and date the five belt drives there. (Tr. I, 138). Then he would head outside at West Virginia where his last date board was located. (Tr. I, 138-139). This route allowed him to finish before the next shift started and avoid running into the new shift. (Tr. I, 139). Then he would go back through the mine and get outside down the mainline. (Tr. I, 139). He took the report for the exam outside and filled out the book himself at this time. (Tr. I, 137).

During his examinations, Howington would look for hazardous conditions and violations including bad rollers, belt rubbing the stand, the belt itself, draw rock on the top, roof conditions, the flow of air, and accumulations. (Tr. I, 139-140, 142). He had been taught to look for these things. (Tr. I, 140). He would travel on a manbus and use the light from his cap. (Tr. I, 139). He did not fix his eyes on one spot, but tried to look around. (Tr. I, 143). He would get off of his manbus and look around at the belt drives, the power centers, and broken belts. (Tr. I, 141). He took this task seriously because he was looking out for every other person in the mine and he took pride in his job. (Tr. I, 140). He rode the manbus for the examination because the area was so big. (Tr. I, 163-164).

He also recalled the five conditions cited by Tuggle. (Tr. I, 141). With respect to the cited stoppings, a condition would have to be pretty loud to hear while riding on the manbus, as the manbus and the belts are loud. (Tr. I, 142, 165). The manbus makes a metal on metal sound and the belts make a lot of sound. (Tr. I, 142-143). While traveling, Howington looks at stoppings to ensure there are no big holes, stoppings out, or anything effecting ventilation. (Tr. I, 149-150). He looks at the stoppings with his light, he does not stop at every stopping. (Tr. I, 150). The entry also had stoppings every 70 feet on both sides. (Tr. I, 148). Traveling inby the stoppings on the left were 10 feet away and the ones on the right were 15-20 feet away, on the other side of the belt. (Tr. I, 148-149).

Howington had seen missing wedges in the top of a stopping before. (Tr. I, 156). It occurs when the plaster gets dry and breaks apart and air blows out the wedge. (Tr. I, 156). This can happen at any time. (Tr. I, 156). The stoppings were about 50 inches high and 18-20 feet wide. (Tr. I, 158). It is not easy to see a three-inch by 16-inch hole moving down the entry in a manbus. (Tr. I, 158-159). The second brattice was in the same return and could have happened in less than a minute. (Tr. I, 159). It would also not be easy to spot. (Tr. I, 159-160).

With respect to bolts, the cited entry was about 43 breaks (2,800 feet) long. (Tr. I, 145). The bolts in this area were five across and four feet apart in a 20-22 foot-wide entry. (Tr. I, 145-147). The bolts were 42 and 48 inches long and had resin. (Tr. I, 146). There were 2,800 bolts in the entry and it would be impossible Howington to look at all of them. (Tr. I, 147). When he travels, he is not only looking at bolts, but everything else. (Tr. I, 147-148). He also examined Two other belt entries. (Tr. I, 144).

The first condition in the Order was a loose bolt. (Tr. I, 150). Howington looked at the bolts but did not see this one. (Tr. I, 150-151). He sometimes sees bolts where draw rock has dropped away. (Tr. I, 151). These do not provide support. (Tr. I, 151). To fix it, he takes a couple of “half-headers” and wedges them between the plate and the roof; the bolt is not removed but stays cemented. (Tr. I, 151). Howington did this occasionally. (Tr. I, 151). The fifth condition was also a roof bolt that Howington did not see. (Tr. I, 160). It takes no time for draw rock to fall. (Tr. I, 160). The bolt did not have to be removed; it still had the resin glue. (Tr. I, 160). This could be corrected by wedging in half-headers. (Tr. I, 160).

Finally, Howington discussed belts. He had seen problems with the belt in the past. (Tr. I, 152). Belts may begin rubbing at any time from a bad splice or something else. (Tr. I, 152-153). Belts can be knocked out of line when a splice contacts a roller and this will cause the belt to run side to side. (Tr. I, 152-153). It is also possible for the structure to bend or break in two. (Tr. I, 153). With respect to holes or damage to rollers, such a condition may take awhile but he was not sure. (Tr. I, 153-156). Rollers can be good one minute and bad the next. (Tr. I, 156). He could not always hear problems with the belt. (Tr. I, 165). If he noticed bad structure he stopped the bus, called outside to tell them he was shutting the belt down, then he knocked the breaker at the power center, and replaced the structure. (Tr. I, 154).

Howington understood that this case was about citations issued for things he missed on the pre-shift. (Tr. I, 161). He tried to do the best he could when doing pre-shifts, including checking for hazards and violations. (Tr. I, 161). He did not believe he was highly negligent. (Tr. I, 161). The conditions would not have been easy to see. (Tr. I, 161-162). However, he conceded that all of the cited conditions could have been present during his examination. (Tr. I, 163).

c. Testimony of Ronald Helton

At the time of the hearing, Ronald Helton had worked in the mines for almost 13 years and worked for Suncoal. (Tr. I, 167). He was certified to conduct belt examinations. (Tr. I, 167). In April 2011 he worked at Dominion 36 on the third shift.²⁹ (Tr. I, 167-168, 177). He did not recall if he was pre-shifting outby areas or active working sections at the time or if he conducted a pre-shift prior to the one at issue here. (Tr. I, 177-178).

²⁹ When asked if he was conducting pre-shift examinations at Dominion 36 on April 2011, Helton testified, “I’d say I was, but” and then the transcript states the rest of his answer was unintelligible. There were several instances in which Helton’s answers could not be recorded. No weight can be given to the answers to those questions.

Helton took conducting pre-shift examinations seriously because he checked for hazards and violations and because of his training. (Tr. I, 168). That classroom training was conducted by Van Dyke and Helton also picked things up from other places. (Tr. I, 169). In order to conduct a pre-shift, Helton would check utility belts, look for bad rollers, bad belt, roof conditions, accumulations and rubbing. (Tr. I, 169-170). Helton would ride a mantrip during his pre-shifts, a process authorized by MSHA. (Tr. I, 170).

Helton reviewed the Order at issue. (Tr. I, 170). The first condition was a loose bolt at crosscut 1 by the first airlock door over the track and there was another loose bolt at crosscut 66 ½ where draw rock had fallen out. (Tr. I, 171). Helton had seen such conditions during pre-shifts before and he saw these he would have put header boards above them. (Tr. I, 171). Draw rock can fall from around a bolt at any time and it can happen quickly. (Tr. I, 172).

The Order notes that three pieces of belt structure damaged at crosscut 11, 16, and 30. (Tr. I, 172). Two pieces were cut by the belt and the belt was causing friction and smoke on two stands. (Tr. I, 172). As an examiner, Helton would never walk by something that was smoking and not fix it. (Tr. I, 172). Helton had seen belts wobble or move, various thing cause this including crooked splices, broke belts, or upside belts. (Tr. I, 172-173). This condition can occur very quickly. (Tr. I, 173). Belt can wobble out of alignment, cut into structure, and then go back into alignment. (Tr. I, 173). He also noted that the belts are miles long. (Tr. I, 172).

The Order also notes two damaged rollers at crosscuts 16 and 30 with bearings and ends missing on the top rollers and the roller outer shell contacting and grinding on the metal support shaft. (Tr. I, 173). Helton had found and removed damaged rollers during pre-shifts. (Tr. I, 173). Bearings go out quickly, even on a new roller, causing the roller to wear out. (Tr. I, 174).

The Order also noted two places where there were holes in the brattices. (Tr. I, 174). This condition can happen at any time from vibrations and the earth moving. (Tr. I, 174-175). Helton had seen and corrected similar conditions during pre-shifts. (Tr. I, 175). He would not be able to hear air going through the hole while on the mantrip. (Tr. I, 175-176). Helton has never had problems doing a pre-shift from the mantrip. (Tr. I, 176).

On cross examination, Helton conceded that he did not recall Tuggle's inspection or the five conditions cited. (Tr. I, 177-178). He would have noted the conditions as hazardous if he had seen them. (Tr. I, 178)

3. Contentions of the Parties

The Secretary contends that Order No. 8182676 was validly issued, was the result of high negligence and an unwarrantable failure ("UWF"), was S&S, and had appropriate penalties. (*Secretary's Post-Hearing Brief* at 31-43). Specifically, the Secretary argues that this violation was valid because Respondent's pre-shift examiner failed to notice five separate obvious hazardous conditions during a pre-shift examination. (*Id.* at 31-33). The Secretary argues that this condition was S&S because there was a violation of a mandatory standard, that violation could lead to numerous safety hazards including roof fall or fire, all five underlying violations were reasonably likely to occur, and four out of the five were likely to result in serious injury.

(*Id.* at 33-34). The Secretary also argues that this condition was UWF because it was obvious, extensive, over a large area, existed for some time, and Respondent had prior warning. (*Id.* at 34-37). Finally, the Secretary contends that the penalty was appropriate considering Respondent's history, size, negligence, business strength, abatement, and the gravity of the violation. (*Id.* at 38-44).

Respondent contends that Order No. 8182676 was invalid, was not the result of negligence, was not a UWF, and was not S&S. (*Respondent's Post-Hearing Brief* at 46-62). Specifically, Respondent argues this violation was not valid because the pre-shift examiner testified that he had conducted the examination thoroughly and the Secretary presented no evidence to show that he did not. (*Id.* at 54). Respondent also argues that the negligence was not high because the conditions were not obvious, there was no evidence that the examiner ignored conditions, and the conditions could have occurred at any time. (*Id.* at 56-58). Finally, Respondent argues that this situation meets none of the requirements for a UWF designation. (*Id.* at 59-62)

4. Findings and Conclusions

a. Validity

Order No. 8182676 was validly issued. An operator commits a violation of 30 C.F.R. §75.360(a)(1) when it fails to conduct an adequate pre-shift examination within three hours preceding the beginning of any eight-hour interval during which any person is scheduled to work or travel underground. Under §75.360(b) an examiner must inspect for, amongst other things, "hazardous conditions." An inspector's determination that a pre-shift examination was inadequate is subject to review under "an objective test of whether a reasonably prudent person, familiar with the mining industry and the protective purposes of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991) (citation omitted). The Commission has held that the terms of §75.360 are "unambiguous" and are of "fundamental importance in assuring a safe working environment underground." *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995); see also *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). Therefore, review of the validity of Order No. 8182676 turns on whether a reasonably prudent person, familiar with the mining industry and the protective purpose of §75.360(a)(1) would have recognized that circumstances were present in the area covered by the pre-shift examination that constituted "hazardous conditions."

In the instant case, Inspector Tuggle conducted an inspection of the mine on April 4, 2011. (Tr. I, 39). It is undisputed that during that inspection Tuggle wrote five citations for hazardous conditions along the mainline belt and track entry. (Tr. I, 43, 59-60). It is further undisputed that Respondent did not contest those five citations and paid the penalties assessed thereto without modification. (GX-3). In fact, Helton conceded at hearing that these conditions were hazardous within the meaning of the standard. (Tr. I, 178). Under *Old Ben Coal Company*, uncontested violations are final orders of the Commission and if the penalty has been paid, the operator's right to contest the violations has been extinguished. *Old Ben Coal Company*, 7 FMSHRC 205, 209 (Feb. 1985). It is further uncontested that Respondent's pre-shift examiner,

T.J. Howington, did not record any of these five conditions in pre-shift book and did not correct them. (Tr. I, 51). Therefore, I find that the Respondent has conceded that the five hazardous conditions cited by Inspector Tuggle exist and, as a result, Respondent violated 30 C.F.R. §75.360(a)(1) by failing to record or correct them.

Respondent cites to *Cyprus Cumberland Resources*, to argue that suspicion that a hazardous condition may have existed at the time of the pre-shift examination is not sufficient to establish a violation of §75.360. *Cyprus Cumberland Resources*, 18 FMSHRC 1271, 1278 (Jul. 1996) (ALJ Melick). Respondent notes that Inspector Tuggle was not present at the time of the pre-shift examination, a point that is not contested. Further, it points to Howington's testimony that he did not see any of the cited conditions. In essence, it argues that because Tuggle was not present for the pre-shift examination and Howington testified that it was properly conducted, there is no evidence that the conditions existed during the examination.

Respondent's reading of Judge Melick's decision in *Cyprus Cumberland Resources* does not stand up to scrutiny. Judge Melick did not hold that an inspector must be present when a pre-shift examination or that the examiner admit the examination was inadequate in order to issue a citation. If he had that decision would be clearly erroneous. Such a holding would render any citation for pre-shift examination invalid so long as the examiner stated he followed the law. Instead, Judge Melick simply stated that in his opinion there must be more than speculation to support a pre-shift violation.

In the instant case, the Secretary showed, by a preponderance of evidence, that the conditions existed during the pre-shift examination and were not recorded or corrected. Inspector Tuggle testified that that the first loose roof bolt had been present since before the last examination because rock dust had accumulated on the roof plate. (Tr. I, 57). Similarly, the roof near the second loose bolt had dust that was not fresh. (Tr. I, 84-85). He testified that it would take a day or two for the belt to cut all the way through the belt structure. (Tr. I, 66). He testified that the first hole in stopping at crosscut 16 may have existed for several days given the flood issues that occurred in the mine. (Tr. I, 77). Finally, he testified that the hole in the stopping at crosscut 37 contained visible, pooling rock dust and therefore had existed before the examination. (Tr. I, 82). Howington even conceded that the conditions could have been present during his examination. (Tr. I, 163).

I found the Inspector Tuggle's testimony was credible with respect to the amount of time the conditions existed. Furthermore, in order to reject the Secretary's explanation of the condition would require that I would have to believe the following scenario:

Between roughly noon and 3:30 p.m. Howington conducted a pre-shift examination, specifically checking the area cited between 2:30 and 3:00 p.m., and found that the area was pristine. (Tr. I, 136, 155, 163). However, as soon as Howington left the cited area, it rapidly, almost cartoonishly, degenerated. Within an hour or so of Howington's examination of the cited area, a host of hazardous conditions suddenly appeared. At the airlock door, a roof bolt became loose, at crosscut 11 the belt cut into the belt structure, at crosscut 16 the belt structure was cut in two by the belt and the rollers were grinding on the support shaft, at crosscut 30 the belt structure was cut in two and began to smoke, at crosscut 16 a hole developed in the stopping and the

stopping began to lean over, at crosscut 37 another hole developed in the stopping, and at crosscut 66 1/2 another bolt failed. After that hour, Tuggle arrived and cited the conditions (which Respondent conceded existed).

I find that such a bizarre series of events was unlikely. It was far more likely, and the preponderance of evidence supports, that the cited conditions existed for some time but were either not noticed or not reported by Howington. Therefore, Respondent's examination was not adequate and the Order was valid.

b. Gravity and S&S

With respect to Order No. 8182676, the event against which the standard, 30 C.F.R. §75.360(a)(1), is directed is basically any hazardous condition. The Commission has recognized preshift examinations as "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995); *see also Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). Chairman Jordan and Commissioner Marks have referred to the preshift inspection requirement as "the linchpin of Mine Act safety protections." *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1391 (Aug. 1996) (Jordan and Marks, concurring and dissenting in part). "The preshift examination is intended to prevent hazardous conditions from developing." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997). The standard seeks to ensure that safety hazards from causing injury by encouraging operators to report and correct those hazards first. In the instant case, Inspector Tuggle credibly testified that this condition was reasonably likely to result in lost workday/restricted duty injuries to six persons. (Tr. I, 90-93). Furthermore, Respondent conceded that the five individual conditions cited were validly issued and that four of the five were reasonably likely to result in serious injuries to six persons. Therefore, inspector Tuggle's determination with respect to the gravity of the cited danger is appropriate.

Further Inspector Tuggle's designation of S&S is clearly correct. The first prong of *Mathies* is satisfied with respect to this violation for the reasons discussed above.

The second prong, that a discrete safety hazard was contributed to by the violation, is also met. The law requires an adequate pre-shift to check for all dangers that might occur in the mine. In this case, an adequate pre-shift would have found roof fall danger from loose roof bolts, the risk of fire from belt friction and broken rollers, and the risk of loss of ventilation or carbon monoxide build-up from damaged stopping. All or one of these conditions could have contributed to a safety hazard.

The third prong, that there is a reasonable likelihood that the hazard contributed to by the violation will cause injury, is also met. In the event of a roof fall, a miner could suffer crushing injuries. (Tr. I, 62-63). In the event of a fire, a miner could be burned. (Tr. I, 71). Finally, in the event loss of ventilation or carbon monoxide build up, and explosion could occur or a miner could suffocate. (Tr. 78-81).

Finally, the fourth prong of *Mathies* is met as injuries resulting from roof fall, fire, explosion, or CO build-up would likely result in at least lost workday/restricted duty injuries and

possibly fatal injuries. Therefore, the S&S designations for each of the three violations related to the gas well are appropriate.

c. Negligence

Inspector Tuggle marked this Order as exhibiting “high” negligence. I find the preponderance of the evidence substantially reports this designation.

The first issue with respect to negligence is whether Respondent knew or should have known that violations at issue in this case existed. That is, whether it knew or should have known that the underlying violations existed such that the pre-shift examination was inadequate. The parties have stipulated that Howington was an agent of Respondent at the time of the examination. If Howington, or other agents of Respondent, were negligent with respect to this violation, that negligence is imputable to Respondent.

A preponderance of the evidence shows that Respondent knew or should have known that the hazards were present in the along the mainline belt and track entry. Inspector Tuggle credibly testified that the first damaged bolt had 5.5 inches of draw rock fallen while the second had 14 inches (which is a lot). (Tr. I, 58, 87, 106-109). He also testified that the damaged belts were smoking, that several pieces of belt structure were cut in half, others were in a bind, and that they were making a loud clanging noise that could be heard over the din of equipment and voices. (Tr. I, 63, 65, 67-70). Perhaps more importantly, some of the damaged belt structure had been supplemented with additional structure, implying that the damaged equipment was seen but not removed. (Tr. Tr. I, 65-66, 70, 125). He further testified that the holes in the stoppings created loud rushing noises that could be heard over equipment. (Tr. I, 74-75, 79, 81, 91). All of these violations occurred along the main track where everyone would travel in the mine, including foremen. (Tr. I, 61-62, 73, 79, 84, 87, 91-92). Finally, Tuggle testified that five conditions along a 2,800-foot entry would be a lot. (Tr. I, 127-128). These conditions were visibly and audibly obvious and Respondent should have known they existed at least during the pre-shift exam. In fact, the evidence with respect to the supplemental structures shows that Respondent knew about some of the conditions but did not correct them.

In its brief, Respondent seeks to mathematically show that the conditions were not obvious and therefore that it should not have known they existed. Specifically, it noted that there were 2,800 roof bolts in the area and that only two were damaged. (*Respondent’s Post-Hearing Brief* at 55). It also noted that there were 80 stoppings in the area and that only two had holes that constituted just 0.00325% of the surface area. (*Id.* at 56). Respondent operates a large mine and a large mine is going to have extremely high numbers of bolts and stoppings. That does not automatically create an excuse for failure to conduct a proper pre-shift examination. If Respondent has an entry with 2,800 roof bolts and 80 stoppings then it should be able to monitor that number of bolts and stoppings. There is no certain low number of violations that form a “safe harbor” for finding a pre-shift was not negligent.

Having determined that Respondent was negligent, the next issue is whether there were any mitigating factors present. Respondent argues that there are several.

Respondent also notes that, unlike the inspector, Howington had only three hours to conduct the pre-shift and that there was no evidence that he ignored the conditions. (*Respondent's Post-Hearing Brief* at 55). If three hours was insufficient time for Howington to conduct a proper pre-shift examination then he should have been given more time or an additional miner should have been assigned to conduct pre-shift examinations. In fact, the evidence shows that Inspector Tuggle told Respondent before this violation was issued that it had insufficient resources designated for pre-shift examinations. (Tr. I, 95). Furthermore, Respondent's witness agreed that the area to be covered by this examination was enormous. (Tr. I, 163). Howington's hurried pace in conducting the examination likely lessens his personal negligence in this matter, but it does not in any way change *Respondent's* negligence. In fact, Respondent's failure to provide time and resources for an adequate examination heightens its lack of care.

Further, Respondent notes that Howington and Helton both testified that they could not hear the clanging and air rushing over the equipment. (*Respondent's Post-Hearing Brief* at 57). I credit Tuggle's testimony that the rushing was audible over the equipment. Perhaps the failure of Respondent's employees to hear the equipment stemmed from the fact that they were moving too quickly through the area. However, even if Howington and Helton could not hear the conditions, they were still visible in a widely traveled area.

Respondent also argued that all of the cited conditions could have occurred in minutes. (*Respondent's Post-Hearing Brief* at 56-58). However, as discussed in the validity section *supra*, the conditions clearly existed since at least the start of the pre-shift and, in a few cases, for several days.

None of the arguments presented by Respondent persuade me that the negligence was in any way mitigated. I find that a high negligence designation is appropriate.

This Order was also cited for an unwarrantable failure. I find that a preponderance of the evidence also supports this designation, as dictated by the *IO Coal* factors. Specifically:

1. Extent of the violative conditions

The inadequate portion of the pre-shift examination covered a 2,800-foot area of the main track and belt entry of the mine. (Tr. I, 127-128). It consisted of at least seven different conditions contained in five different underlying citations. (Tr. I, 56, 67-70, 74, 76-77, 80, 84). Respondent argues that only a small number of bolts, belts, and stoppings were in violation over the course of this area. (*Respondent's Post-Hearing Brief* at 59). However, I credit the testimony of Inspector Tuggle, that five different violations in a half mile area is "a lot." (Tr. I, 127-128). While there were thousands of bolts and dozens of stoppings, I find that the cited conditions were extensive given the small area and the obvious nature of the violations. Furthermore, the area encompassed by the pre-shift examination was characterized as "vast," and Respondent even argued that 3 hours would not be enough time to find the conditions cited. As a result, the inadequate pre-shift touched on all areas of the

2. The Length of Time of the Violation Existed

As noted in the discussion of the validity of these conditions, the cited conditions lasted, in many cases, for several days. All of the conditions existed before the pre-shift examination at issue. A preponderance of the evidence shows that these obvious conditions existed for extensive periods of time. The amount of time is especially extensive in light of the fact that a worker was specifically assigned to search for these kinds of conditions.

3. Whether the violation is obvious or poses a high degree of danger

The underlying violations at issue here dealt with extremely grave hazards. As noted *supra*, the bolt conditions created the possibility of crushing injuries, the belt conditions created the possibility of fire, and the stopping conditions created the possibility of suffocation. The pre-shift examination was supposed to serve as a first line of defense against these hazards, “to prevent hazardous conditions from developing.” *Enlow Fork Mining Co.*, 19 FMSHRC at 15. By failing to conduct an adequate pre-shift examination, Respondent exposed its miners to the underlying hazardous conditions.

4. Whether the operator had been placed on notice that great efforts were necessary for compliance or on notice that this was an issue.

Inspector Tuggle credibly testified that he had raised the issue of pre-shift examination with mine management in the past. (Tr. I, 95). In essence, he stated that there were not enough people conducting the pre-shift examinations. This situation was not corrected by the time of the instant Order, as evidenced by Howington’s testimony that he had to inspect an enormous area and that it would have helped to have assistance. (Tr. I, 163-165).

Respondent argues that, while Tuggle had warned Respondent about pre-shift examination three months prior to the instant Order, new management had come taken over since then and the people working were qualified. (*Respondent’s Post-Hearing Brief* at 60). As Tuggle noted at the hearing, new management was not brought in to correct the conditions but instead because the previous members of management were promoted. (Tr. I, 122). Further, simply bringing in new management did not correct the situation, as Howington was still required to inspect a vast area by himself and was unable to do so adequately.

5. The operator’s efforts in abating the violative condition

Respondent abated the condition by conducting an adequate pre-shift examination. However, the issue of abatement is not particularly relevant. Miners had already been exposed to these conditions for several days.

6. Operator’s knowledge of the existence of the violation

As discussed with respect to negligence, *supra*, Respondent knew or should have known that the pre-shift examination was inadequate. The underlying conditions were visibly and audibly apparent. These conditions clearly posed health and safety dangers to miners.

Respondent should have known that the pre-shift was inadequate. Further, there is some evidence that Respondent had seen conditions with the belt and chosen to supplement the belt structure rather than replace the damaged equipment.

In light of the extensiveness of the condition, the length of time the cited conditions existed, the high danger posed by the violations, the fact that Tuggle had warned Respondent just three months earlier, and Respondent's knowledge of the condition, a finding of unwarrantable failure is appropriate.

d. Penalty

Under the assessment regulations described in 30 CFR §100, the Secretary proposed penalties of \$16,400.00 for Order No. 8182676. I evaluated each of the statutory factors as follows:

(1) The Operator's history of previous violations – Respondent was cited 10 times under Section 75.360(a)(1) in the last two years.

(2) The appropriateness of the penalty compared to the size of the Operator's business – The evidence shows that Respondent had between 1,000-2,000 employees and that this mine was very large. (Tr. I, 210). Therefore, it is a large business.

(3) Whether the Operator was negligent – As previously shown, the operator exhibited high negligence and an unwarrantable failure to comply with all three standards

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

(5) The gravity of the violation – As previously shown, this violation was reasonably likely to result in fatal injuries to six persons.

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

In light of my affirmation of the Secretary's designations with respect to validity, negligence, and gravity, I hereby **AFFIRM** the originally assessed penalties of \$16,400.00 for Order No. 8182676.

ORDER

Respondent, Dominion Coal Corporation, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$216,400.00 within 30 days of the date of this decision.³⁰

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

Distribution: (Certified Mail)

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³⁰ 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 10, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2010-1144
Petitioner,	:	A.C. No. 15-17110-215738-01 2AC
	:	
v.	:	Docket No. KENT 2010-1145
	:	A.C. No. 15-17110-215738-02 2AC
A&R TRUCKING,	:	
Respondent.	:	Mine: Calvary Mine

DECISION

Appearances: LaTasha T. Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor

Ned Pillersdorf, Esq., for A&R Trucking, Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

These civil penalty proceedings are conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the “Act” or “Mine Act”). This matter concerns Citation No. 8217796 and Order No. 8217797 issued against Respondent, A&R Trucking, pursuant to Section 104(d) of the Mine Act. A hearing was held in Pikeville, Kentucky, on July 9, 2013. After the hearing, the parties submitted post-hearing briefs, which have been fully considered.

STIPULATIONS

At hearing, the parties entered the following joint stipulations into the record:

- 1) A&R Trucking is subject to the Federal Mine Safety and Health Act of 1977.
- 2) A&R Trucking has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
- 3) A&R Trucking is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.

- 4) A&R Trucking's Mine I.D./Contractor Number is 2AC. (The original stipulation listed the incorrect Mine ID for A&R Trucking as 15-17110.)

JX-1.¹

SUMMARY OF THE TESTIMONY AND RECORD

In 2009, Patricia Fouts owned three trucks, which would haul coal from underground mines in Knott County to the tipples.² Tr. 44-45. The distances hauled ranged from one and half miles to four miles. Tr. 45.

Inspector Samuel Hill was at the Calvary Mine on December 15, 2009 to inspect the trucks as part of a general inspection.³ Tr. 23.⁴ As part of the inspection, Hill did a visual inspection for safety defects, as well as checking driver training. Tr. 23. As a result of the inspection, Hill issued Citation No. 8217796, and served it to Randy Fouts and Ronnie Miller of A&R Trucking. Tr. 19; SX-1. Hill also issued Order No. 8217797 to Randy Fouts. Tr. 20; SX-2.

Citation No. 8217796

On December 15, 2009, Hill found the following conditions or hazards related to the truck that placed miners in danger: the steering box and hydraulic hose were leaking oil, which could contribute to a loss of control of the vehicle; the left steering tire was worn smooth, which could contribute to a blowout or a loss of steering control and accident; an audible air leak in the rear of the truck, which could impact and compromise the brakes; the front rear tandem differential was pouring oil, which could cause a fire; the exhaust manifold was leaking and allowing smoke into the cab, which was adversely affecting the driver's eyes; and there was oil

¹ Joint exhibits will hereinafter be referred to as "JX" followed by the exhibit number. Secretary's exhibits will hereinafter be referred to as "SX" followed by the exhibit number. Respondent's exhibits will hereinafter be referred to as "RX" followed by the exhibit number.

² Patricia Fouts does business as A&R Trucking. Tr. 43. In addition to running A&R Trucking, she also worked in the Administrative Office of the Court for the Circuit Clerk's Office of Knott County. Tr. 54-55. At the time of hearing, she had been in the trucking business for 24 years. Tr. 55.

³ Samuel Hill worked as an inspector for MSHA in December 2009 when the instant citations were issued. Tr. 16. He has a mining tech degree, as well as an associate's degree from the University of Kentucky. Tr. 16-17. Hill graduated as an inspector from the Mine Academy at Beckley in 1995, and at the time of hearing had worked for over 18 years as a coal mine inspector. Tr. 17. He had also held positions in private industry as an engineer, foreman, and superintendent of both surface and underground mines. Tr. 17. In total, Hill had approximately 39 years of experience in mining. Tr. 18.

⁴ The hearing transcript will hereinafter be referred to as "Tr." followed by page number.

and diesel fuel pouring into the turbo on the motor. Tr. 24-25. As a result of these conditions, Hill issued Citation No. 8217796 for violation of 30 C.F.R. § 77.404(a). Tr. 25.

In 2009, the Mack coal truck at issue was 22 years old and the normal life of a coal truck is 30-40 years.⁵ Tr. 46. Though Randy Fouts was familiar with the cited truck, he was not driving it when it was cited. Tr. 48. At the time that the truck was cited, Ronnie Miller was the driver. Tr. 47. However, Randy Fouts was responsible for fixing the trucks and ensuring that they were safe. Tr. 51-52. Randy Fouts testified that the truck was not in a dangerous condition and still had good brakes. Tr. 47. It was hauling three days per week, eight to ten hours per day. Tr. 47.

Randy Fouts admitted that the truck had an oil leak, but stated that it would not have caused a fire. Tr. 48-49. He testified that it was common for large coal trucks to have oil leaks; however Hill testified that hydraulic leaks in coal trucks were uncommon. Tr. 34-35, 49. Randy Fouts disputed Hill's assessment of a fuel leak, and said that the truck was leaking water. Tr. 48.

Fouts also admitted that the passenger side window was cracked, but said that this condition was not dangerous. Tr. 49. The headlight had gone out the morning of the inspection, and Fouts did not know about it. Tr. 49. He testified that he had fixed the steering arm and also performed other repairs to the truck. Tr. 49-51.

Patricia Fouts denied having many reports of problems with the truck, but stated that she was not involved in day-to-day operation or maintenance of the trucks. Tr. 55-56. Her husband, Randy Fouts, was responsible for the day-to-day operations. Tr. 60. She testified that she did the paperwork at the company, which includes MSHA citations. Tr. 61-62.

Inspector Hill noted the gravity as "highly likely" because he believed that the conditions could result in a loss of control to the driver. Tr. 26. Adding to the dangerous conditions, was the fact that the vehicle was being operated on long winding grades, on a narrow road that was one lane at points, with a steep outslope, and in wintertime conditions. Tr. 26. He marked the injury or illness as "fatal" because of the steepness of the outslopes and the possibility of the vehicle going over the mountain or hitting another vehicle. Tr. 26-27. He marked the citation as "Significant and Substantial" (S&S) because he determined that the conditions had a likelihood of leading to a serious injury to a driver. Tr. 27.

Hill originally marked the citation as "high" negligence, but later modified it to "reckless disregard." Tr. 27. He made this modification after speaking to the vehicle driver and Randy Fouts and concluding that the conditions had been allowed to exist for at least one week. Tr. 27-28. Randy Fouts was responsible for the upkeep of the vehicle and directed the workforce on a daily basis. Tr. 34. Randy Fouts had worked on the truck on the day before the citation was issued, and the driver indicated that some of the issues had existed for over a week. Tr. 28. Furthermore, there had recently been two fires in the truck, and the truck was cited for an out of service fire extinguisher. Tr. 28.

⁵ Randy Fouts has been in the coal trucking business for 25 years, and has been driving coal trucks for 20 years. Tr. 45-46. He is married to Patricia Fouts. Tr. 43.

Hill determined that the violation was an unwarrantable failure to comply with a mandatory safety standard because the conditions would be obvious to the casual observer. Tr. 28. These conditions included visible and audible leaks, as well as substantial oil puddling on the ground beneath the truck. Tr. 28. Additionally, the worn chain on the steering wheel was obvious. Tr. 28-29. Hill testified that these hazards caused a high degree of danger. Tr. 29.

Hill testified that the driver would know of the conditions he cited. Tr. 29. Randy Fouts told him that this type of truck was prone to such problems. Tr. 29. Hill described A&R Trucking as having a “long history” of such violations, and considered the conduct aggravated. Tr. 30.

Order No. 8217797

Inspector Hill issued Order No. 8217797 under §104(d)(1) of the Act for failure to conduct a pre-operational check on the unit and to repair the defects obvious to a casual observer. Tr. 30-31; SX-2. He originally wrote the Order pursuant to 30 C.F.R. § 77.1606(a), but changed it to §1606(c). Tr. 31.

Hill issued Order No. 8217797 for the same conditions on the Mack truck that led him to issue Citation No. 8217796. He marked the gravity as “Highly Likely” due to a confluence of factors contributing to a serious accident. Tr. 31. Hill marked the Order as “Fatal” because of the road conditions, specifically the steep winding grades and traffic volume. Tr. 31. He marked the Order as S&S because the conditions were likely to result in a significant and substantial injury to a driver. Tr. 31-32. Hill determined that the violation was the result of an unwarrantable failure. Tr. 32. He determined that the conditions existed for approximately one week after talking with Randy Fouts and the truck driver, Ronnie Miller. Tr. 32. Miller had stated that he had problems with his eyes for over a week because of the smoke coming into the cab. Tr. 32. Randy Fouts told Hill that he had tried to work on some of the problems. However, he also stated that there had been fires and leaks several days and one week prior to the inspection. Tr. 32.

Hill testified that he believed that A&R Trucking failed to make reasonable efforts to eliminate the issues and hazards present in the truck. Tr. 33. He testified that fatal injuries could reasonably be expected to occur from the violation. Tr. 33. He found the violation to be due to “Reckless Disregard” because there were so many problems present for an extended period. Tr. 33. Those conditions that would have been evident and obvious to anyone. Tr. 33.

The conditions that were cited were repaired six days after the inspection. Tr. 36.

The Correspondences

Several letters were exchanged between MSHA and the Respondent regarding the instant citation and order. On March 5, 2010, Jay Mattos, the Director of the Office of Assessments, sent a letter to Randy Fouts stating in pertinent part:

This letter is in reference to citation number 8217796 and 8217797. The citations were contained in Mine Safety and Health Administration Assessment Case Number (MSHA Case Number) 000209193, Mine Identification Number 15-17110, Contractor Identification Number 2AC.

The citations were modified, which changes the associated civil penalties. Therefore, the citations and associated civil penalties have been removed from this case and the citations will be re-assessed with an increased penalty under a new MSHA Case Number. This action reduced the balance of this case from \$12,885.00 to \$300.00.

We apologize for any inconvenience this may have caused you or your company. If you have any questions, please contact Mrs. Toni Rauch-Balot of my staff at 202-693-9717.

RX-1.

Patricia Fouts testified that she paid the \$300.00 and wrote at the bottom of the letter, "Pd. \$300.00 3/22/2010 Check # 5043. Tr. 56-57; RX-1.

Norman G. Page, the District Manager, sent a follow-up letter to Randy Fouts on March 22, 2010, stating:

As you may know, the Mine Safety and Health Administration has conducted a special investigation regarding Order No. 8217797 and Citation No. 821776. We have decided not to pursue further investigative action at this time and the case is closed.⁶

RX-2.

On April 16, 2010, Respondent's counsel, Ned Pillersdorf, sent a letter to Norman Page and Jay Mattos at MSHA concerning the citations, stating:

I am in possession of correspondence to my client, Randy Fouts, from each of you gentlemen. In the correspondence from Norman Page, there is reference to the fact that citation number 8217797 and 821776 were closed. Thereafter, my client also received correspondence from Mt. [sic] Mattos indicating that he has a balance of \$300.00. My client further advises that he paid the \$300.00, shortly after receipt. Since that time, we have received additional correspondence seeking payment of \$136,000.00. We take the position that my client satisfied the claim when he submitted the \$300.00.

Mattos sent a response to Pillersdorf on May 24, 2010, stating in pertinent part:

This is in response to your April 16 letter regarding correspondence your client, Randy Fouts, received from me regarding civil penalties assessed against Mr. Fouts company, A&R Trucking for order number 8217797 and citation number 8217796.

⁶ There was a typographical error in this letter, and the Citation No. should have read 8217796 rather than 821776.

Civil penalties in the amounts of \$6,624 and \$5,961, respectively, were originally assessed against A&R Trucking in Mine Safety and Health Administration (MSHA) case number 000209193 on January 20, 2010. These penalties were erroneously assessed as regular assessments when they should have been assessed as special assessments as described in Title 30 CFR section 100.5. When MSHA staff identified the error, I notified Mr. Fouts by letter dated March 5, 2010 that the penalties were being removed from case 000209193 reducing the balance owed for that case to \$300. In the same letter, I informed Mr. Fouts that penalties for the two issuances would be re-assessed with increased penalties under a new case. Order 8217797 and citation 8217796 were reassessed as special assessments of \$110,900 and \$25,800, respectively, in case 000215738 on April 10. We will process these assessments for a hearing as requested in your letter.

The correspondence from Norman Page relates to a special investigation that was being conducted into the violations to determine personal liability. Mr. Page's letter advised Mr. Fouts that the special investigation/case was being closed. This is unrelated to the company's liability for the civil penalties.

I hope I have adequately responded to your concerns. If you have any further questions, please contact Ms. Linda Weitershausen of my staff at 202-693-9712.

On questioning by the Court, Patricia Fouts testified that she was not aware that there were five citations, and that she believed that all the citations were being reduced to \$300.00 and the case was being closed. Tr. 61-63.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

The citation and order at issue in this case were both marked as "Reckless Disregard," "Fatal," "High" negligence, with 1 persons affected, Significant and Substantial (S&S), and "unwarrantable failure."⁷ SX-1.

⁷ Inspector Hill thereafter modified Citation No. 8217796 from "High" negligence to "Reckless Disregard."

- a) The Secretary has Carried His Burden of Proof by a Preponderance of the Evidence that 30 C.F.R. § 77.404(a) and 30 C.F.R. § 1606(c) were Violated as Cited in Citation No. 8217796 and Order No. 8217797 Respectively

On December 15, 2009, Inspector Samuel Hill issued Citation No. 8217796 against Respondent, A&R Trucking, for a 104(d) (1) violation of 30 C.F.R. § 77.404(a). This citation, in pertinent part, under Section 8, "Condition or Practice," states as follows:

At the time of inspection the black Mack unit #3, s/n U162119, was not maintained in a safe operating condition and was removed from service until repairs to the cited deficiencies can be corrected. The following deficiencies were found: 1) the steering box and hydraulic hose were leaking oil; 2) the front of the bed sub frame was broken on both sides and had bolts missing holding the hydraulic bed cylinder yoke allowing the unit to slide back and forth during dumping; 3) the front left steering tire was worn smooth; 4) an audible air leak was coming from where the air supply line connects to the tail gate actuator; 5) the front rear tandem differential had gear oil pouring from the seals; 6) the exhaust manifold where it joins the exhaust stack was leaking in front of the hydraulic tank; 7) the steering actuation arm where it attaches to the steering gear box was worn and had a movement of 3/8 inch. The truck is operated on steep long elevated grades and at elevated dump bins. These conditions both individually and collectively and other deficiencies cited during this inspection could result in a lose [sic] of control with dire consequences. These deficiencies are obvious to anyone with any knowledge of equipment operation. The operator, Randy Fouts engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that these conditions existed and that employees would have to operate the truck in the existing condition. This violation is an unwarrantable failure to comply with a mandatory standard.

