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COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20004-1710

December 9, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINSTRATION (MSHA) v. OAK GROVE RESOURCES, LLC	Docket Nos. SE 2009-261-R SE 2009-487

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

DECISION

BY: Jordan, Chairman; Nakamura and Althen, Commissioners

These proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), involve a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Oak Grove Resources, LLC following a fatal accident at its mine. The Secretary alleges that Oak Grove violated a notice of safeguard ("safeguard") which had been previously issued to the mine pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b).

Oak Grove contested the citation and the associated civil penalty before a Commission Administrative Law Judge. Initially, the Judge vacated the citation; he concluded that the safeguard had not been validly issued and, therefore, a violation of the safeguard could not be sustained. 33 FMSHRC 846, 852-54 (Mar. 2011) (ALJ). The Secretary petitioned the Commission for review, which we granted.

The Commission reversed the Judge, concluded that the safeguard was valid, and remanded the citation to the Judge for further proceedings as appropriate. 35 FMSRHC 2009, 2015 (July 2013).

On remand, the Judge concluded that Oak Grove violated the safeguard and that the violation was significant and substantial ("S&S").[1] 35 FMSHRC 3422, 3431 (Nov. 2013) (ALJ). Oak Grove then filed a petition for discretionary review, which we granted.

For the reasons that follow, the Commission now affirms the Judge's conclusion that Oak Grove violated the safeguard, but reverses his decision that the violation was S&S. The proceedings are remanded to the Judge so that he may assess an appropriate civil penalty.

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

I.

Legal Framework

Although an operator is usually cited for violations of mandatory safety and health standards developed through notice-and-comment rulemaking pursuant to Title I of the Mine Act, 30 U.S.C. § 811(a), Title III of the Mine Act also gives the Secretary the authority to issue safeguards in underground coal mines to reduce hazards associated with the transportation of miners and materials. 30 U.S.C. § 874(b).[1] The Secretary implements this provision by authorizing inspectors to issue safeguards on a mine-by-mine basis. A safeguard informs the mine operator about conduct that is mandated or prohibited in a given situation involving transportation in the mine. The inspector issues the safeguard in writing and indicates a time by which the operator must provide and subsequently maintain that safeguard. 30 C.F.R. § 75.1403-1(b). If the operator does not comply with the safeguard, the inspector issues a citation. *See Wolf Run Mining Co. v. FMSHRC*, 659 F.3d 1197, 1204 (D.C. Cir. 2011).

II.

Factual and Procedural Background

On May 28, 2008, a fatal accident occurred at an underground coal mine operated by Oak Grove in Jefferson County, Alabama. Stips. at 1-2; Gov't Ex. 4, at 2. Oak Grove was in the process of transporting the body of a shearing machine to the mine's longwall face. The 24-ton body was placed on a "shearer carrier," a haulage car specifically designed for the task. Tandem locomotives led the shearer carrier, while a second set of tandem locomotives pushed the shearer carrier down the main haulage road.

Motor No. 8 led the procession. Connected to its rear by a coupling device was Motor No. 3, establishing a rigid connection. Motor No. 3 was then connected to the shearer carrier by a one inch diameter, *flexible,* wire rope. The shearer carrier was in turn connected to Motor No. 4 by a solid drawbar. Finally, Motor No. 4 was connected to Motor No. 9 by a coupling device, establishing a rigid connection. The wire rope connection between Motor No. 3 and the shearer was the only connection that was not rigid.[2]

As the lead motors ascended an incline in the mine floor, the shearer carrier derailed. *Id.* It was the fifth time the carrier had derailed during that trip. The operator of Motor No. 3, miner Lee Graham,

[1] Section 314(b) of the Act states that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 U.S.C. § 874(b).

[2] Motors No. 4 and No. 9, the pushing motors, generated most of the force to move the carrier. Tr. 99, 104. The wire rope connecting Motor No. 3 to the shearer carrier behind it "was [used to] help pull the equipment." Tr. 104. It was also used "to help guide the carrier, particularly around curves, and to prevent derailments by using tension." Gov't Ex. 4 at 4; *see also* Tr. 44. The rope was used to pull the carrier back into position on the rails following a derailment. Gov't Ex. 4, at 6; Tr. 106-07.

exited his motor and walked over to examine the derailed carrier. Graham was standing on the tracks, downhill from Motors No. 3 and No. 8, when the motors rolled down the grade, pinning him against the carrier and inflicting the fatal injuries.[3]

David Allen, a mining engineer and a supervisor at MSHA, investigated the accident. Tr. 16-17, 19; Gov't Ex. 4, at 3. As a result of his investigation, he issued Oak Grove a citation for a violation of Safeguard No. 2604892. The citation states:

> A fatal accident occurred on May 22, 2008, when a motorman was crushed between a derailed haulage car and the locomotive he had been operating. The haulage car was being pushed on the main haulage road. The victim would not have been exposed to the pinch point between the locomotive and the haulage car if the car was being pulled instead of pushed on the main haul road.

Gov't Ex. 3 (Citation No. 7696616). Inspector Allen designated the citation as S&S. *Id.*

The safeguard had been issued to Oak Grove on March 3, 1986; it implements the criteria at 30 C.F.R. § 75.1403-10(b). The safeguard states:

> The No. 902 battery powered locomotive was being used to push two loaded supply cars consisting of a car of timber and a car of roof bolts down the graded haulage supply mine track entry of the main south area of the mine, near the intersection of the No. 7 and No. 14 section switch and the No. 10 and the No. 5 section switch. Such area is approximately 2100 feet from the main bottom area of the mine and approximately 3600 feet from the No. 7 section and the No. 10 sections, respectively.
>
> This notice to provide safeguard requires that cars on main haulage roads not be pushed except where necessary to push cars from the side tracks located near the working section to the producing entries and rooms.

Gov't Ex. 2 (Safeguard No. 2604892).

Oak Grove contested the citation, the S&S designation, and the Secretary's proposed $55,000 civil penalty. Oak Grove's contest of the citation included a challenge to the validity of the underlying safeguard.

On August 19, 2010, an Administrative Law Judge issued an order concluding that the safeguard was in effect at the time of the accident. 32 FMSHRC 1081 (Aug. 2010) (ALJ) (order

[3] The brakes had not been set on either of the lead motors. 33 FMSHRC at 850; Tr. 57-58; Gov't Ex. 8. According to MSHA's Report of Investigation, post-accident tests "revealed that the motors would not move if either the service brakes or the park brakes on either motor were engaged." Gov't Ex. 4, at 8.

denying Oak Grove's motion for summary judgment).[4] Thereafter, the parties proceeded to a hearing. On March 28, 2011, the Judge issued a decision determining that the safeguard was not validly issued. 33 FMSHRC at 852 (citing *Southern Ohio Coal Co.,* 7 FMSHRC 509, 512 (Apr. 1985) ("*SOCCO I*"). Therefore, the Judge vacated the citation at issue. *Id.*

On July 25, 2013, the Commission reversed the Judge and held that the safeguard is valid because it identifies a hazardous practice and specifies a remedy. 35 FMSHRC at 2014. We remanded the case to the Judge to determine if the Secretary proved that Oak Grove violated the safeguard as alleged and to conduct other appropriate proceedings.

On November 13, 2013, the Judge issued his decision upon remand. He ruled that Oak Grove had violated the safeguard, rejecting Oak Grove's argument that the safeguard did not apply when the mine was moving heavy equipment such as the shearer carrier. 35 FMSHRC at 3425-26. The Judge also concluded that the Secretary proved that hazards associated with pushing contributed to the fatal incident, rejecting the operator's claim that the accident had no relation to the safeguard. The Judge therefore affirmed the Secretary's S&S designation, and assessed a penalty of $55,000.

III.

Disposition

When considering citations issued for alleged violations of safeguards, the Commission interprets the language of the safeguard narrowly to ensure that the operator was provided sufficient notice. *SOCCO I,* 7 FMSHRC at 512; *see also Green River Coal Co.,* 14 FMSHRC 43 (Jan. 1992); *Bethenergy Mines, Inc.,* 15 FMSHRC 981 (June 1993). The D.C. Circuit has recognized that "the Commission has through adjudication interpreted the criteria so as to ensure that an operator has adequate notice of what safeguard is required." *Wolf Run,* 659 F.3d at 1202 & n.8. This approach balances the Secretary's broad grant of authority to issue what are in effect mine-specific mandatory standards against the absence of the traditional protections accorded by notice-and-comment rule making procedures. *SOCCO I,* 7 FMSHRC at 512. When issuing a safeguard, however, the Secretary is required to provide written notice of the hazardous condition identified by the inspector and a specific remedy. *The American Coal Co.,* 34 FMSHRC 1963, 1969 (Aug. 2012).

A. Oak Grove violated the safeguard.

On review, Oak Grove argues that the Judge erred by failing to narrowly construe the safeguard as required by *SOCCO I.* More specifically, Oak Grove contends that because the safeguard cites the practice of pushing loaded supply cars, it cannot be construed as applying to the practice of pushing heavy equipment on a haulage car.

[4] On August 31, 1987, MSHA issued a "waiver" to Oak Grove which 'permitted [Oak Grove] to push heavy mining equipment on track haulage roads" if six specified conditions were met. OG Ex. 1, at 2. By letter dated December 3, 2001, MSHA informed Oak Grove that the waiver was void. *Id.* at 1.

We disagree and affirm the Judge's finding of a violation. We conclude that the safeguard applies in this case.[5]

The safeguard "requires that cars on main haulage roads [are] not [to] be pushed." Gov't Ex. 2. Although the hazardous condition discussed in the safeguard happened to involve supply cars carrying timber and roof bolts, the remedy set forth prohibits the pushing of "cars" on the main haulage road. We conclude that the specific equipment carried by the car is immaterial. Oak Grove was on notice that it was prohibited from pushing all "cars" on "main haulage roads."

We are not persuaded by Oak Grove's arguments that slight differences between a supply car and shearer carrier, such as differences in the amount of ground clearance from the mine floor, exempt the carrier from the requirements of the safeguard. Nor are we persuaded that the speed at which the carrier was traveling or the number of motors used in the move are sufficiently meaningful distinctions to invalidate application of the safeguard.[6] Simply stated, the safeguard provided notice that the operator was prohibited from pushing cars with a limited exception, and it is undisputed that the exception was not met. *See* Gov't Ex. 2 ("cars on main haulage roads [shall] not be pushed except where necessary to push cars from the side tracks located near the working section to the producing entries and rooms").

Furthermore, we note that while the Secretary initially provided Oak Grove with a waiver of the requirements of the safeguard when it pushed heavy equipment, the waiver was revoked in 2001. Revocation of the waiver by MSHA provided additional notice to Oak Grove that the safeguard prohibited the practice of pushing heavy equipment.

Accordingly, the Secretary has provided sufficient notice to the operator that the safeguard governs pushing all cars on main haulage roads, including cars carrying heavy equipment. As a result, we uphold the citation in question.

B. The Judge erred by finding that the violation was significant and substantial.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a

[5] Commissioner Althen did not participate in the Commission's initial *Oak Grove* decision. Although Oak Grove continues to contest the validity of the safeguard, Commissioner Althen finds that the validity of the safeguard for purposes of Commission review was established in the Commission's initial decision. Thus, he expresses no opinion on the validity of the underlying safeguard.

[6] Oak Grove argues that "the safeguard is only applicable to the transportation of specific supplies and materials, namely timbers and roofbolts." OG Br. at 19. We conclude that Oak Grove's interpretation of the safeguard would lead to absurd results. In order to issue enforceable safeguards, inspectors would need to separately cite each individual piece of equipment that should not be transported, potentially requiring dozens of safeguards to fully implement the criteria at 30 C.F.R. § 75.1403-10(b), an unnecessary burden for both the inspectors and mine management.

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 further explained:

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

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).

On remand, the Judge affirmed the S&S designation. 35 FMSHRC at 3430. The first element of the *Mathies* test was satisfied when the Judge affirmed the violation. The Judge concluded that the second element was satisfied because the Secretary established three discrete hazards "attendant to the practice of pushing cars." *Id.* Those hazards are "diminished visibility, the creation of a pinch point and the lack of positive control." *Id.* With respect to the third *Mathies* element, the Judge concluded that the evidence demonstrated that the hazards resulted in the derailment of the shearer carrier, and it was during the course of assessing the derailment that the accident occurred. Finally, the Judge found that it was reasonably likely that the injury would be of a reasonably serious nature.

For the reasons that follow, we conclude that the Judge's S&S determination was erroneous because substantial evidence does not support a finding that this violation (pushing the shearer carrier) contributed to diminished visibility, the creation of a pinch point, or lack of positive control.

We discuss each of these hazards in turn.

Decreased visibility

The record reflects that decreased visibility was not an issue in the circumstances presented by this case as a miner was operating a motor at the head of the convoy, and was therefore in front of the pushing motors. As described above, Lee Graham was operating the No. 3 Motor (the second car in the procession), and Oak Grove's assistant general mine foreman/day-shift foreman was riding on Motor No. 4 (the fourth car). Tr. 98-100. As counsel for the operator explained at oral argument before the Commission, "the whole theory that you are sitting behind the supply cars and not being able to see up ahead doesn't apply because you actually have somebody up ahead." Oral Arg. Tr. 11.[7]

[7] At the hearing, counsel for the Secretary never asked any witness if visibility obstructions contributed to this derailment.

In sum, substantial evidence does not support a finding that the pushing violation contributed to the hazard of decreased visibility.

Creation of a pinch point

There is also not substantial evidence in the record to support the finding that pushing the cars contributed to the hazard of a pinch point. Rather, the inspector testified that a pinch point was created by the use of wire rope to connect Motor No. 3 and the shearer carrier. Tr. 44. When the inspector was asked on direct examination how the operator should remedy the hazard, the inspector testified that it should "use a drawbar or tongue [as] the rigid connection between the shearer carrier and the motor and pull it." Tr. 44. In fact, after the accident at the mine, a drawbar was attached in place of the wire rope, and Oak Grove then continued to move the shearer carrier to the longwall face. Tr. 73. Thus, the inspector clearly testified that the use of a wire rope contributed to the hazard of a pinch point. Significantly, the inspector did not articulate how *pushing* the shearer carrier contributed to this specific hazard, as required by element two of *Mathies*.

Loss of positive control

The evidence in this case demonstrates that pushing the shearer carrier did not contribute to the hazard of a loss of positive control of the car. Nor is there any evidence that pushing caused the derailment.

There is no testimony regarding the likelihood of derailment when pushing a carrier as opposed to pulling the carrier. Furthermore, the inspector never stated that the lack of control increased the probability of a derailment. Rather, he testified that the derailment occurred "because there was slack in the wire rope between the #3 motor and the shearer carrier." Tr. 60. Furthermore, at oral argument before the Commission, counsel for the Secretary conceded that material on the mine floor caused the shearer carrier to derail. Oral Arg. Tr. 33, 36; Gov't Ex. 4, at 7 ('[a] build-up of material consisting primarily of a muddy combination of rock dust and mine floor materials . . . most likely caused the carrier to derail as indicated during interviews").

In concluding that the safeguard violation contributed to the hazard of a loss of positive control, Commissioner Cohen relies solely on one page of transcript testimony wherein the inspector stated that by pushing the cars, a miner cannot maintain good positive control of the loads. Slip op. at 11 (citing Tr. 43). However, when the inspector made this statement in the context of his general explanation of the hazards addressed by the safeguard (Tr. 41), he intertwined the hazard of poor visibility (which, as we have explained, did not apply in this case) with the loss of positive control. The inspector testified that "if you're pushing a load and it derails, since your visibility is obstructed, a lot of times you don't know that it's derailed until you've pushed it on farther. You don't have as good control. . . . If you're pulling a load, you can see if it derails and you know to stop immediately. And the severity of the accident would be lessened." Tr. 43. At oral argument, Secretary's counsel contended that pushing the cars is more dangerous than pulling them, but he also based this on the need for visibility. Specifically, he argued that "because the load was being pushed, those who were propelling the load forward could not see the build-up." Oral Arg. Tr. 33.

For these reasons, we conclude that substantial evidence does not support a finding that the violation of the pushing safeguard contributed to the hazards identified by the Secretary. Thus, element two of the *Mathies* test has not been met.

In fact, the record evidence identifies an independent cause of the fatality: the park and service brakes were not set on Motors No. 3 or No. 8 at the time of the accident. Gov't Ex. 4, at 8-9. The Report of Investigation states that "if either the service brakes or the park brakes on either motor were engaged," Motors Nos. 3 and No. 8 would not have moved. *Id*. at 8. This evidence demonstrates that an independent act, i.e., the failure to set the brakes on either motor, occurred after the violation of the safeguard. The motors rolled downhill and tragically crushed the miner. Indeed, the Judge recognized this independent cause in his initial decision, stating that "this accident occurred not because of any claimed failure to comply with [the] safeguard. In short the accident did not occur from pushing the shearer." 33 FMSHRC at 850.[8]

Because the Secretary confined his case to the circumstances of the accident and did not provide evidence of the likelihood of injuries from any of the alleged hazards created by pushing cars in the context of continued normal mining operations, he also failed to prove the third step of *Mathies*. The record is bereft of evidence regarding any likelihood of injuries from hazards contributed to by pushing cars during continued normal mining activity in the context of the particular facts in this case. *U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985)*; National Gypsum,* 3 FMSHRC at 825. In presenting his case on the third element of the *Mathies* test, the Secretary relied entirely on the occurrence of the accident at issue, producing no testimony demonstrating that hazards he identified (poor visibility, creation of pinchpoints, and lack of positive control), would have been reasonably likely to cause injury if normal mining operations had continued.

The Secretary's decision to base his S&S argument on the evidence regarding this fatality limited both the evidence and the arguments he asserted to support a reasonable likelihood that hazards associated with pushing would result in serious injury. Perhaps the Secretary could have introduced evidence that the violation would reasonably have been likely to have resulted in a serious injury from continuation of the transportation of the equipment. However, in concentrating solely on the occurrence of the fatality, he failed to do so.[9] Because the Secretary's case was confined to the accident, the Secretary has failed to meet his burden in proving element three of *Mathies* in this case.[10]

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[8] The Judge subsequently contradicted this finding in his decision on remand. 35 FMSHRC at 3430 (relying on "the closely-connected hazardous pushing practice which precipitated the derailment").

[9] At oral argument before the Commission, the Secretary's counsel was asked whether there was any record evidence in this case that derailments are reasonably likely to cause death or serious injury. He replied, "In the abstract? No. No. All of the evidence in this case is about this case." Oral Arg. Tr. 51.

[10] Although Commissioner Cohen states that substantial evidence supports his theory that

(continued…)

IV.

Conclusion

For the stated reasons above, we affirm the Judge's conclusion that Oak Grove violated Safeguard No. 2604892. We reverse the Judge's conclusion that the violation is "significant and substantial" because that conclusion is not supported by substantial evidence in the record. This proceeding is remanded to the Judge for assessment of an appropriate penalty.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

[10] (…continued)
there was a reasonable likelihood that the hazards will result in an injury, slip op. at 12-13, the only evidence he cites is the weight of the equipment transported. Essentially, therefore, his dissent simply assumes a reasonable likelihood that a serious injury would have occurred had the movement of the equipment not been interrupted.

Commissioner Cohen concurring, in part, and dissenting in part:

I concur with my colleagues' conclusion that Oak Grove violated Safeguard No. 2604892 when it pushed a shearer carrier on the main haulage road. I write separately because I believe that the Judge's determination that the violation was significant and substantial (S&S) is supported by substantial evidence in the record, and my colleagues are incorrect in concluding otherwise.

The Commission reviews a Judge's factual determinations under the *Mathies* test in accordance with the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I); *see also Black Beauty Coal Corp.*, 34 FMSHRC 1733, 1741 (Aug. 2012), *aff'd sub nom. Peabody Midwest Mining, LLC v. FMSHRC,* 762 F.3d 611 (7th Cir. 2014). "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 *Consolidation Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Under the substantial evidence standard, the Commission's task is a narrow one. "[E]ven if we would have weighed the evidence differently," our sole responsibility is to "determine whether a … reasonable factfinder could have reached the conclusions actually reached by … the ALJ." *Sec'y of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096, 1104 (D.C. Cir. 1998) (internal quotations omitted).

For the reasons that follow, I would hold that the record contains substantial evidence to support the Judge's determinations as to each of the four *Mathies* elements.

***Mathies* Step Two**

The second element of *Mathies* requires the Secretary to demonstrate that the violation contributed to a safety hazard. The Secretary argued that the violation contributed to three distinct hazards. Sec'y Post-Hearing Br. at 8-9. The Judge concluded that the Secretary demonstrated that pushing the carrier contributed to these hazards. 35 FMSHRC at 3430. I conclude that the record contains substantial evidence to support the Judge's decision.

Decreased Visibility

Common sense dictates that a 24-ton shearer carrier would obstruct the vision of a motor operator who was pushing the load along a graded haul road. In fact, the inspector testified that when a miner uses a motor to push rather than to pull a load it is "harder to see the track and the traffic in front of you." Tr. 43. Notably, the inspector was testifying about the visibility of *the miner who was actively engaged in pushing* the shearer-carrier in violation of the safeguard.

The majority concludes that it was not reasonable for the Judge to rely on the inspector's testimony that pushing the carrier contributed to a visibility hazard. *See* slip op. at 6. Instead, the majority independently determines that complete visibility of the track and traffic was not necessary for the miners operating the motors pushing the load. Citing oral argument by Oak Grove's counsel, the majority concluded that the position of the two miners in front of the load

rendered the visibility requirements of the pushing motor operators superfluous. *See* slip op. at 6 ("decreased visibility was not an issue in the circumstances presented by this case as a miner was operating a motor at the head of the convoy").

However, the majority ignores the fact that when a load is being pushed, the power to move it comes from the pushing motors, while the two motors which Oak Grove placed in front of the load were used to guide the shearer carrier and to help prevent derailment of the carrier. Gov't Ex. 4, at 2; Tr. 35, 69. When a load is being pulled, the miner who operates the pulling motor can see what is in front of him and react immediately if there is a problem with the track or traffic in front of the motor. Tr. 43. However, with the configuration used by Oak Grove, the miner operating the front motor could *see* a problem ahead (just as he would if he were operating a pulling motor), but would have to also *communicate* with the miner operating the pushing motor so that the miner operating the pushing motor could take effective action to avoid the problem. The necessity of communicating as well as seeing thus contributes to a hazard.

Creation of a pinch point

Contrary to the majority opinion, the inspector did testify how pushing the load rather than pulling it contributed to the hazard of the creation of a pinch point. The inspector explained that when a load is pulled, there is a solid bar – a tongue or drawbar – between the motor and the car being pulled. Tr. 29. However, with the configuration used by Oak Grove, instead of a bar there was a wire rope connecting the car with the load and the motor in front of it. Tr. 29, 35, 37, 39. The wire rope was a component of the pushing configuration; it was connected to a forward motor to supply tension to the carrier which would help to prevent the shearer carrier from derailing while the carrier was being pushed, but in turn it created the hazard of a pinch point. Tr. 44, 50-51.

Loss of Positive Control

The Judge also concluded, based on the inspector's testimony, that pushing heavy equipment decreases the amount of control the operator has over the load. 35 FMSHRC at 3430.

My colleagues conclude that "[t]he evidence in this case demonstrates that pushing the shearer carrier did not contribute to the hazard of a loss of positive control of the car." Slip op. at 7. However, the inspector testified that pushing a car provides less control as compared to pulling the car. Tr. 43 (stating that pushing the carrier creates a hazard because "[y]ou don't have as good control. It's like pulling a boat, it's easier to pull a boat than it would be to push a boat."). An inspector's judgment is an important element in a S&S determination. *Mathies Coal Co*., 6 FMSHRC 1, 5 (Jan. 1984) (citing *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825-26 (Apr. 1981)); *see also Buck Creek Coal Inc.*, *v. MSHA*, 52 F.3d at 133, 135-36 (7th Cir.

1995) (stating that the Judge did not abuse his discretion in crediting the opinion of an experienced inspector). [1]

The Judge relied on the testimony of the MSHA inspector in finding that the violation of the safeguard contributed to three discrete safety hazards – decreased visibility, creation of a pinch point and loss of positive control. My colleagues assert that Step 2 of the *Mathies* test was not met here because "substantial evidence does not support a finding that the violation of the pushing safeguard contributed to the hazards identified by the Secretary." Slip op. at 7. However, as described herein, the inspector testified as to each of the three hazards. The question of whether a particular violation is S&S is based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Here the particular facts surrounding the violation include the configuration of the motors and shearer carrier which Oak Grove used to move the shearer. The inspector's testimony about how the pushing of the shearer carrier with that configuration contributed to discrete hazards provides substantial evidence in the record supporting the Judge's finding as to Step 2 of *Mathies.*

***Mathies* Steps 3 and 4**

My colleagues also state that the record does not support the Judge's decision that it was reasonably likely that the hazards contributed to would result in a reasonably serious injury. *See* slip op. at 8. In reaching this conclusion, the majority restricted their analysis to the evidence relating to the derailment and the fatal accident which followed.[2]

However, it is well established that a Judge's evaluation of the reasonable likelihood of injury should be made *assuming* continued normal mining operations. *See U.S. Steel Mining Co.,* 7 FMSHRC 1125, 1130 (Aug. 1985) (emphasis added). The evaluation is made in consideration of the length of time that the violative condition existed prior to the condition and time it would have existed if normal mining operations had continued. *Elk Run Coal Co.,* 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co.,* 6 FMSHRC 1573, 1574 (July 1984). More recently, the Commission has reaffirmed that the S&S analysis should not contain any assumption that the violative condition would be abated by the operator. *Paramont Coal Co. Virginia LLC,* 37 FMSHRC 981, 985 (May 2015).

[1] The majority implies that I have made the legal conclusion that the violation contributed to the hazard of loss of control. *See* slip op. at 7. This is incorrect. Instead, as previously stated, I conclude that substantial evidence supports *the Judge's* legal conclusion that the violation contributed to a loss of control. *See* 35 FMSHRC at 3430. It was reasonable for the Judge to rely on the inspector's opinion that pushing a carrier provides less control as compared to pulling.

[2] Admittedly, the Secretary at trial (but not on appeal) and the Judge also confined their analysis to the facts of the accident rather than considering Steps 3 and 4 of *Mathies* in the context of continued normal mining operations.

Therefore, the majority's consideration of the fatal accident in isolation from continued normal mining operations is inconsistent with our case precedent.

In contrast, I believe that the record contains substantial evidence to support the conclusion that under continued normal mining operations it was reasonably likely that the hazards would contribute to a reasonably serious injury. It is undisputed that Oak Grove transports heavy equipment such as shearers, scoops, shields, and continuous miners on the haulage road a couple of times a year. Tr. 86-87, 108-09. This equipment is of tremendous weight. For example, the shearer weighs 24 tons and a shield weighs approximately 19 tons. Tr. 27, 46, 108-09. Since at least January 2002, the practice at Oak Grove was to push heavy equipment because the drawbar was oriented on the outby side of the carrier.[3] Tr. 85-86, 89, 99. The evidence supports the conclusion that a loss of visibility, or creation of a pinch point, or a loss of control that occurs during the move of a 24-ton piece of equipment (or equivalent) on a graded haulage road would be reasonably likely to result in a reasonably serious injury. *See Peabody Midwest*, 762 F.3d at 616 (the third step under *Mathies* only requires a Judge to determine whether, if a discrete hazard occurs (regardless of likelihood), it is reasonably likely that a reasonably serious injury would result). Indeed, it is hard to understand why the majority would conclude that any loss of control of such equipment on a graded road in a confined space would not reasonably be likely to result in an injury. According to *Peabody,* the Commission must determine whether, *if the hazard occurs* – e.g., a miner loses control of a 24-ton piece of equipment – there is evidence to support a conclusion that it is reasonably likely a miner will suffer an injury. I join the MSHA inspector and the Judge in concluding that the evidence supports such a conclusion. A derailment is just one of the events that may occur as a result of a loss of control, creation of a pinch point, or diminished visibility.[4]

[3] After the accident Oak Grove acquired a new carrier which can be pulled. Tr. 114.

[4] The majority contends that I "simply assume" that there is a reasonable likelihood that serious injury would occur during the course of continuing mining operations. Slip op. at 8 n.11. I disagree. Instead, I conclude that the weight of the equipment, together with the frequency of the moves, the graded haul road used to transport the equipment, and the number of miners involved in each move are factors which, combined, provide substantial evidence to support the Judge's conclusion that the third *Mathies* element was satisfied. No "assumptions" are necessary.

The accident at issue in these proceedings may not have occurred in a foreseeable manner. A mine is a dynamic environment and hazardous practices may lead to injuries in unpredictable ways. The Commission should not conflate our S&S analysis with tort law and require the Secretary to demonstrate that the violative practice actually and proximately caused a specific injury. Instead, the Commission should continue to consider whether it was reasonably likely that the hazards would contribute to a reasonably serious injury if normal mining operations continued with the hazardous practice.

Therefore, I would affirm the Judge's conclusion that the violation was S&S, and dissent from the majority's reversal of that portion of the Judge's Decision.

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

Commissioner Young, dissenting:

In the Commission's initial decision, I dissented from the finding that the safeguard in this case was valid. 35 FMSHRC 2009, 2016-18 (July 2013). Because we remanded the case to the judge after the Commission majority upheld the facial validity of the safeguard, the operator has not had an immediate opportunity to appeal our holding on that issue; it is not final, nor is it binding on any subsequent appeal. *See Kyocera Corp. v. Prudential-Bache Trade Serv., Inc.,* 341 F.3d 987, 995 (9th Cir. 2003) (legal conclusions of three-judge panel binding on other three-judge panels reviewing case, but not on Court rehearing case en banc).

I continue to believe that the ALJ decided this issue correctly the first time, and I incorporate by reference my dissent in our previous decision. I would further note that the majority's own opinion would seem fatal to the theory under which the safeguard was affirmed – i.e., that the practice of pushing cars in this mine was so obviously hazardous that nothing more particular needed to be said in describing the hazard allegedly identified in the safeguard.

Indeed, in a case arising from a *fatal accident*, my colleagues have found that none of the supposed dangers MSHA has postulated significantly and substantially contributed to a mine safety and health hazard in this case. Slip op. at 5-8. This exposes the glaring inadequacy of the safeguard notice.

Safeguards were intended to provide immediate protection against particular, mine-specific transportation hazards in mines. *See Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992) ("*SOCCO II*") ("A safeguard . . . must address a transportation hazard that is actually present in the mine in question."). In *SOCCO II*, the Commission identified the parameters of MSHA's authority to issue safeguards as follows:

> In order to issue a notice to provide safeguards, an inspector must determine that there exists at a mine an *actual* transportation hazard that is not covered by a mandatory standard; that a safeguard is *necessary* to correct the hazardous condition; and the corrective measures that the safeguard should require.

Id. (emphases added).[1]

While the Solicitor initially agreed with my suggestion that his agency believes pushing cars to be a *per se* hazardous practice, Oral Arg. Tr. at 43-45, he has disclaimed that position as a matter of agency policy. Ltr., Edward Waldman, Esq., to Lisa Boyd, May 22, 2015. I am somewhat relieved to learn that MSHA has not failed for decades to promulgate a formal rule

[1] Section 314(b) originates from the Federal Coal Mine Health and Safety Act of 1969. While the legislative history of this provision is limited, it is apparent that Congress recognized the need to grant the Secretary supplemental authority to address specific transportation hazards in a particular mine in addition to the general obligation to promulgate mandatory standards through notice and comment rulemaking. *See* 30 U.S.C. §§ 811, 861.

protecting all miners from a known serious danger to miner health and safety. However, the Secretary's concession on this point precludes the identification of the practice, alone, as a hazardous condition.

Because the practice itself is not characterized as inherently and obviously dangerous, the expression of the particular dangers supposedly inherent in the practice become more critical. The safeguard, however, is silent on the question of particular hazards. And among those identified by the Secretary, none was contributory to the fatal accident. Furthermore, the majority has found that the practice at issue here was not an S&S violation, reversing the ALJ's findings on all three of the Secretary's bases.

The Secretary asserted, and the Judge found, that pushing cars creates a visibility issue. 35 FMSHRC at 3425, 3430. While the visibility problem would have been a sufficient statement of a hazard, had it been expressed properly in the safeguard notice, it was not expressed in the notice. Even if it had been, in this case, miners were positioned on one of the motors which was in front of and helping to steer the car, so the visibility was the same as if the car had been pulled. Thus, the operator might not have been in violation of a safeguard notice that had properly stated poor visibility as the hazard. Slip op. at 6; Tr. 98-100.

The Secretary also claimed that pushing equipment creates a pinch-point hazard, and again the Judge agreed. 35 FMSHRC at 3425, 3430. Again, this hazard is not stated in the safeguard notice. Nor is it self-evident. Indeed, the majority holds that the Secretary has not provided a sufficient explanation under *Mathies* for the manifestation of this hazard. Slip op. at 6. Nothing in *American Coal* excuses the Secretary from describing with particularity a hazard that is not self-evident from the description of the practice or condition. And the majority has found the "hazard" here to be unsupported, even after trial and the opportunity to present evidence in support of the pinch-point hypothesis.

Finally, the Secretary argued that pushing cars gives rise to a lack of "positive control." 35 FMSHRC at 3425, 3430. The majority has concluded that "[t]he evidence in this case demonstrates that pushing the shearer carrier did not contribute to the hazard of a loss of positive control of the car. Nor is there any evidence that pushing caused the derailment."
Slip op. at 7. It's not possible to limit that holding to the accident at issue, because, again, there's no description of the hazard itself in the safeguard. Thus, the majority must consider the application of the safeguard notice to the practice involved, and for the third and final time concludes that there's no evidence of the manifest danger suggested by the Secretary – a danger which, under *SOCCO II* and its progeny, including *American Coal,* must be obvious from the prohibited practice.

We have held today that the operator shall be punished because it engaged in conduct which is not formally and properly proscribed by the regulatory program, without any substantial evidentiary support for the required finding that it failed to protect its miners from a dangerous practice or condition. This is error. Once again, I urge the Secretary to at least look at this practice in light of his own concerns and take steps to protect all miners from the potential danger MSHA has found so troubling in this case. And once again, I dissent from the Commission's holding that the operator failed to conform to a valid safeguard notice.

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 2015

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

v.

J. M. HUBER CORPORATION

Docket No. LAKE 2014-719-M
A.C. No. 11-02627-353629

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 15, 2014, the Commission received from J. M. Huber Corporation ("J. M. Huber") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on June 21, 2014, and became a final order of the Commission on July 21, 2014. The operator asserts that it submitted a partial payment, but mistakenly failed to submit its contest form as well. The Secretary does not oppose the request to reopen. However, he urges J. M. Huber to ensure that future penalty assessments are contested in a timely manner.

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2015-25-M A.C. No. 01-01138-357167
ELMORE SAND & GRAVEL, INC.	

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 9, 2014, the Commission received from Elmore Sand & Gravel, Inc. ("Elmore") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on August 1, 2014, and became a final order of the Commission on September 2, 2014. The operator asserts that towards the end of July 2014, the company's safety director resigned and did not tell anyone about the proposed assessment. The operator offers a letter to support that it submitted the contest form on September 3, 2014. The operator's counsel also maintains that he "traveled extensively," which resulted in a delay filing the motion to reopen. The operator asserts that since this case arose, it has taken steps, such as reassigning office personnel, to ensure that all contests are timely filed. The Secretary does not oppose the request to reopen. However, he urges Elmore to ensure that future penalty assessments are contested in a timely manner.

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. SE 2015-144-M A.C. No. 54-00135-366307
EMPRESAS ORTIZ BRUNET, INC.	

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 21, 2015, the Commission received from Empresas Ortiz Brunet, Inc. ("Empresas") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on November 10, 2014, and became a final order of the Commission on December 10, 2014. Empresas asserts that its failure to timely submit the contest form arose from its confusion with other cases, causing the operator to mistakenly believe that the contest form had been sent.[2] The Secretary does not oppose the request to reopen, but notes that the operator reached out to MSHA on January 14, 2015 to resolve this matter and urges Empresas to ensure that future penalty assessments are contested in a timely manner.

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

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

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

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

[2] We note that the Safety and Health Coordinator, Jorge Negron, who is responsible for contesting proposed assessments by MSHA, is based in Puerto Rico and does not appear to be a native English speaker.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. HOWARD R. HENSLEY, employed by MILL BRANCH COAL CO.	Docket No. VA 2015-29 A.C. No. 44-07189-337390 A

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 30, 2014, the Commission received a motion from Howard R. Hensley ("Hensley") seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 11, 2013, and became a final order of the Commission on January 10, 2014. Mr. Hensley asserts he did not receive the proposed assessment because of a change in his home address. USPS records indicate that the proposed assessment was refused and later returned to MSHA because the addressee was unknown. The Secretary does not oppose the request to reopen. However, he notes that it was Hensley's obligation to notify MSHA of his change of address. He urges Hensley to take steps to ensure that future penalty contests are timely filed.

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 2015

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

v.

EMERALD PROCESSING, LLC

Docket No. WEVA 2014-2201
A.C. No. 46-09258-355340

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 19, 2014, the Commission received from Emerald Processing, LLC., ("Emerald") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on July 9, 2014, and became a final order of the Commission on August 8, 2014. Emerald asserts that it missed the contest deadline by three days because it miscalculated when the deadline was due. It contends that the miscalculation arose from an erroneous departure from procedure by the warehouse technician who receives the proposed assessments. The Secretary does not oppose the request to reopen. However, he urges Emerald to ensure that future penalty assessments are contested in a timely manner.

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 4, 2015

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

v.

O & G INDUSTRIES, INC.

Docket No. YORK 2015-89-M
A.C. No. 06-00017-372166

BEFORE: Young, Nakamura, and Althen, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 29, 2015, the Commission received from O & G Industries, Inc. ("O & G") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on January 15, 2015, and became a final order of the Commission on February 17, 2015. MSHA sent a delinquency notice on April 6, 2015. The operator asserts that it inadvertently mailed the contest form along with a partial payment to MSHA's payment office in St. Louis, MO. The Secretary does not oppose the request to reopen. However, he notes that the address for the St. Louis payment office is the incorrect address for submitting contest forms. The Secretary urges O & G to ensure that contests to future penalty assessments are mailed to the appropriate address in a timely manner.

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 14, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. SE 2014-403
v.	
KOPPER GLO MINING, LLC	

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

ORDER

BY: Cohen, Nakamura, and Althen, Commissioners

A petition for discretionary review was filed by the Secretary of Labor on December 2, 2015. This petition was filed pursuant to section 113(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(d)(2). That section provides that review of a decision of an Administrative Law Judge may be granted upon specified grounds and upon the affirmative vote of two Commissioners. Such review is discretionary. 30 U.S.C. § 823(d)(2)(A).

A threshold issue in this case is whether the petition was timely filed. *See* 30 U.S.C. § 823(d)(2)(A)(1) (petition for discretionary review must be filed within 30 days after issuance of a Judge's decision). The Judge's decision was initially issued on October 29, 2015. Any petition for discretionary review was due 30 days thereafter, on November 30, 2015.[1] Although the Judge issued an amended decision on November 2, 2015, correcting a clerical error, Commission Procedural Rule 69(c) states that the issuance of an amended decision correcting a clerical error shall not toll the time for filing a petition for discretionary review of the Judge's decision on the merits. 29 C.F.R. § 2700.69(c). Thus, in this case, the 30-day time limit for filing the petition, started to run from October 29 (the date of the initial decision) rather than from November 2 (the date of the amended decision).

Nonetheless, the Commission may consider a late-filed petition for review for good cause shown. *See Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981); *McCoy v. Crescent Coal Co.,* 2 FMSHRC 1202, 1204 (June 1980). We find that the Secretary had good cause for believing that the Judge's decision was issued on November 2, 2015, and thus had good cause for filing the petition on the day he reasonably believed it was due, i.e., December 2. Good cause for the late filing is supported by the fact that the Judge did not title the November 2 decision as an "Amended Decision." More importantly, the Secretary relied on an email which

[1] Because the thirtieth day after October 29 was Saturday, November 28, the thirtieth day for purposes of the filing deadline was Monday, November 30. *See* Commission Procedural Rule 8(c), 29 C.F.R. § 2700.8(c).

the Commission docket office sent to counsel with the November 2 decision. The email stated that the appeal period commenced with the date on the attached decision (November 2). Sec'y's Reply to Kopper Glo Mining, LLC's Statement in Opp'n to Pet., Ex. A. Therefore, although the petition was filed out of time, we find good cause to consider it.

Pursuant to 30 U.S.C. § 823(d)(1), a Judge's decision becomes the final decision of the Commission 40 days after its issuance unless within such period the Commission directs review. We recognize that the fortieth day from October 29 was December 8 and, therefore, this Order is beyond the fortieth day from the date of the decision. Recognizing the possibility of delay, the Secretary, in the alternative, moved that we reopen the case to consider the PDR. Sec'y's Reply to Kopper Glo Mining LLC's Statement in Opp'n to Pet. at 4. To avoid any questions of timing should the Secretary appeal, we grant the motion to reopen.

Having considered the petition, no two Commissioners voted to grant the petition or to otherwise order review under 30 U.S.C. § 823(d)(2)(B).[2] Consequently, the petition for discretionary review is denied, and the decision of Administrative Law Judge Margaret A. Miller is final. 30 U.S.C. § 823(d)(1).

Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

William I. Althen
William I. Althen, Commissioner

[2] Commissioner Cohen voted to grant review of the petition.

Chairman Jordan, concurring in part and dissenting in part:

Without addressing the issue of whether the Commission has jurisdiction to entertain petitions for discretionary review filed 30 days after a Judge's decision has issued or whether, once a Judge's decision has been deemed a final order of the Commission pursuant to 30 U.S.C. § 823 (b)(2)(d)(1), the Commission can reopen it, I conclude that the issuance date for the Judge's decision in this case was November 2, and that therefore the petition was timely filed. My reasoning in large part is the same as the majority's rationale for finding good cause for what it considers the late filing of the petition. Notably, the Commission circulated the November 2 decision in an attachment to an email that read in pertinent part: "The date of issuance is stamped or typed on the Decision, and it is the effective date of the document for purposes of computing the deadline for an appeal." Sec'y's Reply to Kopper Glo Mining, LLC's Statement in Opp'n to Pet., Ex. A. In addition, I find it relevant that the November 2 decision was not titled "Amended Decision." I would therefore hold that the petition for discretionary review was timely filed. However, I join the majority in denying review of the petition.

Mary Lu Jordan
Mary Lu Jordan, Chairman

Commissioner Young, concurring:

I join Chairman Jordan in result, but would base my decision on our ability to construe our own procedural rules. While our rules hold that the issuance of a decision correcting clerical error does not toll the period for filing a petition for discretionary review, we should hold that the period should be tolled in the unique circumstances of this case. *See* 29 C.F.R. § 2700.69(c) ("nor the issuance of an order or amended decision correcting a clerical error[] shall toll the time for filing a petition for discretionary review"). This would recognize the fact that an earlier decision was issued, while also reflecting the miscommunication from the Commission and the reasonable misunderstanding arising from it.

Michael G. Young
Michael G. Young, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Docket No. KENT 2015-129 A.C. No. 15-18725-341621
v.	Docket No. KENT 2015-130 A.C. No. 15-17077-341615
MANALAPAN MINING COMPANY, INC.	Docket No. KENT 2015-131 A.C. No. 15-19514-341628

BEFORE: Jordan, Chairman; Cohen, and Nakamura, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 17, 2014, the Commission received from Manalapan Mining Company, Inc. ("Manalapan") three motions seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). [2]

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

[2] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2015-129, KENT 2015-130, and KENT 2015-131, which are all captioned MANALAPAN MINING COMPANY, INC. and involve similar procedural issues. 29 C.F.R. § 2700.12.

reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on February 4, 2014, and became final orders of the Commission on March 6, 2014. The assessments were issued for unwarrantable failure violations under section 104(d)(1) of the Mine Act at three separate Manalapan mines. Manalapan asserts that while it received the proposed assessments, it cannot currently locate copies of the proposed assessments. Manalapan did not file these motions to reopen until 256 days after the proposed assessments became final orders of the Commission. The Secretary opposes the requests to reopen, asserting that the operator failed to timely contest the proposed assessments because of its inadequate internal procedures.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). In the circumstances of these cases, the operator's misplacing of the proposed assessments represents an inadequate internal processing system, and fails to establish good cause for reopening a final order.

We further note that according to MSHA records, two of the three mines involved here have extremely large unpaid penalty assessments which have become final orders of the Commission. The Manalapan RB No. 5 Mine, which is the subject of Docket No. KENT 2015-130, has an outstanding balance of $88,268 comprising 22 unpaid assessments dating back to 2009. The Manalapan D-1 Mine, which is the subject of Docket No. 2015-131, has an outstanding balance of $106,835 comprising 24 unpaid assessments dating back to 2010. (The other mine in the group, the Manalapan RB-11 Mine which is the subject of Docket No. 2015-129, has an outstanding balance of $8443.)

In *H&D Mining, Inc.,* 33 FMSHRC 2121, 2123 (Sept. 2011), a case involving a motion to reopen a default under section 105(a) of the Mine Act where the operator had a large sum of unpaid penalty assessments, the Commission stated:

> Additionally, it is well recognized in federal jurisprudence that the issue of whether the movant acted in good faith is an important factor in determining the existence of excusable neglect.

