

February 2017

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Review was granted in the following cases during the month of February 2017:

Secretary of Labor v. Alcoa World Alumina, LLC, Docket Nos. CENT 2015-128-M, et al.
(Judge Gill, January 10, 2017)

Secretary of Labor v. Sims Crane, Docket No. SE 2016-81 (Judge McCarthy, January 13, 2017)

Secretary of Labor v. A&G Coal Corporation and Chestnut Land Holdings, LLC., Docket No.
VA 2017-69 (Kenneth R. Andrews, January 19, 2017)

Review was not denied in any case during the month of February 2017.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 10, 2017

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of AARON LEE ANDERSON

v.

A & G COAL CORPORATION
and CHESTNUT LAND HOLDINGS, LLC

Docket No. VA 2017-69-D

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

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On January 19, 2017, the Administrative Law Judge issued a decision granting an Application for Temporary Reinstatement filed by the Secretary of Labor on behalf of Aaron Lee Anderson against A & G Coal Corporation (“A & G”) pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).¹ 39 FMSHRC ___, slip op. at 14, No. VA 2017-69-D (Jan. 19, 2017) (ALJ). The Judge further found that temporary reinstatement should not be tolled by the partial layoff which occurred at the mine subsequent to Anderson’s termination. The operator subsequently filed a timely petition for review of the Judge’s grant of temporary reinstatement, directed at the tolling issue. For the reasons that follow, we grant the petition and affirm the Judge’s decision.

¹ Section 105(c)(2) of the Mine Act provides in pertinent part:

Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary’s receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.

30 U.S.C. § 815(c)(2).

I.

Factual and Procedural Background

A. Factual Background

A & G operates the Strip No. 12 Mine, a surface coal mine located in Virginia. Aaron Lee Anderson was employed at the mine, primarily as a truck driver hauling rock, for approximately three months. He was hired on August 26, 2016, and discharged from his position on November 21, 2016.

On November 29, 2016, Anderson filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") against A & G. App. for Temp. Reinstatement, Ex. B at 1-2. MSHA conducted a preliminary investigation of Anderson's discrimination complaint and on January 3, 2017, the Secretary filed an Application for Temporary Reinstatement, requesting an order requiring A & G to temporarily reinstate Anderson to his former position as haul truck driver or to a comparable position. *Id.* at 4. The Secretary alleges that the discharge was motivated by the fact that Anderson raised safety concerns regarding dusty conditions and compromised visibility in the pit area.

The Judge held a hearing on temporary reinstatement on January 12, 2017. At the hearing, Anderson testified² that on November 18, 2016, he was working night shift at the mine. Anderson testified that when he arrived at the mine pit at the start of the shift, he noticed a large amount of dust in the air. Using his truck's CB radio, Anderson communicated his safety concerns to his supervisor, Danny Orrick. He informed Orrick that the dust in the air was impairing his vision while he was operating his truck. Tr. 28-29. According to Anderson, Orrick stated that he would send a water truck to clear the air. Tr. 25, 27. After Anderson hauled his first load to the dump site, he saw that the water truck had not been brought in to control the dust. While hauling his second load of rock, Anderson repeated his concern about the dust impairing visibility over the CB radio. Orrick did not respond to the second complaint. Anderson heard two other truck drivers voice similar concerns about the dust impairing visibility. Tr. 28, 29, 31, 37. Anderson testified that he continued working for fear of losing his job. Tr. 27.

The dust was still significantly impairing visibility when Anderson returned to the pit to receive a third load. Anderson saw one of the front-end loaders raise its shovel above the dust, and believed that the loader's operator was signaling to him to position his truck to be loaded. Anderson attempted to back his truck into position, but collided with another truck which was

² The Commission has noted that in temporary reinstatement proceedings, it is "not the [J]udge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) (citation omitted). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Res., Inc.*, 920 F.2d 738, 744 (11th Cir. 1990). Thus, the Judge here correctly accepted Anderson's testimony as accurate.

already being loaded. Anderson testified that he could not see the other truck because of the dust. The collision caused more than \$50,000 in damage to the other truck. Tr. 29-31, 51-55, 120. After the accident, A & G tested Anderson for drugs and sent him home. Tr. 31-33. The test results were negative. Tr. 33.

Prior to the November 18 accident, Anderson had raised other safety concerns. He had made three complaints to Orrick concerning berm heights, and how they needed to be raised. According to Anderson, Orrick would become agitated at these complaints, and in one instance Orrick responded that Anderson should do his job and Orrick would do his. Tr. 39. Anderson had also complained many times about the handrail on his truck being broken. Tr. 29, 55-56. A & G fixed the handrail, but never in a manner that prevented it being broken again. As of November 18, the handrail had remained unrepaired for approximately 10 days. Tr. 29, 56.

A & G terminated Anderson on November 21, asserting that the accident three days earlier was the reason. Anderson filed a complaint with MSHA pursuant to section 105(c) of the Mine Act eight days later. The Secretary subsequently investigated, and then filed his Application for Temporary Reinstatement.

While the Secretary was investigating Anderson's complaint, A & G idled operations at the Strip No. 12 Mine due to economic conditions. On December 28, 2016, the mine was placed in "nonproducing" status with MSHA. As a result of the idling of the mine, approximately 29 miners were laid off and approximately 19 were transferred to the Bishop Coal Mine, a mine two hours away which was owned by A & G's parent company. Eight miners either refused transfer or resigned. Tr. 90-91; PTR, Ex. A.

Shortly after the Secretary filed his request to have Anderson reinstated to his former position with A & G, the operator filed a motion with the Judge asking that any reinstatement order be tolled due to the layoff. A & G asserted that it would not have transferred Anderson to the Bishop Coal Mine because Anderson did not have enough seniority. In support of its tolling motion, A & G submitted a list of its employees at the Strip No. 12 Mine showing which ones had been offered and accepted a transfer to the Bishop Mine, which had been offered and declined a transfer, and which miners were laid off and not offered a transfer. PTR, Ex. A. According to the employee list, all employees who were offered transfers to the Bishop Mine had more seniority than Anderson.

The Secretary opposed tolling of Anderson's temporary reinstatement and challenged the system which A & G used to determine which employees would be laid off and which employees would be offered the opportunity to transfer.

On January 19, the Judge issued an order requiring temporary reinstatement of Anderson and denying A & G's tolling motion. A & G subsequently reinstated Anderson to a position that it created for him as a truck driver hauling rock at one of A & G's reclamation projects.

B. The Judge's Order

The Judge found that the Secretary's section 105(c)(2) complaint was not frivolous. Specifically, the Judge found that the Secretary had made a non-frivolous claim that Anderson engaged in protected activity and suffered an adverse action. The Judge further found A & G had knowledge of Anderson's safety complaints made over the CB radio, and that Anderson's discharge closely followed his safety complaints. The Judge further found that A& G displayed animus toward Anderson's protected activity in that its responses to the safety complaints ranged "from inaction to outright hostility." Slip op. at 11. Accordingly, the Judge concluded that the Secretary had made a non-frivolous claim that a nexus existed between Anderson's protected activity and his subsequent discharge.

In denying the operator's tolling motion, the Judge reasoned that the operator had failed to demonstrate that Anderson would not have been transferred to Bishop Coal had he not been discharged following the accident. The Senior Vice President of A & G's corporate parent (Southern Coal Corporation), Patrick Graham, testified that three factors were used to determine whether a miner would be laid off or transferred to the Bishop Mine – seniority, skills, and willingness to travel to the Bishop Mine. However, the Judge found that each of those three factors was problematic with respect to Anderson:

- 1) The Judge observed that, according to the operator's own employee list, a miner who was hired the same month as Anderson had been transferred to the Bishop Mine, and another miner who had a decade more seniority than that miner was laid off.
- 2) The Judge further observed that the employee list did not list the skills or certifications of the miners, but only listed the hourly wages. He found that hourly wages were not a "suitable proxy" for determining skills, thus making it impossible to determine whether Anderson's skills would have qualified him for transfer.
- 3) Finally, the Judge found that because Anderson had already been terminated at the time the transfers were offered, his willingness to travel to the Bishop Mine was not considered.

As a result, the Judge found not frivolous Anderson's assertion that, had he been working at the mine at the time of the layoff, including him in the layoff rather than providing a transfer would have been at least in part because of his protected activities. Accordingly, the Judge denied the operator's tolling motion.

II.

Disposition

The operator does not challenge the Judge's conclusions regarding Anderson's underlying temporary reinstatement claim. Rather, the operator argues that the Judge erred in denying A & G's tolling motion. The operator asserts that it presented clear evidence that Anderson would have been included in the layoffs that resulted from the idling of the mine.³

The Commission has recognized that the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee. *See Sec'y of Labor on behalf of Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054-56 (Oct. 2009); *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Res., LLC*, 35 FMSHRC 394, 397-99 (Feb. 2013); *Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 1183, 1187-88 (May 2013); *see also Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638, 1639 (Sept. 1989) (holding that back pay is due to a discriminatee from the date of the unlawful discharge until the time of reinstatement or "the occurrence of an event tolling the reinstatement obligation"); *Wiggins v. E. Assoc. Coal Corp.*, 7 FMSHRC 1766, 1772-73 (Nov. 1985) (concluding that the back pay award ended upon the date of layoff).

Proof of a non-frivolous claim of discrimination in a discharge that precedes a subsequent partial layoff, standing alone, does not foreclose tolling due to the subsequent partial layoff. To prevail on such a tolling claim, however, the operator must prove that the layoff justifies tolling temporary reinstatement. *Gatlin*, 31 FMSHRC at 1055. If the Secretary challenges the objectivity of the layoff, the Commission applies the "not frivolously brought" standard contained in section 105(c)(2) of the Mine Act to the Secretary's challenge. Here, the operator discharged the miner prior to the layoff. Therefore, the Judge must evaluate the tolling claim as if the miner was employed at the time of the partial layoff and was laid off rather than transferred to the sister mine. In such circumstances, once the complainant establishes a non-frivolous basis for a claim of a violative discharge, temporary reinstatement should not be tolled by a partial

³ We reject the Secretary's argument that A & G's temporary reinstatement of Anderson as a truck driver hauling rock forecloses its tolling claim. The Judge ordered the operator to reinstate Anderson immediately. The operator complied with the Judge's order by creating a rock truck position for Anderson at an A & G reclamation site. We are not persuaded by the Secretary's argument that the creation of Anderson's new position somehow undermines the fact that the mine needed to lay off a certain number of miners for economic reasons. The Secretary's approach, in effect, would penalize an operator for complying with the Judge's order for temporary reinstatement. Such an outcome defies logic and runs counter to the goals of the Act by potentially resulting in delays of compliance with temporary reinstatement orders for miners. *See, e.g., Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1053, 1054 n.4 (Oct. 2009) (rejecting the Secretary's argument that the operator is estopped from asserting a tolling claim when it had economically reinstated the miner without receiving job services from him).

layoff unless the operator shows that the transfers were determined and carried out on terms that expose as frivolous the miner's claim that he would have been transferred to the sister mine, but for his improper discharge.

We find unavailing the operator's argument that, absent evidence that a miner with less seniority than Anderson was transferred, A & G had no burden to produce any further evidence in support of its tolling motion. Such a finding would eliminate the Judge's ability to review the totality of the evidence in determining whether the operator carried its burden of proving that the employee would have been included in the layoff for reasons wholly unrelated to protected activity. The Judge must examine the entire record to determine if the proof of the criteria for the layoff, at least insofar as it would have affected the complainant, makes application of the discrimination claim to the layoff frivolous.

We also reject the operator's argument that Graham's testimony and the employee list positively establish that the operator would not have transferred Anderson to the Bishop Mine. PTR at 3-5. The Judge carefully explained his reasons for finding that the testimony and list did not demonstrate that Anderson would not have been transferred to Bishop Coal had he not been discharged following the accident. In short, the Judge found that the operator did not show as frivolous the miner's claim that his inclusion in the layoff, had he been employed, would have resulted at least in part from protected activities.

The Judge found that the operator's assertion of seniority as the "primary factor" in its transfer decisions was not dispositive. A miner who was hired earlier in the same month as Anderson was transferred to the Bishop Mine, and another miner who had a decade more seniority than that miner was laid off. The record supports these findings. In fact, A & G's own employee list shows that 20 miners with more seniority than the miner who was hired in the same month as Anderson, and retained, were laid off, and one of those laid off miners had 13 years more seniority than the retained miner. The operator failed to adduce any evidence explaining why seniority, a factor the operator had asserted as the primary determinant for its decision, carried so little weight in the decisions not to offer transfer to so many miners who had been employed by the company for longer than the least-senior miner offered a transfer. Without further explanation, the evidence supports a conclusion that A & G may have relied upon subjective factors in determining which of the Strip No. 12 miners would be offered the opportunity to transfer to the sister mine. As a result, we conclude that substantial evidence supports the finding that A & G did not prove that it would have included Anderson in the subsequent layoff for reasons entirely unrelated to any protected activity.

III.

Conclusion

For the reasons stated above, we grant the petition, and affirm the Judge's decision.⁴ We remand the matter to the Judge to determine the rate of pay due to the complainant and whether the operator may continue to employ the complainant at the A & G reclamation site or must transfer him to the Bishop Mine.⁵

/s/ William I Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

⁴ Commissioner Young disagrees with the Judge's observation in footnote 17, which expressed concern about the operator's counsel noting that another, more senior miner named by the counsel might be laid off as a result of Anderson's temporary reinstatement. While naming a specific miner should be avoided in the future, it seems obvious that counsel was attempting to remind the Court that there is a human cost when a miner included in an economic layoff must be reinstated.

⁵ While this appeal was pending, the parties submitted supplemental briefing requesting that the Judge clarify his Order of Temporary Reinstatement to specify whether the operator may continue to employ Anderson at the A & G mine or must transfer him to the Bishop Mine at a higher rate of pay. The Judge should address this issue on remand.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 15, 2017

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

v.

SIMS CRANE, INC.

Docket No. SE 2015-315

ORDER

The Specialized Carriers and Rigging Association, Crane Owners Association, Mobile Crane Operators Group, and 39 other companies and organizations have notified the Commission of their interest in participating as amici curiae in this proceeding in support of Sims Crane, Inc. (“Sims”).

Twenty-four of the companies and organizations¹ filed notices with the Commission indicating their intent to participate in these proceedings but did not file subsequent motions requesting leave to participate as amici curiae as required by Commission procedural rules. *See* Commission Procedural Rule 74(a), 29 C.F.R. § 2700.74(a). While these companies and organizations were on notice of the requirements, they failed to comply with Commission procedure for participation as amicus curiae and are thus denied amicus status.

Twelve of the companies and organizations² filed Motions to Participate as Amici Curiae that met the requirements set forth in Rule 74(a). *See* 29 C.F.R. § 2700.74(b). Each of these companies and organizations also included an extremely short amicus brief simply stating that it

¹ These companies and organizations include: AmQuip Crane Rental, LLC; Apollo Mechanical Contractors; Lampson International; Ray Poland and Sons, Inc.; Lampson Canada Ltd.; Sterett Crane and Rigging; CCC Group, Inc.; Cote Corporation; Crane Rental Service, Inc.; F.B. McIntire Equipment Company; Davis Motor Crane Service, Inc.; RCD Equipment LLC; Marco Crane and Rigging Company; Eagle Mine Safety; Russel Crane Service, Inc.; Buchanan Hauling and Rigging, Inc.; Houston International Insurance Group; Houston Specialty Insurance Company; Great Midwest Insurance Company; Oklahoma Specialty Insurance Company; Imperium Insurance Company; TNT Crane and Rigging, Inc.; Budrovich Contracting Company, Inc.; and Budrovich Marine LLC.

² These companies and organizations include: the Texas Crane Owners Association; Barnhart Crane and Rigging Co.; Chellino Crane, Inc.; Olori Crane Service, Inc.; L.W. Connelly and Son, Inc.; the International Union of Operating Engineers; Nabholz Industrial Services; Allegiance Crane and Equipment; Fagioli, Inc.; H.K.B., Inc.; Blackhawk Mining, LLC; and Revelation Energy, LLC.

joins Sims' petition for review and opening brief based on the arguments and legal authorities cited therein. These companies and organizations are granted amicus status and their briefs are accepted as filed.

The Specialized Carriers and Rigging Association, Crane Owners Association, and Mobile Crane Operators Group filed a joint motion for leave to participate as amicus curiae and seeking to file an amicus brief after the closing of the briefing period. While noting that the aforementioned associations' motion was untimely filed, the Secretary does not object to the filing of a joint amicus brief as long as the Secretary is provided a reasonable period of time to respond.

Additionally, Broderson Manufacturing Corporation, Sautter Crane Rental, Inc., and Global Specialized Services LLC filed motions for leave to participate as amici curiae. The Secretary did not respond to these motions.

Upon consideration of the joint motion and the Secretary's response, the Specialized Carriers and Rigging Association, Crane Owners Association, and Mobile Crane Operators Group are granted amici status. In this instance, the Commission will follow the alternate briefing schedule in Rule 74(c). Accordingly, a single, joint amicus brief shall be filed no later than 20 days after the close of the regular briefing period.³ The Secretary may file a supplemental brief in response to the amicus brief within 20 days after service of that brief. *See* Commission Procedural Rule 74(c).

In addition, Broderson Manufacturing Corporation, Sautter Crane Rental, Inc., and Global Specialized Services LLC are also granted amici status. They may file a single, joint amicus brief no later than 20 days after the close of the regular briefing period. The Secretary may file a supplemental brief in response to that separate brief within 20 days after service of that brief.

For the Commission:

/s/ William I. Althen
William I. Althen
Acting Chairman

³ The Secretary's Response Brief was filed with the Commission on January 26, 2017. Pursuant to 29 C.F.R. § 2700.74(a)(2), Sims' Reply Brief is due 20 days from that date—February 15, 2017. For purposes of setting the filing date for the amicus brief, the normal briefing period shall be deemed closed on February 15, 2017.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 21, 2017

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

v.

PORTABLE, INC.

Docket No. EAJA 2015-1-M

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

ORDER OF DISMISSAL

BY THE COMMISSION:

This proceeding involves an application for an award of attorney’s fees and expenses under the Equal Access to Justice Act (“EAJA”). 5 U.S.C. § 504. Portable, Inc., prevailed over the Department of Labor’s Mine Safety and Health Administration in a penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). The Commission Administrative Law Judge vacated the citation at issue. 36 FMSHRC 3249 (Dec. 2014) (ALJ). Portable then filed an EAJA application on the ground that the Secretary of Labor’s position was not substantially justified. The Judge held that the Secretary’s position was not substantially justified and granted the \$62,217.82 award requested in the application. 37 FMSHRC 1405 (July 2015) (ALJ). The Secretary filed a petition for discretionary review, which the Commission granted.

The Secretary and Portable have filed a joint motion to dismiss notifying the Commission that the parties have reached a complete resolution of this matter through settlement. *See* 29 C.F.R. § 2704.305.

Upon consideration of the settlement and joint motion filed by the parties, the motion is **GRANTED** and this proceeding is **DISMISSED**.

/s/ William I. Althen
William I. Althen, Acting Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 6, 2017

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

v.

ROCKWELL MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2016-0514
A.C. No. 46-06618-411984

Mine: Gateway Eagle Mine

DECISION APPROVING SETTLEMENT

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 1977.¹ The CLR has filed a motion to approve settlement. The originally assessed amount was \$4,611.00, and the proposed settlement is for \$3,704.00. The CLR also requests that several citations be modified, as indicated below.