SX-1.

On the same date, Inspector Hill issued Order No. 8217797 against Respondent, A&R Trucking, for a 104(d)(1) violation of 30 C.F.R. § 1606(c). This order, in pertinent part, under Section 8, "Condition or Practice," states as follows:

At the time of inspection the black Mack unit #3, s/n U162119 used to haul coal from the ICG Calvary mine did not have a properly conducted inspection prior to placing the unit in operation. Numerous safety defects were found that would be obvious to the casual observer. The truck was cited for a lack of headlights, operational rear and bed lights, brake lights, hydraulic leaks on the steering box, broken sub frame and bolts missing from hydraulic bed lift mount, oil and fuel leaks on the turbo area of the motor, broken windshield, exhaust leaks in front of the hydraulic tank, front tire worn, air leak on the rear tailgate actuator, oil leaks from the front tandem differential, fire extinguisher not adequate, steering arm worn at steering gear box. The operator Randy Fouts stated [sic] had performed work on the truck in the same area as the deficiencies only the night before and that the conditions are common and normal for that model of truck. Operator Fouts engaged in aggravated conduct constituting more than ordinary negligence in that he knew the deficiencies existed and the employees would be exposed to the hazards of

operation during normal work practices. This violation is an unwarrantable failure to comply with a mandatory standard.

SX-2.

Section 77.404(a) of the regulations states, “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.” 30 C.F.R. §77.404. Section 1606(c) of the regulations states, “Equipment defects affecting safety shall be corrected before the equipment is used.” 30 C.F.R. §77.1606(c). These regulations have similar requirements and will be considered together.

I fully concur with Judge Andrews’ recent summary of the duties imposed under §77.404(a):

According to well-settled Commission precedent, 30 C.F.R. §77.404(a) imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. *Peabody Coal Company*, 1 FMSHRC 1494, 1495 (Oct. 1979); *see also U.S. Steel Mining Company, LLC*, 27 FMSHRC 435, 438 (May 2005). “Derogation of either duty violates the regulation.” *Id.* With respect to the first duty, equipment is maintained in an unsafe operating condition “when a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action.” *Ambrosia Coal & Construction Company*, 18 FMSHRC 1552, 1557 (Sept. 1996). With respect to the second duty, the Commission has held that equipment is still in use if it “is located in a normal work area, fully capable of being operated.” *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843, 845 (April 1981) *see also Mountain Parkway Stone, Inc.*, 12 FMSHRC 960, 963 (May 1990) (equipment was in use when it was “parked in the mine in turn-key condition and had not been removed from service.”) The Commission found that allowing equipment to stay “parked in a primary working area could allow operators easily to use unsafe equipment yet escape citation merely by shutting it down when an inspector arrives.” *Id.*

Triple H Coal, LLC, 2013 WL 2286137, *3 (ALJ) (April 19, 2013). The Commission has further clarified that knowledge of the condition is not relevant to the inquiry of whether §77.404(a) was violated. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979) (“The regulation requires that operators maintain machinery and equipment in safe operating condition and imposes liability upon an operator regardless of its knowledge of unsafe conditions. What the operator knew or should have known is relevant, if at all, in determining the appropriate penalty, not in determining whether a violation of the regulation occurred.”)

Inspector Hill credibly testified that there were a host of problems on the cited Mack truck. Tr. 24-25. These included leaking oil, worn tires, air leaks, and a smoke leak inside the cab. Tr. 24-25. These conditions placed the truck driver in danger. In fact, the exhaust leak had already caused an injury to the truck driver’s eye. Tr. 24-25. The only response from the

Respondent concerning these conditions were they thought the truck was not in a dangerous condition, that oil leaks were common for large coal trucks, that one of the oil leaks was water, and that the truck had good brakes. Tr. 47.

Patricia Fouts testified that she was not involved with the day-to-day operation or maintenance of the truck, so I find her opinion on the truck's safety less than compelling. Tr. 55-56. Randy Fouts was more involved with the day-to-day operations, but his admissions concerning the cracked window, leaking oil and water, and other problems, indicated that he was resigned to the truck having problems. Tr. 48-51. Therefore, I fully credit Inspector Hill's testimony as to the hazardous conditions, and find that the truck was not in safe operating condition. Section 77.404(a) required that the truck either be maintained in safe operating condition or be removed from service. Randy Fouts confirmed that at the time of inspection, the Mack truck was still hauling three days per week, eight to ten hours per day. Tr. 47. Therefore, the Mack truck was neither being maintained in safe operating condition nor removed from service, violating both duties of §77.404(a). Similarly, the conditions on the truck were not corrected prior to the truck being used, in violation of §77.1606(c).

b) Respondent's Violation of §77.404(a) and §77.1606(c) were Highly Likely to Lead to Fatal Injury or Illness, and were Significant and Substantial in Nature

Taking into consideration the record *in toto* and applying pertinent case law, I find that A&R Trucking's violation of §77.404(a) and §77.1606(c) were "highly likely" to lead to "fatal" injury or illness, and were "Significant and Substantial" in nature.

The violative conditions on the Mack truck were "highly likely" to lead to fatal injury or illness. Inspector Hill's credible testimony revealed that the conditions on the Mack truck could lead to loss of control, a tire blowout, compromised brakes, and reduced driver visibility. Tr. 24-26. Furthermore, the roads that the truck driver was driving on were long winding grades, on a narrow road that was one lane at points, with a steep outslope and in wintertime conditions. Tr. 26. The conditions made it highly likely that the vehicle could go over the mountain or collide with another vehicle. Tr. 27.

I further find that the conditions were Significant and Substantial in nature. S&S is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan.

1984); accord *Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

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 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). The Commission has provided additional guidance: “We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Further, “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” and “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). 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 first element of *Mathies*—the underlying violation of a mandatory safety standard—has been clearly established.

As to the second element of *Mathies*—a discrete safety hazard, that is, a measure of danger to safety, contributed to by the violation—has also been clearly established by the record. Loss of control of the Mack truck and vehicle collisions are inarguably discrete safety hazards. Taken together, the violative conditions on the Mack truck contributed to the real possibility that an accident would result.

I find that the third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – has been satisfied here. The Secretary’s argument is persuasive that there was a reasonable likelihood that the hazard contributed to would result in injury. The hazard at issue here, collision or loss of control of the Mack truck, would likely lead to injury of the truck driver. Under *Mathies*, the fourth and final element that the Secretary must establish is that there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Considering, *inter alia*, the treacherous road conditions described by the inspector, it is reasonably likely that the hazard would lead to fatal injuries. Furthermore, while not fatal in itself, the truck driver was already beginning to develop an eye injury from the truck conditions.

I therefore find that Inspector Hill’s S&S designations were justified.

c) Respondent's Conduct Were the Result of Reckless Disregard and Constituted Unwarrantable Failure on Respondent's Part

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

No negligence is where the operator exercised diligence and could not have known of the violative condition or practice;

Low negligence is where the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances;

Moderate negligence is where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances;

High negligence is where the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances; and

Reckless disregard is where the operator displayed conduct which exhibits the absence of the slightest degree of care.

30 C.F.R. §100.3(d).

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

The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999);

Consolidation Coal Co., 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I find that in the instant case the operator displayed conduct which exhibited the absence of the slightest degree of care. 30 C.F.R. §100.3(d). In the instant case, the violative conditions on the Mack truck were obvious and extensive. Many of the problems, such as oil, air, and exhaust leaks, bald tires, and other problems were either visible or audible. Tr. 24-25. The conditions had existed for at least a week, when the truck was being utilized for 24-30 hours per week. Tr. 27-28, 47. Furthermore, the effects of the leaking exhaust had already led to visible eye injuries to the truck driver. Tr. 32. Based on these conditions, it is evident that the Respondent failed to exhibit the slightest degree of care.

In *Sec. of Labor v. Manalapan, Inc.*, 35 FMSHRC 289 (Feb. 2013), the Commission reviewed the factors to be evaluated in determining unwarrantable failure:

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); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

Id. at 5.

Considering the *Manalapan* factors *seriatim*, I find that the violative condition was obvious and extensive and had existed for a significant period of time. The violation clearly posed a high degree of danger. I note that the commission in *Manalapan* reaffirmed that the

factor of dangerousness may be so severe that by itself it warrants a finding of unwarrantable failure. *Manalapan*, at 294.

Given the fatal nature of injuries by the hazardous conditions on the Mack truck, I find that this aggravating factor of dangerousness outweighs any mitigating circumstance. Further, as discussed *infra*, both Respondents knew *or should have known* of the existence of the conditions. I therefore find that Respondent's conduct did constitute an unwarrantable failure.

d) The Penalty is Not Barred Due to Claim Preclusion, Issue Preclusion, or Contract Law Principles

The crux of Respondent's argument appears to be that they understood MSHA's March 2010 correspondences to mean that the entire penalty assessment totaled \$300.00, which was promptly paid, thereby barring MSHA from imposing a special assessment. Respondent's counsel stated in his brief opening argument:

There was correspondence issued from the US Department of Labor dated March 5, 2010 to Randy Fouts of A&R Trucking, Pike, Kentucky. In the correspondence it indicated that it was basically a balance that was reduced to \$300 that my clients paid by check on 3/22/2010, Check No. 5043.

Our position is there was an agreement with the Government whether you call it accord and satisfaction, collateral estoppel, res judicata, whatever you want to call it, it's [sic] been resolved.

We continuously maintain this matter was settled when the Government received a check and negotiated it and the Government or the Department of Labor settled it.

Tr. 12-13.

This argument is not compelling. As will be discussed *infra*, Respondent misinterpreted MSHA's letters, has suffered no detriment based on its reliance, and now misinterprets basic legal principles in arguing its defense.

Though MSHA could have arguably worded the letters in more precise terms, Respondent's interpretation was unreasonable. The March 5, 2010 letter stated clearly that Citation Nos. 8217796 and 8217797 were being removed from the case and "the citations will be reassessed with an increased penalty under a new MSHA Case Number." RX-1. Though the next sentence states, "This action reduced the balance of this case from \$12,885.00 to \$300.00," it is clear that this figure reflects only the penalty amounts in the remaining citations. RX-1. Unless one engages in selective reading, ignoring select terms and sentences, there is no reasonable way to read this letter to mean these citations are being vacated and the penalty reduced. I therefore find Patricia Fouts' testimony incredible that she believed that the letter stated that all five citations involved in the original case were being reduced to a new penalty total of \$300.00.

The March 22, 2010 letter from Norman G. Page to Randy Fouts is arguably more ambiguous and open to misinterpretation. However I cannot find that the poor drafting of a letter should relieve a company of liability when the misunderstanding was quickly corrected and there was no showing of prejudice based upon reliance. The letter stated that a special investigation had been conducted regarding the citation and order at issue here, and that MSHA had decided not to pursue further investigative action and to close the case. “Special investigation” is a term of art in the context of MSHA and refers specifically to investigations pursuant to §§105(c) (discrimination) and 110(c) (agent liability) of the Act. In this case, there were no allegations of discrimination, so anyone familiar with the Mine Act would conclude that the letter is referring to a §110(c) investigation. As a general principle, *Ignorantia juris non excusat*; so the Respondent cannot argue that the mistake in understanding the nature of a special investigation excuses it of liability. Furthermore, Randy and Patricia Fouts have nearly a half-century of experience in the trucking industry between them, which means that they should have some experience and knowledge of MSHA rules and processes.

Lastly, the May 24, 2010 letter clarified the Respondent’s misinterpretation of previous letters. There is nothing in the record to show that the Respondent had any detrimental reliance on its mistaken belief that all citations were being reduced to \$300.00. Even if Respondent’s interpretation were reasonable, based on the evidence in the record, Respondent could only claim to have suffered a \$300.00 loss under a false belief.

Respondent raises the issues of *res judicata*, collateral estoppel, and accord and satisfaction as apparent defenses. They are misplaced. The doctrine of accord and satisfaction holds that “as a general proposition, that a creditor's acceptance of a check explicitly tendered as payment in full of an unliquidated or disputed obligation discharges the underlying obligation by accord and satisfaction.” 42 A.L.R. 4th 12 (Originally published in 1985). “Accord and satisfaction is an affirmative defense with the burden of proof on the proponent.” *Weinstein v. District of Columbia Housing Authority*, 931 F.Supp.2d 178, 187 (D.D.C. 2013) (citations omitted). As such, the Respondent here would have to prove each element of the defense in order to prevail. Courts applying the doctrine have consistently held that the debtor’s offer must be accompanied by acts or declarations that the payment consists of full satisfaction of the claim. 1 Am. Jur. 2d Accord and Satisfaction § 14 (2013). In the instant case there is nothing in the record to indicate that the \$300.00 check was accompanied by a statement that it represented satisfaction for all pending citations. Without such a showing there can be no accord and satisfaction.

Res judicata and collateral estoppel are similarly inapposite here. In order for either issue or claim preclusion to apply, the citation and order would have had to have been previously adjudged in some manner. As explained, *supra*, it was only due to Respondent’s unreasonable interpretation of several correspondences that there was a belief that these issues were closed.

e) Penalty

The Secretary proposed special assessments of \$110,900.00 in Order No. 8217797 and \$25,800.00 in Citation No. 8217796. In a recent decision, this Court opined that whether the Secretary proposes a regularly or specially assessed penalty the ultimate determination of the

penalty amount is up to the Commission. *The American Coal Co.*, LAKE 2011-701 *et al*, *slip op.*, at 33 (September 20, 2013) (ALJ Lewis). This Court is guided in its final determinations by the polestar of 30 U.S.C. §820(i) penalty considerations:

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

I have been further guided by Commission case law instructing how §110(i) criteria should be evaluated. *Inter alia*, I note: the Commission's holding in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) that all of the statutory criteria must be considered, but not necessarily assigned equal weight; and the Commission's holding *Musser Engineering*, 32 FMSHRC at 1289 that, generally speaking, the magnitude of the gravity of the violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed.

In assessing the §820(i) penalty considerations, I find that both respondents demonstrated good faith in achieving reasonably rapid compliance after notification of the violation. Furthermore, the Respondent's history of previous violations is not extensive. I therefore find that a reduction in the penalty is warranted, and reduces the special assessment in Order No. 8217797 to \$75,000.00 and in Citation No. 8217797 to \$17,500.00.

ORDER

It is hereby **ORDERED** that Order No. 8217797 and Citation No. 8217796 are **AFFIRMED** as modified herein.

Respondent, A&R Trucking, is **ORDERED** to pay civil penalties in the total amount of \$92,500.00 within 30 days of the date of this decision.⁸

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

⁸ Payments should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution:

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/mzm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2536
303-844-3577/FAX 303-844-5268

December 10, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-942
Petitioner,	:	A.C. No. 12-01732-261005
	:	
	:	Craney Mine
	:	
v.	:	Docket No. LAKE 2011-1038
	:	A.C. No. 12-02234-264071
	:	
	:	Docket No. LAKE 2012-0231
SOLAR SOURCES, INC.,	:	A.C. No. 12-02234-272665
Respondent.	:	
	:	Docket No. LAKE 2012-0295
	:	A.C. No. 12-02234-275490
	:	
	:	Lewis Mine

DECISION

Appearances: Amber J. Tafoya, Esq., with Courtney Przybylski, Esq., on brief, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Mary M. Runnells, Esq., Bloomington, Indiana and Jacqueline B. Ponder, Esq., Indianapolis, Indiana, 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 Solar Sources, Inc., (“Solar”) 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 Bloomington, Indiana, and submitted post-hearing briefs.

At the hearing, a total of seven citations were adjudicated and two citations were settled. The Secretary proposed a total penalty of \$4,853.00 in these cases. All the citations were issued at surface coal mines.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Right To Perform Preoperational Examinations

I reject Respondent's argument that six of the seven citations at issue in this hearing should be vacated because the inspector refused Respondent's request to perform pre-operational examinations upon the cited equipment. Citing *Wake Stone Corporation*, Respondent asserts that if examinations are not permitted, section 77.1606 will be undermined, tenants of statutory construction will be violated, and an incentive for operators to perform pre-operational exams will be removed. *Wake Stone Co.*, 33 FMSHRC 1205 (May 2011) (ALJ), *petition for discretionary review granted* (June 9, 2011).¹

Respondent's argument that the Act, read as a whole, requires the allowance of preoperational examinations ignores a requirement section 103(a) of the Act. 30 U.S.C. § 813(a). Section 103 explicitly states "no advance notice of an inspection shall be provided to any person. . . ." If I were to accept Respondent's argument, it would suggest that any mine operator could simply request that an MSHA inspector wait until it examined all equipment and other areas of the mine before the inspection could proceed. In these cases, Respondent actually attempted to do just that, as Troy Fields, a safety director, testified that Respondent instituted a policy that inspector escorts should request to perform a pre-operation examination upon any equipment an inspector requests to inspect before the inspector actually inspects that equipment. (Tr. 159). This would, in turn, effectively provide advance notice of an inspection to the mine operator and contradict section 103 of the Act.

Allowing operators to perform examinations immediately prior to an inspection does not strengthen section 77.1606 or enforce compliance, but would actually weaken compliance. Section 77.1606 requires pre-operational examinations before every use of equipment, not merely before inspections. Permitting operators to examine and repair equipment directly before inspections would allow operators to ignore section 77.1606 by not regularly examining equipment or fixing defects. An operator is not prompted to comply with section 77.1606 by significantly reducing the possibility of being cited for a violation of section 77.1606. This behavior would not only undermine section 77.1606, but also expose miners to safety hazards due to operators' failure to regularly examine or repair equipment. I therefore reject

¹ In that case, the judge granted the operator's motion for summary decision, deciding not to impose strict liability upon an operator to comply with 56.14132(a). Instead, the judge ruled that the operator, who insisted upon performing pre-shift examinations upon the two cited vehicles immediately prior to inspection, had the right to do so. The operator could then tag out the vehicles if any conditions were found and avoid a citation. The judge held that "[s]ection 56.14100 and mandatory equipment safety standards need to coexist because of the importance of a harmonized and coherent treatment of all portions of the Miner Act and related regulations to miners' safety, overall." 33 FMSHRC at 1208.

Respondent's assertion that six of the citations at issue should be vacated because the inspector refused to allow Respondent to examine equipment before inspections.²

I also find that it is immaterial whether Respondent requested the opportunity to perform examinations of the cited equipment before the inspector performed his inspection. The witnesses of Respondent and the Secretary disagree whether Respondent requested to perform examinations prior to the inspection. As I find that the inspector was not required to allow Respondent to perform examinations, this argument is moot and I reject it.

B. Citation No. 8434044; LAKE 2011-942

On May 25, 2011, Inspector Douglas Herndon issued Citation No. 8434044 under section 104(a) of the Mine Act, alleging a violation of section 77.400(a) of the Secretary's safety standards. (Ex. G-1). The Secretary amended the citation to allege a violation of section 77.1605(b); the initial designation of 77.400(a) was a mistake. (Tr. 20). The citation stated that the parking brake of the 1190 Euclid End Dump would not function. *Id.* Inspector Herndon determined that an injury was unlikely to occur but any injury could reasonably be expected to be fatal. Further, he determined that the operator's negligence was moderate and one person would be affected. Section 77.1605(b) of the Secretary's regulations requires "front-end loaders shall also be equipped with parking brakes." 30 C.F.R. § 77.1605(b). The Secretary proposed a penalty of \$807.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8434044.

Discussion and Analysis

I find that Respondent violated section 77.1605(b). Both Fields and Inspector Herndon testified that the cited parking brake was ineffective and Respondent does not argue the contrary. (Tr. 149, 20). The cited loader lacked a functional parking brake, which is a violation of section 77.1605(b).

I affirm the "unlikely" and "fatal" gravity designations of Citation No. 8434044. Respondent contends that the vehicle was parked in a parking berm and the likelihood that the truck could unintentionally roll would be "remote" and therefore there was no likelihood of an injury. The probability associated with the word "remote" is not zero; it means that an injury causing accident is unlikely, which matches the inspector's designation. Respondent also

² Respondent also cites *Beverly Materials, LLC*, which is dissimilar from this case. 35 FMSHRC 88 (Jan. 2013) (ALJ). In *Beverly Materials*, the operator was cited for not performing a pre-operational examination, but at the time of the citation the operator was in the process of performing its examination. In the current case, the operator was cited for failing to correct equipment problems before using the equipment. Here, the operator's examination was not interrupted by the inspection; the operator requested to delay the inspection to begin its examination. Both of the cases cited by Respondent, furthermore, are not binding precedent in this case.

contends that the equipment would be examined and repaired before use. The inspector believed, however, that the equipment was operated in the cited condition. I credit Inspector Herndon's testimony that the brake was unlikely to fail while parked and parking brakes fail as a result of long-term use and ordinary wear and tear. (Tr. 31-32). The inspector appropriately designated Citation No. 8434044 as unlikely.³

I also find that the likely injury caused by the cited condition would be fatal. Respondent argues that the likely injury would be no lost workdays because the cited parking brake was unlikely to injure miners. I credit the inspector's testimony that the piece of equipment was large, used upon wet surfaces and grades and used in close proximity to miners. (Tr. 25). A vehicle without a functional parking brake that works around miners and contributes to an injury is likely to contribute to a fatal injury.

I find that Citation No. 8434044 was the result of Respondent's moderate negligence because Respondent knew or should have known about the condition.⁴ As I stated before, I credit the inspector's testimony that parking brakes wear out over time. A penalty of \$800.00 is appropriate for Citation No. 8434044.

³ The citations before me represent numerous alleged violations regarding equipment with ineffective service and parking brakes. By arguing that pre-operational examinations would have corrected all these issues, Respondent essentially asserts that each of these pieces of equipment was damaged the shift before the inspections occurred and would be repaired before use. This is unlikely. Respondent finished repairing the vehicle cited in Citation No. 8434074, discussed below, for an ineffective parking brake immediately before Inspector Herndon cited the vehicle for a violation of section 77.1605(b). The inspector delayed his inspection of the truck because it was being repaired. (Tr. 74). When Respondent informed the inspector that the vehicle had been repaired and was ready for inspection, the vehicle still had an ineffective parking brake. *Id.* Although it is possible that the brakes on the cited equipment may have become defective at the end of the previous shift, the preponderance of the evidence shows that Respondent's pre-operational examinations were ineffective and brake problems were not being corrected. This conclusion is especially important to my analysis of the violations of section 77.1606(c) because the standard requires defects to be corrected prior to operation instead of mandating that defects not exist at any time.

⁴ 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).

C. Citation No. 8434059; LAKE 2011-1038

On June 23, 2011, Inspector Herndon issued Citation No. 8434059 under section 104(a) of the Mine Act, alleging a violation of section 77.1606(c) of the Secretary's safety standards. (Ex. G-3). The citation stated that the air brake system for the 1327 Diamond fuel truck was not maintained because the front right air hose (airline) was completely broken away from the brake chamber. *Id.* Inspector Herndon 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 operator's negligence was moderate and one person would be affected. Section 77.1606(c) of the Secretary's safety standards requires "[e]quipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c). The Secretary proposed a penalty of \$745.00 for this citation.

For the reasons set forth below, I vacate Citation No. 8434059.

Discussion and Analysis

I find that the Secretary did not satisfy his burden to show that Respondent violated section 77.1606(c). The Secretary is required to show the existence of a violation by a preponderance of the evidence. *RAG Cumberland Resources Co.*, 22 FMSHRC 1066, 1070 (Sept. 2000). The Secretary did not show that the cited brake defect would not be corrected before the cited equipment was used or that the equipment was used in the cited condition. The Secretary argues that the weathered and tattered condition of the airline suggested that the condition had existed for more than one operating shift and asserts that the testimony of Respondent's witnesses was unreliable. The Secretary bases his argument upon the inspector's testimony that the airline was "tattered" but not completely broken away from the brake chamber. (Tr. 51).⁵ The testimony of Kenneth Seib, the former pit boss at Lewis Mine, corresponds with the citation itself, which states that the "air hose was completely broken away." (Tr. 257; Ex. G-3). The inspector's testimony conflicts with the citation that he wrote and issued. (Tr. 51-52). The vehicle sat unused for "approximately more than three days," but most likely the vehicle had not been used since April 24, 2011. (Tr. 52; Ex. R-B). This period of inactivity makes a violation of section 77.1606(c) less likely and harder to prove. The damage could have occurred due to a miner stepping upon the airline at any time during its long inactivity. The Secretary did not present evidence to show that the cited equipment was or would be used in this condition.⁶ I hereby VACATE Citation No. 8434059.

⁵ Gerry Hargus, a mechanic and shop foreman for Respondent, did not testify concerning the condition of the cited airline as the Secretary incorrectly states; he affirmed that the airline could appear to be in poor condition but still function properly, which undermines the argument that the appearance of the airline alone proves how long the cited condition existed. (Tr. 230-31).

⁶ Respondent argues, furthermore, that based upon the position and location of the cited vehicle, the airline could not have broken before being placed in that position because the brake system would not allow the movements required to do so. (Respondent's Br. at 10; Tr. 258, 241-42).

D. Citation No. 8434060; LAKE 2011-1038

On June 23, 2011, Inspector Herndon issued Citation No. 8434060 under section 104(a) of the Mine Act, alleging a violation of section 77.1606(c) of the Secretary's safety standards. (Ex. G-4). The citation stated that the air brake system for the 1334 Ford fuel truck was not maintained because the front brake chamber was "blown allowing air to leak freely." *Id.* Inspector Herndon 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 operator's negligence was moderate and one person would be affected. The Secretary proposed a penalty of \$745.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8434060.

Discussion and Analysis

I find that the conditions cited in Citation No. 8434060 violated section 77.1606(c) because the cited vehicle was used before Respondent corrected the cited hazardous defect. The parties do not dispute that the diaphragm in the brake chamber was damaged and I find that this condition affects safety because it would reduce the braking and stopping capacity of the cited vehicle, making collisions more likely. Although the cited fuel truck was not used the day that the inspector issued the citation, I find that it had been used in the cited condition. (Tr. 245). Hargus testified that splatter marks could occur on the vehicle due to "a little bit of oil" coming out of the brake system. (Tr. 235). The splatter marks, however, were noticeable according to the inspector's description, which suggests that the condition existed before the vehicle was put into operation during the previous night shift. (Tr. 66-67). I credit the inspector's testimony that the condition existed for "some time" due to the splatter of internal lubrication and I find that the equipment was put into operation the day before the inspection without correcting the defect. (Tr. 67).

I find that the violation was S&S⁷ because it was reasonably likely that someone would be seriously injured due to the cited condition. I find that the brakes operating at less than full capacity due to the failure of a front brake is reasonably likely to lead to a serious injury due to a

⁷ 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).

collision. To prevent this likely hazard, front brakes are required upon all trucks, not merely in the mining industry, according to Hargus. (Tr. 238-39). Hargus also testified that the rear brakes would stop the vehicle even in an emergency, but that the vehicle could slide. (Tr. 242). The cited vehicle, furthermore, operates in areas of the mine where other mobile equipment and pedestrians travel. (Tr. 68). Although I find that it is unlikely the cited condition would cause the vehicle to violently pull to one side as Inspector Herndon testified, slight pulling to one side, slipping, or stopping slower are all possible and all reasonably likely to lead to an injury causing accident. Citation No. 8434060 is S&S.

I find that Citation No 8434060 was the result of Respondent's moderate negligence. Hargus testified that splatter on a vehicle did not mean that the brake system was defective, only that "it would warrant looking at." (Tr. 235). Respondent should have "looked at" this equipment before using it. Respondent knew or should have known of the cited condition. A penalty of \$750.00 is appropriate for Citation No 8434060.

E. Citation No. 8434074; LAKE 2011-1038

On July 5, 2011, Inspector Herndon issued Citation No. 8434074 under section 104(a) of the Mine Act, alleging a violation of section 77.1605(b) of the Secretary's safety standards. (Ex. G-6). The citation stated that the parking brake of the 1175 Euclid R50 end dump did not function. *Id.* Inspector Herndon determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and one person would be affected. The Secretary proposed a penalty of \$127.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8434044.

Discussion and Analysis

I find that the conditions described in Citation No. 8434074 violated 30 C.F.R. § 77.1605(b). The safety standard requires that all trucks and loaders be equipped with a parking brake. I credit the testimony of Inspector Herndon, Fields, and Seib that the parking brake could not hold the cited vehicle upon a grade, which is a violation of the standard. (Tr. 77, 173, 260).

Respondent acknowledges that the cited parking brake did not function, but argues that the inspector tested the parking brake inappropriately; I reject Respondent's argument. The cited standard requires a functional parking brake, not merely functional service brakes; Respondent's assertion that the cited equipment could be held using its service brakes is therefore immaterial. Respondent also asserts that the inspector tested the brake improperly, possibly damaging it, by having the vehicle pull through the brake upon a flat surface before testing it upon a grade. (Tr. 80). I credit the inspector's judgment and reject this argument because the test implemented by Inspector Herndon is widely used and accepted. The parking brake cited in Citation No. 8434074 violated 30 C.F.R. § 77.1605(b).

I find that Citation No 8434074 was the result of Respondent's moderate negligence because Respondent knew or should have known about the condition. Respondent was aware

that the cited piece of equipment would be inspected before the inspector did so. Mechanics were working on the vehicle when the inspector entered the mine and later informed the inspector that the vehicle was ready to be inspected. (Tr. 74-75). The inspector's moderate negligence determination is appropriate. A penalty of \$125.00 is appropriate for Citation No 8434074.

F. Citation No. 8437659; LAKE 2012-231

On October 3, 2011, Inspector Herndon issued Citation No. 8437659 under section 104(a) of the Mine Act, alleging a violation of section 77.1605(b) of the Secretary's safety standards. (Ex. G-8). The citation states that the parking brake of the 1148 Euclid end dump did not function when tested. *Id.* Inspector Herndon 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 operator's negligence was moderate and one person would be affected. The Secretary proposed a penalty of \$334.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8437659.

Discussion and Analysis

I find that the conditions described in Citation No. 8437659 presented a violation of 30 C.F.R. § 77.1605(b). I credit the inspector's testimony that the parking brake did not function when tested. (Tr. 84, 89-91).

I find that the violation was S&S because it was reasonably likely that someone would be seriously injured if the operator used the cited equipment with an inoperable parking brake. The vehicle presented a crushing hazard if the vehicle collided with a person or another vehicle as a result of the defective parking brake. The defective parking brake was reasonably likely to contribute to an injury because the vehicle was used in various areas of the mine around other equipment and miners, was parked upon a grade, not chocked, and was available for use. (Tr. 90-91). The condition cited in Citation No. 8437659 was reasonably likely to lead to a serious injury; the citation was therefore S&S.

I find that Citation No 8437659 was the result of Respondent's moderate negligence because Respondent knew or should have known about the condition. Steve Edwards, a Safety Director for Respondent, told the inspector that Respondent had trouble with equipment parking brakes "quite often." (Tr. 89). The fact that the safety director acknowledged that parking brakes upon trucks frequently do not work suggests that the company should have more carefully maintained the parking brakes and should have known of the cited condition. Respondent's moderate negligence caused Citation No 8437659. A penalty of \$335.00 is appropriate for Citation No 8437659.

G. Citation No. 8437672; LAKE 2012-295

On October 25, 2011, Inspector Herndon issued Citation No. 8437672 under section 104(a) of the Mine Act, alleging a violation of section 77.410(a) of the Secretary's safety

standards. (Ex. G-10). The citation states that the 1014 Hitachi shovel was readily available for use but did not have a backup alarm. *Id.* Inspector Herndon determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and one person would be affected. Section 77.410(a) requires that "[m]obile equipment such as front-end loaders, forklifts, tractors, graders, and trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that [g]ives an audible alarm when the equipment is put in reverse or [u]ses...other effective devices to detect objects or persons at the rear of the equipment, and sounds an audible alarm when a person or object is detected." 30 C.F.R. § 77.410(a). The Secretary proposed a penalty of \$100.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8437672.

Discussion and Analysis

I find that section 77.410(a) covers the equipment cited in Citation No. 8437672. Respondent argues that the cited equipment, a shovel, is not covered by section 77.410(a) because the regulation does not explicitly include shovels. Where a regulatory provision is clear and unambiguous, the provision must be enforced as written. *Wolf Run Mining Company*, 32 FMSHRC 1669, 1678 (Dec. 2010); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996); *Nolichuckey Sand Company, Inc.*, 22 FMSHRC at 1062. The "starting point" is the language of the regulation itself. *Dyer v. U.S.*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Nolichuckey Sand Company, Inc.*, 22 FMSHRC 1057, 1062 (Sept. 2000). The safety standard does list numerous types of equipment, but also includes "mobile equipment[.]" The only exception to the standard is "pickup trucks with an unobstructed rear view[.]" 30 C.F.R. § 77.410(a). The cited equipment is mobile, has rear view obstructions, and is not a pickup truck. (Tr. 108-09, 185). The plain language of section 77.410(a) is clear and unambiguous; section 77.410(a) covers the cited shovel.

I find that the conditions described in Citation No. 8437672 violated section 77.410(a). Mobile equipment must be equipped with a warning device for when the equipment is reversed. The cited piece of mobile equipment operated in reverse, but lacked a backup alarm or other warning device in violation of section 77.410(a). (Tr. 209-10). Although the operator of the cited shovel can move the cab in a 360 degree circle, Keith Lutgring, Respondent's vice president of maintenance and equipment, testified that the shovel does reverse short distances. (Tr. 183, 209-210).

I find that Citation No 8437672 was the result of Respondent's moderate negligence. Although the shovel was previously inspected without being cited, Respondent had other shovels with alarms and should have known of the conditions. (Tr. 113). A penalty of \$100.00 is appropriate for Citation No 8437672.

H. Citation No. 8437673; LAKE 2012-295

On October 25, 2011, Inspector Herndon issued Citation No. 8437673 under section 104(a) of the Mine Act, alleging a violation of section 77.1140 of the Secretary's safety

standards. (Ex. G-11). At hearing, the Secretary modified the citation to a violation of section 77.1104 to correct the inspector's clerical error. (Tr. 120). The citation states that combustible accumulations of oil and grease covered the lower section of the engines, engine compartment, boom, and pivot section of the 1014 Hitachi shovel. (Ex. G-11). Inspector Herndon determined that an injury was unlikely to occur, but that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the operator's negligence was moderate and one person would be affected. Section 77.1104 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 \$100.00 for this citation.

For the reasons set forth below, I affirm Citation No. 8437673.

Discussion and Analysis

I find that the conditions described in Citation No. 8437673 presented a violation of 30 C.F.R. § 77.1104. Respondent does not dispute that grease and oil accumulated upon the cited piece of equipment, but it does argue that the accumulation did not create a fire hazard. (Tr. 127-29).⁸ I find that the accumulated materials were flammable and covered an engine that was a heat and ignition source, which constitutes a violation of section 77.1104.

I also find that Citation No. 8437673 was the result of Respondent's moderate negligence. Respondent should have known of the cited condition because the accumulations were up to .25 inches thick and covered a considerable area of the cited vehicle. (Tr. 121). A penalty of \$100.00 is appropriate for Citation No 8437673.

II. SETTLED CITATIONS

The parties settled two of the citations in these dockets at the hearing. (Sec'y Br. 1). In LAKE 2011-942 the parties agreed to settle Citation No. 8434040 by deleting the S&S determination and reducing the likelihood of an injury from "reasonably likely" to "unlikely." For LAKE 2012-295, Solar Sources agreed to accept Citation No. 8437674 as written.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The Craney Mine had a history of 58 violations (21 S&S violations) and the Lewis Mine had a history of 14 violations (1 S&S violation) in the 15 months preceding May 23, 2011. (Ex. G-16). At all pertinent times, Solar was a moderately large coal mine operator. The violations were abated in good faith. The penalties assessed in this decision will

⁸ Respondent argues that a fire was not reasonably likely to ignite, citing *Eastern Associated Coal Corp.*, 13 FMSHRC 178 at 184 (Feb. 1991). This argument, however, does not relate to the fact of violation, only an S&S designation. Citation 8437673 was not S&S and therefore this argument is immaterial.

not have an adverse effect upon the ability of Solar Sources, Inc., to continue in business. The gravity and negligence findings are set forth above.

IV. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
LAKE 2011-942		
8434040	72.620	1,300.00
8434044	77.1605(b)	800.00
LAKE 2011-1038		
8424059	77.1606(c)	VACATED
8434060	77.1606(c)	750.00
8434074	77.1605(b)	125.00
LAKE 2012-231		
8437659	77.1605(b)	335.00
LAKE 2012-295		
8437672	77.410(a)	100.00
8437673	77.1104	100.00
8437674	77.1104	100.00
	TOTAL PENALTY	\$3,610.00

For the reasons set forth above, I **VACATE** Citation No. 8434059 and **AFFIRM** Citation Nos. 8434044, 8434060, 8434074, 8437659, 8437672, 8437673, and 8437674. Citation No. 8434040 is **MODIFIED** as set forth in the settlement of the parties. Solar Sources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of \$3,610.00 within 30 days of the date of this decision.⁹

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

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⁹ 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 THE ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, D.C. 20004-1710
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December 17, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2011-583-M
Petitioner	:	A.C. No. 40-00080-256299 E24
v.	:	
	:	
AUSTIN POWDER COMPANY,	:	
Respondent	:	Mine: Cookeville Limestone Quarry

DECISION

Appearances: Noelle Lagueux-Alvarez, Esq., U.S. Department of Labor, Atlanta GA, on behalf of the Secretary

Nichelle Young, Esq., Law Office of Adele L. Abrams, PC, Beltsville MD, on behalf of Austin Powder Company

Before: Judge Barbour

This case is before me upon a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor (“Secretary”) acting through the Mine Safety and Health Administration (“MSHA”) against Austin Powder Company (“Austin Powder”) pursuant to sections 105 and 110, 30 U.S.C. §§ 815, 820, of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”). 30 U.S.C. § 801, *et seq.* The Secretary seeks the assessment of a civil penalty of \$4,689 for one violation of mandatory safety standard 30 C.F.R. § 56.6306(e), which requires that all persons leave the blast area, except those in a blasting shelter or other location that protects them from flying material or other blasting related hazards.¹ The violation is alleged in Citation No.

¹ Section 56.6306(e) states:

“In electric blasting prior to connecting to the power source, and in nonelectric blasting prior to attaching an initiating device, all persons shall leave the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave), flying material, and gases.”

The term “blast area” is described in 30 C.F.R. § 56.2, as “the area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to persons.”

8552491, which was issued pursuant to section 104(a) of the Mine Act.² 30 U.S.C. § 814(a). The Secretary further asserts that the violation was a significant and substantial contribution to a mine safety hazard (“S&S”), that the violation affected one person, and that the violation was a result of “low” negligence by the operator.³ Prior to the hearing, the court granted the Secretary’s Motion to Plead in the Alternative a violation of 30 C.F.R. § 56.6306(f). Section 56.6306(f) requires that before a blast, ample warning be given to all persons to be evacuated and that access to the blast area be guarded against persons or vehicles.⁴ In answering the petition, the company argued that it did not violate Section 56.6306(e) or Section 56.6306(f) and that the Secretary wrongly characterized the violation as S&S. The case was heard in Knoxville, Tennessee.

STIPULATIONS

The parties stipulated as follows:

1. The Cookeville Limestone Quarry, MSHA Mine I.D. 40-00080, is located at 1100 Old Calvary Road, Cookeville, Tennessee, 38501.
2. The Cookeville Limestone Quarry is a mine as defined in Section 3(h) of the Mine Act, 30 U.S.C. Section 802(h).
3. The mining operations at the Cookeville Limestone Quarry are subject to the Federal Mine Safety and Health Act of 1977 and to the jurisdiction of the Federal Mine Safety and Health Review Commission.
4. Judge Barbour, the presiding Administrative Law Judge, has the authority to hear this case and decide all issues herein.
5. During all times relevant to this matter, Austin Powder Company was an operator of the Cookeville Limestone Quarry as defined in section 3(d) of the Mine Act, 30 U.S.C. Section 802(h).
6. During all times relevant to this matter, Austin Powder Company was an operator of the Cookeville Limestone, LLC.