> *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395 (1993); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo,* 447 F.3d 835, 838 (D.C. Cir. 2006). Likewise, the Commission has recognized that a movant's good faith, or lack thereof, is relevant to a determination of whether the movant has demonstrated mistake, inadvertence, surprise or excusable neglect within the meaning of Rule 60(b)(1) of the Federal Rules of Civil Procedure. *M.M. Sundt Constr. Co.,* 8 FMSHRC 1269, 1271 (Sept. 1986); *Easton Constr. Co.,* 3 FMSHRC 314, 315 (Feb. 1981). As pointed out by the Secretary, H&D's delinquency record and its strategy of waiting to file a request to reopen until it was sued for payment collection and then omitting any mention of that action in its request, demonstrates a lack of good faith militating against granting extraordinary relief in this case. *Oak Grove Res., LLC,* 33 FMSHRC ____, slip op. at 3-4, No. SE 2011-16 (June 7, 2011).

Similarly, in these cases Manalapan's pattern of repeatedly disregarding final penalty assessments bespeaks a lack of good faith which militates against granting its motion to reopen.

Accordingly, we deny Manalapan's motions.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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December 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
v.	Docket No. WEST 2015-137-M A.C. No. 35-03498-359104
MID-VALLEY GRAVEL COMPANY	

BEFORE: Jordan, Chairman; Cohen, and Nakamura, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 12, 2014, the Commission received from Mid-Valley Gravel Company ("Mid-Valley") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 18, 2014, and became a final order of the Commission on September 17, 2014. Mid-Valley asserts that it did not receive the proposed assessment. The Secretary opposes the request to reopen.
The Secretary submitted to the Commission records indicating that the proposed assessment was properly delivered to the operator and signed for by the operator's corporate secretary, the person designated by the operator as being in charge of health and safety matters. The Secretary also submitted a copy of the delinquency notice, which the operator acknowledged receiving, and which was mailed to the operator at the same address as the allegedly-unreceived proposed assessment. The operator has not responded to the Secretary's submissions.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). Here, the operator's failure to timely contest the proposed assessment represents an inadequate internal processing system, and fails to establish good cause for reopening a final order.

Accordingly, we deny Mid-Valley's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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December 18, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. E & G MASONRY STONE #2	Docket No. CENT 2015-21-M A.C. No. 41-04413-358874

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 10, 2014, the Commission received from E & G Masonry Stone #2 ("E&G") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on August 18, 2014, and became a final order of the Commission on September 17, 2015. E&G asserts that it intended to contest

the proposed penalties but that there was a miscommunication with off-site mine management.[2] E&G further argues that its intent to contest is evident by the July 22, 2014 notice of contest filed by E&G for Citation No. 8774372. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ 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

[2] We note that this is the third motion to reopen filed by E&G in a two year period. *See E & G Masonry Stone #2*, 34 FMSHRC 3044 (Dec. 2012) (approving motion to reopen when operator mailed an incomplete contest); *E & G Masonry Stone #2*, 36 FMSHRC 5 (Jan. 2014) (denying motion to reopen when operator filed more than a year after becoming a final order). If E&G does not take steps to remedy the faults in its processing of penalty contests, future motions to reopen may be denied. *See, e.g., Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011) (an operator has not established grounds for reopening when the failure to contest a proposed assessment results from an inadequate or unreliable internal processing system).

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December 18, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. NORANDA ALUMINA LLC	Docket No. CENT 2015-71-M A.C. No. 16-00352-355843

BEFORE: Jordan, Chairman; Cohen, and Nakamura, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 3, 2014, the Commission received from Noranda Alumina LLC ("Noranda") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on July 18, 2014, and that the

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

proposed assessment was paid in full by check dated July 25, 2014. Noranda asserts that it failed to timely contest the proposed assessment because the individual who was responsible for handling proposed assessments left the company the day the proposed assessment was delivered. Noranda further contends that the company officials who then handled the proposed assessment thought it was a "bill" and directed that it be paid. The Secretary opposes the request to reopen, arguing that the operator failed to timely contest the proposed assessment because of its inadequate internal procedures. The Secretary notes that the proposed assessment explicitly and repeatedly explained that it was a proposed assessment which the operator could contest if it wished to do so, with a separate sheet designated as "Notice of Contest Rights and Instructions".

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). Here, the failure to timely contest the proposed assessment after the departure of the individual who previously handled such matters represents an inadequate internal processing system, and fails to establish good cause for reopening a final order.

Accordingly, we deny Noranda's motion.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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December 18, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. JAMES L. DECK	Docket No. SE 2014-322-M A.C. No. 38-00740-342730 A

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 29, 2014, the Commission received a motion seeking to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission.

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 8, 2014, and became a final order of the Commission on March 10, 2014. Deck asserts that as part of earlier settlement

negotiations, the Secretary had agreed to administratively withdraw this 110(c) proceeding.[1] The Secretary does not dispute this. However, the Secretary mistakenly failed to do so, and a proposed penalty assessment was subsequently issued to Deck in this 110(c) proceeding. Deck further asserts that the Secretary informed him he did not need to timely contest the proposed assessment. The Secretary disputes this but does not oppose the request to reopen, and urges the operator to take steps to ensure that future penalty contests are timely filed.

[1] The Secretary's alleged agreement in settlement negotiations to not pursue section 110(c) charges against Deck does not appear in the settlement agreement which was tendered to the Judge and approved by him. *See* Deck's Unopposed Motion to Reopen Contest of Civil Penalty Assessment, Exhibit B (Decision Approving Settlement and Order to Pay issued April 30, 2014 in *Secretary v. Deck Sand Company, Inc*., Docket No. SE 2013-201M et al.). However, the Secretary does not dispute Deck's assertion, and we accept it as true. In the future, we urge the Secretary and operators to include all material terms in proposed settlement agreements, including agreements that section 110(c) charges related to the settled citations will not be pursued.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ 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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 18, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEST 2014-918-M A.C. No. 02-03022-350276
v.	Docket No. WEST 2014-917-M A.C. No. 02-03122-350278
CAMPBELL REDI-MIX, INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 7, 2014 the Commission received from Campbell Redi-Mix, Inc. ("Campbell") two motions seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2014-918-M and WEST 2014-917-M, both captioned Campbell Redi-Mix, Inc., and both involving similar procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessments were delivered on May 15, 2014, and became final orders of the Commission on June 16, 2014. Campbell has made partial payment of the proposed assessments. Campbell asserts that it failed to timely contest the unpaid portion of the proposed assessments because it mistakenly failed to send its contests of the proposed assessments to the correct address. The Secretary does not oppose the requests to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 18, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. U.S. SILVER – IDAHO, INC.	Docket No. WEST 2015-717-M A.C. No. 10-00082-376098

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 16, 2015, the Commission received from U.S. Silver – Idaho, Inc. ("U.S. Silver") a motion seeking to reopen seven proposed assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on March 16, 2015, and became a final order of the Commission on April 15, 2015. U.S. Silver asserts that it intended to contest the assessments for Citation Nos. 8790253, 8790352, 8790355, 8790354, 8784867, 8870013, and 8790381 but failed to do so due to a clerical error. The motion was accompanied by a Declaration from U.S. Silver's Environmental, Health & Safety Superintendent, who acknowledged his failure to submit the notice of contest and stated that he had put a system in place to make sure that the error would not occur again. U.S. Silver further avers that it promptly moved to reopen this case upon receipt of the Secretary's June 1, 2015 delinquency notification. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

With regard to Citation No. 8784867, the Commission has subsequently learned that after the original proposed assessment had become a final order of the Commission, U.S. Silver received a modified version of the citation, along with a reduced proposed penalty, which the operator paid. (Letter from W. Christian Schumann, Counsel, Appellate Litigation, Office of the Solicitor, U.S. Dept. of Labor to Lisa M. Boyd, Executive Director, Federal Mine Safety and Health Review Commission (July 15, 2015) (also served on operator's counsel)). This action would appear to reflect the parties' desire to reach a limited settlement of this particular penalty. Pursuant to the Mine Act and our procedural rules, however, settlements are subject to Commission review. See 30 U.S.C. § 820(k); 39 C.F.R. § 2700.31.

Having reviewed U.S. Silver's request and the Secretary's response, in the interest of justice, we hereby reopen Citation Nos. 8790253, 8790352, 8790355, 8790354, 8784867 (as originally issued), 8870013, and 8790381 and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28. The parties may submit a motion regarding the appropriate disposition of Citation No. 8784867 to the assigned Judge for review.

/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

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

December 18, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. BRODY MINING, LLC	Docket No. WEVA 2014-2005 A.C. No. 46-09086-350238

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 11, 2014, the Commission received from Brody Mining, LLC ("Brody") a motion seeking to reopen Order No. 7166788 that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

The Mine Safety and Health Administration's ("MSHA") Mine Data Retrieval System indicates that the proposed assessment became a final order of the Commission on June 11, 2014, and thus, it can be reasonably inferred that the proposed assessment was delivered to Brody on May 12, 2014. Brody asserts that it intended to contest the penalty but failed to do so

due to a discrepancy between the proposed assessment and the order. Brody points to the fact that it timely filed a pre-penalty Notice of Contest of Order No. 7166788 and a Motion to Consolidate and Expedite Order No. 7166788 on October 30, 2013. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

/s/ 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

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

December 22, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. KENT 2015-11-M A.C. No. 15-07101-353345
CARMEUSE LIME & STONE, INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 6, 2014, the Commission received from Carmeuse Lime and Stone, Inc. ("Carmeuse") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on June 19, 2014, and became a final order of the Commission on July 21, 2014. MSHA sent a delinquency notice on September 3, 2014. The operator asserts that on June 23, 2014, it filled out the required paperwork for contesting one of the citations and submitted a signed check for partial payment of the penalties. The operator further asserts that the contest form was lost when it was sent to the company's internal accounting department for final review. The Secretary does not oppose the request to reopen. However, he urges Carmeuse to ensure that future penalty assessments are contested in a timely manner.

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

Mary Lu Jordan
Mary Lu Jordan, Chairman

Michael G. Young
Michael G. Young, Commissioner

William I. Althen
William I. Althen, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 22, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. YORK 2014-192-M A.C. No. 19-00689-352593
BYRNE SAND & GRAVEL CO, INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 9, 2014, the Commission received from Byrne Sand & Gravel Company, Inc. ("Byrne") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on June 11, 2014, and became a final order of the Commission on July 11, 2014. The operator asserts that there was confusion due to the fact that the treasurer had thought that the general manager was going to contest the proposed assessment, while the general manager had thought the treasurer was going to handle it. The Secretary does not oppose the request to reopen. However, he urges Byrne to ensure that future penalty assessments are contested in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 29, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2015-82-M A.C. No. 14-01578-362338 KTL
CLARKSON CONSTRUCTION COMPANY, INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On November 12, 2014, the Commission received from Clarkson Construction Company, Inc. ("Clarkson") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on September 26, 2014, and became a final order of the Commission on October 27, 2014. Clarkson asserts that its error arose from a miscommunication between the safety director and the operator's counsel, which caused the operator to submit the contest form two days late on October 29, 2014. Specifically, there was confusion due to the fact that the counsel had thought that the safety director had filed the contest form for the proposed assessment, while the safety director had thought that the counsel was going to take care of it. The Secretary does not oppose the request to reopen. However, he urges Clarkson to ensure that future penalty assessments are contested in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 29, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. PENN 2015-113-M A.C. No. 36-00064-367879
DYER QUARRY, INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On January 21, 2015, the Commission received from Dyer Quarry, Inc. ("Dyer") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that an attempted delivery of the proposed assessment occurred on December 6, 2015, and became a final order of the Commission on January 5, 2015. The operator asserts that it did not receive the proposed assessment because of a change in address. The operator has since changed its address of record with MSHA to ensure that mail is delivered to the proper address. The Secretary does not oppose the request to reopen. However, he notes that it is Dyer's obligation to notify MSHA of any change of address. He urges Dyer to take steps to ensure that future penalty contests are timely filed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
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December 30, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2015-82-M A.C. No. 04-05276-356398
C. R. BRIGGS	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 23, 2014, the Commission received from C. R. Briggs ("Briggs") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

[1] This case has been delegated to a panel of three Commissioners pursuant to section 113(c) of the Mine Act for the limited purpose of assessing the merits of the motion to reopen. 30 U.S.C. § 823(c).

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") demonstrate that the proposed assessment was delivered on July 22, 2014, and became a final order of the Commission on August 21, 2014. The operator asserts its failure to timely contest the proposed assessment arose out of an internal processing error, and that it intended to contest all unpaid citations. The operator offers letters to establish that it submitted a partial payment to MSHA's payment office in St. Louis, MO. In addition, it appears that the contest form was also submitted to the same address. The operator claims that it has since made improvements to its internal procedures. The Secretary does not oppose the request to reopen. However, he notes that the address for the St. Louis payment office is the incorrect address for submitting contest forms. The Secretary urges Briggs to ensure that contests to future penalty assessments are mailed to the appropriate address in a timely manner.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 8, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of **JEREMY JONES**, Applicant, v. KINGSTON MINING, INC., Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2015-1007-D HOPE-CD 2015-12 Mine: Kingston No. 2 Mine ID: 46-08932

DECISION AND ORDER ON REMAND

Appearances: Lucy Chiu, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, for Complainant

Robert Wilson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, for Complainant

Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, PA, for Respondent

Before: Judge Moran

This case is before the Court upon an application for temporary reinstatement filed by the Secretary of Labor on behalf of Jeremy Jones ("Applicant") pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (2012). On November 9, 2015, all five members of the Commission reversed this Court, finding that Applicant Jones' late filing was excused and that he made safety complaints. Further, the Commission found that it was reversible error for the Court to have excluded evidence regarding the layoff and hiring of new miners.[1]

[1] The Court did not reach the issue of the layoff because it did not accept the proffered reason for Jones' late filing and also because, in context, it did not find his safety complaints to be cognizable. The Commission did not accept either of the Court's bases.

The Commission directed that

> [o]n remand, the Judge shall permit the Secretary to submit evidence regarding the layoff and hiring of miners and shall permit the operator to submit relevant rebuttal evidence consistent with the recognition that the 'scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.'[2]

Sec'y of Labor on behalf of Jones v. Kingston Mining, Inc., 37 FMSHRC ___, slip op. at 6, No. WEVA 2015-1007-D (Nov. 9, 2015). The Commission further directed that the Court was to consider the evidence related to safety complaints "and animus such as the asserted isolation of Jones by Laverty."[3] *Id.*

After the conclusion of the additional evidence upon remand, the Secretary's closing argument noted that the only nexus which must be established is a connection between the protected activity and the adverse action and as to that, citing *Jim Walter Resources*, 920 F.2d 738 (11th Cir. 1990), the burden is only to show that the claim is non-frivolous, that is, to show that the assertions are not clearly without merit. Given Jones' claims about being isolated and as Laverty was involved in Jones' evaluation, the minimal non-frivolous burden was met. The Secretary also showed that the layoff procedure and evaluation had scoring issues, and that is sufficient to demonstrate that the procedure ostensibly had issues of fairness.[4]

For the most part, Respondent's closing strayed into areas that amounted to weighing conflicting presentations, a subject outside of this proceeding. Recognizing the impact of the Commission's remand decision, Respondent did request that this Court give effect to section 105(c)(3)'s requirement that the Secretary notify, within 90 days of receipt of the complaint, of his determination whether a violation has occurred. Jones filed his complaint on August 4, 2015, and therefore the 90 day period for the Secretary to make his determination arrived November 2nd. As of the December 8th, the Secretary's determination, non-jurisdictional though it is, will be 36 days overdue. The Court orders the Secretary, who represented at the December 1st hearing that MSHA has completed its investigation and that the Solicitor's office is reviewing it, and will have its final decision by December 31st, to make that determination no later than that last day of this year.

---

[2] Because there can be no weighing of conflicting accounts in the context of a temporary reinstatement proceeding, the Complainant will prevail if a minimal showing is made.

[3] Jones reasserted that he was "isolated" by Laverty but this term implies more than what occurred. Jones was at times given assignments that were a one-person task and he expressed that he received more than his fair share of such assignments. Laverty presented a different picture, but again because there is no weighing at this stage, the Complainant's version prevails.

[4] In addition, on June 22, 2015, Respondent did hire, among its post-layoff hires, an electrician. Tr. 292. Yet, inexplicably, that individual's name does not appear on the list of such hires. Ex. R-7.

In sum, this Court, consistent with the Commission's remand directions, heard additional testimony at the December 1st hearing. However, upon listening to, and forming opinions about, that further testimony, including that of Jones and Laverty, which opinions by the Court were in line with those made at the time of the October 7, 2015, temporary reinstatement hearing, this Court has concluded that it is appropriate to recuse itself from further involvement in this proceeding and therefore invokes 29 C.F.R. § 2700.81, requesting that the Chief Administrative Law Judge reassign this matter to another judge.

Accordingly, within the inherent constraints in a temporary reinstatement proceeding and the Commission's Decision of November 9, 2015, this Court ORDERS Respondent Kingston Mining, Inc., to reinstate Applicant Jeremy Jones to his former position, or a substantially similar position, as of the date of this decision.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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December 10, 2015

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner, v. TRI COUNTY STONE COMPANY, INC. Respondent	CIVIL PENALTY PROCEEDING Docket No. SE 2015-0137 A.C. No. 40-00048-371150 Mine ID: 40-00048 Mine: Tri County Stone Company

DECISION

Appearances: Laura I. Pearson, Office of the Solicitor, U.S. Department of Labor, Denver, CO, for the Petitioner;

Stanley Hitchcock, Tri County Stone Company, Inc., Morrison, TN, for the Respondent.

Before: Judge L. Zane Gill

This case is before me on a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. On April 2, 2015, Chief Judge Lesnick signed a Notice of Designation For Simplified Proceedings under 29 C.F.R. Part 2700 for this docket, and assigned the docket to me. The parties presented testimony during a simplified proceedings hearing on October 6, 2015, in Nashville, TN.

On the second day of his E01 inspection, November 4, 2014, (Tr.46) MSHA inspector Kevin Dycus issued two 104(a) citations (Nos. 8614883 and 8614884)[1] to Tri County Stone (TCS) for alleged violations of 30 CFR 56.14100(b), a mandatory safety standard. (Tr.28-29; 52) Both citations allege excess slack in the steering linkage components on two Euclid 35-ton haul trucks used at TSC's quarry. Tri County abated the citations by immediately replacing the ball joints in the steering linkage on one truck and tagging the other truck out of service.[2]

[1] The citations were written as S&S, but not as unwarrantable failure. (Tr.22) The S&S designation is supported by the fact that portions of the haul road have some grade, and the haul road crosses a public highway at one point. (Tr.44-45; 48)

[2] The ball joints on the second truck were eventually replaced as well.

Each steering assembly consisted of a hydraulic piston whose rod was connected to a ball joint unit, which was in turn connected to a bell cam or idler arm. Dycus testified that he observed between 3/4" and 1" of play in all seven of the steering linkage elements on the two trucks. Dycus did not specify what TCS had to do to abate the citations. TCS replaced all seven ball joints (three on one truck and four on the other), which Dycus approved. (Tr.176-77; 187)

TCS's witnesses testified that they checked for play in each of the assemblies before removing them for replacement, and other than the rotary movement necessary for a ball joint to function, found no demonstrable slack at all.

After reviewing all the evidence in the record and giving appropriate weight to each witness's testimony, I give more weight to the testimony of the Respondent's witnesses and find that the Secretary failed to prove by a preponderance of evidence that there was enough slack in the linkage assemblies to constitute a violation. Because I am unable to find an underlying defect by the preponderance standard, I am also unable to identify a hazard to support the citations. As a result, I **VACATE** both citations. I do not reach the issue of whether Dycus' appropriately characterized these alleged violations as S&S.

Summary of Facts and Discussion

The standard, 30 C.F.R. 56.14100(b),[3] does not specify a specific amount of play necessary to trigger a violation. The "reasonably prudent person" test is appropriate to determine if a condition or practice violates a broadly worded mine safety standard, such as the "equipment defects" prohibition at issue here. *See Lafarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); 30 C.F.R. 56.14100(b). 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).

Here, the reasonably prudent person test must be applied to determine "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" under 30 C.F.R. § 56.14100(b). *Lafarge North America*, 35 FMSHRC at 3502; *See Alabama By-Products*, 4 FMSHRC at 2131.

Inspector Dycus took guidance from a Commercial Vehicle Safety Alliance document (Ex. S-10) which establishes a slack limit of 1/8" between a linkage member and its point of attachment. However the CVSA reference has only advisory value and is not binding on MSHA or TCS. (Tr.81-84) TCS in turn referred to Part 399 of the Federal Motor Carrier Safety Administration regulations (Ex. R-1) which sets a 1/4" limit on steering mechanism slack.

[3] 30 C.F.R. 56.14100(b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

(Tr.84-87) Although the standard does not require anything more than a showing of a equipment defect that, in the inspector's judgment poses a hazard (Tr.75-76), there must be a preponderant quantum of sufficiently specific and relevant evidence to support the inspector's judgment. In this case, the Secretary's evidence did not reach preponderance.

The Secretary's case pivoted entirely around Inspector Dycus' testimony. He stated that all seven of the linkage points had between three-quarters and one inch of play, which if accepted as true could constitute a violation of the standard. However, the supporting exhibits and testimony fall short of corroborating this blanket allegation. In fact, the lack of individualized evidence of slack in the seven linkage elements greatly diminishes the weight of Dycus' testimony (Tr.59-60). This and the weight and consistency of the Respondent's evidence, make it impossible to find that any of the linkage points exhibited enough slack to violate the standard.[4]

When Dycus inspected the two 35-ton Euclid haul trucks on November 4, 2014, (Tr.31) he tested the steering mechanisms by having a driver turn the steering wheel while he observed the action from the ground. (Tr.161) He did not move the linkage elements with his hands – he only observed them from a distance. (Tr.193) Later, he used a tape measure to quantify the slack he observed and made photos showing linkage components with the superimposed tape measure. (Tr.31-32; Ex. S-8) In describing the slack, Dycus used somewhat confusing terminology, referring to, *inter alia*, slack in the "bearing" (Tr.32; 50; 56; 72) and the "tie rod end," among others (Tr.30; 33). Nonetheless, he described observing at least three-quarters of an inch of back-and-forth movement of the ball joint only (Tr.56-57), using a non-moving part of the linkage assembly as a point of comparison. (Tr. 32-33)

Dycus used the same method to check "multiple" ball joint components on both sides of both trucks. (Tr.36) He initially testified about excess slack in three components on the first truck and three on the second. This was ultimately shown to be erroneous and not consistent with the text of the citations themselves. (Ex. S-2; S-5; Tr.34; 37; 53; 192) After hearing testimony from Hitchcock and Gambill (Tr.71), on rebuttal Dycus allowed that the trucks might have had seven linkage elements, three on one and four on the other. (Tr.192-193) Still, Dycus failed to clarify which of the elements his observation pertained to or whether the slack was side-to-side or radial. Dycus supplemented his testimony on rebuttal to claim that he had observed slack in the linkage assemblies and not just in the ball joints (Tr.191-92), and that he observed back-and-forth, not radial, movement. However he never told the court which of the seven linkage elements exhibited the slack he claimed.

The photos offered by the Secretary (Ex. S-4, S-7, and S-8), which purport to show the amount of prohibited slack, are not self-evident. It is unclear looking at them what, if anything, they prove. There is a tape measure in some of them as mentioned above, but without testimony to establish a reliable inspection methodology or an identifiable point of comparison, the photos do not show evidence of slack in the linkages. (Tr.69;71)

[4] To complicate fact finding even more, Dycus stated on cross examination that he measured the slack in "most" of the seven ball joints, which begs further question about the reliability of his methods and their adjudicatory weight. (Tr.67-68)

Another problem in assessing Dycus' evidence involves determining what type of movement he observed. It became clear during the hearing that radial movement in the ball joints, i.e., rotational movement around the ball joint spindle, is necessary for the steering linkage to function properly. (Tr.86-87;160;139-140) However, the quantum, weight, and credibility of the Respondent's evidence created a significant question whether, contrary to his testimony (Tr.70-71), what Dycus saw and reacted to was this radial movement and not back-and-forth or up-and-down movement in the linkages, which would indicate wear.

TCS brought the actual ball joints into the court room as demonstrative exhibits. (Ex. S-12) None of the witnesses who handled them was able to demonstrate more than one-eighth inch of movement, which would be within the Federal Motor Carrier Safety regulation guidelines Dycus had in mind when he wrote the citations. (Tr.71-75;78;118-119) In the ball joint with the most movement, it was almost indiscernible by observation in the court room. (Tr.197-200) This is consistent with TCS witness John Gambill's testimony that he tested the joints in a vice and could not get more than 1/8" movement from any of them. (Tr.119) It is also dramatically inconsistent with Dycus' testimony about observing several times more slack than that in all seven linkages.

Dycus testified that the truck driver manipulated one of the linkage elements with his hand[5] (Tr.75), and Dycus saw nearly an inch of up-and-down movement. (Tr.187; 194) Dycus also told Hitchcock during their close-out meeting that the ball joints were in danger of coming apart. (Tr.196) After the ball joints were removed, Hitchcock tried to cut one of them apart to test Dycus' claim. (Tr.134) Further testimony and observation of the ball joints in the court room made it clear that, given the size of the ball joint parts, that much up-and-down movement would have been impossible without the ball joint coming apart. (Tr.194-195)

The evidence is clear and consistent that all seven of the ball joints had to, and did in fact, rotate properly around their spindles. (Tr.158-159) But, the Secretary's evidence about non-radial movement was non-specific and at times unclear, confusing, and unconvincing. (Tr.129) TCS' evidence about the integrity of the seven ball joints and their inability to recreate the three-quarters to one inch of non-radial movement Dycus testified about was helpful, but only to a limited extent. It created a possible alternate explanation for Dycus' sweeping claim that all seven ball joints exhibited excess movement. But, it did not deal thoroughly with the possibility that what Dycus saw was slack in the entire steering linkage assembly, not just in the ball joints.

TCS' witnesses presented evidence consistent and convincing enough to cast a significant doubt shadow on all of the Secretary's evidence. Not all of TCS' evidence was relevant, helpful, or convincing, but the combined testimony of Stanley Hitchcock, John Gambill, and Dan McInnis was significantly more convincing both as to their methodology of checking the linkage elements for slack and to their assessment of the improbability of the amount of slack claimed by Dycus.

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[5] Dycus offered the court a hearsay confirmation of his observations in the form of an alleged comment by the driver who turned the steering wheel to help him inspect the trucks. Dycus said the driver exclaimed, "Oh, my!" when Dycus showed him how much slack there was. (Tr.34-35; 68)

John Gambill testified that he advised Hitchcock not to immediately repair both trucks, *viz.* he should fix one and leave the other one as it was so they could figure out how to develop the evidence they would need to challenge the citations. (Tr.181-82) Gambill then made evidence videos of the steering linkages and ball joints within days after the citations were issued. (Tr.182-83)[6] The truck in the video had been tagged out and sat idle until the videos were shot, but it had not yet been repaired. (Tr.183) The two video clips of the intact steering linkage still on the truck show no lateral slack, only rotary movement around the ball joint spindle, which is necessary for proper operation. (Ex. R-3; Tr.91-92; 115; 117) In Gambill's opinion, neither truck was unsafe to operate. (Tr.119-20)

Charles Layne testified on behalf of TCS that neither truck was unsafe because of the steering linkages. (Tr.133) He examined the ball joints at the request of Hitchcock. (Tr.131) However, he did not inspect the linkages on the trucks. The ball joints had already been removed. (Tr.139) Layne suggested that someone with little experience (meaning Dycus) might think that the necessary rotary movement around the ball spindle was unsafe slack. (Tr.137-38)

In response to some of TCS' evidence, the court expressed concern that testing the ball joints in a vice might miss the point. The standard, as understood and applied by Dycus, focuses on the slack between the linkage members and their attachment points. (Tr.123-24) There was no testimony that Dycus saw play in the ball joints themselves. (He claimed that the play was in the linkage.) (Tr.124-25) Gambill's testimony only addressed the integrity of the ball joints, not the linkages. *Id.* Gambill's conclusions were made with both ends of the linkages fixed which produced no movement. (Tr.126)

Dan McInnis' testimony was key to showing that Dycus' generalized testimony about excess movement deserved little credence. Whereas most of TCS's evidence focused on the integrity of the ball joints after they were removed from the trucks, McInnis' testimony was based in large part on his observing the intact steering linkages on one of the trucks before and after they were removed for replacement. (Tr.164;167)

McInnis examined the steering linkages on both trucks within two days of Dycus' inspection (Tr.165), before they were removed. Importantly, he felt for play with his hands and inspected them visually. (Tr.148-49; 160) The only movement McInnis could induce was rotary movement in the ball joints. (Tr.149-151) He found nothing wrong with the ball joints from either truck. (Tr.144-45; 147; 151-52) There was no noticeable wear in the tie rods or where the ball cams attached to the ball joint assemblies. (Tr.148) There was no movement at the pin at the back of the hydraulic cylinders. (Tr.152)[7] He watched as mechanics removed the ball joints from the trucks and saw no slack or anything that needed to be repaired. (Tr.146; 157-160; 169) In his

[6] Of the five video clips comprising Exhibit R-3, three show ball joints being tested after being removed from the truck. The other two clips show the steering linkage, intact and still on the truck. (Tr.180) Only the latter were admitted into the record.

[7] The issue of whether the standard speaks of one-eighth inch or one-quarter inch of slack was irrelevant; McInnis observed no play at all. (Tr.168-169)

view, there was no way to measure slack; it was too small to measure.[8] (Tr.146-47) He found no change in the steering linkages after the parts were replaced. (Tr.166) In his opinion, neither truck was dangerous. (Tr.146) He did not see any justification for the citations. (Tr.168) If there had been as much as three-quarters of an inch of slack, as Dycus claimed, McInnis stated he would have seen it, and a driver would have felt it. (Tr.170)

The Secretary attempted to bolster Dycus' testimony by offering evidence that TCS did not protest the issuance of these citations at the time of the close-out meeting. (Tr.58-59; 175-76) TCS responded by showing that Hitchcock attempted later to talk to Dycus' supervisor (Tr.185-187) and to Dycus himself (Tr.188-189) to argue that the citations should be abandoned. According to Hitchcock, when the two finally spoke, Dycus equivocated and said that it might have been a loose shaft that caused the slack he saw. Hitchcock challenged Dycus, saying as the inspector, he had to be specific. He shouldn't be guessing about such things. (Tr.189)

The court gives due credit to Inspector Dycus' testimony that he believed there was enough slack in the seven steering assemblies to constitute a hazard and a violation of the standard. However, given the summary nature of the Secretary's evidence, the lack of specificity linking Dycus' conclusion to individual ball joint assemblies, and the questionable reliability of his observation and measurement, in order to sustain these citations, I would have to simply take the inspector's word and give it more weight than it deserves. On the basis of the Secretary's evidence, I am unable to find a hazardous slack condition in any of the seven assemblies. Further, I am unable to find even in the aggregate that there was sufficient slack to constitute a citable hazard, regardless of which linkage or ball joint was involved. Moreover, when weighed against the contrary evidence from TCS, which is much more specific and probative, it is all the more clear how thin and lacking the Secretary's evidence was. Therefore, I find that a reasonably prudent person familiar with the hazards of movement in haul truck steering linkages and the use of surface equipment in the mining industry would not have recognized a defect requiring corrective action.

The Secretary's evidence is too vague and conclusory to enable the court to conclude with any confidence or specificity that there was slack in any of the steering linkages. As such, the Secretary has failed to carry his burden of proof as to the existence of a hazardous condition that would violate the standard.

WHEREFORE, it is **ORDERED** that both Citation No. 8614883 and Citation No. 8614884 be **VACATED**.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

[8] The ball joints on both trucks had been replaced only a month before this inspection. (Tr.23-24).

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December 16, 2015

PATRICK SHEMWELL, Complainant, v. KENAMERICAN RESOURCES, INC., Respondent.	DISCRIMINATION PROCEEDINGS Docket No. KENT 2014-258-D MSHA Case No.: MADI-CD-2013-22 Docket No. KENT 2014-259-D MSHA Case No.: MADI-CD-2013-27 Docket No. KENT 2014-281-D MSHA Case No.: MADI-CD-2014-01 Docket No. KENT 2014-282-D MSHA Case No.: MADI-CD-2013-25 Mine: Paradise # 9 Mine ID: 15-17741

AMENDED DECISION AND ORDER[1]

Appearances: Tony Oppegard, Esq., Attorney at Law, Lexington, KY and Wes Addington, Esq., Appalachian Citizens' Law Center, Inc., Whitesburg, KY, Representing Complainant

Marco Rajkovich, Esq., and Todd C. Myers, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, KY, Representing Respondent

Before: Judge Lewis

This case is before me upon a complaint of discrimination brought by Hayward Patrick Shemwell ("Shemwell" or "Complainant"), a miner, against KenAmerican Resources, Inc. ("KenAmerican" or "Respondent").

Shemwell filed four discrimination complaints with the Mine Safety and Health Administration (MSHA) on August 21, 2013, September 11, 2013, September 20, 2013, and October 11, 2013. (RX-9).[2] Shemwell alleged that he was improperly transferred from his

[1] This Decision was amended to fix an error in the caption, which listed the case as being brought by the Secretary of Labor on behalf of Patrick Shemwell.

[2] Complainant's exhibits will hereinafter be designated CX followed by a number. The Respondent's exhibits will be designated as RX followed by a number.

position as a prep plant mechanic to a bulldozer operator, threatened with reprisal after a Significant and Substantial (S&S) violation was issued, threatened with reprisal for using his cellphone camera to document a threat, and ultimately discharged for refusing to operate an unsafe bulldozer. (RX-9).

After conducting an investigation, MSHA declined to file a discrimination complaint with the Federal Mine Safety and Health Review Commission (FMSHRC) for each of these MSHA complaints. Shemwell, through counsel, filed four complaints of discrimination under the Federal Mine Safety and Health Act of 1977 on February 12, 2014, and February 14, 2014. On April 15, 2014, Chief Judge Lesnick assigned these cases to the undersigned judge. On November 28, 2014, this Court consolidated Shemwell's four discrimination claims (KENT 2014-258-D, KENT 2014-259-D, KENT 2014-281-D, and KENT 2014-282-D).

Prehearing statements were timely filed by the parties. On June 3, 2015, KenAmerican Resources filed a Motion in Limine to exclude the expert testimony of Tracey Stumbo, as well as the use of a prior settlement agreement between KenAmerican and Shemwell, which was confidential and placed under seal. Shemwell responded to the Motion in Limine on June 5, 2015. On that date, this Court held a conference call. During the conference call, each side presented arguments concerning the Motion in Limine and the use of an expert witness. At the conclusion of the call, this Court made an oral ruling on the Motion in Limine, which was memorialized in writing. This Court permitted the expert testimony of Tracy Stumbo in relation to the D-6 bulldozer. Further, this Court denied admission of the full prior confidential settlement agreement, but did allow the parties to stipulate that Shemwell had settled six prior discrimination complaints on August 19, 2013, based in part upon his return to work as a prep plant mechanic.

A hearing was held in Evansville, Indiana, from June 9-11, 2015, at which the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post-Hearing and Reply Briefs, which have been fully considered.

STIPULATIONS

1. There was a past confidential agreement on August 19, 2013, in which Mr. Shemwell agreed to settle six prior discrimination complaints in part to return to his job as a prep plant mechanic. (Tr. 8). [3]

2. KenAmerican is subject to the Federal Mine Safety and Health Act of 1977. (Tr. 9).

3. KenAmerican is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the Administrative Law Judge has the authority to hear this case and issue a decision. (Tr. 9).

[3] Pages of the official hearing transcript are designated "Tr." followed by the appropriate page references.

SUMMARY OF TESTIMONY

Patrick Shemwell began as a prep plant mechanic for KenAmerican at the Paradise #9 mine in January 2012. (Tr. 55). He worked there until May 17, 2013, when he was discharged. (Tr. 55; CX-2). Shemwell returned to work on August 20, 2013, pursuant to a confidential settlement agreement he made with KenAmerican. (Tr. 55; CX-2). The same month, Shemwell was chosen by his coworkers to be a miners' representative. (Tr. 53-54). In this role, other miners could come to Shemwell with their mine safety complaints; Shemwell's responsibility was to make certain these issues were resolved. (Tr. 53-54).

On August 19, 2013, which was the day before Shemwell returned to work, Shemwell spoke with KenAmerican's vice president Randy Wiles ("Wiles"), who told Shemwell that he could contact him directly if he had safety complaints and was unsuccessful getting help from the foremen. (Tr. 52-53).

The job reassignment from plant mechanic to bulldozer operator

On August 20, 2013, the day Shemwell returned to work as a plant mechanic, Charles Dwight Wilkins ("Wilkins"), who was the shift foreman at the plant during this time, told Shemwell to work on welding. (Tr. 55-56, 59, 473). Wilkins testified that shortly after the assignment was given, Shemwell asked for the Material Safety Data Sheets ("MSDS") for the welding rods. (Tr. 475). Wilkins called James Nichols ("Nichols" a.k.a. "Smoothy"), the safety department director, and Nichols brought the MSDS over to the plant for Shemwell. (Tr. 47-76). Shemwell took the MSDS upstairs to the control room, where he reviewed them for about an hour. (Tr. 476). When Shemwell returned from the control room, he informed Wilkins that he would not continue to weld because the fumes could cause cancer. (Tr. 477).

As a result, Wilkins assigned Shemwell to change the panels on the coal screens.[4] (Tr. 477). Shemwell went to "lock and tag out" the coal screens, but he was unable to find any locks, and the only available tags were old laminate tags.[5] (Tr. 57). Shemwell complained to Wilkins, and Gary Trump, a Paradise #9 manager, about the inadequate tags and lack of locks. (Tr. 59, 61). Wilkins testified that he did not believe the machine needed to be locked and tagged because he was troubleshooting on it. (Tr. 474-75). Wilkins then told Shemwell to return to work. (Tr. 474). A discussion occurred between Shemwell and Wilkins because Shemwell felt that the lack of locks and the old tags were unsafe. (Tr. 62). Ultimately, no new tags or locks were provided for Shemwell. (Tr. 62). Bobby Jones, another plant mechanic, had already locked the coal screen machine, and Wilkins told Shemwell that one lock was enough. (Tr. 61, 438).

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[4] Raw coal from underground comes up the belt where it is washed and separated; then the coal screens separate the big coal from the fine coal. (Tr. 56). The screens have larger coal at the top and fine coal at the bottom. (Tr. 56).

[5] The process of locking and tagging out is used by miners to prevent machines from turning on and harming another individual when there is work being done on the machine. (Tr. 58-59). Each individual working on the machine gets a lock to put on the machine, which prevents its operation. (Tr. 60). A tag with the name of the miner is also used, so that coworkers are aware who is working on the machine. (Tr. 60).

Due to Shemwell's dissatisfaction with Wilkins's response, Shemwell requested to contact Wiles, KenAmerican's vice president, about this safety issue. (Tr. 62). Wilkins then went down to the plant office with Shemwell to call Wiles on the phone. (Tr. 62, 480). Shemwell spoke with Wiles about his safety concerns involving the lack of adequate locks and tags. (Tr. 62-63). Wiles told Shemwell to instruct Wilkins to go to the warehouse and get more locks and tags. (Tr. 63). Shemwell testified that Wilkins was upset about Shemwell calling Wiles because it would get Wilkins in trouble. (Tr. 63).

The following day Shemwell was assigned to operate a bulldozer at the gob pit, which held the refuse piles at the mine. (Tr. 64, 614). Wilkins was the foreman during the shift, and he asked Shemwell to operate one of the bulldozers. (Tr. 64). Shemwell responded that he did not want to work at the gob pit because he had no experience working there. (Tr. 64). Nonetheless, he was assigned to operate one of the bulldozers at the gob pit. (Tr. 65). There is some dispute as to who ordered this assignment. (Tr. 290, 483). The human resources manager for KenAmerican, Ron Winebarger ("Winebarger"), testified that he did not know if Wilkins ultimately made the decision to move Shemwell to the gob pit. (Tr. 290). Wilkins testified that he thought it was Bruce Patton, the plant manager, who made the decision to move Shemwell. (Tr. 483). After being transferred over to work at the gob pit, Shemwell filed a discrimination complaint wherein he alleged that he was reassigned to operate a bulldozer from his position as a prep plant mechanic because of the safety complaints he had made the previous day. (Tr. 68; CX-7).

Alleged threat of reprisal after a S&S violation was issued at the gob pit

On August 21, 2013, Shemwell was task trained on the D-8 and D-5 bulldozers by Wilkins and a bulldozer operator named Archie Shelton ("Shelton"). (Tr. 79, 485-86, 487-88). At the time, Shelton was working on the gob pit bulldozers and had previously worked at Paradise #9 as a diesel mechanic. (Tr. 487). Wilkins testified that he explained to Shemwell that the gob pile must be kept in two-foot lifts. (Tr. 487). Conversely, Shemwell testified that he was not trained on how high the gob pile must be kept. (Tr. 69). Shemwell said he was only told to push the piles over as the gob truck comes in and dumps the refuse.[6] (Tr. 69).

Several days after working at the gob pit, Shemwell testified he found out about a ground control plan. (Tr. 70). The ground at the gob pit was spongy and saturated with water, which made some of the dump trucks sink when bringing over refuse from the plant. (Tr. 70). Shemwell asked John Sparr ("Sparr"), an engineer who managed the gob pit, for the ground control plan. (Tr. 70). Shemwell also testified that Joey Burden ("Burden"), an equipment operator, told Shemwell that the prep plant needed to fix a sweeper on the gob belt to prevent any water from being put into the gob truck. (Tr. 72). Moreover, Shemwell testified that Burden said the plant let this water problem continue for too long and that a citation could be issued because of the water getting into the gob pit. (Tr. 72-73). Once Shemwell received the ground control plan, he read it, but was unable to understand it. (Tr. 73). Therefore, he called MSHA and

[6] The gob truck is a large dump truck that brings refuse material to the gob pile. (Tr. 490). The truck holds fifty tons. (Tr. 490).

asked them to come out to Paradise #9 and do a 103(g) inspection to determine whether the gob pit was being maintained according to the ground control plan. (Tr. 73).

On September 1, 2013, MSHA inspectors came to Paradise #9, and issued two S&S citations. (Tr. 78; CX-3). These citations were issued due to the gob piles impeding drainage, which created soft spots, and insufficient compacting. (CX-3). In reaction to these citations, Sparr came to Shemwell and told him to compact the gob pile. (Tr. 80-82). Shemwell testified that Sparr threatened him with a "write-up" if Shemwell did not compact the gob pile into two-foot piles by the next day.[7] (Tr. 80-82). Shemwell was then task trained on the compactor by Burden. (Tr. 87). However, the compactor that Shemwell was assigned to did not have a CB radio in it for two-way communication.[8] (Tr. 87). During Shemwell's first shift, Sparr did not get him a two-way radio when requested. (Tr. 88). The same day, on the second shift, Gary Hatfield ("Hatfield"), the second shift foreman, did get Shemwell a two-way radio for the compactor. (Tr. 88-89, 109).

Alleged threat of reprisal for using a cellphone to document a threat

While working at the gob pit, Shemwell called the MSHA hotline about some oil on the ground near where he would refuel the bulldozers. (Tr. 83). Shemwell also made a complaint about the fire extinguishers near the fuel tank not being up to date. (Tr. 84). The second night, Shemwell was asked to use the compactor; there was again no CB radio inside, so he refused to use the compactor. (Tr. 89). Accordingly, Shemwell was assigned to use the bulldozer instead. (Tr. 89).

Shemwell complained on behalf of a coworker named "Big John" that one of the bulldozers had no air conditioning. (Tr. 91, 92). The bulldozer that Big John was using did not have an air conditioner for approximately three weeks. (Tr. 91). Shemwell testified that Big John said he wrote down this problem in the pre-op sheets he had to fill out every day before using the bulldozer.[9] (Tr. 91). Shemwell called the MSHA hotline about this issue and asked MSHA to come out to investigate. (Tr. 91).

Two days after making the complaint to MSHA about Big John's bulldozer, two MSHA inspectors, Inspector Putty and another, came out to the mine with Nichols, the safety department director. (Tr. 92). While Shemwell was clocking in at the bathhouse, the inspectors and Nichols pulled up in Nichols's truck. (Tr. 92). Nichols came over and said the inspectors wanted to talk to the employees before they started work. (Tr. 93). Inspector Putty said the employees needed to make sure to talk to the foreman and Nichols before calling MSHA with safety complaints. (Tr. 93). In response, Shemwell said he was the individual who made the complaints, and his call was

[7] A write-up as referred to here is a type of disciplinary action. (*See* Tr. 82).

[8] A CB or two-way radio is necessary if an individual using a compactor is not within hearing distance of another person. (Tr. 88).

[9] A pre-op sheet is used at the start of a shift to check a machine for its safety condition. (Tr. 97). Fluids, oil, coolant levels, lights, warning beacons, and back up lights are some of the things tested during a pre-op check. (Tr. 97).

not anonymous. (Tr. 94). Then Shemwell and Inspector Putty argued, followed by Inspector Putty apologizing for his statement. (Tr. 95). They also discussed the lack of a water cooler in the bathhouse and Big John's bulldozer during this meeting. (Tr. 95-96). In addition to the inspectors and Nichols, J.J. Stringer ("Stringer"), the heavy equipment mechanic supervisor, David Darnell ("Darnell"), the prep plant superintendent, Wilkins, and approximately eight to ten crew members were present at this meeting. (Tr. 93-94, 99).