The Court has considered the representations submitted in this case and concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
9066897	\$392.00	\$392.00
9064821	\$745.00	\$521.00
9066787	\$745.00	\$521.00
9066899	\$392.00	\$392.00
9064822	\$585.00	\$585.00
9066900	\$224.00	\$224.00
9064219	\$873.00	\$611.00
9064220	\$263.00	\$184.00
9066905	\$392.00	\$274.00
TOTAL:	\$4,611.00	\$3,704.00

¹ It is **DETERMINED** that the Conference and Litigation Representative (CLR) is accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The Secretary presents the following bases for the proposed reductions and modifications in this case:

Regarding Citation No. 9064821,² which alleged a violation of 30 C.F.R. § 75.370(a)(1):

Respondent contends that the negligence of the citation was over-evaluated. Respondent would argue at hearing that this citation was observed half-way through the mining cycle. The section foreman stated that he took a proper air reading and adjusted the line curtain prior to the start of this particular cut. He states they were in compliance with all aspects of their approved ventilation plan at that time of his examination. Respondent contends that after the initial ventilation check performed by the foreman, he had not returned to the entry where the violation existed prior to when the inspector observed and cited the conditions listed in the citation. The required cfm was 9,000 and the amount observed was 7,917 cfm. This condition was found to be less than 13% deficient of the required methane and dust control plan. Foreman states the condition was caused by shuttle cars running through check curtains, while traveling from the continuous mining machine to the section dump and equipment operator error. No visible dust was observed during cutting cycle. Therefore, since no dust was observed, the operator never thought to shut down for another air reading. The remaining cited conditions would have occurred after the start of the cut and as the continuous miner had advanced into the cut. The Secretary agrees to modify the negligence by reducing the negligence from “moderate” to “low”, and reduce the original penalty from \$745 to \$521.

² The Court would note that while the motion relates that although the foreman stated that the condition was caused by shuttle cars running through check curtains, while traveling from the continuous mining machine to the section dump, and by equipment operator error, the citation asserts that the line curtain had been “rolled up” to the 5th row of permanent supports. In connection with another ventilation plan violation issued three days later, Citation No. 9066787, it is noted that the miners were retrained on the ventilation plan.

Regarding Citation No. 9066787,³ which alleged a violation of 30 C.F.R. § 75.370(a)(1):

Respondent contends that the negligence of the citation was over-evaluated. Respondent would argue at hearing that this citation was observed half-way through the mining cycle. The section foreman stated that he took a proper air reading and adjusted the line curtain prior to the start of this particular cut. He states they were in compliance with all aspects of their approved ventilation plan at that time of his examination. Respondent contends that after the initial ventilation check performed by the foreman, he had not returned to the entry where the violation existed prior to when the inspector observed and cited the conditions listed in the citation. The required cfm was 9,000 and the amount observed was 5,100 cfm. Foreman states the condition was caused by shuttle cars running through check curtains, while traveling from the continuous mining machine to the section dump and equipment operator error. No visible dust was observed at the miner during the cutting cycle. Therefore, since no dust was observed, the operator never thought to shut down for another air reading. The remaining cited conditions would have occurred after the start of the cut and as the continuous miner had advanced into the cut. The Secretary agrees to modify the negligence by reducing the negligence from “moderate” to “low”, and reduce the original penalty from \$745 to \$521.

Regarding Citation No. 9064219, which alleged a violation of 30 C.F.R. § 75.512:

Respondent contends that the gravity of the citation is over-evaluated. Respondent would argue at hearing that this particular citation is considered a fire hazard for the continuous mining machine cable, not an electrical shock hazard. If an accident occurred it would more likely cause smoke inhalation, resulting in lost workdays. The Secretary agrees to modify the gravity by reducing the injury or illness from “fatal” to “lost workdays”, and reduce the original penalty from \$873 to \$611.

³ This citation alleges that “upon approaching the continuous mining machine extracting coal in the crosscut, visible dust is airborne in the entry.” This conflicts with the mine operator’s assertion that “[n]o visible dust was observed during cutting cycle [and] . . . since no dust was observed, the operator never thought to shut down for another air reading.” The motion does not address this conflict. It is also noted that, for this ventilation violation deficiency, there was a 43% reduction from the *minimum* 9,000 cfm requirement. It was this second alleged ventilation violation that triggered the inspector’s requirement that the miners be retrained on the ventilation plan. The Court would also note its concern that, despite different facts, both citations received the identical reductions. For Citation Nos. 9064821, the 12% reduction from the required 9,000 cfm resulted in a settlement from \$745 to \$521. Yet, for Citation No. 9066787, a 43% reduction from the minimum brought about the same result, from \$745 to \$521. This has at least the appearance of undifferentiated reductions, especially where the same type of violation was cited a few days earlier.

Regarding Citation No. 9064220, which alleged a violation of 30 C.F.R. § 75.604(b):

Respondent contends that the negligence of the citation was over-evaluated. Respondent would argue at hearing that this citation was observed when the inspector had the operator remove all the cable from the reel. At this time the opening was found in the cable, which would have been on the reel while the machine was in operation and would not have been seen by the operator. Respondent would also argue that the only examination required is a weekly exam, which is once per week (not every seven days). Therefore, the Secretary agrees that the cited condition could have occurred since the most recent examination and has no evidence as to when the condition occurred. The Secretary agrees to modify the negligence by reducing the negligence from “moderate” to “low”, and reduce the original penalty from \$263 to \$184.

Regarding Citation No. 9066905, which alleged a violation of 30 C.F.R. § 75.604(b):

Respondent contends that the negligence of the citation was over-evaluated. Respondent would argue at hearing that this citation was observed when the inspector had the operator remove all the cable from the reel. At this time the opening was found in the cable, which would have been on the reel while the machine was in operation and would not have been seen by the operator. Respondent would also argue that the only examination required is a weekly exam, which is once per week (not every seven days). Therefore, the Secretary agrees that the cited condition could have occurred since the most recent examination and has no evidence as to when the condition occurred. The Secretary agrees to modify the negligence by reducing the negligence from “moderate” to “low”, and reduce the original penalty from \$392 to \$274.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation Nos. 9064821, 9066787, 9064220, and 9066905 be **MODIFIED** to low negligence.

It is **ORDERED** that Citation No. 9064219 be **MODIFIED** to lost workdays or restricted duty.

It is further **ORDERED** that Respondent pay a penalty of \$3,704.00 within 30 days of this order.⁴ Upon receipt of payment, this case is **DISMISSED**.

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

Distribution:

David C. Trent, Conference & Litigation Representative, U.S. Department of Labor, MSHA,
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⁴ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION,
U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO
63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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303-844-3577 FAX 303-844-5268

February 13, 2017

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

v.

BUCKLEY POWDER COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2016-0377-M
A.C. No. 34-01905-408412 SB9

North Troy Quarry

DECISION

Appearances: Maria C. Rich, U.S. Department of Labor, Dallas, TX, for the Secretary; Benjamin J. Ross, Esq., Jackson Kelly PLLC, Denver, CO, for Buckley Powder Company.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Buckley Powder Company (“Buckley”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties presented testimony and documentary evidence at a hearing held in Dallas, Texas. Respondent presented a closing argument on the record, the Secretary filed a post-hearing brief, Respondent filed a reply brief, and the Secretary filed a brief in response to Buckley’s reply brief. One section 104(a) citation was adjudicated at the hearing. Buckley was an independent contractor performing blasting work at the North Troy Quarry, a surface mine in Johnston County, Oklahoma. For reasons set forth below, I affirm the alleged violation, but vacate the inspector’s significant and substantial designation and reduce the level of negligence to low.

I. DISCUSSION WITH FINDINGS OF FACT & CONCLUSIONS OF LAW

Citation No. 8959025 alleges a violation of section 56.14132(a) of the Secretary’s safety standards and asserts that the backup alarm on a dewatering truck did not operate properly when tested. The citation further alleges that the truck is used in a pit area where there is both foot traffic and other mobile equipment operating. Section 56.14132(a) requires that “[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.” 30 C.F.R. § 56.14132(a).

Inspector Larry Kinsey¹ determined that an injury was reasonably likely to be sustained and, if an injury occurred, it could reasonably be expected to be permanently disabling. He determined that the violation was significant and substantial (“S&S”), that one person was affected, and that Buckley’s negligence was moderate. The Secretary has proposed a penalty of \$873.00 for this alleged violation.

Although I have not included a detailed summary of all evidence or each argument that was raised, I have fully considered all the evidence and argument.

Summary of the Evidence

Vulcan Construction Materials operates the North Troy Quarry, a surface mine in Mill Creek, Oklahoma. Tr. 11. Buckley was an independent contractor at the mine and was responsible for loading holes and discharging shots. Tr. 11-12.

On February 22, 2016, MSHA Inspector Kinsey traveled to the mine to conduct a regular inspection. Tr. 11. While traveling with Ned Jennings, the mine manager, he observed three Buckley employees in the pit area.² Tr. 16-17, 29, 43-44. Inspector Kinsey entered the pit area and spoke with Jessie Scott, the blaster from Buckley. Tr. 17. Inspector Kinsey observed that Buckley employees were operating a dewatering truck and a powder truck³ and that a skid steer loader was also in the area. Tr. 17, 44. At the time Inspector Kinsey arrived, Buckley employees were dewatering a drill hole and were preparing to load it with explosive materials.⁴ Tr. 18, 21.

¹ Inspector Kinsey has been with MSHA for 15 years and conducts between 40 and 60 inspections per year. Tr. 8-9. Prior to working for MSHA, he worked for 20 years in surface coal mines operating heavy equipment, including a drill. Tr. 9. He has drilled and loaded shot holes. Tr. 10.

² The Secretary, in his brief, states that Scott testified there were four individuals in the blast site on the day in question. Sec’y Br. 3. However, it appears that the Secretary misunderstood Scott’s testimony. Both Inspector Kinsey and Scott testified that only three Buckley employees were present. Tr. 29, 43-44. In its brief, Buckley stated that only three Buckley employees were at the blast site. Buckley Br. 2-3.

³ The transcript includes references to both a “powder truck” and a “bulk truck.” These trucks are one and the same. Tr. 52-53. For clarity’s sake I refer to the truck as the “powder truck” throughout this decision.

⁴ The blasting process generally involves drilling holes to specific depths in the layout of the shot, testing the depth of the holes to make sure they match the drill log, determining which holes have water in them or are otherwise blocked, using the dewatering truck to dewater holes containing water, loading the holes with emulsion, caps and primers, stemming the holes, and then tying all of the holes together before setting off the shot. Tr. 10-11, 17-18, 44. The purpose of dewatering the holes is to remove the water so that the explosive materials can be inserted to the bottom of the hole. Tr. 18-19.

While inspecting the dewatering truck, Inspector Kinsey instructed the truck driver to put the truck into reverse. Tr. 17, 22. The backup alarm did not sound when the truck was put into reverse. Tr. 22, 55. As a result, the truck was removed from service and Inspector Kinsey issued Citation No. 8959025 for an alleged violation of section 56.14132(a) for failing to maintain the backup alarm in functional condition. Tr. 15, 22.

Fact of Violation

I find that the Secretary established a violation of the cited standard. The cited standard requires that audible warning devices provided on self-propelled mobile equipment be maintained in a functional condition. Consequently, a violation will exist when an audible warning device, such as a backup alarm, on a piece of self-propelled mobile equipment, such as a truck, does not function. *Wake Stone Corp.*, 36 FMSHRC 825 (Apr. 2014); *See e.g., Northern Aggregate, Inc.*, 37 FMSHRC 562 (Mar. 2015) (ALJ), *Northern Illinois Service Co.*, 36 FMSHRC 2811 (Nov. 2014) (ALJ), *Moltz Construction, Inc.*, 36 FMSHRC 1861 (July 2010) (ALJ). There is no dispute that when the dewatering truck was put into reverse the backup alarm did not function. Tr. 22, 55. While the backup alarm may have been functional at the beginning of the shift when the pre-operational examination of the truck was conducted, as discussed below, the Commission has explained that the term “maintain,” as used in the cited standard, requires that the alarm be “capable of performing on an uninterrupted basis and at all times . . . [and] imposes a continuing responsibility on operators to ensure that safety alarms do not fall into a state of disrepair.” *Wake Stone Corp.* at 827 (quoting *Nally & Hamilton Enter., Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011)). Because the alarm did not function when tested, I find that a violation has been established. Buckley did not seriously contest the fact of violation at the hearing or in its brief.

Significant & Substantial and Gravity

I find that the violation was serious but the Secretary did not establish that the violation was S&S. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). In order to establish the S&S nature of a violation, the Secretary must prove “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An experienced MSHA inspector’s opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC 2473, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 38 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[,]” and then determine whether “there exists a reasonable likelihood of the occurrence of the hazard

against which the mandatory safety standard is directed.” *Id.* at 2475-2476. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step then requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in serious injury.” *Newtown* at 2038; *ICG Illinois* at 2476.⁵

In order to address the S&S issue it is helpful to understand the purpose of the dewatering truck and how it is operated. The dewatering truck is a one-ton flatbed truck with a hydraulic tank and dewatering pump in the bed of the truck. Tr. 21. The hydraulic tank blocks the view out the rear window of the truck. Tr. 21, 56. A hose connected to the tank is held by a reel that extends off the left side of the truck and partially obscures the view to the rear of the truck on that side. Tr. 21, 23. The reel, with the hose attached, must be positioned with the hose lined up over the hole so that the pump attached at the end of the hose can be lowered into the drill holes to pump out water. Tr. 21, 23, 43, 54. The truck must be in park in order for the dewatering process to work. Tr. 46. The purpose of dewatering the holes is to remove the water in order to allow the explosive materials to be loaded to the bottom of the hole. Tr. 18-19. In order to dewater a drill hole, a person must be on foot by the truck to align the hose and pump and insert them into the hole. Tr. 22, 30. The dewatering truck is equipped with a boom that can slide two to three feet, which allows some leeway in positioning the reel and hose over the hole. Tr. 54. Once a hole is dewatered, explosive materials are removed from the powder truck to load into the hole. Tr. 43.

Inspector Kinsey determined that the violation was S&S because the alarm on the dewatering truck was not functioning, the truck would be operating in reverse at times, and there was foot traffic and other equipment operating in the area of the shot. Tr. 22-27. He described the area of the shot as a confined space. Tr. 22. He testified that he observed two persons on foot and one in the dewatering truck at the time he was in the area. Tr. 30-31. While he did not see anyone directly behind the dewatering truck, at least one of the individuals on foot was standing next to the truck. Tr. 31. While Inspector Kinsey opined that it was unlikely that the driver of the dewatering truck would be the individual who lined up the pump and hose with the hole, he acknowledged that it was possible for the driver to do that. Tr. 30. The only time Inspector Kinsey saw the truck operate in reverse was when he asked the driver to do so to test the backup alarm. Tr. 31. Buckley was in the process of dewatering the holes and the dewatering truck would have to be backed up as the work progressed. Tr. 23, 27. Further, the dewatering truck, which was used to haul the skid steer on a trailer to and from the mine property each day, would have to back up to hook up the trailer at the end of the day.⁶ Tr. 25, 27. He explained that, while a person on foot could easily suffer a fatal injury if struck by the truck, he determined that it was

⁵ The Secretary, in his brief, takes issue with the Commission’s S&S analysis in *Newtown* and argues that I should instead defer to his interpretation of Section 104(d)(1) as requiring only a showing that the “violation be of such a nature that it ‘could result in[] a safety hazard.’” Sec’y Br. 5-6 (quoting *Newtown*, 38 FMSHRC at 2038 (Aug. 2016) (Commissioners Jordan and Cohen, dissenting) (emphasis added)). With all due respect, I am bound by the majority’s decision in that case.

⁶ Buckley does not keep its equipment at the mine site. Tr. 25. The equipment is transported each day from the Buckley office in Mill Creek to the mine. Tr. 25, 36. The skid steer is transported from the office to the mine site on a trailer pulled by the dewatering truck. Tr. 25.

reasonably likely that any injury would be permanently disabling given that the truck would be traveling at a low rate of speed if it ran into the skid steer or powder truck. Tr. 26-27.

Jessie Scott⁷ testified that on February 22, 2016 he first went to Buckley's office, which was not on mine property and prepared to go to the mine. Tr. 36. As part of his preparations he conducted a pre-operational examination of the dewatering truck, during which no defects were found.⁸ Tr. 37-40, 50. According to Scott, the backup alarm was working at the time of the examination.⁹ Tr. 40. After gathering the caps and boosters needed for blasting and hooking up the dewatering truck to the trailer with the skid steer, Scott and his crew traveled the four miles from the office to the mine. Tr. 36-37, 42. Scott explained that the blast site at the mine is surrounded by a berm with an entrance in it and a sign stating "keep out, explosives." Tr. 42, 51. Scott stated that only Buckley employees and maybe a quarry manager are allowed in the area. Tr. 43. He further stated that if he saw someone who was not a Buckley employee enter the blast site he would stop work and ask them what they needed before carrying on with loading the holes. Tr. 52.

Scott described Buckley's dewatering process and why it was unlikely anyone would ever be behind the dewatering truck. All of the holes at this mine are normally wet and need to be dewatered right before being loaded. Tr. 45. The shot pattern at the time consisted of three rows with nineteen holes in each row. Tr. 48; Ex. R-5. Buckley's method of working through the pattern involved the dewatering truck backing up to the hole so that the hose and pump could be positioned over the hole. Tr. 52-53. Scott explained that the blaster, in this case him, would follow behind the dewatering truck on foot, which, because the dewatering truck was operating in reverse, would place him in front of the dewatering truck. He would load the holes with material from the powder truck, which would follow behind him. Tr. 44-45, 52-53.

⁷ Jessie Scott has been with Buckley for ten years and is currently a branch manager, but was the blaster in charge of loading the shot on February 22, 2016 and was the manager of the other persons on the blast crew that day. Tr. 34-35.

⁸ The pre-operational examination and lack of any defects were documented in Buckley's electronic logbook, PeopleNet. Tr. 37; Exs. R-3 and R-4. The records documenting the examination are kept in the normal course of business. Tr. 38. Scott explained that in order to drive the dewatering truck the driver must login to PeopleNet and go through a pre-operational examination before the truck can be driven. Tr. 38-39. The PeopleNet software prevents the vehicle from moving until the driver has logged on. Tr. 39. Scott also testified that the truck driver conducts a post-operational examination in order to logoff of PeopleNet and the defect would have been noted, at the latest, by the end of the shift on the February 22. Tr. 51; Ex. R-3 p. 2. Moreover, the vehicle would have been examined again the next morning during the pre-operational examination by the equipment operator. Tr. 51

⁹ Buckley introduced into evidence an incident report form which was filled out following the issuance of the subject citation. Tr. 40; Ex. R-2. The form, which was filled out by Taylor Willis, Buckley's branch manager at the time, indicated that Willis heard the backup alarm function when he assisted Scott while hooking up the trailer carrying the skid steer. Tr. 40-42.

Consequently, as the equipment worked its way through the shot pattern the dewatering and powder trucks would be facing each other. The dewatering truck operated in reverse and the powder truck moved forward. Tr. 53. Scott testified that, when on foot, he was at times between the two trucks as they worked their way through the shot pattern. Tr. 55. He agreed that he moved around and there were no barricades to prevent him from going behind the dewatering truck and he would get close to the truck. Tr. 49, 55. He further acknowledged that there was no spotter assisting the truck while it operated in reverse. Tr. 56. Nevertheless, he testified that while on foot he would never walk behind the dewatering truck and there was no reason for him to do so. Tr. 49, 57. Scott would be the only person on foot in the blasting pattern as the trucks moved to the next hole.¹⁰ James Brown, the Buckley employee who was driving the dewatering truck, was responsible for parking the truck then exiting it to lower the pump and hose into the hole. Tr. 45-46, 49. Scott stated that Brown could never be on foot while the dewatering truck was moving because he was the truck's operator. Tr. 46. Because the dewatering process requires that the truck be in park, no miner would ever be exposed to the hazard presented by the inoperable backup alarm while water is being pumped out of the holes. *Id.*

Scott conceded that other individuals would sometimes visit the blast site and specifically noted that "sometimes a quarry manager" would come into the area. Tr. 42. Further, he stated that although other persons do not normally "stay around the blast site," someone "might come down there and check on me and ask me what time we're going to be done." Tr. 52.