² Austin Powder was cited for the violation while performing contract work on the Cookeville Limestone Quarry, which is located in Cookeville, Tennessee.

³ However, at trial, the inspector who issued the citation testified that the violation affected two persons and that the violation was the result of the operator’s high negligence. Tr. 69.

⁴ Section 56.6306(f) states:

“Before firing a blast–

- (1) Ample warning shall be given to all persons to be evacuated;
- (2) Clear exit routes shall be provided for persons firing the round; and
- (3) All access routes to the blast area shall be guarded or barricaded to prevent the passage of persons or vehicles.”

7. Austin Powder Company has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977.
8. The mining operations of the Cookeville Limestone Quarry are small, accounting for 18,979 working hours in 2010.
9. The Secretary's proposed exhibits listed in the Secretary's pre-hearing report have been reviewed by Austin Powder's representative.
10. Austin Powder stipulates the authenticity and admissibility of all the exhibits listed in the Secretary's pre-hearing report except for S-24, the letter from Asher Lefebvre.
11. On April 11, 2011, Austin Powder conducted a stripping blast at the Cookeville Limestone Quarry.
12. On April 11, 2011, Respondent's employee, John T. Frady, a blaster-in-charge, was in charge of the blasting operations at or around Cookeville Limestone Quarry in Cookeville Tennessee.
13. Austin Powder's April 11, 2011 blast resulted in fly rock that left the mine property and damaged a home located at 1250 Skyline Drive in Cookeville, Tennessee.
14. 1250 Skyline Drive is located on private property.
15. The damage to 1250 Skyline Drive, due to the April 11, 2011 blast, included rocks and other debris penetrating the roof and coming to rest in a bedroom.⁵
16. Mr. Roy D. Hudgens and Ms. Sarah P. Hudgens reside at 1250 Skyline Drive in Cookeville, Tennessee.
17. On April 19, 2011, MSHA Inspector Scott M. Blair issued Citation Number 8552491.
18. Citation Number 8552491 alleges a violation of 30 CFR Section 56.6306 subsection e.
19. When he issued Citation Number 8552491, Inspector Blair was acting in his official capacity as a duly authorized representative of the Secretary of Labor.
20. A true and correct copy of Citation Number 8552491 was properly served upon Austin Powder Company or its agent as required by the Mine Act.
21. Secretary's Exhibit S-1 is an authentic copy of Citation Number 8552491 and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the authenticity of any statement asserted therein.
22. Secretary's Exhibit S-5, the assessed violation history report, accurately sets forth the history of violations relevant to this case and may be admitted into evidence and used in determining the civil penalty and assessment for the alleged violation in this case.

⁵ An 86 pound rock was propelled from the blast site into the home. Tr. 32-33.

23. The Secretary proposed a total civil penalty of \$4,689.00 using the criteria set forth in 30 C.F.R. Part 100, as set forth in Secretary's Exhibit A to the Petition For Assessment of Civil Penalty.[⁶]
24. The assessed penalty of \$4,689.00, if affirmed, will not affect the Respondent's ability to remain in business.
25. Respondent in good faith attempted to achieve prompt abatement of the cited condition.

Tr. 17-22.

THE TESTIMONY

BACKGROUND

Two types of blasting are performed at the Cookeville Limestone Quarry, production shots and stripping shots. Tr. 172. Production shots are used to break solid rock formations into manageable, portable rock fragments. Tr. 171. After a production shot, the rock fragments are loaded onto trucks and prepared for sale. Tr. 171. However, when the solid rock formations, also called production rock, are inaccessible, a stripping shot may be necessary to remove the "cap stone," the top layer of weathered rock and dirt. Tr. 166, 213. Unlike production rock, cap stone is not a solid formation and may contain a combination of loose rock and dirt. This distinction is noteworthy to an operator designing a blast in cap stone, as dirt does not absorb a blast as well as solid rock. Thus, an operator must take additional precautions when designing a stripping blast. Tr. 218-19.

Designing and carrying out a blast typically involves the following people: (1) the mine superintendent who is employed by the quarry operator and who works with the blaster-in-charge to design a blast; (2) the blaster-in-charge⁷ who is employed by the blasting contractor, who is the supervisor of the blasting contractor's "helpers," and who works with the mine superintendent to design a blast; (3) the crew of one or two "helper(s)" who are employed by the blasting contractor and who follow the instructions of the blaster-in-charge in preparing the blast; and (4) the driller who is employed by an independent contractor and who drills the holes into which explosives and stemming are loaded according to the blast design. Tr. 101, 220, 224.

⁶ Stipulation 23 was not read into the record at hearing and therefore does not appear in the hearing transcript. Stipulation 23 is found in a separate, two-page document titled "Petitioner and Respondent's Joint Stipulations." This separate document was signed by both parties and submitted simultaneously with the Secretary's Pre-hearing Report and the Respondent's Pre-hearing Statement, dated March 19, 2013.

⁷ This position was variously called: "master blaster" (Tr. 62), "blaster-in-charge" (Tr.101), and "blaster" (Tr.123).

The blaster-in-charge and mine operator's superintendent create the blast design based on the quarry operator's intentions for the blasted material. Tr. 171, 221.

The April 11, 2011, a blast was needed at the top of a highwall to clear cap stone and create a ramp that would make the area accessible to heavier equipment. Tr. 220-21. In creating the blast design, it is necessary for the blaster-in-charge to consider the minimum distance to any nearby structure that people inhabit, such as a home or a school, and makes adjustments in the amount of explosives to ensure that flyrock does not reach the structure.⁸ Tr. 148, 166, 215. In the present case, the blaster-in-charge identified the home of Roy Douglas (Doug) Hudgens and Sarah Hudgens as the nearest inhabited structure. The Hudgens' home was 407 feet away from the blast site. Tr. 223.

In designing the blast, it is necessary for the blaster-in-charge to identify the blast area. Tr. 221. As noted previously, the term "blast area" is defined in the Secretary's Safety and Health Standards for Surface Metal and Nonmetal Mines (30 C.F.R. Part 56) as "the area in which concussion (shockwaves) flying material, or gases from an explosion may cause injury to persons." 30 C.F.R. 56.2. The definition further states that in determining the blast area, the following seven factors shall be considered: "1) the geology or material to be blasted, 2) the blast pattern, 3) the burden, depth, diameter, and angle of the holes, 4) the blasting experience of the mine, 5) the delay system, powder factor, and pounds per delay, 6) the type and amount of explosive material, and 7) the type and amount of stemming." *Id.* Determination of the initial blast area does not end in the blast design stage. As more information becomes available, the blaster-in-charge is expected to adjust the blast area accordingly. Tr. 76-77.

When planning is complete, the blaster-in-charge provides the driller with instructions for drilling holes to match the blast pattern, orientation, distance between holes, and other blast design specifications. Tr. 219-20, 224. The driller then creates blast holes, also called bore holes, which the blaster-in-charge will later load with explosives and stemming. Tr. 132. In the subject blast, the holes were drilled at varying depths, up to 27 feet deep. Res Ex. 13. The driller also generates a drill log, in which the driller records hole specific data, such as the depth, location, and geological composition of each hole. Tr. 114. A typical drill log will also note any unusual issues that can affect the blast, such as cracks or voids in the rocks. Tr. 115, 132, 232. The drill log for the subject April 11 blast did not include any voids in the rocks or similar unusual issues. Tr. 232-33.

Once the blast holes are drilled, the blaster-in-charge uses the drill logs and his own observations to confirm that the holes are in accordance with the blast plan. Tr. 231-32. For

⁸ The minimum distance to the "nearest protected structure" is used by the blaster-in-charge to determine the amount of explosives or "pounds per delay." Tr. 147-48. In order to limit the intensity of ground vibrations and the movement of objects from the blast, the blaster-in-charge uses small time delays between the charges. Tr. 108, 169. The phrase pounds per delay" indicates the amount of explosives detonated in each time interval. Tr. 109, 169. In the subject blast, one bore hole's explosives was detonated every eight milliseconds. Tr. 169.

example, on April 11, the Austin Powder blaster-in-charge checked the depths of the 54 bore holes with a tape measurer and used a twelve-foot loading pole to “feel the dirt and . . . rock” in the hole.⁹ Tr. 169, 231, 248. With this information, the blaster-in-charge evaluates the depth at which to load the explosives and stemming, an inert substance put on top of explosives to hold the energy of the explosives in the rock. Tr. 133-34. Generally, the blast is designed to expand horizontally through the production rock or cap stone, breaking up the geological formation. Tr. 183-84. However, when a blast is conducted in an area with significant amounts of dirt, which cannot hold the energy of explosives, the force of the blast becomes more likely to travel back through the bore hole, typically in a vertical direction. Tr. 131, 133-34. If the force of the blast moves vertically, it may force material from the bore hole and surrounding area to move vertically as well. Tr. 134, 183. Therefore, the blaster-in-charge loads stemming where the drill log indicates the presence of dirt, and explosives are loaded only below that level of stemming. Tr. 111-131-33.

At the subject quarry, Austin Powder uses two common materials for stemming, drill cuttings and crushed stone.¹⁰ Tr. 219. Crushed stone is composed of rock with sharp edges that expand and grip the material on the sides of the bore holes. Tr. 94, 111, 184. Drill cuttings are composed of the dirt and rock material expelled from the bore holes. Tr. 111. Drill cuttings are readily available at the blast site, but are not the preferred method for stemming because drill cuttings do not have crushed stones’ locking characteristics and are more likely to push out of the hole, “blowing out” vertically through the path of least resistance instead of horizontally through the walls of the bore holes. Tr. 97, 134

As one of the final steps before a blast is initiated, mandatory safety standard Section 56.6306(e) requires that the blast area be cleared of all persons before the triggering mechanisms for the blast are connected or attached, in order to prevent injury from shockwaves, flying material, or gases of the blast. Clearing the blast site consists of alerting the persons within the blast site of the blast and ascertaining that they have taken shelter or moved to an area that is not in danger from the blast. Similarly, Section 56.6306(f) requires that ample warning be provided before a blast and persons be prevented from entering the blast area. Flyrock, such as the 86 pound rock ejected from the April 11 blast at the Cookeville quarry, is one of the dangers addressed under Section 56.6306(e).

⁹ Some holes in the April 11 blast were designed to exceed 12 feet in depth, demonstrating limitations to the blaster-in-charge’s verification process. Tr. 228.

¹⁰ “Crushed stone” is sometimes referred to in the transcript as “crushed rock.” Tr. 219

SECRETARY'S WITNESSES

Roy Douglas Hudgens

Roy Douglas Hudgens is a Senior Technical Advisor at Cummins Filtration in Cookeville, Tennessee. Tr. 29. He and his wife, Sarah Hudgens, reside at 1250 Skyline Drive, Cookeville, Tennessee, their home of 25 years. Tr. 30, 50. Cookeville Limestone Quarry borders the Hudgens' property and conducts mining operations 250 feet to the south of the shared property line. Tr. 30.

On April 11, 2011, at 12:15 p.m., Mr. Hudgens arrived at his home for lunch. Tr. 31. When Mr. Hudgens entered his home, he observed a cloud of dust in the air, appearing to originate from his bedroom. Tr. 31. Once in his bedroom, Mr. Hudgens observed a large rock, later determined to weigh 86 pounds, and a hole in the ceiling, where the rock had entered through the roof. Tr. 32-33. The rock crushed a chest of drawers on impact and caused extensive damage to the home, including knocking out a window, creating cracks on the inside and outside walls of the home, and strewing insulation, remnants of ceiling joists, and other debris across a 10 foot area of his bedroom. Tr. 33, 37. A rocking chair next to the drawers was covered in at least a foot of insulation pulled down from the ceiling by the rock. Tr. 33-34.

The rock was determined to be flyrock propelled from a blast at Cookeville Limestone Quarry. Tr. 49-50. The flyrock landed over 400 feet from the site of the blast. Tr. 36. Previous blasts at the Cookeville Limestone Quarry caused dust to be carried up the hill to his home and neighbors' property, covering cars and porches, but, in those instances, the Hudgens' home was not physically damaged. Tr. 31, 38. Prior to April 11, Mr. Hudgens claimed that he experienced shockwaves and the smell of noxious fumes originating from the quarry at least once a month, though he agreed that he never had to be treated for dust or fume inhalation by a doctor. Tr. 46-7, 50. However, Mr. Hudgens testified that a neighbor, Asher Lefebvre, experienced breathing difficulty due in part to the effect of dust. Tr. 41. Mr. Hudgens also testified that shockwaves from blasting caused damage to the doors, windows, and bricks of the Lefebvre home. Tr. 42.

Prior to April 11, Mr. Hudgens never received a warning from Austin Powder that there would be blasting at the quarry. Tr. 47. However, since the flyrock incident on April 11, Mr. Hudgens always receives a phone call from Austin Powder when a blast will occur within an hour. Tr. 47. Upon notification from Austin Powder, Mr. Hudgens calls his wife, informs her of the blast, and asks her to leave the house or to prepare for the blast. Tr. 47.

Sarah Penelope Prescott Hudgens

On April 11, 2011, Sarah Hudgens was at home, reading in her bedroom rocking chair, until some time after 11:00 a.m. Tr. 52. She left her home at 11:30 a.m. for a lunch date and did not return until approximately 1:00 p.m. Tr. 53. When she returned, she observed extensive damage to her home caused by the 86 pound rock that entered through her roof. Tr. 53. She described damage to clothes and a bed, as well as the insulation covering much of her bedroom.

Tr. 54-5. She testified that she was provided with no warning on the day of the blast or any day prior. Tr. 57. After the April 11 blast, the quarry requested her husband's cell phone number to enable blast notifications. Tr. 58-9. When he is notified of blasts "sometimes [the caller is] Austin Powder and sometimes [the caller is the quarry operator,] Cookeville Limestone." Tr. 59.

Scott M. Blair

Scott M. Blair has worked as an inspector for MSHA at its Knoxville, Tennessee field office for 11 years. Tr. 61. Blair has conducted several thousand inspections for MSHA and estimated that half of his inspections each year involve blasting. Tr. 61. Prior to joining MSHA, Blair worked in underground mining for 30 years. Tr. 61. His career included experience in drilling and blasting. Tr. 62. During the last 12 years of his underground mining career, Blair was a supervisor and a master blaster. Tr. 62. He has been in charge of thousands of blasts over the course of his career. Tr. 62-63.

On April 14, 2011, Blair traveled to the Cookeville Limestone Quarry to determine if a previous citation should be extended or terminated.¹¹ Tr. 64. Upon his arrival, Randy Livingston, the Cookeville Limestone Quarry manager, told Blair that "he would have to have an extension on the clearing [of] the top of the shot area because the first time they shot it they hit a house off property."¹² Tr. 65. Livingston had not previously notified MSHA that the house had been damaged because there is no reporting requirement for flyrock if there is no injury. Tr. 83-84. Blair discussed the incident with Livingston, Rich McCormick, one of the owners of the quarry, and an unnamed representative from Austin Powder. Tr. 65. Blair reviewed the drill records and the partial shot record that were provided by Austin Powder and examined the blast site. Tr. 65. Blair observed mud in the woods near the blast site, which he attributed to the shot going in the wrong direction.¹³ Tr. 66. Blair also reviewed a video of the blast in which he observed the material shooting straight up from somewhere near the center of the blast site. Tr. 94. Blair found this to be an indication that either the drilled holes were overloaded or the stemming failed. Tr. 94

Blair testified that he issued Citation Number 8552491 based on his April 14, 2011, visit. Section 56.6306(e) requires that prior to a blast, "all persons shall leave the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave),

¹¹ The basis for the previous citation was not specifically addressed and is not relevant to the subject proceeding. Tr. 64.

¹² "[C]learing the top of the shot area" refers to the operator's efforts to blast the cap stone and use the material broken by the blast to create a ramp for equipment and personnel. Tr. 220-21.

¹³ Mud is part of the geology of cap stone, but not of solid rock. According to Blair, blasts made into solid rock would not shoot mud into the trees. Tr. 92-93. Therefore, Blair believed that although previous shoots in the area were into solid rock, the April 11 shot was into cap stone. Tr. 93.

flying material, and gases.” Blair testified that he found that Austin Powder “hadn’t done anything physically to clear [all persons from] the blast site.” Tr. 67. Blair assessed the type of injuries that could result from the violation as a person being fatally injured by flyrock. Tr. 68. In Blair’s opinion one person, Mrs. Hudgens, was affected, though he acknowledged he could have found that both Mr. and Mrs. Hudgens were affected. Tr. 69. Blair indicated that although the citation was written as “low negligence,” he would have written it for “high” or “reckless disregard” after learning more of the facts. Tr. 69. Specifically, he would have issued the citation for a higher level of negligence if he had known the amount of dirt that was drilled through to sink the blast holes and the type of stemming that was used to fill the tops of the holes. Tr. 75-76. Blair also testified that rock was protruding above the ground at the site, which signaled to Blair that the area was “backfilled” with rock and dirt. Tr. 76. Blair believed the backfill mixed with the cap stone increased the potential fly material and should have resulted in the blast area being doubled or tripled in size to avoid injury. Tr. 76-77. Blair also found that the violation was S&S because Blair believed that it was reasonably likely to cause an accident and the injuries were reasonably likely to be serious or fatal. Tr. 69.

Blair testified that if he had been the blaster-in-charge, he would have doubled or tripled the blast area, which would have included the Hudgens’ home, to prevent injury. Tr. 72-73. He believed that the blast area should have been extended to at least 800 feet because of “the way they stem the hole[s], [and because of] the loading process of the holes”. Tr. 73. He added that an area was cleared 500 feet in the direction of the mine property, but not the same distance in the direction of the Hudgens’ home. Tr. 72, 74. He stated that the home was 407 feet from the blast site. Tr. 73.

Blair terminated the citation when Austin Powder changed from using drill cuttings for stemming to crushed stone. Tr. 94. He explained that drill cuttings, used in the April 11 blast, do not have any locking characteristics, but crushed stone expands and grips instead of blowing out. Tr. 97. Blair stated that a blast is more controlled with crushed stone stemming, which would put more “pressure on the rock itself . . . [i]nstead of shooting straight up.” Tr. 95. For these reasons, a blast using crushed stone as stemming does not require as large of a blast area as a blast using drill cuttings as stemming. Tr. 73, 94-95. Blair also considered the company’s purchase of blast mats when terminating the citation, although it was not included in the written explanation for terminating the citation.¹⁴ Tr. 95, 96. Blair testified that blast mats placed over the blast hole keep the “rocks from escaping” and thereby reduce the area in which flying material can be expected to travel. Tr. 95.

¹⁴ A “blast mat” is defined as “a heavy, flexible, tear resistant covering that is spread over the surface during blasting to contain earth fragments.”
<http://www.answers.com/topic/blasting-mat>.

William Trent Clark

William Clark began working in the mining industry in 1980. Tr. 98-99. In 1987, he became a surface coal blaster for Austin Powder and continued to work there until 1997. Tr. 99. He left for a position with another mining company, but returned to Austin Powder in 2002, and worked for the company until he left to become a MSHA inspector in April 2012.¹⁵ Tr. 98, 100. The Secretary and Respondent stipulated that Clark is an expert on blasting in the mining industry. Tr. 103.

Clark testified that in his opinion the Hudgens' home was in the blast area based on his application of the Section 56.6306(e) requirements to the Austin Powder records of the April 11, 2011, blast. Tr. 126. As previously stated, "blast area" is defined in Section 56.2 as "the area in which concussion (shockwaves), flying material, or gases from an explosion may cause injury to persons." Under Section 56.2, a blast area is determined by considering these seven factors: 1) the geology or material to be blasted, 2) the blast pattern, 3) the burden, depth, diameter, and angle of the holes, 4) the blasting experience of the mine, 5) the delay system, powder factor, and pounds per delay, 6) the type and amount of explosive material, and 7) the type and amount of stemming. Clark's analysis of what constituted the blast area on April 11 focused on three of the seven factors. Tr. 104. In his view, the geology to be blasted, the blasting experience of the mine, and the type and amount of stemming, were inadequately considered before the shot was fired. Tr. 104-106. He did not believe that the other section 56.2 factors were at issue. Tr. 105-06, 109-10.

In examining the first factor, geology to be blasted, Clark reviewed the records and described the pre-blast geology of the drill area as "rock with a lot of dirt." Tr. 105. In Clark's experience, since dirt is not a solid material, the blaster-in-charge must compensate by adding more stemming to the bore hole and by ensuring the explosives are not put into the dirt portion of the bore hole. Tr. 105. Clark also testified that the amount of dirt in the drill area made the geology unpredictable which should have require that the blast area be expanded further than 407 feet in the direction of the Hudgens' home. Tr. 106, 129.

Clark explained that the fourth factor, blasting experience of the mine, refers to the history a miner (blaster) has blasting in an area. If experienced blasters have a routine consisting of similar loads and conditions, the mine and the blaster would expect consistent results. Tr. 107. If the conditions are dissimilar, like the mixed dirt and rock conditions on April 11, Clark expected that the blaster would require an extension of the blast area, as the blaster would find the blast less predictable. Tr. 107-08.

Clark described the seventh factor, type and amount of stemming, as relating to the inert substance that is put in the blast hole on top of the explosives in order to hold the energy of the explosives within the rock. Tr. 111. In his opinion, drill cuttings comprised of dirt and rock, as

¹⁵Clark was an employee of Austin Powder when the subject blast occurred although he was not then working at the Cookeville Limestone Quarry. Gov't Ex 26.

was used in the April 11 blast, are “not a good stemming material.” Tr. 112. Clark testified that the stemming could have significance in how the blast area should have been determined. Tr. 113.

When trying to determine how much stemming was used, Clark encountered inconsistencies between the four Austin Powder April 11 blast records relating to stemming, bore hole depth, and the amount of dirt in the holes. Tr. 114-38. Clark first discussed the drill log, in which the driller recorded the amount of dirt in the holes, but did not include the depths of the holes. Gov’t Ex. 15; Tr. 114-15. Clark explained that the record in the log of the depth and content of each hole and any voids or cracks that the driller encounters is important for accurately stemming the holes, assessing the risk of flyrock, and ultimately determining the blast area. Tr. 115, 132. Clark compared the drill log to the initial blast report for the April 11 blast and found they did not match. Tr. 116. In the initial blast report, Clark found that the blaster-in-charge’s notes recorded the holes to be 17 feet deep, with only six feet of stemming in each hole. Gov’t Ex. 23; Tr. 115. The drill log reported dirt in excess of six feet in several holes, which would indicate more than six feet of stemming was necessary to keep the explosives from being placed into dirt. Tr. 116. Clark also compared the initial blast report to a second blast report created for the April 11, 2011 blast, which contained more detail, including graphic representations of the hole types and four additional pages.¹⁶ Gov’t Ex. 17; Tr. 115, 119. Clark found that the pounds per delay, hole depths, and the number of rows were not the same in the two documents. Tr. 121. Clark testified that the discrepancies between the blast reports and drill log would leave the blaster-in-charge without adequate and accurate information to determine the blast area. Tr. 122. Clark reviewed a fourth document containing the hole-loading data,¹⁷ and found that the hole depths and the powder amounts used were also inconsistent with the initial blast report. Gov’t Ex. 16, 23; Tr. 137-38.

Clark also compared the four April 11 blast records to the company’s stemming guidelines found on the company’s website. Tr. 139. He found the stemming recorded in the blast records was not consistent with the company’s stemming guidelines. Tr. 139-40. In his opinion, several holes in the April 11 blast did not meet the Austin Powder guideline that there must be seven feet of stemming for every ten feet of burden.¹⁸ Tr. 139-40. Clark testified that the burden in the April 11 blast was ten feet and that several of the holes had less than seven feet of stemming. Tr. 140-42.

Clark believed that the Hudgens’ home was in the blast area (Tr. 126) and that Austin Powder should have increased the blast area to include the Hudgens’ property after determining there was inconsistent geology in the area. Tr. 127-9. The inconsistency came from varying

¹⁶ The second blast report had a time and date stamp for April 14, 2011.

¹⁷ This document is referred to by the Respondent as the “blast hole data log.” Tr. 175.

¹⁸ Clark used the “top stemming length formula” from the Austin Powder Company’s Blast Design Formula to determine the standard $T = (0.7 \rightarrow 1.3) \times B$, B=Burden [ft], T= top stemming length [ft]. Tr. 139-141; Gov’t Ex. 22.

depths of dirt and rock, which prevented the driller from knowing how much dirt surrounded the bore holes. Tr. 129. Clark stated that if the blaster-in-charge did not know the amount of dirt on the side of a hole and did not have an accurate drill log, the stemming could not be adjusted to hold the energy of the blast. Tr. 129, 134. He explained that without the proper stemming, energy is going to move to the point of least resistance, which is to go up, creating flyrock, instead of moving sideways. Tr. 134. Clark stated that if he had been the blaster and knew of the inconsistencies in the drill area, he would have expected a chance of flyrock, which would also mean an increase in the size of the blast area. Tr. 127. Clark admitted that during his time as a blaster-in-charge, he had unintended incidents of flyrock, but the rocks did not leave the blast area. Tr. 149. Rather, the flyrock landed in an area where he knew it had the potential to land. In his opinion, the blast area was anywhere the flyrock had the potential to land. Tr. 149.

Clark also testified that the duties contained in both Sections 56.6306(e) and (f) are meant to apply to the protection of all persons in the blast area, not just to miners or to persons on mine property. Tr. 123-128. Clark stated that when he was a blaster-in-charge, his practice was to notify the mine operator prior to the detonation so the operator could alert its employees to evacuate (Tr. 153, 154), but Clark recognized that the blaster-in-charge is ultimately responsible for the safety of the blast. Tr. 128.

COMPANY'S WITNESSES

John Capers

John Capers is a corporate technical manager for Austin Powder Company. Tr. 160. His duties include training and working with the 230 blasters at Austin Powder. Tr. 160. Capers also teaches at a blaster certification training program conducted throughout the country. Through this program, Capers has provided classes for the FBI, ATF, and other federal organizations. Tr. 162. Capers has been practicing in the field of explosives and blasting for 40 years and he is a licensed blaster in Ohio. Tr. 161. Capers was admitted to testify as an expert in the field of explosives. Tr. 163.

Capers explained Austin Powder's application of the seven Section 56.2 factors for determining a blast area. Tr. 164-71. In addressing the geology of the area, Capers provided examples of geological formations, and explained that within a quarry, the geology is slightly different on each bench. Tr. 164. He stressed that blasters are limited to what they can see visually in determining the stability of the geology of the blast area. Tr. 166.

Capers explained that the blast pattern is developed based on the "nearest protected structure" to minimize damage, which he believes was done in preparation for the April 11 blast.¹⁹ Tr. 166. As to burden, depth, diameter, and angle of the holes, Capers explained that the

¹⁹ The "nearest protected structure" is the term used by Austin Powder blasters to identify
(continued...)

holes in quarry blasting are drilled vertically to limit “casting” the material.²⁰ Tr. 167-68. Regarding the blasting experience of the mine, Capers testified that Austin Powder keeps the same blasters in the same quarries “day in and day out, year after year” so they understand the rock strata at a particular quarry. Tr. 168-69. Discussing delay system, powder factor, and pounds per delay, Capers testified that the delay system used in April 11 was non-electric and the system was designed and used correctly.²¹ Tr. 169. Capers also described Austin Powder’s policy of tailoring explosives to the type of rock masses and stated that in this blast, the blaster-in-charge used ANFO “the most popular and [one of the] most simplistic explosive out there.” Tr. 169-70. Lastly, Capers asserted that the amount of stemming used, rather than the type of stemming, was critical. Tr. 170-71. Stemming is used to “plug” the blast hole for a few seconds to force the rock to move horizontally out into the pit instead of vertically. Tr. 183. In his expert opinion, using crushed stone does not necessarily prevent flyrock and drill cuttings “would have probably performed just as well” as crushed stone. Tr. 170-71, 184. However he also stated, “crushed stone locks in to rock very well” to form a plug due to the sharp angles of the rock. Tr. 183-84. When using drill cuttings, Capers, adds one foot of stemming more than he would use with crushed stone. Tr. 184. After reviewing the drill log and blast report, Capers testified that he could not tell whether the blaster-in-charge, John Frady, used sufficient stemming on April 11. Tr. 185. Capers stated that drill cuttings are used as stemming in 80 percent of all bore holes in the United States. Tr. 170. Later in his testimony, he explained that he came to this conclusion because 80 percent of the explosives consumed in the United States are consumed by coal mines, who virtually always use drill cuttings.²² Tr. 182-83.

Capers testified that the April 11 blast was an “overburden/stripping blast,” which is used to remove waste material and that the stemming used in such a blast may differ from a blaster’s “production” stemming. Tr. 172-73. He stated that the stemming may be adjusted in a stripping blast depending on the geology of the blast area because the blaster must put stemming in the

¹⁹(...continued)

the nearest dwelling that people inhabit, such as a home or a school. Tr. 148. The blaster then determines the minimum distance to that building and adjusts the blast pattern and pounds per delay to minimize “specific ground vibration and motion to those structures” and “to ensure that we [Austin Powder] don’t cause damage.” Tr. 148, 166-67, 215.

²⁰ Capers described “casting” as physically throwing the material into an open area. Tr. 167-68.

²¹ A delay system controls the timing of the detonation for each hole. Tr. 108. As mentioned previously, small delays between charges are used to limit the intensity of ground vibrations and the movement of objects in the blast. Tr. 108, 169.

²² Capers justified the use of drill cuttings for stemming in the subject quarry based on his belief that 80 percent of mines, all coal mines, use drill cuttings. Tr. 182-83. When questioned about the Austin Powder guideline that requires stemming to be at least 70% of the burden (7 feet of stemming for every 10 feet of burden), Capers indicated the formula was designed specifically for coal mines, not for quarries. Tr. 200.

areas surrounded by dirt and the explosives must be below the level of the dirt. Tr. 173-74. Capers emphasized that a blaster would fill the part of the hole surrounded by dirt with stemming, not explosives because if the explosives were placed in dirt the ensuing blast would create a crater. Tr. 173-74. Tr. 173-74.

Capers reviewed the four records previously addressed by Clark's testimony (drill log, two blast records, and hole-loading data log) and commented on the purposes behind each of the documents. Capers testified that the blaster-in-charge factors in the drill log data to get an idea of the rock mass and the condition of the bore hole. Tr. 172. He explained that the drill log gives the best information on the condition of the bore holes. Tr. 172. Capers testified that the blast report demonstrates that the blaster-in-charge knew the nearest protected structures, private residences including the Hudgens' home, were to the north and the blast was directed due south away from the structures. Tr. 181.

Capers concluded the flyrock originated from a group of underground broken rocks located six to twelve inches away from the solid bore hole, but he could not determine if the fly rock came from the explosive area or the stemming area. Tr. 186. Capers later contradicted his testimony and said "the rock did not come from the stemming area," in support of his statement that crushed stone stemming would not have prevented the flyrock. Tr. 188. Capers testified that the driller "physically drilled through a solid area" that was very near the broken material, but he had no way of being aware of fractured material, as the drill log indicated there were no problems with the holes. Tr. 186-77. Capers testified that after watching the video of the blast, he concluded the flyrock was caused by a hole located toward the rear of the shot. Tr. 186. However, upon cross examination, Capers testified the flyrock incident was not a "blast back," when the rock goes in the opposite direction, because the flyrock "wasn't caused by material ejecting to the rear of the shot. The flyrock was from the evacuation of a hole almost in the center of the blast [and] went straight up."²³ Tr. 194.

In a corrective action plan to abate state violations for the April 11 incident, Capers testified that Austin Powder identified two probable reasons for the incident, the unidentified geological fault and the stemming material.²⁴ Tr. 198-99. As part of the abatement, Austin Powder agreed that all blasters will use nine feet of crushed stone stemming, for any hole of four and a quarter inches, and crushed stone will be used in all blasts. Tr. 199. Capers also testified that Austin Powder never had a flyrock incident reported from the blaster-in-charge or the company prior to the April 11 incident. Tr 189-90.

²³ This testimony seems to contradict an opinion Capers expressed that the flyrock originated from the rear of the shot. Tr. 186.

²⁴ The April 11 incident was also investigated by State of Tennessee inspectors who issued several citations for violations of state regulations. Tr. 198-99.

John Travis Frady

John Frady is employed by Austin Powder Company in Dunlap, Tennessee. Tr. 210. He began working at Austin Powder in 2004. Tr. 210. In 2005, he attended a week of training in Alabama and received his license as a blaster. Tr. 211. He worked as a blaster in coal mines for four years. Tr. 211. Subsequently, Frady has worked as a blaster at the subject quarry, other quarries, and on various construction sites. Tr. 211.

The parties stipulated that Frady was the blaster-in-charge at the Cookeville quarry on April 11, 2011. Stip 12. Frady testified he has considerable experience blasting at the quarry and that he is familiar with how all of the benches react when blasted because the benches have been established for years. Tr. 217-18. Frady described his blast experience at the quarry as primarily production shots, which require different precautions than the April 11 overburden/stripping blast. Tr. 218-19. Frady also testified that he usually uses crushed stone for all stemming in production shots, as production shots are flat and easy to access for the trucks which haul in crushed stone. Tr. 219. Frady explained he was not able to use crushed stone on April 11 because the steep terrain made it unsafe for a truck to deliver crushed stone to the bench where the blast occurred. Tr. 219-22.

In preparing for the blast, Frady assessed the geology of the mine as “a lot of dirt [and] a lot of cap rock” on top of the production rock. Tr. 212-13. Frady testified that he considered the nearest protected structures when he designed the pattern, in addition to the geology. Tr. 214. Frady explained how he used the drill log and how the drill log correlated to the blast report. Tr. 229-33. Frady testified that the drill log was not completely accurate, but he verified holes with a loading pole and could differentiate between dirt and rock. Tr. 231-32.

Frady acknowledged the chance that rock would not travel in the direction he intended, but he did not consider it a “reasonable” or “likely” possibility. Tr. 255. Frady emphasized that the blast design was for “nothing to go back” and that there were no previous reports of flyrock in the wooded area around the quarry. Tr. 255, 247-48. When clearing the blast area, Frady stated that he only checks the direction that he designed the shot to shoot. Tr. 257. Therefore he cleared the mine shop, which was located 400 to 500 feet to the south of the blast, in accordance with the blast design. Tr. 241, 255.

Frady acknowledged that he was ultimately responsible for clearing the blast area, but indicated that after he notifies the mine management before a blast, the superintendent of the mine takes responsibility for clearing the blast area. Tr. 235-37. Further, Frady stated that the superintendent is responsible for notifying homeowners of the blasts at Cookeville, as is the case for each of the superintendents at the other fifteen rock quarries for which Frady has performed blasts. Tr. 254.

Frady testified that he ensured that the Cookeville Limestone Quarry workers left the quarry with their equipment at 11:30 a.m. on April 11, and that he shot the blast at 11:45 a.m. Tr. 237; Gov’t Ex. 17. When asked why he did not inform the homeowners of the blast, Frady

said he did not know the local homeowners because he was “going to a different quarry every single day in a different county.” Tr. 253. Frady recorded the initial blast report immediately after the blast, but explained that he made changes to the original blast report sometime after 5:00 p.m. on the night of April 11, 2011. Tr. 247. He made the changes to give more detailed information on the blast and to update the report to include the flyrock incident. Tr. 259-61. In Frady’s opinion, the flyrock came from “sort of the middle of the shot in the back corner[,] [b]ut it almost look[ed] like it c[ame] just in the middle.” Tr. 261.

Frank Randall Livingston

Frank (Randy) Livingston is employed as the quarry manager and supply superintendent at Cookeville Limestone Quarry. Tr. 263, 264. Livingston began at Cookeville in 2004. Tr. 264. Livingston testified that Austin Powder blasts at the quarry twice a month on average. Tr. 264. Livingston indicated that the section of the quarry where the April 11 blast occurred had been blasted before on different levels, although he could not recall how many times.²⁵ Tr. 269. Livingston acknowledged that “a fly rock of any size can go at any time off of any shot loaded by anybody.” Tr. 278. Livingston also acknowledged a responsibility for notifying all persons on mine property and any person who notifies the mine that they would like to be notified of blasting. Tr.270, 275-6.

Before Cookeville Limestone quarry began any blasting, management conducted a pre-blast survey that allowed residents to sign up for blast notifications from the mine. Tr. 271. Prior to the April 11 blast, Livingston followed through with the commitment when he notified the state forestry service, which previously requested notification. Tr. 278. The state forestry service building was 500 feet away from the blast and located outside of the mine property. Tr. 278. The forestry service was the only property owner outside of the mine that requested to be notified. Tr. 278.

THE ISSUES

The issues are: (1) whether there was a violation of Section 56.6306(e), and, if not, whether there was a violation of section 56.6306(f), (2) if there was a violation, whether the violation was S&S, and (3) if there was a violation, the amount of the civil penalty that must be assessed for the violation, taking into consideration the civil penalty criteria set forth in section 110(I) of the Act. 30 U.S.C. § 820(I).

THE VIOLATION

First, I must determine whether the company violated Section 56.6306(e). As has been noted, Section 56.6306(e) requires that “[i]n electric blasting prior to connecting to the power source, and in nonelectric blasting prior to attaching an initiating device, all persons shall leave

²⁵ However, when Frady described the geology of the area blasted on April 11, he said “it’s not been touched. It’s the way the good Lord put it.” Tr. 213.

the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave), flying material, and gases.” Section 56.2 defines the term “blast area” as “the area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to persons.” In *Lakeview Rock Products* 34 FMSHRC 244, 249 (Jan. 2012) (ALJ), Administrative Law Judge William Moran interpreted the phrase “may cause injury to persons” to require a reasonable expectation of an injury. Judge Moran found it unreasonable to apply to “any possibility [of causing an injury] no matter how small,” and the Court agrees. 34 FMSHRC at 249.

In order to comply with Section 56.6306(e) the operator or its agent must correctly determine the extent of the blast area. To do so, Section 56.2 provides seven factors that must be considered: “(1) Geology or material to be blasted, (2) Blast pattern, (3) Burden, depth, diameter, and angle of the holes, (4) Blasting experience of the mine, (5) Delay system, powder factor, and pounds per delay, (6) Type and amount of explosive material, (7) Type and amount of stemming.” 30 C.F.R. § 56.2. In addition, and as Judge Moran stated, “[t]he list does not purport to exclude other relevant factors.” *Lakeview Rock Products*, 34 FMSHRC at 246.

In this case, I conclude there was a violation of Section 56.6306(e). The blast area was not cleared of all persons, at least in part because the blast area was not correctly determined by the Austin Powder blaster-in-charge. I credit Frady’s testimony that he considered some factors, such as type of explosive, delay system, and burden, and I find that he subsequently made adjustments in hole size, burden spacing, and blast design and that in this regard Frady met the duty imposed on him by Section 56.2. Tr. 219. However, I find that the following three factors were not adequately considered by the Frady or by any other representative of Austin Powder: the geology or material to be blasted, the blasting experience of the mine, and the type and amount of stemming.

Geology or Material to be Blasted

Neither Frady nor any other agent of Austin Powder adequately considered the geology or material to be blasted when determining the blast area. Although Frady testified that he considered the geology, specifically that there was dirt and rock surrounding the bore holes, the evidence suggests that neither Frady nor anyone else considered the effect of the type of blast being conducted (an overburden/stripping blast) on the surrounding geology. Tr. 212. Witnesses for the Secretary and the Respondent testified that the geology on a cap stone, where weathering has taken place, is unpredictable. Tr. 106, 124, 166. The Respondent’s expert witness, John Capers, testified there was no way to tell the composition of the cap stone, which is not a solid formation, without “x-ray vision.” Tr. 166. Thus, the blaster did not know what material made up the cap stone, specifically if the material contained broken rock. Tr. 166, 187. Capers provided expert testimony that the broken rocks that were launched from the blast site were “perhaps six inches or even a foot away from one or two of the solid drill holes” and “the broken rock would not have been identifiable during drilling or loading the explosives because it did not

intersect the drill hole.²⁶ Tr. 186-87. Capers explained that the force of the explosion propelled the broken rock out of the ground. Tr. 187. While the blaster-in-charge did not know this would happen, he should have been aware of the potential presence of broken rock and the likelihood that the explosion would propel the broken rock in any given direction.