The next day, September 19, Shemwell was operating one of the bulldozers at the gob pit. (Tr. 100). While he was working, Randall Parm ("Parm"), the gob truck driver, drove over to talk with Shemwell. (Tr. 100). Parm told Shemwell that he saw the words "dead man walking" written on the miners' representative sheet with an arrow pointing towards Shemwell's name. (Tr. 100). Shemwell then used Parm's two-way radio to get Darnell to come over to the gob pit. (Tr. 100-01). Darnell drove over to the gob pit with Hatfield. (Tr. 101). They kept asking Shemwell what was going on, but he would not tell them; Shemwell just asked to be taken to the bathhouse. (Tr. 101). They brought him to the bathhouse, where Sparr was waiting. (Tr. 102). Shemwell went over to the bulletin board and took his phone out to photograph the miners' representative sheet. (Tr. 102). Darnell used his own cellphone to take a few photos of Shemwell with his cellphone out and reminded Shemwell that the use of cellphones during working hours was prohibited. (Tr. 102, 534-35). Shemwell was upset and left work because he did not feel safe any longer. (Tr. 102). For about ten days after this event, Shemwell did not return to work. (Tr. 106).

Suspension and discharge for refusal to operate unsafe bulldozers

On October 1, 2013, Shemwell returned to work. (Tr. 107). That day, Shemwell was assigned to operate the D-5 bulldozer. (Tr. 107). The D-5 bulldozer was missing a seal from the doorjamb, which left an inch-wide gap where the exhaust would leak into the bulldozer. (Tr. 108). Shemwell was able to operate the D-5 bulldozer downwind for the rest of his shift, which kept exhaust from blowing inside the bulldozer. (Tr. 108). At the end of his shift, Shemwell told Hatfield about the gap in the bulldozer door, and Hatfield said he would let Darnell know. (Tr. 109).

On the following day, Shemwell was again assigned to operate the D-5 bulldozer, but the door gap was not fixed. (Tr. 110). Darnell brought Shemwell over to the gob pit, and Shemwell told Darnell about the gap leaking exhaust into the bulldozer. (Tr. 110). As a result, Darnell looked at the bulldozer and acknowledged there was a significant space in the door, which needed to be fixed with a gasket. (Tr. 110). Darnell then called Stringer to ask for a gasket, but none was available. (Tr. 110). Darnell suggested fixing the door gap with silicone. (Tr. 111). Shemwell agreed to try and repair the door with silicone, and subsequently filled the gap with silicone. (Tr. 110-11). The fumes from the silicone bothered Shemwell, so he asked to see the MSDS on silicone. (Tr. 111). In reviewing the MSDS, Shemwell read that silicone could affect the nervous system and cause cancer, so a respirator should be worn when in contact with silicone. (Tr. 112). Shemwell asked to go to the bathhouse to wash his hands and asked for a respirator. (Tr. 112). No respirator was available, so Shemwell refused to operate the D-5 bulldozer. (Tr. 112-13).

Shemwell was then asked to use the D-6 bulldozer. (Tr. 113). Burden task trained Shemwell on the D-6, specifically highlighting that the throttle did not always work properly. (Tr. 114, 356). Shemwell operated the D-6 bulldozer for approximately twenty to thirty minutes on the gob pile. (Tr. 114). Shemwell testified that the gob pile was approximately fifteen to twenty feet high. (Tr. 114). Wilkins conversely testified the gob piles reached seven or eight feet at the tallest; Bobby Jones Jr. ("Jones"), a plant mechanic who had also operated the gob pile bulldozer in the past, testified that the piles reached eight to nine feet at most; and Phillip Burden, a plant mechanic, testified that the piles reached six to seven feet. (Tr. 393, 451, 490). Shemwell testified that he "tee-tottered" over the hill when he tried to push the gob, and the throttle was not working properly to help him reverse. (Tr. 117). Therefore, once he was able to safely exit the bulldozer, he told Darnell he would not use the D-6 again.[10] (Tr. 117). Darnell then asked Shemwell if he wanted to travel with the federal inspector, and Darnell testified he told Shemwell he did not have to operate the bulldozer if it made him feel unsafe. (Tr. 121, 51-72).

Tracey Stumbo ("Stumbo"), who testified as an expert witness on behalf of the Complainant, testified that a bulldozer throttle works to bring the machine up to full speed, and there is a decelerator pedal to lower the speed of the bulldozer.[11] (Tr. 260). Stumbo further testified after hearing Shemwell's testimony about the bulldozer almost tipping over, that Shemwell did not have control of the steering due to the throttle not working. (Tr. 262). If a throttle kicks out, a bulldozer will only be at idle speed, and it cannot be reversed. (Tr. 263). As a result, Stumbo testified he would have issued a closure order for a bulldozer if the throttle kicked out. [12] (Tr. 266). However, Stumbo did acknowledge that Shemwell's testimony about tipping over might be suspicious to an investigator because it never showed up in any of Shemwell's complaints or in any statements made to MSHA. (Tr. 277).

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[10] Ronald Winebarger, the human resources manager who ultimately terminated Shemwell, testified that he had no knowledge of Shemwell tipping over in the D-6 bulldozer. (Tr. 625). Shemwell testified he told Darnell about almost tipping over. (Tr. 126). Shemwell also testified he told Winebarger about almost tipping over, but he did not go into detail. (Tr. 195).

[11] Tracy Stumbo was the former chief accident investigator for the Kentucky Office of Mine Safety & Licensing ("OMSL"), which was previously known as the Kentucky Department of Mines & Minerals ("KDMM"). (Tr. 233). After voir dire was conducted, Stumbo was allowed to testify as an expert witness. (Tr. 256). Stumbo worked for KDMM/OMSL for 29 years, including 17 years as the state's chief accident investigator, where he investigated at least 130 fatal mining accidents. (Tr. 233, 239). As an accident investigator, Stumbo spent five years inspecting bulldozers at refuse piles. (Tr. 236). Prior to working for KDMM/OMSL, Stumbo worked for approximately 12 years in the coal mining industry. (Tr. 241). Before testifying, the expert witness listened to Shemwell's testimony about his operation of the D-6 bulldozer. (Tr. 261).

[12] Stumbo did not testify to exactly what a closure order is, but this Court inferred from his testimony that a closure order indicates that a machine is not safe to use and cannot be used until it has been fixed. (*See* Tr. 266).

Two days later, October 4, 2013, was Shemwell's last day of work with Paradise #9 before being suspended. (Tr. 125). Wilkins and Darnell brought Shemwell to the gob pit to operate the D-6 bulldozer. (Tr. 125). But Shemwell refused to operate the D-6 bulldozer because of the throttle. (Tr. 125). Shemwell testified that he offered to use the D-5 instead. (Tr. 133). However, there were still silicone fumes inside, so Shemwell refused to operate the D-5 without a respirator. (Tr. 133). Darnell then brought Shemwell to Winebarger, the human resources manager. (Tr. 128). Darnell told Winebarger that Shemwell would not operate the D-6 bulldozer. (Tr. 128-29). Shemwell responded that there were safety issues with the throttle, which is why he would not use the D-6 bulldozer. (Tr. 129). Consequently, Winebarger suspended Shemwell for three days so Winebarger could conduct a safety investigation of the bulldozer. (Tr. 129).

On October 9, 2013, Shemwell returned to work after suspension. (Tr. 129). When he first arrived, he met with Winebarger and Darnell. (Tr. 131). Winebarger told Shemwell that experienced operators checked the D-6 bulldozer and no safety issues were found. (Tr. 132). Jimmy Lee Bryant, who worked with the maintenance surface shop heavy equipment; Bobby Jones, a plant mechanic; and Phillip Burden were all asked to check the D-6 for safety issues, and they all signed statements indicating that they found no safety issues. (Tr. 334, 416, 437; RX-2-4). Bryant said he did not find an issue with the throttle, but would have tagged out the D-6 if he had found a problem. (Tr. 427). Phillip Burden did not find the throttle idling to be a safety issue. (Tr. 398). Winebarger then terminated Shemwell for the stated reason that he had refused to operate the D-6. (Tr. 132, 331).

CONTENTIONS OF THE PARTIES

Following the hearing, the Complainant and Respondent submitted briefs and reply briefs in support of their respective positions. Complainant argues that Respondent discriminated against Complainant on four separate occasions after he engaged in protected activities. First, Complainant contends that Shemwell's move from plant mechanic to bulldozer operator constituted discrimination. (*Complainant's Post-Hearing Brief* at 43-44). Complainant alleges that this move was made in retaliation for complaints that Shemwell had made about insufficient locks and tags, as well as six other pre-settlement complaints to MSHA. (*Id.* at 43-44). Respondent argues that this move was not made in retaliation to any protected activity. (*Respondent's Post-Hearing Brief* at 4-6). Rather, Respondent contends that moving Shemwell to the gob pit was a business decision not involving Shemwell's safety complaints. (*Id.* at 5-6). Respondent argues that all employees operate equipment in addition to their usual jobs. (*Id.* at 6). In response, Complainant counters that the mere moving of a miner from one position to another after making safety complaints constitutes discrimination. (*Complainant's Reply Brief* at 29-30).

Complainant alleges that a second act of discrimination occurred after Shemwell made a complaint to MSHA to come inspect the gob pit. (*Complainant's Post-Hearing Brief* at 44-45). Complainant alleges that Sparr, the gob pit engineer, threatened Shemwell with a write-up after Shemwell's complaint was made and subsequent citations were issued by MSHA. (*Id.*). Conversely, the Respondent contends that no threat was made to Shemwell because Joey Burden, a coworker who was present during Sparr's conversation with Shemwell, said that Sparr only reminded them about the two-foot lift requirement for the gob pit. (*Respondent's Post-Hearing Brief* at 11-12.)

The third act of discrimination alleged by the Complainant occurred after Shemwell found "dead man walking" written on the miners' representative sheet in the bathhouse. (*Complainant's Post-Hearing Brief* at 45-46). Shemwell contends that Darnell demonstrated animus when he took a photo of Shemwell documenting the comments on the miners' representative sheet. (*Id*. at 46). The Respondent counters that there was a no-cellphone-use policy during working hours, and Shemwell was not singled out by Darnell. (*Respondent's Post-Hearing Brief* at 13). Instead, Darnell consistently attempted to enforce this no-cellphone-use policy while at Paradise #9 mine. (*Id*. at 13). However, Complainant responds that Shemwell's photograph was a protected activity, so any threat of discipline by Darnell was discrimination. (*Complainant's Reply Brief* at 33).

Finally, Complainant contends that his discharge was discriminatory because it occurred as a result of his refusal to operate the D-5 and D-6 bulldozers on October 2, and October 4. (*Complainant's Post-Hearing Brief* at 46). Complainant further contends these work refusals were reasonable because the throttle on the D-6 bulldozer did not work properly, and the D-5 bulldozer was missing a door seal, which resulted in him being overcome with silicone fumes. (*Id*. at 46-47). The Respondent argues that Shemwell was inconsistent when recounting an incident that occurred while using the D-6 bulldozer, and he unreasonably refused to use a bulldozer that was safe. (*Respondent's Post-Hearing Brief* at 16-18). Respondent further contends that three experienced operators—Jimmy Lee Bryant, Bobby Jones, and Phillip Burden—checked out the D-6 bulldozer and did not find any safety issues. (*Id.* at 18-19). Additionally, Respondent argues that Winebarger, the human resources manager, who ultimately discharged Shemwell, was only told by Shemwell that the D-6 bulldozer was old, and that Shemwell did not want to operate it. (*Id.* at 23-24). Consequently, Respondent argues that Shemwell never presented a reasonable safety issue for refusing to operate the D-6 bulldozer, and therefore, the termination was made based on his refusal to work. (*Id.* at 25).

DISCUSSION

This case has been brought based on allegations that the Respondent discriminated against the Complainant under section 105(c) of the Act, which states:

> No person shall…in any manner discriminate against or otherwise interfere with the exercise of the statutory right of any miner…because such miner…has instituted or caused to be instituted any proceeding under or related to this Act…or because of the exercise by such miner…of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1)

The Mine Act is remedial legislation, and it should be liberally construed. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2789 (1980). Recognizing that miner participation was essential to miner's health and safety, the Act was drafted to encourage miners to partake in its enforcement. *Id.* The Senate Report accompanying the Act states:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if

> miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

S. Rep. No. 95-181, at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978).

I. Complainant established a *prima facie* case of discrimination

To establish a *prima facie* case of discrimination, the Complainant must show that he (1) engaged in protected activity, and (2) suffered an adverse action that was motivated at least in part by the protected activity. *Sec'y of Labor on behalf of Miller v. Savage Svcs. Corp.*, 37 FMSHRC 936 (2015). The burden of persuasion is on the Complainant. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2799-2800 (Oct. 1980). An operator can rebut a *prima facie* case by showing that there was no protected activity or that the adverse action was not motivated by the protected activity. *Glover v. Consolidation Coal Co.,* 19 FMSHRC 1529, 1535-36 (Sept. 1997). The Commission has held "[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… alone." *Sec'y of Labor on behalf of Leonard Bernadyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 301 (March 2000).

A. Complainant engaged in activity protected by the Mine Act

The Respondent concedes that it terminated Shemwell for his refusal to operate the D-6 bulldozer. (Tr. 331). Therefore, this case ultimately turns upon whether Shemwell's work refusals, based upon his safety concerns, constituted protected activity. (Tr. 331).

The Commission has repeatedly held that a work refusal is a form of protected activity. *See e.g. Bryce Dolan v. F& E Erection Co.*, 22 FMSHRC 171, 175 (Feb. 2000). Although the Mine Act grants miners the right to complain of a safety or health danger or violation, it does not expressly state that miners have the right to refuse to work under such circumstances. 30 U.S.C. § 815 (c)(1). Nevertheless, the Commission and this Court have recognized the right to refuse work in the face of such perceived danger. *See Bryce Dolan*, 22 FMSHRC at 176; *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Estrada v. Runyan Construction INC.*, 36 FMSHRC 3156, 3166 (2014)(ALJ). A protected work refusal "…is an extremely important legal construct, particularly in the mining industry, where hazards often appear instantaneously and a miner's decision to remove him or herself from a dangerous situation could be the difference between life and death." *Bryce Dolan*, 22 FMSHRC at 179-80. The legislative history confirms the Congressional intent for the Act to cover work refusals:

> The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include…the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are

violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

S. Rep. No. 95-181, at 35.

i. Work refusals must be in good faith to be protected by the Act

For a work refusal to be protected, the miner need not show that a hazard *actually* existed. *Estrada*, 36 FMSHRC at 3166. Rather a miner need only show that he possessed a good faith belief that there was a safety hazard. *Id.* Good faith is required to prevent work refusals involving "frauds or other types of deception." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 810 (April 1981); s*ee also Pasula*, 2 FMSHRC at 2792 (discussing the necessity of good faith in protected work refusals).[13]

The miner retains the burden of demonstrating good faith—but he need *not* prove the absence of bad faith. *Gilbert v. Federal Mine Safety & Health Review Commission*, 866 F.2d 1433 (D.C. Cir. 1989); *Sec'y of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993 (1983). A miner's good faith can be established through his own testimony. *Robinette*, 3 FMSHRC at 810-12. Conversely, an operator can use evidence or cross-examination to demonstrate bad faith. *See id.*

ii. Good faith requires a miner's belief be honest and reasonable

In *Robinette*, the Commission held that in order for work refusals to be protected, the miner's good faith belief must be honest and reasonable. *Id.* at 812. Reasonableness is not an entirely *objective* standard, but rather it requires the ALJ to analyze the perception of the miner at the time the alleged protected activity took place. *Sec'y of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 152, 15349 (1983); *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (1982). In *Bryce Dolan*, the Commission held that "the standard under which work refusals are analyzed includes the *subjective* element of a miner's 'honest belief that a hazard exists' as well as the *objective* requirement that the miner's belief be reasonable." *Bryce Dolan*, 22 FMSHRC at 177, n. 7 (citing *Robinette*, 3 FMSHRC at 810).

Here, Shemwell refused to operate a D-5 bulldozer on October 1, 2013, due to a gap in the doorjamb, which allowed exhaust to enter into the cab. (Tr. 107-08). Shemwell complained twice to his supervisors Hatfield and Darnell. (Tr. 108-10). Darnell thereupon gave Shemwell silicone to repair the door, but this resulted in silicone fumes filling the bulldozer. (Tr. 110-11). After reviewing the MSDS, Shemwell became aware that silicone fumes could affect the nervous system and cause cancer, so he refused to operate the D-5 without a respirator. (Tr.112-13).

[13] In reaching his within findings as to the good faith nature of Complainant's work refusal(s), the ALJ found Complainant's Counsel's arguments persuasive regarding Shemwell's willingness to operate the D-5 bulldozer on October 1, 2013. (*See Complainant's Post-Hearing Brief* at 15).

On October 2, 2013, Shemwell was moved to the D-6 bulldozer. (Tr. 113). When he was task trained on the D-6 bulldozer, Shemwell was told by Burden, an equipment operator, that the throttle did not always work properly. (Tr. 114). Shemwell testified that the throttle stopped working on the D-6 bulldozer while he was on the edge of a refuse pile, which led to the bulldozer almost falling over. (Tr. 117). As a result, Shemwell also refused to operate the D-6 bulldozer after telling his supervisor Darnell about this safety issue with the D-6 throttle. (Tr. 117).

Respondent has questioned whether the D-6 bulldozer tipping incident—as described by Shemwell—had actually taken place or was essentially a fabrication. (*Respondent's Post-Hearing Br. at* 38-39).

However, in order to establish a viable claim of discrimination, Shemwell need not prove that the D-6 bulldozer had nearly tipped over. The Complainant need only show that he had experienced untoward difficulties with the bulldozer such that he reasonably and in good faith felt unsafe in operating it. This Court specifically finds that Shemwell was credible in describing his perceived loss of control of the bulldozer while running it on the gob pile.

In analyzing the *subjective* element of whether Shemwell had an honest belief that the bulldozer's continued operation presented a hazard, this Court has also considered that Shemwell had very limited training and experience in the operation of bulldozers. In experiencing a throttle malfunction while on the gob pile, Shemwell may well have honestly believed himself to be in greater danger than he actually was.

The miners who testified on behalf of the Respondent that they had felt safe in operating the bulldozer may well have been also truthful in their expressed opinions.[14] (RX-2-4). However, the question is not whether these miners subjectively felt themselves at risk in operating the bulldozer—or indeed whether the bulldozer was in fact hazardous to operate—*but whether Shemwell in good faith perceived himself to be in danger*.

As to *Bryce Dolan's* requirement that the miner's belief be objectively reasonable, this Court notes the testimony of the Complainant's expert witness, Tracey Stumbo. Stumbo opined that he would have issued a closure order if the D-6 bulldozer had been used on top of a refuse pile and the throttle kicked out. (Tr. 266). Shemwell's coworkers, Bryant, Phillip Burden and Joey Burden also testified that they knew that the D-6 bulldozer's throttle had not been working properly. (Tr. 404, 421-22).[15]

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[14] This Court is not altogether certain whether the miners were being completely honest in expressing their full confidence in the safety of the bulldozer or merely giving testimony to garner the mine operator's favor. The memorable scene in *Jaws* is called to mind in which Amity Council members, egged on by the mayor, reluctantly go treading into the water to prove to beach-goers there was no risk from sharks. JAWS (Universal Pictures 1975).

[15] In reaching his within findings that Complainant had reasonably refused to operate machinery that he believed to be unsafe, the ALJ found persuasive Complainant's argument that Shemwell had never refused to operate the D-8 bulldozer, which was the primary bulldozer on the gob pile. (*See Complainant's Post-Hearing Brief* at 3-4).

Given the total circumstances, a prudent miner who experienced problems controlling a bulldozer on top of a gob pile could reasonably believe that its continued operation posed a hazard. Therefore, this Court finds that Shemwell's work refusal constituted a form of protected activity under the Act.

B. Complainant's discharge was an adverse action that was motivated at least in part by his work refusal

Given this Court's finding that Shemwell's refusal to operate the D-6 bulldozer was protected activity, this Court will address (1) whether there was an adverse action, and (2) if there is a nexus between the miner's protected activity and the adverse action. *See Kenneth L. Driessen v. Nevada Goldfields, Inc*., 20 FMSHRC 324, 329 (Apr. 1998)(addressing separately if there is an adverse action, then whether there is a nexus between the adverse action and protected activity).

i. Complainant suffered an adverse employment action

Under the Act, an adverse action is broadly defined. *See Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012). The legislative history of the Mine Act demonstrates this expansive intent when it stated:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses, and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal.

S. Rep. 95-181 at 36 (1977).

Here, there was clearly an adverse action because Shemwell was discharged after he refused to operate the D-6 bulldozer. (Tr. 132). On October 4, 2013, Darnell, the prep plant superintendent, and Wilkins, the shift foreman, brought Shemwell to the gob pit and assigned Shemwell to the D-6 bulldozer. (Tr. 125). Shemwell refused to operate the D-6 bulldozer because he said the throttle was a safety hazard. (Tr. 125). Shemwell testified that he offered to use the D-5 bulldozer, but that it still had unsafe silicone fumes in it from a previous day. (Tr. 133). After refusing to use these two bulldozers, Darnell brought Shemwell to Winebarger, the human resources manager, and Darnell told Winebarger about Shemwell refusing to operate the D-6. (Tr. 128-29). In response, Shemwell said that there were safety issues with the bulldozer. (Tr. 129). Shemwell was then suspended for three days so that Winebarger could conduct an investigation. (Tr. 625-626). Upon returning from suspension on October 9, 2013, Shemwell was fired for refusing to comply with a work request to use the D-6 bulldozer. (Tr. 133).

ii. There was a nexus between the protected activity and adverse action

Because Shemwell's termination was clearly an adverse action, it must next be determined whether there was a nexus between the protected activity and adverse action. The Respondent essentially concedes that Shemwell was terminated for refusing to operate the D-6

bulldozer. (Tr. 331). Given Respondent's concession that Shemwell was terminated due to his refusal to operate the D-6 bulldozer and this Court's finding that the work refusal in question was protected activity, in-depth nexus analysis is not necessary.

This Court will review however some of the case law applicable to direct and indirect evidence in the context of the termination and protected work refusal in this case.

In cases where direct evidence of discrimination is unavailable, there are several indicia of discriminatory intent the court will consider, including: "(1) knowledge of the protected activity; (2) hostility towards to protected activity; (3) coincidence in time between the protected activity and adverse action; and (4) disparate treatment of the complainant." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508, 2510 (Nov. 1981) *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983)). "Furthermore, inferences drawn by judges are 'permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred."' *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)). Accordingly, all reasonable inferences may be drawn from the facts. *Id.*

a. Respondent had knowledge of the protected activity

Knowledge of protected activity is one of the most important factors in a circumstantial case for discrimination. *Sec'y of Labor on behalf of Lopez v. Sherwin Alumina, LLC*, 36 FMSHRC 730, 736 (March 2014)(ALJ). The Commission has specifically held "an operator may not escape responsibility by pleading ignorance due to the division of company personnel functions," and a supervisor's knowledge can be imputed to a management decision-maker when the supervisor influences management's determination decisions. *Metric Constructors,* 6 FMSHRC 226 (Feb. 1984); *Turner v. National Cement,* 33 FMSHRC 1059 (May 2011). Moreover, when an agent of an operator has knowledge or should have knowledge of a safety hazard, such knowledge is imputed to the operator. *See Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000); *Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977) *aff'd* 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (holding acts or knowledge of an agent are attributable to a principal). An agent is someone with duties normally delegated to management personnel and has responsibilities fundamental to the mine's operations. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-38 (May 2000).

Winebarger stated he does not remember if he knew about Shemwell's throttle complaint at the time of Shemwell's suspension or at the termination meeting on October 9, 2013. (Tr. 625). However, Winebarger's testimony that he did not know about the throttle complaint at the time of the October 4, 2013, suspension meeting is not credible because he began a safety investigation directly in response to this meeting. (Tr. 625-26). Moreover, Bryant, one of the three individuals who was asked to investigate the D-6 bulldozer, stated that he had been specifically instructed to test the D-6 throttle. (Tr. 419). Therefore, this Court finds that Winebarger knew or should have known of the complaints that Shemwell had made and of Shemwell's work refusal based on the D-6 throttle not working. Given that Winebarger was the

operator's human resources manager, he was an agent of KenAmerican. KenAmerican cannot therefore deny actual or constructive knowledge of Shemwell's protected activity.

b. There was hostility towards Complainant's protected activity

The next consideration is whether the mine operator demonstrated hostility or animus towards the protected activity. *See Chacon,* 3 FMSHRC at 2511. The Commission has held that animus should be weighed more heavily the more specifically-directed it is to the complainant's protected activity. *Id.*

There was clear animus in this case. On October 4, 2013, the prep plant superintendent Darnell brought Shemwell to the human resources manager in response to Shemwell's complaints and refusals to operate the D-6 and D-5 bulldozers. (Tr. 578-79). Shemwell was suspended that same day, and when he returned after suspension, Shemwell was discharged for refusing to operate a bulldozer (the D-6) he felt was unsafe. (Tr. 133, 331). This suspension and discharge are both acts of hostility taken by KenAmerican after Shemwell made safety complaints and safety related work refusals. As a result, this animus weighs more heavily because it was directed specifically at Shemwell's refusals to operate bulldozers he believed to be unsafe.

c. There was a coincidence in time between the protected activity and the adverse action

Here, there was also clear coincidence in time between the protected activity and the adverse action at issue. On October 4, 2013, Shemwell refused to use the D-5 and D-6 bulldozers because he believed them to be unsafe. (Tr. 125-26). That same day, he was taken by Darnell, the prep plant superintendent, to Winebarger who suspended Shemwell for three days to allow for a safety investigation. (Tr. 128-29, 578-79). On October 9, 2013, when Shemwell returned to work, he was discharged for failing to operate the D-6 bulldozer. (Tr. 331). The termination meeting occurred immediately upon Shemwell's return to work on Wednesday October 9, which was less than a week after his suspension. This Court therefore finds that this factor is satisfied and weighs heavily in the Complainant's favor.

d. There is no clear evidence of disparate treatment

The final consideration is whether the Complainant experienced disparate treatment. *Chacon*, 3 FMSHRC at 2510. Disparate treatment occurs when employees who perform the same action or offense are treated differently by management. *Id.* at 2512. However, disparate treatment is not necessary to prove a *prima facie* discrimination claim when other indicia of discriminatory intent are present. *Id.* at 2510-13.

It is unclear whether the Complainant experienced disparate treatment involving his suspension and termination. Shemwell was suspended and discharged for complaining and refusing to use the D-5 and D-6 bulldozers for safety reasons. (Tr. 131-33). No evidence has been brought by the Complainant demonstrating that any other miner who refused to use these bulldozers was treated differently. As a result, this consideration does not favor the Complainant.

In light of the above indicia, there is evidence establishing a nexus between the protected activity and the adverse action. There was a coincidence in time; the Respondent had knowledge of the protected activity; and there was hostility towards Shemwell's protected activity. Consequently, the Complainant has demonstrated a *prima facie* case of discrimination for his termination.

II. Respondent failed to rebut Complainant's *prima facie* case

A *prima facie* case of discrimination can be rebutted by an operator showing that there was no protected activity or by showing the adverse action taken was not related to the protected activity. *Pasula*, 2 FMSHRC at 2799-2800. Given the foregoing findings, the operator has failed to show there was no protected activity and/or that Shemwell's termination was not directly related his protected activity. (Tr. 331). This Court recognizes the legitimate concern on the part of mine operators, including the Respondent, that some miners in an effort to shield themselves from punishment due to poor job performance or misconduct, may make frivolous or unwarranted safety complaints. Further, this Court recognizes that a returning discriminatee, such as Complainant, who has returned to work after a successful discrimination settlement, may also be tempted to insulate himself against future adverse actions by lodging preemptive safety complaints. There are always "outliers," both mine operators and miners, who attempt to "game the system."

Although some of Shemwell's actions upon his return to work could understandably be viewed by Respondent as having been motivated by an improper *mens rea*[16], this Court has found that Complainant's refusal to operate the D-6 bulldozer was a legitimate work refusal and thus constituted protected work activity. As the adverse action, Complainant's discharge, was clearly related to Complainant's work refusal, Respondent has failed to mount a successful rebuttal.

III. The operator has failed to establish a viable affirmative defense

If the operator cannot rebut the Complainant's *prima facie* case, it can still affirmatively defend by demonstrating the miner was disciplined for an unprotected activity alone. *Id.* at 2800. Specifically, an affirmative defense can be proven by the operator demonstrating "past discipline consistent with warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*. 4 FMSHRC 982, 993 (June 1982). However, a defense may be found pretextual when it is "…weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521,1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937-38 (Nov. 1982).

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[16] This Court notes Respondent's "Central Argument" that Shemwell had lodged bad faith safety complaints to avoid undesirable work tasks. (*See inter alia Respondent's Post-Hearing Brief* at 1-2). However, for the reasons discussed herein, this Court finds that Complainant's legitimate concerns about the safety of the D-6 bulldozer transcended a mere desire to avoid gob pile work.

Given the instant factual circumstances, the operator cannot prove by a preponderance of the evidence that Shemwell's discharge would still have occurred absent the protected activity. Indeed Respondent has essentially argued that it was Shemwell's protected activity—his work refusal based upon safety concerns—that led to his discharge. (*See Respondent's Post-Hearing Brief* at 41).[17]

As noted *supra*, Complainant need not prove the absence of bad faith during the time period from his return to work until his discharge. Complainant need only show he had a good faith and reasonable belief that operation of the bulldozer with a malfunctioning throttle on the gob pile presented a hazard.

The Respondent attempts to argue that the suspension and termination of Shemwell was a business decision. (*Respondent's Post-Hearing Br.* at 40). The Respondent argues that Shemwell had refused reasonable work requests, and that one of the company policies allowed employee discharge for unreasonable work refusals. (*Id.* at 41). However, a company policy that prohibits a miner from refusing to perform work he believes is unsafe would not be enforceable under the Mine Act, and therefore cannot form the basis of a business justification.
The Respondent's affirmative defense is not viable because the Complainant's protected work refusal was the critical reason for the disciplinary action taken against Shemwell. (*See* Tr. 331). Thus, Respondent's arguments to the contrary must be rejected.

IV. Three other alleged acts of discrimination

Shemwell also argues three additional previous acts of discrimination were committed against him: (1) Shemwell's transfer from prep plant mechanic to bulldozer operator; (2) an alleged threat of reprisal for calling MSHA to inspect the gob pit, which resulted in two S&S citations; and, (3) an alleged threat of reprisal for using his cellphone to document a perceived written threat on the miners' representative sheet. (CX-1).

Given this Court's above findings that the Complainant suffered a discriminatory discharge based upon his protected work refusal and considering that the dispositions of these other alleged acts of discrimination will not affect Shemwell's ultimate remedies, this Court will only address these allegations in brief.

There is some question as to whether there was a discriminatory animus on the part of the Respondent in its initial transfer of Complainant from his usual prep plant mechanic work to bulldozer work at the gob pile.[18] Respondent contends that a bulldozer operator was needed for the gob pile and all miners were expected to operate machinery when the need arose.

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[17] Moreover, Winebarger admits that his decision to discharge Shemwell was based *solely* upon Shemwell's refusal to operate the D-6 bulldozer that Shemwell found had a throttle problem. (Tr. 331).

[18] This Court notes the suspicious nature of a miner—with significant welding experience—refusing to weld due to health risks involved upon his first day returning to work. (*See* RX-10). This refusal occurred while Shemwell was still working as a prep plant mechanic before his transfer to the gob pile. (*See* Tr. 477, 488).

Although harboring some suspicion as to whether this transfer was purely due to work exigency as alleged by Respondent, this Court finds that the Respondent has by a preponderance of the evidence raised a meritorious affirmative defense of a business justification. *See also Chacon*, 3 FMSHRC at 2510 wherein the Commission held, in analyzing a business justification as an affirmative defense for an adverse action, that—"[t]he proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities…[T]he narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner (Citations omitted)."

As to the threat of reprisal for Shemwell's calls to MSHA regarding the gob pile, this Court remains uncertain as to whether such threat of reprisal had been actually made and accordingly finds that Complainant has not carried his burden of proof.

Finally, the threat of reprisal involving Shemwell using his cellphone to document a perceived written threat has been considered by this Court. Darnell admitted to documenting Shemwell's cellphone use, and warning Shemwell that cellphones are prohibited. (Tr. 534-35). Still it is unclear what reprisal was threatened here, and this Court finds there is no relationship between this incident and Shemwell's ultimate discharge.

CONCLUSION & ORDER

Based on the foregoing, I find that the Respondent violated §105(c) of the Act by discriminating against Shemwell for engaging in protected activity.

KenAmerican is consequently **ORDERED** to cease and desist from discriminating against its employees because of their exercise of rights protected by the Mine Act, including the right to make complaints to mine management, and the right to refuse to perform unsafe work. Moreover, it is **ORDERED** that all management officials employed by KenAmerican be required to undergo comprehensive specialized training by MSHA personnel in the safety rights of miners under §105(c) of the Mine Act. Additionally, Respondent is **ORDERED** to remove any and all negative references to this matter in Shemwell's personnel records.

It is also **ORDERED** that KenAmerican must post this decision in Paradise #9 mine, and the prep plant, in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 consecutive days.

It is further **ORDERED** that Shemwell be immediately reinstated to his position as prep plant mechanic with backpay, benefits, and interest to October 9, 2013.[19] This reinstatement should be at the same rate of pay, on the same shift, and with the same status and classification

[19] The interest should be calculated using the *Arkansas-Carbona/Clinchfield Coal Co.* method, which provides that the amount of interest equals the quarter's net back pay multiplied by the number of accrued days of interest multiplied by the short-term federal underpayment rate. *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), *as modified by Clinchfield Coal Co*., 10 FMSHRC 1493, 1505-06 (Nov. 1988).

that Shemwell would now hold had he not been unlawfully discharged. Respondent is also **ORDERED** to reimburse Shemwell for all reasonable expenses incurred in the institution and litigation of this case, including attorney fees and expenses.

Pursuant to Commission Rule 44(b), 29 C.F.R. §2700.44(b), a copy of this decision will be sent to the office of the Regional Solicitor having responsibility for the area in which the Paradise #9 Mine is located so that the Secretary may file a petition for assessment of civil penalty within 45 days of receipt of this Decision.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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December 17, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. BUSSEN QUARRIES, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. CENT 2015-385 A.C. No. 23-00027-379789 Mine: Jefferson Barracks

DECISION AND ORDER

Appearances: Dan Brechbuhl, United States Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

Ryan Seelke, Steelman, Gaunt & Horsefield, Rolla, Missouri, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Mine Act"). This docket involves one citation issued pursuant to section 104(a) of the Mine Act on December 2, 2014, with a proposed penalty of $6,300.00. The parties presented testimony and evidence regarding the citation at a hearing held in St. Louis, Missouri, on November 4, 2015.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Jefferson Barracks mine is a limestone mine owned and operated by Bussen Quarries, Inc., in St. Louis County, Missouri. The parties have stipulated that Bussen was at all relevant times engaged in mining at Jefferson Barracks and is therefore an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d). Jt. Stips. ¶¶ 1, 3. The parties have also stipulated to the jurisdiction of the Mine Safety and Health Administration (MSHA) and the Commission. Jt. Stips. ¶¶ 2-5.

Citation No. 8860004 was issued by Inspector Gary Swan on December 2, 2014, pursuant to section 104(a) of the Act for an alleged violation of 30 C.F.R. § 56.15005. The citation alleges that there was a portable pump on a wheeled cart being used on the highwall between the edge of the highwall and the last row of drill holes, and that a miner using the pump would have been exposed to a fall hazard. The inspector determined that the condition was reasonably likely

to result in a fatal injury, was significant and substantial, affected one person, and was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $6,300.00 for this alleged violation. For the reasons discussed below, I find that the Secretary has proven the violation as cited.

MSHA's Inspection

Gary Swan is a mine inspector who has been with MSHA since 2008. Prior to becoming an inspector, he worked for 30 years in the mining industry, primarily in surface coal mines, holding a number of positions, including supervisory positions. As part of his duties as an inspector, he has conducted several inspections of the Jefferson Barracks mine. Jefferson Barracks is a large limestone mine that uses explosives to blast through the limestone and rock. Miners drill bore holes into the rock along a highwall, pump water out of the holes as necessary, and then set a charge. The citation at issue involves a portable cart used to pump water out of the drill holes.

When Swan arrived at the highwall, there were four people in the area engaged in a variety of activities. David Becker identified himself as the senior employee present. Becker was standing near a row of drill holes approximately eight feet from the edge of the seventy-foot highwall. Swan observed the pump stationed approximately four and a half feet from the edge of the highwall with its handles pointed towards the edge. No one was using the pump at the time, but it had recently been unloaded from a truck for use throughout the shift. Swan understood that the pump would be used to pump water out of the blasting holes and over the side of the highwall. Swan approached Becker and told him that he wanted to discuss the placement of the pump. Becker then reached for the pump, pulling it closer to the line of drill holes and spinning it so that the handles no longer faced the highwall. Photographs produced by the Secretary show the position of the pump after it was moved and an estimation of its position before it was moved. Ex. 1. Swan noticed that there were older footprints near the edge of the highwall, but they were covered in rock dust and he could not tell how recently they had been made. Rock dust also blurred the edge of the highwall. The weather was overcast and thirty degrees. The conditions at the time including the footprints and the highwall edge are depicted in the photographs introduced by the Secretary. Ex. 1. Swan did not observe any fall protection in the area or any equipment that could be used as an anchor to tie off. Becker informed the inspector that the equipment was in a truck parked nearby, but indicated that it was not needed. Swan observed that there was no line painted on the rock to warn miners when they were approaching the edge, as is a common practice at some mines. There were no signs or other warnings marking the area near the edge. Instead, blasters relied on a measuring pole to place drilling holes eight feet from the edge, then worked near those holes so as not to cross within the six-foot limit.

David Becker has worked for eleven years at Bussen as a drilling and blasting laborer. His current position is as lead blaster. One of his tasks is to remove the water from the drill holes prior to blasting, which is done by attaching a hose to the back of the pump and pumping water out, sometimes over the edge of the highwall. On December 2, 2014, Becker was preparing to load a shot, which required pumping water out of some of the holes. Before he could do so, a powder truck arrived to be unloaded, and Becker had to push the pump out of the way to clear a path to unload bags of powder. Becker testified that at all times, including when he moved the

pump out of the way, his feet remained on the far side of the blast holes, at least eight feet from the highwall edge. The mine has a policy that fall protection is required within seven feet of the edge, and miners had received training on the subject. Becker testified that at no point was he within seven feet of the edge on the morning of the citation. He stated that he was the only one who would have used the pump that day, and that he would not have used it in the position four and a half feet from the edge and would not have crossed the seven-foot line to retrieve it. I do not credit his testimony, however, particularly his statement that no one would have gone within six feet of the highwall to move the pump and that he would have been the only person to use the pump. There were three other workers in the area and any of them could have had a need to use or move the pump throughout the day.

A. The Violation

Section 56.15005 requires that "Safety belts and lines shall be worn when persons work where there is a danger of falling . . . ." 30 C.F.R. § 56.15005. The Commission has specifically determined that in deciding whether the Secretary has proven a violation of this standard, the relevant question is whether "an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

Section 56.15005 is one of thirteen priority standards listed by MSHA in its "Rules to Live By" initiative implemented to improve the prevention of fatalities in mining. Ex. 3. Violations of the standard contributed to thirty-seven fatalities between 1990 and 1998, more than any other standard. Ex. 5 at 2. MSHA has created a PowerPoint presentation addressing the prevention of falls from highwalls, in which it indicates that miners should use fall protection when working within six feet of a stable crest or within six feet of unstable ground. Ex. 5 at 7. MSHA advises mine operators to install visual warnings such as signs, tape, cones, boulders, paint, or chalk to warn miners when they are approaching an edge. Ex. 5 at 8. MSHA also suggests using berms, barriers, or handrails to prevent miners working on the highwall from working too close to the edge. *Id*.

In this case, the issue is whether there was a "danger of falling" that triggered the fall protection requirements of § 56.15005. Inspector Swan observed the pump cart approximately four and a half feet from the edge of the highwall with its handles pointed towards the edge. I agree with the Secretary that the position of the pump together with the absence of any warnings near the edge created a danger of falling. The photographs produced by the mine show drill dust in the area which blurs the edge of the highwall. The bore holes had been drilled between eight and nine feet from the highwall edge, which itself would make it easy for a miner to come within six feet of the edge, given there was no demarcation line for reference. The addition of the pump only four and a half feet from the edge made the fall hazard even greater.

Additionally, Swan observed that there were a number of people working in the area. Becker testified that he was the only one who worked with the pump, and that while he had not yet decided where to use the pump that day, he would not have used it in its current position. He testified that he could have reached the pump to move it back to a safe working position without going into the hazard zone. However, there were three others in the area who had every

opportunity to use or move the pump. The testimony of the miner witnesses indicated that the water pump was put in its position so that it would be out of the way while they unloaded the powder truck. It is difficult to know whether the pump would have been used in the position observed by the inspector. But even if it were not, it would nonetheless have to be moved to a location where it would be used. In either scenario, a miner would enter the fall hazard zone. I agree with the inspector's reasonable inferences that these other miners could have used or moved the pump from its location near the edge. If the pump were used in the location where Swan observed it, a miner would be using both hands to attach a hose, and the water would be discharged from the other side, down the side of the highwall. To move the pump, a miner would likely have used the handles as they were intended, thereby placing himself within a few feet of the edge of the highwall. Clearly, a reasonably prudent person would recognize the fall hazard that was created by placing the pump with the handles facing the edge of the high wall.

Finally, while Becker denies ever entering the fall hazard zone, it is difficult to imagine that he did not go within six feet of the highwall when he placed the pump in the position initially observed by the inspector. While his account is to the contrary, it seems most likely that Becker pushed the pump by its handles rather than carrying it or pushing or pulling it from the side opposite the handles. Bussen argues that, given Becker's assertions, there is no evidence that a miner entered the fall hazard zone. Resp. Br. at 2-6. However, there is no requirement that an inspector witness a violation at the moment it is being committed: the Commission has held that a violation may be proven through "reasonable inferences drawn from indirect evidence." *Mid-Continent Resources*, 6 FMSHRC 1132, 1138 (1984). Here, the inspector indicated that someone must have placed the pump in the position he observed. There were no lines or demarcations on the ground to identify the fall hazard area and warn miners when they were too close to the edge. Considering the mining practices as observed by the inspector, it was highly likely that a miner had entered the fall hazard zone without being tied off to place the pump near the edge and out of the way while unloading the truck. It is also reasonable to believe that a miner would have re-entered the fall hazard zone without protection to either move or use the pump.

Bussen also argues that even if a miner did enter the fall hazard zone, there is no evidence that he was not wearing fall protection. Resp. Br. at 5. The mine witnesses explained that there was fall protection located in the highwall area, stored in the truck. The witnesses also indicated that the company had a policy requiring miners to use fall protection when working within seven feet of the highwall. However, the miners also suggested that there was no need for protection at the time of the inspection. Perhaps if the miners were to actually use the pump for some period of time, they would use fall protection. However, it is easy to see why the inspector, who saw no fall protection in the area and no tie-off location, concluded that fall protection would not have been used for a simple task like moving the pump. Although fall protection was available in the truck, there is nothing that leads me to believe that a miner would have travelled to the truck, donned the fall protection, and secured an area to tie off in order to perform the simple task of moving the pump. Finally, I find that in moving the pump to the location the inspector identified, Becker was near the edge and did not use fall protection. Accordingly, I find that the Secretary has established a violation.

B. Gravity and S&S

The Secretary asserts that Bussen's violation created the reasonably likely risk of fatal injury and that it was significant and substantial ("S&S"). 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)(l). 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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation was 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.

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

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury," but rather that the hazard created would cause an injury. *Id*. at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal*, 33 FMSHRC 2357, 2365 (Oct. 2011).

Applying the *Mathies* test to the case at hand, I find that the Secretary has established the first element by demonstrating the violation of a mandatory safety standard. The violation also contributed to a hazard in that it presented the danger of a miner tripping and falling from the seventy-foot highwall while either using the pump or moving it to or from another location, without the benefit of fall protection.

As for the third element, the Commission has clarified that "The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining

operations had continued." *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005) (quoting *Rushton Mining Co*., 11 FMSHRC 1432, 1435 (Aug. 1989)). Here, the miners believed that their activities did not require fall protection. Thus, it is likely that they would have continued to work without it for the remainder of the shift. There were no markings on the ground or other warnings present, so the miners were likely to approach the edge throughout the shift. Given the position of the pump, they were likely to come within three or four feet of the edge when operating the pump or attempting to move it. The presence of rock dust, the freezing temperature, and the number of people working in the area all exacerbated the tripping hazard. Additionally, the position of the pump with its handles facing towards the highwall created the possibility that it would fall over in that direction, which would require that a miner retrieve it, bringing him even closer to the highwall. Based on these factors, I find that there was a discrete hazard created by the violation and that the hazard was reasonably likely to result in an injury. The injury would almost certainly be fatal due to the seventy-foot drop off the highwall. The third and fourth elements of the *Mathies* test are therefore also established. Accordingly, I conclude that the violation was S&S.