I credit the testimony of Scott as to the procedures Buckley followed when dewatering and loading the holes, as described above. I already determined that the Secretary established a violation of the cited standard. As stated in *Newtown*, the second step requires the judge to (1) define the particular hazard to which the violation allegedly contributes and then (2) determine whether there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed. The hazard in this instance is that a pedestrian will be struck by the backing dewatering truck. I find that the lack of an operable backup alarm certainly would contribute to this hazard especially since the view from the driver's seat to the rear of the truck was at least partially obstructed.

The "reasonably likely" provision does not require the Secretary to prove that an injury was "more probable than not." *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In addition, the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury" but, rather, that the hazard *contributed to* by the violation is reasonably likely to cause an injury. *Musser Engineering, Inc. and PBS Coals Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (emphasis added); *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011).

The critical issue here is whether there existed a reasonable likelihood of the occurrence of the hazard. Was there a reasonable likelihood that a pedestrian would be struck when the truck

¹⁰ Scott explained that Clay Whatley was the powder truck driver that day and his job can be performed entirely from inside the cab of the truck. Tr. 45-47. As a result, he would not have been on foot.

was backing up based on the particular facts surrounding the violation? I find that such an event was not reasonably likely.¹¹

Scott would have been the only person on the ground, because the other two employees would be moving the two trucks. There was no proof that any other vehicles were parked along the blast holes as they were being dewatered and there would be no reason for a vehicle being behind the dewatering truck. Although sometimes a manager from Vulcan would enter the blast area to check on Buckley's progress, there was no evidence that he would exit his vehicle much less walk behind or near the dewatering truck as it was backing up. Scott was the blaster in charge and he was directing the operations, so it would be highly unlikely that he would walk behind the dewatering truck while it was moving because doing so would prevent him from performing an important part of his job, which was helping to make sure that the dewatering truck and the powder trucks were being correctly positioned to dewater and load the next hole. Although the dewatering truck backed up frequently during a shift and it would have been physically possible for Scott or someone else to walk behind the dewatering truck as it backed up, I find that under the particular facts presented here such an event was highly unlikely.¹²

The third step in the S&S analysis requires the judge to assume the existence of the hazard and assess whether the hazard "was reasonably likely to result in serious injury." *Newtown*, at 2038. Assuming that someone was struck by the dewatering truck while it was backing up, a serious injury would be reasonably likely and such an injury would be of a reasonably serious nature including but not limited to permanently disabling injury or a fatality. The violation, while not S&S, was serious.

I base my S&S and gravity findings on the particular facts presented in this case. Scott would have been the only person on foot when the dewatering truck was backing up and he would know if anyone else entered the blast site. Because it was a tightly controlled area, I find that it was unlikely that Scott or another person on foot would have walked behind the dewatering truck.

Negligence

Inspector Kinsey determined that Buckley was moderately negligent because it had conducted a pre-operational examination of truck, at which time the backup alarm had been working. Tr. 28. Inspector Kinsey believed that the alarm quit working during the shift. Tr. 28.

¹¹ The lack of a back-up alarm did not contribute to a hazard for those in other vehicles or to the driver of the dewatering truck while he was backing up. No other vehicles would have been behind the dewatering truck and, assuming that another vehicle was present, an injury would have been unlikely in the event of a collision due to the slow speed of the dewatering truck as it backed up to the next hole.

¹² Backing up the dewatering truck to connect to the trailer carrying the skid steer loader would by necessity involve someone acting as a spotter to line up the hitch on the back of the truck to the hitch on the trailer. It was unlikely that anyone would be struck by the truck in this situation.

He terminated the citation after Buckley repaired the alarm and he had them test it out by placing the truck in reverse, at which time the backup alarm sounded. Tr. 28.

The Commission has determined that “[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). The Commission analyzes negligence by considering what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the safety standard. *Brody Mining LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015).

I find that Buckley’s negligence was low. When writing the citation Inspector Kinsey accepted that Buckley had conducted a pre-operational examination of the truck that morning and that the alarm had been working. Moreover, he acknowledged that the alarm must have quit working sometime during the shift. The PeopleNet report submitted into evidence indicates that the pre-operational examination was completed shortly after 7:11 a.m. on February 22. Ex. R-3 p. 2. The citation was issued at 11:20 a.m. the same day. The violative condition could not have existed for more than four hours and could have existed for only a matter of minutes because Inspector Kinsey did not see the truck operate in reverse except during the test.¹³ A reasonably prudent person would have understood that the condition constituted a violation of the standard. The pre-operational examination and lack of evidence as to when the malfunction occurred mitigate Buckley’s negligence. Consequently, I find that Buckley’s negligence was low.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. 30 U.S.C. § 820(i). While the Secretary’s exhibit booklet included a history of violations marked as S-3-1 through S-3-24, he did not introduce the history at hearing and the exhibit was not entered into evidence. Nevertheless, this exhibit and information at the MSHA website indicate that Buckley had no history of violations at this mine site. Exhibit A to the penalty petition indicates that Buckley had a history of 15 previous violations on a corporate-wide basis. The parties did not present evidence as to Buckley’s size but Exhibit A to the penalty petition indicates that Buckley was assigned 16 penalty points, which correlates with a medium to large size contractor. 30 C.F.R. § 100.3 Table V. The violation was timely abated. No evidence or stipulation was made that payment of the proposed penalty would have an adverse effect upon Buckley’s ability to continue in business. The gravity and negligence are discussed above. Based on the penalty criteria, I assess a civil penalty of \$250.00 for Citation No. 8959025.

¹³ The Secretary argues that the negligence should be moderate because “the dewatering truck had been operating in reverse throughout the shot pattern, yet none of the Buckley Powder miners including Mr. Scott, the supervisor, noticed the alarm not functioning.” Sec’y Br. 12. However, no evidence was introduced at hearing regarding the status of the backup alarm prior to the test the inspector observed and I cannot assume that the backup alarm failed to operate during all or most of the shift.

III. ORDER

For the reasons set forth above, the violation alleged in Citation No. 8959025 is **AFFIRMED**, the significant and substantial designation is **VACATED**, and the negligence attributed to Buckley is **MODIFIED** to low. Buckley Powder Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$250.00 within 40 days of the date of this decision.

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

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 13, 2017

MILTON M. PETTRY, JR.,

Complainant,

v.

PANTHER CREEK MINING, LLC,
DOUG BENDER, MIKE BURKE, and
GREG DOTSON,

Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEVA 2016-438-D
MSHA Case No.: HOPE-CD-2016-03

Mine: American Eagle Mine
Mine ID: 46-05437

DECISION AND ORDER

Appearances: Samuel B. Petsonk, Esq., Bren Pompino, Esq., Mountain State Justice, Inc., Charleston, WV, Representing Complainant

Thomas S. Kleeh, Esq., Jonathan Ellis, Esq., Steptoe & Johnson, PLLC, Charleston, WV, Representing Respondents

Before: Judge Steele

This case is before me upon a complaint of discrimination and interference by Milton M. Pettry, Jr., a miner, against Panther Creek Mining, LLC, Doug Bender, Mike Burke, and Greg Dotson (“Respondents”). On May 11, 2016, Pettry filed a 30 U.S.C. § 815(c) complaint of discrimination and interference. He sought reinstatement for a discriminatory termination. A hearing was held on Tuesday, August 16, 2016, and Wednesday, August 17, 2016, in South Charleston, West Virginia.

As trier of fact, this Court is free to accept or reject, in whole or in part, the testimony of any witness. In resolving any conflicts in testimony, this Court has taken into consideration the demeanor of witnesses, their interests in the case’s outcome, or lack thereof, consistencies or inconsistencies in each witness’s testimony, and any other corroborative or conflicting evidence of record. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the Court’s part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

I. Findings of Fact

At the time of hearing, Milton M. Pettry Jr., (“Complainant,” “Pettry,” “Mickey,”) had been an hourly fireboss and foreman for approximately 20 years. (Tr. 19, 175). Pettry worked for American Eagle Mine since 2000. (Tr. 19). As a fireboss, he was required to conduct examinations at the mine and find and record any hazards and violations he found. (Tr. 22). If Pettry found any hazards, he was required to either take corrective action or danger-off the condition.¹ (Tr. 107-09, 216-18, 358, 374). Pettry’s firebossing duties required that he inspect for hazards and violations on the railway track and the electrical power systems on the main rail line running past panels 17, 18, 19, and 20. (Tr. 24, 25; CX 1²).

Panther Creek Mining purchased American Eagle Mine in October 2015, from Patriot Coal through a bankruptcy proceeding. (Tr. 194). Soon after the change in operators occurred, Panther Creek Mining began to lay off miners. (Tr. 31). Over 100 miners, including at least part of the support staff, were laid off between October 2015, and February 2016. (Tr. 31-32). Pettry testified that the outby crew was laid off. (Tr. 32).

After acquiring American Eagle Mine, there was an MSHA quarterly “closeout” meeting in December 2015. (Tr. 320-22). At such meetings, MSHA would review the “...safety performance at the complex or coal mine. They talk about the violations and trends that they are seeing at the complex.” (Tr. 374-75). At the meeting, the operations manager Doug Bender and the general manager Greg Dotson testified that MSHA said there were problems with the examinations at the mine that needed to be addressed.³ (Tr. 251-53, 321). In response, Mike Burke, the general foreman, testified that management created a two pronged approach to addressing MSHA’s concerns: (1) offering training to the examiners and (2) holding examiners personally accountable for failing to conduct proper examinations, take corrective action, or

¹ The term danger-off describes when a hazardous condition is sectioned off by some type of barricade, preventing miners from being exposed to the hazard.

² Each of Complainant’s exhibits will be referred to as CX followed by its number, and Respondents’ exhibits will be RX followed by its number.

³ Doug Bender was the operations manager at Panther Creek since October 2015. (Tr. 373). His job entailed overseeing all of the aspects of the mine—production, safety, shipments, safety programs, compliance, daily management, and operations. (Tr. 373). He reported to Greg Dotson at the mine. (Tr. 373).

Greg Dotson was the general manager at Panther Creek since late October or early November 2015. (Tr. 319). He provided general oversight of the complex, coal preparation, shipping, refuse handling, the warehouse, purchasing, safety, and production at the mine. (Tr. 320).

danger-off hazards found.⁴ (Tr. 251). As part of this plan, the mine conducted an eight-hour training course for examiners and firebosses on December 30, 2015. (Tr. 252; RX-1).

When Pettry started working at Panther Creek in October 2015, he understood he was a probationary employee for 90 days. (Tr.105). Pettry also testified that he knew from conversations with mine management that MSHA was focusing on improving examinations and reducing violations at American Eagle. (Tr. 138). Pettry testified that during the December 2015 training, he did not receive additional fireboss training, only training on belt violations. (Tr. 138-39). However, at hearing, Pettry reviewed a document he signed, entitled Training Class Report Form, dated December 30, 2015, which he signed. (Tr. 139; RX-1). The top of the form states that it was for examinations training. (RX-1). The document appears to show that multiple firebosses were at this training, and the safety director was present at the training. (Tr. 140-41). Pettry testified that this training did not concern violations or how to conduct examinations; instead it covered the condition of belts and how to properly clean them. (Tr. 142).

Shawn Endicott, the former general mine foreman, testified at hearing. (Tr. 28-29). Endicott testified that he left his job with American Eagle Mine on December 10, 2015, because he no longer felt safe operating the mine after the October 2015, layoffs. (Tr. 194, 197-98, 200). Endicott also testified that if a hazard or violation is noted, a fireboss must record the hazard and take and record some type of corrective action. (Tr. 217-18).

Alleged document alterations

At hearing, Pettry reviewed the preshift examination reports for the 19 headgate, from December 8, 2015, to December 10, 2015; he testified that the airflow measurements varied greatly, which could have indicated a hazardous condition. (Tr. 45-55; CX-3). The minimum amount of airflow allowed was 20,000 CFM. (Tr. 46; CX-3).

Petry believed that two of the airflow measurements had been altered in the preshift examination reports. (Tr. 47-52). Pettry testified that a preshift examination report on December 9, 2015, by Travis Epling recorded the airflow at 24,625 CFM.⁵ Complainant's counsel asked Pettry if the number could have been 29,625, to which Pettry said it was possible. (Tr. 47). Pettry

⁴ Mike Burke was the general foreman at American Eagle Mine since December 2015. (Tr. 250). Starting in 2000, he worked with Massey Energy as a management trainee for approximately three years in various areas of the mine. (Tr. 250). In 2003, he started as the section foreman and moved to Elk Run until 2005 or 2006. (Tr. 250). He then worked as an outby mine foreman and block foreman, until 2007, when he transferred to Mammoth, where he was the mine foreman superintendent of the Coal Grove Mine. (Tr. 250-51). Burke then moved to Slab Fork Mine, then to Speed Mining in 2013, where he worked as a projects manager before becoming the mine foreman. (Tr. 251).

⁵ Travis Epling worked at Panther Creek Mine making examinations. (Tr. 358). He was a longwall setup foreman, which is a salaried position he has had for five or six years. (Tr. 362). He worked examining the setup face or tear down areas that he worked in. (Tr. 363).

believed that the first digit may have been altered from one to two. (Tr. 47-48). In Pettry's preshift examination report on December 10, 2015, the recorded airflow was 28,800 CFM, but Pettry alleged his fireboss notes reported the airflow at 25,800 CFM.⁶ (Tr. 48-49). It also appeared to him that the book was altered from 25,800 to 28,800, with the five being written over. (Tr. 48-49). Pettry called out this reading, which was recorded by another miner; Bobby Rader, a foreman, countersigned the report. (Tr. 52). Pettry also testified that his preshift examination report on December 11, 2015, was 15,500 CFM, and it did not appear to be altered in any way, even though it was 4,500 CFM below the minimum requirement. (Tr. 124).

Suspension for a water pump violation

On December 15, 2015, Pettry and another fireboss named Dwayne Hodges, met with operations manager Doug Bender, general manager Greg Dotson, and shift manager Bobby Harper, concerning an MSHA citation that American Eagle Mine received on Monday, December 14, 2015. (Tr. 65; CX-5). MSHA cited Panther Creek Mine for allowing water to accumulate in the primary escapeway in the intake of the 20 headgate, in violation of 30 C.F.R. § 75.380(d)(1) on December 11, 2015. (Tr. 65,129, 30; CX-10). The water had been accumulating in the area long enough that a pump had been installed to remove the water. (Tr. 133). The pump had come unplugged from a power station in what Respondents claim was Pettry's and Dwayne Hodge's examination area. (Tr. 133). At the meeting, Dotson suspended Pettry for three days, for failing to abate the unplugged water pump hazard, and warned him that further disciplinary action could result in discharge. (CX-5). Hodges was also suspended for three days. (Tr. 325).

A letter dated December 18, 2015, from Greg Dotson to Pettry, stated that during the December 15 meeting Pettry "openly admitted that this was part of [Pettry's] examination and due to [Pettry's] negligence, employees had to be removed from the section." (CX-5; Tr. 326). Pettry signed this letter and did not make any notations. (CX-5). The letter also stated that Pettry's "behavior is unacceptable and further incidents will subject you to further discipline up to and including discharge." (CX-5). Pettry testified that this letter contained falsehoods, and he claimed he objected to being suspended for a condition that was not part of his exam. (Tr. 65-67). Pettry testified that he understood that Dotson believed the water pump condition was the responsibility of Pettry and his fireboss partner. (Tr. 67). Pettry believed it was the airwalker's responsibility to make note of these types of hazards and that Pettry should not have been penalized for the water pump hazard because it was a pump that required only weekly examinations. (Tr. 71, 136). Thomas Elmore, a fireboss, also testified that he believed the airwalker was responsible for the water pump at issue.⁷ (Tr. 19-20). However, Pettry also testified that the power center and the plug for the water pump at issue was in an entryway that he was responsible for. (Tr. 132-33). Pettry testified that Dwayne Hodges or Harper, the shift

⁶ Pettry's notes were not brought forward or admitted at hearing.

⁷ Thomas Elmore was a fireboss at American Eagle Mine. (Tr. 225). He worked at Massey Performance Coal until 2006. (Tr. 225). Then he worked at Speed Mining, which is also known as American Eagle Mine, until January 2016. (Tr. 225-26). During the last five months at American Eagle, he worked with Milton Pettry. (Tr. 226). He worked on the 4 south belt, 3 west belt, and 3 south belt. (Tr. 227).

manager, stated that the firebosses were not familiar with, and were not responsible for, the water accumulations during the suspension meeting. (Tr. 68).

Dotson testified he was part of Pettry's suspension meeting and that Pettry had admitted he should have examined the area with the water pump accumulation more thoroughly. (Tr. 323-24). Dotson also testified that another fireboss was reprimanded for this condition and suspended along with Pettry. (Tr. 325-26). Dotson testified that he never disciplined someone for endangering an area off or taking corrective action. (Tr. 328).

Low airflow readings

On January 6, 2016, Pettry also reported an airflow of 19,600 CFM. (Tr. 56). He testified that Mike Burke told Pettry "you can't do that" and explained that "[Burke] was basically saying don't put that kind of air reading in the book." (Tr. 57). Immediately after, Complainant's counsel asked "Okay. And had Mike Burke talked to you before about how he wanted you to record your hazards in the book? Had he said to you before about how he wanted you to handle that?" (Tr. 57-58). Pettry's response was "Yes. He basically insinuated that whether you do corrective action or not, show—put it in the book." (Tr. 58). Pettry testified that he did what management wanted him to do, which was to report the low air reading. (Tr. 150). Pettry did not take any corrective action or danger-off this section of the mine. (Tr. 144-45). He believed that even if the area was dangered-off, miners would have still walked through it. (Tr. 186).

Burke, the mine's general foreman, testified after reviewing Respondents' exhibits 4 and 5 that an "owl shift" examiner took corrective action during the midnight shift and hung a curtain in the No. 5 room to correct the airflow issue Pettry reported. (Tr. 257-58). In his opinion, it would take two or three minutes to rehang the curtain if it fell down or a rock fell on it. (Tr. 258). Burke testified that examiners cannot decide to leave hazards for another shift without dangering-off the condition or taking corrective action. (Tr. 259). Burke then described several scenarios where miners were disciplined for inadequate exams or failing to take corrective action. (*See infra*).

Elmore, another fireboss, testified at hearing that Pettry did not work with him on Elmore's assigned belts unless Elmore was unable to complete his work because Pettry was usually busy with a different run. (Tr. 227). However, they did work together prior to making their runs, maintaining and repairing hazards from prior shift reports. (Tr. 227-28). Elmore testified that he "remember[ed] [Pettry] talking about [a low air reading] on 19, up on the setup face" on one occasion. (Tr. 230). Elmore testified he believed Mike Burke was the mine foreman at the time. (Tr. 230). Complainant's counsel asked Elmore "And do you remember when Mickey was finding that low air—and this would've been around the end of the year—do you remember Mickey talking about or do you remember witnessing what Mike Burke told Mickey to do in response to the situation with the low air?" (Tr. 230-31). Elmore responded "I just remember him telling Mickey not to put nothing in the book without consulting with him first." (Tr. 230-31). Complainant's counsel then asked, "Was that the conversation Mike Burke had had with you about how you were to handle your firebossing work?" (Tr. 231). Elmore testified in response, "He's told me that, yes." (Tr. 231). Elmore testified that this conversation concerned, initially "purposes of not shutting the belts off or for something in that order." (Tr. 231). Elmore

also testified that he was not disciplined on December 3, 2015, December 15, 2015, or January 4, 2016, for endangering-off hazards. (Tr. 237-38).