The Secretary's expert, William Clark, also testified that the amount of dirt reported in the drill area indicated that the geology was not consistent. Tr. 129. Clark found that the drill log, though incomplete as to the depth of each hole, indicated that different amounts of dirt were found in bore holes throughout the blast area. Tr. 129-30. Clark explained that explosives need to be in solid material, which will hold the energy of the explosives, so the blaster needs to know the amount of dirt in a bore hole and the amount of dirt around the bore hole to adjust the stemming for the blast. Tr. 129-31, 133. When the dirt amount is consistent, the stemming could be adjusted to that amount of dirt, but if one hole has four feet of dirt and the one next to it has six feet of dirt, the blaster can not predict where the dirt increases between the holes or know what to adjust in the stemming and explosives. Tr. 133. Clark testified that the blaster should have accounted for inconsistency in the dirt by extending the blast area. Tr. 127, 129, 133. I accept Clark's expert testimony.

Frady, as the blaster-in-charge, testified that his experience was primarily related to production, but included "stripping shots," and that he "knew how the rock was a lot different than what [he] had been doing."²⁷ Tr. 218-19. Frady acknowledged that the geology was unpredictable. Yet, the blast area design only included clearing persons for 500 feet to the south of the blast, including the mine shop. Tr. 74, 242, 278. Frady correctly and reasonably concluded that the blast was capable of sending shockwaves, flyrock, and gases at least 500 feet away, but he should have also reasonably expected that blasting in unpredictable geology could produce flyrock with the potential to travel to the north, not just south of the blast. I credit the Secretary's blasting expert, Clark, that the dirt was inconsistent in areas, that there were indications of more dirt on the side of the blast requiring an increase in the blast area, and the Hudgens' home should have been considered in the blast area. Tr. 106, 127, 129. The house was located 407 feet north of the blast, well below Frady's anticipated blast range of 500 feet, though in the opposite direction. Tr. 75, 124, 242.

²⁶ Capers stated that it was "by bad luck of the driller, we'll call it bad luck, he did not intersect those broken areas when he drilled it." Tr. 187. However, based on the evidence presented, it was the inadequate consideration of Section 56.2 factors by the blaster-in-charge that resulted in the incident and it was by the "good luck" of all parties involved that Mrs. Hudgens made plans for lunch that day and narrowly avoided a serious or fatal injury.

²⁷ As of April 11, 2011, Austin Powder credited Frady with conducting 787 blasts in the position of a blaster. Tr. 203. He has four years as a blaster working at the Cookeville Quarry and fifteen other quarries, and he has five years of experience assisting another Austin Powder blaster. Tr. 203.

The Blasting Experience of the Mine

Clark believed the blasting history of a blast site should be considered when determining the blast area because it is reasonable to expect that similar loads of explosives and stemming under similar conditions, would yield similar results. Tr. 107. Austin Powder's commitment to repeatedly use the same blaster in the same quarry is undoubtedly an advantage toward preventing accidents when there were similar loads and conditions. Tr. 168-69. Frady supported this policy when he stated that he knew "how all of the Cookeville benches act" because the benches have been "laid out for years." Tr. 218. However, in this case, the testimony from both of the parties indicates that this specific area had not been blasted before,²⁸ and that no one was aware of the makeup of the geology blasted. Tr. 106, 166. In addition to working in a new area of the quarry with unknown geology, Frady chose to deviate from the normal type of stemming used in the quarry blasts.²⁹ Tr. 218-19. This was not a routine blast, with conditions that could be categorized as consistent or similar to previous experiences. Tr. 213. Yet, Frady hoped that he could restrict all harmful gases, shockwaves, or flyrock to 500 feet to the south and his plan did not acknowledge that those harmful effects might go to the north. That was unreasonable. With his experience at the quarry, he knew and acknowledged the ground he was blasting was different. The court heard testimony that experienced blasters would anticipate flyrock and expand the blast area. Tr. 76-77, 127. Frady anticipated the blast could send debris 500 feet away. Tr. 241-42. He should have cleared a blast area extending, at a minimum, 500 feet in all directions, which would have included the Hudgens' home.

Type and Amount of Stemming

As to type and amount of stemming, the court finds that the use of drill cuttings rather than crushed stone, had an effect on the blast that could and should have been anticipated. Frady explained that he normally uses crushed stone when blasting at the quarry and most of his blasts are targeting solid production rock, not cap stone. Tr. 218-19. Frady defended the use of drill cuttings instead of crushed stone for the April 11 blast because the area was too steep for a truck to bring crushed stone to the drill holes. Tr. 219, 268. The Secretary's expert credibly testified that the drill cuttings lacked the locking capability that crushed stone provides in the blast making fly rock in all direction more likely. Tr. 111. The Secretary's expert and the inspector testified that because of this effect the blast area should have included the area to the north of the blast. Tr. 126-27. I credit the Secretary's expert witness and the inspector's testimony that the change from crushed stone to drill cuttings likely changed the course of the blast. Tr. 111. I agree with the Secretary's expert, Respondent's abatement plan (approved by the state), and the

²⁸ Frady described the area as untouched, although he blasted in areas nearby. Tr. 219. Frady also told the court that he works at "a different quarry every single day in a different county" and while he has extensive experience at Cookeville Quarry working on six benches, he never worked on the area he blasted on April 11, 2011. Tr. 253.

²⁹ Frady indicated that he usually used crushed stone stemming and did not typically use drill cuttings as stemming. Tr. 219.

inspector's opinion that the stemming used by Frady on April 11 called for expanding the dimensions of the blast area to the north of the shot. Tr. 198-99.

Other Considerations

Since the Respondent failed to adequately consider 56.2 factors in determining the "blast area," it therefore failed to warn and clear persons who should have been properly considered to be in the "blast area." The court emphasizes that the blast area is not simply the area that the effects of the blast are designed to go, but rather "the area in which the concussion (shockwaves), flying material or gases from an explosion may cause injury to persons." 30 C.F.R. § 56.2. Frady determined 500 feet was a reasonable distance for the blast area, but the Court concludes the record fully supports finding it was reasonable that flyrock could travel 500 feet in all directions including the approximate 400 feet to the north of the blast, an area that contained the Hudgens' home.³⁰

Summary

Upon considering the three factors discussed above, the Court concludes the record supports finding that neither Frady nor any other agent of Austin Powder adequately considered the geological composition of the blast site, the different experience to be expected when conducting an "overburden stripping" blast, and the possible effects of using drill cutting to stem such a blast in the drilled geological area. The court further concludes Austin Powder did not adequately determine the blast area of the April 11 blast and in so doing that it failed to comply with section 56.2. Had the company adequately considered all of the specified criteria in section 56.2 it would have determined the blast area should extend 500 feet in all directions around the blast site.

As I have determined the blast area should have been understood to include the Hudgens' home, the second issue is whether the Respondent acted to provide warning and clear all persons in the blast area except persons in a blasting shelter, prior to initiating the blast. It is undisputed that Mrs. Hudgens was home at 11:30 when Frady was prepared to blast. Tr. 53, 237. As Chief Judge Robert J. Lesnick stated in *Orica USA, Inc.* 32 FMSHRC 709, 712 (May 2010) (Order denying Mot. To Dis.) the Respondent's duty to protect persons in accordance with section 56.6306(e) does not stop at the legal boundary of the mine.³¹ Here, Austin Powder had

³⁰ The Respondent's witness, Livingston, demonstrated some awareness that the area to the north was at risk when he stated that he notified the state forestry office, to the north of the blast, several hours before the blast to ensure their employees were not walking around the woods, also to the north of the blast. Tr. 272.

³¹

Orica is not absolved of its duty to protect people in the blast area from injury merely because the blast area extended beyond the legal property line of the Pattersonville mine. To only include flyrock injuries on

(continued...)

the duty to comply with the statute for all persons in the blast area. Since Mrs. Hudgens was not given ample warning or cleared of the blast area, I find that the Respondent violated section 56.6306(e).

30 C.F.R. § 56.6306(f)

The court granted the Secretary's Motion to Plead in the Alternative a violation of 30 C.F.R. § 56.6306(f), which requires that "[b]efore firing a blast - (1) Ample warning shall be given to all persons to be evacuated. . . ." *Id.* Although the Secretary's alternative argument is not before the Court due to its finding that Austin Powder violated section 56.6306(e), the Court observes that had it been required to rule on the issue, the Court would have no difficulty in finding Austin Powder violated section 56.6306(f), by failing to give Mrs. Hudgens the ample warning that would have allowed her to evacuate.

S&S AND GRAVITY

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 that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (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 3-4 (Jan. 1984) *accord Buck Creek Coal Co., Inc. v. MSHA*, 52 F.3d 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).

I have found a violation of the cited safety standard. I further find a discrete safety hazard existed in that I credit Inspector Blair's testimony that following a blast, the hazards of gas, dust or flyrock could harm people in the blast area, and that the flyrock especially poses the danger of crushing or fatal injuries. Tr. 68, 77.

³¹(...continued)

roadways that are "private" and/or "appurtenant to" a mine would allow blasting operators to escape liability for violations of Section 56.6306 that result in injuries simply because the injuries occur off of the mine property.

32 FMSHRC at 712.

Regarding the third element, the Secretary must prove “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). I find there is a reasonable likelihood that flyrock will cause injury to a person in a blast area. It is uncontested that flyrock in the blast area is possible. The court notes that in this case, flyrock entered the Hudgens’ home with sufficient force to break a hole in the roof and smash several pieces of furniture, interior walls, and windows. Indeed, the 87 pound rock landed within a few feet of where Mrs. Hudgens had been sitting. If she had not left her bedroom shortly before the blast, it is reasonable to conclude she would have been seriously injured or killed.

Finally and obviously, there was a reasonable likelihood that the injury in question would be of a reasonably serious nature. I credit Inspector Blair’s obvious observation that flyrock can crush a person and produce a fatality. Tr. 68. The violation was S & S.

The violation was very serious. I credit the inspector’s testimony that fatal injuries could result from not warning and clearing persons in a blast area and thus allowing them to evacuate. Tr. 68. Persons affected by the violation are subject to the hazards of flyrock. The inspector found that one person usually is affected, based on his opinion that “most of the time it’s only one person that gets hit.” Tr. 68. In this case, the person was Mrs. Hudgens. Tr. 69.

NEGLIGENCE

The inspector indicated that although the citation was written as “low negligence,” he would have written it for higher negligence if he had known all the facts regarding the blast. Tr. 69. However the inspector elected not to modify the citation. I find that the fact Frady considered some factors in determining the blast area indicates he acted with a degree of requisite care, but unfortunately he did not consider all relevant factors and therefore he did not exercise all of the care required by the circumstances. Therefore, I find his and Austen Powder’s negligence was “moderate.”

REMAINING CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The parties stipulated that the assessed violation history report, noted as Secretary’s Exhibit S-5, accurately sets forth the history of violations relevant to this case. Tr. 21. Although the history of violations presented by the Secretary provided 241 violations between January 4, 2007 and April 20, 2011, I will only consider the 62 violations that occurred in the 15 months

prior to the subject violation.³² Gov't Ex. 5. Under 30 C.F.R. § 100.3(c), the maximum penalty points are assessed when an independent contractor's overall history of violations exceeds 29 violations. Therefore, under the Secretary's penalty regulations, Austin Powder's history of previous violations is deemed to be large, and I so find.

SIZE

The parties stipulated that mining operations at the Cookeville Limestone Quarry are small, accounting for 18,979 working hours in 2010. Tr. 19. However, the relevant information for determining the penalty assessment for Austin Powder is not the size of the Cookeville Limestone Quarry, but the "size of the business of the operator charged." 30 U.S.C. § 820(i). Under 30 C.F.R. §100.3(b), the size of an independent contractor is measured by the total hours worked at all mines. Although the parties did not stipulate the size of Austin Powder, the testimony of the Respondent's expert witness John Capers indicated that there are at least 230 blasters that work for the company. Tr. 160. Mr. Frady testified that he is working in "a different quarry every day", which is presumably a full work week. Tr. 253. Based on this information, I calculate Austin Powder to have a minimum of over 300,000 annual hours worked at all mines.³³ Mr. Capers also stated that Austin Powder has multiple product lines and works through the United States as well as internationally. Tr. 160. Under 30 C.F.R. § 100.3(b), 20 out of a possible 25 penalty points are assessed when an independent contractor has worked between 300,000 and 500,000 annual hours worked at all mines. I find that Austin Powder is a large company.

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated that the proposed penalty will not adversely affect the Austin Powder's ability to continue in business. Tr. 22.

GOOD FAITH ABATEMENT

The parties stipulated that the Respondent, in good faith, attempted to achieve prompt abatement of the cited condition. Tr. 22. In addition to the abatement described in the citation, the Respondent initiated a system of notifying the neighboring properties after the April 11 blast. Tr. 236.

³² 30 CFR 100.3(c) considers the operator's history of previous violations based on the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period.

³³ 230 blasters x 50 weeks a year x 40 hours a week = 460,000 hours.

CIVIL PENALTY ASSESSMENT

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8552491	4/19/2011	56.6306(e)	\$4,689.00

I have found that the violation existed, that it was very serious, and that the negligence of the company was moderate, rather than low. Given these findings and the other civil penalty criteria, I assess a penalty of \$5,000.00.

ORDER

Within 40 days of the date of this decision, Austin Powder is **ORDERED** to pay a civil penalty totaling \$5,000.00 for the violation of section 56.6306(e) set forth in Citation No.

8552491. Payment **SHALL** be sent to the: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63197-0390. Upon payment of the penalty, this proceeding **IS DISMISSED**.

/s/ David F. Barbour
David F. Barbour
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

December 17, 2013

BOART LONGYEAR COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. WEST 2012-248-RM
	:	Order No. 8605604; 10/25/2011
v.	:	
	:	Docket No. WEST 2012-249-RM
	:	Citation No. 8605605; 10/25/2011
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 2012-250-RM
	:	Order No. 8605606; 10/25/2011
	:	
	:	Docket No. WEST 2012-251-RM
	:	Citation No. 8605607; 10/25/2011
	:	
	:	Mine: Durkee Cement Plant
	:	Mine ID: 35-02970 Y12
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 2012-422-M
	:	A.C. No. 35-02970-275832 Y12
	:	
v.	:	Docket No. WEST 2012-891-M
	:	A.C. No. 35-02970-287135 Y12
	:	
BOART LONGYEAR COMPANY, Respondent	:	Mine: Durkee Cement Plant

DECISION

Appearances: Bryan Kaufman, Esq., U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary

Dana Svendsen, Esq., Jackson Kelly, PLLC, Denver, Colorado, on behalf of Boart Longyear Company

Before: Judge David F. Barbour

These proceedings are before me based upon four notices of contest and two petitions for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”). 30 U.S.C. § 815(d).

These matters concern the disposition of three orders and two citations issued by the Secretary of Labor (“the Secretary”) against Boart Longyear Company (“Boart”), for which the Secretary seeks a total civil penalty of \$200,984.00.

Order No. 8605604, contested in Docket No. WEST 2012-248-RM, was issued pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a), which requires miners to be withdrawn from areas where imminent dangers exist. Civil Penalty Docket No. WEST 2012-891-M involves two alleged violations of the Secretary’s mandatory safety standards for surface metal and nonmetal mines, as found in 30 C.F.R. §§ 56 *et al.* Citation No. 8605605 (contested in WEST 2012-249-RM) alleges a violation of section 56.15005, which requires that safety belts and lines be worn where there is a danger of falling. Order No. 8605606 (contested in WEST 2012-250-RM) alleges a violation of section 56.11001, which requires safe means of access to working places. Civil Penalty Docket No. WEST 2012-422-M also involves two alleged violations. Citation No. 8605607 (contested in WEST 2012-251-RM) alleges that a truck backup alarm was inoperative, in violation of section 56.14132(a). Order No. 8605608 alleges a violation of the Secretary’s mandatory training and retraining standards for miners employed at surface mines, as found in 30 C.F.R. §§ 46 *et al.* Specifically, the order charges that a newly hired experienced miner had not been provided with the training required by section 46.6(a).

A hearing on these matters was held on July 30-31, 2013, in Salt Lake City, Utah. The parties filed post-hearing briefs on September 20, 2013.

Background

Boart Longyear Company is an independent contractor drilling company with both a Mining and Energy Section (M&E) and an Environment and Infrastructure Section (E&I). The E&I section is further divided into a Rotary Division and a Drilling Division. Generally, M&E supports mineral exploration, obtaining core samples to determine the viability of new mine sites, while E&I does environmental work such as locating the source of ground contamination or checking the integrity of underground water systems. Tr. 344-45. However, the E&I division also occasionally drills for samples on mine sites. Tr. 358. In October 2011 Boart was hired by Ash Grove Cement West, Inc. (“Ash Grove”) to explore for areas with low mercury content at Ash Grove’s Durkee Cement Plant, a limestone quarry and processing center, in order to address the Environmental Protection Agency’s concerns regarding the cement plant’s mercury emissions. Tr. 29, 31.

Though Boart does not now contest that the drilling operation at the cement plant was subject to MSHA regulations, Tr. 197-98, at the time, Boart believed the project was scientific, and therefore not subject to MSHA regulations. Tr. 165, 232. The project supervisors and the drill team for the cement plant project were members of Boart’s E&I Section. Robert Stadel, zone manager for the E&I Rotary Division, was involved in the proposal stage, then Kristian Thordarson, zone manager for the Drilling Division, took over as the project manager. Tr. 178. Thordarson allegedly was on site for the first few days, and about once a week thereafter.

Tr. 234-35. Doug Tucker of the Drilling Division was the on-site driller for the project; he has been a driller since 2000, and started with Boart's E&I Section in December 2010. Tr. 224. Prior to the Durkee Cement Plant project, Tucker had no experience on mine sites. Tr. 231. Allen Headman, also of the Drilling Division, was the driller's assistant for the project. Tr. 327. The parties disagree as to whether Thordarson or Tucker was the senior on-site supervisor. Sec'y Br. at 11; Resp Br. at 20.

Tucker explained that in a typical drilling operation, two pieces of equipment are involved, a drill rig and a flatbed truck. First, the drill rig is moved into position and set up to drill. Then, the flatbed truck is backed toward the drill rig until the catwalk of the drill rig and the back of the truck provide "porch steps" for access to the flatbed of the truck and the drill rig. Tr. 241-244. When drilling is finished and the drill team is ready to move to a new on-site location, the drill rig (a largely self-contained mobile unit) is moved first, then the tools and drill steel (large pipes) are loaded and strapped onto the flatbed of the truck. Tr. 249-50. In order to load the drill steel, a member of the drill team will climb up onto the flatbed, pull each drill steel toward the cab and roll it toward the edge of the truck, then repeat, alternating between the left and right edge of the truck so that the person on the flatbed continues to have a flat working surface. Tr. 319-20. Once the truck is loaded, it is taken to the new location and backed up to the drill rig using a spotter. Tr. 250. For the Durkee Cement Plant project, the drill rig and truck were being relocated every one or two days. Tr. 327.

The bed of the truck in use at the cement plant was approximately five feet high and eight feet wide. Resp. Br. at 18-19. Boart's M&E trucks generally have some built-in fall protection, such as overhead cables with retractable lanyards, and built in ladders. Tr. 194. However, those features are not present on Boart's E&I trucks, including the one in use at the plant. Tr. 56. It is company policy to conduct a preoperational inspection of the trucks every day, Tr. 247, though according to Headman, the inspections are less thorough if the rig is already on site. Tr. 336-37.

On October 25, 2011, Boart had been on site for approximately 12-15 days. Sec'y Br. at 18. MSHA Inspector Scott Amos contends the drill was set up approximately 150 yards uphill from active drilling and blasting, Tr. 33, though Tucker recalls the distance as $\frac{1}{4}$ to $\frac{1}{2}$ mile, Tr. 238. When Amos arrived, the drill rig and flatbed truck had been separated, and Tucker was on the flatbed moving materials on the flatbed so that they could be strapped down in preparation for driving the truck to a new location. Tr. 47-48. He was wearing a hard hat, but no fall protection. Tr. 47. Amos testified that he observed Tucker standing two to three feet from the edge of the truck's flatbed, on an uneven, slippery surface, surrounded by tripping hazards. Amos felt that Tucker was in imminent danger of tripping and falling off the flatbed and severely injuring himself; Amos therefore asked Tucker to come down from the flatbed, which he did. Tr. 36-41. Amos and Tucker then discussed Tucker's responsibilities at the mine site, and upon Tucker's representation that he was in charge of the on-site operation, the inspector issued a section 107(a) imminent danger order of withdrawal to Boart. Tr. 43-44, 37.

Amos and Tucker also discussed Tucker's method of climbing onto the flatbed, which involved using the door of a toolbox on the side of the truck as a step. Tr. 256. Amos then continued the inspection, and found that the truck's backup alarm was not in functional condition, Tr. 75, though Tucker testified that the alarm was working during that morning's

preoperational inspection. Tr. 269. As a final matter, Amos made some calls after leaving the mine site to determine whether Tucker had received the required miner training, and confirmed with both Boart and Ash Grove officials that he had not. Tr. 135-38.

As a result of his observations during the inspection, his discussion with Tucker, and his calls regarding Tucker's training, Amos issued to Boart, in addition to the imminent danger order, the following enforcement actions: a section 104(d)(1) citation for Tucker's failure to wear a safety belt where there was a danger of falling; a section 104(d)(1) order for failing to provide Tucker with a safe means to access the truck's flatbed; a section 104(a) citation for the Truck's inoperative backup alarm; and a section 104(g)(1) order of withdrawal for failure to provide Tucker with the required training.

107(a) Order No. 8605604 (Docket No. WEST 2012-248-RM)

Order No. 8605604 alleges the following:

The foreman was observed working on top of truck #2268. The foreman was not wearing fall protective gear. The foreman was about 5 feet above ground level on the bed of the Kenworth truck (serial # 1FUYYSYBAGP 281935). The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order was issued to the foreman working on the bed of the truck at 11:45 PST this date. The bed of the Kenworth Truck #2268 is hereby ordered withdrawn from service.

Gov. Ex. 1.

Section 107(a) of the Act, 30 U.S.C. § 817(a), authorizes inspectors to order persons to be withdrawn from an area where an imminent danger exists. An imminent danger is defined as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Although the Commission has cautioned against narrowly construing the term to only include immediate threats, the Commission has also recognized the obvious tenet that there must be some degree of imminence to support an imminent danger order; a hazard must be impending for immediate withdrawal to be required. *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (Mar. 1993). An inspector's finding of an imminent danger should be given strong consideration, but a judge "is not required to accept an inspector's subjective 'perception' that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed." *Id.* at 346 (finding the inspector's anticipation of ignition and explosion as a result of a methane accumulation 'speculative,' such that it was not reasonable to expect the accumulation to result in death or serious bodily harm).

Imminent danger orders have been upheld where there was danger of a person falling from a truck. In *Lime Mountain Co.*, 20 FMSHRC 1192, 1192-95 (Oct. 21, 1998) (ALJ), the judge affirmed the inspector's determination that there was an imminent danger of a fall resulting in serious injury where a miner was standing on an eleven foot high trailer coated in lime dust, using a compressed air hose to clean the trailer with the hose coiled behind him, without wearing a safety line. In *Nelson Brothers Inc.*, 18 FMSHRC 618, 624 (April 12, 1996) (ALJ), the judge found an imminent danger where a driver was standing near the edge of a nine foot high tanker truck (i.e. a rounded surface) with no guard rails or safety line. Here, however, I do not find it reasonable for Amos to have concluded that there was an impending threat of a fall resulting in serious harm where Tucker was working five feet off the ground without a safety line, on a flatbed which was dry, level, and stationary, which contained some loose materials but allowed moderate room to maneuver, and which was parked on packed dirt.

The picture that Inspector Amos painted with his testimony was one in which the flatbed was covered in trip and fall hazards such that Tucker was likely to lose his footing at any minute. Amos testified that the flatbed contained loosely or totally unsecured drill steel (round, smooth pipes) which could shift or roll, that the drill steel and flatbed floor were covered in mud and bentonite (lubrication), and that 'garbage cans and some smaller items and hoses' were stacked against the truck cab. In Amos' opinion the flatbed floor presented a slippery, unstable, uneven surface without a clear path for movement. Tr. 37-48. Amos further testified that Tucker was moving two to three feet from the edge of the truck, standing on and climbing over the drill steel, and was doing these things while not wearing fall protection. *Id.*; Tr. 57. In the inspector's view, given these circumstances, it was highly likely that Tucker would fall off the truck if these work practices were allowed to continue. Tr. 86-87; Sec'y Br. at 14.

Inspector Amos also testified that such a fall could easily have been fatal. In this regard, Amos stated that MSHA has determined that falls from machinery are a major cause of fatalities in the nation's metal and non-metal mines. Tr. 38. Amos also noted that a 200 pound person who falls six feet will hit the ground with 5,000 pounds of force, Tr. 49, and commented that fatalities have occurred at heights lower than six feet, particularly where an individual fell backwards and hit his head. Tr. 50-51. Amos listed numerous scenarios in which Tucker could have been fatally injured if he were to fall: Tucker could have landed on a rock; he could have landed on one of the two sideboards;¹ he could have landed on the sharp edge of the toolbox and broken his neck. Tr. 55. In sum, the imminent danger order is premised on a determination that Tucker could have fallen off the side of the truck and landed on his head or neck with fatal force, Sec'y Br. at 13, and that given the frequency and history of that type of falling injury, Amos wanted Tucker off the truck before a similar accident occurred. Tr. 41.

¹ In this context, sideboards are metal rectangles which are placed along the edge of a flatbed to prevent pipes from rolling off the truck. The cited truck appears to have had two sideboards, approximately eight inches high by two inches deep by two inches wide, near the front right edge of the flatbed. Tr. 53; Gov. Ex. 7; Resp. Ex. A (circled in green).

Boart presents a much less dramatic, and ultimately more convincing, picture. With regard to the impending threat of a fall, Boart contends that the drill steel was largely tied down and orderly, no mud or bentonite was present, and Tucker was standing on a wide, flat, dry, secure surface. Resp. Br. at 18. Tucker testified that the weather was dry, and the drilling process in use at the time did not involve drilling mud because the company was drilling reverse rotary air holes.² Tr. 259-60. Significantly, a photograph taken at the time of the citation supports this version of the conditions; though there are some odds and ends piled near the cab, as well as two or three unsecured sections of pipe and some loose straps, there is clear space for movement, and no sign of mud, either for drilling purposes or due to the weather. Gov. Ex. 7; Resp. Ex. A. Furthermore, Tucker testified that strapping materials down on the flatbed takes about fifteen minutes, and he had already been doing so for about five minutes when Amos arrived, thus limiting the time within which he was most likely to trip. Tr. 280. While it is certainly conceivable that a person could trip on one of the objects on the flatbed and fall to the ground below, or take a misstep and fall off the side of the flatbed, such an event on the flatbed as it then existed – level, clear of mud, with room for Tucker to position himself – within the few remaining minutes that Tucker would have been up on the truck, would have been rare rather than likely.

Boart further contends that, assuming a fall was to occur, serious injury was theoretically possible, but highly unlikely. Boart argues that the circumstances required for serious injury to occur, specifically that Tucker would fall backwards, be unable to catch himself, lose his hard hat (which Amos admits he was wearing), and land on his head or something sharp, are simply too speculative. Resp. Br. at 18. Boart adds that the Secretary has not provided any evidence that serious injury commonly results from a five foot fall. Resp. Br. at 20.

Again, I find Boart's argument persuasive. Most of Inspector Amos' testimony is indeed speculative; Tucker could land on a rock (although the evidence does not indicate any large rocks close to the truck), he could trip in just the right spot to land on a sideboard or toolbox, or in just the right way to land on his head, and fatalities have occurred at lower heights. Tr. 55. Amos references MSHA's 'Rules to Live By' report, Tr. 38, which indicates that falls from elevation accounted for 23 of the 589 mining fatalities between 2000 and 2008. Rules to Live By Program Priority 24 Standards Report, <http://www.msha.gov/focuson/RulestoLiveBy/Reports/priority24.asp>. However, such generalized information does not support a finding that the specific conditions at issue here constitute an imminent danger. For these reasons, I conclude that while Inspector Amos' testimony indicates that a fatal fall from the truck in issue is possible, the Secretary has not established that it is likely.

² Drilling mud is a fluid that commonly consists of bentonite and polymers. Mud Rotary Drilling uses drilling mud to cool the drill bit, remove cuttings, and stabilize the borehole. Reverse Circulation Rotary Drilling, on the other hand, uses air flow rather than drilling mud to collect cuttings. Boart Longyear, Rotary Drilling Services page, <http://www.boartlongyear.com/drilling-services/surface/rotary/> (last visited Dec. 3, 2013).

An imminent danger order requires something more than a generalized danger, it requires a reasonable determination that a given condition creates an impending threat of serious harm. *See, Island Creek Coal Co.*, 15 FMSHRC at 345-46. I find that the inspector's determination regarding the condition at issue was not reasonable. First, the photographic evidence does not support the inspector's determination that Tucker was in imminent danger of tripping and falling, as the surface of the flatbed at that time was dry, flat, and relatively unencumbered. Secondly, the inspector's determination that a fall would be fatal was overly speculative given the relatively low height of the flatbed, the very small amount of surface area presented by the sideboards, and the absence of rocks of any notable size on the ground below. Tucker falling *and* seriously injuring himself in the few minutes it would take to finish his work would simply be too much of a fluke to consider the risk imminent. Accordingly, the imminent danger order will be vacated.

104(d) Citation No. 8605605 (WEST 2012-249-RM, WEST 2012-891M)

104(d) Citation No. 8605605 alleges the following:

The foreman was observed working on top of the bed of truck #2268. The foreman was not wearing fall protective gear. The foreman was about 5 feet above ground level on the bed of the Kenworth truck (serial # 1FUYYSYBAGP281935). The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order (8605604) was issued to the foreman working on the bed of the truck at 11:45 PST this date. Doug Tucker, foreman engaged in aggravated conduct constituting more than ordinary negligence in that he conducted an unsafe act violating a mandatory standard. Doug stated he had been trained in the use of fall protection but actively chose not to use it.

Gov Ex. 2. Inspector Amos found the cited condition was a significant and substantial contribution to a mine safety hazard (an S&S violation), was highly likely to result in a fatality to one person, was attributable to a high degree of negligence, and was the result of an unwarrantable failure to comply with the standard. For the reasons discussed below, I find that the cited condition was only reasonably likely to result in lost workdays or restricted duty, rather than being highly likely to result in a fatality, but I otherwise affirm the citation.³

³ An S&S finding is not inconsistent with vacating an imminent danger order. The finding of no imminent danger is primarily based on the fact that Tucker was not likely to fall in the next few minutes, the time it would have taken him to finish his work. Unlike an imminent danger order, which accounts for conditions as they will exist only until the hazardous condition can be abated, an S&S determination allows for normal changes over time, such as weather and truck location.

Fact of the Violation

Section 56.15005 requires that safety belts and lines be worn when persons work where there is a danger of falling.⁴ Boart in effect concedes that Tucker was not wearing a safety belt or line. Therefore the determination as to whether Boart violated the standard rests on whether there was a danger of falling. As indicated in the text of the citation, Citation No. 8605605 was issued as a result of the same conditions as Order No. 8605604, *supra*. However, the Secretary's burden is lower. While I do not credit inspector Amos' interpretation of the cited condition as resulting in an imminent danger, I find that the uncontested facts reflect that there was a danger of falling, and consequently that Amos properly cited the company for a violation.

Boart does not contest that the flatbed was approximately five feet high, or that there were some loose materials on the flatbed; rather, Boart contends that working at an elevation of five feet, on a dry, flat, surface, does not create a danger of falling. Resp. Br. at 19. Respondent looks for support to a Program Policy Letter issued by MSHA giving weight to a determination by OSHA that a danger of falling begins at elevations of six feet. Tr. 20; Resp. Ex. H; PPL No. P12-IV-01. However, the policy letter was issued after Citation No. 8605605, and more important, it leaves room for site specific evaluation. P12-IV-01 at 1. In other words, a five foot elevation is neither inherently safe nor inherently unsafe; site specific conditions must be taken into account. While the danger of falling was not as extreme as Amos' testimony indicated, the photographic evidence supports the inspector's observations insofar as confirming that some trip hazards were present. It is also telling that Boart's Mining and Energy trucks, also with five feet of elevation, have built in fall protection; it is reasonable to assume that this would not be the case unless, as the Secretary notes, a reasonable person would recognize that there is at least some danger of falling while standing on a flat, five foot high surface. Sec'y Br. at 15. Accordingly, I conclude the Secretary has proved the violation.

S&S and Gravity

As a general proposition, a violation is properly found to be S&S if there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 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 in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal Co., Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995)

⁴ Specifically, section 56.15005 states that "safety belts and lines shall be worn when persons work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

(approving *Mathies* criteria). 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. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

The Secretary has established the fact of the violation, and the presence of a discrete safety hazard, namely a danger of falling, is inherent in that violation. As for the third and fourth factors, the Secretary contends, for the reasons discussed above in the context of the imminent danger order, *supra*, that the cited conditions were highly likely to result in a fatal injury. Relying on Inspector Amos' testimony, the Secretary notes that drillers have job related tasks that would likely compromise their balance, namely rolling drill steel toward the edges of the truck, that the flatbed did and would continue to contain obstacles and trip hazards, and that if a driller were to fall off the side of the truck, especially backward, the driller could land on his head or neck with thousands of pounds of force. Sec'y Br. at 16-17, *citing* Tr. 45-55, 319-20. The Secretary notes that miners have been killed falling from less than half the height of the flatbed. *Id.* Respondent contends that the Secretary has not provided any evidence that a serious injury resulting from a five foot fall is reasonable, rather than just possible. Resp. Br. at 19-20.

With regard to the likelihood of a fall, the Secretary's allegation that injury is highly likely to occur is largely theoretical; the Secretary has assumed the presence of significant slip and trip hazards, such as mud, rolling drill steel, and a lack of any clear pathway, which the photographic evidence does not support. Gov. Ex. 7. However, the presence of some trip hazards, such as some unsecured pipes, some loose straps, and a garbage can, have been established. Gov. Ex 7; Resp. Ex A. Furthermore, the inspector raised a valid concern that bad weather would create an increased risk of falling, Tr. 46, and it could also be reasonably expected that any unsecured pipes would roll if the truck were parked at an incline at any point during the project. Therefore, I find that a driller working on the flatbed could reasonably be expected to fall, given continued mining operations. With respect to the expected severity of any resulting injury, while I credit Amos' factual and anecdotal testimony regarding the ways in which a five foot fall *can* result in a fatal injury, I do not credit his conclusion that such a fall is *likely* to result in a fatality. However, Amos' testimony that a miner falling from five feet lands with thousands of pounds of force, Tr. 49, is sufficiently convincing to indicate that if Tucker were to fall from the flatbed, he could reasonably be expected to sustain injuries resulting in lost workdays or restricted duty, such as severe bruising or a twisted ankle.

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 a violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The evidence supports a finding that the effect of a five foot fall from the flatbed was reasonably likely to result in lost workdays or restricted duty, and I conclude that the violation was serious. Accordingly, I affirm the significant and substantial designation, but reduce the gravity findings from highly likely to reasonably likely, and from fatal to lost workdays or restricted duty.

Unwarrantable Failure and Negligence

The Secretary has attributed the violative condition in Citation No. 8605605 to a high degree of negligence and an unwarrantable failure by the operator. The Commission has summarized the legal principles for determining whether a violative condition is the result of an unwarrantable failure:

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) (“*Consol*”) [further citations omitted]. 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, Inc., 23 FMSHRC 705, 711 (July 2001).

The parties do not contest the length, extent or obviousness of the violative condition, or the lack of pre-citation abatement. The points of contention are whether Tucker was a supervisor, and whether the operator was on notice and/or had knowledge of the existence of the violation.

With regard to the length of time the violation had existed, Tucker conceded that he did not wear fall protection for the entire time the truck was on-site, Tr. 262, a 12-15 day period. Tr. 90. With respect to the extent and obviousness of the condition, it is uncontested and obvious that no form of fall protection had been provided. Prior to Amos' inspection, Boart made no effort to abate the condition, despite the availability of Boart trucks and/or truck designs with built in fall protection. Sec'y Br. at 18; Tr. 194. Finally, the degree of danger has been established via the S&S and gravity determinations, above. These factors favor upholding the inspector's unwarrantable failure finding.

In further support of the unwarrantable failure finding, the Secretary argues that a supervisor, namely Tucker, was involved in the violation. The Mine Act defines an agent as a person "charged with responsibility for the operation of . . . or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802. Under Commission precedent, the negligence of an agent is imputable to the operator or contractor for the purposes of unwarrantable failure. *Wayne Supply Co.*, 19 FMSHRC 447, 453 (Mar. 1997); *Southern Ohio Coal Co.*, 4 FMSHRC 1458, 1463-64 (Aug. 1982). To distinguish between agents and rank-and-file miners, the Commission relies upon function rather than job title; an employee is an agent if the employee's function is crucial to the mine's operation and involves a level of responsibility normally delegated to management personnel. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995). For example, the Commission has found that a rank and file miner who is assigned by the operator to carry out required examination duties may be appropriately viewed as an agent of the operator. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991).

Amos testified that in his experience inspecting Boart drilling operations, although there may be an occasional visit from midlevel management, the driller is the senior on-site representative, the individual responsible for filling out paperwork and arranging deliveries. Tr. 57-58. Specifically, Amos recalled asking Tucker if he was "the foreman, the guy in charge of the operation," to which Tucker said, "Yes, I am." Tr. 44. Amos also recalled Headman confirming that Tucker was the person on site who most represented the company. *Id.* Tucker's memory of his conversation with Amos is hazy, but he conceded that his promotion to driller gave him responsibilities, and that being the driller means if something goes wrong with the drill it "comes down on him." Tr. 306-07. Additionally, Rotary Division zone manager Robert Stadeli testified that pre-shift examinations and filling out forms were Tucker's responsibility, Tr. 219, and that driller's assistant Allen Headman received his day-to-day instructions from Tucker, Tr. 181. All of this supports finding that Tucker was a supervisor.

Boart contends that Drilling Division zone manager Kristian Thordarson, rather than Tucker, was the on-site supervisor. Resp. Br. at 20; Tr. 181, 224, 334. However, Tucker's testimony establishes that work on the project was taking place on a daily basis, Tr. 244-45, and yet, although Tucker spoke with Thordarson daily by phone, after the first few days of the project, Thordarson was only on site once a week. Tr. 234-35. This indicates that Thordarson was not the on-site supervisor. Respondent also notes that Tucker was an hourly rather than

salaried employee, and had no authority to hire, fire, or discipline. Resp. Br. at 20; Tr. 182, 231. However, as noted above, it is the supervisory function rather than the trappings of a position that are relevant. As the senior on-site Boart employee (of two!), Tucker carried out certain critical duties that could only be carried out on-site, such as conducting pre-shift examinations and directing the actions of the only other Boart employee present. Accordingly, I concur with the Secretary's finding that, as the individual trusted to handle the on-site aspects of the drilling operation, Tucker was the person "charged with responsibility" for the on-site drilling operation. Sec'y Br. at 11. Thordarson was Tucker's superior, but Tucker was the on-site supervisor. And as Tucker was also the individual working without fall protection, a supervisor was directly involved with the violative condition, supporting a finding of unwarrantable failure. Sec'y Br. at 19.