C. Negligence

Inspector Swan indicated that the negligence in this instance was high. Bussen argues that its negligence was less than high because all of the employees on the highwall were hourly employees and all had been trained in the use of fall protection.

Negligence is "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* 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.*

The fall protection standard is one of MSHA's "Rules to Live By." Ex. 3. MSHA's Rules to Live By initiative identifies twenty-four standards that are frequently cited in fatal accident investigations. MSHA provides reference materials for operators to learn about these standards and how to stop common yet preventable fatalities. Since operators have been put on notice and given resources about ways to prevent these specific types of accidents, violating one of these standards is indicative of a significant lack of care.

Here, Becker was an hourly employee, but he indicated that he was in charge of the blasting operation and described himself as the lead blaster. It seems clear that Becker was aware that the pump was too close to the edge. When Inspector Swan was asked at hearing whether he had required Becker to use fall protection when he moved the pump in Swan's presence, Swan said, "It was just too fast. I mean, yeah, I didn't ask him and he didn't say anything. He just turned around and grabbed it . . . ." Tr. at 42. Becker was aware that the pump was too close to the edge and quickly moved it before the inspector could do anything further.

Bussen has a policy requiring miners to stay an extra foot back from the highwall, seven feet instead of the six feet required by MSHA. It also has a policy of disciplining miners who do not follow the safety policies when working in the highwall area. The mine had held a safety meeting in March, a few months prior to the citation, regarding its policies for the use of fall protection. However, these policies and training did not keep Becker from placing the pump in such a location that it created a hazard to the other miners. The placement of the pump close to the edge was obvious. Becker identified himself as the person in charge, yet he is the one who placed the pump in the location that was cited. Further, the mine failed to provide warning devices to indicate the edge of the wall such as a painted line or warning sign. The miners testified that they stayed seven feet back from the edge, but I am skeptical given the location of the holes, the location of the pump, and the fact that there were no warnings to remind workers to stay back. Hence, I find the negligence to be high.

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 duty of proposing penalties is delegated 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 ALJ must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows that the mine had not been cited for a fall protection violation in the fifteen months preceding this violation. Ex. 8. Bussen is a large operator. The penalty as proposed will not affect its ability to continue in business, and the operator demonstrated good faith in abating the citation. The gravity and negligence are discussed above. I find that a penalty of $6,300.00 is appropriate.

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 $6,300.00 for Citation No. 8860004. Bussen Quarries is **ORDERED** to pay the Secretary of Labor the sum of $6,300.00 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 18, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. WEBSTER COUNTY COAL, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2013-652 A.C. No. 15-02132-316453 Mine: Dotiki Mine

DECISION AND ORDER

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

Tyler Fields, Esq., Alliance Coal, LLC, Lexington, Kentucky, for Respondent

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (2012). At issue is whether the Respondent, Webster County Coal, LLC,[1] violated § 75.223(a)(1). That standard, titled, "Evaluation and revision of roof control plan," provides, in relevant part, "Revisions of the roof control plan shall be proposed by the operator (1) When conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts." On January 22, 2013, the Secretary issued a section 104(a) citation, alleging that "[r]evisions to the Approved Roof Control [plan] were not proposed by the Dotiki Mine Operator when conditions indicated that the plan was not suitable for controlling the roof." For the reasons which follow, because the Secretary did not meet his burden of proof, the citation is DISMISSED.

[1] Respondent is also referred to as "Webster" and "Dotiki" in this decision.

Findings of Fact[2]

Testimony began with the Secretary's roof control specialist, MSHA Inspector Ronnie Rich, who issued the citation at issue. Tr. 32. Rich completed his MSHA Inspector training in April 2010.[3] The inspector informed that the first roof fall comprising the Secretary's case, the fall of November 2, 2012, was attributable to material above the anchorage.[4] The fall's location was inby the tail piece, a particular concern because there is more miner exposure in such an area. Its dimensions were about 25 feet by 10 to 11 feet in depth. The original entry was 19 feet across. The inspector noted the roof support that Respondent, Webster County Coal, had installed at that location. At the end of his investigation, the inspector concluded that water infiltration, which posed an anchorage problem, was the cause of the fall.[5] Tr. 44.

The inspector then spoke about the second fall, which was also on the number two unit. That fall occurred on December 17, 2012. The mine then ceased production in the main southeast panel. After the inspector concluded his investigation, he determined that again the cause was water infiltration of the roof, the same reason for the first fall. Following the first roof fall, per a revision to the roof control plan, longer roof bolts had been installed at that location, but they still did not hold. Tr. 45. The plan revision involved more than using longer bolts — it also included the installation of T3 channel, as part of the mine's roof control approach if they encountered water inby the tailpiece. Tr. 46. The inspector opined that the revision to the plan following the first roof fall was not effective, given that a second fall occurred. Tr. 46.

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[2] The Parties submitted a joint stipulation, which consisted of the following: 1.Webster County Coal, LLC is subject to the Federal Mine Safety and Health Act of 1977. 2. Webster County Coal, LLC has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977. 3. Webster County Coal, LLC 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. Webster County Coal operates the Dotiki Mine, I.D. No. 15-02132. 5. The Dotiki Mine produced 3,363,050 tons of coal in 2012, and had 1,014,498 hours worked in 2012. 6. A reasonable penalty will not affect Webster County Coal LLC's ability to remain in business. 7. Without the Respondent stipulating to the truth of the matters asserted therein, a true copy of the citations and order at issue were served on the Respondent as required by law. Ex. 1; Tr. 13.

[3] This training however was only as a coal mine inspector, not as a roof control specialist. The inspector's experience *as a roof control specialist* began about four months prior to the November 2, 2012, roof fall which is a subject of this citation, and his formal training as such a specialist was not completed until after that date. Training before November 2nd was limited to his regular coal mine inspector annual re-training. Tr. 65.

[4] Inspector Rich marked on Petitioner's Exhibit 10 ("Exhibit P-10"), which is a map of the Dotiki mine, the cited roof fall locations, beginning with the November 2, 2012, fall. Tr. 37.

[5] At the location of the fall, roof support was present. This consisted of eight foot bolts, screen wire and cribs. Tr. 43.

The third fall, which occurred on January 16, 2013, was on a different unit, the number three unit in the mains. Rich's investigation of that fall revealed that several factors were involved. Roof water was again part of the problem. However, Rich couldn't figure out what else was at work and he sought assistance, calling MSHA's Technical Support division to help solve the roof control issues. Following Tech Support's visit to the mine, and its assessment and input, there was another revision to the roof control plan. Tr. 47.

Testimony then turned to the fourth roof fall. This fall was on the number four unit on January 19, 2013, and thus it occurred in yet a different area of the mine than the other three falls.[6] Tr. 48. The fall was inby the second dumping point, as were all the falls. In terms of exposure, 16 to 17 miners were working in the area of the fall, on both production shifts mining and loading coal. Tr. 51. In this instance, the inspector traced a continuous slip[7] line in the immediate roof, which followed a definite angle, going across the unit until it disappeared. Tr. 49. The inspector attributed the cause of the fourth fall to the slip, stating, "This fourth fall with the visible slip line that we saw in the immediate roof, it had a hidden slip at the top of the fall." Tr. 50. However, the inspector continued, "This visible slip line . . . [y]ou can see the roof above the top of the fall. It has a slip in it that would have been hidden until the fall." *Id.*

This comment prompted the Court to inquire: "So, by definition, the mine operator can't see a hidden slip?" The inspector agreed,

> No. He cannot, but he can trace the actual slip -- and *I understand the burden of proof is on us*, but this fall was on the ground. *I know not* if it had a visible [slip] in it or not. I know it has a visible slip leading to it and out of it.

Id. (emphasis added). Unlike the other falls, the inspector did not attribute the fourth fall's occurrence to be due to water, admitting, "This fall throwed [sic] us for a curve as far as lack of roof water." Tr. 51.

As noted, the focus of this hearing pertains to Citation 8510632, a 104(a) citation, issued January 22, 2013, citing 30 C.F.R. § 75.223(a)(1). The inspector stated that he issued the citation because Dotiki had not proposed adequate addendums to the roof control plan when the conditions indicated that it was not suitable for controlling the roof. Inspector Rich's test for determining if the addendums were adequate was that a roof fall occurred: "If they had been

[6] Examining the mine map, Exhibit P-10, and its scale of 1 inch equaling 500 feet, the fourth fall was about three-quarters of a mile from the third fall.

[7] A "slip" refers to two joints of rock that meet. It has a definite appearance with one side being a slip and slide; it was also described as a broken rock with two joints coming together. Tr. 49.

adequate, it probably wouldn't have fallen."[8] Tr. 53. The violation, which involved the fourth roof fall, was abated by Webster Coal making a roof control plan revision proposal, which was then accepted by MSHA.[9] Tr. 56.

The inspector then disclosed that after the fourth fall, and as of the hearing date in this matter, two additional falls had occurred inby the feeder. These falls occurred some eight or nine months after the fourth roof fall. As the inspector described these, "they were both dealt with. There were reasons that they fell that this couldn't help and we obtained [further] revisions in the [roof control] plan to satisfy them." Tr. 58-59. However, Rich was not involved in the investigation of those subsequent falls. Tr. 60.

The inspector confirmed that MSHA's Technical Support became involved after the third roof fall and that it made recommendations concerning that fall, which were then adopted by Dotiki. Tr. 60. Approximately one day after implementing the Tech Support recommendations, the mine experienced the fourth fall, which is the subject of this litigation. Tech support did not come back to the mine following the fourth fall. As noted, the fourth fall did not involve water issues. The inspector acknowledged that the fourth fall did not involve water. Instead there was the discovery of the slip line. Tr. 61. The inspector believed that the line was visible to the mine operator. Tr. 62. Given that, the inspector was asked whether Webster Coal should have

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[8] The inspector evaluated the violation as "reasonably likely" because of "a culmination *of the other evaluations* . . . due to the exposure, the amount of exposure, the results, if these revisions had not been -- been provided and approved and the unit started back running without these changes to the plan." Tr. 53-54 (emphasis added). The inspector marked the violation as permanently disabling, though at the hearing he remarked that fatal would have been a more appropriate assessment. His reasoning was that the mine employs string wire that "pings" before a fall occurs, but because the tail piece is an inherently noisy area, miners might not hear the ping, and therefore not have the audible warning of an imminent roof fall. Tr. 54. He also marked the alleged violation as S&S, but his offered reasoning simply recited the *Mathies* formula: "[I]t was a violation of the mandatory standard of the health or safety regulation and there was exposure to too many miners. It would likely or reasonably likely result in a serious injury if the anticipated event occurred." Tr. 55. The number of persons affected was marked as one. For negligence, the inspector marked that as "moderate" based on "[t]he past falls. We had received them -- we had gotten changes to the roof control plan, revisions." Tr. 56.

[9] Exhibit P-9 is Dotoki's proposal to abate the violation; it was accepted by MSHA. The inspector stated that

> the way I understand it, water infiltration, roof conditions, the whole nine yards, we're backing up and redoing -- and redoing -- we want to redo our primary roof control. We want to go from a grade 60 bolt to a grade 75 bolt. And then it lists all the reasons in this report. It lists the load bearing capacity of each. It's all contained in this. They allude in here that we think this may have been the leading reason for all the falls we've experienced.

Tr. 56.

submitted a revision to their roof control plan based on the slip line, which he asserted was visible. He responded: "They could have if they wanted to . . . *I cannot say that they should have*." Tr. 62. (emphasis added).

On cross-examination, with regard to the first fall, the inspector stated that there was no supplemental support installed that he could find and he was told that there were only 8 foot bolts for the primary support. Tr. 66. However, the inspector agreed that, at that time, the absence of supplemental support was not a violation of the roof control plan, and he agreed that he did not find a violation of the roof control plan on that day. Tr. 66-67. The supplemental support that was then installed was longer roof bolts. Tr. 67. Asked whether the longer bolts actually made matters worse, in terms of causing more problems with water, the inspector would only admit, "I've had some of them cause problems . . ." Pressed, he then admitted when asked if the use of longer bolts were causing more water, "They [the bolts] were penetrating water. . . . It seemed more water came out of them." When asked if more water came out of where longer bolts were installed, he responded, "Uh- huh," which he then clarified as a "yes" to the question. Tr. 67-68.

As to the second fall, that of December 17th, which was also on unit two, the inspector agreed that the mine had moved into a different panel, dividing the two at that time. The inspector then admitted that, after that second fall, there was a meeting between Webster County Coal officials and the MSHA officials and that the two sides discussed potential roof control plan and modifications to resolve that second fall. Further, the inspector conceded that the modifications to the roof control plan that ensued were the result of collaboration between MSHA and Webster County Coal and that those efforts were designed to address the cause of the December 17 roof fall. The inspector stated that both falls pertained to water in the mine roof. Tr. 69-71.

For the third fall, that of January 16th, the inspector admitted that he could not determine the cause of the fall initially. The fall in that instance was on a different unit, the number three in the mains, and thus it was in a different area than unit two. Tr. 71-72. This was the fall for which Tech Support was called. Jim Vadimal was the MSHA Tech Support person who came to the mine. Indirectly, the inspector conceded that by having a Tech Support mining engineer come to the mine, that action would offer a level of expertise which would help address the roof problem. Tr. 73. At the conclusion of the Tech Support engineer's visit, Vadimal met with Dotiki management and offered recommendations to them. Those recommendations were then adopted, being included in the plan addendum that Dotiki submitted *and MSHA approved* on January 18th. Tr. 74.

In terms of MSHA's enforcement in connection with the four roof falls, the November 2, 2012, roof fall resulted in a 104(a) citation being issued for an alleged violation of 30 C.F.R. § 75.223(a)(1), but no roof control violation was issued then. For the December 17th roof fall, no citation was issued. As to the January 16th roof fall, which the inspector inspected the following day, no citation was issued then either. Tr. 76-77. The only citation issued for the January 19th incident was two days later for the alleged violation of § 75.223(a)(1). Tr. 77. Shown his notes, dated January 18, 2013, which stemmed from his investigation of the January 16th roof fall at the Number 3 unit, the inspector agreed those notes related to the same time of the MSHA Tech

Support inspection. Those notes reflect that the inspector's (k) order was modified "to allow operator to support roof ribs per approved plan," and the inspector confirmed that his reference to the "approved plan" referred to the plan addendum, meaning the plan addendum that was approved on January 18th. Tr. 79. The notes also stated that once supported, the unit may resume production per the addendum/plan until MSHA conducts an evaluation of the area and determines the unit is through the area. Tr.79. The inspector explained the Tech Support evaluation as follows:

> Technical support and [Webster Coal's] people and [the local MSHA office] people that were with him, the meeting we had after we came outside when Mr. Vadimal made his recommendations, you-all [i.e., Webster Coal] opted to follow them. We wanted -- everyone involved wanted to make sure that this new support plan would work and that it would be completely out of this geological abnormal zone before we went back or altered the roof bolting pattern and the extra support.

Tr. 81. The Tech Support evaluation pertained only to the area of the third roof fall.

Moving to the fourth roof fall (again, the fall on January 19th), on unit four, the inspector agreed that Dotiki submitted a rehab plan for that roof fall. The inspector's (k) order included Dotiki's rehab plan in it, per his Modification-02, and he agreed that by including it in his (k) order, he was essentially accepting what Dotiki proposed for rehabilitating the fall. Resp't's Ex. 10 ("Ex. R-10"); Tr. 82-83. The rehab plan, the inspector also agreed, provided that Dotiki would be submitting a plan modification *prior* to resuming production but it had not finished the rehabilitation of the area by January 22nd, and no approval of a roof control plan had been approved by that date. Tr. 83-84. This is significant because such an approval would need to be issued before they could start production again. Tr. 84.

Turning to the cause of the January 19th fall, the inspector reaffirmed that he attributed the cause to the presence of the slip. He also referred to a "hidden" slip, "in the middle of a fall." Tr. 84. Asked if that slip could not have been visible to the mine before the fall occurred, the inspector initially attempted to evade a direct answer. Tr. 84-85. After the Court intervened, the inspector relented, answering the question when repeated: "The hidden slip, you testified under oath that that could not have been seen by the mine personnel until the fall occurred; is that correct?" The inspector responded: "That is correct." Tr. 85.

When asked about his remark that there was a visible slip that the inspector and Mr. Quisenberry[10] were able to trace, he affirmed that was true, adding that it was a "slip line." Tr. 85. The inspector agreed that he could not tell if the slip line was present in the area of the fall, but that one end of the slip exited the fall on both sides. Tr. 86. The inspector made no determination of when the slip line developed. He believed that it was not immediately before the roof fell out because there was rock dust covering it. Tr. 87. Though he conceded that rock dust will kick up when roof falls, he added that does not happen all the time and that in this

[10] Mr. Quisenberry's affiliation was not identified by the parties.

instance it had been applied.[11] However, he made no mention of this in his notes. Tr. 88-89. He also conceded that he said in his testimony on direct that "the fall threw *us* for [a] curve," (emphasis added) but then adding that in using "us," he was referring to himself. Tr. 89-90. His explanation for the remark was that the fall occurred in the absence of roof water, making it distinct from the previous three falls. Tr. 90.

Conflicting with the text of his own citation, the inspector stated that when he wrote the citation for the fourth fall, it was based on that event alone. His noting the three previous falls, he maintained, was included as "history." Tr. 90. When asked, if the three previous falls had not occurred, whether he would have issued a citation for the fourth fall, alleging a violation of § 75.223(a)(1), he responded that he did not know. Tr. 91. Noting that his investigation was on January 20th but that he did not issue a citation until the 22nd, the inspector admitted that he was instructed to issue the citation by his immediate supervisor, Tim Gardner. Tr. 93. The inspector did not know if Gardner examined the January 19th roof fall, nor did he know if Gardner examined any of the four falls. Tr. 93. As Gardner later testified, he did not examine any of the falls.

Revisiting the fall of January 16th, the inspector agreed that the January 18th changes to the roof control plan were designed to address areas of abnormal geological zones. Tr. 94. Given that, when asked if the fourth fall was in such an abnormal geological zone, the inspector stated that it did not meet all of the criteria described in the plan for an abnormal zone. *Id.*

The four falls were all in the 13 seam and that seam was a fairly new development for Dotiki. Tr. 96. And, Rich conceded that, as part of the development of the coal seam, there is a learning process when mining a new seam. Tr. 96. The point is that the roof control plan is developing as the mine learns of the seam conditions. However, the inspector maintained that the plan was deficient in that it did not address the slip formation that he and Quisenberry found. Directed to his notes and his drawing of the map with a slip line identified on it, the inspector again agreed that *he did not know when the slip line developed* and that the mine *had not had falls developing from slips in the 13 seam* as far as he knew. In this connection, he agreed that the fourth fall represented the first fall resulting from a slip where there was no water infiltration. Tr. 98.[12]

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[11] As explained further herein, given that the claimed presence of rock dust was an important observation, yet not included in his notes, the Court does not find the inspector's claim about its presence to be credible. As noted below, the inspector admitted that he was thrown by occurrence of the fourth fall and that he was instructed by his supervisor to issue the citation.

[12] On redirect, referring to the inspector's notes, P-2 at 15, the inspector described the slip line in his drawing, noting numbers on the left side, number 38 and the black circle, which reflects the fall and that it encompassed the intersection. The dashes in the drawing reflect the slip line, as determined by the inspector and Mr. Quisenberry. The line up from 37 at about a 45 degree angle reflects the visual slip line. A hash mark on the upper corner of the left side of the black dot goes down at a 45 degree angle, depicts the visual slip. He stated that the start of the slip line was visible to the operator and the point was made that one need not wait for a roof fall to occur in order to make a revision to a roof control plan. Tr. 101-02.

The Court asked that the inspector, regarding Exhibit P-2, to mark the slip he described that he believed existed prior to the roof fall, although he was uncertain about its presence. Tr. 102-103. This newly created exhibit was marked as P-2A. Tr. 103.[13] The inspector then marked the exhibit with a red pen, and stated that they depicted the slip lines he saw when he came upon the site of the roof fall. Tr. 106. He described it as a "proposed slip line" because the slip line entered into areas that had not yet been mined. The Court then asked for further clarification, asking, "You can still see the slip line?" The inspector responded, "No, sir. No." Tr. 107. He added, "That's why I called it a visual proposed slip line." Tr. 108. Therefore, he admitted that he was making, as framed by the Court, "a guess that the slip line continue[d] into an area that you can't see," stating in response, "That would be correct." Tr. 108.

The Court then asked,

> [W]hen you talk about the area that you could not see, is it equally possible that the slip line did not continue into that area? You're saying that you -- none of us can see, right? We don't have x-ray vision, for the use of a less articulate term, so you can't see it; that means no one can see it. So my question is: Is it equally possible that that slip line did not continue into the area that you could not see?

Tr. 110. Although Counsel for the Secretary attempted to overcome the evidentiary dilemma by offering that the inspector was trying to draw the portions that could be seen and those that could not, the Court did not consider that a solution because "if you can't see it, then it seems to me logically that you can't know that, in fact, they were there; is that true?" The witness then responded, "That is true," and his Counsel then admitted, "Right." Finishing up this area of questioning, the Court stated: "So if you can't know that it's there, then it's equally possible that it is not there; isn't that true?" The inspector replied, "That is true." Tr. 111. On cross-examination, Respondent's Counsel asked if it is true that a slip is not one solid line that extends through the entire coal seam. The inspector affirmed, based on the slips he has seen, that is true, that is to say, a slip will start and stop. Tr. 112.

Significantly, in the Court's view, *the inspector agreed that the mine was in compliance with the provision of the roof control plan addressing how to support slips*. Further, the inspector

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[13] The black squares on the map reflect the pillars and therefore show the areas that had been mined out at that time. Tr. 109. The inspector marked in red the visual area of the slip line that could be seen (i.e., when he was present at the mine) and used a blue pen to mark the area that was *not* visible. Tr. 109. The areas marked in red were all the areas in the crosscuts of the entry and represented areas that had been mined and the inspector confirmed that he walked those entries and crosscuts and saw slips. Tr. 112. Regarding the pillar block between crosscut 38 and 39, one of the inspector's markings was in error and he marked that out and initialed the mistaken area. Tr. 114.

agreed that *Dotiki had never experienced a roof fall because of slips prior to the citation in issue*.[14]

Regarding the point made by the Secretary's Counsel that one doesn't have to wait for a roof fall to make a roof control plan revision, the inspector stated that he was not aware that Dotiki made other plan submissions independent of roof falls in that November 2 to January 19 period. Tr. 117.

The Court asked the inspector about the fourth roof fall and in so doing expressed its understanding of the basis for the inspector's issuance of the citation as follows:

> [T]he sole reason why you issued this citation is that you believe that the mine operator should have seen this slip which you refer to as a slip line, and that . . . upon seeing that slip line prior to the fall, they should have made revisions to their roof control plan based solely upon seeing that slip line.

Tr. 104. As the inspector did not agree with the Court's summary, it then asked the inspector to "explain the basis for your determining that Webster County Coal came up short prior to the roof fall -- what conditions they should have observed which should have caused them to react to amend their roof control plan." Tr. 104. The inspector responded:

> The slip line, as I called it, played a very important role in it. The direction of the slip line is what they should have recognized and it would -- if they had been in a future -- I don't know how -- some of the coal hadn't been mined yet right close to this slip and as on the map, I called it a proposed slip line, and I'm denoting the actual slips that we saw, the direction of them should have alerted Dotiki management that they were getting ready to go into a different kind of zone because of the lack of low roof water.

Tr. 105.

When the Court inquired if the sole reason that Webster should have reacted was the presence of the direction of a slip line, the inspector affirmed that was accurate. Tr. 105-06. Following up on that response the Court asked: "And it should have told them to take action based solely on that because there w[ere] no other elements such as water being a problem?" Tr. 106. The inspector responded that was his interpretation but conceded that he did not know with any certainty when the slip line first appeared. Tr. 106.

The Court also asked whether, when the inspector arrived at the scene of the roof fall and he saw the slip line, it was an essential part of his finding that there was a violation, that the slip line continued into the areas that he could not see. The inspector responded: "It played a great

[14] Amending his remark, the inspector stated that he said they had never experienced a fall without the presence of roof water. Tr. 115. Amending further still, he stated that as to those falls that he investigated, such prior slips were hidden, visible only *after* a fall. Tr. 116.

part in it, Your Honor. I would have to say yes." Tr. 119. To be sure that it understood his position, the Court asked whether it was fair to state "that if [he] had not made the conclusion that this slip line continued and [he] only saw the slip line that [he] could see, . . . that [he] would not have issued this citation?" Tr. 120. The Court, noting that the question was a hypothetical, emphasized that the inspector was to block out from his analysis that which he could not see and that he was to consider only the slip line that he was able to visualize. With that in mind, it asked whether the inspector still would have issued the citation. The inspector responded, "No. Because -- no." To be sure of the answer he just gave, the Court asked again, "You would not have issued this citation?" The inspector responded again, simply, "No." *Id.*

Timothy Gardner also testified for the Secretary. Gardner is an MSHA roof control supervisor. Regarding the subject of this hearing, Gardner first spoke to how a roof control plan is developed. He advised,

> For a new -- a new plan -- a new mines going in, we look at other mines that was mining the same seam in that area. We try to review their last roof control plans. We try to talk to different people that had worked at them mines, try to gather as much information as we can about the mines, and in doing so, hopefully, we can make a good judgment on what the operator submits for that mine.

Tr. 123-24. He added that the onus in developing a roof control plan is on the mine operator, resulting in the submission of a plan "that should be adequate in supporting the roof and . . . any of the geological conditions that they might encounter in that area or region." Tr. 124.

The Secretary's Counsel directed Gardner's attention to Webster County Coal's Dotiki Mine and the type of geological conditions he was aware of there, and he responded that "water infiltration, water coming through the mine roof, there's slips, there's sandstone that comes down close to the --the number 13 seam, their overall immediate shell is considered to be weak." Tr. 124.

Gardner was aware of the revisions for the control plan at the Dotiki Mine pertaining to the four roof falls from November to January and he reviewed the progression of those revisions. For the first fall, he thought, they issued a citation for section 75.223(a)(1), for the roof not being adequately supported and he believed that water was the issue for that one, though he admitted "not [being] real -- sure on that." Tr. 126. He noted that the mine submitted, and MSHA approved, an addendum for additional support. He acknowledged that MSHA plays a role in plans too, in that it sends out a specialist who investigates a roof fall and tries to determine the cause. Then the mine will meet with MSHA before an addendum is provided and there is communication between the two. In arriving at a remedy, MSHA listens and tries to be reasonable. That is, he expressed that MSHA tries "to be reasonable and come to somewhere in the middle to where we feel, you know, like we're making an adequate adjustment in the roof control plan to prevent future roof falls." Tr. 127. Gardner admitted that it's not easy to figure out how to prevent future falls: "Of course, you know, if I could adequately say this is what it's going to take, I probably wouldn't be sitting here today. I'd be somewhere else [getting rich from such prescience]." Tr. 127. Continuing with his theme that it is a collaborative effort to figure out an effective roof control plan, Gardner stated: "It's a -- it's a guess. It's a guess off history,

experience or knowledge in roof control that we try to come to -- come together and we listen to the operator as well as we listen to our roof control specialist in trying to come up with a plan. And that was on the first fall." Tr. 127.

Speaking to the second fall, Gardner stated he believed they came "in to a geological conditions of, if I recall, the sandstone was dipping these areas within a certain feet of the 13 seam." Tr. 127. The operator believed that this dipping created more water infiltration and so they came up with a plan and increased their roof control plan a little bit. However, he was unable to remember exactly what steps Webster took, though he thought they increased their pillar size. In Gardner's view the mine's use of an isopach map[15] gave them a pretty accurate view of where the sandstone was dipping down. Tr. 128. The upshot was that MSHA did not issue a citation for the second fall. Tr. 129.

Moving then in his testimony to the third fall, Gardner described water as the chief culprit. This was the third fall on a working section and it happened only a short period of time following the second fall. That heightened MSHA's attention, prompting it to seek some help from the MSHA technical support group to come down and do an evaluation of the 13 mine seam. As noted, that group did make a visit and an evaluation. Gardner however wasn't part of that, as he was dealing with a medical issue. *Working together*, the mine and tech support concluded that an increase in the supplemental support was needed. To that end, a truss system was installed in between the rows of permanent support, and the plan involved having the support installed quicker, too. Though unsure, he thought the roof bolt length might have been increased as well. The bottom line was that together, *MSHA and the mine came up with a plan* and MSHA did not issue a citation for the third fall. Tr. 128. Gardner confirmed that the parties work together on arriving at a plan.

For the fourth fall, which, it bears repeating, is the only fall genuinely in issue, Gardner stated that MSHA did not issue a citation right away. Because roof falls are considered to be accidents, MSHA usually waits to review its specialist's investigation report. Tr. 129. Understandably, MSHA was worried that, eventually, a miner was going to be under one of these roof falls and therefore a handle had to be achieved to control these events. *He added that the mine shared the same concern*. In that regard, Webster advised MSHA that they had their corporate geologist speaking with roof bolt manufacturers as they tried to come up with a solution to stop the falls. Tr. 130. Gardner identified Exhibit P-9 as the report that Webster developed and presented to MSHA a few days after the fourth fall. This amendment to the mine's roof control plan, as characterized by Gardner, asserted that the mine was using the wrong support system. The new plan was to use a stronger roof bolt and to increase some of the cable bolts and install them more rapidly. Tr. 131.

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[15] Not expressly explained by the parties, an isopach map indicates, "usually by means of contour lines, the varying thickness of a designated stratigraphic unit," or sedimentary rock layer. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 288, 543 (2d ed. 1997). Webster's defines an isopach as "an isoline that connects points of equal thickness of a geological stratum formation or group of formations." "Isopach," Merriam-Webster.com, http://www.merriam-webster.com/dictionary/isopach (last visited Dec. 17, 2015).

Gardner, speaking to the proposal's approach to the primary roof control following the fourth fall, noted that Webster would be employing grade 60 bolts (eight foot bolts) as their primary system at Dotiki Mines. Tr. 132. However, Gardner then expressed that Webster

> should have come up with this when we had the third fall. Tech support was come in. That was the time we was [sic] trying to really get a handle on these falls and come up with something that would work. That was our objective when we called tech support. We're trying to come up with something to work, and we always encourage the operators to do their upmost in helping us come up with an addendum that's going to support the roof at their mines.

Tr. 134.

Regarding Exhibit P-9, Gardner acknowledged that MSHA and Webster agreed that supplemental support of the intersections be extended to the entire sections, including entries and crosscuts and that all sides agreed to continue this support through the zone of influence and then to reevaluate after conditions improve. Tr. 137-38. Gardner admitted that the changes in the roof control plan were approved on January 18th, and that the fourth fall occurred the next day. Yet, Gardner maintained that Webster could have and should have been doing a reevaluation after the first fall occurred to prevent subsequent falls. Reluctantly, Gardner agreed that the reevaluation had not occurred before the fourth fall on the 19th. Further, Gardner conceded that he never personally examined any of the four roof falls discussed during the hearing and that his knowledge was limited conversations with Inspector Rich and review of the inspector's notes. This was done as MSHA and Webster "were trying to come up with addendums" to the roof control plan. Tr. 143-44. Yet, ultimately, Gardner admitted that he instructed Rich to issue the citation in issue in this proceeding. Tr. 144.

Gardner later backed away from a claim that Webster should have gone to the grade 75 bolts after the third roof fall, instead stating that

> I think I said, you know, when we had this third roof fall, we pulled out our big gun tech support and I think my reference was, you know, we were hoping Dotiki would pull out every obstacle to and let's come together and let's – let's prevent these roof falls on the working section.

Tr. 144. He conceded both that tech support recommended supplemental support and that it be installed quicker. He also admitted that tech support would have been aware of the grade 75 bolts at the time it made its recommendations. He also was aware of the grade 75 bolts at that time. Yet, neither tech support nor Gardner himself made a recommendation that Webster start using them. While the operator has the responsibility to propose such plans, it is MSHA which must approve them. Gardner admitted that MSHA would not approve a plan if it believed it was inadequate. Tr. 145.

The Court inquired further about Gardner's involvement with these falls. He conceded that, while he never went underground to view any of them, he was engaged with the amendment to the roof control plan after the first fall in that he was involved with developing the addendum

to the plan and, further, that he believed that the changes then made were sufficient to deal with the problem presented with that first fall. Tr. 146. However, as to the second fall, he qualified his answer regarding whether he was satisfied with the roof control changes presented:

> With the information I had, yes. And you -- when we're reviewing these, of course, we could jump out and say steel supports everywhere, but we have to be reasonable and take information given to us by our specialists and also consider what my management is telling us also. I mean, yeah, we could probably come up with a tool to stop them, but then again, *that's not being reasonable*.

Tr. 147 (emphasis added).

Nor, Gardner admitted, was his review based on a blind acceptance of what Webster Coal was telling MSHA; he had Inspector Rich and other people advising him. Accordingly, he agreed that he had firsthand knowledge through the people that worked in his office and those MSHA personnel had input into the review of the proposed changes to the plan. Tr. 147. In fact, Gardner agreed with the characterization that it was *a collaborative effort*. Tr. 148.

Gardner then added: "these falls was [sic] in four different areas. Conditions change when you move from one area to another area, so, you know, the . . . characteristics of one fall is going to be different than in another fall."[16] Tr. 148. Gardner attempted to rebut his own observation, adding "[b]ut this last submittal that we come [sic] together with, changing the primary support, we have had two roof falls since that time on working sections." Tr. 149. To this, the point was made again that the falls were in different areas and that MSHA had its "big gun," Tech Support, out of Triadelphia, West Virginia, come down to the mine to assess the roof control. Effectively, Gardner's response was that MSHA is limited in what it can do vis-à-vis such roof control problems: "you know, we can't -- when we're trying to negotiate these plans, we can't come up with every avenue to make sure we get it adequately supported." Tr. 149. To this defense, or excuse, depending on how one wishes to characterize it, the Court stated that it understood, but it also observed that Gardner wasn't "sitting there sitting on [his] hands so to speak." Gardner answered, "Correct." Tr. 149. Gardner then responded that, as with the prior two falls, he "was involved" with the third fall and that the remedy also had his approval. The same was true for the fourth fall. Tr. 149-50.

The government having rested, Respondent called Chris Gunn, safety director with Webster County Coal's Dotiki Mine. Tr. 153. Gunn held this position during the times involved with the roof falls discussed in this decision. Addressing the first of those falls, that of November 2, 2012, in the 13 seam, Exhibit R-1, reflects the roof control plan then in effect. Tr. 156. He explained that fall as follows: "Number two unit, we had roof water. It was coming in and, of course, when the roof water came in, it caused an intersection to give way and -- and it fell." Tr. 156. The fall was reported to MSHA. Tr. 157. The results of the MSHA investigation were that

[16] The Court observed with regard to Gardner's point that the falls occurred in four different areas and that conditions change: "I agree. I don't know if that helps your case or hurts your case, though." Tr. 148. Gardner agreed that the locations were not next to one another. *Id.*

the mine would have to submit an addendum addressing roof water inby the tail piece and how it would handle roof water from that point on. Tr. 157. Exhibit R-2 reflects that addendum.[17]

Exhibit R-6 is an addendum to the roof control plan of December 18th and it pertains to the December 17th roof fall. Tr. 163. That plan revision addressed sandstone dipping to less than 30 feet of the roof. The mine realized that there was a greater issue than just roof water inby the tail piece and their geologist and engineers appreciated that when the sandstone in that area would dip below 30 feet, it would cause the roof to almost turn into gravel in certain areas when the roof water would start coming in. Tr. 164. The steps taken by the mine were in reaction to the second roof fall and those proposed changes were discussed with MSHA prior to its approval. Tr. 165.

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[17] Gunn noted that Exhibit R-2 reflects that Webster went to a seven foot minimum bolt length. Gunn stated that it was his understanding that the mine was already installing a seven foot bolt at that time, but that it was then formally expressed in the plan. Gunn noted that the plan also spoke to the precautions to be taken when roof water was encountered, in that it addressed additional measures that would have to be seen by the section foreman or the examiner, meaning that they would have to have test holes drilled, and then examine the test holes to make sure that water was not coming in. In addition, the mine would drill test holes in adjacent intersections to make sure that water was not carrying over to an adjacent entry. Beyond that, the mine would do an additional on-shift to look this area over, checking the area, to make sure that it was not getting worse. Further, Webster would narrow the entries in these areas where it had roof water, and thereby increase the pillar size. Tr. 158. Other steps were taken as well, as Gunn described:

> [W]e put a 10 foot minimum cable length bolt in here for our supplemental support option and then the crib block size, we increased that from 30 inches to 48, and the crib block size, it wasn't actually applicable to the addendum for the roof -- roof water, however, after we'd been in the 13 seam -- we started in January of 2011, you know, initially, so we realized at the end of 2012 that 30-inch crib block was too small. [This occurred] in discussion with me and Mr. Gardner, so we increased those to 48-inch length as to fit the mine height. The mine height in 13 seam's approximately 10 foot of mine height, so the 30-inch crib block were [sic] actually too small by the time you stacked them up to form a crib.

Tr. 160. These changes were not related to the November 2nd fall. Instead they were included in the addendum as additional roof control measures. Tr. 160. Exhibit R-2 reflects the letter from MSHA approving the modification on November 5th. Tr. 161. At the time of the November 5th approval, Webster had previously submitted, on October 2nd, a modified roof control plan, which was then pending. Ex. R-4. This roof control plan would supercede the then-existing plan. Tr. 162. Gunn described it as a "cleanup" of the existing plan because the mine was no longer producing coal in the nine seam. All units had ceased production in the nine seam, and Webster was minimizing the nine seam plan to only be applicable to outby areas. That plan was not approved until November 8th. Ex. R-5. The plan that was approved on November 5th was incorporated into the plan that the mine submitted on October 2nd. Tr. 163.

Addressing the third roof fall, that of January 16th, Gunn stated that occurred on the number three unit. Tr. 166. It was for this fall that MSHA's Tech Support became involved. Tech Support's Mr. Vadimal gave guidelines that he believed would fix the problem going forward to ensure that it wouldn't happen again. His recommendations were included in the plan addendum approved by MSHA. Tr. 167; Ex. R-8. MSHA's approval was issued on January 18, 2013.

As for the fourth fall, which occurred on the number four unit on January 19, 2013, Gunn expressed:

> It was a gut-wrencher because, you know, we had exhausted, we felt, everything on the previous fall, and, you know, the 13 seam was going through a hard knock here because the previous fall that was on the number three unit was in our mains, so this was the main life of mines to allow development for the rest of Dotiki.

Tr. 168. At that time Respondent was trying to figure out what to do next. The mine believed that it had addressed the roof water and the sandstone dipping and that it had thrown "the kitchen sink" at the roof control problems. With the fourth fall, the mine concluded that it had to "kind of basically go back to the drawing board and realize okay, well, . . . what can we do now different than what we've done in the previous addendums . . . we were kind of at wit's end of -- of what to do next." Tr. 168-69.

Gunn stated that the January 19th fall did not have symptoms similar to the previous three falls. Tr. 169. The Court would note that this is undisputed. Following the January 19th event, Webster submitted a rehabilitation plan. Gunn's response placed the plan in context, as he noted that there are times when a fall occurs and the mine can stop running that entry and it can timber or crib it out or flag it out, so that no one goes in the area, but there are also times when a fall occurs and the mine needs to continue use of the entry, strategically, to load out. In such circumstances, MSHA will require submission of a rehabilitation plan to ensure that the area is safe to resume production and that is what happened. Tr. 169.

Gunn spoke about the rehabilitation plan the mine submitted following the January 19th fall. Ex. R-11.[18] The next day, on January 20th, the mine advised that it would be submitting an approvable addendum, noting that "[a] roof control addendum will be submitted and approved *prior to resuming production* on number four sections" and then it listed the MMU numbers, MMU037 and MMU029, in the first northwest panel, which is the section where the fall on the 19th occurred. Tr. 171 (emphasis added). However, the roof control plan addendum was not approved by January 22th, which was the date that the citation involved in this case was issued. The mine was not producing coal on the number four unit when the citation was issued. At the time of the (k) order and the citation the mine was required to follow through with its rehabilitation plan and submit an addendum. The mine did submit such an addendum (Exhibit R-12) and it was then approved by MSHA (Exhibit R-13). Tr. 171-73. The mine had also submitted

[18] The plan provided for installing cribs at different intersections, installing support and, for rock loading, the methods for extracting the rock and support through the area and ultimately to submit a roof control addendum for MSHA's approval which would then allow production to resume in the number four section. Tr. 170.

other plans between November 2nd and January 19th. On November 28, 2012, a plan reflected a different Fletcher-type roof bolter per a roof control specialist's conversation with Gunn. Tr. 174. This approved change came about without any citation involved. Exs. R-14, R-15. Similarly, Exhibit R-16 is another addendum to the roof control plan, bearing a December 5th date, regarding supplemental support options involving use of T3 channel bolts. These had been used at another mine, and Webster wanted to employ the idea for its mine. This was approved as well and their use also came about without any citation involved. Ex. R-17. Yet another addendum occurred on December 20, 2012, with that one involving changing the roof bolt plate size. This, too, was at the mine's initiative, not under the issuance of a citation. MSHA approved that change on January 4, 2013. Tr. 176-77; Ex. R-19.

In its post-hearing brief, Respondent fairly summed up the above information regarding Webster's voluntary efforts as follows:

> In addition to the modifications to the roof control plan required by MSHA to terminate 103(k) orders resulting from the above-referenced roof falls, WCC took the initiative to submit additional roof control plan changes for MSHA's approval between November 2, 2012 and January 19, 2013. A complete roof control plan was submitted to MSHA for approval on October 2, 2012, and approved November 8, 2012. Tr. 162. R-4. That plan removed the roof control provisions for coal production in the #9 seam, but also incorporated the roof control plan addendum submitted by WCC as a result of the November 2, 2012 roof fall. Tr. 162-163. R-4. Additionally, the mine submitted proposed roof control plan addendums on November 28, 2012, December 5, 2012, and December 20, 2012, all of which were not required to terminate any manner of enforcement action by MSHA.

Resp't's Br. 6.

The Secretary's cross-examination emphasized that the burden for proposing changes and for dealing with roof control is on the mine operator. Tr. 180. However, per Ex. R-12, and the approved addendum, dated January 18, 2013, the mine stated that the falls on the number two and three sections were all related to "an abnormal geological zone." Tr. 182. That addendum stated that it would address any other abnormal geological zones projected or encountered. In response to a question posed by the Secretary, Gunn stated that the fourth fall occurred outside of the geological zone are that the mine was aware of. In the Court's view, Gunn's response was helpful to the Respondent. Tr. 184.

The Parties' Contentions

The Secretary's Brief

The Secretary notes that pursuant to 30 C.F.R. §75.223(a)(1), revisions to the roof control plan shall be proposed by the operator when conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts. When MSHA adopted this standard, the agency noted that "any condition which indicates the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts requires that the plan be revised." 53 Fed. Reg. 2354, 2372 (Jan. 27, 1988). The Secretary invokes the rule that in interpreting and applying broadly worded standards, "the appropriate test is . . . whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co*., 12 FMSHRC 2409, 2416 (Nov. 1990). Looking to an administrative law judge's decision,[19] the Secretary contends that to prove a violation of section 75.223(a)(1), he must show "(1) the existence of adverse roof conditions at the mine, (2) that a reasonably prudent miner would have recognized the existing roof control plan was insufficient to address those negative conditions, and (3) the mine did not amend the roof control plan." Sec'y's Br. 6 (quoting *Big Laurel Mining Corporation*, 37 FMSHRC 2001, 2020 (Sept. 2015) (ALJ).

From this, the Secretary contends that the evidence presented at hearing established that Webster County Coal violated 30 C.F.R. § 75.223(a)(1). To make this argument, the Secretary first asserts that adverse roof conditions existed at the Dotiki mine. Specifically, the mine had experienced four roof falls over a short period of time and that, after each roof fall, Webster met with MSHA and proposed revisions to the roof control plan. Thus, the Secretary contends that the Respondent was well aware that the mine was experiencing adverse roof conditions because of the four roof falls between November 2012 and January 2013. The Secretary asserts that while those roof falls occurred in four different areas, the falls still put the mine on notice that adverse roof conditions were being encountered during the mining process. Sec'y's Br. 6.

With that premise, the Secretary declares that the four falls would have caused a reasonably prudent mine operator to have recognized that the existing roof control plan was insufficient to address the negative conditions at the mine. *Id.* It notes that, according to Inspector Rich's testimony, there was a visible slip that could be traced from one end of the fourth roof fall to the other end and that the slip should have been visible to the mine operator because it was easily traced by Inspector Rich. While a mine operator cannot see a hidden slip, the operator can easily trace the actual slip by following the visible slip line. The hidden portion of the slip, which could be traced from one visible end to the other visible end, became visible after the fall occurred. From this, the Secretary argues that the operator should have been aware that a slip line was present on the unit and apparently by that fact alone, should have recognized that the existing roof control plan was insufficient to address the negative conditions created by the slip line. *Id.* at 6-7. Attempting to establish its case by actions taken following the fourth fall, the Secretary points to revisions presented by Webster County Coal after that event and that

[19] Neither the Secretary, Respondent, nor this Court could find a Commission-level decision addressing the contours of the cited provision.

those revisions were then sufficient to maintain the roof while also acknowledging that the revisions thereafter limited (but did not eliminate) the future occurrence of additional roof falls. *Id.* at 7. Finally, the Secretary believes that, because the mine had a geologist investigate the conditions at the mine that caused the roof falls only after the fourth fall this apparently demonstrates that it could have taken such action aforehand. Thus, the Secretary is critical that such proposed revisions were not included in the mine's revisions to the roof control plan following the first, second, and third falls, and that they did not submit the geologist report until after the fourth roof fall occurred.