Travis Epling, a mine examiner, also testified that he would have corrected the low air reading taken by Pettry on January 6, 2016, or endangered-off that area. (Tr. 359). He also testified that all examiners had the authority to danger-off or correct hazardous conditions and that he has endangered-off conditions in the past instead of fixing the hazard. (Tr. 359-60).

Written warning and the belt shutdown incident

On January 8, 2015, a written warning was issued to Pettry for reporting hazards in the fireboss books on January 6, 2016, without taking an action. (Tr. 147-49, RX-2). Pettry testified that action was taken because he talked to airway walker Bruce Gilmour and the preceding boss from the nightshifts. (Tr. 150). The only action Pettry took was to report the low air reading to management. (Tr. 150-51). Nothing was written on the warning in the plan for improvement section. (Tr. 173; RX-2).

Petry further testified about an incident when there were coal spillages on the 3 south belt which covered the belt drive at the distribution point. (Tr. 59). Pettry testified he and Tommy Elmore were verbally disciplined for turning the belts off. (Tr. 59). Elmore also testified that he and Pettry had the belt off for an “extensive time” and that “Mike Burke came and hollered at us for keeping the belts off that long.” (Tr. 231). When asked by counsel, “What did [Burke] say would happen if you did put it in the book without talking to him first,” Elmore replied “I don’t guess he had to say it. You just kind of knew that you was going to get in trouble.” (Tr. 231)

Elmore testified that firebosses were given some discretion as to how they wanted to split up their duties to address what would be taken care of. (Tr. 231-32). He further testified that the firebosses could decide their responsibilities amongst themselves unless a supervisor told them otherwise. (Tr. 232). Elmore testified that a violation that is not an emergency can be recorded and left for oncoming examiners to correct the hazard. (Tr. 239). However, he never left an air reading “to worry about it later.” (Tr. 240).

January 20, 2016, morning meeting and termination

On January 20, 2016, Burke asked Pettry and the other firebosses to start “firebossing” the belts on the way in to their examination areas, at the start of the shift during a meeting from approximately 7:00 a.m. to 7:30 a.m. (See Tr. 79). Pettry testified that Burke wanted the firebosses to maintain the belts instead of the support help, who were laid off and would have worked on belt violations in the past. (See Tr. 81). All of the firebosses for that shift were in the meeting together, and one of his partners said “I’ve never heard of this, so, you know, how can we do it,” in reference to maintaining the belts. (Tr. 81-82).

Petry and his partner, Terry Buckner, reviewed the belt book. (Tr. 82, 156). They saw a violation on the 20 headgate recorded by a previous fire boss for coal spillage. (Tr. 82). Accordingly, Pettry and his partner began to head towards the 20 headgate. (Tr. 82, 155). They

told Burke that they were going to the 20 headgate, because “that’s what we always do.” (Tr. 156-57). Pettry and his partner had to wait for transportation from the nightshift. (Tr. 82). When the vehicle was delivered to Pettry, he noticed it was “pretty well drained of charge. You have to let it charge it up a little bit to proceed toward 20 headgate.” (Tr. 83). Pettry traveled with his partner up to the mother drive at 18 where Pettry began charging his ride. (Tr. 83). Pettry reached the 18 headgate at 8 or 8:30 a.m., which would have taken him ten to fifteen minutes from the bathhouse. (Tr. 90).

Prior to reaching the mother drive, Pettry and his partner repaired “a couple” of fire valves and they cleaned the mother drive, filled the dusters up with 40lb bags of rock dust, applied rock dust, checked the longwall belt for splices (20-25 breaks, which are each 140 feet), and checked the store unit with belt equipment. (Tr. 83). Pettry’s partner then caught a ride from the 18 to 20 headgate to work on a violation noted in the examination books, a coal spillage. (Tr. 83-84).

During this time, Pettry testified that he traveled to 19 headgate as soon as his vehicle was charged. (Tr. 84). Once Pettry was at the 19 headgate, a dispatcher ordered him to stay in the mouth of 19, off the main road, because a track crew was installing a spur on the 20 headgate, and there was a spad crew and inspectors on their way to the 20 headgate. (Tr. 85, 87). Pettry testified that the dispatcher controls traffic, and miners must follow a dispatcher’s orders because it is a state law. (Tr. 86). He testified that a miner can be subject to discipline for disobeying a dispatcher’s order, and the state could issue a citation for violating state law. (Tr. 86-87).

While waiting at the 19 headgate, Bender and “the company” (Pettry could not remember who else was there) passed by. (Tr. 89). Bender asked what Pettry was doing in the 19 headgate. (Tr. 89). Pettry said that the “motor crew was coming, the track crew, motor crew, spad crew and inspectors.” (Tr. 89). Pettry remained at the 19 headgate for approximately 20 minutes. (Tr. 89). At approximately 10:30 a.m., Bender and the other members of management came across Pettry at the 19 headgate. (Tr. 157).

Bender testified that he encountered Pettry sitting in his vehicle, which “struck him [as] odd...[because] it was in the middle of the day.” (Tr. 382). Bender testified he knew that Burke and other members of management had assigned “a couple” of people to work on the violations at the 20 headgate. (Tr. 382). Bender testified that he asked Pettry what he was doing in the 19 headgate, and Pettry told him the dispatcher asked him to wait until traffic passed by. (Tr. 396). Bender testified that Pettry would have to follow the dispatcher’s orders. (Tr. 397). Bender also testified that he asked Pettry why he didn’t walk up to the 20 headgate, and Pettry said he hadn’t thought about it. (Tr. 411). Further, Pettry believed that he was parked under a lifeline, so he could not leave his vehicle and walk up to the 20 headgate, without the vehicle obstructing the travel path in violation of safety laws. (Tr. 421-24). After exiting the mine, Bender testified that he asked Burke if Pettry was supposed to be working on something when Pettry and Bender encountered each other underground. (Tr. 383).

Petry testified that when the dispatcher cleared him to travel, Pettry went up to the 20 headgate where his partner had already abated the recorded hazard. (Tr. 88). Pettry testified that

his partner was “pretty upset” because the hazard should not have been entered into the examination books. (Tr. 88).

Later that day, there was a meeting with Bender and management, and Pettry testified that management “felt that [he] was just sitting there doing nothing and had been doing nothing since 7:00, which was totally wrong, till 10:30.” (Tr. 161). Burke testified that he, Doug Bender, possibly Carl Lucas, the superintendent, and Tony Osbourne, the Human Resources Director, were at this meeting where Pettry was terminated. (Tr. 273-74). Burke testified that the meeting was a “Return-to-work” meeting after Pettry’s suspension, but they didn’t believe Pettry was remorseful for his past poor work performance, and Pettry became agitated, so they terminated him that day. (Tr. 274). Bender testified that he was not disciplining Pettry for obeying the dispatcher, but that it was halfway through Pettry’s shift and Pettry should have been where he was “supposed to be.” (Tr. 411-12). Bender was also concerned about Pettry’s disciplinary events within a short time period. (412). Bender did not write up any record of Pettry’s discharge. (Tr. 394). He testified that either him or the human resources manager told Pettry he was terminated. (Tr. 395).

Bender also testified that the mine does have last chance agreements, which are sometimes used to give miners a final chance after discipline before there is a termination. (Tr. 399-400). Bender testified that management did not consider entering into a last chance agreement with Pettry. (Tr. 402).

Discipline of other miners

Petry testified that he was unaware that on January 8, 2016, a fireboss was issued a verbal warning for recording hazards without recording an action; a section foreman was issued a written warning for failing to take corrective action on January 20, 2016; on January 21, 2016, a foreman was issued a verbal warning for failing to take corrective action; and a miner was issued a written warning for recording violations without taking corrective action on February 3, 2016. (Tr. 165-167).

Burke, the mine foreman, testified that he expected firebosses at American Eagle to look for violations and hazards, record the hazards, and take corrective action or danger-off the hazard and record the action. (Tr. 253). He testified that a preshift examiner was terminated for an inadequate exam; another miner was terminated for an inadequate exam, allowing water to accumulate in a primary escapeway, in addition to previous poor job performance. (Tr. 258-61; RX-6, 7). Burke also testified that two examiners were given warnings because they failed to take corrective action for hazards they found; one examiner failed to record a hazard and corrective action for a pre-shift area that later received a violation; another salaried fireboss was terminated for failing to take any action when there was a “gobbed out” tailpiece with coal spilling around it.⁸ (Tr. 262-67; RX-8-11). Burke further testified that another examiner was terminated for failing to take corrective action, after reviewing Respondents’ exhibit 12. (Tr.

⁸ The fireboss who was terminated was initially suspended according to Burke. (Tr. 267). Additionally, it is noted by this Court that Pettry, an hourly paid fireboss, testified that a salaried fireboss would have been his superior. (Tr. 175).

267-68; RX-12). Burke testified that he did not ever instruct anyone to alter examination books and that there would be “severe consequences” if he found out examination books were altered. (Tr. 272).

Doug Bender, the operations manager testified that he knew of several miners who were terminated for failing to satisfy their job requirements. (Tr. 383). Respondents’ exhibits 21, 22 and 23 described miners being terminated for an improper preoperational exam and a miner failing to wear protective gear. (Tr. 384-86).

III. Contentions of the Parties

Complainant contends that he engaged in protected activity when he reported hazards to mine management after Panther Creek Mining took over the mine in 2015. (Tr. 201-02; Compl. Br. at 7-8). Complainant also contends that he engaged in protected activity by documenting hazards during his preshift examinations and refusing to work in conditions that violate safety laws. (Compl. Br. at 8-10). Additionally, Complainant contends that the Respondents took an adverse action when they suspended and terminated Complainant, which was motivated in part by Complainant’s protected activity. (Compl. Br. at 11-13). Further, Complainant argues Respondents interfered with his rights when Doug Bender tried to get Complainant to abandon his vehicle under the life line, interfering with the Mine Act’s standards. (Compl. Br. at 14-15).

Respondents contend that Complainant was repeatedly disciplined for failing to detect, report, and correct or danger-off hazards. (Resp’t. Br. at 5-17). Respondents contend that the Complainant was not engaged in any protected activity because he did not make safety complaints. (Resp’t. Br. at 19-21). Respondents further argue that Pettry’s termination was not motivated by any protected activity, but rather his repeated poor work performance. (Resp’t. Br. at 22-25). Respondents contend that other miners were disciplined or terminated for the same actions or lack of action taken by Complainant. (Resp’t. Br. 26-29). Furthermore, Respondents contend an affirmative defense of termination for Complainant’s poor job performance, even if there was a prima facie case of discrimination. (Resp’t. Br. at 30-31).

IV. Discussion

This case has been brought based on allegations that the Respondents discriminated against and interfered with the rights of 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 that should be construed liberally to allow miner participation in its enforcement. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2789 (1980). 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).

A. Complainant Has Successfully Proven 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 that an operator may also affirmatively defend against a *prima facie* discrimination case by demonstrating it would have taken the adverse action for a miner’s unprotected activity alone. *See Sec’y of Labor on behalf of Leonard Bernadyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 301 (March 2000).

1. Complainant Engaged in Protected Activity When He Refused to Perform Work

The Commission has held that a work refusal is a 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 hazard 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 supports protected 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.

a. Complainant's Work Refusal Was Made in Good Faith because it was Honest and Reasonable

A miner only needs to have a good faith belief that there was a safety hazard for a protected work refusal. *Estrada*, 36 FMSHRC at 3166. A good faith belief is required to prevent fraudulent work refusals. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 810 (April 1981);

The Commission held in *Robinette*, that a miner's good faith belief must be honest and reasonable. *Id.* at 812. Reasonableness is determined by 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).

However, a miner's continuing work refusal "may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition." *See Bryce Dolan*, 22 FMSHRC at 177 (citing *Bush*, 5 FMSHRC at 998-99).

On January 20, 2016, Pettry was working as a fireboss at American Eagle Mine. (Tr. 78). Pettry was delayed that morning at the 19 headgate while his firebossing partner went ahead to headgate 20. (Tr. 82-85). Pettry testified that after he had charged his vehicle and had begun to travel to the 20 headgate, he was stopped by the dispatcher under the 19 headgate lifeline. (Tr. 85). Pettry testified that he was told by the dispatcher to wait on his vehicle until other traffic could proceed. (Tr. 85). At approximately 10:30 a.m., Doug Bender, the operations manager, came across Pettry on his vehicle in the 19 headgate. (*See* Tr. 414). Bender testified that he engaged in a conversation with Pettry, where Bender asked Pettry why he was sitting in his vehicle. (Tr. 396). Bender was irritated that Pettry had wasted time getting "tie[d] up...all day sitting on a ride." (Tr. 414-15). Further, Bender testified that he asked Pettry why he did not leave his vehicle and walk up to headgate 20. (Tr. 414-15).

At hearing and in their post hearing brief, Respondents conceded that a miner disobeying a dispatcher's order would violate state law and that ultimately violating the dispatcher's orders would result in a disciplinary action. (Tr. 397-99). Pettry testified that he could not leave his vehicle or move his vehicle under the lifeline until the dispatcher cleared him to move. (Tr. 87). Pettry said this was because he could not violate the safety requirement to obey a dispatcher's orders. (Tr. 86-87). Because Respondents admit the danger of violating a dispatcher's order, Pettry's refusal to move his vehicle was made in good faith because it is honest and reasonable to refuse to violate state law and put himself or others in a potentially dangerous situation. A

dispatcher controls underground mine traffic to prevent vehicle collisions and any hazardous blockages from occurring. As Respondents admit in their post hearing brief, “Respondents do not deny that in the abstract, when a dispatcher directs a rail car to stay put, it is illegal for the driver to proceed on in the vehicle.” (Resp’t. Br. at 17 (citing to W. Va. Code § 22A-2-37(t)(2)).

Respondents argue that Pettry should have already caught a ride up to the 20 headgate with his partner or walked instead of waiting per the dispatcher’s instructions. (Respt. Br. at 17). However, this does not effectively persuade this Court that the work refusal is not protected. Once Pettry was under the lifeline, whether he should have been there or not (an issue to be determined in the affirmative defense analysis), it only matters how he believes he could have safely acted.

As a result, this Court finds Pettry’s refusal to proceed on foot to be made in good faith, because it is both honest and reasonable for him to want to keep from abandoning his vehicle in such a manner that could violate a federal safety regulation. While Respondents may imply that there was no direct order to proceed up to headgate 20, Bender had a problem with Pettry waiting under the lifeline in his vehicle and Bender asked Pettry why he was there and why Pettry did not proceed ahead on foot or catch a ride. (Tr. 396, 411). A question delivered in the format of “Why are you not engaged in a certain activity?” by a disapproving superior is enough to make a miner reasonably believe that they have received a work order.

Perhaps Pettry should have proceeded up with his fireboss partner earlier, before he was stopped by a dispatcher in the lifeline. But once Pettry was in the lifeline, he was required by state law to remain there until released by the dispatcher. Pettry could also not abandon his vehicle and walk or catch a ride once in his vehicle, because it would violate federal law. Thus, Pettry’s choice to remain on his vehicle satisfies an honest subjective belief of a hazard that is objectively reasonable because Pettry provided safety standards that would have been violated if he left the lifeline at the time that Bender approached him.

Respondents contend, via the testimony of Bender and in their post hearing brief, that “Pettry does not explain...why he did not catch a ride with another driver...or why he could not simply have walked. It was, after all, just three quarters of a mile, which would have taken him only ten or fifteen minutes.” (Resp’t. Br. at 17.) This offer by the Respondents of a reasonably safe alternative could violate a federal regulation. 30 C.F.R. §75.380(d)(7)(iv) states that a lifeline must be “located in such a manner for miners to use effectively to escape.” A reasonable step to dissipate Pettry’s fear of remaining in his vehicle to comply with a dispatcher’s order cannot be to abandon his vehicle and potentially violate a different safety standard. (Tr. 422). Thus, this Court also finds Pettry’s refusal to abandon his vehicle and walk up to the 20 headgate, where Bender and management wanted Pettry to be, is not a reasonably safe alternative. Consequently, Pettry’s refusal to move or abandon his vehicle in headgate 19 constituted a protected work refusal under section 105(c) of the Mine Act.

2. There Was a Nexus between the Protected Work Refusal and Termination

There were two adverse actions in this case. Pettry was suspended for three days on December 15, 2015, and he was terminated on January 20, 2016.⁹ Both the suspension and termination were not disputed by either party.

Once an adverse action has been established, the Complainant must prove that the adverse action was motivated at least in part by his protected activity. *Driessen v. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). In the instant case, Pettry must demonstrate that either his suspension or termination was related to his work refusal.

Direct evidence of a discriminatory motive is not required; instead a Complainant may use circumstantial evidence to demonstrate a connection. *Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). The time between the adverse action and protected activity, the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, and disparate treatment are considered in a circumstantial case. *Id.* at 2510-13.

Only the termination will be analyzed in relation to the work refusal because this protected activity did not occur until after the suspension. The adverse action and protected activity occurred on the same day. Pettry refused to leave his vehicle under the lifeline and was called into a meeting with management where he was terminated on January 20, 2016. This shows a very close time period between the protected work refusal and termination.

The operator had knowledge that Pettry made a work refusal. On January 20, 2016, Bender and other members of mine management found Pettry waiting under a lifeline on his vehicle. (Tr. 382). Bender was dissatisfied that Pettry was sitting on his vehicle, rather than up at headgate 19 abating a violation. (Tr. 414). Bender testified that he asked Pettry why he was not up at headgate 19 and why Pettry would not merely walk up to the next headgate. (Tr. 411). Pettry subsequently refused to move up to headgate 19, where his partner fire boss was working, because the dispatcher told him to wait there for traffic to pass through. Since Bender, the operations manager, testified that he was aware Pettry refused to leave headgate 19, this demonstrates the operator's knowledge of Pettry's work refusal. As Bender was the operations manager, he qualifies as management for the purpose of demonstrating the operator's knowledge.

The operator demonstrated hostility to Pettry when Bender revealed his displeasure at finding Pettry sitting beneath the lifeline in his vehicle. Bender asked Pettry why he was there and why Pettry could not just walk up to headgate 20. This suggestion of action and questioning by management confirms Respondents' hostility toward Pettry's choice to remain in headgate 19.

⁹ In his brief, Complainant appears to allege the suspension meeting was on December 11, 2015, which is not the date testified to by Complainant at hearing, December 15, 2015. (*Compare* Compl. Br. at 11-12 *with* Tr. 65).

Complainant failed to establish that he was treated differently than other miners or firebosses. Respondents brought forth evidence of several examiners who were suspended and terminated for not performing examinations properly. (*See supra*). In fact, one of the instances leading up to Complainant's termination involved a failure to work on a water pump hazard, for which Pettry and his partner were both suspended for three days.

Consequently, there was a protected work refusal the same day as the termination meeting; management was aware at the work refusal; and there was at least a measure of hostility shown to Complainant. However, there was no evidence of disparate treatment. In totality, Complainant has demonstrated a *prima facie* discrimination claim.

3. Complainant Engaged in Protected Activity When He Made Safety Complaints and Documented Safety Hazards

The Mine Act states that a miner cannot be discharged because he "has filed or made a complaint under or related to this chapter, including a complaint notifying the operator...of an alleged danger or safety or health violation." 30 U.S.C. §815(c)(1). The Mine Act's legislative history indicates that the scope of protected activities should be broadly interpreted. S. Rep. No. 950181 at 35 (1977).