With regard to the remaining factors, Boart does not deny knowledge of the existence of the *condition*, but denies knowing the condition constituted a *violation*, thereby also claiming it had not been put on notice that greater efforts at compliance were required. Rather, Boart contends that it had a reasonable, good faith belief that the drillers on site at the Durkee Cement Plant were subject to OSHA, rather than MSHA, regulations, and therefore were not required to use fall protection for elevations under six feet. Resp. Br. at 21. I find that this belief, even if held in good faith, was not reasonable, and therefore Respondent's argument for a mitigating factor is ultimately unconvincing.

The Boart employees involved may indeed have had a good faith belief that MSHA regulations did not apply. Tucker and Stadel's testimony that when the project started they believed it to be environmental is supported by the fact that the drill team was from Boart's E&I section and was drilling to test for mercury. Tr. 212, 232. Furthermore, Boart claims that Ash Grove's representatives told Boart's representatives at least twice that the drill team was not subject to MSHA regulations. Resp. Br. at 21. According to Stadel, after Boart received the contract purchase order from Ash Grove, upon noticing that the general terms and conditions referenced MSHA or OSHA regulations "that might apply," Stadel requested clarification from Ash Grove and was told the drill team would be working solely under OSHA regulations. Tr. 179. Then, at Stadel's request, Thordarson confirmed with the Ash Grove "safety folks" that the drill team would be working under OSHA regulations. Tr. 180. Thordarson passed this answer to Tucker when Tucker asked if MSHA training was required since they were at a mine site. Tr. 300-01. Although he ultimately characterized all of this as a "breakdown of communication," Ash Grove plant manager Terry Kirby confirmed to Amos that Boart was under the initial impression that its employees were not covered by MSHA regulations. Tr. 165.

However, assuming the project team believed that MSHA regulations did not apply, Boart was negligent in failing to ensure that its E&I employees had the correct information regarding MSHA applicability while working on mine sites. First, the M&E Section was aware of the requirements of section 56.15005: M&E trucks were fitted with fall protection, Tr. 56,

the M&E Section would have been aware of MSHA's 'Rules to Live By' Report, and had been recently cited for similar violations. Sec'y Br. at 18. Second, by the very fact that the question was asked, it is clear that those involved in the project suspected that MSHA regulations might be relevant. Contact between the M&E and E&I sections was clearly feasible, given that abatement of the citation consisted of modifying the truck at issue to match M&E truck designs. Tr. 194. And yet, Boart management did not inform the project team that MSHA jurisdiction applied, and the project team did not follow through on their apprehensions by contacting the M&E Section. Boart should have known that the condition was a violation, and been on notice that greater efforts were necessary to comply.

In sum, I find that Boart violated section 56.15005, that the violation was S&S, that the violation was reasonably likely to result in injuries causing lost workdays or restricted duty, that the supervisory involvement of Tucker, the length of time he violated the standard, and the degree of danger posed to Tucker by the violation support affirming the inspector's unwarrantable failure finding, and that Boart was highly negligent.

104(d) Order No. 8605606 (WEST 2012-250-RM, WEST 2012-891M)

Order No. 8605606 states the following:

The foreman was observed working on top of the bed of truck #2268. The foreman was provided with but did not utilize safe access. The foreman stated he climbed up the side of the truck, standing on the toolbox door, then stepping onto the elevated area. No handholds or handrails were provided. The foreman was about 5 feet above ground level on the bed of the Kenworth truck (serial # 1FUYYSYBAGP281935). The foreman was standing at the edge of the bed of the truck. The bed was covered in pipe, tools, a garbage can, dirt, loose pipe, and debris. Sharp blasted rock and debris were on the ground under the miner's work area. Should the miner fall it would likely expose him to serious or fatal injuries. An oral imminent danger order (8605604) was issued to the foreman working on the bed of the truck at 11:45 PST this date. Doug Tucker, [the] foreman[,] engaged in aggravated conduct constituting more than ordinary negligence in that he conducted an unsafe act violating a mandatory standard. Doug stated he had been trained in the use of safe access but actively chose not to use it. The bed of the truck #2268 is hereby ordered out of service until it is provided with safe access and a representative of MSHA has verified a safe means of accessing the truck is implemented by the contractor.

Gov. Ex. 3. The order alleges that the cited condition violated 30 C.F.R. § 56.11001, which requires that “[s]ure means of access shall be provided and maintained to all working places.” The inspector found the alleged violative condition was S&S, was highly likely to result in a fatal injury to one person, was attributable to a high degree of negligence, and was the result of an unwarrantable failure. As discussed below, the fact of the violation, S&S determination, negligence, and unwarrantable failure findings will be affirmed, however the gravity will be modified to reflect that the violative condition was reasonably likely to result in lost workdays or restricted duty.

Further Findings of Fact

With regard to Tucker’s actual method of access during the Durkee Cement Plant project, it is uncontested that Tucker regularly began his ascent onto the flatbed by stepping onto the horizontal open door of a toolbox attached to the side of the flatbed truck.⁵ Tr. 62, 252. Tucker testified that he would then have placed his left foot on the flatbed, taken hold of either the post or the D-ring above his head with both hands, and pulled himself up into a standing position on the flatbed. Tr. 252, 294-95; Resp. Ex. A (toolbox door and post circled in red). Tucker conceded he probably would have pushed some materials out of the way with his foot to create a space to place his foot. Tr. 299. The Secretary does not credit Tucker’s testimony, claiming that a soft drink on the toolbox door, and drill steel and garbage near the truck’s edge, would have made it too difficult to step onto the flatbed, use the post as a handhold, and pull himself up. Sec’y Br. at 21-22. The Secretary instead suggests that after stepping on the toolbox door, Tucker pulled himself up onto the truck without using a handhold, and then crawled on his hands and knees over loose pipes until he found a clear space to rise to his feet, also without using a handhold. Sec’y Br. at 21-22. This theory is based on Amos’ testimony regarding his conversation with Tucker; Amos did not see Tucker climb onto the flatbed. Tr. 62.

With regard to alternate means of access, Amos testified that he saw a ladder on the flatbed,⁶ and when he asked Tucker why he had not used the ladder, Tucker replied he hadn’t used it because it was already loaded onto the truck. Tr. 70-71. Tucker testified that he did not recall whether or not a ladder was present. Tr. 283. Amos also testified that using the step at

⁵ Rather than a lid which opens upwards, the toolbox attached to the side of the truck had a front panel ‘door’ which opened downwards and was supported by chains, such that when the toolbox was open, the front panel was parallel to the ground. Gov. Ex. 7; Resp. Ex. A (circled in red).

⁶ Amos testified that the ladder was visible, though difficult to discern, in the photograph taken of the truck. Tr. 70; Gov. Ex. 7 (circled in blue). I agree that the ladder is difficult to identify, but credit the inspector’s testimony that the object circled in the photograph is a ladder.

the rear of the truck would have been marginally safer than the toolbox door, because it was at a more appropriate height.⁷ Tr. 73. Tucker noted that he used the back step when the flatbed was backed up to the drill rig. Tr. 243-44.

Fact of the Violation

Section 56.11001 requires that a safe means of access be both provided and maintained. Inspector Amos conceded that Boart *provided* safe access in the form of the ladder that was located in the flatbed. Tr. 71. Therefore, the existence of a violation turns on whether Boart properly *maintained* a safe means of access. The Commission has interpreted an operator's duty to "maintain" safe access as "an on-going responsibility . . . to ensure that a means of safe access is utilized." *Watkins Engineers & Constructors*, 24 FMSHRC 669, 680 (July 2002) (quoting *Lopke Quarries*, 23 FMSHRC at 708). The Commission has further elucidated that the duty to maintain a means of safe access "at a minimum . . . mandates that management officials utilize that access, and require other miners to do so." 23 FMSHRC at 709. Tucker conceded that he regularly accessed the flatbed via the toolbox door rather than the ladder, and Tucker himself was a supervisor (*see* page 11, *supra*), therefore I conclude that Boart made no significant efforts to ensure the ladder, an obviously safe means of access, was utilized. Accordingly, the key factual dispute is whether the toolbox door also constituted a safe means of access.⁸

The Secretary contends that the ladder was the only safe means of access, so by failing to ensure that Tucker used the ladder, Boart failed to maintain a safe means of access. Sec'y Br. at 20. The Secretary asserts that using the toolbox door for access was unsafe because the chain holding the door could snap, Tucker could get his foot caught in the door and trip, he could encounter any number of fall hazards while pulling himself up onto the flatbed, and even if he pulled himself up using the posts for handholds, he could lose his grip. Sec'y Br. at 21-22. Amos noted that the toolbox door did not meet the height and depth requirements for steps or ladders, and theorized that the door was not strong enough to bear Tucker's weight. Tr. 63, 66.

⁷ The back step is a metal grating spanning the width of the rear of the truck. Resp. Ex. A (circled in blue).

⁸ Tucker also accessed the flatbed via the step on the back of the truck. However, whether the back step was a safe means of access is not outcome-determinative, given that Tucker testified that the toolbox door was his usual means of access when the drill rig and flatbed truck were not parked back to back. Even assuming the back step was a safe means of access, which Amos contests, Tr. 73, and even if Tucker used the back step and the toolbox door in equal measure, Boart still allowed Tucker to access the flatbed via the toolbox door as a matter of course. Therefore, if the toolbox door was unsafe, Boart failed to ensure that its on-site supervisor used only safe methods of access.

Respondent contends that the toolbox door was a safe means of access, therefore allowing Tucker to use that method of access does not constitute a violation. Resp Br. at 22. Respondent calls the Secretary's assertion that the chains could snap mere speculation. Resp. Br. at 22. Furthermore, Tucker testified that he would feel safer standing on the toolbox door than a wobbly ladder, Tr. 283, and Stadel pointed out that by using handholds, Tucker maintained three points of contact. Tr. 200.

While Respondent's arguments may be relevant for determining the likelihood or severity of expected injury, I find that the Secretary has presented sufficient evidence of a trip/fall hazard to deem Tucker's method of access unsafe, especially given Tucker's testimony that he had to push material out of the way to place his foot on the flatbed, Tr. 299, and the fact that a number of Boart trucks have built in ladders.⁹ Tr. 194. Because Respondent did not ensure that Tucker used a safe means of access, I find a violation of section 56.11001.

S&S and Gravity

The Secretary alleges that the cited condition was S&S. The Secretary has established a violation which contributes to a fall hazard. With regard to the third and fourth *Mathies* factors, as will be discussed in more detail below, Inspector Amos testified that the dangers presented by Tucker's unsafe method of access as described in Order No. 8605606 were essentially the same as those presented by Tucker's lack of fall protection as described in Citation No. 8605605, Tr. 106, and accordingly, he found that the condition was highly likely to result in an injury that could reasonably be expected to be fatal. I agree that the two cited conditions present very similar dangers, and therefore find that, as with Citation No. 8605605, the cited condition in Order No. 8605606 was reasonably likely to result in an injury that could reasonably be expected to result in lost workdays or restricted duty.

The Secretary's allegation that injury is highly likely to occur is again largely speculative, particularly the notion that the chain holding the toolbox door level could snap under Tucker's weight. Sec'y Br. at 21-22. However, as Tucker's means of access involved stepping onto the flatbed, then the same unsecured pipes and loose straps which posed a moderate trip hazard once on the flatbed also presented a trip hazard while stepping onto the flatbed; Tucker admitted that he regularly had to push material out of the way to make space for his foot when stepping onto the flatbed from the toolbox door. Tr. 299. Respondent counters that injury was unlikely because Tucker maintained three points of contact by gripping the post above his head or the edge of the flatbed while pulling himself up. Tr. 200. However, given continued mining operations, a situation would almost certainly arise which could cause Tucker to lose his grip;

⁹ As for Tucker's assertion that he felt safer using the toolbox than a "wobbly ladder," Tr. 283, if the ladder was indeed wobbly, the proper solution would have been to request a sturdier ladder, rather than to use an alternate but still unsafe method of access. "It was the lesser of two evils" is not a proper defense to a violation.

for example, just as bad weather would increase the chance of falling once Tucker was on the flatbed, Tr. 46, ice or water on the handholds would increase Tucker's risk of falling while pulling himself onto the flatbed. Accordingly, I find it reasonably likely that, given continued mining operations, the cited condition would result in a fall injury.¹⁰

With regard to the expected severity of the injury, Amos stated that he designated Order No. 8605606 as likely to result in a fatal injury for the same reasons that he designated Citation No. 8605605 as likely to result in a fatal injury. Tr. 106. The finding is therefore again rejected on the basis that Amos' testimony only established that a fatality *could* occur. Based on Amos' testimony regarding the force with which a miner falling from five feet would land, as well as a common sense understanding of the dangers involved with a fall of between three to five feet,¹¹ I find that, like Citation No. 8605605, any injury resulting from a fall while accessing the flatbed would reasonably be expected to result in lost workdays or restricted duty. Accordingly, I affirm the S&S designation, but reduce the gravity findings to reflect that the violative condition was reasonably likely to result in lost workdays or restricted duty.

Unwarrantable Failure and Negligence

The Secretary contends that Boart's failure to ensure that its on-site supervisor and other personnel utilized a safe means of access, particularly in light of the fact that the company owned trucks with built in ladders and guardrails, constitutes aggravated conduct sufficient to establish an unwarrantable failure. Sec'y Br. at 22. I find that the evidence supports the Secretary's unwarrantable failure determination.

The strongest elements in favor of an unwarrantable failure finding are the involvement of a supervisor, and length of time for which the condition existed. Because Tucker was the individual cited as utilizing an unsafe means of access, and Tucker is a supervisor (*see* pg. 11, *supra*), a supervisor was directly involved in causing the violation. This is even more significant because compliance with the cited regulation in essence mandates that supervisors ensure that other miners use safe access by setting a good example; Tucker did the opposite. Additionally,

¹⁰ Respondent also contends that injury was unlikely because Tucker had "probably climbed the truck like that a thousand times" without incident. Tr. 206. However, it has long been recognized that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010) (citation omitted).

¹¹ It could be argued that injuries sustained from a fall while accessing the flatbed would be less severe than those sustained once on the flatbed, because the miner would be falling from a lower height (the toolbox door). However, the fall could just as easily occur in the final stages of access, once the miner was already at the height of the flatbed.

the condition existed for a significant length of time, given that Tucker testified that the toolbox door was a common method of access. Tr. 252.

Boart again claims there was no knowledge of the violative condition or notice that greater efforts were required, because there was a good faith belief that MSHA regulations did not apply. Resp. Br. at 25. For the reasons discussed above in the context of fall protection, I find that Boart should have known that the condition was violative, and been on notice, because the Durkee Cement Plant project team could have consulted with the M&E Division, which was on notice given that there were M&E trucks with built-in ladders. *See* pg. 12, *supra*.¹²

In Respondent's favor, I do note that the condition did not pose an exceedingly high degree of danger. I also find that the condition was potentially non-obvious; Tucker's own willingness to use the toolbox door as a convenient step to access the flatbed, and his lack of any mishaps using the toolbox door, indicate that a person could conclude that it provided a sufficiently safe means of access. However, the balance of factors still falls in favor of an unwarrantable failure determination, particularly given the involvement of a supervisor in a violation.

104(a) Citation No. 8605607 (WEST 2012-251-RM, WEST 2012-422M)

Citation No. 8605607 states the following:

The Kenworth #2268 (Ser# 1FUYYSYBAGP281935) was provided with an automatically activated reverse signal alarm which was not maintained in functional condition. The truck is used on narrow roads where backing occurs as needed for supplying drill steel to the drill rig. The truck has a large blind spot to the rear. Two miners typically work at the drill pad: one driving the truck, and one on foot. The truck is used intermittently as needed. Should the truck back up and a miner on foot be struck, it would likely cause serious or fatal crushing injuries.

Gov. Ex. 4. The citation alleges a violation of 30 C.F.R. § 56.14132(a), which requires that audible warning devices on mobile equipment be maintained in functional condition. The inspector determined that the alleged violation as S&S, reasonably likely to result in a fatal injury to one person, and attributable to a moderate degree of negligence. Respondent admits the fact of the violation, Resp. Br. at 25, but challenges the gravity and negligence findings

¹² Amos suggested more direct knowledge and notice, testifying that Tucker told Amos he "was trained in safe access but chose to ignore it." Tr. 108-09. However, Amos later admitted to paraphrasing what he was told by Tucker. Tr. 166. I therefore choose not to rely on Amos' testimony.

on grounds that the drill team used spotters when reversing the trucks, and the alarm had been functioning during the pre-operational inspection. For the reasons below, I find that the cited condition was not reasonably likely to result in injury.

S&S and Gravity

The discrete safety hazard contributed to by a malfunctioning backup alarm is inherent in the concept of an audible reverse alarm, namely the hazard of a miner being struck by the reversing vehicle. Boart does not contest that a fatality could be expected if a miner were to be struck by the subject vehicle. Accordingly, the only contested element of the S&S criteria is whether there was a reasonable likelihood of a miner being struck as a result of the nonfunctioning backup alarm. The Secretary contends that, because the normal operation of the flatbed truck involves backing up toward a drill rig with a miner standing on the back, it is reasonably likely that the lack of an audible backup alarm would result in injury. Sec'y Br. at 24. Respondent contends that injury is unlikely because it is company policy to use a spotter when backing the truck into place. Resp. Br. at 26.

The relevant normal mining operations are as follows. The trucks on site were moved approximately every one or two days, and moving the trucks necessarily involves backing one truck up to the other at the new location. Tr. 241-50, 327. The Secretary suggests that the flatbed truck would also occasionally back up to the drill rig with supplies while the drill rig was in operation, such that the driller would be standing at the back of the rig in the truck's blind spot. Sec'y Br. at 23-24; Tr. 80, 114. Respondent counters that the truck would never be reversed into place while the drill was in operation, in part because it would be dangerous, and in part because with a two person drill team, one would be driving and the other would be acting as a spotter, leaving no one to operate the drill. Tr. 248; Resp. Br. at 26. Tucker and Headman both testified that it was company policy to use a spotter, and described the procedure as follows: Headman would get into the cab, honk three times, make eye contact with Tucker through the mirror, and Tucker would guide Headman into the new location via agreed upon hand signals. Tr. 227, 246, 328. Amos testified that Headman told him a spotter had not been used the last time the flatbed was backed into place, Tr. 76, though Headman claimed he did not discuss spotters with Amos, Tr. 329.

In *Qmax Co.*, Administrative Law Judge Michael Zielinski found that where a company had a written policy requiring the use of a spotter, and the miners using the cited truck were in compliance with that policy, the company's failure to maintain a backup alarm in violation of section 56.14132(a) was a purely technical violation that was unlikely to result in injury. 28 FMSHRC 848, 857-58 (Sept. 29, 2006) (ALJ). The decision noted that the spotter policy was consistent with the intent of the violated standard, which provides that a back-up alarm is not required where there is an "observer to signal when it is safe to back up." *Id.*, citing 30 C.F.R. § 56.14132(b)(1)(iv). The finding in *Qmax Co.* is applicable and persuasive. Although Boart did not have a written policy requiring the use of spotters, I credit Tucker

and Headman's testimony that it was company policy to use a spotter, especially given the particularity and similarity of their descriptions. With a spotter in place, injury would be unlikely to occur while the flatbed truck was reversing, despite the absence of a back-up alarm. Accordingly, I find that the cited condition is non S&S. However, I find the cited violation to be serious, given that if injury were to occur, it could easily be fatal.

Moderate Negligence

The Secretary has designated this condition as attributable to a moderate degree of negligence. Moderate negligence is attributable where an operator "knew or should have known of the violative condition . . . but there are mitigating circumstances." 30 C.F.R. § 100.3(d). Tucker testified that when he conducted a preoperational check of the truck around 6:45 a.m. on the morning of the citation, the backup alarm was functional. Tr. 304-05. Although the Secretary seems to question the adequacy of the examination because of Headman's testimony that examinations are less thorough if a truck is already on site, Tr. 337, Tucker's contention that the alarm was functional is somewhat supported by a statement made to Amos by Ash Grove's safety director that the equipment was functional before the truck first came on site. Tr. 77-78. In light of the evidence suggesting that the condition may not have existed for any significant length of time, I find the Secretary's determination of moderate negligence appropriate.

104(g)(1) Order No. 8605608 (WEST 2012-422M)

Finally, Order No. 8605608 states the following:

Doug Tucker, foreman[,] had not received any training as required for newly hired experienced miners pursuant to 46.6. The foreman had zero months mining experience but had conducted similar job tasks before working on the mine site. The foreman stated he had worked 15 days at the mine without receiving part 46 mandatory training. The contractor Boart Longyear was aware of the requirements. Doug Tucker, foreman[,] is hereby ordered withdrawn from the mine until he receives the required mandatory training. The Federal Mine Safety and Health Act of 1977 states that an untrained miner is a hazard to himself and to others.

Gov. Ex. 5. The order alleges a violation of 30 C.F.R. § 46.6(a), which requires that newly hired experienced miners be provided with training as specified in sections 46.6(b) and (c). The order was issued pursuant to section 104(g)(1) of the Mine Act, which states that an inspector who finds "a miner who has not received the requisite safety training . . . shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from . . . the mine, and be prohibited from entering such mine until . . . such miner has received the training." 30 U.S.C. § 814. The Secretary alleges

that the cited condition is S&S, reasonably likely to result in a fatal injury to one person, and attributable to a high degree of negligence. For the reasons below, I affirm the citation with regard to fact of the violation, gravity, and the S&S designation, and reduce the degree of negligence attributable to Respondent from high to moderate.

Fact of the Violation

A newly hired experienced miner is simply an experienced miner who is “beginning employment with a production-operator or independent contractor.” 30 C.F.R. § 46.2(j).¹³ Alternately, a new miner is one who is “beginning employment as a miner . . . and who is not an experienced miner.” §46.2(i). The Secretary issued the above citation on grounds that Tucker was an experienced miner because he had been a driller for over ten years, and had not received the training required for new hires. Sec’y Br. at 26-27. Respondent admits that Tucker had not received the required MSHA training, Tr. 301, and concedes that per MSHA regulations, Tucker was a miner and training was required. Tr. 197-987. However, Respondent contends that because Tucker had never worked on mine sites previous to his work at the Durkee Cement Plant, he was not an experienced miner, and therefore the citation was improperly issued. Resp. Br. at 28.

Given that the Durkee Cement Plant project was Tucker’s first experience as a driller on a mine site, Tr. 231, at first glance Tucker may appear to be an individual who was “beginning employment as a miner.” However, Inspector Amos’ rationale for designating Tucker as an experienced miner is sound; Tucker had over ten years of experience with the same drilling skills he was now employing as a miner. Tr. 62. As an experienced driller (now jurisdictionally a miner) beginning employment with a new operator, Tucker was required to go through the training required by section 46.6.

S&S and Gravity

By requiring an untrained miner to be immediately withdrawn on grounds that the miner constitutes “a hazard to himself and to others,” section 104(g) of the Act essentially defines the failure to properly train a miner as a significant and substantial violation; the untrained miner constitutes a hazard sufficiently likely to contribute to a serious injury to himself or others as to require his immediate removal. Respondent contends that the gravity should be reduced,

¹³ Section 46.2(j) also notes that “Experienced miners who move from one mine to another, such as drillers and blasters, but who remain employed by the same production-operator or independent contractor are not considered newly hired experienced miners.” While one could argue that Tucker was not newly hired because he was a long-term employee of Boart, Tucker was beginning a contract with Ash Grove. Accordingly, his long term employment with Boart does not prohibit Tucker from being considered a new hire.

because Tucker had received OSHA training, had significant experience as a driller, and had received specific on-site training, such that all potential dangers were largely addressed. Resp. Br. at 29-30; Tr. 225, 236, 303. However, as the Secretary notes, familiarity with MSHA regulatory standards, as well as training on Miners Rights, are a crucial component in ensuring a safe working environment, and would likely not have been covered by Tucker's non-MSHA training.¹⁴ Sec'y Br. at 28. The best way to ensure that accidents resulting from insufficient training do not occur is to ensure that all new hires receive the MSHA-required training. Accordingly, the gravity findings and S&S designation for the citation are affirmed.

Negligence

An operator's conduct constitutes high negligence where the operator "knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). The Secretary suggests that Respondent knew MSHA Part 46 training was required for Tucker, noting that Headman had received that training. Sec'y Br. at 29; Tr. 132. However, it is unclear when and why Headman received the training (it could have been the result of a previous contract through Boart's Mining and Energy Division), therefore actual knowledge cannot be implied. On the other hand, as discussed above, Boart should have known that MSHA regulations applied. *See* pg. 12, *supra*. Respondent's belief that Tucker was a scientific worker and therefore immune from training requirements was not reasonable.

And yet, I conclude there are a number of mitigating circumstances which, when viewed together, are sufficient to reduce the degree of negligence attributable to Respondent. If Amos' conversations with management personnel subsequent to his inspection are any indication, Tucker received very mixed messages from Ash Grove management regarding the necessity of MSHA Part 46 training; Terry Kirby stated that MSHA training was not required for Boart employees, while Chris Hughes stated all contractors are generally told to follow MSHA requirements. Tr. 135-36. Furthermore, as discussed above, Tucker had received OSHA training, and had over ten years of experience and on-the-job training as a driller. Tucker even recalled receiving on-site training on the proper procedure to follow when blasting was taking place. Tr. 303. It is also worth noting that proper Part 46 training is provided to Boart's M&E division employees, and even to E&I employees when the drilling is clearly related to mining. Tr. 358. In other words, Tucker's training was omitted because of a mistaken premise that it was not required for a driller who was on site to test mercury levels, rather than reckless disregard of MSHA requirements, and the lack of training did not drastically increase the level of danger in this particular instance.

¹⁴ To provide a relevant example, if Tucker had been provided with MSHA required training, he would likely have been aware that there was no minimum elevation required for a danger of falling to be present.

Cumulatively, these factors raise strong doubts that Respondent's behavior in not providing Tucker with Part 46 training was highly negligent; it is conceivable that a reasonable person in this situation would believe it had met its duty of care. Accordingly, the negligence attributable to Respondent for the violative condition in Order No. 8605608 shall be reduced from high to moderate.

Civil Penalty

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission's authority 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 "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 and 2700.44. The Act requires that, "[i]n 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 of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission has noted that the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

The parties have stipulated to Respondent's good faith in attempting to achieve rapid compliance, and that the assessed penalties would not affect Respondent's ability to continue in

business. Jt. Ex. 1, Stips. 7, 8. However, the parties disagree as to the relevant history of violations and size of Respondent's business. The Secretary, relying on Boart's I.D. page on MSHA's data retrieval site, designated Boart as a large contractor with a very high history of past violations. Sec'y Br. at 29-30. Respondent counters that Boart's M&E and E&I sections had separate identification numbers until 2010, and that by looking to the post-2010 combined statistics, the annual work hours and past history of violations have been unfairly inflated such that they do not represent the true safety record of the E&I Section. Resp. Br. at 30; Tr. 349-51, 355. While it is true that the combined statistics do not accurately reflect the safety record of the E&I Section alone, it seems only fair that if a contract at a mine site is assigned to the E&I Section, it should expect to be treated as a mining division for purposes of violations incurred at that mine site. Accordingly, I find the Secretary to be justified in calculating the past history and size of Respondent based on the combined record.

Although judges have the authority to assess penalties *de novo*, the penalty calculation tables provided in 30 C.F.R. § 100.3 provide a useful guide. In this respect, I find the following reductions in penalty to be justifiable based on reductions in the gravity of the violative condition and/or the negligence attributable to Respondent, as discussed above: The civil penalty for Citation No. 8605605 shall be reduced from \$70,000.00 to \$13,300.00; the civil penalty for Order No. 8605606 shall be reduced from \$70,000.00 to \$13,300.00; the civil penalty for Citation No. 8650607 shall be reduced from \$13,268.00 to \$6,000.00; and the civil penalty for Order No. 8605608 shall be reduced from \$47,716.00 to \$13,000.00.

ORDER

Consistent with this Decision, **IT IS ORDERED** that 107(a) Order No. 8605604 in Docket No. WEST 2012-248-RM **IS VACATED**.

IT IS FURTHER ORDERED that 104(d) Citation No. 8605605 in Docket Nos. WEST 2012-249-RM and WEST 2012-891M **IS MODIFIED** to reduce the likelihood of injury or illness from highly likely to reasonably likely, and to reduce the injury or illness that could reasonably be expected to occur, from fatal to lost workdays or restricted duty. Accordingly, **IT IS ORDERED** that a civil penalty of \$13,300.00 shall be assessed for Citation No. 8605605.

IT IS FURTHER ORDERED that 104(d) Order No. 8605606 in Docket Nos. WEST 2012-250-RM and WEST 2012-891M **IS MODIFIED** to reduce the likelihood of injury or illness from highly likely to reasonably likely, and to reduce the injury or illness that could reasonably be expected to occur, from fatal to lost workdays or restricted duty. Accordingly, **IT IS ORDERED** that a civil penalty of \$13,300.00 shall be assessed for Order No. 8605606.

IT IS FURTHER ORDERED that 104(d) Citation No. 8605607 in Docket Nos. WEST 2012-251-RM and WEST 2012-422M **IS MODIFIED** to reduce the likelihood of injury or illness from reasonably likely to unlikely, and to delete the significant and substantial designation. Accordingly, **IT IS ORDERED** that a civil penalty of \$6,000.00 shall be assessed for Citation No. 8605607.

IT IS FURTHER ORDERED that 104(g) Order No. 8605608 in Docket No. WEST 2012-422M **IS MODIFIED** to reduce the degree of negligence attributable to Boart Longyear from high to moderate. Accordingly, **IT IS ORDERED** that a civil penalty of \$13,000.00 shall be assessed for Order No. 8605608.

IT IS FURTHER ORDERED that Boart Longyear pay, within 40 days of the date of this decision, a total civil penalty of \$33,900.00 in satisfaction of the four remaining citations at issue in these proceedings. Upon receipt of timely payment, the captioned contest and civil penalty proceedings **ARE DISMISSED**.

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

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December 23, 2013

THE DOE RUN COMPANY,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. CENT 2013-334-RM
	:	Citation No. 8684827; 03/04/2013
v.	:	
	:	Mine: Buick Mine/Mill
	:	Mine ID: 23-00457
	:	
	:	Docket No. CENT 2013-369-RM
SECRETARY OF LABOR,	:	Citation No. 8676770; 03/25/2013
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mine: Sweetwater Mine/Mill
Respondent.	:	Mine ID: 23-00458

DECISION

Appearances: R. Henry Moore, Jackson Kelly, Pittsburgh, PA, for Contestant
Susan J. Willer and Leigh Burleson, U.S. Department of Labor, Office of
Solicitor, Kansas City, MO, for Respondent

Before: Judge Simonton

This case is before me on a Notice of Contest filed by The Doe Run Company (“Doe Run”), pursuant to section 101 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Act” or “Mine Act”). On March 13, 2013, Doe Run filed a Motion to Expedite requesting an expedited hearing, which I granted. A hearing was held on April 18, 2013 in St. Louis, Missouri. The parties’ post-hearing briefs are of record.

I. ISSUES FOR ADJUDICATION AND DISPOSITION

The sole issue for adjudication is whether the failure to provide chairs or other blocking devices for the hoists at Doe Run's Buick and Sweetwater mines is a violation of 30 C.F.R. § 57.16017, which requires chairs or other suitable blocking when the stretching or contracting of hoist ropes could create a hazard. For the reasons stated below I find no violation of the standard and **VACATE** the citations at issue.

II. FINDINGS OF FACT

A. Stipulations

The parties entered the following as joint stipulations at the April 18, 2013 hearing:

The Respondent produces lead-zinc ore from its underground mine operations, and these mining operations affect interstate commerce. Therefore, Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et. seq.*, and the Administrative Law Judge has jurisdiction over the disputes in these consolidated matters.

With respect to Docket No. CENT 2013-334 RM, the parties stipulated that:

1. The Doe Run Company is, and has been at all relevant times to the inspection, the owner and operator of the Buick Mine/Mill, Mine ID no. 23-00457, located in Iron County, MO.
2. The Buick Mine is a mine as that term is defined by the Act.
3. On March 4, 2013, the Mine Safety and Health Administration ("MSHA") inspected The Doe Run Company's Buick Mine/Mill.
4. MSHA Inspector Michael Marler was acting in his official capacity as an authorized representative of the Secretary when he inspected said mine.
5. MSHA issued a Section 104(a) Citation, No. 8684827, to The Doe Run Company on March 4, 2013, alleging a violation of 30 C.F.R. § 57.16017
6. The Section 104(a) Citation No. 8676770 has not been terminated.
7. The subject Citation was properly served by a duly authorized representative of the Secretary upon Contestant's agent on the date and place stated in the Citation, and may be admitted into evidence for the purposes of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.
8. The hoist mechanisms at the Buick Mine/Mill are manually controlled. An operator in a control room controls the movement of the hoist and the positioning of the conveyance at a landing.
9. The hoist at the Buick Mine has been in place for approximately 40 years. Doe Run has never been cited under 30 C.F.R. §57.16017 at the Buick Mine.

10. The Buick Mine/Mill hoist system is a friction, or Koepe, hoist where the wire ropes pass over a drum from the conveyance to a counterweight. The Buick hoist has four wire ropes.
11. The shaft at the Buick Mine is approximately 1145 feet deep at 4 Level and 1235 at 5 level.
12. All wire rope stretches in use to some degree.
13. The MSHA Assessed Violations History accurately reflects the history of Doe Run's Buick Mine/Mill for two years prior to the date of the contested Citation.

With respect to Docket No. CENT 2013-369 RM, the parties have agreed to the following stipulations:

14. The Doe Run Company is, and has been at all relevant times to the inspection, the owner and operator of Sweetwater Mine/Mill, Mine ID No. 23-00458, located in Reynolds County, MO.
15. On March 25, 2013, MSHA inspected The Doe Run Company's Sweetwater Mine/Mill.
16. MSHA Inspector Lawrence Sherrill was acting in his official capacity as an authorized representative of the Secretary when he inspected said mine.
17. MSHA issued a Section 104(a) Citation No. 8676770 to The Doe Run Company on March 25, 2013, alleging a violation of 30 C.F.R. 57.16017.
18. The Section 104(a) Citation No. 8676770 has not been terminated.
19. The subject Citation was properly served by a duly authorized representative of the Secretary upon Contestant's agent on the date and place stated in the Citation, and may be admitted into evidence for the purposes of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.
20. The hoist mechanisms at the Sweetwater Mine/Mill are manually controlled.
21. The Sweetwater Mine/Mill hoist system is a double drum hoist.
22. The shaft at the Sweetwater Mine is 1486 feet deep from the collar to the shaft bottom.
23. The hoist at the Sweetwater Mine has been in place for approximately 40 years. Doe Run has never been cited under 30 C.F.R. § 57.16017 at the Sweetwater Mine.
24. The MSHA Assessed Violations History accurately reflects the history of Contestant's Sweetwater Mine/Mill for two years prior to the date of the contested Citation.
25. The cited standard, 30 C.F.R. § 57.16017, was promulgated at 50 Fed. Reg. 4082 (Jan 29, 1985). A predecessor standard, 30 C.F.R. § 57.16-17, was promulgated on 34 Fed. Reg. 12517 (July 31, 1969), with follow-up on August 17, 1979. MSHA has not addressed either standard in any policy document, including the Program Policy Manual. The Federal Register documents contain little discussion of the standard's requirements.

26. The exhibits offered by Contestant and Respondent are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein. The parties stipulate that the exhibits may be admitted into evidence.
27. The Doe Run Company currently uses chairs in its loading and unloading processes at the Brushy Creek Mine/Mill and at the Fletcher Mine and Mill.

B. Factual Background and Testimony

The citations at issue involve hoists at two mines owned and operated by the Doe Run Company: the Buick Mine and the Sweetwater Mine.

The Buick Mine: Citation No. 8684827

The Buick Mine is located in Iron County, Missouri, and is conjoined with other Doe Run mines. Tr. 25. The mine is a room and pillar lead mine, in which the lead is blasted and crushed underground and then transported to the surface, where it is milled into the final product. Tr. 26-27. The mine has a production shaft, a man and material shaft, and a number of ventilation shafts. Tr. 26-27. The hoist at issue in this case is in the man and materials shaft, which is 1200 feet deep and has four landings, known as “shaft stations.” Tr. 26-27. This hoist is used by men to ride up and down at the beginning and end of their shifts, and is also used to convey supplies. Tr. 28. The “cage” on the hoist is a large platform, similar to an elevator, that is approximately eight feet wide and twelve feet long with gates on both ends of the cage. Tr. 28. It is manually operated by an operator known as a “hoist man” remotely from the control building. Tr. 29.

The hoist at the Buick mine is a friction hoist, which means it is a counter-weighted hoist system where cables run up over a power drum and back down to a counter-weight. Tr. 29. The counter-weight maintains the ropes in tension as the hoist moves. On the hoist at the Buick mine, there are four steel wire ropes lifting the side of the cage, each approximately an inch and a quarter in diameter. Tr. 29-30. At issue in these dockets is whether this hoist, as well as the hoist at Doe Run’s Sweetwater Mine, should have been supplied with chairs or other blocking devices. As explained at the hearing, a “chair” as used in this context is a mechanical device on the shaft that limits the movement of the cage, and maintains it in one spot. Tr. 32.

The issue of chairing in Doe Run’s mines first arose when MSHA inspector Michael Marler visited the Buick Mine in December 2012 and again in March 2013. Inspector Marler has 25 years of experience as an inspector with MSHA as well as prior experience in the field, including jobs overseeing the production of equipment at limestone quarries and working at Pea Ridge Iron Ore. Tr. 20-22. At the time of the hearing, Marler had conducted close to 1000 inspections, and had inspected Doe Run’s Buick Mine approximately 14 times. Tr. 22-23.

Marler testified that during the inspection, he spoke with a forklift operator (also known as a “nipper”), Mr. Richard Mann, about how Mann had been stuck on the cage hoist while trying to drive off of it in a small forklift. Tr. 38-39. Marler testified that Mann told him he couldn’t get the small loader to back off the cage after he drove onto it. Tr. 38-39. It wouldn’t climb over the

step that was created when the cage was below the level. He made a couple attempts to get the fork truck off the cage and he finally bumped back over the step and got off the cage. Tr. 38-39. Marler testified further that Mann first told him that the cage was spotted seven inches below the level landing and when he drove onto the cage it moved an additional inch making an eight inch difference between the cage and landing. Tr. 62, 66.

After his conversation with Mann, Inspector Marler met with mine management in order to discuss the incident. Tr. 41. At the time of the discussion, he was not sure that there was a violation, since he was uncertain as to whether chairs could or could not be used on this type of hoist. Tr. 41. Chairs are not normally used with friction hoists, since there is a possibility of creep in the drum that could throw off indicators. Tr. 41-42. In addition, MSHA's own guidance states that chairs should be omitted whenever possible, and are not recommended for use on friction hoists. Tr. 56.

However, Marler ultimately wrote citation number 8684827 at issue in this case on his return visit in March. Exhibit G-1. Marler testified about several other blocking mechanisms that could be used instead of chairs, as detailed in Exhibit G-6, which contains several sketches of chairs and other blocking devices. Tr. 46; Exhibit G-6. Although the guidance in G-6 suggests clamping as an alternative to chairs, Marler later testified that this applied to steel shaft guides, which the hoist system at Buick does not have. Tr. 56-57.

With respect to the citation, Marler testified that he felt one person, the forklift operator, would likely be affected by the condition, and that it was unlikely to cause an injury because of the mine's long history of safely operating this hoist. Tr. 48. This particular mine had been inspected four times a year since 1977, and no one had brought up the hoist issue prior to Inspector Marler's visit in December 2012. Tr. 52-53. When asked specifically about the hazard involved with Mann's difficulty in backing the forklift off the cage, Marler testified that the hazard was Mann being "thrown off the fork truck. He may possibly turn the truck over if he doesn't hit the station squarely with both wheels." Tr. 40. In contrast to the testimony of other witnesses at the hearing, Marler maintained that he did not actually see the December incident involving forklift operator Richard Mann, but instead stated that Mann described the incident to him and that he never saw the forklift or the loads in question. Tr. 54-55.