In sum, the Secretary reasserts that Webster, well aware that conditions existed at the Dotiki Mine that indicated a plan change was needed, still failed to revise the roof control plan when the conditions indicated that the plan was not suitable. *Id.* Apparently, the asserted presence of the slip line was sufficient to require Webster to proactively submit a plan change to prevent the fourth roof fall.

The Respondent's Brief

The Respondent notes that, for each fall incident, it took action. The steps it took after each event are not in dispute. Turning to the fall which provoked the citation, Webster notes that the fall occurred the day after its most recent plan had been approved by MSHA. Resp't's Br. 4. It also points out that the fourth fall was very different from the falls which preceded it. In terms of establishing the alleged violation, Webster observes that while the inspector believed that a hidden slip line was present in the mine roof and the pillars, he admitted that was simply a guess and that it was equally possible that slip line did not continue into the unmined areas. *Id.* at 5. Further, the inspector conceded that in his experience slip lines can stop and start throughout a coal seam. Nor could he state definitively when the slip line first appeared in the mine. Webster also notes that when the inspector was asked if the mine should have submitted a revision to their roof control plan based on the visible slip line, he stated that they *could* have submitted a change, but did not assert that it *should* have done so. *Id.* Webster also observes that the roof control plan in place as of the time of this fall did have a provision regarding slips, and that Rich admitted that the mine was following the plan with regard to that provision. Rich was also not aware of any prior roof falls at Dotiki in the 13 seam that were caused by visible slips, when water was not a contributing factor. Rich testified that the existence of the visible slip line was an essential part of his finding of a violation in fact. Tr. 119-20. The inspector stated that, had he not made the conclusion that the slip line continued on and instead only considered the visible areas of the slip, he would not have issued the citation. Resp't's Br. 5.

Webster states that instead of immediately submitting a plan change to terminate the 103(k) order issued following the January 19th fall, it submitted a rehabilitation plan the next day, detailing the steps they would take to make the number four unit safe for normal mining operations. Resp't's Br. 5-6. However, it included in that plan a statement that the mine would submit a plan modification prior to resuming production and in that regard it points out that as of January 22nd, the date the citation in issue was issued, it had not resumed production on the number four unit. Consistent with this assertion, the inspector confirmed that the mine would be required to have an approval on that roof control plan modification before production could resume on the affected unit. Resp't's Br. 6.

Discussion

The Secretary has contended that on January 19, 2013, the conditions preceding the roof fall on that date indicated that the roof control plan was not suitable for controlling the roof. Part and parcel of the Secretary's case was its noting that the Dotiki Mine experienced four roof falls inby the dumping point of the producing units in four different locations of the mine beginning on November 2, 2012, and ending with the roof fall of January 19, 2013. It contends that those roof conditions at the Dotiki Mine therefore indicated that the plan was not adequate or suitable for controlling the roof. While MSHA acknowledged that Webster County Coal met several times with the Mine Safety and Health Administration regarding the roof falls, and each time, a revision was made, it argues that the revisions made were not adequate. It emphasizes that it is up to the operator to propose revisions to MSHA in order to control roof conditions of the mine.

In response, it is Respondent's contention that the Secretary must establish two elements to prevail in a claimed violation of § 75.223(a)(1): The Secretary has to establish that conditions were present that indicate that the current plan was not suitable, and that the mine failed to submit proposed modifications to that plan after the conditions manifested themselves. Respondent argues that at the time of the roof fall immediately preceding the citation there was no evidence of any conditions present which indicated that the plan in place at the time was not suitable. It notes that a roof control plan proposed by Webster County Coal with MSHA's input and approval was in place for a little over one day when the mine suffered the roof fall that led to this citation. Additionally, in the time period identified by the inspector involving the four roof falls, Respondent submitted an entirely new roof control plan as well as three additional roof control plan addendums that were not submitted as a result of any citation or other enforcement action. Accordingly, it contends that Webster was diligently and prudently monitoring its roof control plan throughout the relevant time period and proposing changes as necessary. It notes that at times those changes occurred when the mine experienced a roof fall but that changes were also proposed independent of any geological event. Returning its focus on the cited event, however, it asserts that at no point did the mine fail to submit a plan modification when conditions indicated that it should do so.

In analyzing the alleged violation, it is important to keep in mind the full text of the Secretary's Citation, Number 8510632. That citation asserts:

> Revisions to the Approved Roof Control [plan] were not proposed by the Dotiki Mine Operator when conditions indicated that the plan was not suitable for controlling the roof. This operation has experienced four (4) roof falls inby the dumping point of producing units in four (4) different locations from 11/02/2012 to 01/19/2013. The Dotiki Mine Operator has not proposed adequate revisions to the approved Roof Control Plan when roof conditions at the Dotiki indicated that the plan was not adequate or suitable for controlling the roof. Standard 75.223(a)(1) was cited 1 time in two years at mine 1502132 (1 to the operator, 0 to a contractor).

Accordingly, the Citation rests upon the four cited roof falls *in the attempt to establish* the claimed violation. Yet, it has been conceded that the fourth roof fall, the fall that resulted in

the citation's issuance here, was entirely different from the preceding three falls and citations were not issued for two of the four roof fall events.[20] At the hearing, the Court inquired and the Secretary's Counsel confirmed that it would explain where the Secretary believes Webster County Coal came up short in this process, and what they should have done on a given day or time, in light of events, but failed to do so. Tr. 16.

As noted by the Court at the hearing, the triggering mechanism for § 75.223(a)(1), the cited provision, arises when conditions in an existing plan indicate that it is not suitable for controlling the roof face, ribs, or coal or other rock bursts. Under such established conditions, revisions of the roof control plan are to be proposed by the operator to deal with that lack of suitability.[21] The Secretary's failure to meet its burden of proof is evident on several fronts. First, its chief witness, Inspector Rich, could not state definitively that the slip line continued beyond where it was visible. The Court has found that the inspector's late assertion that rock dust was present was not credible. Also, the inspector was unable to assert that Webster should have proposed revisions to its roof control plan. The inspector, the sole MSHA hearing witness who actually viewed the falls, admitted that he was directed by a person or persons above him to issue the citation. The Secretary did not point to any provision of the roof control plan existing at the time of the fourth fall that was deficient. For example, the plan existing before the fourth fall spoke to slips, providing, in part, that "[i]f a fault or slip is running with the entry or cross cut an 8' minimum length cable bolt will be installed on each side of the fault or slip on 4' centers." Ex. R-4 at 4. The Secretary, in addition to not establishing the extent of the slip, nor the period of time it existed, did not offer any evidence that Respondent failed to comply with the plan's provisions regarding slips nor how the plan's addressing the subject of slips was not suitable.

In the Court's view, the genesis for this citation's issuance was MSHA's understandable frustration that there had been four roof falls. However, that is an insufficient basis to establish a violation of § 75.223(a)(1). That a roof fall occurred is insufficient to establish, by that fact alone, that the standard was violated. Though the cause of the fourth fall was undisputedly not related to the causes of the preceding three falls, MSHA, both through the citation and at the hearing, attempted to tie the first three falls to the fourth. In short, the Secretary may not bootstrap its way to establishing a violation by showing that there were previous roof falls when those falls were not instructive to the cause of the fourth fall. Further, it certainly was not the case that Webster was ignoring the issue. To the contrary, it was working closely with MSHA to solve the problems each step of the way. In addition, Webster established that it made changes to its roof control plan independent of citations. It is fair to state that both sides were attempting, in

[20] All of the falls occurred in the 13 seam, with the mining for this new seam of coal beginning around July 2011. The mine had previously been in the nine seam. By September 2012, the mine had four units, eight MMU's, operating in the 13 seam. Tr. 178. Respondent's witness Gunn reviewed the fall locations for the Court: Falls number one and two were in the number two section, fall three in the three section, and fall four in the four section. Tr. 187.

[21] Respondent also argued in the alternative that, should the Court find that the standard was violated, it takes issue with the appropriateness of the proposed penalty and with related questions regarding whether the alleged violation was properly designated as S&S. As the Court vacates the citation, it does not need to address the Respondent's alternative arguments.

good faith, to control the roof.[22] Revealing that both parties were without an answer, even the roof control remedies suggested by MSHA's technical support office, and fully accepted by Webster, came up short a day after they were implemented.

Accordingly, under those circumstances and also by the Secretary's failure to meet its burden of proof, the Citation is VACATED and this matter is hereby DISMISSED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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[22] It was after the fourth fall that Webster decided that the mutually agreed upon fixes to the first three falls were not sufficient.

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December 21, 2015

ELLIS & EASTERN COMPANY, Applicant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Respondent.	EQUAL ACCESS TO JUSTICE PROCEEDING Docket No. EAJA 2015-0003 (formerly CENT 2014-0451-M) A.C. No. 39-00008-351487 Z272 Mine: Sioux Falls Quarry Mine I.D. – 39-00008

DECISION GRANTING APPLICATION FOR ATTORNEY FEES AND EXPENSES

Ellis & Eastern Company has applied for an award of fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, as implemented by the Commission Rules at 29 C.F.R. Part 2704. E&E was the prevailing party in a Summary Decision. *Ellis & E. Co*., 37 FMSHRC 1607 (ALJ Gill)(July 2015).[1] The Secretary did not appeal the Summary Decision. E&E now moves for attorney fees and expenses[2] in the amount of $21,450.96, and also moves to withhold its financial information from public disclosure. E&E submitted its financial statement, itemized statements for attorney fees and costs, and a petition for attorney fees at a rate of $200.00 per hour. For the reasons stated below, I find that E&E is entitled to reasonable attorney fees and expenses, and I approve the requested $200.00 per hour rate.

E&E is Entitled to Attorney Fees and Expenses

The Secretary concedes that the previous litigation was an "adversary adjudication" under 29 C.F.R. § 2704.103, that E&E was the "prevailing party" as defined in 29 C.F.R. § 2704.104, and that E&E meets the definition of a "party"[3] under the Mine Act. (Sec'y. Obj. at 2-3) Therefore, the only issue left to be determined is whether the Secretary has met his burden of

[1] On February 17, 2010, MSHA inspected the railroad shop of E&E and issued two citations, which were contested based on jurisdiction. *Id.* at 1608. MSHA vacated the citations because of concerns that E&E had not received sufficient notice of its jurisdiction. *Id*. On March 19, 2014, MSHA inspected the railroad shop and issued E&E a citation. *Id.* E&E again contested based on jurisdiction. *Id.* at 1608-9. The Summary Decision was based upon the 2014 citation.

[2] The Commission Rules provide that "an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses." 29 C.F.R. § 2704.

[3] 5 U.S.C. § 504(b)(1)(B) defines "party," for the purposes of this case, as a "corporation […] the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated." E&E has met this criteria.

proving that his position in the previous litigation was substantially justified. *See Cooper v. United States R.R. Retirement Bd*., 24 F.3d 1414, 1416 (D.C. Cir. 1994); *see Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992); *see* 29 C.F.R. § 2704.105. "Substantially justified" means that the Secretary's position in the previous litigation had "a reasonable basis in both law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Secretary is not required to show, however, that his decision to litigate was based on a substantial probability of prevailing. *James M. Ray, empl. by Leo Journagan*, 18 FMSHRC 2033, 2039 (Nov. 1996).

The Summary Decision was based on the sole issue of MSHA's asserted jurisdiction over E&E's railroad shop. *Ellis & E. Co*., 37 FMSHRC at 1607. I found that there was "no genuine issue of material fact, and the Respondent [was] entitled to Summary Disposition as a matter of law because MSHA does not have jurisdiction over the railroad shop […]" and I vacated the underlying citation.[4] *Id.* The decision denying MSHA's jurisdiction over the railroad repair shop was based on three reasons:

> 1) E&E's railroad repair shop was not a mine under the Mine Act, and the Secretary's interpretation, in which he asserted jurisdiction over the shop because its proximity to the railroad tracks made the shop a private way appurtenant to the mine, was unreasonable and not entitled to deference;
> 2) The equipment E&E maintained in the railroad shop was not mining equipment because it was not used in activities "usually done by the operator" under the plain meaning of the Mine Act; and
> 3) E&E and Concrete Materials could not reasonably be treated as a single operation run by a parent company because both corporations had sufficiently diverse holdings and interests to merit treatment as distinct companies.

Id. at 1611-13.

The majority of the arguments in the Secretary's Objection are the same as the arguments set forth in the previous litigation, and I will address those first. While it is true that the mere fact that E&E prevailed in the Summary Decisions does not create a presumption that the Secretary's position was not substantially justified, *Contractors Sand and Gravel, Inc.,* 20 FMSHRC 960, 968 (Sept. 1998), I find that none of the theories proffered by the Secretary in the previous litigation were reasonable. Indeed, as the D.C. Circuit has held, "[i]n some cases, the standard of review on the merits is so close to the reasonableness standard applicable to determining substantial justification that a losing agency is unlikely to be able to show that its position was substantially justified." *F.J. Vollmer Co. v. Magaw,* 102 F.3d 591, 595 (D.C.Cir.1996); *Contractor's Sand & Gravel, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 199 F.3d 1335, 1340 (D.C. Cir. 2000). Based upon the reasoning set forth in the Summary Decision, I find that there is no reasonable interpretation of the facts or the law that supports the Secretary's theory that the railroad shop was located in an area where mining occurred, that the shop was a private way appurtenant to the mine, or that the equipment inspected was mining equipment. I also find that there is no reasonable interpretation in law or in fact that MSHA can assert jurisdiction

[4] E&E also requested that its Independent Contractor Identification Number be vacated, but I denied that request.

based on a "single operation" theory, i.e. that E&E and Concrete Materials were "integral components of a single operation" run by their parent company Sweetman Construction.

The Secretary also now argues that the substantial justification standard should not be used to deter the government from bringing cases of first impression, nor should it be used to deter an agency's good faith prosecution of a case of first impression. (Sec'y Obj. at 6-7); *See Magruder Limestone Co., Inc.*, 36 FMSHRC 3288, 3298) (ALJ McCarthy) (Dec. 2014)(*citing S.E.C. v. Zahareas,* 374 F.3d 624, 627 (8th Cir. 2004)); *See Concrete Aggregates, LLC*, 25 FMSHRC 500, 503 (ALJ Manning)(Aug. 2003). The Secretary argued that since railcars are maintained in the railroad shop, and the railcars are used by the mine to load product, the railroad shop that maintained the railcars could reasonably be considered under the Mine Act's jurisdiction. Additionally, the Secretary argued that since there was no case law directly on point, reasonable minds can differ on the application of the cases relied on in the Summary Decision.

I agree that the substantial justification standard should not be used to deter an agency's good faith prosecution of a case of first impression. However, using it as a shield in a circumstance in which MSHA issued a frivolous citation is inappropriate. As set forth in the Summary Decision, E&E daily brings empty railcars into Concrete Materials' Sioux Falls quarry, which are then loaded by Concrete Minerals' miners during the night shift. *Ellis & E. Co*., 37 FMSHRC at 1608. The railroad tracks lie between the E&E railroad shop and Concrete Materials' mining pit, and end in the mine's screening and washing area where the railcars are loaded. *Id.* A public road must be crossed to travel from the mine's quarry and processing areas to E&E's railroad shop. *Id*. None of E&E's railroad vehicles enter the quarry extraction area. *Id.* at 1612. Additionally, E&E's railroad maintenance shop is exclusively dedicated to transportation equipment maintenance, and the transportation equipment is used to deliver finished goods. *Id.* at 1612, 1615. This is a situation in which an MSHA inspector traveled onto E&E's railroad property, far away from the railroad tracks where Concrete Minerals' miners load product from the quarry onto railcars, walked into E&E's maintenance shop, inspected a maintenance pick-up truck, and issued E&E a citation because the truck's parking break was not set. It appears that, based on the facts and circumstances before me, the Secretary did not act in good faith when deciding to prosecute the underlying litigation.

Further, the Secretary also now argues that the Summary Decision was "somewhere in the middle of the parties' positions" because, while the railroad shop was not under MSHA's jurisdiction, E&E's status as a contractor was not removed because of the services it provided the mine. (Sec'y Obj. at 6) Therefore, the Secretary contends, reasonable minds could differ about "where the line was drawn." *Id.* This is simply not true. The underlying litigation centered on the sole issue of whether MSHA had jurisdiction to issue a citation in a railway shop, and my reasoning for denying E&E's request to remove its independent contractor status was distinct from the jurisdictional finding. The fact that E&E requested the additional relief of removing its independent contractor status bears no consequence as to the reason the parties were originally before me. It is a mistake to assume denial of an additional form of relief somehow equates to the Secretary "winning" part of its underlying case, and a reason to deny or decrease E&E's application for attorney fees and expenses.

For the reasons stated above, I find that the Secretary failed to meet his burden to prove his position in the underlying litigation was substantially justified because its position in the previous litigation was not reasonable in fact or in law. I therefore grant E&E's application for attorney fees and costs.

E&E is Entitled to a Rate in Excess of the Statutory Maximum

Under the EAJA, "[n]o award for the fee of an attorney or agent under this part may exceed $125 per hour" plus reasonable expenses. 29 C.F.R. § 2704.106(b). However, a petition can be made to request an increase in the hourly rate set forth within the regulation. In determining the reasonableness of the fee sought for an attorney, the court considers:

> 1) The attorney's customary fee for similar services;
> 2) Similar rates charged by attorney's in the community in which the attorney performs services; 3) The time spent in the representation of the applicant and its reasonableness based on the circumstances of the case; and
> 4) Such other factors as may bear on the value of the services provided.

Id. at 2704.106(c).

Based upon Exhibit A and Exhibit B attached to E&E's Application, I find that the hourly rate of $200.00 per hour charged by Attorney Sar was reasonable and did not exceed the customary rate in the community. Additionally, upon review of the itemized billing of the services rendered by Attorney Sar, I find that the time spent was reasonable given the issues before the court, and I find that the accompanying expenses reasonable as well. Therefore, I find E&E is entitled to a total of $21,450.96 in attorney fees and expenses, as requested.

WHEREFORE, it is **ORDERED** that E&E's financial information be withheld from public disclosure.

It is further, **ORDERED** that the Secretary of Labor pay a total of $21,450.96 in attorney fees and expenses to E&E within 30 days of this decision.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

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December 24, 2015

POCAHONTAS COAL COMPANY, LLC Contestant	CONTEST PROCEEDING
v.	Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/2013
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Affinity Mine Mine ID: 46-08878
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2014-1028 A.C. No. 46-08878-350475
v.	Docket No. WEVA 2015-854 A.C. No. 46-08878-382268
POCAHONTAS COAL COMPANY, LLC, Respondent	Mine: Affinity Mine

SUMMARY DECISION

Before: Judge Miller

These cases are before me on petitions for penalty filed by the Secretary of Labor and a notice of contest filed by Pocahontas Coal Company LLC pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Act"). Docket No. WEVA 2014-1028 contains eighteen citations and orders, seventeen of which were issued pursuant to section 104(a) of the Act and one of which was issued pursuant to section 104(e)(2). The Secretary proposed penalties totaling $17,251.00 for the eighteen citations and orders. The seventeen 104(a) citations were resolved in an Order Approving Partial Settlement issued by this court on May 6, 2015. The remaining Order No. 9001636 is the subject of the present order. Dockets Nos. WEVA 2015-854 and WEVA 2014-395-R both involve a single order, Order No. 3576153, which was issued pursuant to section 104(e)(1). The Secretary has proposed a penalty of $5,600.00 for that order.

The parties have filed a Joint Motion to Consolidate these dockets, which is hereby **GRANTED**. The parties have also filed a Joint Motion for Summary Decision. The purpose of the motion is to complete these two penalty dockets so that the parties may file an appeal with regard to the order granting summary decision on the issue of the validity of the notice of pattern of violations. That order disposed of most of the issues in these cases and this order disposes of the remaining issues.

Commission rules provide that summary decision is appropriate when the entire record shows "(1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). Based upon the stipulations of the parties and a review of the entire record, I find that there is no genuine issue as to any material fact. I conclude that, for the reasons stated below, the Secretary of Labor is entitled to summary decision as a matter of law.

Procedural Background

On October 24, 2013, the Mine Safety and Health Administration ("MSHA") notified Pocahontas Coal Company, LLC, ("Pocahontas") that MSHA had determined that a pattern of violations existed at Pocahontas's Affinity Mine and issued Written Notice No. 7219153 ("the NPOV") pursuant to section 104(e)(1) of the Mine Act. That notice was upheld as validly issued in an order issued by this court on November 3, 2015. Order No. 3576153 was a section 104(e)(1) order predicated on the NPOV. It was issued on December 19, 2013, and alleged a violation of 30 C.F.R. § 75.370(a)(1). Pocahontas filed a Notice of Contest for that order on January 3, 2014, which was docketed as WEVA 2014-395-R. The Secretary filed a Petition for Assessment of Civil Penalty on August 27, 2015, for WEVA 2015-854, which included Order No. 3576153. Order No. 9001636 is a section 104(e)(2) order predicated on the NPOV. It was issued on March 26, 2014, and alleged a violation of 30 C.F.R. § 75.517. The Secretary filed a Petition for Assessment of Civil Penalty on July 15, 2014, for WEVA 2014-1028, which included Order No. 9001636. The docket, WEVA 2014-1028 and the contest WEVA 2014-395-R are the cases in which an order was entered upholding the validity of the NPOV issued to the mine. The addition of the last penalty makes the record complete.

Joint Stipulations of Fact

The parties entered into the following stipulations of fact for purposes of summary judgment:

1. Section 104(e)(1) Order No. 3576153 was issued by an authorized representative of the Secretary on December 19, 2013.

2. Order No. 3576153 alleges a violation of 30 C.F.R. Section 75.370(a)(1) as follows:

> The operator failed to follow the safety precautions listed on page 1 of a revision to the ventilation plan for the slope fill construction project. When observed, the operator failed to install an adequate fall barrier on top the support structure at the Beckley Seam level and along the elevated walkways leading to the support structure. The fall barrier along the front of the structure was made of loose rebar, which did not span the full length of the opening on front of the structure, and red caution tape stretched across the area. The railing installed along elevated walkways was also not sufficient to prevent persons from falling. The railing was measured and found to be less than 28" high at its highest point. Standard

75.370(a)(1) was cited 38 times in two years at mine 4608878 (38 to the operator, 0 to a contractor).

The Parties agree that inspector saw the condition as outlined in Order No. 3576153.

3. The authorized representative determined that in Order No. 3576153 the gravity was reasonably likely, the injury or illness could reasonably be expected to be permanently disabling, and the hazard would affect one (1) person. The parties agree that the inspector properly marked Order No. 3576153 as reasonably likely, permanently disabling, and affecting one person.

4. The authorized representative determined that Order No. 3576153 was significant and substantial. The parties agree that Order No. 3576153 was properly cited as significant and substantial.

5. The authorized representative determined that the negligence in Order No. 3576153 was moderate. The parties agree that Order No. 3576153 was properly cited with moderate negligence.

6. The Office of Assessments assessed a civil penalty in the amount of $5,600.00 for Order No. 3576153. The Parties agree that the assessed civil penalty of $5,600.00 is proper given the following factors:

    a. The proposed penalty is appropriate given the operator's history of previous violations;
    b. The proposed penalty is appropriate to the size and business of the operator charged;
    c. The proposed penalty is appropriate based on the level of negligence alleged;
    d. The proposed penalty will not affect the operator's ability to continue in business;
    e. The proposed penalty is appropriate based on the gravity of the violation; and
    f. The proposed penalty is appropriate based on the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

7. Section 104(e)(2) Order No. 9001636 was issued by an authorized representative of the Secretary on March 26, 2014.

8. Order No. 9001636 alleges a violation of 30 C.F.R. § 75.517 as follows:

    The power wire for the AL LEE Forklift Co. #3 S/N E11858, is not being maintained fully insulated and adequately protected. The Forklift is being used outby the No. 2 section and has damage at the Anderson plug exposing an uninsulated energized power conductor. Standard 75.517 was cited 14 times in two years at mine 4608878 (14 to the operator, 0 to a contractor).

The parties agree that the inspector saw the condition as outlined in Order No. 9001636.

9. The authorized representative determined that in Order No. 9001636 the gravity was reasonably likely, the injury or illness could reasonably be expected to be permanently disabling, and the hazard would affect one person. The parties agree that the inspector properly marked Order No. 9001636 as reasonably likely, permanently disabling, and affecting one person.

10. The authorized representative determined that Order No. 9001636 was significant and substantial. The parties agree that Order No. 9001636 was properly cited as significant and substantial.

11. The authorized representative determined that the negligence in Order No. 9001636 was moderate. The parties agree that the order was properly cited with moderate negligence.

12. The Office of Assessments assessed a civil penalty in the amount of $764.00 for Order No. 9001636. The Parties agree that the assessed civil penalty of $764.00 was proper given the following factors:

    a. The proposed penalty is appropriate given the operator's history of previous violations;
    b. The proposed penalty is appropriate to the size and business of the operator charged;
    c. The proposed penalty is appropriate based on the level of negligence alleged;
    d. The proposed penalty will not affect the operator's ability to continue in business;
    e. The proposed penalty is appropriate based on the gravity of the violation; and
    f. The proposed penalty is appropriate based on the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Order No. 3576153 alleges a violation of 30 C.F.R. § 75.370(a)(1). That standard requires that operators "develop and follow a ventilation plan approved by the district manager." 30 C.F.R. § 75.370(a)(1). The parties have stipulated that fall barriers installed on top of a support structure and elevated walkways at the mine did not comply with requirements included in a revision of the mine's ventilation plan. Jt. Stips. ¶ 2. The parties have further stipulated that the violation was reasonably likely to cause a permanently disabling injury; that it would affect one person; that it was significant and substantial; and that it was the result of moderate negligence. Jt. Stips. ¶¶ 3-5. They agree that the proposed penalty of $5,600.00 is appropriate in view of the operator's history of violations, its size, the gravity of the violation, and the negligence involved; that the penalty will not affect the operator's ability to continue in business; and that the operator demonstrated good faith in abating the violation. Jt. Stips. ¶ 6.

Order No. 9001636 alleges a violation of 30 C.F.R. § 75.517. That standard requires that "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." 30 C.F.R. § 75.517. The parties have stipulated that at the time of the inspection, the power wire for the cited forklift had damage at the Anderson plug exposing an uninsulated energized power conductor. Jt. Stips. ¶ 8. Thus, the power cord

was not "insulated adequately and fully protected" as required by the standard. *Id*. The parties have further stipulated that the violation was reasonably likely to cause permanently disabling injury; that it would affect one person; that it was significant and substantial; and that it was the result of moderate negligence. Jt. Stips. ¶¶ 9-11. They agree that the proposed penalty of $764.00 is appropriate in view of the operator's history of violations, its size, the gravity of the violation, and the negligence involved; that the penalty will not affect the operator's ability to continue in business; and that the operator demonstrated good faith in abating the violation. Jt. Stips. ¶ 12.

The two orders at issue here were both issued pursuant to section 104(e) of the Mine Act. Order No. 3576153 was issued pursuant to section 104(e)(1) and Order No. 9001636 was issued pursuant to section 104(e)(2). Sections 104(e)(1) and 104(e)(2) grant the Secretary the authority to issue withdrawal orders for significant and substantial (S&S) violations when a mine has received notice that a pattern of S&S violations exists at the mine. 30 U.S.C. § 814(e). Thus, for an order to be properly issued under either of those sections, the operator must have received a notice of pattern of violations (NPOV) as described in section 104(e)(1). *Id*. The NPOV underlying the two orders here was Written Notice No. 7219153, which was issued to Pocahontas on October 24, 2013. Pocahontas does not concede that the NPOV was validly issued or that a pattern of violations existed at the mine, and thus argues that these two citations should have been issued as 104(a) citations rather than 104(e) orders. Jt. Memo. at 7. However, the issue of the validity of the NPOV was already decided by order granting partial summary decision to the Secretary on November 3, 2015. Therefore, Orders No. 9001636 and 3576153 were properly issued as 104(e) orders.

In view of the entire record, I find that there is no genuine issue remaining as to any material fact. Based on the stipulations of the parties, I find that both violations occurred and that the proposed penalties are appropriate under the criteria set forth in section 110(i) of the Act. I therefore find that the Secretary is entitled to summary decision as a matter of law.

II. ORDER

For the reasons set forth above, the motion for summary decision is **GRANTED**, the notice of contest is **DISMISSED,** and Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $6,364.00 within 30 days of the date of this decision.

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

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December 29, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PETRO CHEMICAL INSULATION INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2014-606 A.C. No. 15-00365-348946 Mine: Estill Co.

DECISION

Appearances: Malia Lawson Holzberger, Office of the Solicitor, U.S. Department of Labor
211 7th Avenue North, Suite 420 Nashville, TN 37219

Thomas Strong, Venable LLP
750 East Pratt Street Suite 900
Baltimore, MD 21202

Before: Judge Simonton

I. INTRODUCTION

This case is before me on a civil penalty petition filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), against Petro Chemical Insulation Inc. (Respondent), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. This docket contains two 104(a) citations issued by MSHA Inspector Jamie Daniels on March 11, 2014 at the Respondent's Estill Co. mine.

At hearing, Inspector Daniels testified for the Secretary. Petro Chemicals supervisor Mauro Fernandez testified for the Respondent. Both parties filed post-hearing briefs. For the reasons that follow, Citation Nos. 8392133 and 8392134 are **AFFIRMED** as originally written and assessed for a total civil monetary penalty of **$434.00**.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8392133

MSHA Inspector Daniels issued Citation No. 8392133 for an alleged violation of 30 CFR §77.1109(c)(1) on March 11, 2014. Daniels alleged within the citation that:

> The fire extinguisher being provided for the Genie S-60 Man lift (C/N 24-ML-02) operating at this mine site has a indicator dial showing re-charge.

Sec'y Ex. 1, 1.

Daniels designated Citation No. 8392133 as a moderate negligence violation that was unlikely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. *Id*. Daniels determined that the failure to recharge or replace the fire extinguisher properly was not significant and substantial. *Id*. The Respondent abated the citation by installing a fully charged fire extinguisher approximately ten minutes after the citation was issued. Tr. 27. The Secretary has proposed a regularly assessed penalty of $100.00 for Citation No. 8392133. Sec'y Petition, Ex. A. Prior to hearing, the Secretary filed a motion to amend the cited standard to 30 CFR § 77.1110. Sec'y Mot. to Amend, 1; Tr. 37.

1. Testimony

a. The Secretary

Inspector Daniels testified that he had worked in the mining industry as a general laborer and then a section foreman in underground coal mines from 1994 to 2007. Tr. 7. Daniels stated that he had also received a bachelor's degree in industrial technology and a minor in mining technology. Tr. 6-7. Daniels testified that he started with MSHA in 2007 and has completed the standard inspector training courses, including classes regarding surface facilities and equipment. Tr. 9-10. Daniels stated that he has performed preoperational checks on underground mobile equipment as a miner and has inspected manlifts as an MSHA inspector on several occasions. Tr. 8, 20.

Daniels stated that he traveled to the Estill County mine on March 11, 2014 to perform a regular E 01 inspection. Tr. 14. Daniels described the Estill Co. mine as a surface coal mine that excavated previously abandoned refuge coal and processed the refuge coal for commercial markets. Tr. 15. Daniels explained that the mine site had several processing facilities, including a train load out area where processed coal was fed into train cars. Tr. 16.

Daniels stated that Bowie Refined Coal was the primary operator of the plant and that Petro Chemicals was one of a number of contractors working at the train load out facility. Tr. 15-16. Daniels explained that he checked in with the plant superintendent who declined to accompany him on the inspection. Tr. 19. Daniels stated that when he began inspecting the train load out facility there were at least six or eight employees working in the area performing rewiring and sheet metal installation. Tr. 17-18.

Daniels testified that he approached a Genie manlift at around 10:30 AM and performed a standard equipment inspection. Tr. 20-21. Daniels stated that in the course of inspecting the lift, he checked the fire extinguisher mounted at the base of the machine. Tr. 25-26. Daniels testified that he noticed that the dial for the provided fire extinguisher read "recharge." Tr. 25. Daniels stated that when the dial reads recharge the fire extinguisher has been discharged or lost pressure and the operator cannot be sure the fire extinguisher will work for any length of time. *Id*. Daniels explained that he did not test the fire extinguisher as MSHA regulations do not permit an inspector to perform a destructive test on a mine operator's equipment. Tr. 25-26.

Daniels testified that he pointed out the uncharged fire extinguisher to Petro Chemicals foreman Mauro Fernandez and issued Citation No. 8392133. Tr. 26-27. Daniels stated that the Respondent replaced the uncharged fire extinguisher with a fully charged fire extinguisher ten minutes later. Tr. 27.

b. The Respondent

Petro Chemicals supervisor Mauro Fernandez testified that at the time of the inspection there was an additional fire extinguisher located approximately twenty to twenty five feet away from the Genie manlift. Tr. 70.

2. The Violation

The originally cited standard, 30 CFR §77.1109(c)(1), requires all mobile equipment to be equipped with at least one portable fire extinguisher. 30 CFR §77.1109(c)(1). 30 CFR § 77.1110 also mandates that, "firefighting equipment shall be continuously maintained in a usable and operative condition." 30 CFR § 77.1110. The cited Genie manlift clearly qualifies as mobile equipment and was operating prior to the inspection. Tr. 20, 28. Although there was a fire-extinguisher mounted on the manlift, the pressure gauge indicated the fire extinguisher needed to be recharged. Tr. 25.

The Respondent argues that the Secretary failed to conclusively prove that the fire extinguisher was non-operative as Inspector Daniels did not attempt to discharge it after noting the pressure gauge indicated 'recharge." Tr. 25-26; Resp. Br., 2. However, the Respondent did not present any rebuttal evidence indicating that the fire extinguisher was in fact operational. Furthermore, Inspector Daniels credibly testified that MSHA inspection policies prohibited him from ordering a possibly destructive test. Tr. 25-26. As the Respondent has conceded that the gauge indicated a recharge was necessary, the court concludes that the pressure gauge reliably indicated that the fire extinguisher was improperly charged. Resp. Br., 2; See *Garden Creek Pocahontas Co.*, 11 FMSHRC 2153, 2154 (Nov. 1989); *Mid-Continent Resources*, 6 FMSHRC 1132, 1138. (May 1984)(Secretary may establish the occurrence of a violation when the there is a rational connection between the evidentiary facts presented and the ultimate fact inferred). Thus, the court finds that the Respondent violated 30 CFR § 77.1110 in failing to keep the cited fire extinguisher fully charged.

The Commission has stated that gravity determinations for violations of emergency equipment standards must be made while assuming the occurrence of an emergency. *Spartan*

Mining Co., 35 FMSHRC 3505, 3508-09 (Dec. 2013). However, Inspector Daniels testified that there were no flammable accumulations on the manlift and that the Respondent was able to replace the cited fire extinguisher within a matter of minutes. Tr. 27. Thus, the court finds that even in the event of a fire on the manlift, the violation was unlikely to contribute to the occurrence of an injury and was not significant and substantial.

As the pressure gauge indicated "recharge," the Respondent should have identified that the fire extinguisher needed to be recharged during a pre-operational inspection. Tr. 39. However, the Respondent appears to have maintained other working fire extinguishers in the immediate area. Tr. 27, 70. Based upon these mitigating factors, the court finds that the negligence level for Citation No. 8392133 is moderate. Tr. 70.

3. Penalty

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

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

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

These criteria are generally incorporated by the Secretary within a standardized penalty calculation that results in a pre-determined penalty amount based on assigned penalty points. 30 CFR 100.3: Table 1- Table XIV. The Secretary has proposed a regularly assed penalty of $100.00 for Citation No. 8481807 based upon the 30 CFR 100.3 penalty tables. Sec'y Petition, Ex. A.

The Respondent is a large operator with a relatively low rate of total violations per inspection day and no indications of previous fire protection violations. Sec'y Pet., Ex. A. I have found that the Respondent acted with moderate negligence. The Respondent has stipulated that the proposed penalty will not affect its ability to continue in business. Resp. Pre-Hearing Report, 1. I have found that the violation was unlikely to result in an injury and any injury that occurred would result in lost workday/or restricted duty. The parties have stipulated that the Respondent promptly replaced the cited fire extinguisher with a fully charged fire extinguisher. Sec'y Prehearing Report, 2; Resp. Pre-Hearing Report, 2.

After considering this evidence in light of all six statutory factors I uphold the Secretary's proposed penalty and assess a penalty of $100.00 for Citation No. 8392133.

B. Citation No. 8392134

MSHA Inspector Daniels issued Citation No. 8392134 for an alleged violation of 30 CFR §77.410(a)(1) on March 11, 2014. Daniels alleged within the citation that:

> The audible alarm provided for the Genie S-60 Man Lift (C/N 24-ML-02) operating at this mine site is inoperable. This Man Lift operates in close proximity with miners on foot and in loud surrounding noises. Anyone hit by a moving Man Lift would receive crushing injuries.

Sec'y Ex. 1, 1.

Daniels designated Citation No. 8392134 as a moderate negligence violation that was likely to contribute to the occurrence of an injury resulting in lost workdays or restricted duty. *Id*. Daniels determined that the failure to maintain an audible alarm for the Genie S-60 manlift was significant and substantial. *Id*. The Respondent abated the citation by installing a new audible alarm. *Id.* The Secretary has proposed a regularly assessed penalty of $334.00 for Citation No. 8392134. Sec'y Petition, Ex. A. Prior to hearing the Secretary filed a motion to cite 30 CFR § 77.410(c) in the alternative. Sec'y Mot. to Amend, 1.

1. Testimony

a. The Secretary

Inspector Daniels testified that as part of his routine inspection of the S-60 manlift, he asked the operator to move the lift in reverse. Tr. 28. Daniels stated that when the operator put the lift in reverse, the alarm did not sound at all. Tr. 29. Daniels explained that for this lift, he considered forward motion to be towards the lift's work platform and reverse to be away from the work platform. *Id.* Daniels testified that he observed a welder and either a mechanic or electrician working in the area at the time he issued the citation. Tr 21-22. He believed there would be ten to twelve people working in the area over the course of a shift installing metal sheeting. Tr. 33. Daniels stated that the lift did not make a lot of noise when it moved and that the lack of a backup alarm in the busy construction area made a serious crushing injury reasonably likely. Tr. 36, 41.

On cross-examination, Daniels testified that in his experience and training, the manlift could only be moved with the boom lowered. Tr. 44. However, Daniels confirmed that he had never operated that particular model lift. Tr. 44-45. Daniels also stated that he was not positive that the lift had been operated in reverse on the day of the inspection. Tr. 45. During redirect examination, Daniels clarified the operator would typically operate the manlift in reverse during a normal shift to reposition the work platform. Tr. 52-53. Daniels stated that he only asked the operator to move the lift in reverse while conducting his inspection. Tr. 58-59. Daniels testified that when he returned to the site two days after issuing the citation, the Respondent had replaced the alarm and the alarm sounded a clearly audible beep when operated in reverse. Tr. 53-54.

b. The Respondent

Petro Chemicals Supervisor Mauro Fernandez testified for the Respondent regarding the operation of the Genie S-60 manlift. He stated that operators were instructed to partially raise the operator basket before moving the lift and that the operator basket had good visibility in both directions but that he always looked behind him before moving the lift in reverse. Tr. 65-66. Fernandez stated that the lift had a movement alarm that sounded in both forward and reverse. Tr. 67-68, 75, 77.

Fernandez testified that the alarm made some noise before Inspector Daniels issued Citation No. 8392134 but that it was very low and could not be heard over the noise of even the lift's engine. Tr. 67, 76. Fernandez stated that after the alarm was replaced it was much louder. Tr. 67. Fernandez testified that the Respondent had designated an employee to act as a spotter in order to position equipment and direct traffic on the day of the inspection. Tr. 68. Fernandez stated that there were two Petro Chemical's employees in the area in addition to several other contractors at the time of the citation. Tr. 69-70.

2. The Violation

30 CFR §77.410(a) mandates:

> Mobile 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—
>
> (1) Gives an audible alarm when the equipment is put in reverse;

30 CFR §77.410(a)(1).

The Respondent argues that since the standard does not list boomlifts as a type of mobile equipment, 30 CFR § 77.410(a)(1) does not apply to the Genie S-60 boomlift. Resp. Br., 4. The Respondent is incorrect. The cited standard applies to all mobile equipment not otherwise exempted and the examples given within the standard following "such as" are not a definitive list. 30 CFR §77.410(a)(1). The Respondent claims that the MSHA's Program Policy Manual (PPM) indicates that backup alarms are not required for equipment with unobstructed rear views. Resp. Br., 4. However, MSHA's PPM only exempts personal vehicle type equipment such as "automobiles, jeeps, pickup trucks, and similar vehicles" including "service vehicles" with unobstructed rear views from the standard. Sec'y Reply Br.,2; V MSHA, U.S. Dep't of Labor, Program Policy Manual, Part 77 Subpart E.

The Genie S-60 manlift moves under its own power. Tr. 29, 78. The Genie S-60 manlift is not an automobile, jeep, pickup truck, or similar service vehicle. Tr. 66. Thus, the Genie S-60 manlift is mobile equipment covered by the standard.

30 CFR § 77.410(c) further requires operators to maintain warning devices in a functional condition. 30 CFR § 77.410(c). The Commission has held that the cited regulation[1] requires operators to continuously maintain backup alarms for all available mobile equipment regardless of how the equipment is used throughout a particular shift. *Wake Stone Corp*., 36 FMSHRC 825, 827-28 (April 2014). A fellow ALJ has recently found that in order to be considered functional, a back-up alarm must be loud enough to be heard above the surrounding work environment. *Buckley Powder Co*., 37 FMSHRC 2115, 2117-18 (Sept. 2015)(ALJ Miller). Additionally, none of the provisions of 30 CFR § 77.410 allow operators to substitute employee spotters in place of audible back-up alarms. 30 CFR § 77.410. As such, while I found Fernandez's testimony regarding the use of a traffic spotter credible, that practice is irrelevant to evaluating the alleged violation. Tr. 68.

Inspector Daniels testified he could not hear the back-up alarm at all while Supervisor Fernandez stated that the alarm did make some noise but that it was "very, very low" and he had to stand right next to the machine to hear it. Tr. 29, 67. Although Daniels only tested the alarm in one direction, Fernandez confirmed that the alarm was a uni-directional alarm and that it was very hard to hear during the operator's own re-test. Tr. 58, 74-76. Fernandez also testified that the view from the man basket was better than from a pick-up truck and that he always looked behind him before moving in reverse. Tr. 66. However, as noted above, the standard only exempts "*pickup trucks* with an unobstructed rear view" from the back-up alarm requirement. 30 CFR §77.410(a)(emphasis added).

Furthermore, the court notes that the Genie S-60 manlift basket had a continuous 360 degree range of horizontal motion in combination with over 90 degrees of vertical motion. Genie S-60 Service Manual, 2-1.[2] Although the Genie S-60 was equipped with a drive enable device that would prevent travel in certain positions, that function could be overridden with a simple toggle switch. Genie S-60 Service Manual, 4-16. Thus, it is reasonably likely that the Genie S-60 boomlift would be operated with significant blind spots beneath and behind the man-basket during ordinary continued mining operations.

The Respondent objected to Inspector Daniels's characterization of "reverse" and "forward" for the Genie S-60 manlift and his manner of testing the back-up alarm. Tr. 44-45, 58-59; Resp. Br. 8. The court finds the Respondent's objections unavailing on multiple grounds. The Respondent's own witness, Supervisor Fernandez, stated that the Genie S-60 boomlift had a movement alarm that was supposed to sound in both "forwards" and "reverse". Tr. 67-68, 75, 77.

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[1] *Wake Stone Corp* analyzed a citation issued under the Secretary's Surface Metal/Non-Metal standards, specifically, 30 CFR §56.14132, which contains a nearly identical command to equip and maintain functional back-up alarms on mobile equipment.

[2] Prior to issuing this decision, the court notified the parties of his intent to take judicial notice of the publically available service manual for the Genie S-60 manlift. *Union Oil*, 11 FMSHRC 289, 300 n.8 (March 1989)(Stating that judicial notice can be taken of the existence or truth of a fact or other extra record information that is not the subject of testimony but is commonly known, or can safely be assumed to be true).