This Court acknowledges as a fireboss, Pettry's job required constant reporting and recording of safety hazards as well as abatement of safety violations on a daily basis. Thus, there is too large a number of safety complaints, and documentation, to analyze all protected activities Pettry engaged in. Therefore, this Court will limit its analysis of safety complaints to solely relevant complaints and/or those raised in the Complainants' briefs.¹⁰

¹⁰ In an attempt to impeach Pettry with his deposition, Respondents' counsel, without entering the deposition into the record, thus questioned the Complainant:

- Q. We asked you in your deposition, Mr. Pettry, to explain to us the factual basis for why you believe you were terminated because you were calling MSHA, which you didn't do, but you just told us that was your firm belief, right?
- A. Part of it.
- Q. And that if you had any facts or evidence to show that, you would've presented it to us by now, correct?
- A. On the contact with MSHA?
- Q. Yes, sir.
- A. No.
- Q. You told us you thought you were fired because you were trying to do the right thing, correct? (Tr. 163-64).

There is insufficient other evidence in the testimony and filings to demonstrate that Pettry had any belief that he was being discriminated against because the operator believed Pettry made a complaint to MSHA. Therefore, an MSHA complaint or the belief of an MSHA complaint made by Pettry will not be considered as a protected activity.

Complainant testified that he reported an air reversal to superintendent Dale Smith and general mine manager Endicott after Panther Creek took over the mine in November 2015. (Tr. 201-02, 213). Pettry made this complaint to management around the time that MSHA cited the mine for air reversals during the fall of 2015. (Tr. 201-04). This Court agrees with Pettry: any complaint or report of a safety hazard, which in this case was an air reversal, qualifies as a protected activity.

Next, Pettry testified that during a meeting with Burke, on January 20, 2016, Pettry complained to Burke that the decreased staff at the mine impacted examiners' abilities to correct all of the hazards they encountered and conduct pre-shift examinations. (Tr. 81, 419; Resp't. Br. at 7-8). This complaint made to management would also be a protected activity because it involved Pettry's perceived ability to keep the mine safe as a fireboss and belt examiner.

During the January 20 meeting, Pettry testified that Burke told the firebosses that they were going to have to start "taking care" of the belts because there was no support help anymore due to layoffs. (Tr. 81). Pettry's counsel then asked "Okay. So you voiced your opposition. Did you say you—what did you say or what did you and the other firebosses say in response to Mike's order that morning to begin firebossing the belts on the way into the mines?" (Tr. 81). Pettry responded "We voiced the question, my partner, one of my partners—there's three firebosses on a team—he's a senior, senior fire boss and he's been doing it 34 years and he questioned, he said I've never heard of this, so you know, how can we do it. But he said, you know, because he's been doing it for a long time." (Tr. 82). His counsel again asked "Right. But did you also voice your personal concern about it?" (Tr. 82). And Pettry responded "Yeah, we were all in there—we were in there together." (Tr. 82). This Court finds that there is sufficient evidence that a group of firebosses including Pettry could have been reasonably perceived by management to be making a complaint together, at the meeting. Thus, I find this complaint concerning belt maintenance to be a protected activity.

Petry also alleges that the inadequate airflow on the 19 setup panel he documented constitutes a protected activity. He appears to have documented inadequate airflow on several occasions. (CX-3) Pettry's documentation of inadequate airflow on the 19 setup panel would also qualify as a protected activity because it involved a safety concern of the lack of airflow to miners.

4. Complainant Failed To Demonstrate a Nexus between Protected Safety Complaints or Documentation and Adverse Actions

Mr. Pettry was suspended on December 15, 2015, and he was terminated on January 20, 2015. After reviewing the safety complaints and documentation in conjunction with the suspension and termination, there is no direct evidence of a nexus between these protected activities and adverse actions. Therefore, I will turn to the indicia of discriminatory motive: the time between protected activity and adverse action, management's knowledge of the protected activity, animus or hostility towards the protected activity, and disparate treatment. *Chacon*, 3 FMSHRC at 2510.

The suspension occurred on December 15, 2015, and the termination occurred on January 20, 2016, while the safety complaints occurred in November 2015, December 10, 2015, and January 20, 2016. All of these safety complaints occurred within three months of the suspension and termination. This is a close enough time period to show a coincidence in time between protected activities and the adverse actions.

Management also had knowledge of all three safety complaints. The November 2015 airflow complaint was made to Dale Smith, who was the superintendent at the mine. (Tr. 213). The documented air reversal called out by Pettry on December 10, 2015, was recorded in the preshift examination report, which was signed by foreman Bobby Radar and another member of management. (CX-3). The third complaint made by a group of firebosses was delivered directly to Burke, a mine foreman. (Tr. 81, 419). Thus, management had knowledge of all of the protected safety complaints.

However, this Court does not find there to be any animus or hostility towards Pettry before the work refusal above. First, Complainant alleges Respondents showed hostility by management's "rationalizations" as to why Pettry was discharged. (Compl. Br. at 12). This is a vague and circular argument that need not be addressed. Nonetheless, this Court does not find the termination justification to demonstrate hostility as Respondents provided a legitimate non-discriminatory reason for his termination: Pettry's recurring poor job performance.¹¹ (Tr. 83-84).

The second act of hostility alleged by Complainant is that Pettry was given a written warning on January 8, 2016, for failing to record an action after reporting a low air reading on January 6, 2016.¹² The written warning states that Complainant failed to take an action in violation of safety policy. Pettry alleges that Burke did not want him to even record low air readings, but also testifies that management did want firebosses to record hazards in the book; thus, I don't find Pettry credible in his testimony that management insinuated to not record low airflow. (See Tr. 58). Pettry admitted he did not take a corrective action, which is a safety hazard in itself and would have allowed for managerial intervention. (Tr. 144-45). Moreover, I do not find a warning by management for Pettry not taking a corrective action or endangering-off the condition to be animus, especially when another miner was able to abate this condition by rehanging a curtain. (Tr. 157-58).

Additionally, Pettry testified that on December 10, 2015, Pettry recorded the airflow at 25,800 CFM, which he wrote in his notes and called out for another miner to record. (Tr. 48-49). After reviewing his preshift examination report at hearing, he testified that the airflow was recorded by someone at 28,800 CFM. (Tr. 48-49). It appeared to him that the airflow report was altered from 25,800 to 28,800 CFM. (Tr. 48-49). Pettry testified that he called out this reading and that Bobby Rader countersigned the report. (Tr. 52). Pettry testified that the minimum

¹¹ This argument is more fully addressed in the affirmative defense analysis.

¹² Complainant appeared to describe the written warning on January 8, 2016 as the "hostile" disciplinary action. (Compl. Br. at 13-14). It is not completely clear, but from the testimony by the parties and the reference to the January 6, 2016, airflow report made by Pettry it appears the Complainant is referring to the written warning on January 8, 2016.

amount of air allowed is 20,000 CFM. (Tr. 46; CX-3). Since the airflow was well above the minimum requirement, and there is no evidence to demonstrate that this alteration in numbers had an effect on examiners or mine safety, this Court does not find this unexplained alteration to demonstrate animus.

Therefore, this Court does not find there to be any hostility towards the safety complaints made by Complainant. Rather, this Court finds it concerning that Complainant admits to not taking corrective action and dangering-off conditions when that is what his job required. The Act promotes safe conditions in mines, and a miner failing to take safety action, when required to, is dangerous. Warning such a miner does not constitute hostility.

There was also no disparate treatment of Pettry. Complainant does not allege disparate treatment and several of Respondents' witnesses point to a variety of occasions where firebosses and examiners were warned, suspended, and terminated for failing to record, correct, or danger-off safety hazards.

As a result, in reference to safety complaints and documentation, Pettry is only able to show a close proximity in time between complaints and the adverse action, and management's knowledge of said complaints. No hostility or disparate treatment has been demonstrated. Therefore, I do not find a nexus between the safety complaints and adverse action, and the Complainant has failed to demonstrate by a preponderance of evidence a *prima facie* case of discrimination here.

B. Respondents Successfully Proved an Affirmative Defense for Complainant's Poor Work Performance

While Complainant has not established a *prima facie* discrimination case involving safety complaints or documentation, a *prima facie* case has been demonstrated involving his work refusal under the 19 headgate. Accordingly, this Court will address Respondents' affirmative defense.

An operator may defend against a *prima facie* case by showing that its action was also motivated by unprotected activity and that it would have taken the action for an unprotected activity alone. *See Robinette*, 3 FMSHRC at 817-18; *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSJRC 1361, 1365 (Dec. 2000). Since the Respondents conceded that the conversation between Pettry and Bender under the 19 headgate triggered Pettry's termination meeting, this Court finds a *prima facie* case of discrimination.

To demonstrate a legitimate, non-discriminatory reason for termination, the Commission considers "evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practice forbidding the conduct in question." *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHC 1361, 1365 (Dec. 2000). An affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). An operator's defense can be pretextual if it is "weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res.*, 12 FMSHRC

1521, 1534 (Aug. 1990). Additionally, an affirmative defense may fail if the Complainant was terminated for conduct that was provoked by the operator. *U.S. Steel*, 23 FMSHRC 981, 992 (Sept. 2001).

This Court finds that Respondents had a legitimate reason to terminate Pettry's employment due to repeated disciplinary action for poor work performance. Pettry was a fire boss responsible for examining the mine and endangering-off or abating hazardous conditions. Respondents cite to three different instances involving Pettry's failure to follow instructions and complete his daily job tasks. (Resp't. Br. at 7-17).

First, Pettry and his partner were suspended for three days for allowing a water pump accumulation in an area that they were responsible for examining. (CX-5). Pettry signed his suspension letter without adding any denial, and he admitted that the plug for the water pump was in his examination area. (Tr.132-33). Therefore, I do not find Pettry's protestations at hearing that the water pump condition was not part of his examination area to be credible.

Second, Pettry received a written warning for failing to take and record an action to correct or danger-off an airflow hazard. (RX-2). Pettry admitted he only reported the low air reading to management. (Tr. 150-51). Pettry did not testify that he took corrective action or endangered-off the condition, which was a fireboss job requirement, as testified to by all the witnesses at hearing. Any accusations by Pettry that management encouraged miners to ignore hazards are not credible due to Pettry's vague and contradictory testimony concerning this claim. (Tr. 56, 58, 145-51, 186).

Third, Pettry was terminated due to his failure to follow work orders on January 20, 2016. Pettry received examination books that recorded a hazard on headgate 20 at the morning meeting. Pettry and his partner then admittedly chose to go address that hazard and reported their plan to management because Pettry said "that's what we always do." (Tr. 156-57). He entered the mine after the 7:00 a.m. meeting, which lasted approximately 30 minutes, where they waited for a vehicle to travel to the 18 headgate mother drive where Pettry began to charge his vehicle. Pettry testified that they reached the 18 headgate at approximately 8 or 8:30 a.m.—although it took only 10-15 minutes to get there from the bathhouse. While at the 18 headgate, he and his partner cleared the belt, rock dusted, and checked for splices. Then Pettry's partner caught a ride up to the 20 headgate where the violation they had to abate existed. Pettry chose not to take a ride up with his partner, but instead stayed back and charged his vehicle, while his partner traveled up to and resolved the hazard before Pettry joined him. Pettry's choice to remain at the 18 headgate and charge his vehicle was a work refusal to join his partner. No reason was provided as to why Pettry could not have left his vehicle in the 18 headgate—there is no allegation there was also a lifeline here—or why Pettry found it necessary to charge his vehicle when his partner did not.

At approximately 10:30 a.m., Doug Bender, the operations manager, came across Pettry on his vehicle in the 19 headgate. (See Tr. 414). Bender felt that Pettry should have already been working at the 20 headgate instead of sitting in the 19 headgate. This Court agrees with Complainant that Pettry could not have left the 19 headgate once the dispatcher told him to wait. However, this Court does question why Pettry refused to travel with his partner earlier. His

partner evidently believed the hazard at the 20 headgate was important enough to not wait while their vehicle charged. Pettry could have easily made the same decision. It is unclear whether the time from the meeting at 7 a.m. to Pettry's 10:30 a.m. encounter with Bender was spent by Pettry attempting to fulfill his work responsibilities in good faith. However, it is clear that Pettry gave no compelling explanation for why he had to remain to charge his vehicle. This Court finds that the Respondents credibly believed Pettry to have refused a reasonable work request at the 20 headgate by refusing to travel there with his partner—when it was safe. The decision to terminate Pettry for poor work performance is consistent with the previous suspension and warning he received for failing to conduct examinations safely and properly.

Additionally, Respondents brought forward enough evidence demonstrating that other firebosses and examiners were similarly being held responsible for unsafe work practices. Respondents' witnesses credibly testified that once Panther Creek Mining took over American Eagle Mine, there was a MSHA closeout meeting. At the meeting, one of the primary complaints made by MSHA was that the examiners were not making satisfactory examinations, which needed to be remedied in the upcoming year. As a result of this meeting, Respondents decided to take two steps to ensure better examinations. Panther Creek first retrained the miners, and then management began to hold examiners responsible for inadequate examinations. (RX-1). Pettry along with several other firebosses were thus disciplined for failing to adequately perform examinations.

A fireboss is responsible for examining and reporting the hazardous conditions in a mine. When he fails to do so, the mine becomes unsafe for him and other miners. Therefore, I find Respondents had a legitimate non-discriminatory reason for discharging Pettry due to poor work performance evidenced by his previous warnings and suspension.

C. Complainant Failed to Prove Respondents Interfered with Complainant's Protected Rights

Complainant also alleges an interference claim against the Respondents. This claim is made in Complainant's filings and his post hearing brief. However, in the post hearing brief, Complainant appears to use the same occasion that he alleged for discrimination (the work refusal *supra*) to allege interference.

Section 105(c) of the Mine Act states that no person shall interfere with the rights of any miner. 30 U.S.C. 815(c)(1). In *UMWA on behalf of Franks and Hoy v. Emerald Coal Resources, LP*, 36 FMSHRC 2088, 2104-19 (Aug. 2014), the Commission approved a test for interference suggested by the Secretary. The test established interference occurs when:

- (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.

See Sec’y of Labor on behalf of McGary v. Marshall County Coal Co., 38 FMSHRC 2006, 2011 (Aug. 26, 2016); *UMWA on behalf of Franks and Hoy v. Emerald Coal Res. LP*, 36 FMSHRC 2088, 2108 (Aug. 2014) (Jordan & Nakamura, Comm’rs).

Complainant argues that Bender interfered with Pettry’s statutory rights to refuse unsafe work orders because Bender pressured Pettry to leave the lifeline, and work elsewhere. (Compl. Br. at 14, 15). Complainant argues that “Mr. Bender intended to cause Mr. Pettry to abandon his ride under the lifeline and to interfere with Mr. Pettry’s decision to do what was both safe and mandatory under the Mine Act,” which was to wait until the dispatcher cleared Pettry to move. (Compl. Br. at 15).

While the work refusal demonstrated a protected activity for a *prima facie* case of discrimination, Bender asking Pettry why he was sitting on his vehicle under the lifeline does not rise to the level of interference. (*See* Tr. 396, 412). The protected class here is miners, specifically firebosses. Bender asking Pettry why he was waiting under the 19 headgate, and why he did not walk up to the 20 headgate, is not enough to be reasonably viewed by a fireboss, who has to interact with management regularly, as tending to interfere with his right to refuse to disobey a dispatcher’s order or block a lifeline by abandoning his vehicle there. Therefore, the first step of the test for interference has not been satisfied because Bender’s questioning of Pettry and Pettry’s ultimate work refusal is not enough to be considered as reasonably tending to interfere with a fireboss’s protected work refusal.

Complainant fails to also satisfy the second element of interference. Bender and management demonstrated, through Pettry’s documented poor job performance, that their termination was not due to any attempt to prevent miners from exercising protected activities. Instead it was due to Pettry repeatedly failing to perform his job adequately. Bender testified that Pettry’s work refusal triggered a disciplinary action because he was not performing the work required from him on January 21, 2016, which was to abate a hazard at the 20 headgate. (Tr. 382, 387-89, 369). Pettry’s fireboss partner was able to obtain a ride up the headgate, while Pettry effectively refused, instead choosing to spend excess time charging a vehicle that was not shown to be necessary to any miner’s safety. Pettry continuing to perform his job poorly and ignore a hazard arguably created the greater threat to the safety of miners.

This Court will also address any perceived, but not specifically alleged, interference by Pettry. Pettry testified that he believed a preshift examination report on December 9, 2015, by Travis Epling appeared to him to be 24,625 CFM. Pettry then conceded the number might have been 29,625 CFM. (Tr. 47-48). Pettry testified that he believed the airflow reading should have been either 14,625 CFM or 19,625 CFM without the alteration he perceived.¹³ (Tr. 47-48).

¹³ It is unclear whether Pettry believed the original report should have stated 14,625 CFM or 19,625 CFM, as he changed his testimony as to what he observed in the report at hearing. (Tr. 47-48).

Additionally, in Pettry's preshift examination report on December 10, 2015, Pettry testified that air recorded was 28,800, but he wrote in his fire boss notes 25,800. (Tr. 48-49). It appeared to him that the book was altered from 25,800 to 28,800. (Tr. 48-49). Pettry testified that he called out this reading and that Bobby Rader countersigned the report. (Tr. 52). Pettry also testified that the minimum amount of acceptable airflow is 20,000 CFM. (Tr. 46; CX-3).

This Court now addresses both of these alleged document alterations. The alleged number change on Epling's preexamination report is not apparent to this Court when reviewing the report in CX-3. (See CX-3). Additionally, Complainant had the opportunity to question Epling about whether or not the numbers he reported in that preshift examination report were altered, but Complainant failed to do so. As a result, this Court does not find that there was an alteration to Epling's pre-examination report. However, it does appear to this Court that Pettry's airflow recording was altered by someone writing over the 5, from Pettry's alleged finding of 25,800. (See CX-3). Because this report was written by someone else—Pettry called out the airflow reading—it is unclear who altered it or why this number was changed. Both 25,800 and 28,800 CFM are well above the minimum airflow requirements of 20,000 CFM, and there has been no sufficient evidence or testimony to show that these airflow measurement reports could reasonably be viewed as interfering with a fireboss's protected rights. It is also not clear to this Court that the change was not made due to an error in first recordation or how it would significantly benefit the operator.

Further, this Court will address Pettry's testimony that Burke insinuated that Pettry should not record low airflow measurements without first reporting them to management. (Tr. 57). However, Pettry contrarily testified that Burke told him to record whatever action he took in the examination books. (Tr. 58). I find that Pettry's inconsistent testimony on this allegation lacks credibility. Complainant attempts to bolster this allegation with Elmore's testimony. I also find Elmore not credible concerning these alleged insinuations by management. Elmore inconsistently testified that he witnessed this interaction and that he merely heard about it from Pettry. (Tr. 230-31). Thus, these allegations are not credible as the witnesses are unable to convincingly articulate why and what Burke warned them specifically not to do.

The final allegation this Court addresses is that Elmore and Pettry were scolded by management for keeping a belt shut down for too long. Pettry and Elmore testified that they were working to clear the belt after a large amount of accumulations created a hazard. (Tr. 59, 231). This Court finds it equally possible that a fireboss who has continuously been disciplined for failing to adequately do his job could be criticized by management for keeping a belt shutdown for an excessive amount of time. Firebosses have the responsibility to regularly report uncomfortable truths, such as hazards and violations, to management. Firebosses should be able to work with management and be aware that management will sometimes be irritated with the existence of hazards, and therefore cannot credibly claim to be afraid of reprisal in these alleged circumstances.