The mine foreman at Buick, Jeffrey Gibson, also testified as to his recollection of the December incident at the Buick hoist. Gibson had worked at Buick in various positions for 19 years, and prior to his time at Buick, had 11 years of mining experience with another company. Tr. 143. Gibson testified further that over his 31 years of mining experience, he had been given a lot of training on identifying hazards, including annual refresher training and training sessions a few times a year. Tr. 151-152.

Gibson described the hoist and cage generally, and discussed two photographs of the hoist at the Buick mine and the shaft landing, noting that the hoist had gates that prevented movement of the hoist every time they were open, minimizing the miners' exposure to the moving hoist. Tr. 144; Exhibits R-1A, R-1B. He testified that on December 3, 2012, he accompanied Inspector Marler on his inspection of the Buick mine. Tr. 145. He testified further that during this

inspection, they walked up to the hoist and observed forklift operator Richard Mann trying to drive off the hoist in the forklift. Tr. 145. According to Gibson, as Gibson and Marler approached the cage, it was coming up from the surface underground, and the cage was spotted a little bit low at the landing. Tr. 146. He testified, “as Richard drove the forklift on the cage to get the mine supplies loaded off, the front tires actually dropped a little bit on to the cage. He pulled in, picked up the load. As he backed up to exit off the cage with the load, the tires actually spun between the difference of what the cage level was and the landing level was. So he pulls up little bit and again puts it in reverse, hit it a little bit harder, jumped out and proceeds out.” Tr. 146.

Gibson said he did not notice the cage drop noticeably when Mr. Mann pulled onto it with the forklift, noting that there were only very light loads on the cage at the time. Tr. 147. In general, he testified that the fact the forklift operator had to back up once and try to get off the cage again had nothing to do with the stretching of the cables, because the movement of the forklift and lifting of the load on the cage did not result in any changes in the location of the hoist. He stated that he had only seen the wire stretch with very heavy loads, in the range of 15,000 pounds, which is the heaviest load the Buick mine had ever placed on the cage. Tr. 153. He also testified that it was impossible for there to have been an 8-inch gap between the cage and the shaft landing as Mr. Marler had suggested, as it would have been physically impossible for the forklift to come off at all. Tr. 62, 153. This is due to the fact that the Caterpillar forklift in use that day only has approximately 6 and a half inches of ground clearance, and that the front forks only had roughly 3 and a half or 4 inches of ground clearance. Tr. 158. Further, there is a hydraulic cylinder and a mast connecting the forks that runs between the forks that are lower than the forks. Thus, even with a 3 or 4 inch gap the forklift would have probably been unable to clear the landing at all. Tr. 158.

Gibson did not believe a hazard existed at the Buick mine, and noted that immediately after Inspector Marler had witnessed the incident, the forklift operator asked the inspector if everything was okay, and Marler replied that it was. Tr. 148. At the time Inspector Marler also asked if there had ever been chairs on the hoist, and Gibson told him that there had not. Tr. 148. The next morning, Marler came back to finish the inspection and noted that the lack of chairs may be problematic and that he would look into whether chairs were needed. Tr. 149.

Gibson testified that as he observed the event, he did not see anything about the operation of the forklift within the hoisting cage that indicated a hazard. Tr. 151. He noted that if the spotting had been off, Mann could have called the hoist man and asked him to recalibrate, which the hoist operator can do remotely. Tr. 150. In fact, Gibson had seen situations in which the cage had to be repositioned in order for someone to get off, in which case the person on the cage had simply called the hoist man and asked him to reposition. Tr. 160-61. In his opinion, the difficulty Richard Mann experienced getting the forklift onto the landing was due to the wetness of both the cage floor and the level landing. Tr. 158-159.

Richard Mann also testified about his experience operating the forklift during the incident on December 3, 2012. Tr. 162. Mann had worked at Buick for over nine years and was permanently assigned to “nipping,” which means that his job entails continually loading and

unloading supplies off the hoist. Tr. 163. Prior to his time at Doe Run, he had 10 years of mining experience, including in the safety department at other mines in the area. Tr. 163-64. He testified that on December 3, 2012, they had spotted the cage and needed to unload a blue crate with "UPS type supplies" off of the cage. Tr. 164. He got the Caterpillar forklift, which is considerably smaller than the machine he normally uses, and when he drove onto the cage he noticed it was spotted about an inch and a half to two inches below the landing. Tr. 164. When he picked up the box and backed off the cage, the tires spun a bit against the landing during his first attempt to exit. Tr. 164. Then, he inched up and backed off again, slightly faster, which allowed him to come up off of the cage and on to the landing. Tr. 164. He testified that he did not notice the cage move when he pulled the forklift on to the cage, and did not feel in any way at risk when backing off. Tr. 165. In addition, he did not feel like the forklift would tip in any way, or that he would shift within the forklift. Tr. 174.

Mann also testified about the different types of forklifts used at the mine, and noted that on the day in question, he was using the Caterpillar forklift, which is smaller than the one he normally uses. Tr. 166. When asked about some of the heavier loads he works with on the hoist, he described the loading of Anfo containers, which weigh between 4200 and 4500 pounds each. Tr. 167. Up to two Anfo containers are placed on the cage at a time. Tr. 167. Mann stated that when unloading these containers, the forklift stays on the landing the entire time and merely picks up each Anfo container and backs it off of the cage. Tr. 167. In addition, he had never had a problem with the hoist jumping suddenly after removal of an Anfo container. Tr. 168. As another example of a heavier load, he described how a railcar would be transported underground using the hoist. Tr. 168. In that scenario, the railcar is the only thing that fits on the cage, so they will typically push it with the lift, with a cable attached to it. Tr. 168. When it is unloaded, they will attach the cable to the lift and pull the railcar off. Tr. 168. In both of these scenarios, the forklift operator does not drive the forklift onto the cage. Tr. 168.

Mann also stated that had the cage been seven or eight inches below the landing as the inspector suggested, he would not have been able to get the forklift off the hoist at all. Tr. 169. Mann noted that in that situation it would have been necessary to have another piece of equipment drag the forklift off the cage or have contacted the hoist operator to raise the cage through the bell cord system and telephone the mine has in place to allow communication between loader operators and the hoist man. Tr. 169-70. Mann testified that he had been loading and unloading supplies at Buick for four and a half years, and had never had an instance where he couldn't get off the cage, or it dropped suddenly. Tr. 170. He did state that the landing area around the cage is usually slick since it is made of solid steel decking. Tr. 170. Additionally, he felt that if he had used the larger forklift, the Selleck, which was normally in use, he would have had no trouble getting off the cage and would not have noticed the difference between the level of the cage and the landing. Tr. 170-71.

The hoist operator at the Buick mine, Mr. Steve Harris, also testified. Harris has worked on the hoist at Buick for two years, and as hoist operator, he runs man trips and supplies in and out of the mine. Tr. 175-176. He has over 12 years of experience as a hoist operator. Tr. 176. Harris discussed exhibit R-1J, a picture of the control panel on the Buick hoist that allows him to move the cage. Tr. 177. To ensure that the controls are accurate and the hoist is lining up with

the landing, Harris synchronizes the cage off a set point as often as temperature and usage conditions require. Tr. 178-79. Harris testified that there were several different options available for miners on the hoist to communicate with the hoist operator, including bell signals, telephone, radio, and a camera. Tr. 179-80. Harris stated that if the cage is spotted too low, the forklift operator at the shaft only has to send a simple signal to the hoist operator in order to have the cage raised to the appropriate level. Tr. 180. On December 3, 2012, Harris was the hoist man during the incident in question and testified that he did not think there was a problem, and was not made aware of one. Tr. 181. He also added that, in his experience operating hoists, installing chairs and letting a hoist rest on them actually causes the cage to jump a few feet if the brake is not released slowly enough, although with controlled operation this should not happen. Tr. 181, 186.

William Courtney, the maintenance supervisor at the Buick mine, also testified. Courtney has been general maintenance supervisor at Buick since 2009, and his duties include maintenance of all parts of the mine, including the hoist. Tr. 191. Overall, Courtney has approximately 37 years of experience as a maintenance supervisor. Tr. 191. Courtney testified that he supervised the employees at Buick that inspect the hoist, and that inspections were conducted on a regular basis weekly. Tr. 192. Every 14 days, they would perform additional measurements to check the ropes for shrinkage. Tr. 192-93. Courtney discussed the safety features on the hoist, which includes an overspeed device, and over travel limit switch, and a jam conveyance that will kill power and set the brakes if the hoist drum is turning without the ropes moving. Tr. 194.

Courtney also testified in detail about how the mine checks for ropes that exhibit too much stretch, and the criteria they use for taking a rope out of service. Buick performs nondestructive tests on their ropes at this hoist once every six months, where measurements of rope diameter are taken with a dial caliper. Tr. 195-196. These tests are performed by an outside contractor, Evergreen, who submits reports to Buick. Exhibit R-3B; Tr. 196. Courtney did admit that it is impossible to completely eliminate rope stretching and contraction from a hoist system. Tr. 204. In order to determine whether a rope should be taken out of service due to stretching and contraction, Courtney stated that they look at the LMA numbers in the report and take a rope out of service if it is close to 10%.¹ Tr. 196. Similar 6-month nondestructive, 14 day, and seven day inspections are performed on the hoist at Sweetwater. Tr. 197.

Courtney also discussed the size of the loads placed on the hoist at Buick mine, and noted that although the maximum load for the hoist is 25,000 pounds, the most they load onto the hoist is a few Anfo containers, which weigh 7000 pounds total. Tr. 198. For larger loads, they typically use the hoist at West Fork. Tr. 198. He also stated that the only time chairs were ever used on the hoist at Buick was under a previous owner, when all four hoist ropes were changed at the same time. Tr. 199-200. When they change the ropes at Buick, they are changed one at a

¹ “LMA” was defined in the testimony of the Secretary’s expert Michael Snyder, who stated that “LMA” is a measure of the changes in the metallic area of a wire rope, and thus, serves as an indicator of broken or damaged wires. Tr. 111.

time. Tr. 200. Courtney testified that in general, he did not believe chairs were necessary on this hoist, and that he had not noted any close calls involving stretching of hoist ropes that would necessitate the use of chairs. Tr. 200-202. He also stated that the expense of installing chairs on this hoist would be astronomical, and that there is never significant movement from the hoist ropes. Tr. 200-202. He emphasized that the mine has never had an incident in which the hoist jumped up or dropped during loading or unloading that could be attributable to stretching or contracting of the ropes. Tr. 202.

Doe Run also presented testimony by Don Moore, who has been the Buick mine's safety specialist for the past four to five years. Tr. 209. As safety specialist, he makes routine audits, conducts safety lessons and meetings, performs inspections, and generally accompanies the company's inspectors. Tr. 209. His experience includes training personnel on the safe use of equipment, including forklifts. Tr. 210.

Moore testified that on the day of Marler's inspection, he met with Marler after he had witnessed the incident at the hoist. Tr. 211. Moore stated that Marler had told him he would talk to other people at Doe Run and with MSHA personnel about the incident at the cage, and that Marler told him he would "issue [Doe Run] a citation and see if we get it resolved." Tr. 211. Moore testified that he talked to mine personnel about the incident, and accompanied Mr. Snyder and Mr. Marler on their visit to the mine on a later date. Tr. 211. He did not think that the fact that Mann had to bump his forklift over the lift had anything to do with the stretching and contracting of the hoist ropes, nor did he think it presented a significant safety hazard. Tr. 211. He noted that the cage at issue supports a lot of weight, and the weight of the forklift and the items it was carrying that day was not significant compared to the maximum capacity of the cage. Tr. 212. Further, Moore stated that no miners had ever raised any safety issues indicating possible hazardous stretching of the rope hoist system. Tr. 212.

The Sweetwater Mine: Citation No. 8676770

The Sweetwater mine is located in Reynolds County, MO, and is a "standalone" mine, unconnected to the other Doe Run mines in the area. Tr. 75-76. The materials mined at Sweetwater include lead, zinc, and copper. Tr. 76. There are several shafts in the mine, and the main shaft is the number two shaft, which is used for moving men and materials and is the subject of this case. Tr. 77. The hoist in the number two shaft is a manually operated drum type hoist, with just one wire that attaches to the cage. Tr. 79-80.

Inspector Lawrence Sherrill testified at the hearing regarding his inspection of Doe Run's Sweetwater mine in March 2013. Sherrill has been an inspector for 15 years and has over 30 years of experience in the mining industry, including some time working for Doe Run's predecessor company. Tr. 72-74. At the time of the hearing, he had inspected the Sweetwater mine 7 times on regular inspections and once to conduct a complaint investigation. Tr. 74.

On March 25, 2013, Sherrill visited the Sweetwater mine with the intent of checking whether Sweetwater had complied with the chairing standard cited at Buick. Joint Stip. No. 15; Tr. 77-78. Although no particular incident had occurred at the hoist at the Sweetwater mine, Inspector

Sherrill issued a citation because he saw they had not provided chairs on the hoist despite the issuance of a citation at the Buick mine. Tr. 78, 82. He noted that it was possible with a drum hoist to use chairs, and that in fact, he believed this particular mine used to have chairs at the shaft landing. Tr. 83.

Sherrill testified that he observed materials being loaded and unloaded from the hoist, though he did not see any loads that he would consider really heavy. Tr. 83-84. He also testified that he interviewed mine employees Rick Smith, Mike Gore, and Vince Mertzluffd, who told him that when heavy objects were moved down the shaft, it would stretch the ropes somewhere in the neighborhood of a foot and a half to two feet. Tr. 84.

The forklift operator involved with the December 2012 incident at the Buick mine, Steven Harris, testified that he had also worked at the Sweetwater mine as a hoist operator for 18 months back in 2002. When asked specifically about the possibility of hoist movement in excess of one foot due to cable stretching at the Sweetwater Mine, Harris stated that he had never observed that type of movement during active loading operations. Tr. 187. Further, Harris confirmed that when moving heavy loads, they hang loads in the cage with cable, such that no one is ever in the cage during heavy hoisting. Tr. 189-90.

Doe Run presented the testimony of Vincent Mertzluffd, the maintenance supervisor on the surface of the Sweetwater Mine. Tr. 215. He had held this position since 2003, and his duties include maintenance of equipment on the surface and the mill, which included maintenance of the hoist. Tr. 215. He stated that he was familiar with the hoist since it had been there when he first started at the mine in 1976, and had seen it when the mine was under the supervision of other companies as well as Doe Run. Tr. 216. Similar to the one at Buick, the hoist at the Sweetwater mine has several safety features, such as an overspeed device and over travel limit switch, to prevent unanticipated movement of the hoist. Tr. 216-17. Mertzluffd described in detail how the mine moves heavy objects, such as a locomotive, underground. Tr. 219- 20. When transporting very heavy objects, he stated that they remove the cage completely and use the standalone hoist to lift material. Tr. 220. Importantly, they remove the man cage portion, the part that someone would travel on, and install an overhead crane that is used to raise and lower the equipment. Tr. 220. No one is ever on the hoist when very large equipment is being loaded or unloaded, and further, it would be impossible for a forklift to be on the hoist at the same time because there would be no room for one. Tr. 226. Instead, the equipment is usually on a skid and pushed into the loader. Tr. 225.

Mertzluffd also testified that when Sherrill came to inspect the mine, he did not inspect the hoist at all, but rather wrote a citation simply based off of the conversation he had. Tr. 221. Contrary to Sherrill's testimony, Mertzluffd testified that he never told the inspector anything about the hoist sinking one and a half to two feet. Tr. 221-22. While he did tell the inspector

that there used to be chairs on the hoist, he had not mentioned how those chairs were used, and at trial, he testified that they use chairs for the sole purpose of testing the safety dogs on the hoist.² Tr. 241-42. Similarly to the other mine personnel that testified, Murtzluffd stated that in his 30 years at the mine, he had never seen or been told of an issue with the hoist dropping down or raising up when supplies were unloaded. Tr. 223

Expert Testimony regarding the Sweetwater and Buick Mines

The Secretary also presented the testimony of Mr. Michael Snyder, a mining engineer with the Approval and Certification Center for MSHA, where he conducts nondestructive wire rope testing for MSHA. Tr. 102-104. He testified that he had visited both mines because he had become aware of the violation issued at the Buick mine, where he conducted visual inspections of the hoist. Tr. 124. He watched the loading and unloading of the hoist and tried to get a sense of the types of loads that were being put on the cage. Tr. 124. He noted that the incident with the forklift at the Buick Mine seemed like it would be a hazard to him, although he had not observed any other violations at the mine based on the condition of the ropes. Tr. 126-127. In fact, he confirmed that during the time he visited the mine, he did not see anything out of the ordinary that would cause him to be alarmed. Tr. 135-136. He did not observe the loading and unloading of any equipment, and at no point during his visit did see anyone put a forklift or loader on the hoist. Tr. 137-138. He also testified about abatement options at the mine, noting that there was a chairing system in place at the Sweetwater Mine, and further, that while the chairing system would not be applicable to a friction hoist like the hoist at the Buick mine, other clamping mechanisms would be appropriate alternatives to chairs. Tr. 129-30.

However, Snyder also testified that a possible abatement method for the forklift incident would be to use a larger forklift. Tr. 133. He also acknowledged notes in the record, written by Inspector Marler, which stated “if a larger weight than that, West Fork shaft is used.” Tr. 132, Gov’t Exhibit 17. This supports the prior testimony of William Courtney, who stated that for heavy loads, the Buick mine would use a different shaft and avoid some of the issues the cited standard seeks to prevent. Tr. 132.

The special projects coordinator for the Buick mine, Michael Reed, also testified about his knowledge of the hoists and Sweetwater and Buick mines. Tr. 229. As special projects coordinator, he performs varied tasks, described as building power lines and substations, as well as “various large unusual electric installations.” Tr. 229. He also serves as an internal consultant for the hoist ropes, and is called in if there is an electrical issue or if they are considering retiring a wire rope. Tr. 230. Reed has a Bachelor of Science degree in electrical engineering and a Master’s degree in engineering management, as well as experience in this field at a variety of mines since 1974. Tr. 230-32.

² A safety dog is a device that will grab the guide rails in the event of a rope failure. Tr. 241. In order to test the safety dogs you must essentially let the rope go slack in order to simulate rope failure. Only in this special instance are chairs used to support the cage. Tr. 241-42. The one set of chairs left at the Sweetwater hoist is used only for this purpose. Tr. 243.

Reed testified as to the workings of a friction hoist, and stated that Doe Run has three friction hoists, none of which are equipped with chairs. Tr. 233. Further, he noted that the shafts at the Doe Run mines are shallow by world standards and thus, there is less potential for stretching. Tr. 233. While all wire ropes stretch and contract, the amount of stretching depends on temperature conditions and the load. Tr. 234. Like Moore and Mertzluffd, Reed explained that in the context of the maximum capacity of the hoist system, the small Caterpillar forklift carrying a small load is insignificant compared to what the ropes can handle. Tr. 237. Like Doe Run's other witnesses, he did not believe that the stretching and contracting of the ropes had anything to do with the incident involving Mann and the forklift. Tr. 235. While people have come to him from time to time regarding issues with the ropes and hoist, he has never had anyone report significant movement in the range of 1.5 to 2 feet. Tr. 239-40. Reed again emphasized that when very heavy loads are moved, they use the procedures described by other witnesses to eliminate the need for any worker to be in the cage. Tr. 244. The company also has a policy that states no one should ride in the cage with anything that they cannot pick up with their hands and carry. Tr. 244-45.

III. APPLICABLE LAW

30 C.F.R. Section 57.16017

Citation Nos. 8684827 and 8676770 were each issued for a violation of 30 C.F.R. § 57.16017, which states:

Where stretching or contraction of a hoist rope could create a hazard, chairs or other suitable blocking shall be used to support conveyances at shaft landings before heavy equipment or material is loaded or unloaded.

After researching the Commission Record, it appears a violation of this regulation has never been adjudicated by a Commission ALJ. Furthermore, the Federal Register provides little guidance as to the intent and further meaning of this standard. Joint Stip. at 4.

However, both the MSHA Hoisting Glossary and the Mine Bureau Hoist Inspection manual describe the appropriate manner for using chairs in hoist-ways. Exhibit G-5: Exhibit G-6. The MSHA Glossary states that chairs should not be used under normal conditions, but should be used when necessary to control specific loading and unloading stresses. Exhibit G-5, 2. The Mine Bureau Hoist Inspection Manual states that chairs are not common in the United States, but are used when needed to prevent sudden unsafe load shifts. Exhibit G-6, 2.

The Commission has provided guidelines for evaluating issues of first impression as follows:

The language of a regulation ... is the starting point for its interpretation. Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded.

In determining the meaning of regulations, the Commission ... utilizes traditional tools of (statutory) construction, including an examination of the text and the intent of the drafters. In a plain meaning analysis, a provision at issue must be considered in the context of the language and design of the Secretary's regulations as a whole.

Cannelton Industries, Inc., 26 FMSHRC 146, 150-51 (March 2004) (internal citations omitted)

Thus, using Commission guidelines regarding statutory construction and considering MSHA's own hoist inspection procedures, I make the following basic findings regarding 30 C.F.R. § 56.16017. 30 C.F.R. § 56.16017 states that chairs or other suitable blocking shall be used "where stretching or contraction of a hoist rope could create a hazard." Thus, I find that chairs are not a mandatory safety feature on rope hoist systems unless the stretching or contraction of the hoist ropes could create a hazard. Furthermore, I find that the routine stretching and contraction of hoist ropes due to ordinary use and changes in weather conditions is *not*, in itself, a hazard that requires the application of 30 C.F.R. § 56.16017 to all rope hoist systems. To hold otherwise would render the regulations explicit reference to potential hazards superfluous and meaningless. This finding is consistent with MSHA's own policy guidelines that chairs should not be installed in a hoist-way unless necessary to control specific loading and unloading stresses. Exhibit G-5,2 ; Tr. 56.

Furthermore, as the statute concerns heavy equipment loading and unloading at shaft landings, I find that the hazards covered by the statute are most properly described as hazards created by unexpected load shifts, unbalanced loads, and possibility of caught-between and struck by accidents. Exhibit G-6, 2.

Thus, in order to sustain a violation of 30 C.F.R. § 56.16017, the Secretary must show that an operator failed to provide chairs or other suitable blocking where the stretching or contraction of hoist ropes increased the likelihood of unexpected load shifts, unbalanced loads and possibility of caught-between, or struck by accidents.

IV. ANALYSIS OF EVIDENCE

Factual Conflicts and Witness Credibility

I find that the conflicts between the inspectors' and the mine personnel's testimony should largely be resolved by giving credence to the recollection of Doe Run personnel. Central to this finding is the fact that the inspector at Buick, Michael Marler, denied ever witnessing the December "incident" at the Buick mine, but rather, testified that forklift operator Richard Mann told him about the incident. Tr. 61-62. This is troubling because several eyewitnesses to the incident, and most notably, the forklift operator himself, later testified in detail as to their recollection of the incident from a first-person, on the ground perspective. Their detailed accounts of the hoist operation on that day are internally consistent and describe exactly how and why the incident occurred.

In particular, Mr. Mann's recollection of the events of that day, including his perception of the "hazard" and its causes, are credible. Further, the mine personnel's collective accounts convincingly explain why chairs were not appropriate given the minimal amount of rope stretching that may occur, and most importantly, why providing chairs to prevent rope stretching would have not changed anything with respect to the incident that was the basis for the citation. In contrast, inspector Marler's contention that he did not observe the incident runs directly contrary to the testimony of several more credible witnesses, and further, the citation he wrote based not on his knowledge but on interviews with others, holds little weight in this analysis.

Similarly, Inspector Sherrill based his issuance of the citation at Sweetwater off of his observations of routine activity and his interviews with three employees of the mine, including Mr. Mertzluffd. After hearing the testimony of other witnesses that have worked at Sweetwater and actually observed the loading and unloading of a variety of loads on the hoist, I find it likely that any employees Sherrill spoke with that told him the ropes may stretch one to two feet were most likely describing heavy loads, loads that are subjected to different procedures when moved down the shaft. Tr. 84. As I will discuss, these heavy lifting procedures eliminated the possibility of cable stretch endangering a miner, and thus, eliminated any need to provide chairs.

I also give very little weight to evidence from the testimony of wire rope expert Michael Snyder, because the activities he observed at the mine were not similar to the "incident" that prompted the issuance of the citations in question. Tr. 137. Further, he did not observe any conditions out of the ordinary, and despite being given the opportunity to do so, did not ask mine personnel to load the hoist with a forklift or any heavy material so that he could observe the rope stretching under conditions that might lead to a hazard. Tr. 137-38.

I also rely on the credible testimony of mine personnel regarding the physical dimensions of the forklift in finding that inspector Marler's allegation of an 8 inch gap at the loading shaft is highly unlikely. Mine Foreman Gibson testified that, given the less than 6 inch ground clearance of the forklift itself, and the less than 4 inch clearance below the forks, it was physically impossible for the gap between the cage and the shaft landing to be 8 inches and have the forklift leave the cage at all. Tr. 157-158. Forklift operator Mann similarly testified an 8 inch gap would have required using a separate piece of equipment or cage repositioning in order to remove the

forklift from the cage in such a situation. This further puts inspector Marler's testimony in question, since it is undisputed that the forklift, after backing up and attempting to clear the cage the second time, was in fact able to exit onto the shaft landing without any assistance. Tr. 62, 68, 146. Given Foreman Gibson's credible and corroborated testimony regarding the dimensions of the forklift and explanation of how wet conditions contribute to wheel slippage, I find that the hoist was likely spotted no more than 2-3 inches too low at the time of the December incident. Tr. 157-159; 170.

Findings-

The stretching and contraction of the wire ropes at Doe Run's mines did not create a hazard

The cited standard clearly states that chairs should be used *when stretching or contracting of a hoist rope* could create a hazard. In this instance, the Secretary did not meet his preponderant burden of proof in showing that a hazard could have been created because of the stretching of the hoist ropes at either mine. I find that the December 2012 "incident" that led to the citation issued at Buick (and indirectly, the citation at Sweetwater) was the result of several factors, including the slickness of the metal surface, the spotting of the cage and the size of the forklift used that day, but the stretching of the hoist ropes did not contribute to the difficulty Forklift Operator Richard Mann had with backing the forklift off the cage. Tr. 170-71, 202.

While both Mann and Mine Foreman Gibson admitted that Mann had some difficulty exiting the cage on his first attempt, the reasons they identified for the difficulty were not the stretching of the wire rope, and certainly would not be remedied by equipping the shaft with chairs. They testified that the landing was made of steel decking, which was always slick, causing some slippage on the wheels of the forklift. Tr. 170, 159. In addition, the cage was spotted a few inches lower than the landing, and part of the difficulty Mann experienced had to do with him negotiating the difference in spotting. It is also reasonable to conclude that had the gap been due to rope stretching, the cage would have most likely moved when the forklift was driven from the cage on to the landing; it did not. Tr. 147.

Notably, Inspector Marler himself admitted that the difference between the hoist and the shaft landing could have been entirely the result of spotting, and not the stretching of the ropes. Tr. 68. He also stated that the problem would not have occurred if the nipper had been using a larger forklift, or if the hoist operator had positioned the cage higher, which suggests that any hazard perceived by the Inspector had nothing to do with the stretching of ropes or the mine's decision not to provide chairs. Tr. 69-70. This severely weakens the validity of the citation, as the cited standard specifies that the cause of the hazard created should be the stretching or contracting of the wire rope. *See* 30 C.F.R. § 57.16017. Yet, as noted, even the inspector who wrote the citation admitted the incident could have occurred without *any* stretching or contraction. Tr. 68.

The fact that the stretching of hoist ropes was not the cause of a hazard, and that chairs were an inappropriate requirement in this context, is further evident in light of both parties' suggestions for abatement. Inspector Marler himself stated that chairs are not widely used in the United States at all, and particularly not on friction hoists. Tr. 56-57. He also noted that one of

his suggested alternatives, clamping, was not an appropriate solution for this hoist because it did not have steel shaft guides. Tr. 57. The government's witness Mike Snyder, Mine Foreman Gibson, and Forklift Operator Mann all confirmed that if the larger Selleck forklift had been used as opposed to the smaller Caterpillar one, Mann would have been able to negotiate the gap between the landing and the hoist in one attempt without any difficulty. Tr. 133, 159, 170-171. In addition, Gibson, Harris, and Mann all confirmed that Mann had several options for communicating to Harris that the cage needed re-positioning, which again would have eliminated any perceived hazard without the use of chairs. Tr. 150, 156-157, 169-170, 180. This confirms that chairs were not an appropriate way to address the situation, and thus, that the cited standard does not apply in this case.

In addition, I find that the December 2012 "incident" at issue did not present a hazard. All testimony presented concurs that forklift operator Mann was completely uninjured and Mann testified that he never felt unsafe, shifted around in the lift, or felt the forklift become unstable in any way while exiting the hoist. Tr. 174. I also find Inspector Marler's identification of the event as a "hazard" less than credible because he claimed numerous times to base his citation only off of a conversation he had with Forklift Operator Mann, yet Mine Foreman Gibson and Forklift Operator Mann both testified that he was in fact present, and further, Gibson stated that Marler told Mann at the time that everything was alright. Tr. 38-40, 54, 65-66, 145-146, 148, 157, 171.

With respect to whether the stretching of the wire ropes *could* possibly create a hazard, I find that Doe Run's policies and the safety mechanisms on both hoists prevent this possibility. The Secretary focused repeatedly on the fact that one cannot completely eliminate stretching and contracting out of wire ropes, a fact stipulated to by Doe Run. Tr. 204, 213. However, the Secretary did not show how such stretching could actually create a hazard at either one of the two mines based on the December 2012 "incident" or any other observed circumstances. The employees from each mine were credible when testifying that stretching of the ropes had never been of such magnitude as to cause a hazard. Tr. 202, 239. To support this assertion, they noted the multitude of safety options the mines were equipped with to prevent sudden movement, and most importantly, they described procedures used to transport "heavy loads" (as the cited standard contemplates) that did not involve any miner being put in the path of a hazard from rope stretching. Tr. 225-226.

The maintenance supervisor at Buick, William Courtney, described in detail the various safety mechanisms on the hoist that could be used in the event of a hazard. Tr. 194. The hoists at both mines are equipped with an overspeed device, an over travel limit switch, and a jam conveyance that will kill power and set the brakes if the hoist drum is turning without the ropes moving. Tr. 194, 216-17. These mechanisms made it unlikely that the hoist would move suddenly, which is confirmed by Doe Run's clean safety record with respect to the hoists. Joint Stip. at 9, 23. With respect to the spotting problems in particular, both Harris and Mann mentioned the communication options available to signal the hoist operator for hoist repositioning. Tr. 169-70, 179-80. Had Mann felt he could not safely make it to the shaft landing, he could have easily used the bell cord system to direct the hoist operator to recalibrate the hoist before entering the cage and starting unloading operations.

The cited standard specifically applies to heavy loads, and I find that Doe Run's procedures for the hoisting of heavy loads are such that stretching cannot create a hazard. These procedures, which were described in detail by workers at both mines, prevent miners from entering the hoist when heavy loads were being moved up and down the shaft. A crucial aspect of Doe Run's procedures, and one that eliminates Inspector Sherril's express concern regarding potential tip-over hazards, is the fact that miners themselves are not in the shaft when heavier objects such as locomotives or large cable spools are lowered into the shaft. Tr. 84; 189-90. It is also Doe Run's policy that no one can ride in the cage with anything they can not pick up in their hands and carry. Tr. 244-45. The cited standard requires chairs in situations where wire rope stretching due to heavy loads presents a hazard to miners. However, the described procedures at both mines for heavy loads prevent such a hazard from occurring, because even if there is stretching, miners are never on the hoist when it occurs. Further, the incident upon which the citations were originally based did not involve heavy loads. Thus, it is unlikely that chairs would have been used even if they were provided for heavy loads as the cited standard contemplates.

For the reasons above, I find that there was not any hazard present at either the Buick or Sweetwater Mine due to the stretching and contracting of wire ropes. Thus, Doe Run was not required to provide chairs or other blocking mechanisms for the hoists at issue in these dockets at the Buick and Sweetwater mines.

V. ORDER

Accordingly, Citation Nos. 8684827 and 8676770 are **VACATED** and this case is **DISMISSED**.

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

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December 27, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2012-1447-M
Petitioner,	:	A.C. No. 51-00173-296668
	:	
	:	Docket No. WEST 2013-4-M
	:	A.C. No. 51-00173-299306
v.	:	
	:	Docket No. WEST 2013-162-M
	:	A.C. No. 51-00173-302252
	:	
	:	Docket No. WEST 2013-639-M
	:	A.C. No. 51-00173-315170
GRACE PACIFIC CORPORATION,	:	
Respondent.	:	Mine: Makakilo Quarry

DECISION

Appearances: Courtney Przybylski, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner;
Richard Rand, Marr Jones & Wang, Honolulu Hawaii, attorney for Respondents.

Before: Judge Miller

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, Mine Safety and Health Administration (“MSHA”) against Grace Pacific Corporation at its Makakilo Quarry, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. These dockets involve nine citations with penalties assessed pursuant to section 110(i) of the Mine Act. At hearing, the parties indicted that they had resolved six of the citations, leaving three for decision after hearing. The parties presented testimony and evidence at a hearing held on November 18, 2013 in Honolulu, Hawaii.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Makakilo Quarry, an aggregate mine owned and operated by Grace Pacific Corporation, is a mine within the meaning of the Mine Act. Grace Pacific is a medium-sized operator and the penalties proposed in this case will not affect the company’s ability to continue in business. The parties’ stipulation, Jt. Ex. 1, indicates that there are no issues of jurisdiction and that certain penalty criteria are agreed to. The parties agree that Sec’y Ex. 15 accurately reflects the mine history of assessed violations.

Inspector Scott Amos, assigned to MSHA's Boise field office, has been a surface mine inspector for six years and traveled to the Makakilo Quarry on May 15, 2012 to conduct a general inspection. During that inspection, Amos issued the three citations discussed below.

a. *Citation No. 8691005*

On May 15, 2012 Amos issued Citation No. 8691005 to the mine under section 56.14101(a)(1) for allegedly failing to maintain the air brake system on the Kenworth water truck. At hearing the Secretary sought to amend the citation to reflect an alleged violation of section 56.14101(a)(3), but the request was denied because the operator had not been given notice. However, after listening to all of the evidence, it is clear that the evidence of both parties bears directly on subsection (3) and that Respondent will not be prejudiced by the amendment. *Faith Coal Co.*, 19 FMSHRC 1357, 1361-1362 (Aug. 1997). Additionally, I note that the body of the citations states that "[t]he air brake system was not maintained in functional condition[,]" which tracks the language of subsection (3) of the standard instead of subsection (1). The Commission has determined that leave should be freely granted to modify a citation in such a circumstance. *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). Accordingly, the citation is amended to reflect an alleged violation of 30 C.F.R. § 14101(a)(3).

While inspecting the Kenworth water truck Amos noticed that a knock-out plug was missing on one of the brakes, which lead him to suspect a problem with the brakes. He tested the air brakes and discovered a leak, evidenced by the sound of escaping air, which was loud enough to hear over the running truck engine. Amos determined that the air brake was leaking at a rate of 28 psi per minute. His experience, along with a DOT guideline, dictates that 2 psi per minute is the acceptable standard and, consequently, he believed that the brakes would not be effective. For that reason Amos did not ask the driver to test the brakes on a grade and instead determined that he would issue a citation for failing to maintain the brakes in functional condition.

Grace Pacific's witnesses disagree that there was a defect in the brakes. Raymond Pauline, who is in charge of the equipment and works in maintenance for Grace Pacific at an off-site location, explained that he does DOT inspections and keeps all of the equipment up to DOT standards. He is familiar with air brake systems and, in his opinion, if a leak develops in the air brakes it may not be readily apparent to the driver. He explained that these air brakes automatically send a signal to the driver if losing pressure and, when a certain pressure is reached, the brakes shut down and lock. Pauline agrees that if the brakes are leaking air they should be taken out of service. I note that, while Pauline and the mine take issue with the citation and assert that there was no preshift that indicated a problem with the brakes, MSHA is required to issue a citation "before the entire braking system fails" given that its interpretation is "preventive and seeks to cure equipment defects before serious accidents occur." *Daanen & Janssen Inc.*, 20 FMSHRC 189, 193 (Mar. 1998).

The mine argues that the standard only applies to self-propelled mobile equipment slated to be used during the shift and that the truck was not in use on the day of the inspection. I reject this argument. While the truck was parked at the time of the inspection, and had not been operated for an undetermined amount of time, it was not locked or tagged out and was available for use. *Alan Lee Good*, 23 FMSHRC 995 (Sept. 2001).

The standard cited requires that “[a]ll braking systems installed on the equipment shall be maintained in functional condition.” 30 C.F.R § 14101(a)(3). Given that the psi was lower than the acceptable level, leaving the brakes ineffective, I find that the brakes were not maintained in functional condition and a violation has been shown.

Air brakes, with a leak of the nature discovered by Amos are not safe to operate and, in Amos’ opinion, it would not have been prudent to have put the driver in harm’s way to test the brakes by operating the vehicle. The one defective air-line with a low pressure is connected to the entire truck braking system and when it is leaking it is reasonable to expect that braking potential is reduced by at least one quarter. The water truck, like other equipment at this mine, operates on grades of 5-10%, with other heavy mobile equipment traveling the same roads. However, because the truck operates at low speeds and is used only 2-3 days each week, Amos did not assess the violation as significant and substantial. While there is a potential for fatal injuries if an accident occurs, Amos did not find it reasonably likely that an accident would occur. He explained the importance of keeping brakes in a safe and functional condition and noted that the issue is important enough that it is one of the “rules to live by” formulated by MSHA. Amos explained that the missing knock-out plug was the first clue he had that there was a problem and mine personnel would have seen the same thing as they walked by. As a result he found the negligence to be moderate. It is not likely that this problem arose while the truck was parked, and the last driver should have known about the leak, particularly based on the way the pedal would have functioned. I credit Amos’ testimony and affirm the Secretary’s gravity and negligence determinations. Accordingly, I assess the originally proposed penalty of \$176.00.

b. Citation Nos. 8691006 and 8691007

On May 15, 2012, Amos also issued Citation Nos. 8691006 and 8691007 for violations he found on a Cat front end loader that he observed loading haul trucks in the pit area. He issued the first citation because he believed that the operator of the loader had climbed out onto the boom of the loader to clean the windshield and because there was a gap in the handrail near the cab of the loader where the operator could have fallen as he reached across to clean the windshield from the deck. The second citation was issued for failing to wear fall protection while climbing on the loader.

Amos issued the first citation for a violation of section 56.11001 for the mine’s alleged failure to provide the loader operator with a safe means of access to clean the windshield. Amos was aware of a number of accidents involving falls from equipment while attempting to clean the windshield and those accidents had resulted in serious injuries. Therefore, he made it a habit during each inspection to question equipment operators about cleaning the windshield to ascertain that it was done safely.

On the day of the inspection Amos approached the loader, asked the operator to stop, and climbed up to the cab to speak to the operator. The loader, as shown in Sec’y Ex. 10, is large mobile equipment, operated from a cab that is twelve feet above the ground. Amos spoke with the loader operator alone and, based on the conversation, understood that, in order to clean the three front windows, the operator walked along the elevated walkway and climbed out onto the boom at least a couple of times each week. According to Amos, the operator explained that,

while the company provides a squeegee with a long handle, it is often missing and, consequently, the driver must climb out along the boom in order to adequately reach the windshield. The second photo in Sec'y Ex. 10 details the opening in the handrail on the deck. According to Amos, the 18 inch wide opening in the handrail is the location where the loader operator must lean through in order to reach the windshield even if using the squeegee. Either way, climbing on the boom to reach the windshield or leaning across the unprotected area, is unsafe. Amos issued the citation for a violation of 30 C.F.R § 56.11001, which requires that "[s]afe means of access shall be provided and maintained to all working places."