Similarly, the Genie S-60 service manual also states that the "travel" alarm should sound whenever the "drive controller is moved off center in either direction." Genie S-60 Service Manual , 4-47. As both Inspector Daniels and Supervisor Fernandez credibly testified that the alarm could not be heard when the boomlift was put in drive, it is apparent that the "travel" alarm was not functioning properly. Tr. 29, 67, 76. Furthermore, as outlined above, the multiple configurations and drive directions of the Genie S-60 boomlift would result in shifting blindspots and relative directions of "forwards" and "reverse." For these reasons, having demonstrated that the travel/back-up alarm did not function properly when tested by Inspector Daniels, the Secretary has properly shown that the Respondent violated 30 CFR § 77.410(c).

a. Gravity

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

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

An S&S designation must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

In this case, the Respondent violated a mandatory safety standard, 30 CFR 77.410(c), by failing to repair the faulty back up alarm on a mobile manlift. The violation exposed workers to the hazard of a ten ton lift operating in reverse without an audible alarm that would alert workers of the approaching vehicle. Tr. 23. The manlift was operating in an active construction area with at least two workers on the ground in the immediate vicinity. Tr. 21-22, 69. Although Supervisor Fernandez credibly testified that the Respondent designated traffic spotters, the Commission has held that employee diligence does not mitigate the seriousness of an established hazard. Tr. 68; *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123

Accordingly, I find that there was a reasonable likelihood that the safety hazard created by the faulty back up alarm would result in a struck-by injury to workers at the train load-out facility. Given the heavy weight of the manlift, I find that the violation created the risk of at least a lost time injury to one worker. For all these reasons, I affirm the designation of Citation No. 8392134 as a Significant and Substantial violation.

b. Negligence

The operator should have identified that the back-up alarm was not functioning properly during a diligent pre-operational inspection. Tr. 39. However, as Supervisor Fernandez credibly testified that the alarm did make some minimal noise, it appears that the alarm may have been damaged shortly before the MSHA's inspection or not flagged during routine pre-operational checks. Additionally, Fernandez credibly testified that the Respondent attempted to prevent equipment collisions within the work-site by employing a traffic spotter. Tr. 68. For these mitigating factors, I find that the operator acted with moderate negligence for Citation No. 8392134.

3. Penalty

The Respondent is a large operator with a relatively low rate of total violations per inspection day and no repeat violations of 30 CFR 77.410(c) in the 15 months prior to the citation at issue. I have found that the Respondent acted with moderate negligence. The Respondent has stipulated that the proposed penalty will not affect its ability to continue in business. I have found that the violation was reasonably likely to result in at least a lost-time injury. The parties both testified that the Respondent promptly installed a new back-up alarm that gave off a much louder alarm. Tr. 32, 67. Accordingly, I find that the originally assessed penalty of $334.00 is an appropriate civil penalty.

III. ORDER

The Respondent, Petro Chemical Insulation Inc., is **ORDERED** to pay the Secretary of Labor the total sum of **$434.00** within 30 days of this order.[3]

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

Distribution: (First Class U.S. Mail)

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[3] 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 30, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. MACH MINING LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2015-552 A.C. No. 11-03141-382619 Mine: Mach #1 Mine

DECISION AND ORDER

Appearances: Christopher Smith, United States Department of Labor, Office of the Solicitor, Nashville, TN, for Petitioner;

Christopher Pence, Hardy Pence, PLLC, Charleston, WV, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). This docket involves eight citations issued pursuant to section 104(a) of the Mine Act with a proposed penalty of $34,053.00. The parties have settled seven of the citations, leaving only Citation No. 9031549 for decision. The parties presented testimony and evidence regarding that citation at a hearing held in St. Louis, Missouri, on November 4, 2015.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Mach #1 mine is an underground coal mine located in Johnson City, Illinois. The Mach #1 mine is operated by Mach Mining, LLC, ("Mach") and is owned by Murray Energy. The parties have stipulated that Mach's mining operations affect commerce and that it is an "operator" as defined in section 3(d) of the Mine Act, 30 U.S.C. § 803(d). Jt. Stips. ¶¶ 2, 4. The parties have also stipulated to the jurisdiction of the Mine Safety and Health Administration (MSHA) and the Commission. Jt. Stips. ¶¶ 3, 5. The parties agree that Mach is a large operator and that the proposed penalty of $3,784.00 will not hinder its ability to continue in business. Jt. Stips. ¶¶ 8, 9.

Citation No. 9031549 was issued by Inspector Edward Law on April 14, 2015, pursuant to section 104(a) of the Act for an alleged violation of 30 C.F.R. § 75.220(a)(1), a failure to follow the mine's roof control plan. The citation alleges that the operator of a continuous mining

machine was observed tramming the continuous miner between the second and third entries while standing in the "red zone" in violation of the mine's roof control plan. The inspector determined that the condition was reasonably likely to result in a fatal injury, was significant and substantial, affected one person, and was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $3,784.00 for the alleged violation. The inspector also issued a 107(a) imminent danger order related to the citation, which has not been contested by the operator.

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses' demeanors and voice intonations. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness's testimony in this decision should not 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).

Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the post-hearing briefs, I find that the Secretary has proven a violation, the S&S designation is appropriate, and the negligence is moderate, as alleged.

MSHA's Inspection

Inspector Edward Law is a mine inspector who has been with MSHA since 2005. Prior to becoming an inspector, he worked for 23 years in the mining industry in a number of positions, including as a repairman for heavy equipment and continuous miners. Law has attended the required MSHA training and is a roof control specialist. As part of his duties as an inspector, he has inspected the Mach #1 mine on several occasions. The mine is a large underground coal mine that uses continuous mining machines to mine coal.

On April 14, 2015, Law visited the mine to conduct a six-month roof control evaluation. In the course of his inspection, Law was walking in the tailgate entry #3 when he heard a machine running. He turned the corner from entry #3 into crosscut #2 and observed the operator of a continuous miner tramming the machine by remote control in the crosscut from entry #3 to entry #2. The machine was approximately 60 feet from Law with its tail towards him. He observed that the operator, Miles Townsend, was positioned just past the machine's cable hook on its tail. The tail was swung toward the rib, and Townsend was between the tail of the machine and the rib. Law flagged the operator with his cap light and verbally issued a 107(a) imminent danger order to the mine's safety representative, Charles Harvey.[1] Law then spoke to the operator of the machine, telling him that he could not stand in that position because it placed him in the red zone. Law testified that the miner operator replied that he wasn't thinking and

[1] The imminent danger order has not been contested and therefore is a final order of the Commission.

didn't normally stand in the red zone. Law understood those statements as an agreement that the operator had been standing in the red zone. Law then asked Harvey to confirm that the operator had been in the red zone, but Harvey claimed that as soon as he heard Law issue the imminent danger order, he "zoned out" and did not remember anything. The machine was moved shortly after Law issued the order, so he was unable to take measurements. Law sketched a diagram of the scene later that day, which was admitted into evidence as Exhibit 7. As a result of his observations, Law issued Citation No. 9031549 for a violation of the mine's roof control plan.

At hearing, Harvey testified that when Law verbally issued the imminent danger order, Harvey looked in the direction of Townsend to see whether he was in the red zone but could not tell from his vantage point. Harvey believed that the continuous miner was parked and turned off at the time of the alleged violation. Harvey and Townsend both indicated that a roof bolter was operating nearby at the time, which created noise that Law could have mistaken for the sound of the continuous miner. Townsend testified that he was not in the red zone, but rather behind the tail of the machine with the pump motor shut down when Law arrived. He stated that he was in the process of tramming the machine around a corner but had just turned off the pump to make sure the cable was not caught and the machine was not pulling on the ventilation curtain. When the pump is turned off, the machine has no hydraulic action and cannot move. Townsend said that he was standing behind the tail of the machine and had not yet turned the pump back on when he heard Law yell, at which point he left the machine and walked towards Law. The mine introduced a diagram illustrating Townsend's account as Exhibit A. Finally, Townsend testified that when Law informed him that he was writing a citation, Townsend denied being in the red zone.

The accounts of the three witnesses differ dramatically as to the events surrounding the alleged violation. Law was certain that the continuous miner was tramming and that Townsend was next to the rib inside the tail of the machine. Townsend and Harvey recalled the machine being powered off, and Townsend recalled being behind the tail of the machine out of the red zone, while Harvey was unsure. I find Law to be a knowledgeable and credible witness and I credit his testimony on these issues. Law admitted that had the tail been straight, it would have been difficult to determine the operator's exact location from his position sixty feet away. But because the tail was at an angle to the rib when Law observed it, he was confident of Townsend's position.[2] Law was also confident that the machine was tramming when he observed it and that he was not mistaken that the noise he heard was the continuous miner. He also observed the continuous miner moving when he rounded the corner. I therefore credit his testimony on this issue. Finally, Respondent notes that Law failed to take measurements or otherwise investigate the violation after issuing the imminent danger order. Resp. Br. at 7-8. I

[2] Respondent argues that Law was too far away to be able to discern Townsend's position with respect to the continuous miner. Resp. Br. at 5-7. At hearing, Harvey described how he a recreated the scene later with his manager and determined that it was impossible to tell whether a person was standing inby or outby the machine from a distance of sixty to eighty feet away. Tr. at 118. That re-creation, however, did not account for the fact that when Law observed Townsend, the tail of the machine was between the two men. I find that this arrangement allowed Law to accurately observe Townsend's position from where Law stood.

do not find that fact to detract from Law's credibility because the machine was moved after he issued the order, preventing him from taking accurate measurements.

A. The Violation

Section 75.220(a)(1) requires that "Each operator shall develop and follow a roof control plan." 30 C.F.R. § 75.220(a). In order to prove a violation of § 75.220(a)(1), the Secretary must establish, first, that the provision allegedly violated is part of the approved and adopted plan, and second, that the condition cited actually did violate the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280 (Dec. 1998); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987).

The roof control plan for the Mach #1 mine requires that

> The continuous miner shall be operated from a sufficient distance so that the miner operator will not be endangered by the continuous miner or the shuttle car. . . . While tramming the miner machine in the remote mode, all persons shall be in a safe location from the continuous mining machine so that miners will not be endangered.

Ex. 3 at 7. The plan then refers miners to a "red zone illustration." *Id*. A red zone is an area that puts the miner in a position where he could be pinned or crushed by the machine as it moves. Miners are prohibited from being in those areas. The illustration indicates that when the machine is tramming, all areas between the sides of the machine and the ribs are part of the red zone. Ex. 3 at 9. The operator must stand well behind the continuous miner while it is tramming so as not to be endangered by the machine.

Law observed Townsend standing beside the tail of the continuous miner between the machine and the rib while the machine was tramming. This placed him in the red zone in violation of the roof control plan.

B. Gravity, S&S, and Negligence.

The Secretary asserts that Mach's violation created the reasonably likely risk of causing a fatal injury, that it was significant and substantial ("S&S"), and that it was the result of moderate negligence on the part of the operator. 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)(l). 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).

At the outset of the hearing, the parties agreed that if a violation occurred as described in the citation, the violation was significant and substantial and was the result of moderate

negligence. Jt. Stips. ¶¶ 11-14. I have found a violation, and given that the miner was in the red zone, I agree that it created a very serious hazard. I find that the violation was reasonably likely to cause a fatal injury and was significant and substantial. I also find that the moderate negligence designation was appropriate.

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 duty of proposing penalties is delegated 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 ALJ must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence. While the mine had no roof control plan violations in the fifteen months preceding this violation, it had a number of other roof control violations. Ex. 2. Mach is a large coal mine operator. The penalty as proposed will not affect its ability to continue in business, and it demonstrated good faith in abating the citation. The parties agree that the violation is significant and substantial, and therefore the violation is a serious one. In addition, an uncontested imminent danger order was issued with this citation, further indicating the seriousness of the violation. The violation was the result of moderate negligence. I find that a penalty of $3,784.00 is appropriate.

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 $3,784.00 for Citation No. 9031549. The remaining citations are addressed in a separate order approving partial settlement. Mach is **ORDERED** to pay the Secretary of Labor the sum of $3,784.00 within 30 days of the date of this decision for the violation at issue here.

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

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December 30, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GMS MINE REPAIR, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2014-27 A.C. No. 11-03193-333379 (MVK) Docket No. LAKE 2014-178 A.C. No. 11-03193-339876 (MVK) Docket No. LAKE 2014-115 A.C. No. 11-03193-337266 (MVK) Mine: Lively Grove Mine

DECISION AND ORDER

Appearances: C. Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;

William C. Means, Esq., GMS Mine Repair, Bruceton Mills, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon the petitions for assessment of a civil penalty filed by the Secretary of Labor ("Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, ("Mine Act"), 30 U.S.C. § 815(d). In dispute are four section 104(a) citations issued to GMS Mine Repair ("GMS" or "Respondent") at the Lively Grove Mine. To prevail, the Secretary must prove his charges "by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Chief Administrative Law Judge Robert J. Lesnick assigned to me Docket Nos. LAKE 2014-27, LAKE 2014-115, and LAKE 2014-178, and I consolidated them for hearing. The Secretary initially charged GMS with a total of seven section 104(a) citations. The parties settled two of the seven citations, and I issued a Decision Approving Partial Settlement on January 20, 2015. Respondent subsequently requested to withdraw its contest of a third citation, and on

January 30, 2015, I issued an Order Granting Motion to Withdraw Contest disposing of that citation. Thus, four section 104(a) citations remain at issue.

Docket No. LAKE 2014-27 involves two citations. First, Citation No. 8444102 alleges a violation of 30 C.F.R. § 72.630(b) for failing to maintain the dust collection system of a roof bolting machine. Second, Citation No. 8444104 alleges a violation of 30 C.F.R. § 75.362(a)(2) for failing to conduct a proper on-shift examination of the roof bolting machine. The Secretary designated each of the alleged violations as significant and substantial ("S&S")[1] and as a result of GMS's moderate negligence. The Secretary proposes a total penalty of $5,802.00 for this docket.

Citation No. 8443658 in Docket No. LAKE 2014-178 alleges a violation of 30 C.F.R. § 75.606 for failing to protect a trailing electrical cable from damage. The Secretary designated the violation as S&S and as a result of GMS's moderate negligence. The Secretary proposes a penalty of $5,080.00 for this citation.

Lastly, Citation No. 8443659 in Docket No. LAKE 2014-115 alleges a violation of 30 C.F.R. § 75.202(a) for insufficiently supporting the mine roof by failing to secure sulfur balls, which are mine roof irregularities. The Secretary designated the violation as S&S and as a result of GMS's moderate negligence. The Secretary proposes a penalty of $1,412.00 for this citation.

After proper notice to the parties, I held a hearing in Evansville, Indiana. The Secretary presented testimony from Inspectors Randy G. Henry and Shane M. Gilpin. GMS presented testimony from GMS Mine Coordinator Phillip Kittinger. The parties each filed post-hearing briefs and the Secretary filed a reply brief on April 6, 2015.[2]

II. ISSUES

The Secretary argues that the conditions noted in each of the four citations were properly cited as violations and that the allegations underlying the citations are valid. (Sec'y Br. at 25.) In response, GMS denies each violation, arguing that the Secretary has failed to meet his burden of proof for each citation.[3] (Resp't Br. at 6.)

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

[2] In this decision, the hearing transcript, the Secretary's exhibits, and GMS's exhibits are abbreviated as "Tr.," "Ex. G–#," and "Ex. R–#," respectively. The parties also admitted a list of stipulations in a joint exhibit, which was admitted as "Ex. Jt.–#."

[3] GMS argues that Citation No. 8444102 and Citation No. 8444104 are duplicative citations based on the same facts. GMS contends that it should have been cited only once, if at all, for either a violation of 30 C.F.R. § 72.630(b) or 30 C.F.R. § 75.362(a)(1). However, the two standards impose separate and distinct duties—in a nutshell, monitoring versus maintaining.
(continued…)

Accordingly, the following issues are before me: (1) whether, for each citation, the Secretary proved that GMS violated a mandatory safety or health standard at Lively Grove Mine; (2) whether the Secretary proved that each alleged violation was S&S; (3) whether the Secretary proved that GMS acted with moderate negligence regarding each violation; and (4) whether the Secretary's proposed penalties are appropriate.

For the reasons that follow, I **AFFIRM** Citation Nos. 8444102, 8444104, 8443658, and 8443659, as written.

III. FINDINGS OF FACT

Lively Grove Mine is an underground, room-and-pillar coal mine located in Washington County, Illinois. GMS is an independent contractor that provides underground maintenance and contracting services to coal mine operators, including Prairie State Generating Company ("Prairie State"), owner of Lively Grove Mine. (Tr. 55:5–56: 6.) Work at the Lively Grove Mine was divided into three shifts, a first shift during the day, a second shift in the evening, and a third shift also called the "midnight" shift. (Tr. 98:16–21, 107:24–108:7.) Miners from GMS staffed the day and evening production shifts. (Tr. 98:16–21.) Prairie State's own employees worked during the midnight shift, a maintenance shift where no coal is produced. (*Id.*)

Like in all underground coal mines, miners at the Lively Grove Mine may be exposed to a number of potential hazards from roof falls and rib bursts to mining-related respiratory illnesses and accidents involving power machinery.

The coal mining process extracts coal deposits that exist in layers between rock strata. Removing the coal seam may expose dangerous irregularities in the mine roof, such as sulfur balls. (Tr. 173:16–174:8.) Sulfur balls, which are also referred to as kettle bottoms and carbonate nodules, are dense, spherical irregularities in the rock layer. (Tr. 173:11–174:8.) When cut through, sulfur balls often appear different from the surrounding rock. (Tr. 173:21–174:14.) Because sulfur balls are irregularities in the rock strata, they may separate from the mine roof and fall suddenly, particularly when the roof is made of weaker material like shale. (Tr. 174:15–22, 175:9–21.) Due to the risk of sulfur balls falling on miners, MSHA requires operators to install additional support for these roof anomalies. (Tr. 176:9–25.) Prairie State's roof control plan specifies that exposed sulfur balls must be supported with wire mesh or a metal plate across the exposed anomaly. (Tr. 176:16–20, 203:14–19.)

At the Lively Grove Mine, the machinery used to install roof bolts produces dust that, if inhaled, can contribute to respiratory illnesses. (Tr. 38:22–25, 64:4–14.) Dust containing quartz can lead to the development of silicosis, a deadly lung disease. (Tr. 34:12–16.) Given this danger, MSHA requires the quartz content of respirable dust in a working area to be no greater than five percent. (Tr. 53:17–54:5.) MSHA further requires all roof bolting machines to be equipped with dust control mechanisms such as air vacuums and dust filters before the machines

[3] (…continued)
Because these violations may have arisen due to the same event is not dispositive. *Cumberland Coal Res., LP*, 28 FMSHRC 545, 553 (Aug. 2006); *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993).

are permitted into a mine. (Tr. 55:24–56:6); *see* 30 C.F.R. § 72.630(b). As part of this requirement, operators must regularly inspect the dust suppression systems on the mine's machinery to ensure the devices are working properly. (Tr. 63:24–64:14.) At the Lively Grove Mine, GMS conducted on-shift examinations of Prairie State's equipment during the first and second shifts. (Tr. 98:4–21, 55:22–56:6.) GMS also bore responsibility for maintaining and repairing the roof bolting machine during its shifts. (Tr. 55:22–56:6.)

Additionally, underground mining takes place with permissible machinery powered by electricity which presents a potential electrocution risk to miners, particularly those handling the wiring for energized machinery. (Tr. 163:17–164:8.) Examinations to detect cuts in power or trailing cables are thus important for safety. Most miners at the Lively Grove Mine do not wear the kind of work gloves that would protect them from potential electrocution. (Tr. 166:5–11.)

IV. PRINCIPLES OF LAW

A. Significant and Substantial

A violation is 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). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

In providing guidance for the application of the *Mathies* test, the Commission has observed that "the reference to 'hazard' in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present a measure of danger." *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (Aug. 1984) (citing *Nat'l Gypsum*, 3 FMSHRC at 827). The Commission has further indicated that the correct inquiry under the third element of *Mathies* is not whether there must be a reasonable likelihood that the violation will cause injury, but "whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury." *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). Evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co*., 6 FMSHRC 1573, 1574 (July 1984). Tthe Commission has noted that "an inspector's judgment is an important element" in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825-26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). Finally, the Commission has adopted a presumption that the violation of a respirable dust standard is S&S. *See Consolidation Coal Co.*, 8 FMSHRC 890, 898–99 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987).

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

A. Citation No. 8444102 – Drill Dust Controls

1. Further Findings of Fact

Inspector Henry visited Lively Grove Mine on August 26, 2013, to collect quarterly respirable dust samples. (Tr. 21:6–24.) Henry had more than 35 years of experience in the mining industry working as a miner and an MSHA inspector. (Tr. 20:14–19.) Henry's training included MSHA certification as a respirable dust sampler and in respirable dust maintenance and calibration. (Tr. 20:3–13.)

After examining the mine's pre-shift and on-shift examination books, Henry traveled into the mine with Prairie State's safety technician, Kim Morgan. (Tr. 22:7–16, 24:8–14.) At the working section, Henry found two miners using a RRI double boom Fletcher roof bolter. (Tr. 27:9–14, 28:2–10.) The roof bolter, which had previously received certification from MSHA for use in the mine, contained a dust control system whereby vacuums sucked in and filtered out dust produced from drilling into the mine roof. (Tr. 41:3–10, 32:16–34:10, 39:1–2.) The roof bolter had two drilling mechanisms, one on the left side of the machine and a second on the right side. (Tr. 28:20–29:2.) Accordingly, the roof bolter also had a separate dust collection system for each side. (Tr. 38:8–11, 41:16–25.)

Inspector Henry began by examining the left-hand side of the machine. (Tr. 29:22–30:3.) First, he measured the suction strength of the left-hand vacuum and examined the exterior hoses and fittings. (Tr. 29:6–30:3.) There, Henry discovered a hole in a vacuum-hose fitting that emitted an audible suction sound. (Tr. 42:4–20.) Although the leak was audible, Henry did not see dust kicking out of the hole, and the vacuum's suction strength was still above the regulatory minimum. (Tr. 39:7–40:23; Ex. G–3 at 26.) Henry continued his check of the left side of the machine and was surprised to find dust inside the left-hand muffler, which is the exit point from the system. (Tr. 30:20–31:6, 31:21–32:15.) The muffler is located on the clean side of the machine, past the system's dust filters, so drill dust should not be present in the muffler. (Tr. 31:25–32:15, 34:4–16.)

Inspector Henry then opened the left side's dust collection system to see if the filters were functioning properly. (Tr. 34:23–35:2.) There, he discovered that the wing nut attaching the filter had not been completely tightened. (Tr. 35:1–10.) A loosely installed filter could fail to seal properly, leaving a gap through which dust could escape. (Tr. 35:20–22.) Henry was able to tighten the wing nut two full revolutions by hand. (Tr. 35:13–22.) Henry subsequently removed the filter and found loose, dry drill dust behind the filters. (Tr. 35:24–36:4.) Dust located behind the filter would be free to evacuate into the air, exposing miners to respirable quartz. (Tr. 36:5–11.) Based on the amount of visible dust behind the filters and the extent of the dust contamination in the system, Henry estimated that the contamination had persisted for at least one shift, and probably multiple shifts. (Tr. 36:14–37:2.) Using a small kit Henry designed himself, the inspector collected a sample of the dust from inside the muffler and behind the filter. (Tr. 37:6–12, 44:25–45:7.)

Inspector Henry then examined the right side of the roof bolter, first checking the suction hoses and muffler before examining the internal components. (Tr. 43:2–20.) When Henry examined the right-side muffler, he again found drill dust on what should be the clean side of the machine. (Tr. 43:13–17.) Henry discovered that the wing nut attaching the right-side dust filter was also loose, as he was able to tighten the nut by three full rotations. (Tr. 44:8–18.) After removing the filter, Henry again found drill dust contamination behind the filter, on the clean side of the filtration system. (Tr. 44:25–45:13.) Henry similarly took a sample of the dust found in the right side of the machine. (Tr. 45:17–24.)

Based upon his observations, Inspector Henry issued Citation No. 8444102. The condition and practice section states:

> The company is not maintaining the dust collection system on the [No.] RR1 double boom Fletcher roof bolter, in unit [No. 3] North panel, MMU 007-0 in a permissible and operating condition. When the dust parameters were inspected for the roof bolter, drill dust was discovered behind the dust filters and dust was visible in the exhaust mufflers. There was also a suction hose fitting damaged and leaking on the left side. This roof bolter is located at cross-cut [No.] 66 in entry [No.] 11.

(Ex. G–1.) Henry marked the citation as S&S and indicated that two miners were likely to be affected. (*Id.*) He determined that this violation was reasonably likely to result in a permanently disabling injury due to Respondent's moderate negligence. (*Id.*) MSHA proposed a penalty of $2,901.00 for this violation. The lab results for the sample Inspector Henry submitted for analysis showed a quartz content of 10.7 percent, which is above the 5.0 percent limit for quartz in respirable dust samples. (Ex. G–4; Tr. 53:12–54:6.)

GMS abated the violation by replacing the damaged suction hose and purging the dust collection system to remove any accumulated quartz. (Tr. 62:23–63:19; Ex. G–1 at 2.)

2. Analysis and Conclusions of Law

Section 72.630(b) requires, "Dust collectors shall be maintained in permissible and operating condition. Dust collectors approved under Part 33 . . . are permissible dust collectors for the purpose of this section." 30 C.F.R. § 72.630(b). According to Part 33 of the Secretary's regulations, to be permissible, dust collectors must conform to the requirements of Part 33 and receive a certificate of approval to that effect. 30 C.F.R. § 33.2(a). MSHA issues certificates of approval only to dust collection systems as a whole. *See* 30 C.F.R. § 33.9. Therefore, a dust collection system must be maintained as initially approved by MSHA for the system to be permissible. Second, section 72.360(b) requires mine operators to maintain dust collection systems in "operating" condition. 30 C.F.R. § 72.630(b). As I determined when I previously examined this same regulatory provision, "[t]he plain use of the word 'operating' is synonymous with 'functional,' a word defined as 'performing or able to perform its regular function.'" *Liggett Mining, LLC*, 33 FMSHRC 1702, 1714 (July 2011) (ALJ) (citing *Webster's Third New Int'l Dictionary* (Unabridged) 921, 1581 (2002)).

In other words, the Secretary may demonstrate a violation of section 72.630(b) by proving either that: (1) the dust collection system was not maintained as it had been approved; or (2) the dust collection system was not able to perform its regular function, i.e., the system was not functioning regularly.

i. Violation of 30 C.F.R § 72.630(b)

The parties acknowledge that the cited roof bolter had received certification from MSHA. To demonstrate a violation of 30 C.F.R. § 72.630(b), the Secretary must prove either (1) the cited machine was not maintained in permissible condition, or (2) the dust collection system was not functioning regularly. The Secretary asserts that the drill dust found in the muffler and on the clean side of the dust filtration system shows GMS violated the standard. (Sec'y Br. at 16.) In contrast, GMS contends the roof bolter was maintained in permissible and operable condition. (Resp't Br. at 3–4.) GMS asserts that the Secretary failed to produce sufficient evidence to show the roof bolter was not functioning as designed because the visible dust discovered on the clean side of the filtration system has no relevance to the violation. (*Id.* at 4.) Rather, GMS contends only air samples of respirable dust would provide sufficient evidence of a violation. (*Id.*)

In issuing the citation, Inspector Henry found several problems with the roof bolter. First, he discovered a hole in the vacuum suction fitting large enough to be audible when the roof bolter was running. (Tr. 42:8–20.) Henry further found the filters were installed too loosely, allowing dust to escape the filters. (Tr. 35:1–10, 44:8–18.) More critically, Henry found dust in the mufflers and behind the filters on both the left- and right-side dust collection systems. (Tr. 38:12–19, 44:25–45:13.) Inspector Henry credibly testified that the drill dust he found indicated the clean side of the dust control system had been contaminated throughout. (Tr. 38:12–25.) Once the clean side of the system becomes contaminated, the roof bolter expels dust into the air as if no filter were present. (Tr. 39:1–6.) Indeed, the dust samples he collected from the clean side of the filter showed quartz concentrations of 10.7 percent, more than double the maximum permissible level of 5 percent. (Ex. G–4; Tr. 53:12–21.)

Respondent provides no evidence to suggest the roof bolter was functioning as designed. Instead, GMS asks me to disregard the dust samples that Henry collected and deem the Secretary's evidence insufficient. (Resp't Br. at 4.) Respondent fails to cite to any legal precedent suggesting MSHA must collect respirable dust samples to prove a violation of section 72.630(b). To the contrary, the D.C. Circuit has found that a respirable dust sample is not necessary to find a violation of a related section of the same regulation. *Jim Walter Resources, Inc. v. Sec'y of Labor*, 103 F.3d 1020, 1024 (D.C. Cir. 1997) (recognizing that respirable air samples are not a prerequisite for determining whether 30 C.F.R. § 72.630(a) has been violated). Commission Judges have similarly found violations of section 72.630(b) without respirable dust samples. *See Genwal Res., Inc.*, 27 FMSHRC 580, 589 (Aug. 2005) (ALJ); *Tri County Coal, LLC*, 34 FMSHRC 3255, 3275 (Dec. 2012) (ALJ).

Given Inspector Henry's extensive mining experience and training as a dust control specialist, I give significant weight to his testimony and find his dust sample method credible. Accordingly, I find that the roof bolter was expelling drill dust into the air, and that the dust discovered on the clean side of the filter was representative of the dust expelled. *Cf. Tri County*

Coal, 34 FMSHRC at 3275 (ALJ) ("If visible dust could bypass the filters, certainly invisible respirable dust could also bypass the filters and would have been exhausted into the mine atmosphere."). MSHA would not approve as permissible a dust collection system that allowed dangerously high levels of silica to enter the mine's air. I therefore determine that the Secretary proved the roof bolter was not being maintained in permissible and operating condition, as the dust collection system was not functioning regularly to remove the drill dust from the air.

Given the Secretary has satisfied both elements of a violation, I conclude that GMS violated 30 C.F.R. § 72.630(b).

ii. Gravity and S&S

GMS's violation of 30 C.F.R. § 72.630(b) satisfies the first element of the *Mathies* test. As to the second element, the presence of visible amounts of dust containing 10.7 percent quartz on the clean side of the filter corroborate Inspector Harris's determination that the expulsion of this drill dust into the mine air would expose miners to hazardous amounts of respirable silica dust capable of causing silicosis. (Tr. 34:12–16, 38:22–25, 59:14–19.) Accordingly, I determine that the second element of the *Mathies* test is also satisfied.

For the third *Mathies* element, the Secretary asserts that the high level of quartz present in the dust sample makes it reasonably likely that a miner exposed to the roof bolter's exhaust could suffer an injury. (Sec'y Br. at 16–17.) *Cf. Consolidation Coal*, 8 FMSHRC at 899–90 (adopting presumption of S&S, inasmuch as there is a reasonable likelihood the health hazard contributed to will result in an illness, where Secretary proves a respirable dust violation based on samples). GMS contends, however, that the Secretary failed to show an injury was reasonably likely to occur because no miners were working in the roof bolter's exhaust. (Resp't Br. at 4.) In support, GMS points to the mine's ventilation plan, which was designed to carry dust away from the miners. (Resp't Br. at 4; *See* Ex. R–2.) Yet GMS's own witness, Mine Coordinator Kittinger, acknowledged that several miners would normally work downwind of the roof bolting machine, including the operators of a continuous miner and a coal scoop. (Tr. 115:8–17.) Also, Inspector Henry unequivocally testified that the two roof bolt operators would be exposed to expelled drill dust as a result of the violation because, due to the location of the back of the machine, the dust leaving the machine's exhaust was being expelled into the intake air and "going over" the roof bolt operators as air flowed from the intake to the return. (Tr. 66:15–22; Tr. 111:3–20). Based on this evidence, I determine that, given continued mining operations, it is reasonably likely that at least two miners would have been exposed to respirable silica dust, resulting in injury.

Finally, even modest amounts of silica dust can cause silicosis, a deadly respiratory disease. (Tr. 91:4–13.) Therefore, the Secretary has satisfied the fourth *Mathies* element. Based on the evidence before me, I determine that all four *Mathies* elements have been satisfied, and I conclude that Citation No. 8444102 is appropriately designated as S&S.

iii. Negligence

Inspector Henry marked GMS's negligence as moderate. Given the audible hole in the vacuum hose and the extent of the dust throughout the clean side of the roof bolter's dust control

system, Henry believed the violative condition was obvious and should have been discovered in GMS's on-shift examination of the equipment. (Tr. 36:12–37:2, 42:10–20.) Henry felt the amount of drill dust he discovered took at least one shift to accumulate and likely longer. (Tr. 64:15–65:9.) Nevertheless, Henry credited GMS for previously conducting an on-shift examination of the roof bolting machine and considered this a mitigating factor, even though he found the examination was insufficient. (Tr. 60:20–61:20; Tr. 66:25–67:5.) Given the evidence before me, I agree with Henry's determination and conclude that Citation No. 8444102 was the result of Respondent's moderate negligence. I hereby affirm Citation No. 8444102 as written.

B. Citation No. 8444104 – On-Shift Examination

1. Further Findings of Fact

Inspector Henry met with GMS's Phillip Kittinger to discuss the problems Henry had found with the roof bolter. (Tr. 60:22–61:20.) Although Kittinger informed Henry that GMS's face boss had conducted an on-shift examination of the roof bolter, the examiner had failed to identify either the hole in the suction tube or the drill dust contamination. (Tr. 64:15–65:9.) Given the amount of dust in the dust filtration system's exhaust and the audible hose leak, Henry believed GMS should have discovered both problems in the last on-shift examination. (Tr. 65:2–9.) In light of these observations, Henry issued Citation No. 8444104:

> The contractor shall conduct an on[-]shift examination to assure compliance with the respirable dust control parameters specified in the min[e] ventilation plan. The contractor performed an inadequate on[-]shift exam of the [No.] RR1 double boom Fletcher roof bolter located in unit [No. 3] North panel at cross-cut [No.] 66, entry [No.] 11. When an inspection of the roof bolter was performed it was discovered that there was still drill dust behind the filters and contaminating the exhaust and there was also a suction fitting damaged and leaking.

(Ex. G–2.) Henry designated the citation as S&S and indicated that two miners were likely to be affected. (*Id.*) He determined that this violation was reasonably likely to result in a permanently disabling injury. (*Id.*) Henry considered Respondent's negligence to be moderate because the operator had conducted an on-shift examination, but the examination had been merely cursory. (Tr. 65:6–9, 66:23–67:11.) MSHA proposed a penalty of $2,901.00 for this violation.

2. Analysis and Conclusions of Law

Section 75.362(a)(2) requires a mine operator to: (1) conduct an examination of the mine's respirable dust control parameters specified in the mine ventilation plan; and (2) correct any deficiencies in the dust controls before production begins or resumes. *See* 30 C.F.R.

§ 75.362(a)(2).[4] In addition to specific items, the examination must include "any other dust suppression measure required by the ventilation plan." (*Id.*) Therefore, the Secretary may demonstrate a violation of section 75.362(a) by proving the operator either (1) did not examine a dust suppression measure required in the ventilation plan or (2) did not correct a problem with a dust suppression measure.

The Commission has recognized that workplace examinations are "of fundamental importance in assuring a safe environment underground." *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995); *see also* 61 Fed. Reg. 9764, 9790 (Mar. 11, 1996) ("The preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof."). Indeed, the Commission has upheld S&S violations for inadequate pre-shift and on-shift examinations even where actual hazards were not detected. *See Jim Walter Res., Inc.*, 28 FMSHRC 579, 604 (Aug. 2006); *Buck Creek Coal Co.*, 17 FMSHRC 8 (Jan 1995).

i. Violation of 30 C.F.R. § 75.362(a)(2)

GMS contends that its face boss, Jamie Jones, conducted an on-shift examination of the roof bolter, satisfying the requirements of section 75.362(a)(2). (Resp't Br. at 2.) In contrast, the Secretary contends that GMS's on-shift examination, if performed, was inadequate because Respondent failed to notice the problems Inspector Henry discovered. (Sec'y Br. at 17–18.)

The ventilation plan for the Lively Grove Mine requires GMS to inspect the roof bolter's dust collection system as part of the on-shift examination, including "dust box doors, door gaskets, latches, *filter*, *muffler*, dump skirt, and *vacuum* on the head." (Ex. R–1 at 5(a) (emphasis added).) When Inspector Henry examined the roof bolter's dust control system, he found an obvious hole in the vacuum tube, two dust filters incorrectly installed, and drill dust improperly accumulating in the mufflers and behind the filters on the clean side of the dust control system. (Tr. 42:8–20, 35:1–10, 44:8–18, 38:12–19, 44:25–45:13.) I have already determined that these problems constituted a dust control violation. *See* discussion, *supra*, Part V.A.2.i. GMS failed to note any of these problems in its on-shift examination of the roof bolter's dust collection system,

[4] At the time the citation was issued, section 75.362(a)(2) provided, in pertinent part: "A person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan . . . . Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and other control device placement, and any other dust suppression measures required by the ventilation plan." 30 C.F.R. § 75.362(a)(2) (Apr. 2012).

let alone fix the conditions prior to resuming work with the roof bolter.[5] GMS did not call Jamie Jones to discuss his on-shift examination of the roof bolter's dust collection system.

By failing to identify and fix the improperly installed filters, as well as the hole in the left-side vacuum hose, GMS did not correct problems with the roof bolter's dust collection system. Even if GMS's Jamie Jones examined the machine, the Secretary has thus proved the second element of a violation of section 75.362(a)(2). I therefore conclude that GMS violated 30 C.F.R. § 75.362(a)(2) by not conducting a proper on-shift examination of the roof bolter.

ii. Gravity and S&S

GMS's violation of 30 C.F.R. § 75.362(a)(2) establishes the first *Mathies* element. As Inspector Henry noted, the operator's failure to find and fix the problems with the roof bolter's dust control system resulted in miners being exposed to respirable silica dust. (Tr. 90:17–91:16.) Thus, the Secretary has satisfied the second *Mathies* element. Because the roof bolter operators and any miners working downwind of the roof bolter were exposed, it is reasonably likely that they would inhale the silica dust, which in turn can cause silicosis. The Secretary has therefore satisfied the third element of the *Mathies* test. *See* discussion, *supra*, Part V.A.2.ii. Regarding the fourth element, as noted above the injury likely to result from exposure to respirable dust is silicosis, a dangerous lung disease. *See id.* Given that the Secretary has proven all four *Mathies* elements, I conclude that the Secretary properly designated Citation No. 8444104 as S&S.

iii. Negligence

The Secretary asserts that this violation of the on-shift examination requirements was the result of GMS's moderate negligence. (Sec'y Br. at 18.) Inspector Henry marked GMS's negligence as moderate because he believed an on-shift examination, although inadequate, did take place. (Tr. 60:20–25.) As previously discussed, I have already found GMS's negligence for the underlying violation—Citation No. 8444102—to be moderate. *See* discussion, *supra*, Part V.A.2.iii. Considering all the evidence before me, I conclude that Citation No. 8444104 was the result of Respondent's moderate negligence. I hereby affirm Citation No. 8444104 as written.

C. Citation No. 8443658 – Protection of trailing cables

1. Further Findings of Fact

Inspector Gilpin conducted a general E01 inspection at the Lively Grove Mine on September 11, 2013. (Tr. 127:15–24.) Prairie State's compliance officer, Rich Baker, accompanied Gilpin during the inspection. (Tr. 129:4–12.) On the active section, Gilpin

[5] Respondent points to the testimony of Inspector Henry to support its position that GMS complied with section 75.362 by performing the required on-shift examination. (Resp't Br. at 2.) Yet Respondent's argument misrepresents the nature of Henry's testimony. Although Henry credited GMS's assertion that a miner had performed an on-shift examination, the MSHA inspector clearly felt the examination was not sufficiently thorough. (Tr. 61:11–20, 64:9–65:9.) Moreover, section 75.362(a)(2) requires more than a mere check of the dust control equipment; it also requires the operator to fix any problems with the equipment. 30 C.F.R. § 75.362(a)(2).

examined the mine's feeder, a large machine that breaks coal into smaller pieces and feeds it onto the mine's conveyor belt. (Tr. 131:7–13, 132:21–133:20.) The feeder continually sprays water to suppress dust created by crushing and transferring coal. (Tr. 133:8–20.) Although the feeder generally remains stationary during mining, Prairie State typically moved the equipment once a week during its maintenance shift as coal production advanced deeper into the Lively Grove Mine. (Tr. 155:24–157:10, 167:7–13.) The feeder, which is self-propelled, receives power from a 750-foot-long, 995-volt electrical cable connecting the feeder to a power center. (Tr. 135:3–13.) When Gilpin inspected the feeder, GMS had laced the power cable in long loops on the wall of the crosscut between Entry Nos. 5 and 6. (Tr. 141:1–25.) The power cable was hung approximately 4-1/2 to five feet off the mine floor. (Tr. 145:1–10.)

After examining the feeder's exterior, Inspector Gilpin de-energized the machine so he could closely examine its power cable. (Tr. 134:12–135:2.) Gilpin ran his hands along the cable, searching for any irregularities. (Tr. 135:17–23.) While examining the cable, Gilpin found a cut approximately 1-1/2 inches long. (Tr. 138:11–22.) The chest-high cut had penetrated the hard outer jacket of the cable, exposing the inner insulated power conductors. (Tr. 138:20–139:12.) The cut in the cable had not penetrated the inner insulation to expose any bare wires. (Tr. 140:2–141:15.) Gilpin believed the damage occurred either by the cable being run over by mobile equipment while it dragged on the ground behind the feeder during a move, or by the cable being hit by mobile equipment, such as a scoop or a ram car, pulling into the crosscut while the cable was suspended on the wall. (Tr. 143:6–144:18.) Gilpin also believed that the damage to the cable would worsen over time if left unrepaired. (Tr. 145:13–24.)

Inspector Gilpin observed that miners regularly traveled the area near the damaged section of cable, often congregating around a picnic table approximately 40 feet away. (Tr. 142:11–143:5.) Miners also used hoses nearby to clean mining equipment. (Tr. 142:1–5.) At the time of the inspection, approximately three inches of water had accumulated on the mine floor in the vicinity of the damaged section of cable. (Tr. 142:1–8.)

Based on his observations, Gilpin issued Citation No. 8443658, alleging a violation of 30 C.F.R. § 75.606(a):

> When inspected the trailing cable (2/0 3 Conductor) that supplies 995VAC power to the company [No.] 601 feeder that is in service in the 3rd Panel North Unit MMU: 001 & 007) has a cut in the outer jacket approximately 1.5 [inches] in length. This cut is exposing the inner insulated power conductors. The area of the mine where this cable is located has standing water on the mine floor up to 3 [inches] in depth. Trailing cables shall be adequately protected to prevent damage by mobile equipment.

(Ex. G–5.) Gilpin marked the citation as S&S and determined that this violation was reasonably likely to result in a fatal injury to one miner due to GMS's moderate negligence. (Ex. G–5.) MSHA proposed a penalty of $5,080.00 for Citation No. 8443658.

2. Analysis and Conclusions of Law

Section 75.606 requires that operators adequately protect trailing cables to prevent damage by mobile equipment. 30 C.F.R. § 75.606. Section 75.606 mirrors section 306(f) of the Mine Act, 30 U.S.C. § 866(f). In enacting section 306(f), Congress emphasized the hazardous nature of unprotected trailing cables in mines and recognized the significant danger of shock and mine fires posed by damage to power cables. *Spartan Mining Co.*, 30 FMSHRC 699, 707 (Aug. 2008) (citing S. Rep. No. 91-411, at 71 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 197 (1975)). The Commission has similarly emphasized the importance of keeping intact both the inner and outer protective layers of electrical cables. *See U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

i. Violation of 30 C.F.R. § 75.606

To prove a violation of section 75.606, the Secretary must show that: (1) a trailing cable (2) was not adequately protected from damage (3) by mobile equipment. 30 C.F.R. § 75.606.

For Citation No. 8443658, the Secretary asserts that the feeder's cable was a trailing cable, covered by the regulation, and that mobile equipment caused the 1-1/2-inch cut Inspector Gilpin discovered on the cable. (Sec'y Br. at 19; Sec'y Reply at 6–8.) In contrast, GMS contends that it did not violate section 75.606 because the cable was not a trailing cable and the cut was not substantial enough to constitute a violation. (Resp't Br. at 5.) In support, GMS emphasizes that the feeder is a very large, mostly stationary piece of equipment. (*Id.*)

Although the feeder primarily remained in one place, the machine was self-propelled and moved as frequently as every week. (Tr. 155:20–157:15, 167:7–13, 135:3–13, 136:1–14.) More importantly, Prairie State, owner of the Lively Grove Mine, opted to treat the feeder's cable as a trailing cable for purposes of MSHA regulation rather than as a stationary power cable. (Tr. 137:15–138:5.) By opting to treat the feeder's cable as a trailing cable, Prairie State and GMS were permitted to handle the feeder's cable less carefully, including lacing the cable along the mine ribs and dragging it on the mine floor. (Tr. 137:1–14.) Respondent presented no evidence to contradict the Secretary's proof.[6] Because Prairie State previously informed MSHA of its choice to treat the feeder's cable as a trailing cable, Inspector Gilpin's examination of the feeder's cable under 30 C.F.R. subpart G (Trailing Cables) is reasonable. I therefore find that the feeder's cable is a trailing cable. The Secretary has thus satisfied the first element of a violation under section 75.606.