When examining all of the facts presented at hearing and in the filings, this Court does not find there to be sufficient evidence of interference. This Court finds that the protected class of firebosses would not reasonably view the actions of Respondents as tending to interfere with the exercise of protected rights. Management disciplining firebosses for failing to find and take

action on safety hazards does not interfere with a fireboss's protected rights. Nor does an unexplained alteration to an acceptable airflow reading, or a supervisor being upset that a belt has been shut off (without more) for an excessive period of time constitute reasonable interference. This Court does not find the other allegations above credible; accordingly, in totality, there is not enough to demonstrate a fireboss, who is trained to report and take action on safety hazards, would reasonably believe his protected rights were being interfered with by Respondents. Therefore, the first element of interference has not been satisfied.

Even though the first element has not been satisfied, and so an interference claim fails, this Court will still address the second element. Respondents have been able to demonstrate that MSHA had a problem with the quality of examinations at American Eagle. Thus, management retrained examiners, including firebosses, and started to hold them accountable to ensure greater compliance with MSHA regulations. Respondents were protecting mine safety by disciplining and holding firebosses, like Pettry, accountable for poor work performance. Multiple examples of firebosses being disciplined for failing to conduct safe examinations and take corrective action were presented at hearing. Consequently, Respondents have demonstrated a legitimate and substantial reason of improving mine examinations that outweighs any perceived harm to the exercise of protected rights. As a result, Complainant fails to satisfy the second element of interference.

In conclusion, Complainant has shown a *prima facie* case of discrimination, which Respondents were able to defeat by successfully asserting an affirmative defense, and Complainant has failed to prove interference.

D. Doug Bender, Mike Burke, and Greg Dotson Are Not Liable for Discrimination or Interference

There is no evidence that Bender, Burke, or Dotson acted independently or engaged in discrimination or interference that is not rebutted by Respondents affirmative defense. Accordingly, the complaint against each is dismissed.

V. ORDER

Therefore, complaints against Panther Creek Mining, LLC, Doug Bender, Mike Burke, and Greg Dotson are **DISMISSED**. Each party shall pay its own costs and expenses.

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

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February 14, 2017

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of AARON LEE ANDERSON,
Complainant,

v.

A&G COAL CORPORATION and
CHESTNUT LAND HOLDINGS, LLC,
Respondents.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. VA 2017-69-D
MSHA Case No.: NORT-CD-2017-02

Mine: Strip #12
Mine ID: 44-06992

DECISION AND ORDER ON REMAND

Before: Judge Andrews

Background

A Discrimination Complaint was filed by Aaron Lee Anderson (“Anderson” or “Complainant”) on November 29, 2016. On January 3, 2017, the Secretary of Labor (“Secretary”) filed an Application for Temporary Reinstatement of miner Anderson. Respondent timely requested a hearing, which was held on January 12, 2017, in Pikeville, Kentucky. By Order of January 19, 2017, the application was granted and the issue of tolling was denied.

On January 24, 2017, Respondent filed a Petition for Review of Temporary Reinstatement Order.¹ The Secretary and counsel for Anderson filed responses on January 31, 2017. Also on January 24, 2017, Complainant's counsel filed:

Brief In Support Of Aaron Anderson's Request To Receive The Same
Rate Of Pay, Hours Worked, And All Other Benefits As The Miners
Previously Transferred From The Strip #12 Mine.

On the same date Respondent filed a Supplemental Brief in opposition to the request and the Secretary filed a Position Statement requesting clarification of the reinstatement order. Thereafter, the Commission affirmed the Temporary Reinstatement Order and remanded the matter to address the parties' supplemental briefs on February 10, 2017.

Contentions

Complainant, by counsel, contends that he should receive the same rate of pay, hours worked, and all other benefits that are currently received by the miners who were transferred from the A&G Strip #12 mine to the Bishop mine. If Anderson had not been terminated his non-discriminatory status would be the same as the miners at the Bishop mine, and he should be treated no differently than the miners transferred there. Complainant argues refusing a temporarily reinstated miner pay increases and other benefits would violate Section 105(c) of the Mine Act because it would be in response to the miner's protected activities.

Respondents, by counsel, contend the A&G Strip #12 Mine was idled and placed in non-producing status on December 28, 2016 and approximately 35 miners were laid off and approximately 15 miners were transferred to a Bishop Coal mine. A&G reinstated Anderson to a rock truck position it created at an A&G reclamation job where he is receiving the same rate of pay and other benefits as at the time of his discharge. Anderson was not transferred to the Bishop mine but his reinstatement is in complete compliance with the Order and also complies with the spirit of the temporary reinstatement provisions of the Mine Act. Respondents argue there is no known Commission precedent requiring A&G to pay Anderson a higher rate of pay when he was reinstated by A&G to a job at an A&G reclamation site.

The Secretary, in his Position Statement, requests that the Order of reinstatement be clarified since it could be argued the complainant need only be reinstated to the position he held prior to the discriminatory action, or that it is not frivolous to assume that he would have been transferred to the Bishop mine along with his co-workers.

¹ Rule 45(e)(4) provides:

A Judge's order temporarily reinstating a miner is not a final decision within the meaning of § 2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding.

29 C.F.R. § 2700.45(e)(4).

Discussion

Claims of discrimination under the Mine Act are not finally adjudicated until there is a hearing and decision on the merits, and where the claimant prevails, a decision on the appropriate remedies. If the issue of tolling is raised it is a part of the decision on the merits, and where Respondent prevails on this issue, the period of tolling is considered in deciding the appropriate remedies. These decisions are only entered after the parties have had an opportunity for discovery and time to develop their positions, and present evidence at the hearing.

An Application for Temporary Reinstatement of a miner must be considered and decided within a very short time frame, and under limited evidentiary standards. 29 C.F.R. § 2700.45. An order temporarily reinstating a miner is not a final decision. *Id.* Where, as here, a period of tolling is not granted at this early stage of the proceeding, this determination is also not final.

A temporarily reinstated miner is restored to the status he would have occupied but for the discrimination claimed. Any remedial relief due to him must be determined on the basis of the non-discriminatory status he held following any protected activity, had there not been an adverse action. *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1420 (June 1984); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Company*, 6 FMSHRC 516, 522-525 (March 1984).

In the instant case, one of the protected activities alleged was on the evening of November 18, 2016. At that time, Anderson was operating a 100-ton 777D rock truck and was being paid the hourly rate of \$16.50. His employment was terminated on November 21, 2016. Based on information of record provided by the parties, Anderson was reinstated to a job driving a 777 rock truck at the same rate of pay, number of hours worked and benefits he was receiving at the time of his termination. He began work on January 23, 2017, at an A&G reclamation site, the Virginia Fuels Corporation Darby Road Mine #1. This is a different work site than the Bishop mine to which the other A&G miners were transferred.

The Complainant's request is for a modification of the Temporary Reinstatement Order of January 19, 2017, to require that Respondents provide to Anderson the same rate of pay, hours worked, and all of the benefits currently received by the miners transferred from the A&G Strip #12 mine to the Bishop mine. The hourly rate at the Bishop mine was reported to be higher.

Complainant's argument is essentially one of fairness; that temporarily reinstated miners should receive the same increases or decreases in benefits as other miners in equivalent positions, and Anderson should be treated no differently than the miners transferred from the idled A&G mine to the Bishop mine. However, Anderson was not transferred to Bishop with the other miners considered in the evaluation process because he had already been fired. Rather, a position similar to his job at A&G was found for him. Further, no precedent or persuasive authority has been offered as would support an order to a mine operator to either require the temporarily reinstated miner to work at a specific location or increase that miner's pay and benefits based on what other miners receive at the work site.

Complainant argues that an operator's refusal to grant a temporarily reinstated miner pay increases, additional overtime, or increased employee benefits would "violate Section 105(c) of the Mine Act because it would clearly be in response to the miner's protected activities". However, at this preliminary stage of the proceedings, a final decision on the merits of all elements of a claim of discrimination, including protected activity, has yet to be determined. Further, in the opinion of the undersigned, to order even a partial remedy pending a hearing on the merits would be inappropriate. At this time, the parties have not had the opportunity to fully complete discovery and develop their positions, which in this case would include the issue of tolling due to the idling of the Strip #12 mine.²

ORDER

The request for modification of the Temporary Reinstatement Order to compel Respondents to increase the pay and benefits of Complainant Anderson is **DENIED**.

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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² This Decision and Order in no way forecloses the possibility that, should complainant be successful in the merits case, he may be entitled to the difference between his current rate of pay and the higher rate of pay suggested by the Secretary.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 21, 2017

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

v.

RED RIVER COAL COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2014-236
A.C. No. 44-06199-345299-01

Docket No. VA 2014-237
A.C. No. 44-06199-345299-02

Docket No. VA 2014-239
A.C. No. 44-06199-346250

Mine: No. 1 Prep Plant

DECISION

Appearances: C. Renita Hollins, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, on behalf of the Petitioner;
William J. Sturgill, Esq., Sturgill Law Office, P.C., Wise, Virginia, on behalf of the Respondent.

Before: Judge Feldman

These consolidated civil penalty proceedings are before me based on petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Mine Act”), 30 U.S.C. § 815(d), against the Respondent, Red River Coal Company, Inc. (“Red River”). A hearing was held on June 16 through June 17, 2016, in Pikeville, Kentucky.

These consolidated dockets concern, in part, three orders in Docket No. VA 2014-237, all of which have now settled. The parties’ settlement terms with respect to Docket No. VA 2014-237 that impose a total civil penalty of \$5,000.00 shall be approved herein. Adjudicated in this matter are the citations and orders at issue in Docket Nos. VA 2014-236 and VA 2014-239. In disposing of these matters, the parties’ post-hearing briefs, filed on September 30 and October 3, 2016, have been considered.

I. Violations at Issue

The single 104(d)(2) order at issue in Docket No. VA 2014-236, and the six 104(d)(2) orders and one 104(a) citation at issue in Docket No. VA 2014-239, have been adjudicated in this proceeding. The seven contested orders that are attributable to unwarrantable failures consist of four orders alleging impermissible coal dust accumulations in Red River’s loadout facilities, one order concerning an allegedly inadequate on-shift examination, one order alleging the failure

to provide a safe means of access along an elevated walkway, and one order alleging Red River's failure to report the occurrence of an accident. The remaining 104(a) citation concerns Red River's alleged alteration of an accident scene.

In satisfaction of these eight contested orders and citations, the Secretary proposes a total civil penalty of \$63,200.00. As a result of this adjudication, two orders and one citation shall be affirmed, and five orders shall be modified from section 104(d)(2) orders to section 104(a) citations, thus removing the unwarrantable failure charges. Given these modifications, a total civil penalty of \$21,600.00 shall be assessed for the eight orders and citations adjudicated in this proceeding.

II. Evidentiary Framework

The issues to be resolved are whether the cited violations in fact occurred, whether or not the cited conditions were properly designated as significant and substantial ("S&S") and/or attributable to unwarrantable failures, and the appropriate civil penalties to be assessed. The criteria for resolving these issues are as follows:

a. Fact of the Violation

To find a violation of a mandatory standard, the Secretary has the burden of proving each element of a citation by the preponderance of the evidence, based on direct evidence or adequate circumstantial evidence. *See Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152-53 (Nov. 1989) (citations omitted). The Commission has noted that the burden of showing something by a preponderance of the evidence standard requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. *Rag Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

b. S&S

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is [S&S] 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 [by the violation] will result in an injury; and

(4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4; *see also Austin Powder 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).

Once the fact of a violation has been established under step one of *Mathies*, the second *Mathies* step addresses the extent to which the violation contributes to a particular hazard. In a change to the Commission’s long-standing interpretation of the *Mathies* criteria, the Commission has recently opined that the second step analysis is “primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed.” *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037 (Aug.2016) (*citing Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148, 163 (4th Cir. 2016)). Thus, step two of the *Mathies* test now involves a two-part analysis: first, identification of the hazard created by the subject violation of the safety standard; and second, “a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed.” *Newtown Energy*, 38 FMSHRC at 2038. Consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Under the Commission’s analysis in *Newtown Energy*, when evaluating the third *Mathies* criterion, the analysis assumes that the hazard identified in step two has been realized, and then considers whether the hazard would be reasonably likely to result in injury, again in the context of “continued normal mining operations.” *Newtown Energy*, 38 FMSHRC at 2038 (*citing Knox Creek Coal Corp.*, 811 F.3d at 161-62); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d 133 at 135; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). In sum, while the methodology for analyzing S&S under the long-standing *Mathies* criteria has been modified by *Newtown Energy*, the Commission acknowledged that “the ultimate inquiry has not changed.” *Id.* at 2038, n.8.

c. Unwarrantable Failure

As a general proposition, an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). An unwarrantable failure is characterized by “indifference,” a “serious lack of reasonable care,” “reckless disregard,” or “intentional misconduct.” *Id.* at 2003-04; *see also Buck Creek Coal*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission’s unwarrantable failure test). Whether conduct is “aggravated” in the context of an unwarrantable failure is determined by looking at all the facts and circumstances of a case to see if aggravating or mitigating factors exist. *See IO Coal Co.*, 31 FMSHRC 1346, 1350-51 (Dec. 2009). The Commission has identified several such factors, including: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and whether the operator knew or should

have known of the existence of the violation. *Id.* These factors are viewed in the context of the factual circumstances of each case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). All relevant facts and circumstances of each case must be examined to determine whether a mine operator's conduct is aggravated or if mitigating circumstances exist. *Id.*

d. Civil Penalty Criteria

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

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

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). The Commission has noted that the *de novo* consideration of the appropriate civil penalties to be assessed does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Mine Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

III. Description of Loadout Facilities

The No. 1 Prep Plant is a coal preparation and distribution facility in Wise County, Virginia, owned and operated by Red River. The No. 1 Prep Plant is subject to the provisions of 30 C.F.R. Part 77 of the Secretary's mandatory safety standards, which govern surface coal mines. As a general matter, the coal that is processed at the No. 1 Prep Plant is extracted from

local surface mines and hauled to the plant via haulage trucks. Tr. at 67.¹ After the coal is processed, it is discharged via chutes from the prep plant into freight trains passing below the facility. Tr. at 68-69, 74-75.

Central to this proceeding is a train that was loaded on September 16, 2013, one day prior to the issuance of the subject violations. The next train was scheduled to be loaded on September 20. Tr. 314; *Resp. Br.* at 2, 15-16. Processed coal is loaded onto freight trains through a distribution building that is fed by two underground conveyor belt tunnels. Tr. at 68-69, 74-75. Three of the four alleged accumulation violations occurred in these two conveyor belt tunnels and a narrow vent pipe, and the fourth allegedly occurred in the distribution building.

Specifically, various grades of processed coal are stockpiled on the surface and fed through a series of chutes onto two underground loadout conveyor belts. These underground conveyor belts are located in a “top loadout tunnel” and a “bottom loadout tunnel.” Tr. at 74-75. These tunnels are designed to convey and transfer coal through an L-shaped system of belts. *See, e.g.*, Gov. Ex. 18; Tr. at 74-75. Coal deposited onto the top loadout tunnel belt is transferred onto the perpendicular bottom loadout tunnel belt. *Id.* Coal can also be fed directly onto the bottom loadout belt. *Id.* The bottom loadout tunnel belt conveys the coal uphill, from underground onto the surface, above a state highway, and into the loadout distribution building. *Id.*; Tr. at 84.

The loadout distribution building is an eight story facility located above the train tracks from which freight trains are loaded with processed coal. Tr. 119. The loadout distribution building is comprised primarily of a surge bin, a weigh bin, and associated equipment. Tr. 303-04. Coal is fed into the distribution building’s surge bin from the bottom loadout tunnel belt, then into the weigh bin where it is measured and distributed via chutes as trains pass slowly on the tracks situated below. *Id.* In the interim period between the arrival of trains, the loadout facilities are idle; no miners, with the exception of the miner tasked with cleaning and maintenance, are assigned to work there. Tr. at 314-15, 320; Tr.2 at 69-70.

Miners enter and exit the loadout tunnels at the mouth of the bottom loadout tunnel where the belt exits from underground to the surface. Tr. at 70, 96. If the mouth of the bottom loadout tunnel became inaccessible in an emergency, pursuant to 30 C.F.R. § 77.213, an exhaust vent pipe located at the far end of the top loadout tunnel can serve as an escapeway.² *Id.* This vent pipe is 36 inches in diameter. *Id.* Air courses through the two loadout tunnels and vent pipe from the mouth of the bottom loadout tunnel by means of a ventilation fan located at the mouth of the vent pipe. Tr. at 80. Thus, during loadout operations, the ventilation system causes coal dust to be blown from the mouth of the bottom loadout tunnel, through the bottom belt tunnel into the top belt tunnel, ultimately exiting through the exhaust vent pipe.

¹ As used herein, citation “Tr.” refers to the June 16, 2016, hearing transcript. Citation “Tr.2” refers to the June 17, 2016, hearing transcript.

² Section 77.213 provides, in pertinent part, that an escapeway of not less than 30 inches in diameter must be provided when a tunnel is closed at one end. 30 C.F.R. § 77.213.

IV. Disposition of Violations at Issue

a. Order No. 8202324 (Ventilation Pipe Accumulations)

i. Findings of Fact

On September 17, 2013, Mine Safety and Health Administration (“MSHA”) Inspectors Stonewall Eldridge and Scott Beverly conducted an E16 spot inspection of the No. 1 Prep Plant loadout facilities. Tr. at 62. Eldridge and Beverly began their inspection by crawling down the 36 inch diameter exhaust vent pipe (in the opposite direction of airflow design) for the purpose of accessing the top loadout tunnel. Tr. at 70, 173-74. Eldridge and Beverly testified that they observed a coating of dry black coal dust accumulated on the vent pipe’s inner surface. Tr. at 89, 96, 105, 173-74. Eldridge described these accumulations as “a thick coating” such that “when you run your finger through it, you can see where it pulls the coal away, and you can see the coal on each side of it, on the side of the mark that you make with your finger.” *Id.* The act of crawling through the tunnel caused the black coating of coal dust to become suspended in the air. Tr. at 93. Eldridge also observed similar accumulations in an adjacent 24 inch diameter vent pipe that is used solely for ventilation purposes. Tr. at 96-97.

Based on the inspectors’ observations, Eldridge issued 104(d)(2) Order No. 8202324, which alleges impermissible coal dust accumulations in surface installations in violation of section 77.202.³ Specifically, Order No. 8202324 provides:

The 36 inch diameter loadout tunnel escapeway has accumulations of coal dust in dangerous amounts inside. A thick coating of coal dust has accumulated all around the inside of the escapeway. A separate 24 inch diameter ventilation pipe, which connects to the 36 inch escapeway on one end and to the loadout tunnel also has a heavy coating of coal dust inside. The ventilation fan for the draw off tunnel pulls air through the escapeway so a coal dust explosion inside the tunnel would suspend the coal dust inside the escapeway intensifying the explosion. The foreman is required to travel this area at least once each working shift and the condition was obvious. The foreman engaged in aggravated conduct constituting more than ordinary negligence by allowing the condition to exist. This is a [sic] violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 1. Eldridge was concerned that the cited coal dust created an explosion and fire hazard. Tr. at 100. Consequently, Eldridge characterized the cited violation as S&S and attributable to “high” negligence constituting an unwarrantable failure. The Secretary has proposed a \$9,100.00 civil penalty for Order No. 8202324. The record reflects that the accumulations were reported as abated on September 19, 2013, by washing the cited accumulations in the pipe with a hose. Gov. Ex. 1; Tr. at 187.