Guy Branco, the operator of the loader, recalls the conversation with the inspector differently and, at hearing, denied that he walked out on the boom to clean the windshield. He instead testified that he often uses the squeegee to reach the windows, uses his wipers, or relies on assistance from the water truck which can shoot the windshield with a water cannon.

I find Amos to be a credible witness, but given that Branco, the loader operator, denied that he climbed on the boom, I decide this particular violation solely on the basis of the gap in the handrail that Amos cited. Amos explained that a miner, who must reach across a wide area to clean the windshield, would be required to lean across the unprotected area between the cab and the handrail, with no rail to hold onto. Although the loader operator may not do it daily, it is reasonable to believe, as Amos suggests, that the windshield is cleaned from the outside platform on a regular basis. With a better handrail and squeegee, the access would have been safe. While Branco denied that he leaned over in the area near the gap in the handrail, I find that improbable given the position of the handrail and the need to clean the windshield. I credit Amos' testimony in this regard. Based upon Amos' testimony, along with the photographs, I agree that there was no safe access and find a violation.

Amos indicated that the violation was significant and substantial given that the windows must be cleaned frequently, that the loader operator must be in the area without a rail to protect him against a fall. He explained that the conditions create the hazard of falling twelve feet to the ground. Additionally, Amos testified that he issued a citation on this island in the last few years when an operator fell over 8 feet while cleaning the windows on heavy equipment. As a result of the fall, the miner missed more than a year of work. Amos opined that the same accident and injury was likely to result here.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term “significant and substantial” to be:

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

The Commission has addressed the third element of the *Mathies* formula and explained that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985).

I have already found that Grace Pacific violated a mandatory standard, specifically that there was not a safe means of access to walk outside the cab and reach over to clean the windshield. The 18 inch gap between the rail and the side of the equipment exposed the loader operator to a fall hazard. Given that the windshield must be cleaned regularly, it is reasonably likely that the loader operator would either lean over and lose his balance, or slip on grease, oil or other material on the deck and fall. The deck or platform where the miner would stand is twelve feet off the ground and such a fall would result in a serious injury. Therefore, I find the violation to be significant and substantial.

Amos indicated that the negligence was moderate. Although the mine operator alleges that the handrail had not been modified since the time of its manufacture, I agree with Amos that the hazard, in the form of the gap, was plainly obvious and therefore the negligence should remain moderate. I assess a penalty of \$900.00.

Given the potential for a fall from the loader, Amos issued the third citation of the day, for failing to wear fall protection. Citation No. 8691007 was issued for an alleged violation of section 56.15005, which requires, in pertinent part, that “safety belts and lines shall be worn when persons work where there is danger of falling[.]” 30 C.F.R. § 56.15005. Inspector Amos testified that the hazard was, again, falling from the loader. He designated the alleged violation as significant and substantial and as being the result of the mine’s moderate negligence.

Amos confirmed that he relied on the same facts and information he used to find the violation of the safe access standard, discussed above, and indicated that the loader operator could not safely access the area from the boom and, therefore, he must be tied off. Amos also testified that there was no safe place to secure a hook for the safety harness. He stated that the reasons for the violation and his negligence determination were the same for this citation as for the safe access violation discussed above and that providing the handrail, as required by Citation No. 8691006, also terminated this violation. He could not adequately explain why this citation was not duplicative of the first. (Tr. 54-55).

The commission has determined that citations are not duplicative so long as the standards cited impose separate and distinct duties upon an operator. *Cumberland Coal Res. LP*, 28 FMSHRC 545, 553 (August 2006). In *Cumberland Coal*, the Commission found that the non-compliance with different duties under the ventilation plan were not duplicative. In that case, the citations referred to different aspects of the mine's ventilation plan and that the termination of one violation may not have terminated the second. Here, however, the duties imposed on the operator under the two standards in the limited context of the mine's practice of cleaning the loader's windshield are not separate and distinct. Both of these citations were based on the same omission of the mine operator, that of failing to provide a safe way to clean the windshield. Both citations could be cured by providing an adequate rail so that the loader operator would not fall from the deck of the loader as he cleans the windshield. In this limited circumstance the Secretary did not show that the second citation was based on a separate omission or that the termination activity would result in addressing a separate deficiency. For these reasons, I find that, and given the lack of evidence to the contrary, Citation No. 8691007, which was issued for failure to wear fall protection, is duplicative. Accordingly, this citation is vacated.

c. Other Matters

Finally, with regard to each of the violations, the mine operator argues that, because it was not aware of the violative conditions, it should not have received the citations discussed above. Boyd Nobriga, the quarry manager, testified that he and the mine's safety manager have increased training at the mine and that, had any miner been responsible for the violation as Amos indicated, they would have been reprimanded. With regard to the first citation the mine argues that since Nobriga and others at the mine didn't know that the brakes were defective, they, in turn, did not realize they should be repaired. Further, it argues that there is a lock and tag out procedure, and whoever finds a safety issue puts a tag on it. As to the citation issued for failure to provide safe access, the mine argues that it was not aware that an additional handrail was required on the front end loader. I reject these arguments. The Mine Act and its regulations impose strict liability on mine operators regardless of knowledge or fault. See *Nally Hamilton Enterprises*, 33 FMSHRC 1759, 1764 (Aug. 2011) (citing *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) and *Stillwater Mining Co. v. FMSHRC*, 142 F.3d 1179, 1184 (9th Cir. 1998)). While these arguments are not a defense to the violations themselves, they may relate to the negligence of the operator and, accordingly, I have considered such in reaching my negligence findings addressed above.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mineact delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus when an operator notifies the Secretary that it

intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that “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). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is “bounded by proper consideration of the statutory criteria and the deterrent purpose[s] ... [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a limited history for this mine. The mine is a medium-sized operator. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence of the violations are discussed above. The operator demonstrated good faith in abatement. At hearing, the Secretary read the terms of the settled citations, including the agreed upon modifications, into the record. Based on my findings set forth above and the criteria in section 110(i), I assess the penalty amounts set forth below for both the citations addressed at hearing and those addressed by the parties’ settlement on the record.

WEST 2012-1447-M

<u>Citation No.</u>	<u>Assessed Penalty</u>	<u>Final Penalty</u>
8691006	\$873.00	\$900.00
8691110	\$1,026.00	\$1,026.00

WEST 2013-162-M

<u>Citation No.</u>	<u>Assessed Penalty</u>	<u>Final Penalty</u>
8691005	\$176.00	\$176.00
8691112	\$100.00	Vacated

WEST 2013-04-M

<u>Citation No.</u>	<u>Assessed Penalty</u>	<u>Final Penalty</u>
8691007	\$873.00	Vacated

WEST 2013-639-M

<u>Citation No.</u>	<u>Assessed Penalty</u>	<u>Final Penalty</u>
8691456	\$100.00	\$100.00
8691458	\$117.00	\$117.00
8691461	\$100.00	\$100.00
8691463	\$100.00	\$100.00

Given my above findings, I assess a total penalty of \$2,619.00 for both the settled citations and those that were addressed at hearing. Grace Pacific is hereby **ORDERED** to pay the Secretary of Labor the sum of \$2,519.00 within 30 days of the date of this decision.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 27, 2013

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA), on	:	
behalf of CLINTON RAY WARD,	:	Docket No. WEVA 2013-597-D
Complainant,	:	MSHA Case No. PINE-CD-2012-02
	:	
v.	:	
	:	
ARGUS ENERGY WV, LLC,	:	Mine ID: 46-08994
Respondent.	:	Mine: Deep Mine No. 8

DECISION AND ORDER
DENYING DISCRIMINATION COMPLAINT
AND DISSOLVING THE TEMPORARY REINSTATEMENT

Appearances: John M. Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA on behalf of Complainant Clinton Ray Ward

Mark E. Heath, Esq., and Dennise R. Smith, Esq., Spilman, Thomas & Battle, PLLC, Charleston, WV for the Respondent

Before: Judge Steele

This case is before me upon the complaint filed by the Secretary of Labor (“Secretary”), 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, on behalf of Complainant Clinton Ray Ward (“Ward”), alleges that Argus Energy WV, LLC (“Argus” or “Respondent”), violated Section 105(c)(1) of the Act when it discharged Ward on June 1, 2012.

On June 9, 2012, the Secretary filed an Application for Temporary Reinstatement of Ward to his former position with Argus at its Deep Mine No. 8 (“the Mine”) pending final hearing and disposition of the case.

A hearing was held on his request for temporary reinstatement on July 27, 2012 in Charleston, West Virginia. Under the legal standard of a Temporary Reinstatement hearing, I found that Ward’s complaint was not frivolously brought, and I issued an Order temporarily reinstating him on August 1, 2012. Argus appealed the Order, and the Commission upheld it on August 21, 2012. The Secretary, Ward, and Argus agreed to economic reinstatement in lieu of actual reinstatement.

For the reasons set forth below, I deny the discrimination complaint and dissolve the temporary reinstatement.

CONTENTIONS OF THE PARTIES

The Secretary of Labor contends that Respondent discriminated against Ward, in violation of Section 105(c)(1) of the act, for raising safety concerns at the Mine. Specifically, the Secretary claims that a *prima facie* case exists to show that Ward was discharged for making safety complaints. First, the Secretary asserts that Ward engaged in protected activity within the meaning of the Act. *Secretary of Labor's Post-Hearing Brief* at 31. That protected activity included complaining about the number of workers assigned to electrical tasks and noting water accumulating near the seals. *Id.* at 20, 31. The Secretary further contends that Ward suffered adverse employment action, first when he was required to ride into the mine with his crew, when he was singled out in a safety meeting for calling MSHA, and finally when he was discharged. *Id.* at 34. The Secretary also asserts that Respondent had a discriminatory motive which is shown through circumstantial evidence. *Id.* at 35-36. Specifically, the Secretary asserts that there is circumstantial evidence that Respondent had knowledge of Ward's complaints, that there was previous discriminatory action before the discharge, and that the timing between the protected activity and the discharge were close. *Id.* at 35-39. In a related argument, the Secretary contends that Respondent's claim that Ward was discharged for work performance issues is mere pretext. *Id.* at 40-43. The Secretary notes that the investigation into Ward's alleged work performance was inadequate to support a finding that the discharge was not pretextual. *Id.* at 39-40. Finally, the Secretary contends that Ward is entitled to damages. *Id.* at 44.

Respondent contends that Ward did not engage in protected activity, that it did not have discriminatory animus towards Ward, and that it had a legitimate business reason for discharging Ward. *Respondent's Post-Hearing Brief* at 51-64. Specifically, Respondent asserts that Ward did not engage in protected activity because there is no evidence that Ward ever reported a problem with water at the seals, even though he was tasked with examinations. *Id.* at 51-52. Respondent argues that the only substantiated instance where Ward spoke to management about water was after the condition was already cited and Respondent was actively correcting the problem. *Id.* at 52. Respondent also contends that even if Ward had engaged in protected activity, it did not have unlawful motive in discharging him. *Id.* at 54. Respondent asserts that no *prima facie* case of discriminatory intent can be made because there is no evidence that management had any knowledge of Ward's protected activity. *Id.* at 54-56. Respondent also notes that there was no evidence of animus toward the protected activity; in fact the miner who eventually reported the cited condition in writing, Adkins, faced no repercussions. *Id.* at 56-58. Respondent also asserts there was no disparate treatment of Ward because other supervisors were required to travel with their crews. *Id.* at 59. Finally, the Secretary contends that it had actual cause to discharge Ward. *Id.* at 59. Specifically, Respondent asserts that Ward did not complete his work tasks, failed to properly supervise employees, and stayed on the surface when he should have been working underground. *Id.* at 60-64. He was even given a verbal warning that he would be fired if his performance did not improve and he failed to take corrective action. *Id.* at 61. Respondent asserts that this is more than a mere pretext but, in fact, constitutes good cause for discharge. *Id.* at 64-65.

JOINT STIPULATIONS

The parties stipulate to the following:

- 1) Deep Mine No. 8 (the “Mine”) is subject to the jurisdiction of the Health Act of 1977 (the “Act”).
- 2) The Mine is located in Lincoln County, West Virginia.
- 3) The Mine is owned and operated by Respondent, Argus Energy WV, LLC.
- 4) Respondent has an effect on interstate commerce within the meaning of the Act.
- 5) Respondent is subject to the Act.
- 6) The presiding Administrative Law Judge has jurisdiction over the above-captioned proceedings pursuant to § 105 of the Act.
- 7) Respondent is subject to the jurisdiction of the Federal Mine Safety and Health [Review] Commission and stipulates that the Administrative Law Judge has the authority to hear this case and issue a decision.
- 8) The parties stipulate to the authenticity of their exhibits but not to the relevance or truth of the matters asserted therein.
- 9) Payment of the total proposed penalty of \$25,000.00 in this matter will not affect Respondent’s ability to continue in business.
- 10) Complainant, Clinton Ray Ward, was employed by Respondent as the third shift electrician from on or about October 2011 until June 1, 2012.
- 11) While working at the Mine, Complainant was a miner as defined in § 3(g) of the Act, 30 U.S.C. §802(g).
- 12) Complainant has been economically reinstated from August 1, 2012 through the present.

FINDINGS OF FACT

The findings of fact are based on the record as a whole and the undersigned’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the undersigned’s part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Ward's Position in the Mine:

Clinton Ray Ward began working at Argus Energy Deep Mine No. 8 in October 2011. Tr. 30. Argus Mine No. 8 had approximately 50-60 employees in March 2012, with approximately 10 of those in maintenance on each shift. Tr. 262. His last day working at the mine was May 31, 2012. Tr. 30. At that time, Ward worked as the third shift chief electrician. Tr. 30.

Prior to working at Argus, Ward had four years of underground experience and three and a half years as an electrician. Tr. 30. He had a year's experience working as a supervisor electrician. Tr. 31. Ward had a West Virginia underground certification and a West Virginia low, medium, and high voltage electrical card. Tr. 31.

As a third shift electrician, Ward's shift was from 11 pm to 7 am, but he tried to get to work at 10 pm. Tr. 31-32. Each shift, Ward would receive his assignments as a work list from the day shift electrician, Jake Bowen.¹ Tr. 33, 309; SX-1. Additionally, the second shift would sometimes tell Ward about work that needed to be done. Tr. 34, 309.

Ward's regular duties included multiple electrical examinations, including checking the permissibility and recording in the books the belt heads and the KVA's (or power centers). Tr. 35. The KVA's had to be examined once a month. Tr. 37. On a weekly basis, Ward had to examine nine belt heads, which meant that he performed approximately three examinations per night. Tr. 37. These examinations took approximately 45 minutes to one hour to perform. Tr. 37. After Ward began working at Argus, Bowen told him that it was a "hands-on underground job." Tr. 311, 475.

Additionally, Ward testified that he was sometimes pulled off his regular duties to do non-maintenance work, including hauling supplies or roof bolting. Tr. 38-39. Ward stated that he and his crew also had to haul materials in during belt moves, which took place every other night on two sections. Tr. 39-40. Ward testified that due to his non-electrical duties he often could not get all of his duties completed. Tr. 40. Ward was told that when his assignments conflicted, he should do superintendent Grover Meade's assignments first.² Tr. 41.

I credit Elza Maynard, the move boss at the time of Ward's employment, who testified that he never requested help with belt moves or repairs, but sometimes Ward or his crew helped

¹ At the time of hearing, Jake Bowen had worked as the chief electrician for Argus No. 8 mine for two years. Tr. 287. He had Kentucky and West Virginia electrical, mine foreman, and EMT certifications. Tr. 288. He was also a hoist engineer and a shot firer, a Kentucky state instructor, a federal instructor, and was certified in dust. Tr. 288. Prior to working at Argus, Bowen worked briefly at Mt. Laurel and then for 11 years at Excel, the last five of which he was a chief electrician. Tr. 288-289. At the time of hearing, Bowen had 27 years of mining experience and 15 years of experience as an electrician. Tr. 288.

² Grover Todd Meade began working as the superintendent of Argus No. 8 mine in June 2011. Tr. 472. He had 16 years experience in the coal industry. Tr. 472. Meade was certified as a foreman in West Virginia and Kentucky. Tr. 472.

when they did not have anything to do.³ Tr. 428. This occurred approximately once per week. Tr. 440. Ward never asked Maynard to borrow a member of his crew to help retrieve parts, but Maynard testified that had Ward asked, there would have been crewmembers available to help. Tr. 433-434.

Ward supervised three trainees and a contractor electrician who were divided over two sections. Tr. 42-43. However there was one month when Ward was alone with a trainee. Tr. 42. A trainee is not permitted to perform any electrical work unless he is being closely supervised, and he cannot perform examinations. Tr. 43. Ward testified that he asked for additional workers, and he would occasionally get additional contractors. Tr. 44. However, he testified that the contractors were often late or absent from work, or on drugs. Tr. 44. On cross-examination, Ward conceded that Bowen would help him when he had little help, and his workload was decreased during those periods. Tr. 126-128.

In some instances, Ward had to perform the checks on the KVA's at the D set of seals. Tr. 45. The seals were constructed in September or October 2011. Tr. 241-242. They are 120 PSI seals and are approximately 20-feet wide and 17-feet thick. Tr. 291. The topography of the area was not level, and the floor dipped down as one approached the seals. Tr. 46. The lowest point was No. 1, and it had a water trap to keep the bad air from the sealed area from coming in contact with good air. Tr. 47. The pipe, which Ward estimated was eight inches in diameter, was also supposed to keep water from building up behind the seals. Tr. 48.

Allegations of Water at the Seals

Ward testified that in January 2012, he walked to the double doors, looked over the No. 1 and 2 seals, and saw water in the return. Tr. 51-54. However, he stated that he was not concerned because there was not a lot of water. Tr. 51. He could not recall whether he talked with anyone about the water, but testified that he may have talked with Jake Bowen and Maynard. Tr. 63. Both Bowen and Maynard testified that Ward never discussed any water or safety issues with them. Tr. 333, 436, 437. Ward testified that the water had built up because there had been a roof fall on the track outby in January that knocked out the power to the seals. Tr. 55-56. Therefore, the pumps did not work. Tr. 56.

Ward testified that he traveled to the No. 7 box in January and returned in mid-February at Bowen's direction and found a lot more water at the pumps. Tr. 59, 64, 132. However, Bowen testified that several of the KVA's were not powered from September 2011 through late April 2012, meaning that there was no need to check on them or put them in the book. Tr. 294-302. Furthermore, Harless and Bowen traveled to the D seals at the end of January and did not observe any water present. Tr. 279. In late April, the No. 6 pump was put back in service. Tr.

³ Elza Maynard was employed as a third shift mine foreman for Argus from September 2011 until May 2012. Tr. 424-425. In May, Maynard became the third shift move boss. Tr. 425. He had 15 years of mining experience and had a West Virginia and Kentucky mine foreman's certificates, dust sampling card, and an EMT card in Kentucky. Tr. 425.

299-307. Meade had been at the D seals several times after they were constructed, and he never observed any water there prior to April 23. Tr. 479-480.

Kay Adkins, the day shift mine foreman, testified that he had been to the seals several times prior to April 23, and never observed any water in front of them.⁴ Tr. 387-393. On April 23, Adkins observed water approximately 18-24 inches high. Tr. 392-395. Adkins put this in the books, and was not disciplined in any way for doing so. Tr. 395.

Ward testified that he discussed the water issues with Maynard, Bowen, and Dingess. However, each of these individuals testified that Ward never discussed any such issues with them. Tr. 65, 145, 333, 436-437, 463-464. Based on the credible testimony of these three individuals, I credit their versions of the events.

Ward also did not bring up any safety complaints to any of the state inspectors that accompanied him. Tr. 150-151, 167. Harless testified that Ward never brought any safety complaints to him or reported any water problems to him. Tr. 279-280. Bowen testified that Ward never made any safety complaints to him, and that he was not aware of Ward making any safety complaints to anyone at the mine. Tr. 333. Ward also never discussed the water issues in the mine to Bowen. Tr. 333. Maynard testified that he had been at the D seals one time prior to April 23, and he did not observe any water. Tr. 426.

Ward performed the electrical examinations at the No. 6 and 7 pump stations in March 2012, and indicated that there were no dangerous conditions observed.⁵ Tr. 57-58. If they were de-energized at that time, they would have been marked out of service. Tr. 57-58. Ward testified that the No. 6 pump was back in service in March, but the No. 7 pump was under water. Tr. 59. Ward described the water as being three or four more breaks outby where it had been in February. Tr. 62-63.

Ward's Performance Issues:

Benton Harless, the maintenance superintendent for Argus mines Nos. 7, 8, and 10, and the prep plant, worked closely with Ward, and described him as not having enough hands-on

⁴ Kay Adkins was employed at Argus No. 8 since 2003, with the last two years as the day shift mine foreman. Tr. 381. Prior to that position, Adkins was a section boss. Tr. 382. He has worked in the coal industry since 1978, and has a West Virginia mine foreman card, as well as a CPR, EMT, and surface cards. Tr. 382.

⁵ The No. 6 KVA is also referred to as the "mid point box," and the No. 7 KVA is also referred to as the "old 2 head." Tr. 59.

experience for the position he was in.⁶ Tr. 264. Harless reached this conclusion after several incidents. Tr. 264. The first was Ward's not knowing how to fix the chain on the belt head. Tr. 265-266. In another instance, Bowen wrote Ward up for incorrectly connecting the wrong sized cable to a motor. Tr. 266-267. Additionally, Harless spoke with Ward several times about making sure he went to both sections each night to check on his crew because tasks were not being completed. Tr. 268.

Similarly, after observing Ward's work for some time, Bowen formed the opinion that Ward "had room to grow as a chief electrician. He wasn't real good at prioritizing." Tr. 312. He described Ward as a "good worker," but qualified that "a lot of times we would have to go in and redo something he had done." Tr. 312.

In one instance Ward spent most of his shift trying to connect a P-40 breaker box to a P-70 pump. Tr. 269. Ward testified that he was told by either Meade or Bowen to connect the P-70 pump to the P-40 starter box, however Bowen denied this, testifying that he did not even know at the time that the pump was down. Tr. 108-110, 190-191, 312, 325. Bowen said that connecting a pump to a breaker is not a complicated task and that an experienced electrician should have known not to connect the P-70 pump to the P-40 box. Tr. 312, 325. Connecting the P-70 pump to the P-40 starter box was illegal and it would not work. Tr. 108-109. Ward testified that he stated that it would not work, and was told "hook it up anyway." Tr. 109.

Dingess was able to get the pump working on the next shift within 25 minutes. Tr. 113, 269. When Harless spoke to Ward that morning, Ward simply stated that he could not get the pump going or the breaker to stay in. Tr. 270. Dingess told Harless that the problem was that a P-70 pump is a 45-amp breaker and a P-40 is a 10.25-amp breaker, and that an electrician should know that he cannot connect the two. Tr. 270. He testified that it would have been basic knowledge not to wire the P-70 to the P-40. Tr. 458-459.

Harless also had several discussions with Ward concerning MSHA's inability to run dust on 3 Section on February 16 because the equipment was not maintained properly. Tr. 270-271. On February 16, the dust pumps were run on the day shift on two sections. Tr. 313-314. However, after an hour and a half into the shift, the crew still could not get the 3 Section to run, because they couldn't get their checks done on the miners. Tr. 314-315. As a result, the mine was not able to get enough production that day for dust sampling to count on 3 Section. Tr. 318. This looked bad for the mine and it required the inspector to come spend another full day at the mine. Tr. 407-408. Bowen spoke with Ward about the inability to get the 3 Section running, and Ward stated that in spite of having been instructed to go to the 3 Section, he spent all his time on the 2 Section and had not made it to the 3 Section. Tr. 315-316.

⁶ Benton Harless was a maintenance superintendent for Argus Nos. 7, 8, and 10 mines, as well as the prep plant since December 2011. Tr. 258. Prior to that he was the chief electrician at the No. 7 mine for four years. Tr. 258-259. He was certified as an electrician in Kentucky and West Virginia. Tr. 258-259. Harless had been employed in the coal industry since 1988, and had been a certified electrician since 1993. Tr. 259.

During this period, the tracker was indicating that Ward was staying outside for three hours into his shift before going underground. Tr. 271. Harless testified that only in rare circumstances should a chief electrician remain outside for that long. Tr. 272. Harless stated that there was no reason that Ward would need to wait outside to talk to the second shift, because he could talk to them once he got to the section. Tr. 278. Bowen talked with Ward about making sure he checked on his crew and made sure they were doing their job. Tr. 313.

A meeting was held on February 17 with Ward, Meade, Maynard, Bowen and Harless, Meade told Ward that his job as a chief electrician was to go to both sections and make sure everything was ready to run coal for the day shift. Tr. 158, 318-319. Ward was told that he didn't need to sit outside as long as he was doing, and "if they didn't straighten up, that they'd probably end up losing their job." Tr. 318-319. During that meeting, Ward told Meade that he was on 2 Section all night. Tr. 160. Meade responded that Ward was not telling the truth because the tracking system indicated that he was outside until 2:30 a.m. Tr. 160, 182. Ward could not recall why he spent so much time outside on that day. Tr. 160.

Meade testified that unless something was down outside, there was no reason for a chief electrician to stay outside for any extended period of time. Tr. 477. When Ward was hired, Meade explained to him that his duties required him to be underground supervising his crew. Tr. 477-478. When ordering a part, the outside man can radio down to tell underground miners that the part arrived. Tr. 495. When Meade told Ward that there was a problem with how long Ward was staying on the surface Ward did not explain his conduct in response. Tr. 162. Instead Ward simply said "yes" and "no." Tr. 162. Ward stated that his silence was because Meade and him "didn't get along, didn't see eye to eye." Tr. 162.

In that same meeting, Harless spoke with Ward about making sure that the equipment was being maintained. Tr. 272-273. Meade told Ward and Maynard that he thought they had done a poor job. Tr. 495. Meade told Ward that he was supposed to go to both sections and he did not. Tr. 495-496. Ward wanted to suspend two employees, and Meade told him that if anyone should be suspended it should be Ward. Tr. 495-496. Meade told Ward that he could be terminated if the section was not ready again, and was told not to stay outside. Tr. 275, 435.

Ward testified that he "usually, regularly" was underground within an hour and 15 minutes of the start of his shift. Tr. 163-164. However, when asked if the tracking data would confirm those timeframes, Ward conceded that he often went underground later than he had previously testified. Tr. 164. Ward stated that he stayed outside for long periods based on what he was taught at a previous job at Rock Springs. Tr. 164. However, he conceded that Rock Springs staffed their mines differently than Argus, and the third shift electrician did not do electrician work. Tr. 164-165.

On May 31, production could barely be run at the proper levels for dust samples to be run. Tr. 280.

The April 24 Impact Inspection

Kenneth Butcher was one of the inspectors who performed the April 24, 2012 impact inspection at the No. 8 mine.⁷ Tr. 221. Butcher estimated that there were eight inspectors at the mine that day. Tr. 222. Jake Bowen accompanied Butcher on the impact inspection. Tr. 223, 319. Bowen told Butcher that “he knew they were going to get hammered if they were to get a good electrical exam...because he stated he was shorthanded and people were taking shortcuts.” Tr. 225.

Following the inspection, MSHA shut down the mine and required it to remove the water around the D seals. Tr. 68-69. The mine received 97 violations and 10 D-Orders during the impact inspection. Tr. 498. This was the most that Meade had ever received. Tr. 498.

It took approximately three weeks to remove all the water. Tr. 69. This was done by Ward and Maynard taking a “John boat” over the S-trap and opening and shutting the valves to pump out the water. Tr. 69. They did this in order to regulate the water and keep it from overriding the pump and flooding the area further. Tr. 70. Ward and Maynard took the boat there two to three times. Tr. 71.

Butcher returned to the mine to terminate citations on May 17 with Inspector Wolford from the Pineville office, and was accompanied by Meade. Tr. 226. Butcher saw evidence that water had been present at the seals. Tr. 228-230. The water was too high between the 2 and 3 seals for Butcher to inspect the area. Tr. 230-231. Butcher described two possible hazards when there is excessive water at the seals. Tr. 237-239. The first is to the examiner and the second is when the operator must check for methane. Tr. 237-239.

Ward testified that he felt a current under the boat because the seals were leaking. Tr. 70-71. Ward believed that this could have posed a fatal hazard. Tr. 71. He testified that he shared this concern with Maynard. Tr. 71. Ward also testified that he discussed his concerns with Lee Williamson, who became the third shift foreman during that time.⁸ Tr. 71-72. However, this discussion occurred after the impact inspection, when there was an active attempt to pump out

⁷ Kenneth Butcher was employed by MSHA for four and a half years, and served as a supervisor of Work Group II at the Logan Field Office since February 2013. Tr. 219. Prior to this position, Butcher held positions as electrical specialist at the Logan Field Office and CMI. Tr. 219. He had a BA in civil engineering and was a certified mine foreman, certified electrician, certified diesel instructor, and an MSHA accident investigator. Tr. 220. Prior to working for MSHA, Butcher worked as an underground coal miner for 28 years where he held a variety of positions, including foreman, chief electrician, laborer, and equipment operator. Tr. 220.

⁸ Norman Lee Williamson had been employed at Argus Mine No. 8 since February 2012. Tr. 403-404. He began as a boss on the 3 Section day shift crew and in May 2012 became a miner operator. Tr. 404. He had worked in the coal industry for 21 years. Tr. 405.

the water. Tr. 71-72. Williamson responded that Ward and Maynard should not go to the area alone. Tr. 72.

On cross-examination, Ward testified that the reason he was told not to go alone may not have concerned safety, but rather efficiency. Tr. 172. Ward testified that he also spoke about his concerns with William Robert Sloan, the safety director at several of Argus's mines.⁹ Tr. 72-73. However, Sloan testified that although he spoke to Ward three to four times per week, Ward never made any safety complaints to Sloan, including any pump or seal issues. Tr. 446. I credit Sloane's testimony that Ward never complained to him.

After the impact inspection, Ward had a meeting with Meade and Maynard where Maynard was demoted to section boss and Ward was told to ride in and out with the crew. Tr. 73. Ward took this change as a demotion, but admitted that section bosses and foremen often ride in with their crews. Tr. 184. He also continued to get the same rate of pay, had the same responsibilities, and was still the chief electrician. Tr. 188. Meade did not provide them any reasons for the changes. Tr. 75. Meade testified that he told Ward to ride in with the crew so that Ward could get more done underground. Tr. 509-510.

After the impact inspection, Ward was responsible for two sections, which constituted one supersection. Tr. 85-86. On those sections was the following equipment: two miners, four buggies, and two roof bolters. Tr. 86.

At a meeting following the impact inspection, Meade discussed the MSHA inspection. Tr. 75. Ward brought up the subject of who may have called MSHA. Tr. 178. Ward asked "was it Whalen?" referring to a third shift electrician. Tr. 76. Meade responded, "No, I know who called," while looking at Ward and shaking his head. Tr. 76. Ward understood this to constitute a threat. Tr. 76. Meade testified that he did not believe that Ward called MSHA. Tr. 507-508. He believed that a contractor who was denied unemployment compensation called MSHA. Tr. 508.

Ward testified that Williamson said that Meade never like Ward and was going to get rid of Ward as soon as he could. Tr. 76-77. Ward testified that Meade's disdain for him traced back to when Ward first began working at Argus in October 2011. Tr. 123. However, Meade denied having any problems getting along with Ward. Tr. 475.

Ward's Termination:

On his last shift, Ward arrived to work at 10 pm on May 30, 2012 and worked until 8 am on May 31. Tr. 77. Ward testified that on that shift, Billy Justice, a state electrical inspector accompanied Ward until approximately 5 am. Tr. 77-78. Ward testified that Justice kept him

⁹ At the time of hearing, Willard Robert Sloan had worked as the safety director at Argus Nos. 7, 8, and 11 mines for two years. Tr. 444. Prior to working at Argus, Sloan worked examining airways and belt lines at Booth Energy for 20 years. Tr. 445. He had Kentucky and West Virginia mine foreman, surface, unlimited instructor, and EMT cards. Tr. 445.

from being able to work on the planetary on the miner as his work order directed.¹⁰ Tr. 78-79; SX-1. Ward testified that working on the planetary usually takes three to four people three to four hours. Tr. 82. Additionally, he was directing the trainees on a belt and power move. Tr. 83.

Justice wrote up the miner because the methane monitor would not calibrate properly. Tr. 115. Specifically, the miner would not calibrate past .8, meaning that the miner would not shut down even under dangerous amounts of methane. Tr. 326-327. The citation that Justice wrote indicated that he was at the mine from the night of May 29 through the morning of May 30, which is one day before Ward testified that he was there. Tr. 118-120; RX-A. Ward testified that the inconsistency must have been due to a typo on Justice's part. Tr. 119-120. I credit the date on the exhibit over Ward's memory, as Ward consistently could not remember important details of his employment. See e.g. Tr. 168, 180.

The work order for the May 30 shift included work on the planetary and making sure the new car was running, however Joe Flemming, an electrician on the second shift, also told Ward that there was a problem with the roof bolter that he needed to attend to. Tr. 80. The way Ward prioritized his work was to put the inspector first and then proceed to help in moving the miner. Tr. 81. Ward placed three of his men to help with the move. Tr. 81.

After Ward was finished with Justice, he went to the 2 Section and found that nothing had been done. Tr. 87. By 7 a.m., Ward's crew had one miner working, which Justice had shut down due to problems with the methane monitor. He also may have had one bolter working. Tr. 88-89. Ward's crew never got started on the planetary. Tr. 89-90.

Bowen took the MSHA inspector, Roger Workman, to the section on the morning of May 31 to run dust, and the miner would not start. Tr. 327-328. This problem was not in any way related to the cited problem with the miner the day before. Tr. 328. They found that both miners and both bolters were down. Tr. 329. Ward had told Bowen that one of the miners was down due to planetary repairs, however he did not report the other equipment problems, even though it was his responsibility to report them. Tr. 329. One of the bolters was tagged out and Bowen had to take the other out of service because it didn't have enough suction. Tr. 329-330. This problem should have been discovered by Ward when he ran dust parameters in his shift, and the problem should have been reported. Tr. 330.

Some time after this shift, Bowen spoke to Ward and said that the section "looked like a bomb went off."¹¹ Tr. 91. Ward responded that there was a belt move during the previous shift, and he had Inspector Justice with him. Tr. 91-92. Then Meade called Ward and Bowen into his office and fired Ward. Tr. 92-93. Meade testified that there were consistently problems with Ward's performance. Tr. 486-489. Harless and Meade decided to fire Ward because of job performance, management skills, and for being responsible for MSHA's inability to run dust on

¹⁰ The planetary is the drive that turns the Caterpillar track and propels the miner. Tr. 79.

¹¹ Ward could not recall if it was on May 31 or June 1. Tr. 90-92.

two occasions. Tr. 280-281. There was no requirement at Argus for an employee to be written up before being fired. Tr. 478.

Ward stated that Meade did not make any mention of the planetary and did not give Ward a reason for his termination. Tr. 93-94. However, Ward also testified that Meade told him that it was the second time that the section was not ready to run. Tr. 196. Meade testified that he fired Ward because things kept getting worse. Tr. 517-518. Furthermore, Bowen and Meade each stated that Meade told Ward about his performance issues as an electrician. Tr. 32. Ward was provided an opportunity to explain, but said nothing. Tr. 332. Ward testified that he did not mention to Meade that he had a state inspector because he “figured there was no need for it.” Tr. 196.

On the termination slip that Ward received, the reason provided was “not doing his job.” Tr. 95-96; SX-4. Ward never received written warnings prior to his termination. Tr. 96. Ward testified that he believed that he was fired because Meade thought Ward had called MSHA resulting in the impact inspection. Tr. 101.

ANALYSIS

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. 181, 95th Cong., 1st Sess. 35 (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*, at 623 (1978).

Section 105(c)(1) of the Act states in relevant part:

No person shall discharge or in any manner discriminate against [...] or otherwise interfere with the exercise of the statutory right of any miner [...] in any coal or any other mine subject 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 C.F.R. § 815(c)(1).

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). “The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the

adverse action was in no part motivated by protected activity.” *MSHA on behalf of Leonard Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 301 (March 2000). The Commission has further held that even “[i]f the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone.” *Id.*

I find that the Secretary has both failed to meet his *prima facie* case by failing to present credible evidence that Ward engaged in protected activity or that the termination was motivated by such activity. Furthermore, even if the Secretary had met his burden here, Respondent has shown that it would have terminated Ward’s employment for legitimate non-discriminatory reasons related to his poor work performance.

Ward did not engage in protected activity and there was no animus toward such alleged activities

Both the Secretary and Respondent spent an inordinate amount of resources in the hearing and in their post-hearing briefs dedicated to the issue of whether there was water at the D seals prior to April 23, 2012. However, for purposes of this discrimination proceeding, the relevant issue is not whether water was present during this timeframe, but whether Ward made any health or safety complaints related to the water.

Though Ward testified that he discussed the water at the seals with several individuals, his testimony on the matter was vague and incredible. Ward stated that he *may* have spoken with Bowen and Maynard about the water, but Bowen and Maynard each testified unequivocally that Ward never discussed the issue with them. Tr. 51, 63, 333, 436, 437. Similarly, Ward did not mention the issue to any of the state inspectors that accompanied him or with Harless. Tr. 150-151, 167, 279-280. Aside from Ward’s often inconsistent testimony, there is nothing in the record to indicate that Ward made any health or safety complaints.

Additionally, the totality of the evidence indicates that there was no animus toward any alleged protected activities. First off, it should be noted that Adkins, who reported the water in April, testified that he suffered no repercussions. Tr. 395. Ward testified that at a meeting to discuss the impact inspection, Meade gave Ward a threatening look when Ward asked if it was another electrician that called MSHA. Tr. 76, 178. If anyone engaged in problematic conduct at this meeting, it was Ward—a supervisor—who attempted to implicate another electrician for making an anonymous complaint to MSHA—a form of conduct that the Mine Act encourages. Furthermore, Meade’s looking at Ward as he responded, saying, “No, I know who called,” cannot be taken as a threat without more. Tr. 76. It is not uncommon for individuals to look at each other when talking. Though Ward may have sincerely believed Meade’s look to be threatening, there is nothing in the record to substantiate this subjective feeling.

Similarly, other alleged forms of animus described here do not create the inference of discrimination. Despite testifying that it felt like a demotion, Ward’s being told to ride in with his crew carried no reductions in pay or title. Tr. 188. Ward conceded that section bosses and foremen often ride in with their crews, and Meade testified that he told Ward to do so in order to

ensure that he spent more time underground. Tr. 184, 509-510. Without being able to show through credible evidence that Ward engaged in protected activity, and that he suffered an adverse employment action as a result, the Secretary has not made a *prima facie* case.

Argus Energy had a legitimate non-discriminatory reason for terminating Ward's employment

Even if the Secretary had met its burden of making a *prima facie* case of discrimination, Argus had a legitimate non-discriminatory reason for terminating Ward's employment. During Ward's short tenure at the mine, he had numerous performance issues, several of which he was warned about. Ward spent an excessive amount of time on the surface, at the expense of going underground and supervising his crew. Tr. 271. Ward was told that his job required him to be "hands on" and be underground, yet he repeatedly stayed above ground for up to 3 hours of an 8 hour shift. Tr. 311, 475. As a result of Ward not spending his shift underground, he often left tasks unfinished or finished incorrectly. Tr. 266-268.

Ward also made significant mistakes that an experienced electrician should not have made. This included spending the majority of a shift wiring a P-40 breaker box to a P-70 pump. Tr. 269. The P-70 pump is a 45-amp breaker and the P-40 box is a 10.25-amp breaker, meaning that the two pieces of equipment are incompatible. Tr. 270. Ward testified that he was ordered to connect them, and he just did as he was told. Tr. 108-110. Bowen denied that anyone told Ward to connect the two pieces of equipment. Tr. 190-191. Dingess, who fixed the pump in the next shift, was able to do so in 25 minutes. Tr. 113. I find Bowen's testimony more credible, and find that it defies logic that Ward explained to his supervisors the impossibility of this task and they told him to waste his shift trying. Furthermore, if he was so directed, it should not have taken his entire shift to connect the equipment.