Although Respondent admits a 1-1/2-inch cut existed in the outer jacket of the trailing cable, it contends this alone cannot constitute a violation of section 75.606 because the inner jacket was not cut. (Resp't Br. at 5.) Respondent's argument runs contrary to Commission precedent. The Commission has emphasized the importance of both the inner and outer jackets of trailing cables for the protection of miners. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1284–85 (Dec. 1998) (affirming trailing cable violation as S&S even with no exposed wires); *U.S. Steel Mining*, 6 FMSHRC at 1573–74 (affirming trailing cable violation as S&S

[6] Indeed, Respondent declined to call a witness for Citation No. 8443658.

where outer jacket was cut but inner jacket wires remained individually insulated at time of inspection). Accordingly, I find that the 1-1/2-inch cut in the trailing cable's outer jacket is sufficient evidence to satisfy the second element of a violation of section 75.606.

Finally, Respondent does not challenge the testimony that mobile equipment caused the damage to the trailing cable. Inspector Gilpin believed the damage to the trailing cable resulted from mobile equipment, like a scoop or a ram car, either hitting the cable suspended on the rib of the crosscut when mobile equipment pulled into the crosscut from the travel way, or running over the feeder's trailing cable as it was being dragged through the mine by the belt moving crew. (Tr. 143:6–144:18.) GMS presented no evidence to contradict Gilpin's testimony and no alternative theory to explain the cable's damage. Based on the evidence before me, I find that mobile equipment caused the damage to the trailing cable, satisfying the third element of a violation of section 75.606. Thus, the Secretary has proven all three elements for a violation of section 75.606. Accordingly, I conclude that GMS violated 30 C.F.R. § 75.606.

ii. Gravity and S&S

GMS's violation of 30 C.F.R. § 75.606 establishes the first *Mathies* element. The second *Mathies* element requires that the violation contribute to a safety hazard. As Inspector Gilpin explained, the damaged trailing cable contributed to the hazard of a miner being electrocuted. (Tr. 146:21–147:8.) Thus, the Secretary has satisfied the second element of the *Mathies* test.

Regarding the third *Mathies* element, Inspector Gilpin explained that the damage to the cable could reasonably be expected to worsen as mining continued and the feeder advanced further into the mine. (Tr. 145:13–24, 146:8–14.) The cable hung at chest height in an area miners frequented. (Tr. 145:25–146:7.) Moreover, the area around the trailing cable was wet, with hoses and water sprayers nearby causing approximately three inches of water to accumulate on the mine floor. (Tr. 142:1–8.) GMS contends a cut that does not penetrate the cable's inner insulation cannot create a reasonable likelihood of injury. (Resp't Br. at 5.) To the contrary, the Commission has held that damage to a cable's outer jacket could be expected to worsen and reasonably be expected to injure a miner. *See Harlan Cumberland Coal*, 20 FMSHRC at 1284–85 (affirming finding of S&S where outer jacket of trailing cable damaged); *U.S. Steel Mining*, 6 FMSHRC at 1574. In addition, miners at the Lively Grove Mine did not wear gloves capable of protecting them from electric shock. (Tr. 166:5–11.) Given the evidence before me, and considering the harsh environment of an underground coal mine, I determine that the damage to the feeder's trailing cable was reasonably likely to worsen as mining continued and result in injury to a miner. Accordingly, the Secretary has satisfied the third *Mathies* element.

Finally, the trailing cable carried 995 volts of electricity, nine times the amount of voltage that commonly is fatal. (Tr. 146:21–147:8.) Given this evidence, it is reasonably likely that an injury from being shocked by the trailing cable would be fatal. The Secretary has thus satisfied the fourth *Mathies* element. I conclude Citation No. 8443658 was properly designated as S&S.

iii. Negligence

Inspector Gilpin marked GMS's negligence as moderate because the damaged portion of the trailing cable could not be easily seen. (Tr. 149:15–22.) Nevertheless, Gilpin felt that GMS should have discovered the gash during its weekly electrical examination. (Tr. 160:1–16.) Given this evidence, I conclude that GMS's negligence for Citation No. 8443658 was appropriately designated as moderate. I hereby affirm Citation No. 8443658 as written.

D. Citation No. 8443659 – Unsupported Roof

1. Further Findings of Fact

On October 2, 2013, Inspector Gilpin conducted a spot inspection at the Lively Grove Mine. (Tr. 169:12–170:21.) Gilpin, MSHA Inspector Greg Waldeck, and Prairie State's compliance officer, Dale Pearman, traveled underground together to the active section. (Tr. 171:4–20.) While checking the section for imminent dangers, Gilpin found six black, circular irregularities in the mine roof in the last open crosscut of the section. (Tr. 172:3–174:14.) Gilpin identified the irregularities as sulfur balls, or kettle bottoms. (Tr. 172:3–23.) Each sulfur ball measured one to two feet in diameter. (Tr. 173:4–15.) Gilpin tested the density of the sulfur balls with a sounding rod and confirmed that the anomalies, when tapped, sounded different than the surrounding shale roof. (Tr. 177:15–178:5.) GMS had installed roof bolts in the intersection with the sulfur balls approximately two hours prior to Gilpin's inspection, but the mine had failed to install direct support for these roof irregularities. (Tr. 183:14–19.)

Based on his observations, Gilpin issued Citation No. 8443659, alleging a violation of 30 C.F.R. § 75.202(a):

> The roof where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the mine roof. 6 carbonate nodules (sulfur balls) were observed unsupported in the immediate mine roof. This area had been previously roof bolted. These sulfur balls were located between entries 1 and 2 at ss: 47+80 of the 3rd North Panel Unit (MMU:001). These sulfur balls measure approximately 1' to 2' in diameter and were approximately 7' from the mine floor.

(Ex. G–7.) Gilpin marked the citation as S&S and reasonably likely to result in an injury causing lost workdays or restricted duty to one miner. (*Id.*) Gilpin characterized GMS's negligence as moderate because the sulfur balls were obvious, but they had persisted unaddressed for only around two hours. (Exs. G–7, G–8 at 2; Tr. 183:3–24.) MSHA proposed a penalty of $1,412.00 for Citation No. 8443659.

2. Analysis and Conclusions of Law

Section 75.202(a) requires mine operators to support or otherwise control the roof and ribs of a mine to protect persons from hazards related to roof falls. 30 C.F.R. § 75.202(a).

Accordingly, the Secretary may demonstrate a violation by showing (1) that the roof or ribs were not supported to protect persons from hazards related to roof falls, and (2) the insufficiently supported roof or ribs were located in an area where persons work or travel. *See Jim Walter Res.*, 37 FMSHRC 493, 495 (Mar. 2015). Because section 75.202(a) is worded broadly, the Commission has held that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Harlan Cumberland Coal*, 20 FMSHRC at 1277 (citing *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987)).

i. Violation of 30 C.F.R. § 75.202(a)

The conditions cited by Inspector Gilpin were located in the last open crosscut, an area recently mined and near the active face. (Tr. 172:16–23, 178:23–179:8, 183:14–19, 198:9–18.) Respondent does not contend that the cited conditions were located in an untraveled area of the mine. Accordingly, I find that the cited conditions were in an area worked and traveled by miners, satisfying the first element of a violation of section 75.202(a).

Next, Respondent admits that Inspector Gilpin observed several anomalies in the mine roof that were not supported. (Resp't Br. at 6.) Moreover, Respondent agrees that these anomalies appeared to be sulfur balls.[7] (*Id.*) Indeed, GMS's Kittinger testified that when he examined the area after Inspector Gilpin, Kittinger found the six discolored anomalies Gilpin cited. (Tr. 196:11–197:16.) When Kittinger tested the anomalies with a sounding rod, he too noticed that the anomalies sounded different from the rest of the mine roof. (Tr. 197:19–25.) Kittinger agreed that the anomalies were sulfur balls. (Tr. 202:21–24.) Given this evidence, I find that the anomalies in the roof identified by Gilpin were sulfur balls.

Prairie State's roof control plan requires the mine to provide additional support for exposed sulfur balls, such as installing wire mesh. (Tr. 203:14–19.) This additional support is necessary because sulfur balls can fall out of the roof with little or no warning. (Tr. 174:15–22, 192:14–23.) Inspector Gilpin had experienced such a sudden fall firsthand, as a sulfur ball once fell on Gilpin, dislocating his shoulder. (Tr. 178:7–16.) Here, the discovered sulfur balls were in a roof of shale, a weaker rock that has the tendency to flake off and allow sulfur balls to fall out more easily. (Tr. 175: 9–21.) Given this evidence, I determine that a reasonably prudent miner, familiar with the danger posed by unsupported sulfur balls in a shale roof and the requirements of section 75.202(a), would have provided more support for the cited sulfur balls. *See Harlan Cumberland Coal,* 20 FMSHRC at 1277.

The Secretary has proved both elements of a violation of section 75.202(a). Accordingly, I conclude that GMS committed a violation of 30 C.F.R. § 75.202(a) by not supporting the cited sulfur balls in the mine roof.

[7] Although Respondent admits the cited anomalies were sulfur balls, GMS contends the conditions could not be a violation under section 75.202(a) because they were not cited under the mine's roof control plan. As Inspector Gilpin explained, however, he could have cited the unsupported sulfur balls either under section 75.202(a) or as a violation of the mine's roof control plan. (Tr. 176:9–177:11.)

ii. Gravity & S&S

GMS's violation of section 75.202(a) establishes the first *Mathies* element. By failing to support six sulfur balls, GMS contributed to the hazard of a miner being hit by material falling from the mine roof. This satisfies the second *Mathies* element because the violation contributed to a discrete safety hazard.

Regarding the third *Mathies* element, Respondent asserts that the Secretary failed to demonstrate the sulfur balls were reasonably likely to fall onto a miner and cause injury. (Resp't Br. at 6.) Specifically, GMS asserts that the Secretary has not provided sufficient evidence regarding the size and weight of the sulfur balls, or regarding how compacted the sulfur balls were in the mine roof. (*Id.*) In support, Respondent points to the testimony of GMS's Kittinger, who had difficulty finding any bulging sulfur balls when he viewed the area after GMS had installed additional wire mesh to support the conditions. (Tr. 196:16–197:6, 203:20–205:1.) Kittinger checked the roof with a sounding rod and believed the area sounded generally "competent for people to work" under. (Tr. 197:20–198:6.) Yet Kittinger admitted the sulfur balls sounded different from the surrounding roof, and indeed the discoloration ring around the sulfur balls did not sound as solid. (Tr. 197:13–198:2.) Kittinger thus contradicted his own testimony that the roof seemed solid. Moreover, I note that Kittinger examined the cited area only after additional support had been installed, making the roof difficult to examine. (Tr. 203:20–205:1.) In contrast, Inspector Gilpin testified that the sulfur balls reasonably could be expected to fall out if left unsupported. (Tr. 192:14–193:2.) Gilpin had painfully witnessed firsthand how sulfur balls can fall from a mine roof without any warning. (Tr. 178:7–16.) Gilpin further testified that the discovered sulfur balls each measured one to two feet in diameter. (Tr. 173:4–15.) Gilpin estimated the sulfur balls weighed 150 pounds or more. (Tr. 173:4–15, 178:9–22.) Respondent provided no evidence to challenge Gilpin's estimates. Given the evidence before me, and considering Inspector Gilpin's extensive mining background and firsthand experience with sulfur balls, I credit Gilpin's testimony and determine that there was a reasonable likelihood the hazard of the sulfur balls falling from the mine roof would lead to an injury. Accordingly, the Secretary has satisfied the third element of the *Mathies* test.

Finally, Gilpin testified that a falling sulfur ball would at least result in bruises and broken bones, and could even be fatal. (Tr. 178:7–22.) Gilpin himself suffered a dislocated shoulder from being hit by a falling sulfur ball approximately the size of those he cited at the Lively Grove Mine. (Tr. 178:11–14.) Given this evidence, I determine that a miner hit by a falling sulfur ball would suffer a serious injury, satisfying the fourth *Mathies* element. The Secretary satisfied all four elements of the *Mathies* test. Accordingly, I conclude that Citation No. 8443659 was properly designated as S&S. I hereby affirm Citation No. 8443659 as written.

iii. Negligence

Inspector Gilpin marked this citation as moderate negligence because the sulfur balls had been left unsupported for approximately two hours. (Tr. 180:25–181:6.) Gilpin believed a mine foreman had not been in the area since GMS had installed its initial roof support, thus mitigating GMS's negligence. (Tr. 181:7–15.) Nevertheless, Gilpin felt the miners who bolted the area should have noticed the sulfur balls and corrected the problem because the anomalies were fairly

obvious. (Tr. 181:15–182:4.) Given the evidence before me, I agree with the inspector's determination that GMS demonstrated moderate negligence in failing to support the sulfur balls for two hours. Accordingly, I conclude that the negligence determination for Citation No. 8443659 was properly designated as moderate.

IV. PENALTIES

When assessing a civil penalty, section 110(i) of the Mine Act requires the Commission's Administrative Law Judges to consider the following six criteria: (1) the operator's history of previous violations, (2) the appropriateness of the penalty relative to the size of the operator's business, (3) the operator's negligence, (4) the penalty's effect on the operator's ability to continue business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i).

The Secretary proposes a penalty of $2,901.00 for Citation No. 8444102, a penalty of $2,901.00 for Citation No. 8444104, a penalty of $5,080.00 for Citation No. 8443658, and a penalty of $1,412.00 for Citation No. 8443659.

For each citation, I have concluded that GMS violated MSHA's regulations and determined each violation to be both S&S and the result of Respondent's moderate negligence. GMS has stipulated that it is large in size and that the Secretary's proposed penalties would not affect its ability to remain in business. (Ex. Jt.–1.) Respondent demonstrated good faith in abating each citation. (*Id.*) I further note that GMS did not receive any citations under sections 72.630(b), 75.362(a)(2), 75.606, or 75.202(a) in the two years prior to these citations being issued. (Exs. G–9, G–10, G–11.)

Given the evidence before me and considering each of the six penalty factors in section 110(i), I determine that the Secretary's proposed penalty assessments are appropriate. Accordingly, I assess a penalty of $2,901.00 for Citation No. 8444102, a penalty of $2,901.00 for Citation No. 8444104, a penalty of $5,080.00 for Citation No. 8443658, and a penalty of $1,412.00 for Citation No. 8443659.

VI. ORDER

In light of the forgoing, it is hereby **ORDERED** that Citation Nos. 8444102, 8444104, 8443658, and 8443659, are **AFFIRMED** as written.

WHEREFORE, Respondent GMS Mine Repair is **ORDERED** to pay a civil penalty of $12,294.00 within 40 days of this decision.

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

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/aal

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 31, 2015

BHP NAVAJO COAL CO., Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDING Docket No. CENT 2013-335-R Citation No. 8480130; 02/20/2013 Mine: Navajo Mine Mine ID: 29-00097
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. BHP NAVAJO COAL CO., Respondent	CIVIL PENALTY PROCEEDING Docket No. CENT 2013-555 A.C. No. 29-00097-323596 Mine: Navajo Mine

DECISION

Appearances: Bryan Kaufman, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, on behalf of the Petitioner;

Charles W. Newcom, Esq., Sherman & Howard, LLC, Denver, Colorado, on behalf of the Respondent.

Before: Judge Bulluck

This matter is before me upon a Notice of Contest and a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), on behalf of the Mine Safety and Health Administration ("MSHA"), against BHP Navajo Coal Company ("BHP Navajo"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act" or "Mine Act"), 30 U.S.C. § 815(d).

A hearing was held in Durango, Colorado. The single violation at issue, section 104(d)(1) Citation No. 8480130, alleges a violation of section 77.516 of the Secretary's mandatory safety standards. Section 77.516 provides:

> In addition to the requirements of §§ 77.503 and 77.506, all wiring and electrical equipment installed after June 30, 1971, shall meet the requirements of the National Electric Code in effect at the time of the installation.

30 C.F.R. § 77.516.

Citation No. 8480130 was designated by the Secretary as significant and substantial ("S&S"),[1] and "reasonably likely" to contribute to at least the "lost workday or restricted duty" injury of one miner. The Secretary also attributed the violation to a "high" degree of negligence and an unwarrantable failure to comply with the Secretary's mandatory safety standard.[2] The Secretary seeks a civil penalty in the amount of $11,000.00.

As such, the following issues are before me: (1) whether BHP Navajo violated 30 C.F.R. § 77.516, as alleged in Citation No. 8480130; (2) whether the violation was S&S; and (3) whether the violation was attributable to a "high" degree of negligence and an unwarrantable failure to comply with section 77.516. The parties' post-hearing briefs are of record.[3]

For the reasons set forth below, Citation No. 8480130 is **AFFIRMED**, as modified from a section 104(d)(1) citation to a section 104(a) citation, the S&S designation is upheld, and a penalty is assessed against BHP Navajo.

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[1] Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

[2] When Citation No. 8480130 was issued on February 20, 2013, the Secretary originally designated the violation as a section 104(a) citation attributable to a "moderate" degree of negligence. On March 1, 2013, the violation was modified to a section 104(d)(1) order attributable to a "high" degree of negligence and an unwarrantable failure. However, the predicate unwarrantable failure citation, which established the subject violation as a 104(d)(1) order rather than a citation, has since been modified to a 104(a) citation. Consequently, the subject violation is now a 104(d)(1) citation, rather than an order. Tr. 14; Stip. 10.

[3] The parties filed separate post-hearing briefs on the applicable version of the National Electric Code (abbreviated hereinafter as "Br. on NEC" and "Reply Br. on NEC"), and the merits of Citation No. 8480130 (abbreviated hereinafter as "Br." and "Reply Br.").

I. Stipulations

The parties have stipulated as follows:

1. At the time of the inspection on February 19, 2013, [BHP Navajo] was engaged in mining and selling coal, and its mining operations affect commerce.

2. At the time of the inspection on February 19, 2013, [BHP Navajo] was the operator of the mine with the Mine Identification No. 29-00097.

3. At the time of the inspection on February 19, 2013, the mine was subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq*.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of [MSHA], upon an agent of [BHP Navajo] on the date and place stated therein. Accordingly, the citation may be admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. [BHP Navajo] timely contested the subject citation.

7. The payment of $11,000.00 will not affect [BHP Navajo's] ability to remain in business.

8. Installation and testing of the fan in dispute in this matter was completed on June 7, 2012.

9. The room in which the fan was located became operational on August 31, 2012.

10. Citation No. 8480130 was written as an unwarrantable failure order. The underlying unwarrantable failure citation making it an order has subsequently been modified to a non-unwarrantable failure. Thus, Citation No. 8480130 is an unwarrantable failure citation, not an order.

11. At all times relevant to this matter, no manager with [BHP Navajo] ever conceded that they felt there was a violation of 30 C.F.R. § 77.516 and, in fact, took the position that they were in compliance in their discussions with any representatives of MSHA.

12. At no time did anyone in management with [BHP Navajo] ever concede that they thought what applied to this motor was the 1968 National Electric Code but, rather, that . . . BHP management's view was that the 2011 National Electric Code applied.

Tr. 11-14 (stipulations 1-10), 404 (stipulations 11-12).

II. Factual Background

The Navajo Mine is an active surface bituminous coal mine in San Juan County, New Mexico. In February 2013, at the time that the subject citation was issued, the Navajo Mine was operated by BHP Navajo Coal Company. The Navajo Mine operation includes an on-site coal laboratory, called the SGS coal sample lab, which tests and analyzes the quality and chemical characteristics of the locally-extracted materials.[4] Tr. 320.

A. SGS Coal Sample Lab

The SGS coal sample lab has two separate coal processing rooms: the "prep room" and the "x-ray room."[5] As part of the routine coal testing procedure, coal samples are brought into the prep room, where they are crushed into a fine powder. The prep room is equipped with a dust collection and exhaust system that collects dust from the pulverizing process in a dust collection bag and exhausts any accumulations of gas. Tr. 354-55. The exhaust fan generates negative pressure in the prep room, which works to prevent suspended coal dust in the prep room from spreading to other parts of the lab. Tr. 181, 321-22.

Adjacent to the prep room, and connected by a door, is the x-ray room. Coal powder from the prep room is routinely transported to the x-ray room, burned down into an ash, and moltenized by a fluxer - - essentially a system of propane-fueled Bunsen burners.[6] Tr. 322. The molten coal ash is then cooled and evaluated using a robotic x-ray machine. Tr. 325-26. The x-ray machine utilizes, in part, potentially combustible methane gas. Tr. 356. To mitigate the

[4] While BHP Navajo has long-operated a coal lab at the site of the current lab, in 2011, BHP Navajo and the Arizona Public Service Company consolidated their respective coal-testing facilities into the current laboratory, which is now staffed and operated by SGS, an outside contractor. Tr. 320, 339-40.

[5] The record in this matter alternatively refers to these rooms as the "pulverizing room" and the "burn room."

[6] The fluxer is equipped with an automatic shut-off mechanism that shuts off the flow of propane should the system fail to ignite; however, the automatic shut-off mechanism does not shut off the valve on the propane container, itself. Tr. 201-02, 323, 345.

possibility of a combustible gas buildup, the x-ray room is equipped with a ventilation and gas-monitoring alarm system.[7] Tr. 323-25, 344-45.

The x-ray room is also equipped with a general exhaust system, which is the subject of Citation No. 8480130. The exhaust system in question draws air from the x-ray room through a large hood above the fluxer, exhausting the air through an external cone on the roof of the lab. See Tr. 74. The cone is a bowl-shaped metal structure that physically exhausts the air drawn from the x-ray room. Tr. 74-75; Ex. P-4 at 14. Within the exhaust cone is a smaller cylindrical metal structure. Tr. 74-75; Ex. P-4 at 14. Inside this smaller metal cylinder are the fan motor, motor housing, electrical junction box, and an associated wiring system. Ex. P-4 at 16. There are a number of small holes in the smaller metal cylinder that allow air passing through the exhaust cone to enter the location of the fan motor.

Directly west of the SGS coal sample lab is a large emergency stockpile of coal. West of the stockpile, about 1,500 feet from the coal lab, is the Navajo Mine North coal plant. Tr. 438. When the wind blows from the west, coal dust can be blown in the direction of the coal lab. Tr. 208; 434-36. Varying winds are also likely to blow sand, dirt, and ash in the direction of the coal lab. Tr. 435.

B. MSHA Inspection of the Exhaust Fan Motor

On January 19, 2013, BHP Navajo electrician J.D. Arnold, upon observing an unfamiliar exhaust hood in the x-ray room, went onto the roof of the SGS coal sample lab to investigate the exhaust fan equipment. Tr. 86-87. Arnold removed the cap to the metal cylinder containing the fan motor, and observed an "open-faced motor" surrounded by a fine layer of dark-colored dusty material. Tr. 87-88. Concerned that the motor was non-compliant with the National Electric Code ("NEC") and the Mine Act because it was not a closed-type motor, Arnold approached BHP Navajo electrical supervisor Kerry Steagall. Tr. 90-91. Steagall advised that the exhaust fan and motor and, in turn, the x-ray lab, should not be tagged-out at that time because he was uncertain of the NEC compliance requirements for the motor in question. Tr. 90-91.

Before conducting a monthly electrical inspection of the coal lab on February 14, Arnold, again, consulted with Steagall about the compliance of the exhaust motor. Tr. 90-91. Steagall and Arnold sought second, third, and fourth opinions regarding the compliance issue, none of which provided a conclusive answer. Tr. 92-93. Having not received a definitive opinion regarding the motor's compliance, Steagall and BHP Navajo safety representative Tyler Martin instructed Arnold not to tag-out the exhaust fan during his monthly inspection. Tr. 93; Ex. P-3.

A few days later, Martin reported to Arnold that the exhaust fan motor in question was compliant with the NEC, without any modifications. Tr. 108. Arnold, unsatisfied with Martin's

[7] The triggering of the ventilation and gas-monitoring alarm system does not automatically shut off the fluxer propane gas feed. Tr. 125, 424.

opinion, filed a section 103(g) complaint with the mine's union representative.[8] Tr. 109-10. At that time, Steagall instructed Arnold to vacuum out the dust observed in the motor housing area, and take before-and-after photographs. Tr. 110-11.

On February 19, while conducting a regular inspection of the Navajo Mine, MSHA Inspector Ruth Williams received notice of Arnold's 103(g) complaint about the coal lab. Tr. 188. Williams proceeded to the roof of the coal lab, accompanied by Martin and BHP Navajo electrician Lawrence Beyale, to inspect the exhaust fan motor. Tr. 189-90. Williams removed the cap to the metal cylinder containing the fan motor, and observed evidence of the dust that had accumulated in the proximity of the fan motor and electrical components prior to Arnold's vacuuming. Tr. 192-93. Because the lab technician was absent, Williams was unable to operate the exhaust fan during the inspection. Tr. 193. While Williams observed no coal dust accumulation in the recently-cleaned x-ray room, she did observe coal dust accumulations in the prep room. Tr. 194. Unclear about the requirements of the Mine Act and the NEC, Williams did not issue a citation following the inspection. Tr. 198.

After consulting MSHA Regional Manager Don Gibson, Williams returned to the coal lab the following day, February 20, to further inspect the exhaust fan motor. Tr. 199. Arnold showed her the photographs that he had taken prior to having vacuumed the dust out of the exhaust fan motor housing, and she examined the operation of the automatic propane shut-off mechanism on the fluxer and the ventilation and gas monitoring alarm system. Tr. 204-06. After this follow-up inspection, and in consultation with Gibson, Williams issued Citation No. 8480130 for a violation of section 77.516. The "Condition or Practice" is described as follows:

> North Plant at the SGS Coal Sample Lab. The 115 Volt motor that is installed for the exhaust fan system does not meet the 502 Group F of the National Electric Code in the area where it is installed. The coal lab is located in a real black fine coal dusty area. The motor is designed for commercial and restaurant exhaust system. The exhaust system for the coal lab needs a "dust-ignition-proof" shall mean [sic] enclosed in a manner that will exclude ignitible amounts of coal dusts or amounts that might affect performance or rating and that, where installed and protected in accordance with the NEC, will not permit arcs, sparks, or heat otherwise generated or liberated inside of the enclosure to cause ignition of exterior accumulations or atmospheric suspensions of a specified dust on or in the vicinity of the enclosure. The motor is located inside a metal compartment with a

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[8] Section 103(g)(1) provides:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

30 U.S.C. § 813(g)(1).

> cover. The cover is not a dust tight cover; coal dust accumulation was observed inside the compartment. The black fine coal dust will float into the open motor and accumulate inside, that would affect the rotation of the motor. The coal lab is exposed to coal dust 24/7. The potential of an electrical hazard exists, because of the floating dust going inside the enclosure. There are miners that work inside the lab, and the carpenter shop is adjacent to the building and there are miners inside that are exposed. The Mine failed to install the electric equipment to meet the requirement of the NEC in effect at the time of the installation.
>
> Standard 77.516 was cited 3 times in two years at mine 2900097 (3 to the operator, 0 to a contractor).

Ex. P-1 at 7-8. On March 1, Williams modified Citation No. 8480130 from a 104(a) citation to a 104(d)(1) order. See Ex. P-1 at 10. BHP Navajo abated the cited condition on March 1 by installing a sealed exhaust fan motor and sealed wiring components. Ex. P-1 at 11, P- 4 at 26.

III. Findings of Fact and Conclusions of Law

A. Applicable Version of the National Electrical Code

Section 77.516 requires that "all wiring and electrical equipment . . . meet the requirements of the National Electric Code *in effect at the time of the installation*." 30 C.F.R. § 77.516 (emphasis added). As a preliminary matter, the parties disagree over which version of the NEC - - the 1968 or the 2011 edition - - applies to the exhaust fan motor in question. It is undisputed that the subject exhaust fan motor was installed on June 7, 2012. Stip. 8.

There is a primary substantive difference between the applicable sections of the 1968 and 2011 NEC, which necessitates resolution of this preliminary question. Unlike the 1968 NEC, the 2011 version has a specific definition of, and testing requirement for, "combustible dust," the presence of which would require the exhaust fan motor to be sealed. See Ex. R-1 at 1, 6. The 2011 NEC defines combustible dust as:

> Any finely divided solid material that is 420 microns (0.017 in.) or smaller in diameter (material passing a U.S. No. 40 Standard Sieve) and presents a fire or explosion hazard when dispersed and ignited in the air.

Ex. R-1 at 1 (NEC § 500.2). The 2011 NEC also specifies that combustible dust must be tested in accordance with the American Society for Testing and Materials standards to determine that it has more than eight percent total entrapped volatiles. Ex. R-1 at 6 (NEC § 500.6(B)(2)).

The 1968 NEC, however, has no specific testing requirement to determine the presence of "combustible dust." Compare Exs. P-9 and R-1. It is undisputed that no tests were performed by MSHA to determine whether the dust identified in proximity to the fan motor in question was "combustible dust" under the 2011 NEC. Therefore, BHP Navajo asserts that "[t]he lack of any

testing/verification of whether 'combustible dust' was present precludes finding a violation for dust under the 2011 NEC," should that version apply in the present case. Resp't Br. at 8.

In asserting that the 1968 NEC applies to the exhaust fan motor in question, the Secretary interprets "in effect at the time of installation" to refer to the NEC version incorporated by reference into section 77.516. The Secretary argues that the 1968 NEC has been effectively incorporated by reference into the Mine Act and, as such, has the force of law. See Sec'y Br. on NEC at 3-10; Sec'y Reply Br. on NEC at 1-6. In contrast, BHP Navajo interprets "in effect at the time of installation" to refer to the most recent version of the NEC available on June 7, 2012, when the exhaust fan motor was installed - - the 2011 edition. BHP Navajo also argues that the 1968 NEC was never officially incorporated by reference because MSHA did not complete formal rulemaking applying the 1968 NEC to section 77.516. See Resp't Br. on NEC at 2-9; Resp't Reply Br. on NEC at 2-3.

This disagreement is, in essence, about the interpretation of the phrase "in effect at the time of installation" in section 77.516. In considering this question of statutory construction, the first inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). In ascertaining the meaning of a statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *Chevron*, 467 U.S. at 843 n.9; *Local Union*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *See Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

In the context of section 77.516 and the enforcement of electrical safety regulations by application of the NEC, interpretation of the phrase "in effect" raises the question of whether the applicable NEC is made effective dynamically by the mere act of publication of an updated edition or, alternatively, by affirmative adoption by a regulatory body, such as MSHA. Where the meaning of a phrase is open to alternative interpretations, it should be treated as ambiguous under a *Chevron I* analysis. *See Berwind Nat. Res. Corp, et al.*, 21 FMSHRC 1284, 1308 (Dec. 1999) (citing *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418-19 (1992), and 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.02, at 6 (5th ed. 1992) ("ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.")). Accordingly, I conclude that the phrase "in effect at the time of installation" in section 77.516 is ambiguous.

As here, if a statute is deemed to be ambiguous, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of it is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2;

Keystone, 16 FMSHRC at 13. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844).

Based on the forthcoming analysis, it is clear that the 1968 NEC has been properly incorporated by reference into section 77.516, demonstrating MSHA's consistent and long-standing agency practice of interpreting and enforcing the 1968 NEC as the edition "in effect at the time of the installation" in the regulation. Such consistency reflects that MSHA's interpretation of section 77.516 has been a result of "considered judgment," rather than a *post hoc* rationalization, and should be accorded deference. *See Akzo Nobel Salt, Inc. v. FMSHRC,* 212 F.3d 1301, 1304 (D.C. Cir. 2000); *Tilden Mining Co.*, 24 FMSHRC 53, 60-61 (Jan. 2002) (ALJ) (holding that consistent and long-standing agency interpretation of an ambiguous standard reflects "considered judgment" in support of deference).

The practice of incorporation by reference began in 1966 to reduce the volume of material published in the Federal Register. *See* 5 U.S.C. § 552(a). Incorporation by reference "allows Federal agencies to comply with the requirement to publish rules in the Federal Register and the Code of Federal Regulations ("CFR") by referring to material already published elsewhere. The legal effect of incorporation by reference is that the material is treated as if it were published in the Federal Register and CFR." *Electronic Code of Federal Regulations, Incorporation by Reference*, U.S. GOVERNMENT PRINTING OFFICE, http://www.ecfr.gov/cgi-bin/text-idx?tpl=ibr.tpl (last visited December 30, 2015).

In 1980 and, again, in 1981, the Director of the Federal Register ("Director") approved the incorporation by reference of the 1968 NEC into section 77.516.[9, 10] Approvals of Incorporation by Reference, 45 Fed. Reg. 44090, 44098 (June 30, 1980); 46 Fed. Reg. 33980, 33991 (June 30, 1981). Thereafter, between 1982 and 2008, the printed edition of the CFR included the 1968 NEC, as incorporated by reference in section 77.516. Since 2009, while the printed editions of the CFR no longer contain a list of materials incorporated by reference, that list, including the 1968 NEC, remains published on the U.S. Government Printing Office's e-CFR website. *See Electronic Code of Federal Regulations*, *Title 30—Mineral Resources, Material Approved for Incorporation by Reference*, U.S. GOVERNMENT PRINTING OFFICE, http://www.ecfr.gov/cgi-bin/text-idx?SID=e793601b8c7ebf86d3eff77f0d5cce f4&mc=true& tpl=ibr/30V1.tpl (last visited December 30, 2015).

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[9] In 1980 and 1981, an agency that desired to incorporate material by reference was required to annually submit that material to the Director for authorization. *See* 45 Fed. Reg. 44090 (June 30, 1980). In 1982, the Director revoked the annual submission requirement. 47 Fed. Reg. 34107 (Aug. 6, 1982).

[10] As identified by the Secretary, it is noteworthy that, in 1980, when the 1968 NEC was first incorporated by reference into section 77.516, three newer editions of the NEC had been published. Resp't Br. on NEC at 4 (citing *National Electric Code*, NATIONAL FIRE PROTECTION ASSOCIATION, http://www.nfpa.org/codes-and-standards/document-information-pages?mode= code&code=70&tab=editions (last visited December 30, 2015)).

Nevertheless, BHP Navajo argues that while the 1968 NEC may have been "approved" for incorporation by reference by the Director, it has never been officially promulgated into section 77.516 by the formal procedure required for incorporation by reference in 1 C.F.R. Part 51. BHP Navajo's argument is belied, however, by the clear intent of the Director.

The Director's 1980 approval of the 1968 NEC for incorporation by reference expressed a clear intent to give legal effect to that material, rather than merely "approve" it for further promulgation:

> [T]he materials [including the 1968 NEC] included on the table below *are* incorporated by reference in the CFR under 5 U.S.C. § 552(a) and 1 C.F.R. Part 51. These procedures provide that material approved for incorporation by reference by the [Director] *has the same legal status as if it were published in full in the Federal Register*."

45 Fed. Reg. 44090 (June 30, 1980) (emphasis added). Similarly, the 1991 CFR provided that the Director had "approved under 5 U.S.C. § 552(a) and 1 C.F.R. Part 51 the incorporation by reference" of the 1968 NEC for section 77.516. Ex. P-9 at 46. Importantly, this language unambiguously states that the Director's approval of the 1968 NEC for incorporation by reference was granted consistent with the requirements of 1 C.F.R. Part 51. It is clear that compliance with 1 C.F.R. Part 51 - - argued to be defective by BHP Navajo - - was a condition precedent to the Director's approval. As such, the Director's "approval" was not an inchoate blessing for further action by MSHA, but rather, was independently sufficient to finalize incorporation by reference.

Additionally, interpreting "in effect at the time of the installation" to mean the most recent version of the NEC available, as BHP Navajo asserts, suggests a dynamic incorporation that would automatically update the requirements of section 77.516 whenever a new edition of the NEC is published. Such dynamic incorporation is impermissible. The D.C. Circuit has held that dynamic incorporations violate the notice and comment requirements of the Administrative Procedure Act. *City of Idaho Falls v. FERC*, 629 F.3d 222, 227-28 (D.C. Cir 2011) (holding that FERC violated the APA by attempting to adopt, without additional notice and comment, updated Forest Service fee schedules, a previous version of which was incorporated by reference in its regulations). Rather, 1 C.F.R. § 51.11(a) provides unambiguous instructions to agencies regarding the formal procedure necessary to amend or update material incorporated by reference.[11]

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[11] 1 C.F.R § 51.11(a) provides:

> An agency that seeks approval for a change to a publication that is approved for incorporation by reference must—
>
> (1) Publish notice of the change in the Federal Register and amend the Code of Federal Regulations;
>
> (2) Ensure that a copy of the amendment or revision is on file at the Office of the Federal Register; and
>
> (3) Notify the Director of the Federal Register in writing that the change is being made.

Accordingly, I conclude that the Secretary's interpretation that the 1968 NEC was "in effect at the time of the installation" of the subject exhaust fan motor in June of 2012 is reasonable and should be accorded deference.[12]

B. Fact of the Violation

Having resolved the dispute as to the applicable version of the NEC, the question is whether the subject exhaust fan motor was compliant with the requirements of the 1968 NEC, as mandated by section 77.516.

Article 500 of the 1968 NEC states that "[t]he provisions of Articles 500-503 apply to locations . . . subject to the conditions indicated by the following classifications." Ex. P-9 at 31 (NEC § 500-1). The Secretary alleges that the subject exhaust fan motor and associated components violated alternative Article 500 classifications: Class II, Division 1; or Class II, Division 2.[13] Sec'y Br. at 10-13. These classifications apply to locations in which combustible dust may be present. More specifically, as relevant to the facts of this proceeding:

- Class II, Division 1 applies to locations "in which combustible dust *is or may be* in suspension in the air continuously, intermittently, or periodically *under normal operating conditions*." Ex. P-9 at 32 (NEC § 500-5(a)) (emphasis added).

- Class II, Division 2 applies to locations "in which combustible dust [will] *not normally be in suspension in the air*, or will not be likely to be thrown into suspension by the normal operation of equipment," but where "deposits or accumulations of such dust may be sufficient to interfere with the safe dissipation of heat from electrical equipment," or "might be ignited by arcs, sparks or burning material from such equipment." The NEC specifies that the Class II, Division 2 classification may apply to "rooms or areas adjacent to [Class II, Division 1 locations], and into which explosive or ignitable concentrations of suspended dust *might be communicated only under abnormal operating conditions*." Ex. P-9 at 32 (NEC § 500-5(b)) (emphasis added).

The NEC provides specifications for all fittings, junction boxes, wiring connections, and motors in Class II, Division 1 and Class II, Division 2 locations. Most notably, in Class II, Division 1 locations, junction boxes must be approved and "dust-ignition proof," and are prohibited from having "openings (such as holes for attachment screws) . . . through which

[12] It is noteworthy that Commission judges have, likewise, applied the 1968 NEC to violations of section 77.516 cited in 1992 and 1993. *See Peabody Coal Co.*, 16 FMSHRC 50 (Jan. 1994) (ALJ); *Peabody Coal Co.*, 16 FMSHRC 1505 (July 1994) (ALJ).

[13] Testimony at the hearing repeatedly addressed two additional Article 500 classifications: Class I, Division 1; and Class I, Division 2. Both of these Class I categories apply to locations "in which flammable *gases or vapors* are or may be present in quantities sufficient to produce explosive or ignitable mixtures." Ex. P-9 at 31 (NEC § 500-4) (emphasis added). However, the Secretary does not contend that these classifications applied to the subject condition. See Sec'y Br. at 10-13.

adjacent combustible materials might be ignited"; all flexible wiring connections must be "dust-tight," and "flexible cords shall be provided with dust-tight seals at both ends"; and motors must be approved and "dust-ignition-proof or totally enclosed pipe ventilated." Ex. P-9 at 39-40 (NEC §§ 502-4, 502-8). Similarly, in Class II, Division 2 locations, "[w]ireways, and fittings and boxes in which taps, joints or terminal connections are made, shall be designed to minimize the entrance of dust" through "telescoping or close fitting covers," and are prohibited from having "openings (such as holes for attachment screws) through which dust might enter, or through which sparks or burning material might escape"; all flexible wiring connections must be "dust-tight," and "flexible cords shall be provided with dust-tight seals at both ends"; and motors must be approved and "dust-ignition-proof or totally enclosed pipe ventilated."[14] Ex. P-9 at 39-40 (NEC §§ 502-4, 502-8).

It is clear that the subject exhaust fan motor and associated components were not in compliance with the requirements of either Class II division when Citation No. 8480130 was issued on February 20. According to MSHA District Manager Gibson, BHP Navajo electricians Arnold and Beyale, and Arthur Bruno, an electrical engineer consultant who testified on behalf of BHP Navajo, the open-type motor, and unsealed wiring, flexible connections, and junction box were insufficient for either a Class II, Division 1 or Class II, Division 2 location. Tr. 100 (Arnold); Tr. 152, 154-56, 161 (Beyale); Tr. 278-84 (Gibson); Tr. 375 (Bruno). Thus, the threshold issue is whether the cited exhaust fan motor and associated components were required to comply with the Class II requirements at all. To resolve this issue, it must be determined whether the x-ray room, of which the exhaust fan is an integral component, is a Class II location. For the reasons that follow, I find that the x-ray room is a Class II, Division 2 location and, consequently, that the exhaust fan motor and associated components were required to comply with the applicable NEC Class II requirements.

BHP Navajo concedes that the prep room adjacent to the x-ray room was a Class II, Division 2 location, due to the dust generated by the coal crushing and pulverizing process.[15] Tr. 354; see Tr. 153. However, BHP Navajo argues that there is no evidence of sufficient coal dust in the x-ray room, itself, to classify it as a Class II location. Resp't Br. at 10-14; Tr. 133, 366, 386; see Stip. 11.

On the contrary, the balance of the evidence establishes that coal dust was regularly present in the x-ray room, often transported from the adjacent prep room. Inspector Williams testified that she had regularly seen coal dust on surfaces in the x-ray room during prior inspections. Tr. 212-13. She also testified that there was no dust in the x-ray room during the

[14] BHP Navajo has not argued that the exception to these Class II, Division 2 motor requirements, regarding moderate non-conducting dust accumulations in easily-cleanable locations, applies. See P-9 at 40 (NEC § 502-8).

[15] Bruno asserts that the prep room was a Class II, Division 2 location, rather than a Class II, Division 1 location due to the mitigating operation of a dust collection and exhaust system. Tr. 354. While not dispositive of the outcome of this proceeding, testimony regarding the prevalence of suspended coal dust in the prep room suggests that the prep room may be, in fact, more properly classified as a Class II, Division I location. Tr. 194, 268.

February 19 inspection because she was told that the lab technician had cleaned the room prior to inspection. Tr. 194, 213. Poignantly, former coal lab manager Jamie Horton testified on cross-examination to the widespread presence of coal dust throughout both rooms of the lab:

> Counsel: Had you ever seen coal dust anywhere in the lab outside of the pulverizing room at the time you worked there?
>
> Horton: There's dust in the lab at all times.
>
> Counsel: Coal dust?
>
> Horton: I'm sure there was some level of coal dust. It's a dusty lab because we're in the middle of the desert. Like accumulations of coal dust, we kept it pretty well swept up, so it's inevitable. It's a coal lab.
>
> Counsel: Okay. If you have coal dust that's mostly going to be in the air in the [prep] room, how does it wind up outside in the rest of the lab?
>
> Horton: Through the air. It's a dusty area. People's clothes - - that would be the main thing. If you spill a little bit when you're weighing some out, that would just be less than a gram of coal here and there.
>
> Counsel: Okay. I'm not sure I understand. Was there a door that separated the x-ray room from the rest of the lab?
>
> Horton: There's a - - well, there was a doorway, but we never shut the door.
>
> Counsel: Okay. Could the coal dust that was in the rest of the lab travel into the x-ray room?
>
> Horton: I guess so. Like I said, it's kind of everywhere. You know, it's on the counter. It's dusty, it's dust, and so if you went into the lab with coal on you, it would get everywhere.

Tr. 328-29. The evidence further demonstrates that if there is accumulated or suspended coal dust in the x-ray room, it is likely to be drawn into the exhaust fan, thus requiring a Class II, Division 2-compliant exhaust fan motor. On this point, Bruno testified on cross-examination regarding his failure to recommend installation of a closed-type motor for the exhaust fan:

> Judge: If one of the lab technicians told you [the x-ray room] was normally a dusty area and that on an as-needed basis, the techs would wipe dust from countertops and that some would be on their clothes, and that the door [to the prep room] wasn't kept closed,

may that have changed your opinion about the environment of that room where that - - or the site of where that installation was?

Bruno: If I thought there would have been accumulations of dust inside that room, yes, it would change my opinion of it.

Judge: Okay.

Counsel: How would it change your opinion?

Bruno: If there's truly combustible dust in the room that the exhaust fan could suck up through the motor, then I would be concerned about it.

Counsel: Okay. How so? What would that concern be about and what should be done about it?

Bruno: Well, the concern would be if there were, in fact, enough dust available to pull it up through the motor and result in an actual Class I or Class II, Division 2 situation, then the motor itself would have to be an enclosed motor. It makes all the difference.

Tr. 387-88.

BHP Navajo asserts that dust suppression and control measures that have been taken in the prep room mitigate the classification of the x-ray room as a Class II, Division 2 location. This argument, however, misses the heart of the issue: a location should be classified as Class II, Division 2 if "explosive or ignitable quantities of suspended dust *might be communicated only under abnormal operating conditions*." Ex. P-9 at 32 (NEC § 500-5(b)) (emphasis added). It is clear that the NEC contemplates a Class II, Division 2 classification in circumstances where there are safety measures in place, the failure of which, although unlikely, would proliferate coal dust in combustible quantities; should the dust suppression and control measures in the adjacent prep room fail, Horton and Bruno's testimonies make clear the likelihood of potentially explosive quantities of suspended coal dust in the x-ray room.