³ 30 C.F.R. § 77.202 provides: “Coal dust in the air of, or in, or on the surfaces of, structures, enclosures, or other facilities shall not be allowed to exist or accumulate in dangerous amounts.”

ii. Fact of the Violation

Section 77.202, the cited mandatory standard, requires that an operator of a surface facility should not allow *the existence or accumulation* of coal dust in dangerous amounts. 30 C.F.R. § 77.202. Unlike the primary escapeway requirements in 30 C.F.R. § 75.380 that require intake air to be used in escapeways in underground mines, the vent pipe escapeway at the surface loadout facility is ventilated with what, in essence, is return air. *See* Tr. at 70. In this regard, the loadout facility is designed to direct the suspended coal dust, which is generated by the dumping of as much as 100,000 tons of coal through chutes and onto beltlines in the loadout tunnels, into the escapeway vent pipe. *Id.*; Tr. at 41, 74-75. Yes, indeed, there is gambling in the casino. Yet the Secretary seeks to hold Red River liable for vent pipe accumulations that the loadout facility is designed to create.

Nevertheless, while I have reservations about the propriety of citing Red River for such accumulations, Red River has acknowledged that section 77.202, the cited mandatory safety standard, obligates it to clean these unavoidable accumulations following each train loading activity. *See* Tr. at 319. Here, it is undisputed that Red River failed to timely clean the cited accumulations following the train loading on September 16, 2013, as the coal dust that accumulated during that load was still present during the September 17 inspection. In this regard, although the next train was due to arrive on September 20, the cited accumulations must be viewed in the context of their continued existence during the course of future loading operations. When Red River failed to expeditiously clean the subject accumulations, it did so at its own risk. Having concluded that section 77.202 is applicable to the cited accumulations, the Secretary has demonstrated the fact that Red River “allowed” coal dust accumulations in the exhaust vent pipe in violation of the cited mandatory standard.

iii. S&S

In view of the above, the requirement of the first step of *Mathies* to identify an underlying violation of section 77.202 has been satisfied. Under the Commission’s *Newtown Energy* modification of step two of the *Mathies* criteria, the focus shifts to analyzing the “likelihood of the occurrence of the hazard” against which section 77.202 is directed. *Newtown Energy*, 38 FMSHRC at 2038. Here, as there are no ignition sources in the cited vent pipe, the relevant hazard is the propagation of a fire or explosion that begins in the loadout tunnels. Based on the design of the airflow, any explosion that occurs in one of tunnels will be funneled toward the vent pipe where the cited accumulations were located. Should such an explosion occur, the cited coal dust accumulations are reasonably likely to further propagate the explosion.

Turning to *Mathies* steps three and four, however, the focus shifts to whether such propagation is reasonably likely to result in a reasonably serious injury. *Id.* It is highly unlikely, if not impossible, that the cited condition will contribute to injury to miners *working in the tunnels* for, given the direction of airflow and the lack of ignition sources in the vent pipe, the accumulations in the vent pipe cannot propagate an explosion that will be directed *into* the loadout tunnels. Thus, the cited condition cannot properly be designated as S&S with respect to the propagation hazard as it relates to the loadout tunnels.

However, regarding the issue of the propagation hazard posed to miners *using the vent pipe as an escapeway*, it is readily apparent that any propagation hazard in the escapeway is illusory, as the full force of any explosion in the loadout tunnels, where there are potential sources of ignition, would be directed into, and magnified by, the 36 inch vent pipe. In this regard, Order No. 8202324 states: “The ventilation fan for the draw off tunnel pulls air through the escapeway so a coal dust explosion inside the tunnel would suspend the coal dust inside the escapeway *intensifying the explosion.*” Gov. Ex. 1 (emphasis added). Thus, propagation confined within the exhaust vent pipe does not create a discrete hazard to miners, as this hazard cannot be disassociated from the hazardous effects created by the force of an explosion originating in the loadout tunnels. Simply put, the risk of injury to miners in the vent pipe from an explosion exists regardless of the presence of the cited accumulations. Thus, the cited condition cannot be properly designated as S&S with respect to the propagation hazard as it relates to the accumulations in the vent pipe.

iv. Unwarrantable Failure

As previously noted, the classic hallmark of an unwarrantable failure is conduct characterized by “indifference,” a “serious lack of reasonable care,” “reckless disregard,” or “intentional misconduct.” *Emery Mining*, 9 FMSHRC at 2001. As the loadout tunnel system is designed to deposit accumulations in the vent pipe, it is significant that MSHA does not assert that the loadout tunnel design is impermissible. Consequently, there is no basis for concluding that the occurrence of the cited accumulations is attributable to more than ordinary negligence. With respect to the issue of duration, the fact that the accumulations, cited on September 17, 2013, were located in a loadout facility that would remain idle until September 20, during which time the accumulations could have been cleaned, is a mitigating factor. Thus, the unwarrantable failure designation shall be deleted and Order No. 8202324 shall be modified to a 104(a) citation, as the evidence reflects that the cited condition was attributable to no more than a “low” degree of negligence.

v. Civil Penalty

The Secretary proposes a \$9,100.00 civil penalty for Order No. 8202324, which has been modified to a 104(a) citation in this proceeding. I view the reduction in negligence and gravity, the problematical ventilation design that made the cited accumulations unavoidable, and the idle nature of the loadout facility, as overriding mitigating circumstances. Consequently, applying the penalty criteria in section 110(i), **a civil penalty of \$100.00 shall be assessed for Citation No. 8202324.**

b. Order Nos. 8202325, 8202326 and 8202327 (Loadout Tunnels and Distribution Building Accumulations)

i. Findings of Fact

These orders allege that Red River violated 30 C.F.R. § 77.202, for allowing dangerous amounts of coal dust to accumulate in the top loadout tunnel, bottom loadout tunnel, and the loadout distribution building, following the loading of a freight train on September 16, 2013.

The cited accumulations were observed by MSHA Inspectors Eldridge and Beverly the following day, on September 17. Red River asserts that the loadout facilities were scheduled to remain idle until September 20, when the next freight train was anticipated to arrive. Tr. 314; *Resp. Br.* at 2, 15-16.

After exiting the vent pipe on September 17, 2013, Inspectors Eldridge and Beverly inspected the top loadout tunnel beltline. Tr. at 123. Eldridge observed accumulations of black coal dust on the backside of the belt structure and on the floor beneath the belt. Tr. at 123-24. Eldridge testified that these accumulations measured three inches in depth along the beltline, and one inch deep around the guards at the tail drive roller. Tr. at 124. Eldridge further testified that there was evidence that the tail roller shaft had been turning in the loose coal during the September 16 loading operation, creating frictional heat and a potential ignition source. Tr. at 125-29, 131. Red River Prep Plant Foreman Randy Morgan, who observed the subject conditions shortly after the issuance of the orders, conceded that the accumulations along the top and bottom loadout tunnel beltlines were the result of spillage from the belt. Tr.2 at 58. As a result of the inspectors' observations, Eldridge issued 104(d)(2) Order No. 8202325, alleging impermissible coal dust accumulations in surface installations in violation of section 77.202. Specifically, Order No. 8202325 provides:

The top clean coal loadout reclaim tunnel has accumulations of coal dust, in dangerous amounts, on the backside of the belt structure and on the floor underneath the belt. The coal underneath the belt and on the backside measures up to 3 inches deep. The coal dust measures up to 1 inch deep around the guards at the tail drive roller and on the belt structure. The tail drive roller shaft is turning in the loose coal, which creates an ignition source. *This area is required to be traveled* during the required on shift examination at least once *during each working shift*. *The belt and tunnel are idle at this time* but were used on 9-16-2013 and are available for use at any time. The foreman has engaged in aggravated conduct constituting more than ordinary negligence by allowing the coal accumulations to exist. This violation is an unwarrantable failure to comply with a mandatory standard. *Standard 77.202 was cited 1 time in two years* at mine 4406199 (1 to the operator, 0 to the contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 2 (emphasis added). Eldridge characterized the cited violation as S&S. Despite the fact that the loadout tunnels would remain idle for several shifts, and a lack of a significant history of relevant violations, Eldridge characterized the cited condition as attributable to "high" negligence constituting an unwarrantable failure. The Secretary has proposed a \$9,100.00 civil penalty for Order No. 8202325. The violation was abated on September 19, 2013, after the accumulations were washed down the tunnel into a sump pump that is located at the junction between the top and bottom loadout tunnels. Gov. Ex. 2; Tr. at 187.

Continuing their inspection along the bottom loadout tunnel, Eldridge observed 14 inches of coal accumulations around the tail roller, near the transfer point between the top and bottom loadout tunnel beltlines. Tr. at 133. Morgan (Prep Plant Foreman) and Red River Maintenance Supervisor Allen Wingler testified that coal accumulations near the transfer point

and adjacent sump pump are generally wet from accumulations of groundwater and water from recently-washed coal. Tr. at 309-11. Eldridge further observed two inches of coal dust accumulations on the roller guards and belt structure along the beltline. Tr. at 133. At the tail roller, Eldridge testified that there was evidence that the belt itself was running in the accumulations, presenting a risk of frictional heat and an ignition source. Tr. at 133-35. Based on these observations, Eldridge issued 104(d)(2) Order No. 8202326, alleging impermissible coal dust accumulations in surface installations in violation of section 77.202. Specifically, Order No. 8202326 provides:

The bottom clean coal loadout reclaim tunnel has accumulations of coal dust, in dangerous amounts, present. Coal dust measuring up to 14 inches deep is all around the tail roller of the tunnel belt. The belt has been running in the loose coal, which creates an ignition source. The guards and belt structure have a thick coating of dust measuring up to two inches deep. This area is required to be traveled at least once each working shift by a certified foreman doing the required on shift examination. The foreman engaged in aggravated conduct constituting more than ordinary negligence by allowing this obvious condition to exist. This is an unwarrantable failure to comply with a mandatory standard. Standard 77.202 was cited two times in two years at mine 4406199 (2 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 3. Eldridge characterized the violation as S&S. Once again, despite the mitigating circumstances noted above, Eldridge characterized the cited condition as attributable to “high” negligence constituting an unwarrantable failure. The Secretary has proposed a \$9,100.00 civil penalty for Order No. 8202326. The violation was abated on September 19, 2013, after the accumulations were washed down the tunnel into the sump pump located at the junction between the top and bottom loadout tunnels. Gov. Ex. 2; Tr. at 187.

After inspecting the loadout tunnels, Eldridge and Beverly proceeded to the loadout distribution building. Tr. at 147. As previously noted, the loadout distribution building is an eight story facility situated above the railroad track where freight cars are loaded with processed coal. Tr. at 119. Eldridge and Beverly inspected the distribution building from the roof down, first identifying “a thick coating of coal dust” on the belts, wall structures, floors, and all equipment throughout the building. Tr. at 147-55. Eldridge testified to dry coal dust accumulations, as much as four inches deep, on electrical equipment such as conduits and connections, wiring, control boxes, motors, hydraulics, heaters, air compressors, and welders, including accumulations within the motor control center. *Id.*

Thus, Eldridge issued 104(d)(2) Order No. 8202327, alleging impermissible coal dust accumulations in surface installations in violation of section 77.202. Specifically, Order No. 8202327 provides:

The loadout building has accumulations of coal dust, in dangerous amounts, present. The walls, floors, electrical conduit and all the equipment on all floors, including the 2nd floor MCC room, have a thick coating of coal dust present,

measuring up to 4 ½ inches deep in areas. The loadout building is idle at this time but was used on 9-16-2013 and is available for use if needed. The foreman is required to do an on shift examination of this building at least once each working shift. The foreman has engaged in aggravated conduct constituting more than ordinary negligence by allowing the accumulations to exist. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 77.202 was cited 3 times in two years at mine 4406199 (3 to the operator, 0 to a contractor).

Gov. Ex. 4. Eldridge characterized the violation as S&S. Despite mitigating circumstances previously discussed, Eldridge characterized the cited condition as attributable to “high” negligence constituting an unwarrantable failure. The Secretary has proposed a \$9,100.00 civil penalty for Order No. 8202327. On September 19, 2013, the accumulations were abated by pressure washing, vacuuming, and hand wiping away the coal dust. Gov. Ex. 4.

ii. Fact of the Violations

Inspectors Eldridge and Beverly speculate that all of the cited accumulations likely built up over “several train loads.” Tr. at 104, 112, 162, 182. In contrast, Red River employees Wingler, Morgan, and Boyd testified that the cited accumulations in the escapeway exhaust vent pipe, the two loadout tunnels, and the distribution building, were solely the by-product of the September 16 train loading. Tr.2 at 47, 55-57, 60, 84-85. To support this assertion, Red River estimates that the total tonnage of coal loaded on September 16 was between 60,000 and 100,000 tons. Tr. at 41. Moreover, Morgan testified that he had been in the loadout facilities prior to the September 16 train loading and that the facilities were clean. Tr.2 at 63.

Thus, Red River asserts that the cited accumulations in the vent pipe, the loadout tunnels, and the distribution building, occurred as a result of normal loadout operations when the facilities were last utilized on September 16, one day before the subject inspection. Tr.2 at 44, 47, 55-57, 84-85. The next loading operation was scheduled to occur four days later, on September 20. Tr. 314; *Resp. Br.* at 2, 15-16. When trains are not being loaded, the loadout facilities are idle and unstaffed, with the exception of the miner who is assigned to clean and maintain the facilities in between train loads. Tr. at 314-15, 320; Tr.2 at 69-70. While idle, the only energized equipment in the loadout facilities is a permissible sump pump at the junction of the top and bottom loadout tunnels, the ventilation fan, and lights illuminating the distribution building. Tr. at 335-337. Contrary to the Secretary’s assertion, Red River argues that this energized equipment does not present a likely source of ignition. Tr. at 194, 335-337. Consequently, Red River asserts that the cited coal accumulations were not hazardous when the facilities were idle. Tr. at 320, 335-337.

Notwithstanding the question of whether the cited accumulations were hazardous while the loadout facilities were idle, Red River maintains that the residual accumulations that occurred during the September 16 train loading would have been cleaned during the morning shift immediately following the loading operations (in this case, the morning of September 17). Tr. at 319; Tr.2 at 51, 61, 90. Thus, Red River contends that the cited accumulations would normally have been cleaned prior to the late afternoon inspection by Eldridge and Beverly. Tr. at 319; Tr.2 at 61, 90. However, cleaning was reportedly delayed as Dwayne Carroll, the miner in charge

of cleaning the loadout facilities, called in sick on September 17. Tr. at 318-19; Tr.2 at 61. Red River argues that a miner would have been assigned to clean the loadout facilities in place of Caroll had the facilities been scheduled to operate sooner than September 20, the date of the next scheduled loading operation. Tr. at 315, 320, 342; Tr.2 at 69-70.

In addressing the issue of liability, the question is whether the Secretary is alleging that Red River allowed the accumulations to occur, or alleging that Red River failed to timely clean the subject accumulations. The record, when viewed in its entirety, clearly reflects that significant accumulations in the loadout tunnels and distribution building are a normal by-product of loading trains with as much as 60,000 to 100,000 tons of coal. Consequently, it is unreasonable to expect that significant coal can be prevented from accumulating during the train loading process. *See* Tr. at 153. One must question the propriety of requiring miners to be present in the loadout tunnels for the purpose of monitoring conditions during loading, exposing them to dust inhalation and explosion or propagation hazards.

Significantly, Inspector Beverly testified:

. . . [T]here was a lot of float coal dust. There was just too much float coal dust. It was just everywhere, and *it hadn't been cleaned*. It hadn't been — it hadn't been addressed, so — and it shouldn't have been allowed to accumulate like that. It should've been taken care of. And it was black, most of it.

Tr. 181 (emphasis added). Thus, it is obvious that the Secretary premises Red River's liability on its alleged failure to timely clean the cited accumulations, as the cited conditions are an inevitable by-product of the loading process.

With regard to timeliness, Red River relies on the alleged absence to due illness of Caroll, the miner regularly tasked with cleaning the loadout facilities on the morning shift of September 17. The purported absence of Caroll is not a mitigating, or otherwise relevant, circumstance. Mine operators are responsible for providing substitute personnel to ensure the safety of ongoing mining operations.

We now turn to whether the cited accumulations can be properly characterized as “dangerous” accumulations prohibited by section 77.202. The Commission has recognized that the degree of hazard posed by a cited condition must be evaluated as if the condition were permitted to exist unabated. *See S&H Mining*, 15 FMSHRC 956, 957 (June 1993); *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1140-41 (May 2014) (holding that consideration of accumulations violations cannot take into consideration future planned abatement efforts). Thus, while the fact that cited accumulations were observed during a period when the loadout facilities were idle may mitigate the degree of negligence, it does not obviate the fact of the cited violations. As previously stated, when Red River failed to immediately clean the subject accumulations during the morning shift on September 17, it did so at its own risk. Red River's self-serving assertion that these accumulations would have been cleaned prior to the next train loading on September 20 is insufficient to shelter it from liability.

Having assumed the cited accumulations would continue to exist until the next train was loaded on September 20, heat generated by defects in running conveyor belt systems at that time, and the potential arcing of energized electrical systems, were ever-present sources of ignition. The presence of the cited accumulations in proximity of these potential ignition sources created a fire or explosion hazard. Consequently, the Secretary has satisfied his burden of demonstrating the fact that the cited accumulations in the loadout tunnels and distribution building constituted “dangerous” conditions in violation of section 77.202.

1. Duplicity of Violations

Having determined that the violations cited in Order Nos. 8202325, 8202326 and 8202327 occurred, we now address Red River’s assertion that these orders are duplicative and should be combined into a single violation. *Resp. Br.* at 19-20. Section 110(a) of the Mine Act provides that “[e]ach occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.” 30 U.S.C. § 820(a). In asserting that these orders are duplicative, Red River relies on the fact that the loadout tunnels “are [both] interconnected and the ventilation system for the tunnels all have one fan that pulls air throughout the whole system and blows air toward the transfer point.” *Resp. Br.* at 19.

At hearing, Inspector Eldridge explained that he issued separate orders for the two tunnels as the conveyor belts therein “can be run independently of each other.” *Tr.* at 114-15, 120. Eldridge testified that he did not issue eight different citations for each of the eight floors of the loadout distribution building where he found accumulations of coal dust, as the entire building “runs in unison” and “functions like one piece of equipment.” *Tr.* at 119.

The Commission has held that “citations or orders are not duplicative as long as the standards allegedly violated impose separate and distinct duties.” *Kentucky Fuel Corp.*, 38 FMSHRC 1614 (July 2016), citing *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997). Separate citations for similar conditions are justified as such citations serve the purpose of guiding and motivating discrete abatement efforts needed to eliminate discrete hazards. *Port Costa Materials, Inc.*, 15 FMSHRC 1516, 1519-20 (July 1994) (ALJ). Each conveyor belt, from head pulley to tail pulley, presents discrete safety hazards with regard accumulations in proximity to potential sources of ignition created by misaligned belts or defective rollers. Operators are obliged to ensure that each “separate and distinct” conveyor belt is operating safely. As discussed below, while similarity of violations may be a relevant consideration regarding a multiplier effect relevant to the civil penalty to be imposed, such similarity is not a bar to the issuance of multiple citations. Consequently, the fact of the accumulation violations in the loadout tunnels and distribution building shall be affirmed.

iii. S&S

On first blush, the idle nature of the loadout facilities would appear to be a mitigating circumstance with regard to the issue of S&S. However, Red River’s self-serving assurances that the cited accumulations would have been cleaned prior to the scheduled September 20 train loading operation are not dispositive, as violative conditions must be presumed to have remained

unabated during the course of continued mining operations. *See Knox Creek*, 36 FMSHRC at 1140-41.