Ward was also in large part responsible for MSHA's inability to run dust samples on two separate occasions. MSHA tried to run dust samples on February 16, but was unable to do so because the equipment was not maintained properly. Tr. 270-271. Such maintenance was one of Ward's primary responsibilities. Tr. 35-37. After this incident, Ward was warned about staying above ground at the expense of doing his work underground. Tr. 158, 318-319. He was also told that if it occurred again, he may lose his job. Tr. 318-319.

On May 31, MSHA returned to run dust samples, and this time was barely able to run the samples due to problems with the equipment. Tr. 280. The next day Ward was terminated for performance issues. Tr. 486-489. I find that these performance issues, as well as others described at hearing, constitute legitimate non-discriminatory reasons for Ward's termination.

CONCLUSION

I have reviewed the entire record in this case and have carefully considered the contentions of the parties. I conclude that Argus Energy did not discriminate against Clinton Ray Ward. Accordingly, the discrimination complaint is denied and the August 1, 2012 Temporary Reinstatement Order is dissolved.¹²

ORDER

Based on the foregoing, the Secretary's discrimination complaint is hereby **DENIED**, and Complainant's Temporary Reinstatement is **DISSOLVED**.

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

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/mzm

¹² Respondent's Motion to Dissolve Temporary Reinstatement while this decision is pending has been made moot. Furthermore, it should go without saying that any money paid to Complainant during the period of temporary reinstatement is not recoverable.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710

December 31, 2013

TENNCO ENERGY, INC.,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
	:	Docket No. EAJ 2013-02
v.	:	
	:	Formerly KENT2010-1511
SECRETARY OF LABOR,	:	KENT 2011-499
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID: 15-19408
Respondent	:	Mine: Hance Mine No. 1

DECISION

Appearances: Marco Rajkovich, Esq., Rajkovich, Williams, Kilpatrick and True, PLLC, Lexington, Kentucky, on behalf of Tennco Energy, Incorporated; Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor.

Before: Judge Zielinski

This proceeding is before me upon the application of Tennco Energy, Incorporated, for an award of fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504. Tennco prevailed over the Department of Labor's Mine Safety and Health Administration in the underlying civil penalty proceedings brought under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. *Tennco Energy Inc.*, 35 FMSHRC 2107 (July 2013) (ALJ)¹. The EAJA provides that an eligible applicant may be awarded attorney's fees and expenses unless the position of the United States in the underlying proceeding was substantially justified or that special circumstances make an award unjust. The Commission's rules for the implementation of the EAJA in Commission proceedings are set out at 29 C.F.R. Part 2704.

Tennco contends that it qualifies as an eligible applicant and that the position of the Secretary was not substantially justified. The Secretary does not dispute that Tennco is a prevailing party and that it is an entity that meets the eligibility criteria for an award.² He contends that Tennco is not entitled to an EAJA award because his position in the underlying

¹ The cases were heard on March 15 and 16, and April 4, 2012, by Administrative Law Judge Jeffrey Tureck, who is no longer with the Commission. References to the transcript of the March 15 and 16 proceedings are cited as "TrI." and references to the transcript of the April 4 proceeding are cited as "TrII."

² See 29 C.F.R. §§ 2704.104(b), 202.

cases was substantially justified and that the amount of fees and expenses claimed is unreasonable. For the reasons that follow, I find that the Secretary's position in the underlying cases was substantially justified, and deny Tennco's application.

Applicable Law

The Commission has recognized the settled principles for determining whether a party is entitled to an award of attorney's fees under the EAJA. *James Ray*, 20 FMSHRC 1014, 1021-22 (Sept. 1998).

Under the EAJA, a prevailing party shall be awarded attorney's fees unless the position of the United States is substantially justified. *Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C.Cir. 1994). The agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C.Cir. 1992). Substantially justified means that the Secretary's position is such that it would have been "justified to a degree that could satisfy a reasonable person" and has "a reasonable basis in both law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). "This necessarily requires the court to examine . . . the Government's litigation position and the conduct that led to litigation. After doing so, the court must then reach a judgment independent from that of the merits phase." *FEC v. Rose*, 806 F.2d 1081, 1090 (D.C.Cir. 1986).

The Underlying Proceedings

In the underlying cases, Tennco was charged with violating three provisions of the Secretary's Mandatory Safety Standards for Underground Coal Mines.³ The violations were issued as a result of MSHA's investigation of an accident at Tennco's Hance Mine that occurred shortly after noon on June 22, 2010. Luther Shelton, a roof bolter operator, sat down next to rib near the corner of an intersection in the working section, and was struck on the back by a piece of "cap coal" that fell from an area where rib coal met rock comprising the mine roof. He suffered fractured vertebrae and had not returned to work as of the time he testified at the hearing on March 15, 2012.

Following Tennco's notification of the accident, MSHA promptly commenced an investigation. James Lundy, an MSHA investigator, and his supervisor, Lonnie Curnutt, arrived at the mine around 1:30 p.m. on June 22. Personnel from Kentucky's Office of Mine Safety and Licensing also arrived and participated in the investigation. Lundy spoke to the miners, who had been withdrawn from the mine in response to a verbal order issued pursuant to section 103(j) of the Act. The investigative team then entered the mine, accompanied by Alex Sorke, Tennco's safety consultant, and Mike Runyon, the mine superintendent. They traveled to the working

³ 30 C.F.R. Part 75.

section through the main travelway, which was located in the No. 2 entry. The main travelway was also the secondary escapeway.

While traveling through the 2,800-foot long main travelway/secondary escapeway, Lundy observed what he believed were 40 to 50 locations where there were loose ribs, i.e., ribs with excessive sloughing, or cracks. He believed that the conditions were hazardous, in that pieces of the rib coal and “middleman” could fall out and injure a miner using the travelway/escapeway.⁴ The hazardous nature of the conditions appeared obvious, and he concluded that at least some of the conditions had existed for as long as 10-14 days. He issued three violations to Tennco, all of which were grounded on those critical observations and evaluations. Order No. 8335475 charged a violation of 30 C.F.R. § 75.202(a), based on an alleged failure to support or otherwise control the mine ribs in areas where persons worked or traveled. Order No. 8335476 charged a violation of 30 C.F.R. § 360(g), based on an alleged failure to conduct an adequate preshift examination of areas where persons were scheduled to work or travel.⁵ Citation No. 8335474 charged a violation of 30 C.F.R. § 75.364(b), based upon an alleged failure to conduct an adequate weekly examination of the mine’s escapeways. The citation and orders charged that the violations were the result of Tennco’s high negligence, rising to the level of unwarrantable failure, and were issued pursuant to section 104(d) of the Act.

Tennco timely contested the violations, which resulted in the Secretary filing two Petitions for Assessment of Penalty.⁶ Tennco answered the petitions and, following discovery, the cases were heard. On July 17, 2013, Judge Tureck issued a Decision, rejecting the Secretary’s positions on the violations, and vacating the citation and orders. The Secretary did not seek review of that decision. On September 13, 2013, Tennco filed the instant Application for an Award of Attorney’s Fees and Expenses. The Secretary filed an answer on September 30, and on October 10, Tennco filed a response.

Tennco’s application for fees and expenses requires that the entire record of the underlying proceedings be reviewed to determine whether the Secretary’s position on each of the three alleged violations was justified to a degree that could satisfy a reasonable person and had a reasonable basis in both law and fact. An issue common to all three alleged violations is whether there were inadequately supported ribs in the mine, as charged in Order No. 8335475. The other

⁴ Runyon explained that the Hance coal seam consisted of three layers; 30 inches of coal, topped by a 10-inch layer of clay and rock referred to as a middle man – topped, in turn, by another 30-inch layer of coal. TrI. 419. Lundy provided a similar description. TrI. 81.

⁵ The Order was amended, pursuant to the Secretary’s unopposed motion, to allege a violation of section 75.360(g), rather than the originally noted section 75.360(f). TrI. 8-9.

⁶ The petition in Commission Docket No. KENT 2010-1511 sought imposition of a civil penalty of \$2,000 for the violation alleged in Citation No. 8335474. The petition in Commission Docket No. KENT 2011-499 sought imposition of a civil penalties in the total amount of \$105,000 for the violations alleged in the two orders.

two alleged violations also included a timing element, i.e., whether hazardous rib conditions existed at earlier points in time, when required examinations were made.

Substantial Justification

Order No. 8335475

Order No. 8335475 charged a violation of 30 C.F.R. § 75.202(a) which requires that: “The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” The violation was described in the Condition and Practice section of the order as follows:

The operator has failed to control the ribs on the active 001-0 working section of this mine. Loose ribs have been found in various locations on and outby the active section. The ribs have not been supported or taken down to prevent miners from [being injured]. Failure to implement corrective measures has resulted in an accident involving serious injury to a miner. Failing to recognize the hazard and implement necessary changes constitutes more than ordinary neglect and is an unwarrantable failure to comply with a mandatory standard. Foremen and management personnel shall be trained in hazard recognition and the revised roof control plan prior to returning to the underground areas of the mine.

Ex. G-6.

A rib in an area where persons work or travel poses a hazardous condition if it is not “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). In *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987) (cited in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998)), the Commission held that:

Questions of liability for alleged violations of this broad aspect of this standard [the precursor to the present section 75.202(a)] are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent. Specifically, 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 purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. (citations omitted)

The Secretary's position on this alleged violation was that, on June 22, 2010, the day of the accident and investigation, there were inadequately supported ribs in the mine that presented hazardous conditions to miners.⁷

The Secretary's position was supported largely with the testimony of Lundy, who had extensive experience both as a miner and as an MSHA inspector. He began working in the coal industry in 1973, obtained an associate's degree in mining technology in 1975, and served as a general laborer, section foreman, mine foreman, safety manager, mine examiner, and accident investigator. He obtained a degree in nursing in 1997 and worked in that field until joining MSHA in 2008. After completing mine inspector training, he served as a health specialist, and accident investigator. TrI. 18-31. Sorke, who had extensive experience working for MSHA before becoming a safety consultant, had known Lundy for years and considered him a friend. He was of the opinion that Lundy was a "very good" MSHA inspector. TrII. 40-41. Runyon, who had nearly 30 years of mining experience, also knew Lundy and "absolutely" considered him a credible person. TrI. 499.

Lundy believed, based upon his experience, training and observations, that approximately 80% of the 40-50 loose ribs that he observed while traveling through the No. 2 entry, the main travelway and secondary escapeway, were hazardous. He also had observed what he believed to be hazardous rib conditions on the working section and in an approximately 400-foot portion of the primary escapeway. TrI. 45-46, 95-97, 244, 327-28. Lundy also related that Curnutt, his field office supervisor, had traveled the entire length of the primary escapeway and reported to him that the conditions in that escapeway were similar to those that they observed in the No. 2 entry. TrI. 317-18, 322.

Lundy qualified as a person familiar with the mining industry and the protective purpose of the standard. His opinion that the ribs were not adequately supported constituted competent probative evidence that hazardous rib conditions existed in the main travelway/secondary escapeway, in the primary escapeway, and on the working section on June 22, 2010. He also related Curnutt's statement regarding conditions in the primary escapeway. Although hearsay, the field office supervisor's statement, coupled with Lundy's observations, provided additional competent probative evidence that hazardous rib conditions existed in the primary escapeway.

That evidence, and the evidence discussed below, provides support for the Secretary's argument that his position on the violation was justified to the degree that it could satisfy a reasonable person and that it had a reasonable basis in both law and fact.

⁷ Lundy also noted in the order that the accident had occurred as a result of the violation. However, that determination went only to the gravity, not the fact of the violation. The same notation was made on the preshift violation order. Had he determined that those violations were highly likely to result in an injury causing event, as he did with the escapeway examination citation, their gravity would also have been very serious.

However, Tennco advanced several attacks on Lundy's credibility that proved successful, prompting the hearing judge to reject the Secretary's case and vacate the order. Tennco has made the same arguments in its application for fees. They will be addressed below, following the discussion of the remaining alleged violations.

Order No. 8335476

Order No. 8335476 was issued on June 23, 2010, the day following the accident and Lundy's investigation. It charged a violation of 30 C.F.R. § 75.360(g), which provides, in pertinent part:

(g) *Recordkeeping.* A record of the results of each preshift examination, including a record of hazardous conditions and their locations found by the examiner during each examination . . . , shall be made before any persons . . . enter any underground area of the mine.

The standard requires that a certified person conducting a preshift examination, in the 3 hours before the start of a shift in areas where persons are scheduled to work or travel, find hazardous conditions and record them in the preshift examination book. *See Cumberland Coal Res., LP*, 32 FMSHRC 442, 446 (May 2010); *RAG Cumberland Res., LP*, 26 FMSHRC 639, 651, 653 (Aug. 2004); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997). The most recent preshift examination was conducted on June 22, the morning of the accident, between 5:00 a.m. and 6:15 a.m. TrI. 257; Ex. G-13. The "pre-shift mine examiner's report" for that examination was recorded in the appropriate book, and no hazardous rib conditions were noted. Ex. G-13.

The Secretary's position on this order was identical to that on Order No. 8335475, with the added element that the hazardous rib conditions upon which the section 75.202(a) violation was predicated had existed at least 9-to-10 hours earlier, when the preshift examination was conducted. Lundy had testified that the hazardous conditions existed for a "minimum of three" preshift examinations. TrI. 263. The Secretary's post-hearing brief in the underlying cases focused on the 5:00 a.m.–to–6:15 a.m., June 22, preshift examination, and also noted that hazardous rib conditions had not been recorded for examinations conducted on the previous 4 days.

That evidence, and the other evidence discussed below, provided support for the Secretary's argument that his position on the violation was justified to the degree that it could satisfy a reasonable person and that it had a reasonable basis in both law and fact.

Citation No. 8335474

Citation No. 8335474 was also issued on June 23, 2010, and charged a violation of 30 C.F.R. § 75.364(b), which provides, in pertinent part:

(b) *Hazardous conditions.* At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:

(5) In each escapeway so that the entire escapeway is traveled.

The standard essentially requires that a certified person conducting weekly examinations of the mine's escapeways find hazardous conditions and record them in the weekly examination book. *See Cumberland Coal Res., LP, supra.* Runyon, the mine foreman, had conducted weekly examinations of the escapeways, most recently, on June 21. He recorded the results of the examinations in the book, but, did not find or report any hazardous conditions related to loose or sloughing ribs. TrI. 218-19; Ex. G-17.

The Secretary's position on this citation was identical to that on Order No. 8335475, with the added element that the hazardous rib conditions upon which the section 75.202(a) violation was predicated had existed in one or both of the escapeways when the June 21 escapeway examination was conducted. Sec'y. Reply Br. in the underlying cases at 5. Lundy believed that the hazardous rib conditions he observed on June 22 had existed on June 21, and earlier. TrI. 219.

As with the orders, there is evidence supporting the Secretary's argument that his position on the violation was justified to the degree that it could satisfy a reasonable person and that it had a reasonable basis in both law and fact.

Analysis

On the face of it, the cases appeared to present a classic credibility contest between highly qualified witnesses, Lundy for the Secretary and Sorke and Runyon for Tennco, as to whether there were hazardous rib conditions in the mine on June 21 and 22. There was limited disagreement about the appearance of the mine's ribs. Runyon had seen pictures that Lundy had taken of conditions in the secondary escapeway and at the scene of the accident, and generally agreed that they looked like conditions in the mine on June 22. TrI. 499-500. Sorke also agreed that the "ribs in most of [Lundy's] pictures looked just like that" at the time of the investigation on June 22. TrII. 21-22. Despite the poor quality of the photographs, the trial judge noted that "they were clear enough to show some sloughing and cracks in ribs somewhere in the secondary escapeway on June 22, 2010." 35 FMSHRC at 2113, 2117. The parties' disagreement centered on whether the conditions were hazardous. As the trial judge noted, there was a "fundamental difference between the parties with regard to whether sloughage and the loose ribs are hazardous." 35 FMSHRC at 2116.

The Secretary argues that he “cannot be expected to predict how an ALJ will analyze the evidence when making credibility determinations and findings of fact on close issues” citing *James Ray*, 20 FMSHRC 1014, 1027 (Sept. 1998) and *Concrete Aggregates, LLC*, 25 FMSHRC 500, 503 (Aug. 2003) (ALJ). Tennco does not quarrel with the Secretary’s general statement of the law. It argues that the issues were not close, and that the problems with Lundy’s credibility were evident well before the cases were heard, such that the Secretary should have expected the adverse decision and not taken the cases to hearing.

Tennco’s Credibility Arguments

Tennco advanced several attacks on Lundy’s credibility. Those attacks lead to a finding of numerous “defects” in Lundy’s testimony, and, in conjunction with a finding that other MSHA inspectors failed to find similar defects during the weeks preceding the accident, resulted in the trial judge finding, initially, that the Secretary had failed to meet his burden of proof. An examination of Tennco’s arguments, however, demonstrates that the adverse result was not compelled, and that there was substantial evidence to support the Secretary’s positions on the violations.

Whether Lundy’s findings were contradicted by other MSHA personnel

The most direct attack on Lundy’s testimony was evidence introduced by Tennco that several other MSHA personnel had been in the mine within weeks of the accident and, with one exception, had not cited or remarked about hazardous rib conditions. It argues that the Secretary’s allegation that there were obvious widespread hazardous conditions “for three weeks prior to issuing the citation and order[s]” was contradicted by the Secretary’s “own personnel” “who were present in the mine during this same time frame [and] did not see these hazards, even though they traveled the same areas.” Appl. at 8.

That argument was one of the primary factors that prompted rejection of the Secretary’s position in the underlying cases. 35 FMSHRC at 2112-13, 2116. However, the Secretary’s position on when the violations occurred and the length of time that the allegedly hazardous conditions existed was not as broad as Tennco claimed. Moreover, there was evidence introduced by both parties from which it could reasonably have been concluded that no other MSHA personnel had traveled the areas where the violations were cited at a time when the hazardous conditions were alleged to have existed.

As framed by the citation and orders, and the Secretary’s arguments as presented in post-hearing briefs, the violation charged in Order No. 8335475 was that there were inadequately supported ribs that presented hazardous conditions to miners along the roadway and in the active section on June 22, 2010, the day of the accident and investigation. The violation charged in Order No. 8335476 was that the preshift examination conducted by Tennco between 5:00 a.m. and 6:15 a.m. on June 22 was inadequate. While the narrative section of the order included a statement that “[n]o loose ribs have been noted in the book reviewed for the previous three weeks,” that observation is not an element of the violation. As the Secretary contended in his

post-hearing brief, the violation could have been established by proof that the June 22 preshift examination was inadequately performed. The violation charged in Citation No. 8335475 was that Tennco conducted an inadequate weekly examination of the mine's escapeways, the most recent of which was done on June 21, the day before the accident/investigation. That violation could have been established by proof that the weekly escapeway examination conducted on June 21 was inadequate, as the Secretary contended in his post-hearing briefs. Consequently, the Secretary could have established each of the alleged violations by proving that hazardous rib conditions existed on June 21 and 22. The length of time that such conditions existed prior to June 21 would have been one of a number of relevant considerations in assessing the degree of Tennco's negligence,⁸ but proof that hazardous rib conditions existed prior to June 21 was not a necessary element of any of the alleged violations.

The Secretary introduced evidence that the hazardous rib conditions were of relatively recent origin, and were related, at least in part, to a spell of hot weather that resulted in condensation of moisture, referred to as "sweating," which wet the mine floor and softened the approximately 10-inch thick "middle man" in the coal seam, weakening the coal ribs.⁹ Lundy had described many of the hazardous conditions as appearing "fresh" or "recent." TrI. 66, 71, 81, 98-99, 134, 144. Inspectors from the State of Kentucky, who were riding with Lundy through the travelway, had remarked that there were recent changes in the ribs, changes that had not been there when they were last in the mine. TrI. 69.¹⁰ Sorke had also remarked to Lundy that the conditions in the mine were starting to change because they were taking on a little bit of moisture. TrI. 69-70. Runyon confirmed that the conditions were changing. He stated to Lundy; "It's getting wet and it's changing a lot." TrI. 222-23.

⁸ See *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

⁹ When Lundy arrived at the mine on June 22, the outside temperature was 93 degrees, as compared to the ambient temperature of 55-56 degrees underground. TrI. 99-100. When that hot air was forced through the mine by the ventilation system, considerable moisture condensed on the cool mine surfaces, to an extent that the mine floor was wet. TrII. 33-34. Runyon explained that the coal did not absorb the condensed moisture, but that the middle man did, which caused it to get soft and flake out. TrI. 419. Lundy's notes reflect a statement by Runyon to the effect that he had "seen the ribs rolling and getting worse but that he does not consider it to be that bad." Ex. R-UU at 19.

¹⁰ That evidence was not admitted, because Tennco's objection, on hearsay grounds, was sustained. TrI. 66-68. Under Commission rules, hearsay is admissible if it is relevant and not unduly repetitious or cumulative. 29 C.F.R. § 2700.63(a). Hearsay evidence should be evaluated to determine whether it is reliable and entitled to any probative weight. *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (Mar. 1998). The Secretary could not have anticipated that the statements would not be admitted under the Commission rule.

Lundy testified that the hazardous rib conditions evolved over a period of 10-14 days, such that some of them could have been identified as of June 12 or, possibly, as early as June 8.¹¹ As noted in the Decision in the underlying cases, John Sizemore, reputed to be a thorough MSHA inspector, had been in the mine on May 21 and 25, and June 1, 3, 7, 8, and 15, 2010. In addition, Mark Hiser, an MSHA engineer who was accompanied by two other MSHA personnel, had traveled to the working section on June 10 to perform a methane study in conjunction with a request by Tennco to take 40-foot cuts. Neither Sizemore, nor Hiser's party, noted any problems with the mine ribs, with the exception of a citation for an inadequately supported rib in the belt entry issued by Sizemore on June 1.¹² 35 FMSHRC at 2113.

Only one of the visits by other MSHA personnel, Sizemore's June 15 inspection, occurred squarely within the time frame that Lundy believed that many of the hazardous rib conditions existed. However, on June 15, Sizemore apparently did not travel the No. 2 entry or the other areas of the mine that were the focus of Lundy's investigation. Sorke, who traveled with Sizemore that day, testified that they traveled up the belt line and most likely returned the same way. TrI. 614-15. Sorke's recollection of the visit was aided by Sizemore's field notes, which reflect that they traveled the belt entries, and "returned to surface same way entered." Ex. R-T. The next most recent visit was by the engineering party on June 10, 12 days before Lundy's investigation. Many, most, or all of the conditions that were the focus of the violations may not have been in existence, and/or would not have been as obvious, at that time. Sizemore had traveled the areas that Lundy cited as recently as June 7 and 8. Lundy testified that he had shown Sizemore pictures of the conditions that prompted the violations, and Sizemore informed him that "they weren't like that" when he had been in the mine. TrI. 304.

¹¹ In Lundy's judgment, at least some of the rib conditions that he deemed hazardous had existed "probably around two weeks, give or take a few days, you know, a couple days." TrI. 98. He felt that "some" of the conditions had existed longer than 5 days. TrI. 99. Based on his experience, and what he was told, he concluded that the "conditions had mostly occurred in the past two weeks" and that all of them had existed longer than a couple of shifts. TrI. 196. As to the conditions in the secondary escapeway, he felt that they were present on June 21, when the last weekly examination had been done. He also felt that, while it was a "gradual process," there was plenty of evidence that "stuff was happening" in the escapeway at least two weeks prior to June 22. As to the preshift violation, he opined that the conditions had existed for a "minimum of 3 preshifts, and some as much as two weeks. TrI. 263. On cross-examination, he declined to state that the conditions would have been obvious two weeks before the accident. TrI. 301-02. He opined that the conditions "evolved" over a 2-week period, and that many "would have been obvious even 10 or 12 days prior." TrI. 302. He went on to state that they "existed for 10 to 14 days." TrI. 302.

¹² Sorke disagreed with Sizemore's determination that the condition was hazardous. TrI. at 597.

The evidence discussed above could have lead a reasonable person to conclude, contrary to Tennco's argument, that no other MSHA personnel had traveled the areas where the violations were cited at a time when the hazardous conditions were alleged to have existed. The Secretary was not required to adopt Tennco's position, and could reasonably have failed to anticipate that the trial judge would view the evidence as Tennco urged.

Lundy's mistaken references to escapeways.

During his testimony on direct, Lundy repeatedly referred to the No. 2 entry as the "primary" escapeway, when, in fact, it was the secondary escapeway, as he had correctly recorded in his field notes. TrI. 42-43, 134, 156, 166, 172, 175; Ex. R-UU at 9. He also referred to the primary escapeway as the secondary escapeway. TrI. 45-46, 95-97, 244. As a result, the trial judge found that Lundy was "terribly confused about where he traveled in the mine," and "his entire testimony regarding the locations where his photos were taken is incorrect." 35 FMSHRC at 2113-14.

Lundy explained that he had mistakenly identified the two escapeways. TrI. 288, TrII. 77. Moreover, his testimony that the inspection party traversed the main mine travelway was consistent, and there was no significant dispute about where the party traveled in the mine, or that the bulk of the allegedly hazardous conditions that Lundy observed and described were located in the main travelway, which was the secondary escapeway.

The Secretary could not have reasonably anticipated that Lundy would mistakenly interchange the names of the two escapeways, or the extent of the adverse impact on his credibility that resulted from what was, in effect, a simple labeling error.¹³

¹³ The judge's conclusion may have been based, in part, on the fact that Lundy was uncertain about specific locations where some of the photographs of allegedly hazardous conditions were taken. TrI. 175, 361. He had not made notes for each photograph, which Tennco argued was not consistent with MSHA policy. TrI. 282. Lundy explained that the photos had all been taken in the secondary escapeway, and were intended to show general conditions, not specific violations, because he had determined not to issue 40-50 citations for violations of the roof/rib control standard. TrI. 134, 247, 361, 380-81. Moreover, there was evidence that rebutted at least one of Tennco's challenges. Sorke testified that photographs purporting to show hazardous conditions in the pillars closest to the portal could not have been taken at those locations because the pillars were not required to be banded as part of the abatement effort, indicating that there was nothing wrong with them. TrI. 633, 642-43. However, Lundy explained that Tennco had done a lot of rehabilitation work on those pillars while it secured approval of changes to its roof control plan and waited to obtain supplies for the banding process. TrI. 379. The mine map upon which Sorke identified unbanded pillars shows that most of the pillars within 6-7 breaks of the portal were not banded, which is consistent with Lundy's explanation. Ex. R-LL.

The extent of the allegedly hazardous conditions

Lundy had noted in the escapeway citation that hazardous rib conditions were widespread even in the primary and secondary escapeways. Based primarily on his testimony that he had not traveled the primary escapeway in its entirety, the court found that Lundy had traveled “only the secondary escapeway,” which “is in conflict with the citation.” 35 FMSHRC at 2114.

However, Lundy testified that he had examined an approximately 400-foot length of the primary escapeway and found hazardous rib conditions, although he mistakenly referred to the location as the secondary escapeway. TrI. 45-46, 95-97, 244. Moreover, he related that his supervisor, Curnutt, who had traveled the primary escapeway, told him that conditions were essentially the same as those in the secondary escapeway. TrI. 317-18, 322. That evidence was rejected as unreliable, based, apparently, on the fact that Curnutt was not called as a witness. 35 FMSHRC 2114. Perhaps because of that ruling, Tennco continues to argue that there was “only one” inspector who inspected “only one” escapeway. Appl. Reply Br. at 4.

Aside from the fact that the escapeway violation could have been established by proof that hazardous conditions existed in only the secondary escapeway, there was evidence from which a reasonable person could have concluded that there were hazardous conditions in both escapeways. The Secretary was not required to anticipate an adverse outcome on that issue, or its adverse impact on Lundy’s credibility.

Failure to issue an imminent danger order

Tennco made much of the fact that Lundy did not issue an imminent danger order pursuant to section 107(a) of the Act, which the trial judge found to be inconsistent with his assessment that widespread hazardous conditions existed. 35 FMSHRC at 2117. However, Lundy explained that, with a mining height of 7 feet, a rib was unlikely to fall more than 7 feet into the entry and that he felt that the inspection party, a limited number of persons, all of whom were certified examiners, could travel safely in the center of the 20-foot wide entry, and that issuance of an imminent danger order would have substantially impeded the investigation of the accident. TrI. 238, 307-10.

The Secretary was not required to anticipate that Lundy’s reasonable explanation would be rejected, or the adverse impact of that rejection on his credibility.

Conclusion

While Tennco succeeded in convincing the trial judge to reject the Secretary’s positions on the citation and orders, there was ample evidence that could have prompted a reasonable person to reject Tennco’s arguments. The Secretary could not have been expected to predict that the trial judge would accept them, and would reject Lundy’s testimony and the Secretary’s positions. I find that the Secretary has carried his burden of proof, and established that his position as to each of the alleged violations was substantially justified, that is, justified to a

degree that could satisfy a reasonable person and had a reasonable basis in both law and fact.

ORDER

Based upon the foregoing, I find that the Secretary's positions on the citation and orders at issue in the underlying cases were substantially justified. Accordingly, Tennco's application for attorney's fees and expenses is denied.

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

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 21, 2014

BRODY MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEVA 2014-83-R
	:	Order No. 7166788; 10/28/13
	:	
v.	:	Docket No. WEVA 2014-82-R
	:	Order No. 9003242; 10/28/13
	:	
	:	Docket No. WEVA 2014-86-R
	:	Order No. 4208892; 10/29/13
	:	
	:	Docket No. WEVA 2014-87-R
	:	Order No. 4208893; 10/29/13
	:	
	:	Notice No.: 7219154; 10/24/13
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID: 46-09086
ADMINISTRATION, (MSHA),	:	Mine: Brody Mine No. 1
Respondent.	:	

ORDER DENYING APPLICATION FOR TEMPORARY RELIEF

Before: Judge Steele

This case is before me upon an Application for Temporary Relief filed by Contestant Brody Mining, LLC (“Brody Mining”) pursuant to Section 105(b)(1)(B)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Act” or “Mine Act”) and 29 C.F.R. §§ 2700.46, 47. Brody Mining filed its Application on November 4, 2013. On November 7, 2013, the Secretary filed his Memorandum of Law in Support of Opposition to Application for Temporary Relief. A hearing on this matter was held on November 8, 2013 in Pittsburgh, Pennsylvania.

Factual and Procedural Background

These Contest cases are related to a Pattern of Violations (“POV”) notice issued to the Brody Mine pursuant to section 104(e) of the Mine Act. Notice No. 7219154 was issued on October 24, 2013. Subsequently, Order Nos. 9003242, 7166788, 4208892, and 4208893 were

issued at the mine on October 28 and 29, each requiring the withdrawal of all persons in the affected area until the violation was abated, pursuant to section 104(e)(1) of the Act. In its Application for Temporary Relief, Brody sought temporary relief from these orders and the notice of a pattern of violations.

Legal Standard

Section 105(b)(1)(B)(2) of the Act states:

[a]n applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 104 together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if –

- (A) A hearing has been held in which all parties were given an opportunity to be heard;
- (B) The applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and
- (C) Such relief will not adversely affect the health and safety of miners

The requirements of the statute are mirrored in the Commission's rules:

§ 2700.46 Procedure.

- (a) When to file. As provided in section 105(b)(2) of the Act, 30 U.S.C. § 815(b)(2), an application for temporary relief from any modification or termination of any order or from any order issued under section 104 of the Act, 30 U.S.C. 814, may be filed at any time before such order becomes final. No temporary relief shall be granted with respect to a citation issued under sections 104(a) or (f) of the Act. 30 U.S.C. §§ 814(a) and (f).
- (b) Statements in opposition. Any party opposing the application shall file a statement in opposition within 4 days after receipt of the application.
- (c) Prior hearing required. Temporary relief shall not be granted prior to a hearing on such application.

§ 2700.47 Contents of application.

(a) An application for temporary relief shall contain:

- (1) A showing of substantial likelihood that the findings and decision of the Judge or the Commission will be favorable to the applicant;
- (2) A statement of the specific relief requested; and
- (3) A showing that such relief will not adversely affect the health and safety of miners in the affected mine.

(b) An application for temporary relief may be supported by affidavits or other evidence.

Analysis

The parties appear to agree that temporary relief may be granted in this situation. See Application at 4 (quoting 78 FR 5056 (January 23, 2013)). The court agrees. In seeking temporary relief, consistent with the forgoing statutory provision and Commission Procedural Rules 46 and 47, the applicant has the burden of showing all three of the statutory requirements before temporary relief is granted. As noted above, a hearing was held on November 8, 2013, satisfying part (A) of the temporary relief provisions.

Other than the hearing requirement, the right to temporary relief is to be decided by two statutory requirements. First, the applicant must show that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and second the applicant must show that such relief will not adversely affect the health and safety of miners. The applicant has the burden of proof to establish these elements. The wording of the statute requires that the applicant make “showings,” and accordingly, the burden is on the applicant. In addition, even general procedural rules require the applicant to shoulder the burden of proof as the proponent of the order. See Commission Rule 63(b)(“The proponent of an order has the burden of proof”); See also *Buck Mountain Coal Company*, 15 FMSHRC 2350, 2352 (July 1993)(ALJ) (wherein temporary relief was denied by a Judge who found that the applicant had failed to meet its burden of proof to justify relief due to the conflicting testimony of witnesses).

The Contestant’s application raises a number of arguments which relate to the likelihood that the Commission will ultimately favor its challenge to the pattern of violations notice by its challenge to the later issued orders enforcing the notice. It argues that the Secretary’s regulations at 30 C.F.R. Part 104, as constituted as of March 25, 2013 are invalid since it argues that POV notifications cannot be based on non-final prior issuances. Application at 6-10. The Contestant appended a brief filed by other parties in the 6th Circuit challenging Part 104 rule for various reasons. Application at Exhibit 7. It argues that the underlying screening criteria, posted on the MSHA website, had not been subjected to notice and comment rulemaking as required by the Administrative Procedure Act and therefore could not be utilized. Application at 10-12. The Contestant also alleges a change of ownership on December 31, 2012, subsequent mine personnel and mine management changes, and closures of certain areas of the mine, which it claims the Secretary should have considered more fully as mitigating factors. It states that the Secretary abused his discretion in considering the criteria the Secretary used to assess the POV finding against its mine. Application at 13-14.

The Secretary defends the pattern of violations rule's consistency with the Mine Act, and claims that it validly adopted the pattern of violations rule, and that the screening criteria are not subject to the requirement of notice and comment rulemaking. *See* Secretary's Memorandum at 3-25. The gist of the Secretary's arguments is that the screening criteria and pattern criteria guide him in the identification of mine operators who may have a pattern of such violations. This is data that informs the prosecutorial decision-making process. Secretary's Memorandum at 41. He claims that he has identified a pattern of violations in a set of previously issued significant and substantial violations at the Brody Mine and that he will demonstrate that this pattern exists at a hearing. *Id.* at 39-40. The Secretary appears to be willing to demonstrate the existence of the violations and their levels of gravity at a hearing in this matter and thereby addresses the issue of finality regarding violations which compose the pattern but which have not been adjudicated in the past.

These questions are complex and the meaning of term "pattern of violations" has not been fully litigated. In many respects, this appears to be a case of first impression. The court does not now definitively make a determination of whether the Contestant has established that the Commission would favor its position on the merits on the question of whether Part 104 and the screening criteria are invalidly promulgated, or incorrectly applied, because it is unnecessary to do so at this early point in the litigation. That is because the Contestant has failed to meet its burden to establish that granting the relief would not adversely affect the health and safety of the miners.

The court has looked diligently for argument on this essential point and found remarkably little mention of it, and importantly, no evidence adduced to support it. The Application only mentions this prong in passing. Application at 5. The Memorandum states only that "because of wide-ranging improvements, complete change of management personnel, and increased scrutiny, relief will not adversely affect the safety and health of the miners." Memorandum in Support of Application at 9. Statements of counsel are not evidence. *See Secretary of Labor o/b/o Walter Jackson v. Mountain Top Trucking Co., Inc. et al.*, 21 FMSHRC 1207, 1213 (November 30, 1999). As for unauthenticated documents of disputed real world significance, they could be excluded as lacking authentication under an analogous rule at Federal Rule of Civil Procedure 56(e), and they remain open to dispute as to their meaning and accuracy. *See Hoffman v. Applicators Sales and Service, Inc.*, 439 F.3d 9 (1st Cir. 2006).

The Secretary did not reply to the statement of the Contestant in the Application on this point, but in the discussion of the claimed mitigating circumstances surrounded by the alleged change of ownership and the adoption of a corrective action program, the Secretary discounts the idea that these changes might be found to have an impact on miner safety and health. Secretary's Memorandum at 36-39. Accordingly, whatever effect these changes have made, they remain disputed by the parties and there is certainly no evidence upon which to base relief. There is insufficient indication that removing the possibility of Section 104(e) withdrawal orders will not affect mine safety and health.

At oral argument the issue of the effect of the relief on the safety and health of the miners also was only discussed briefly, as the mine operator's counsel stated that the abatement of the violations found by the inspector is sufficient to address the safety concerns. Tr. 34. The

Secretary's counsel responded to the mine operator's claim by stating that what it regards as a pattern of violations has required this enhanced enforcement. Tr. 57.

In this case the mine operator has not met its burden to establish that granting temporary relief would not affect the safety and health of its miners. The remedy at Section 104(e) exists as part of the graduated enforcement scheme put in place by the framers of the Mine Act. *See Greenwich Collieries*, 12 FMSHRC 940, 945 (May 1990)(citing *White County Coal Corp.*, 9 FMSHRC 1578, 1581 (Sept. 1987) (discussing the graduated enforcement mechanisms of the Act)); S. REP. NO. 95-181, AT 4 (1977)(wherein the Committee stated that under the prior Mine Act, "Mine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the government can bring habitual and chronic violators of the law."). The closure orders are designed to improve miner safety and safeguard their health by spurring increased attempts by the mine operator to assure compliance or remedy non-compliant conditions prior to detection by MSHA inspectors. Relying only on the abatement time requirements is not as effective since the inspector must still detect the violation wherein the possibility of a pattern order is likely to cause the mine operator to take corrective action on potential violations before they are ever discovered by MSHA. The Section 104(e) remedy is one of these remedies that are designed to spur added compliance. Absent some clear testimony and authenticated documentary evidence put in to the record to the contrary, I cannot find that the relief would not reduce the health and safety of the miners during the pendency of this litigation.

Finally, the court notes that the application draws attention to potential "irreparable harm" to the Contestant if temporary relief is not granted. Application at 4-5. As a matter of law, this potentiality is not part of the test to determine the availability of temporary relief under Section 104(b)(1)(B)(2). There is simply nothing in the statute which allows this consideration in an application for temporary relief. In fact, the U.S. Court of Appeals for the D.C. Circuit has stated that this section is a "model of near-perfect clarity," making it clear that there is little room for interpretation of ambiguity in this provision of the Act. *Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 239 (D.C. Cir. 2011). Moreover, no irreparable harm has been established. Mere monetary losses are not considered irreparable harm. *See United Mine Workers Of America On Behalf Of Mark A. Franks v. Emerald Coal Resources*, 2013 WL 4140440 (F.M.S.H.R.C.)(citing *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987)). Claims regarding the potential effect of the Secretary's actions on the Contestant's

bankruptcy are not established and are too conjectural to be credited .In light of the clear statutory wording, and the instruction from the D.C. Circuit that the clear provisions of 105(b)(1(B)(2) should not be embellished, such arguments are not considered material here and if they were, they would be rejected.

Conclusion

Accordingly, Brody Mining's Application for Temporary Relief is **DENIED**.

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

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