BHP Navajo also argues that the coal dust first identified and photographed by Arnold in and around the fan motor was neither of sufficient quantity to be combustible nor, in fact, coal dust at all. Indeed, a number of witnesses testified to the likelihood that the dust observed in and around the subject motor may have been non-combustible dirt and sand that had blown into the container from outside the lab.[16] However, a conclusion that the fan motor must comply with

[16] As an additional factor in support of the issuance of Citation No. 8480130, the Secretary argues that coal dust could blow from the nearby coal stockpile and coal plant in the direction of the coal lab, potentially contributing to the accumulation of dust observed near the motor. Because an analysis of the dust observed near the motor was never performed, I find the (continued…)

Class II, Division 2 requirements need not be predicated on an existing accumulation of combustible coal dust. Rather, the NEC clearly contemplates the likelihood of accumulations occurring over time, given the location and environment of the motor installation. Therefore, because the cited exhaust fan motor and associated components did not meet the standards of the 1968 NEC, as required for a Class II, Division 2 location, I find that the Secretary has established a violation of section 77.516.

C. Significant and Substantial

Citation No. 8480130 alleges an S&S violation, as defined in section 104(d)(1) of the Mine Act. In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*, 3 FMSHRC 822 (Apr. 1981): 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding that violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987) (citing *Nat'l Gypsum*, 3 FMSHRC at 825). The Secretary need not prove a reasonable likelihood that the violation, itself, will cause injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010).

The fact of violation has been established. It is also readily apparent that there was a discrete safety hazard contributed to by the violation. On this point, Beyale testified that coal dust near the motor could ignite if there were a motor or wiring failure that caused a spark. Tr. 155-56. Moreover, because of the presence of the explosion pentagon - - oxygen, fuel, heat source, suspension, and confinement - - an explosion could result. Tr. 217-18, 274-75. As such, the focus of this S&S analysis is on the third and fourth *Mathies* criteria: whether the ignition of coal dust near the motor was reasonably likely to result in an injury, and whether the resulting injury would be serious.

The Commission has emphasized that the test under the third *Mathies* criterion is whether the hazard contributed to by the violation is reasonably likely to cause injury, not whether the violation, itself, is reasonably likely to cause injury. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2365 (Oct. 2011). Here, should an explosion occur, it is reasonably likely to result in serious injuries to technicians working in the lab, i.e., burns or smoke inhalation, and contusions,

---

[16] (…continued)
Secretary's argument on this point too speculative to consider as a basis for the violation. Rather, the Secretary's demonstration of the potential for combustible dust to accumulate in the x-ray room is sufficient to support the fact of violation.

head trauma, or broken bones from falling roof material. Therefore, I find that the violation of section 77.516 was S&S.

D. Negligence and Unwarrantable Failure

Citation No. 8480130 was modified to allege a "high" degree of negligence and an unwarrantable failure to comply with section 77.516. In particular, the modification alleges the following:

> After further review, it was determined that several company officials were aware of the existence of an open type motor being used on the exhaust fan system at the SGS Coal Sample Laboratory for an extended period of time and failed to take any form of corrective action to correct the condition. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-1 at 10.

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). It is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). The Commission has recognized the relevance of several factors in determining whether conduct is "aggravated" in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, the operator's efforts in eliminating the violative condition, and whether the operator has been put on notice that greater efforts are necessary for compliance. *See Consolidation Coal Co.*, 22 FMSHRC 328, 331 (Mar. 2000) (citing *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994)). The Commission has also considered whether the violative condition is obvious or poses a high degree of danger. *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984)). Each case must be examined on its own facts to determine whether an actor's conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consolidation Coal Co.*, 22 FMSHRC at 353).

In support of the unwarrantable failure designation, the Secretary asserts that the condition existed from, at least, January 19, when the dust accumulations and open-type motor were first identified by Arnold, until issuance of Citation No. 8480130 one month later. During that period, the Secretary alleges that BHP Navajo made no efforts to abate the violative condition by replacing the potentially hazardous motor, or even tagging the exhaust fan and the lab out-of-service until the condition could be further investigated. On this point, the Secretary alleges that prior to issuance of the citation, Arnold communicated his concerns about the condition to no less than five supervisors, while nothing was done to correct the obvious condition.

The Secretary's arguments, however, overstate the obviousness of the violation, and disregard BHP Navajo's previous good faith efforts to ensure compliance with the Mine Act and NEC. Regarding the obviousness of the violation, the Secretary asserts that the fan motor "was subjected to a significant and easily visible amount" of coal dust. Sec'y Br. at 17. As previously noted, however, a number of witnesses testified that the dust observed may have been non-combustible dirt and sand that had blown into the motor container from outside the lab. This testimony is credited, especially to the extent that it identifies legitimate ambiguity regarding the need for a fully sealed motor to protect against accumulations of combustible coal dust. In fact, that the violation was not obvious was made apparent by Inspector Williams's initial uncertainty. Following her 103(g) inspection, Williams left the mine without issuing a citation because she was unsure whether a violation existed. Williams issued a 104(a) citation the following day, only after consultation with two MSHA managers; nine days passed before she modified the 104(a) citation to a 104(d)(1) order, alleging an unwarrantable failure.

Regarding BHP Navajo's good faith efforts to ensure compliance with the Mine Act and NEC, when the SGS coal sample lab was renovated in 2012, lab management sought the electrical engineering expertise of consultant Arthur Bruno to ensure the lab's compliance with the NEC. Bruno made a litany of compliance and safety recommendations, which were all fully implemented by BHP Navajo. Bruno's recommendations, however, did not include an exhaust fan motor for the x-ray room that was compliant with Class II, Division 2 requirements. These previous efforts to ensure compliance with the NEC provide context for BHP Navajo's cautious response to Arnold's concerns. Indeed, an "unwarrantable failure does not result from a good faith, although mistaken, belief that an operator was complying with regulations." *Wyoming Fuels*, 16 FMSHRC 1618, 1627 (Aug. 1994).

Based on a thorough review of the evidence, I conclude that BHP Navajo was moderately negligent in violating the standard, and that it did not engage in aggravated conduct constituting unwarrantable failure.

IV. Penalty

While the Secretary has proposed a specially assessed civil penalty of $11,000.00 for the violation, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 20 U.S.C. § 820(j). *See Sellersburg Co*., 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that BHP Navajo is a large operator with a negligible history of section 77.516 violations. As stipulated by the parties, BHP Navajo's payment of the proposed penalty will not affect its ability to continue in business, and BHP Navajo demonstrated good faith in abating the hazard.

The Secretary has established that the violation was S&S, but has not proven that BHP Navajo was highly negligent or that the violation resulted from an unwarrantable failure to comply with section 77.516. Rather, the facts establish that BHP Navajo was moderately negligent. Consequently, a reduced civil penalty of $6,000.00 is appropriate.

ORDER

ACCORDINGLY, it is **ORDERED** that the Secretary **MODIFY** Citation No. 8480130 to a citation issued under section 104(a) of the Act, with the degree of negligence reduced to "moderate," and that BHP Navajo Coal Company **PAY** a civil penalty of $6,000.00 within 30 days of this Decision.[17]

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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/acp

[17] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 8, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CEMEX INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2014-453-M A.C. No. 01-00016-357166 Mine: Demopolis Plant CEMEX Inc.

ORDER DENYING RESPONDENT'S MOTION IN LIMINE

The above-captioned case is before me upon the Secretary's petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d).

This case is currently scheduled for hearing on December 22, 2015. The Notice of Hearing issued several months ago instructed the parties to exchange a list of witnesses at least 20 business days prior to the start of the hearing (i.e., by November 23, 2015). On November 20, the Respondent filed a Motion for Summary Decision. On November 25, two days after the deadline to disclose witnesses, the Secretary notified the Respondent of his intent to call Thomas Barkand as an expert witness to respond to the Motion for Summary Decision. The Respondent has now filed a Motion in Limine asking me to exclude Barkand's testimony.

Parties' Positions

The Respondent argues that the Secretary's late disclosure of Barkand as a witness violates the deadline set forth in my Notice of Hearing; violates Commission Procedural Rule 56(e), 29 C.F.R. § 2700.56(e), which requires discovery to be completed at least 20 days before the hearing and states that discovery shall not unduly delay or impede disposition of cases; and contradicts the spirit of Commission Procedural Rule 67(a), 29 C.F.R. § 2700.67(a), which requires motions for summary disposition to be filed at least 25 days before the hearing, therefore contemplating that the parties will have established the evidentiary record by then. The Respondent further asserts that allowing Barkand to testify would be unfair, prejudicial, and would set a dangerous precedent for future cases.

The Secretary argues that the Commission's procedural rules have not been violated and that the addition of Barkand as a witness will not conflict with the Commission's flexible evidentiary rules or set a dangerous precedent. The Secretary concedes that the witness was disclosed two days after the deadline set forth in the Notice of Hearing, but asserts that the late disclosure was a mere oversight rectified by the Solicitor as soon as he realized that the deadline was calculated in *business* days rather than regular days. The Secretary further contends that

Barkand has been made available for deposition and that the Respondent has failed to make a showing of actual prejudice.

Discussion

Although the Secretary failed to promptly disclose Barkand as a witness, the disclosure nonetheless falls within the timeframe specified by the Commission's procedural rules for completion of discovery. Discovery must be completed at least 20 days prior to the start of the hearing under Rule 56(e). 29 C.F.R. § 2700.56(e). The witness was identified on November 25, which was more than 20 days before the start of the scheduled December 22 hearing.

The last-minute disclosure violated the deadline set forth in my Notice of Hearing. However, the Commission has indicated that the exclusion of evidence is an "extreme" sanction not normally to be imposed absent a showing of bad faith on the part of the proponent of the evidence. *Gray v. N. Fork Coal Corp.*, 35 FMSHRC 2349, 2360 (Aug. 2013) (citing In re: *Paoli Railroad Yards PCB Litigation*, 35 F.3d 717, 791-92 (3d Cir. 1994); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 905 (3d Cir. 1977)). In *Gray v. North Fork*, the Commission held that the testimony of a late-disclosed witness should have been admitted in light of the lack of surprise to the opposing party, the importance of the testimony, the absence of bad faith or willfulness on the part of the proponent of the testimony, and the ability to cure any resulting prejudice. *Id.*; *see also Jim Walter Res., Inc.*, 37 FMSHRC 1958, 1965 (Sept. 2015) (permitting late disclosure absent showing of legal prejudice).

In this case, the subject matter of the testimony in question should not be a surprise to the Respondent, given that the main issue the witness will address (whether certain equipment falls within the regulatory definition of a "hoist") was raised during depositions and in the Respondent's Motion for Summary Decision. The testimony will be important to holding a fair and complete trial. The Respondent has not shown that the Secretary acted in bad faith or willfully disregarded my order in identifying Barkand as a witness two days late. Any prejudice resulting from the late disclosure can be cured by the less extreme sanction of continuing the hearing and discovery deadlines to give the Respondent time to address Barkand's testimony, and the Respondent will be granted a continuance to depose Barkand and call any rebuttal witness(es) if desired.

For the foregoing reasons, the Respondent's Motion in Limine is **DENIED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 21, 2015

SCOTT D. MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

ORDER TO SHOW CAUSE[1]

Before: Judge Feldman

The summary decision on liability in this matter held that Dominion Coal Corporation ("Dominion") violated the anti-discrimination provisions of section 105(c) by interfering with Scott D. McGlothlin's right to pay protection under 30 C.F.R. Part 90 when Dominion reduced McGlothlin's pay after McGlothlin sought a determination concerning his eligibility for Part 90 protection. *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-66 (June 2015) (ALJ). On March 19, 2014, McGlothlin's wife contacted attorney Tony Oppegard regarding her husband's discrimination complaint. At that time, Oppegard contacted Wes Addington, Deputy Director of the Appalachian Citizens' Law Center ("ACLC") about a potential client. On March 26, 2014, ACLC contacted McGlothlin to initiate representation. Proposed Confidential Settlement Agreement, Ex. A (Nov. 11, 2015).[2] Having resolved the liability at issue in this matter, the focus now shifts to the issue of the reasonableness of the attorney fee sought by ACLC, based on the legal services provided by Staff Attorney Evan Smith, and the reasonableness of the attorney fee sought by Oppegard as a private practitioner.

ACLC is seeking reimbursement for 212.5 hours of legal services at $225.00 per hour, amounting to $47,500.00, in addition to $3,174.82 in incidental expenses, resulting in a total requested reimbursement of $50,674.82. Oppegard's fee petition reflects that Oppegard is

[1] This Order to Show Cause supersedes the Order to Show Cause issued on December 18, 2015, to correct paragraph two on page one and the ordering clause, to reflect that ACLC is seeking reimbursement at a rate of $225.00 per hour. This Order to Show Cause also modifies footnote three to reflect the total attorney fees previously proposed and currently sought by the parties.

[2] The parties' request for unconditional confidentiality was denied on November 18, 2015. 37 FMSHRC __, slip op. (Nov. 18, 2015) (ALJ).

seeking reimbursement for 121.6 hours of legal services at $500.00 per hour, amounting to $60,800.00, in addition to $990.66 in incidental expenses, resulting in a total requested reimbursement of $61,790.66. Thus, ACLC and Oppegard seek a total of $112,465.48 in attorney fees based on a total of 331.1 hours (more than eight weeks) of legal services claimed.[3]

ACLC and Oppegard bear the burden of establishing that the hourly rates charged are reasonable and that the legal services provided by them were necessary and non-duplicative. *Hays v. Leeco, Inc.*, 13 FMSHRC 670, 680 (1991) (ALJ). In addressing the issue of reasonable attorney fees, courts look to the lodestar standard that requires the multiplication of an attorney's reasonable hourly rate by the reasonable number of hours expended. *See Perdue v. Kenny A. ex rel. Winn*, 599 U.S. 542, 551-52 (2010); *Blum v. Stenson*, 465 U.S. 886 (1984).

With respect to hourly rate, "an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Covad Comm'n Co. v. Revonet, Inc.*, 267 R.R.D. 14, 29 (D.D.C. 2010) (citing *Kattan ex rel. Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993)). A reasonable hourly rate, however, must be one that is adequate to attract competent counsel in the relevant legal market, but yet does not produce a windfall to that attorney. *Blum*, 465 U.S. at 894-95.

With regard to the reasonable number of hours expended, in *Hays v. Leeco, Inc.*, 13 FMSHRC at 690, Judge Koutras explained:

> In *Johnson v. Georgia Highway Express, Inc.*, *supra*, at 488 F.2d 714, the Fifth Circuit Court of Appeals stated "If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted." Likewise, in *Copeland v. Marshall*, *supra*, at 641 F.2d 891, the D.C. Circuit Court of Appeals, stated ". . . where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time." *See also Charles v. National Tea Co.*, 488 F. Supp. 270 (D.C. W.D. La. 1980), where the court cited *Johnson v. Georgia Highway Express, Inc.*, *supra*, and stated at 488 F. Supp. 276 that "The time of two (2) lawyers in a courtroom when one would do, may obviously be discounted."

Such duplication of efforts "inevitably occur[] when lawyers hold conferences, call each other on the phone, write each other letters and memoranda, or when several lawyers bill for reading the

[3] The parties have proposed terms providing for the reimbursement of attorney fees calculated at $200.00 per hour for Smith, and $350.00 per hour for Oppegard, for a total of $88,975.48. However, the parties' proposed terms may not be adopted. Smith now represents that he and Oppegard are seeking a total reimbursement of $112,465.48 for their legal services at rates of $225.00 per hour, and $500.00 per hour, respectively, if the parties' proposed terms differ from the relief ultimately awarded by the Commission in this proceeding. Email from Evan Smith (Dec. 4, 2015).

same document received from the defendants or the court." *Chavez v. Mercantil Commercebank, N.A.*, 2015 WL 136388, at *4 (S.D. Fla. Jan. 9, 2015).

The Commission addressed the issue of duplicative private attorney fees in a case brought by the Secretary pursuant to section 105(c)(2) in *Sec'y of Labor o/b/o Ribel v. Eastern Associated Coal Corp.*, 7 FMSHRC 2015 (Dec. 1985). In *Ribel*, the Commission declined to award a private counsel attorney fees for efforts that were "not reasonably incurred" because they were duplicative of the Secretary's competent representation and prosecution of the claimant's discrimination complaint. *Id.* at 2023, 2025. Similarly, in *Leeco, Inc.*, Judge Koutras determined that legal fees sought by both Oppegard and Stephen Sanders, who is currently Director of ACLC, were duplicative, and only awarded fees to one attorney. *Hays v. Leeco, Inc.*, 13 FMSHRC at 694.

In *Pendley v. Highland Mining Co.*, 37 FMSHRC __ slip op. (Sept. 21, 2015) (ALJ), over the objection of the respondent's counsel, the judge awarded Addington and Oppegard a total of $84,125.15, including expenses, for 214.2 hours of legal work. Unlike this case, which was decided by summary decision, *Pendley* was decided after a hearing on the merits. To support the award of attorney fees, the judge determined that the *Pendley* case "presented a fairly complex and unique set of facts." *Id.* at 2. However, the liability determination in this case was resolved by summary decision because it was straightforward in that it was based on an undisputed chronology of events regarding McGlothlin's application for Part 90 protection.

Despite the judge's finding that the issues in *Pendley* were "complex and unique," the dual legal fees sought by both ACLC and Oppegard appear to be the rule, rather than the exception. In this regard, ACLC and Oppegard have demonstrated a pattern of dual representation in numerous recent section 105(c) discrimination cases. *See*, *e.g.*, *Pendley v. Highland Mining Co.*, 37 FMSHRC __ slip op. (Sept. 21, 2015) (ALJ Andrews); *Shemwell v. Armstrong Coal Co., Inc.*, 36 FMSHRC 2352 (Aug. 2014) (ALJ McCarthy); *Sec'y of Labor o/b/o Riordan v. Knox Creek Coal Corp.*, 36 FMSRHC 1050 (Apr. 2014) (ALJ Moran); *Shemwell v. Armstrong Coal Co., Inc.*, 35 FMSHRC 726 (Mar. 2013) (ALJ Feldman); *Sec'y of Labor o/b/o Flener v. Armstrong Coal Co., Inc.*, 34 FMSHRC 1658 (July 2012) (ALJ Simonton); *Sec'y of Labor o/b/o Green v. D&C Mining Corp.*, 33 FMSHRC 243 (Jan. 2011) (ALJ Harner); *Gray v. North Fork Coal Corp.*, 33 FMSHRC 2495 (Oct. 2011) (ALJ Rae); *Sec'y of Labor o/b/o Wilder v. Private Investigation and Counter Intelligence Servs., Inc., et al*, 33 FMSHRC 1667 (July 2011) (ALJ Gill); *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 983 (Aug. 2010) (ALJ Hodgdon).

ORDER

Without question, both ACLC and Oppegard are competent, if not specialized, in representing claimants in section 105(c) proceedings. Given both attorneys' expertise, **IT IS ORDERED** that McGlothlin's counsel **SHOW CAUSE on or before January 13, 2016**, why the total requested reimbursement for attorney fees of $112,465.48 for legal services

provided should not be significantly reduced. In this regard, McGlothlin's counsel should specifically address:

- Why the $225 and $500 hourly rates for ACLC and Oppegard, respectively, are reasonable;

- Why the total 331.1 hours claimed for legal services claimed are reasonable;

- Why the services rendered were necessary and not duplicative, given the fact that many of the fees are based on individual reimbursement to each attorney for calls and emails to each other, and for the reading and review of filings in this matter; and

- Why either ACLC or Oppegard could not have solely and competently represented McGlothlin, as 105(c) discrimination cases are within each attorneys' area of expertise.

McGlothlin's attorneys may also provide any other documentation, case law or other information, they deem relevant.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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December 22, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CEMEX INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2014-453-M A.C. No. 01-00016-357166 Mine: Demopolis Plant CEMEX Inc.

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

The above-captioned case is before me upon the Secretary's petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d).

Background

At issue in this proceeding is a single citation issued to the Respondent under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 56.19120, which requires each operator of a surface metal or nonmetal mine to develop and follow a "systematic procedure of inspection, testing, and maintenance of shafts and hoisting equipment" at its mine. This mandatory safety standard was promulgated under the Secretary's personnel hoisting regulations, which apply to "hoists and appurtenances used for hois[t]ing persons." 30 C.F.R. § 56.19000. The Secretary defines a "hoist" as "a power driven windlass or drum used for raising ore, rock, or other material from a mine, and for lowering or raising persons and material." *Id.* § 56.2. Proceeding under the theory that elevators can fall within this regulatory definition, the Secretary cited the Respondent for failing to complete annual inspections of three elevators at its Demopolis Plant in 2013. The citation alleges that the doors to one of the elevators would open on the sixth and eighth floor while the elevator was on the ground floor, exposing miners to a fall hazard.

After a hearing was scheduled and discovery was conducted, the Respondent filed a motion for summary decision arguing that the elevators at the Demopolis Plant do not constitute "hoists" within the meaning of the regulations. The Respondent further asserts that the Secretary did not provide fair notice of his position that the personnel hoisting regulations apply to non-hoists as well.

The Secretary opposes the motion for summary decision and has filed a cross motion for partial summary decision asking me to narrow the scope of the issues at hearing by finding that the Respondent's elevators do qualify as hoists that are subject to the Secretary's personnel hoisting regulations.

Legal Framework for Summary Decision

Commission Procedural Rule 67, which is analogous to Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to grant summary decision when the entire record shows that "there is no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The record must be viewed in the light most favorable to the nonmoving party and the judge may not weigh the factual evidence or engage in fact-finding beyond those facts that are established in the record. *W. Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015); *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4 (Jan. 2007).

Discussion & Conclusions of Law

The Respondent argues that the cited elevators do not constitute hoists because they are traction (friction driven) elevators, not power driven drums or windlasses.[1] In support of its position that traction elevators are not hoists, the Respondent points to deposition testimony from two MSHA inspectors, including the inspector who issued the citation, showing that neither could confidently identify traction elevators as power driven drums or windlasses.

The Secretary asserts that the Respondent's argument relies on a purely semantic distinction between the terminology employed by the elevator industry and that employed by MSHA, which explains the inspectors' confusion at deposition. Relying on an affidavit from MSHA Senior Electrical Engineer Thomas Barkand, the Secretary argues that "traction elevator" is a term of art in the elevator industry that actually refers to friction drum hoists.

The Secretary's interpretation of his own ambiguous regulations that lacks the force of law is entitled to respect to the extent it has the power to persuade. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see, e.g.*, *Resolution Copper Mining, LLC*, 37 FMSHRC _, Nos. WEST 2013-319-RM et al. (Oct. 28, 2015) (according *Skidmore* deference when Secretary's interpretation of safety standard was consistent with language and purpose of standard and served Mine Act's purpose of promoting safety). I find that the Secretary's interpretation of the personnel hoisting regulations to include traction elevators is reasonable and persuasive, for the reasons discussed below.

First, the Secretary's interpretation is consistent with the Secretary's regulations for surface coal mines under Part 77 and with the Mine Act's safety-promoting purposes. The Respondent correctly notes that Part 77 distinguishes between elevators and hoists. However, Part 77 applies the same examination requirements to both elevators and hoists and does not exempt elevators from examination as the Respondent seeks to do in this case. *See* 30 C.F.R. § 77.1403. Section 77.1400 states that the personnel hoisting regulations for surface coal mines apply to "hoists and elevators, together with their appurtenances, that are *used for hoisting persons*." *Id.* § 77.1400 (emphasis added). The intended use of the equipment for "hoisting persons" is the germane idea that triggers the need for safety examinations to fulfill the Mine Act's safety-promoting purposes. In contrast to the Part 77 regulations, the hoisting regulations

[1] One of the elevators at the Demopolis Plant is a hydraulic elevator, but it was not cited and therefore is not at issue in this case.

in Part 56 speak largely to aerial tramways and train conveyances, which are surface mine oriented. There are fundamental differences between coal and metal/nonmetal mining that could account for the differences in language between Parts 56 and 77. Regardless, I find it significant that elevators are subject to the same examination requirements as hoists under Part 77 and are not exempted from regulation.

The Secretary's interpretation of traction elevators as hoists is reasonable because it is not an extension of the regulatory definition of "a power driven windlass or drum used … for lowering or raising persons" under § 56.2. As noted above, the germane concept underpinning this definition is that of a vehicle which hoists personnel up and down. This concept encompasses elevators. Moreover, the Secretary has presented evidence that traction elevators are, in essence, friction drum hoists because they share the same operating principle and technical design. The Respondent argues that elevators' operating mechanisms differ from hoists in that elevators have governors and undercar safety devices. The safety features and mechanisms which control overspeed may differ, but this does not change the fundamental operating mechanism of a traction elevator and does not mean that such equipment is excluded from safety examinations or MSHA inspections. The fact that the doors on one of the cited elevators opened at higher floors while the elevator was on the ground floor, exposing the open elevator shaft, demonstrates that governors and undercar safety mechanisms do not make elevators intrinsically safe and emphasizes the need for safety examinations to be conducted in accordance with § 56.19120.

Because the Secretary has advanced a reasonable and persuasive interpretation of 30 C.F.R. § 56.19120 that is consistent with the language and purpose of the standard, I accord *Skidmore* deference to the Secretary's interpretation and therefore find that the traction elevators at the Demopolis Plant constitute "hoists" within the meaning of the standard.

The Respondent argues that the Secretary did not provide due notice of his interpretation of § 56.19120 as covering elevators. To determine whether a mine operator has sufficient notice of the meaning of a regulation to be charged with violating it, the Commission applies the reasonably prudent person test. *See LaFarge North America*, 35 FMSHRC 3497, 3500 (Dec. 2013). Under this test, even if the operator does not have actual knowledge of the Secretary's interpretation of a safety standard, the operator is considered to have constructive knowledge when a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have ascertained the specific prohibition or requirement contained therein and realized that it was applicable under the circumstances. *LaFarge*, 35 FMSHRC at 3501; *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990).

In this case, I reject the Respondent's argument that it was not on notice of the Secretary's interpretation of the cited regulation for two reasons. First, it would be unreasonable for a prudent person familiar with the mining industry and the protective purposes of the personnel hoisting regulations to believe that elevators are not subject to those regulations. Second, the Respondent had hired a contractor to systematically inspect and test the elevators at the Demopolis Plant in the past and submitted to the MSHA inspector correspondence from elevator maintenance companies detailing the updates needed to keep it in compliance with

safety regulations. Both actions indicate a conscious level of understanding that the elevators were subject to health and safety regulations.

For the foregoing reasons, the Respondent's motion for summary decision is **DENIED**.

Because no material issues of fact remain on the issue of whether the traction elevators at the Demopolis Plant constitute "hoists" within the meaning of § 56.19120, the Secretary's motion for partial summary decision is **GRANTED** as to that narrow issue.

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

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December 30, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CEMEX INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. SE 2014-453-M A.C. No. 01-00016-357166 Mine: Demopolis Plant CEMEX Inc.

ORDER DENYING MOTION FOR RECONSIDERATION

The above-captioned case is before me upon the Secretary's petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d).

Procedural Background

At issue in this proceeding is a single citation alleging that the Respondent failed to follow a systematic procedure of inspection, testing, and maintenance for three traction elevators at its Demopolis Plant, in contravention of 30 C.F.R. § 56.19120, which is one of the Secretary's personnel hoisting regulations.

A hearing was previously scheduled for December 22, 2015. On November 20, the Respondent filed a motion for summary decision arguing that its elevators do not fall within the definition of "hoists" under 30 C.F.R. Part 56 and therefore are not subject to § 56.19120. The Secretary submitted a response and cross motion for partial summary decision asking me to find that traction elevators do constitute hoists within the meaning of the personnel hoisting regulations in Part 56. Attached to the response and cross motion was an affidavit from MSHA engineer Thomas Barkand attesting that traction elevators are equivalent to friction drum hoists.

On December 10, the Respondent submitted a response to the Secretary's cross motion for summary decision arguing that the Secretary's own evidence and regulations establish that elevators are not hoists. The Respondent did not allege that genuine issues of material fact remained to be adjudicated as to this issue.

On December 22, I issued an order finding that elevators do qualify as hoists within the meaning of § 56.19120. I denied the Respondent's motion for summary decision and granted the Secretary's cross motion for partial summary decision on that issue.

Discussion

The Respondent argues that granting partial summary decision was inappropriate because it did not have an opportunity to depose Barkand, whose unchallenged testimony forms the basis for the Secretary's cross motion for partial summary decision, or to designate any rebuttal witnesses.

Although my order granting partial summary decision mentioned Barkand's affidavit as an aside, I did not rely on his statements in finding that the traction elevators at the Demopolis Plant fall within the regulatory definition of a "hoist," which is a question of law. This finding was predicated upon my interpretation of the regulations and application of the broad protective purposes of the Mine Act. The crux of my analysis was that elevators, like hoists, are used for hoisting personnel; exempting them from safety examinations under Part 56 would defeat the Mine Act's safety-promoting purposes and would be inconsistent with the parallel personnel hoisting regulations found in Part 77, which mention elevators separately but still subject them to the same examination requirements as hoists. Barkand's opinions did not influence this analysis. The fact that the Respondent did not have a chance to depose him or designate a rebuttal witness is therefore irrelevant.

The Respondent contends that summary judgment is inappropriate because issues of material fact exist, but no genuine, material factual issues have been raised. The burden is on the party opposing a motion for summary decision to provide a "separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference to any accompanying affidavits or other verified documents." 29 C.F.R. § 2700.67(d). In its opposition to the cross motion for partial summary decision, the Respondent did not allege that any material issues of fact remained to be decided, in fact it was the Respondent who filed the first motion for summary decision alleging that no material facts exist. Whether an elevator is a hoist under the cited standard is a question of interpretation of the standard and the regulatory purpose of the Act which is a question of law properly before me. Therefore, the motion is **DENIED**.

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

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December 30, 2015

SECRETARY OF LABOR, MSHA, on behalf of **ERIC GREATHOUSE**, Complainant, v. MONONGALIA COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-904-D MORG-CD 2015-07 Monongalia County Mine Mine ID: 46-01968
SECRETARY OF LABOR, MSHA, on behalf of **RICKY BAKER**, Complainant, v. OHIO COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-905-D MORG-CD 2015-08 Ohio County Mine Mine ID: 46-01436
SECRETARY OF LABOR, MSHA, on behalf of **LEVI ALLEN**, Complainant, v. THE MARSHALL COUNTY COAL, CO., MCELROY COAL COMPANY, MURRAY AMERICAN ENERGY INC., and MURRAY ENERGY CORPORATION, Respondents.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-906-D MORG-CD 2015-09 Marshall County Mine Mine ID: 46-01437

SECRETARY OF LABOR, MSHA, on behalf of **MICHAEL PAYTON**, Complainant, v. MARION COUNTY COAL CO., CONSOLIDATION COAL COMPANY, MURRAY AMERICAN ENERGY INC., and MURRAY ENERGY CORPORATION, Respondents.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-907-D MORG-CD 2015-10 Marion County Mine Mine ID: 46-01433
SECRETARY OF LABOR, MSHA, on behalf of **ANN MARTIN,** Complainant, v. HARRISON COUNTY COAL CO., CONSOLIDATION COAL CO. MURRAY AMERICAN ENERGY INC., and MURRAY ENERGY CORPORATION, Respondents.	INTERFERENCE PROCEEDING Docket No. WEVA 2015-908-D MORG-CD 2015-11 Harrison County Mine Mine ID: 46-01318
SECRETARY OF LABOR, MSHA, on behalf of **MARK RICHEY,** Complainant, v. THE OHIO VALLEY COAL COMPANY and MURRAY ENERGY CORPORATION, Respondents.	INTERFERENCE PROCEEDING Docket No. LAKE 2015-616-D MORG-CD 2015-12 Powhatan No. 6 Mine Mine ID: 33-01159

ORDER DENYING RESPONDENTS' MOTION TO DISMISS

These cases are before me upon a complaint of interference filed by the Secretary of Labor ("the Secretary") on behalf of six miners and miner representatives against the Respondents pursuant to the interference provisions of section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Mine Act"). The Respondents have filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted under the Mine Act. For the reasons set forth below, the motion is denied.

I. The Secretary's Complaint

The complaint alleges that the Respondents violated section 105(c)(1) by implementing "Safety and Production Bonus Plans" at six different mines that interfere with the exercise of

rights protected under the Mine Act. The bonus plans, copies of which are attached to the complaint, provide that miners will receive graduated bonuses for each shift worked based on the amount of coal mined during the shift. A miner must be physically present for the entire shift in order to qualify for a bonus, however, and certain other occurrences will disqualify the entire crew from receiving a bonus for a given shift. Each mine's bonus plan contains the following limiting language:

> An S&S citation received on a section (inby the tailpiece) will disqualify all shifts worked on that section, that day, from earning a bonus. A lost time accident to a crew member that incapacitates the crew member during the shift will disqualify the entire crew for the bonus on that shift. Issuance of a "D Order" or "B Order" on a section (inby the tailpiece) attributable to the crews working on that section will disqualify all the crews on that section from the bonus for seven (7) consecutive days, including the day the Order occurred.

(Compl. Exs. A, C, E, G, I, K.)

The Secretary alleges that the bonus plans are coercive and interfere with the exercise of protected rights in that they create financial and social pressure for miners to refrain from engaging in protected activities that could impact their own or their coworkers' eligibility for bonuses or that could affect productivity in the short term. Specifically, the Secretary alleges that the bonus plans directly affect the following protected activities: refusing to work under hazardous conditions; reporting injuries and making safety complaints to management and miner representatives; requesting an MSHA inspection to address potential violations or imminent dangers; performing safety-related work such as workplace examinations or maintenance tasks that could have the effect of temporarily delaying production; and exercising the walkaround rights guaranteed to miner representatives. (Compl. ¶¶ 44-48.)

II. The Motion to Dismiss

In their motion to dismiss, the Respondents contend that, as a matter of law, the complaint fails to state a violation of the Mine Act. Relying on *Swift v. Consolidation Coal Company*, 16 FMSHRC 201 (1994), and *Feagins v. Decker Coal Company*, 23 FMSHRC 47 (Jan. 2001) (ALJ), the Respondents argue that the bonus plans can be found to violate section 105(c) of the Mine Act only if (1) they overtly impose negative consequences for the exercise of protected rights, or (2) they were enacted with the intent to damage or deny such rights. The bonus plans do not, on their faces, impose negative consequences for the exercise of protected rights, and the Secretary has not pled that they were enacted with the intent to harm such rights or that they have actually caused any such harm. Therefore, the Respondents contend that the complaint should be dismissed for failure to state a claim upon which relief can be granted.

The Secretary argues that the Respondents' motion to dismiss should be denied because establishing unlawful interference does not require proof of discriminatory intent or proof that miners have actually been deterred from exercising protected rights. According to the Secretary, the test set forth in *Swift* and *Feagins* is inapposite because those cases involved claims of discrimination rather than interference, which is treated as a separate cause of action under

section 105(c). Relying on the plurality opinion authored by Commissioners Jordan and Nakamura in *UMWA on behalf of Franks v. Emerald Coal Resources, LP*, 36 FMSHRC 2088 (Aug. 2014) [hereinafter "*Franks*"], *vacated and remanded on other grounds*, _ Fed. Appx. _, 2015 WL 4647997 (3d Cir. Aug. 6, 2015), the Secretary asserts that the appropriate test for interference is whether, under the totality of the circumstances and from the point of view of a reasonable miner, the Respondents' conduct in implementing the bonus plans could reasonably be viewed as tending to interfere with the exercise of protected rights. The Secretary argues that the complaint contains sufficient factual allegations to meet this test.

III. Legal Framework

A. Dismissal for Failure to State a Claim

The pleading requirements for complaints filed under section 105(c) of the Mine Act are found in Commission Procedural Rule 42, which states that a complaint must include "a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42. The Commission has characterized this pleading requirement as "minimal." *Ribble v. T&M Dev.*, 22 FMSHRC 593, 595 (May 2000); *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921 (Nov. 1996).

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a respondent to move for dismissal of a complaint due to failure to state a claim upon which relief can be granted. Although the Commission's procedural rules do not contain an analog, the Respondents' motion to dismiss is tantamount to a 12(b)(6) motion.[1] To survive such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This means the complaint must plead sufficient facts to allow the court to draw a reasonable inference that the named respondent is liable for the misconduct alleged. *Id.* (citing *Twombly*, 550 U.S. at 556-57). The Commission has stated that motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted. *Ribble*, 22 FMSHRC at 594-95; *Perry*, 18 FMSHRC at 1920.

B. Section 105(c) Interference

The prohibition against interference is established in section 105(c)(1) of the Mine Act, which provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against *or otherwise interfere with the exercise of the statutory rights* of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a

[1] The Commission follows the guidance of the Federal Rules of Civil Procedure when its procedural rules do not otherwise apply. 29 C.F.R. § 2700.1(b).

> complaint under or related to this Act … or … is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 [relating to black lung] or … has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(2) permits a miner or his representative to file a discrimination complaint with the Secretary if he believes "that he has been discharged, interfered with, or otherwise discriminated against" in violation of the Mine Act. *Id.* § 815(c)(2).

Most cases that come before the Commission pursuant to section 105(c) involve allegations of discrimination rather than interference. In such cases, the Commission evaluates the sufficiency of the complaint by applying the *Pasula-Robinette* framework, wherein a complainant makes out a prima facie case of discrimination by showing that he engaged in protected activity, suffered an adverse employment action, and the adverse action was motivated at least in part by the protected activity. *See Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1064 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

However, in the recent *Franks* case, a majority of the Commission recognized that interference claims should be analyzed under a separate framework. Two Commissioners expressly stated that section 105(c) "establishes a cause of action for unjustified interference … which is separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework." 36 FMSHRC at 2103 n.22 (Young & Cohen, Comm'rs). They also noted that this separate cause of action has been implicitly recognized in at least two prior Commission decisions. *Id.* (citing *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478-79 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), and *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1, 7-8 (Jan. 2005)).

Two Commissioners, who wrote separately in *Franks*, articulated a test for evaluating interference claims as a separate cause of action. *Id.* at 2108 (Jordan & Nakamura, Comm'rs). This test has been followed by several of the Commission's Administrative Law Judges[2] since

[2] *Sec'y of Labor on behalf of McGary v. Marshall County Coal Co.*, 37 FMSHRC _, Nos. WEVA 2015-583-D et al. (Nov. 18, 2015) (ALJ); *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-65 (June 2015) (ALJ); *Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 309-11 (Feb. 2015) (ALJ). *See also Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 2352, 2356-57 (Aug. 2014) (ALJ) (pre-*Franks* ALJ decision applying similar interference test crafted from same precedent); *Sec'y of Labor on behalf of Clapp v. Cordero Mining, LLC*, 33 FMSHRC 3029, 3072 (Dec. 2011) (ALJ) (same).

Franks and is now advanced by the Secretary as the appropriate test for interference. Under this test, an interference violation occurs if:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
>
> (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Id. Thus, the test approaches interference from the perspective of those whose rights the Mine Act attempts to protect.

By contrast, the Respondents' proposed interference test would approach the issue from the mine operator's perspective by limiting unlawful interference to situations when the operator specifically intends to harm protected rights or takes an action that overtly imposes negative consequences for the exercise of protected rights. This test is inconsistent with the Commission's and other courts' expansive interpretations of what conduct is prohibited under section 105(c)[3] and with Congress's stated intent to "protect miners against not only the common forms of discrimination, such as discharge, suspension, [or] demotion … but also against the *more subtle forms of interference*, such as promises of benefits or threats of reprisal." S. Rep. No. 95-181, at 36 (1977) (emphasis added). The Senate report relating to 105(c) also stresses that the provision should be "construed expansively to assure that miners will not be inhibited in any way" from exercising the rights afforded by the Mine Act. *Id.* The interference test advocated by the Secretary is consistent with this legislative directive because it addresses not only purposeful and overt attacks on protected rights but also any other actions that may inhibit miners' exercise of protected rights in any way.

The interference test advocated by the Secretary is also consistent with Commission precedent. It encompasses principles accepted by the Commission in contexts outside of 105(c) interference. For example, the Commission has recognized that evaluation of the impact of an employer's conduct on protected rights requires evaluating, from an objective standpoint,

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[3] For example, in *Simpson v. FMSHRC*, the D.C. Circuit deemed a constructive discharge to be discriminatory despite the absence of evidence of specific intent, reversing a Commission decision that had required proof of a retaliatory motive. 842 F.2d 453, 461-63 (D.C. Cir. 1988), *rev'g Simpson v. Kenta Energy, Inc.*, 8 FMSHRC 1034 (1986). Characterizing the Commission's interpretation of section 105(c) as "severely restrictive," the D.C. Circuit noted that Congress had enacted 105(c) to replace a narrower discrimination provision and suggested that the protection conferred should be construed broadly so as to render coverage comparable to that afforded under other antidiscrimination statutes. 842 F.2d at 463. *See also Sec'y of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1537-38 (Sept. 1997) (rejecting argument that operator need only "reasonably accommodate" protected walkaround rights, as 105(c) provides expansive protection by assuring exercise of rights will not be inhibited "in any way").

whether the conduct "reasonably tend[s] to discourage" protected activity. *Sec'y of Labor on behalf of Poddey v. Tanglewood Energy*, 18 FMSHRC 1315, 1321 (Aug. 1996); *Sec'y of Labor on behalf of Johnson v. Jim Walter Res., Inc.*, 18 FMSHRC 552, 559 (Apr. 1996). As another example, in the context of determining whether an operator could receive a regular citation for interfering with a protected right, the Commission has previously recognized that this determination requires the court to balance the operator's business interests against miners' statutory rights. *Emery Mining Corp.*, 10 FMSHRC 276, 288-92 (Mar. 1988) (citing *Hudgens v. NLRB*, 424 U.S. 507, 521-22 (1976) and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). Significantly, the interference test advanced by the Secretary is also consistent with the two prior decisions referenced above, *Moses v. Whitley Development* and *Secretary on behalf of Gray v. North Star Mining*, in which the full Commission implicitly recognized interference as a separate cause of action.

The Commission has long recognized that "case law interpreting the [NLRA], upon which the Mine Act's antidiscrimination provisions are modeled, provides guidance on resolution of discrimination issues." *Sec'y of Labor on behalf of Johnson v. Jim Walter Res.*, 18 FMSHRC at 558 n.11; *see, e.g.*, *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite*, 23 FMSHRC 924, 934 n.8 (Sept. 2001); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-43 (Dec. 1990). To determine whether interference has occurred under section 8(a)(1) of the NLRA, the National Labor Relations Board asks "whether the employer engaged in conduct, regardless of intent, which reasonably tends to interfere with the free exercise of employee rights under the Act." *Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1223 (2004) (citing *American Freightways Co.*, 124 NLRB 146, 147 (1959)); 29 U.S.C. § 158(a)(1). If so, the burden shifts to the employer to demonstrate a legitimate and substantial business justification for its conduct. *Cal. Newspapers P'ship d/b/a ANG Newspapers*, 343 NLRB 564, 565 (2004); *Indep. Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 553 (5th Cir. 2013); *see also Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (discussing need to balance employees' protected NLRA rights and employers' property rights under 8(a)(1)).

The Respondents' proposed interference test focuses on the operator's motive in that it would impose liability only when the interference is intentional or when it is overt and therefore foreseeable to the operator. The Secretary's proposed interference test is more consistent than the Respondents' with Commission precedent and Congressional intent regarding section 105(c) and aligns more closely with analogous principles developed under the NLRA. I will therefore apply the Secretary's test in evaluating the sufficiency of the complaint.

IV. Analysis of Sufficiency of Complaint

To survive the motion to dismiss, the Secretary's complaint must contain a simple statement of facts that tend to demonstrate interference and must also contain a statement of relief requested. There is no dispute that the complaint contains a clear statement of the relief requested. Therefore, the review of the complaint focuses on whether or not it contains sufficient factual allegations, accepted as true, to permit a reasonable inference that miners and miner representatives would view the bonus plans as tending to interfere with the exercise of their protected rights.

The complaint explains that the bonus plan was put into effect on January 15, 2015, at six underground coal mines that are operated by Murray Energy. The complaint further discusses the bonus plan in detail and enumerates the rights with which the bonus plans are alleged to interfere, referencing the statutory basis for each right. In addition, the complaint identifies which aspect or aspects of the bonus plans will interfere with each right; and briefly explains how such interference will occur. For example, the complaint alleges that the bonus plans will interfere with the right of an authorized representative of miners to accompany an MSHA inspector during the physical inspection of a mine. (Compl. ¶ 45.) This is referred to as the representative's "walkaround" right and is protected under section 103(f) of the Mine Act. *See* 30 U.S.C. § 813(f). The bonus plans disqualify an employee from receiving a bonus if he is not physically present on his assigned section during the entire shift, which could deter a representative from exercising his protected walkaround right when doing so would necessitate absenting himself from his section for part of the shift. (Compl. ¶ 45.)

Finally, the complaint sets forth the amount of bonus that each employee may receive and under what circumstances. The facts are detailed and contain more than enough information to understand the basis of the claims made by the Secretary. I find, therefore, that the facts alleged in the complaint, if accepted as true, are sufficient to make out a plausible claim that the bonus plans have a tendency to interfere with miners' and miner representatives' exercise of protected rights. The Complaint meets the requirements of the Commission for making an interference complaint and accordingly, the Respondents' Motion to Dismiss is **DENIED**.

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

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