Applying the Commission's S&S criteria, step one of *Mathies* is satisfied as the Secretary has demonstrated violations of section 77.202. Turning to *Mathies* step two, as modified by the Commission's recent holding in *Newtown Energy*, the record reflects that the hazard contemplated by section 77.202 is a potential fire or explosion. The record further reflects that it is reasonably likely that the cited accumulations will be a fuel or propagation source that will reasonably likely cause or contribute to a fire or explosion. Regarding *Mathies* steps three and four, in the event of a fire or explosion in the loadout tunnels or distribution building, it is reasonably likely to result in reasonably serious, if not fatal, injuries to miners who may be working in the loadout facilities. Consequently, the cited accumulation conditions in the loadout tunnels and distribution building are properly designated as S&S.

iv. Unwarrantable Failures

In determining whether violations are attributable to more than ordinary negligence justifying unwarrantable failure designations, the Commission looks to such factors as whether the violation posed a high degree of danger, the length of time a violation has existed, and the operator's knowledge of the existence of a violation. *IO Coal Co.*, 31 FMSHRC at 1350-51. Significantly, the Commission has expressed that all relevant facts and circumstances of each case must be considered to determine if a mine operator's conduct is aggravated, or if mitigating circumstances are present. *Consolidation Coal Co.*, 22 FMSHRC at 353.

With respect to mitigating circumstances, the orders acknowledge that the top and bottom loadout tunnel conveyor belts, as well as the loadout building, were idle at the time the cited accumulations were observed by the MSHA inspectors. Regarding the hazard posed to mine examiners, despite the fact that the orders specified that the loadout tunnels and distribution building require an examiner to travel these areas at least once during *each working shift*, the operative daily inspection provisions of section 77.1713(a) only require inspections in *each active working area*. *Compare* Gov. Exs. 2, 3, 4, with 30 C.F.R. § 77.1713(a).

Thus, examiners were not required to be in the loadout facilities each shift during the interim period between September 16 and September 20, when the facilities were scheduled to be idle. Upon entering the loadout area to conduct an inspection, the cited accumulations do not pose a fire or propagation hazard to mine examiners during the interim idle period. As such, the Secretary has failed to demonstrate that the cited accumulations posed a high degree of danger.⁴

⁴ With respect to the distribution building, Inspector Beverly's testimony that accumulations on non-sealed electrical equipment are dangerous, is belied by the fact that ordinary electrical equipment is not required to be sealed and dust proof even though combustible coal dust routinely accumulates in the loadout distribution building during regular loading operations. Tr. at 197-98. The electrical equipment in the distribution building that was required to be sealed to prevent the entry of coal dust was properly sealed. Tr. at 334. Thus, the degree of danger posed by the cited accumulations in the distribution building during a period when trains are being loaded is not an aggravating factor.

Moreover, Red River's failure to identify the cited accumulations during a period when the loadout facilities were idle and examinations were not required is not an aggravating factor.

Although the cited accumulations were obvious, the specific facts of this case reflect that, as noted, the accumulations were not in an active area when observed on September 17, 2013. Thus, the obviousness of the conditions is likewise not an aggravating factor. Nor is the continued existence of the accumulations in an idle area of the mine an aggravating consideration with respect to duration. Finally, the cited orders reflect that there is no history of relevant violations.

In apparent recognition that the unusual circumstances in this case present significant mitigating factors, the Secretary seeks to elevate the seriousness of the violations by asserting that the cited accumulations were the result of "several train loads," in addition to the accumulations that occurred on September 16. Tr. 24-25, 104, 112-13, 162, 182-84. It is axiomatic that the Secretary bears the burden of proving every element of a violation. *Garden Creek Pocahontas Co.*, 11 FMSHRC at 2152-53. Given the fact that chutes were repeatedly utilized to load the train with as much as 100,000 tons of coal on September 16, the Secretary's assertion is based on speculation that falls far short of satisfying the Secretary's burden of proof. See Tr. at 41. Thus, the Secretary has failed to adequately demonstrate that the cited accumulations had been present for more than one day.

Consequently, the Secretary has failed to establish that the cited accumulations are attributable to more than ordinary negligence. Accordingly, Order Nos. 8202325, 8202326 and 8202327 shall be modified to section 104(a) citations to reflect that the cited conditions were not attributable to unwarrantable failures.

v. Civil Penalties

While it has not been contended that the proposed penalties are inappropriate to the size of Red River's business, or that they would otherwise interfere with its ability to continue in business, there are significant mitigating factors. For example, the absence of any significant history of relevant recent violations is a mitigating consideration. Moreover, the negligence attributable to Red River's conduct has been reduced from aggravated to no more than "moderate" negligence given the idle status of the loadout facilities. This idle condition is an additional mitigating factor with respect to the gravity of the violations. Red River demonstrated good faith in rapidly achieving compliance after the orders were issued. Finally, the interrelated nature of the violations results in a multiplier effect that is an additional factor warranting a reduction in each civil penalty.

In view of these considerable mitigating circumstances brought about by the rather unusual circumstances of this case, **a civil penalty of \$1,400.00 each shall be issued for Citation Nos. 8202325, 8202326 and 8202327, resulting in a total civil penalty of \$4,200.00 for these three citations.**

c. Order No. 8207981 (Walkway)

i. Findings of Fact

On September 17, 2013, MSHA Inspector Larkin Clevinger inspected the area surrounding the strip coal sampler building at the prep plant. Tr.2 at 99. Along the backside of the sampler building, Clevinger inspected a walkway that was constructed with a combination of metal grating, concrete, and dirt. Tr.2 at 100; Gov. Ex. 8, p. 29-34. The walkway was elevated above a steep loose coal slope that culminated in an approximately 40 foot drop to the ground below. Tr.2 at 115. To prevent injuries from a fall, a handrail was installed extending the full length of the walkway. Gov. Ex. 8, p. 29-34. The walkway provides exterior access for cleaning and maintenance of a ring gate chute. Tr.2 at 100. This chute is used to discharge extraneous coal from the sample building. *Id.* As an alternative to using the walkway, personnel could access the ring gate chute area from inside the sampler building via a door located at the end of the walkway. *Id.*

Clevinger observed two areas of significant erosion along this elevated walkway that were located at junctions of metal grating and dirt. *Id.* The first hole was triangular, measuring approximately 13 inches, by 20 inches, by 28 inches. *Id.* The second hole was also triangular, measuring approximately 12 inches, by 48 inches, by 30 inches. Tr.2 at 100. At the hearing, the Secretary proffered photographic evidence of the conditions observed by Clevinger. *See* Gov. Ex. 8, p. 29-34.

Based on his observations, Clevinger issued 104(d)(2) Order No. 8207981, alleging a violation of 30 C.F.R. § 77.205(a). This mandatory standard provides that a “[s]afe means of access shall be provided and maintained to all working places.” Order No. 8207981 provides:

A safe means of access was not provided for the walkway behind the L2 Strip Coal Sampler Building. Two areas had eroded on each end of the metal walkway creating holes where workers could easily fall. The first area was triangular in shape and 13 inches by 20 inches by 28 inches. The second area was triangular in shape and measured 12 inches by 48 inches by 30 inches. These areas have occurred over time due to rain/runoff. These areas were obvious and easily seen. Workers are required to travel this area for cleaning and maintenance. The highwall at this walkway consisted of an approximate slope of 30 percent for 15 feet then a vertical drop of approximately 40 feet to the stockpile below. A handrail was provided for this walkway. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. Standard 77.205(a) was cited 9 times in two years at mine 4406199 (6 to the operator, 3 to a contractor).

Gov. Ex. 7.

Clevinger testified that he was not concerned about the structural integrity of the walkway, but rather the possibility that a miner utilizing the walkway could fall through one of

the eroded holes. Tr.2 at 104. In such event, the miner could suffer serious injuries to his extremities, or fatal injuries by sliding down the slope and falling 40 feet to the ground below. Tr.2 at 111. In support of the high negligence and unwarrantable failure designations, Clevinger believed that the holes resulted from erosion over a significant period of time, and that previous on-shift examinations clearly had repeatedly overlooked the conditions despite their obviousness. Tr.2 at 117, 128. Clevinger estimated that approximately three to six people traversed this walkway daily. Tr.2 at 129.

Clevinger characterized the cited violation as S&S and attributable to “high” negligence constituting an unwarrantable failure. Red River does not dispute the fact of the violation or the S&S designation. *Resp. Br.* at 21. However, as discussed below, Red River disputes that the cited condition was attributable to an unwarrantable failure. The Secretary has proposed a \$9,100.00 penalty for Order No. 8207981. Order No. 8207981 was timely abated on September 19, 2013, by taking the necessary remedial actions to alleviate the hazard. Gov. Ex. 7; *Resp. Ex.* 10-14.

ii. Unwarrantable Failure

In support of the unwarrantable failure designation, Clevinger attributed this violation to a “high” degree of negligence based on the obviousness and hazardous nature of the cited conditions. Tr.2 at 117, 128. In disputing this negligence designation, Red River argues that the walkway was not an active working area since it is only used periodically for maintenance purposes, and that the ring gate chute was accessible by miners without using the subject walkway. *Resp. Br.* at 23.

As previously noted, an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC at 2001. The Commission has identified the indicia of an unwarrantable failure: the length of time a violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious, whether the violation posed a high degree of danger, and whether the operator knew or should have known of the existence of the violation. *See IO Coal Co.*, 31 FMSHRC at 1350-51. Significantly, it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that a violation is unwarrantable. *Id.*; *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189 (Oct. 2010).

The photographic evidence depicts a handrail that delineates the perimeter of the walkway. Gov. Ex. 8, p. 29-34. The fall hazard posed to miners is evidenced by Red River’s installation of this handrail, as required by 30 C.F.R. § 77.205(e). Significantly, the two large holes that concerned Clevinger were located at the base of the handrail that defines the area where miners would likely work or travel. *Id.* These two holes were obvious, in that they were large and posed a significant drop-off hazard. With respect to duration, the photographs reflect that the erosion undoubtedly occurred over a significant period of time. *Id.* Additionally, Red River’s argument that the cited walkway was not frequently utilized does not diminish the risk

posed to miners who periodically used the walkway during the course of continued mining operations.

As noted, the propriety of an unwarrantable failure designation must be viewed in the context of the circumstances surrounding the violation. The indicia applied in unwarrantable failure determinations are not necessarily given equal weight. Here, the obviousness and extended duration of the cited condition, given its hazardous nature, adequately supports that the cited walkway defects were attributable to a “high” degree of negligence. Consequently, the unwarrantable failure designation in Order No. 8207981 shall be affirmed.

iii. Civil Penalty

Applying the criteria in section 110(i) of the Mine Act, I view the history of violations to be neither an aggravating nor mitigating circumstance. Given the high degree of negligence and gravity associated with the cited condition, the **Secretary’s proposed civil penalty of \$9,100.00 shall be assessed for Order No. 8207981.**

d. Order No. 8189011 (On-Shift Examination)

i. Fact of the Violation

MSHA’s September 17, 2013, inspection of Red River’s No. 1 Prep Plant resulted in the issuance of a total of approximately 22 citations and orders, none of which were noted in the relevant on-shift examination books. Consequently, MSHA Inspector Herbert Skeens issued Order No. 8189011, which alleges a violation of the on-shift examination provisions of 30 C.F.R. § 77.1713(a). This mandatory standard provides:

At least once during each working shift, or more often if necessary for safety, *each active working area and each active surface installation* shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. § 77.1713(a) (emphasis added). Skeens characterized the cited failure to conduct adequate on-shift examinations as S&S and attributable to “high” negligence constituting an unwarrantable failure. The Secretary has proposed a \$10,700.00 civil penalty for Order No. 8189011.

Of the 22 citations and orders relied on by Skeens to support the allegedly inadequate on-shift examination violation, only five have been adjudicated in this proceeding. Namely: the four accumulation violations in the loadout facilities (Citation Nos. 8202324, 8202325, 8202326 and 8202327) and the defective walkway violation (Order No. 8207981).

With respect to the Secretary’s assertion that the failure to note the loadout accumulations in the September 17 on-shift examination book evidences a violation of section 77.1713(a), we

must focus on the operative terms in the cited provision. By its terms, section 77.1713(a) *only* requires an on-shift examination in active workings or active surface installations. *Black Castle Mining Co.*, 36 FMSHRC 323, 325 (Feb. 2014). It is undisputed that the loadout facilities were idle on September 17. Tr. at 95. Further, the Secretary does not dispute that loadout operations were not scheduled to resume until September 20. Tr. at 314; *Resp. Br.* at 2, 15-16. Consequently, consistent with the provisions of section 77.1713(a), Red River was not required to perform an on-shift examination of the loadout facilities as alleged by the Secretary. Thus, Red River's failure to note the conditions in the on-shift examination book during a shift in which the loadout facilities were scheduled to remain idle is not a proper consideration in determining whether an on-shift examination was adequate.⁵

Turning to the defective walkway violation cited in Order No. 8207981 and adjudicated in this matter, as previously discussed, it is apparent that the cited erosion in the walkway posed a significant hazard, and was both obvious and significant in duration. However, the issue is whether the on-shift examination was adequate. For not every failure to note a violative condition in an on-shift examination book evidences, in and of itself, an inadequate on-shift examination. In this regard, the unnoted hazardous walkway, located in an area not heavily travelled, alone, does not evidence sufficient malfeasance to support a finding that the on-shift examination was inadequate.

In addition to the defective walkway, the Secretary relies on an additional 17 citations and orders issued during the course of the September 17 inspection that were not adjudicated in this proceeding. All 17 of these citations or orders have either been settled or vacated by the Secretary. (The disposition and agreed upon civil penalties are noted below.) Specifically, Order No. 8189011 identifies:

- Citation No. 8199079: Spillage on the 2nd floor of the refuse bin. (Settled; \$162)
- Citation No. 8199080: Exposed drive shafts on unit 15 transfer conveyor belt. (Settled; \$243)
- Citation No. 8199081: Exposed slip switch drive shaft and roller on unit 32 conveyor belt. (Settled; \$243)

⁵ The Secretary asserts that an on-shift examination of the loadout facilities was performed by miner Steve Gillam on September 17, which transformed the area into a working place. Tr. at 138-40. At that time, Gillam made a note of his loadout examination in the prep plant book, but did not identify the accumulation conditions in the loadout facilities. *Id.* The Secretary did not proffer this examination book as evidence. Red River asserts that Gillam's examination concerned the strip dump above the loadout tunnels, rather than the loadout facilities themselves. Tr.2 at 71-73; *Resp. Br.* at 16. Section 77.1713(a) only required Red River to conduct an on-shift examination prior to the anticipated activation of the loadout facilities on September 20. Thus, an examiner's unnecessary on-shift examination in an idle area of the mine that is not anticipated to be activated for several days does not transform this area, otherwise idle, to an active working place. Significantly, accumulations that are permitted to remain in the idle areas of the self-contained loadout facilities do not pose a propagation hazard to other active areas of this surface mine site.

- Citation No. 8199082: Dry grass within 11 inches of the top lube and diesel storage tanks. (Settled; \$100)
- Citation No. 8199084: No illumination in the refuse bin headhouse. (Settled; \$100)
- Citation No. 8199085: Oil accumulations on the refuse bin gate hydraulic pump. (Settled; \$100)
- 104(d)(2) Order No. 8189007: Shrubs against electrical equipment in the raw coal dump area. (Settled; \$2,900)
- 104(d)(2) Order No. 8189008: Weeds, leaves, and other combustible material against or around the bulk diesel storage tank in the raw coal dump area. (Settlement approved in this proceeding; \$1,200)
- 104(d)(2) Order No. 8189009: Portable fire extinguisher in the raw coal area not examined within 6 months. (Settled; \$2,400)
- 104(d)(2) Order No. 8189010: Portable fire extinguisher in the raw coal area not examined within 6 months. (Vacated)
- Citation No. 8207976: The catch screen under the #17 clean coal conveyor does not extend over the roadway below. (Settled; \$100)
- Citation No. 8207977: The catch screen under the #32 refuse conveyor does not extend over the roadway below. (Settled; \$162)
- Citation No. 8207978: A ladder located on the top floor of the refuse bin adjacent to the prep plant was not maintained in good condition. (Settled; \$162)
- Citation No. 8207979: A Rhino 375 step ladder on the 3rd floor of the prep plant was not maintained in good condition. (Settled; \$162)
- 104(d)(2) Order No. 8207980: Two guards on the L2 sample feed conveyor were not secured in place. (Settled; \$2,800)
- Citation No. 8207982: The guard for the drive shaft/barrel shaft on the #342 pump located on the bottom floor of the prep plant is not adequate. (Settled; \$162)
- 104(d)(2) Order No. 8202323: The 36 inch diameter escapeway for the clean coal tunnel is not maintained in good repair. (Settlement approved in this proceeding; \$2,000)

Gov. Ex. 9.

By way of summary of the above, of these 17 cited conditions, one citation was vacated and eight of the remaining 16 citations were designated as non-S&S. *Resp. Br.* at 25-26. The agreed-upon civil penalty for eleven of the 16 citations ranged from \$100.00 to \$243.00. *Id.* The civil penalty for the remaining five citations ranged from \$1,200.00 to \$2,900.00. *Id.*

Thus, while not the subject of this proceeding, it is apparent that twelve of the 17 additional citations relied upon by the Secretary were either vacated or assessed a nominal penalty. Consequently, the failure to note these twelve conditions in the relevant on-shift examination books, in addition to the unnoted defective walkway condition, is not sufficient to warrant the conclusion that Red River's September 17 on-shift examinations were inadequate.

Having addressed the immaterial loadout accumulation violations and the citations that were vacated or settled with nominal penalties, the operative question is whether the remaining five conditions, three of which are designated as non-S&S, for which the Secretary agreed to

penalties ranging from \$1,200.00 to \$2,900.00, in addition to the unnoted obvious defective walkway violation, constitute an inadequate examination under section 77.1713(a). Although I have misgivings regarding the lack of evidence presented concerning the circumstances surrounding these five conditions, Red River has agreed to pay the moderate civil penalties agreed upon by the parties. Consequently, although the evidence does not reflect that the relevant on-shift examinations were perfunctory, I will give the Secretary the benefit of the doubt that these five unnoted violative conditions, in conjunction with the unnoted defective walkway condition, constitute an inadequate examination. As such, the Secretary has demonstrated a violation of section 77.1713(a).⁶

ii. S&S

Turning to the issue of S&S, the Secretary has established a violation of section 77.1713(a). The second element of the Commission's recent *Newtown Energy* modification to the *Mathies* criteria requires, first, identification of the hazard contemplated by section 77.1713(a), and second, an analysis of whether, based on the particular facts of the case, it is reasonably likely that this hazard will occur. In the context of an inadequate examination violation, these considerations are synonymous; for by definition, the hazard contemplated by section 77.1713(a) that hazardous conditions will continue to go unaddressed, cannot be disassociated from the likelihood of the hazard occurring. In other words, if there is a failure to note hazardous conditions in violation of section 77.1713(a), the hazard has occurred. In this regard, the Commission has recognized the indispensable role of pre-shift and on-shift examinations, describing them as "fundamental in assuring a safe work environment for the miners." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 15 (Jan. 1997); *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995).⁷ Given the unsafe working environment created by inadequate on-shift examinations, it is reasonably likely that the hazard posed to miners will result in a reasonably serious injury. Consequently, the evidence adequately reflects that the cited violation of section 77.1713(a) is properly designated at S&S.

iii. Unwarrantable Failure

An unwarrantable failure is characterized by more than ordinary negligence, evidenced by a serious lack of reasonable care. Here, the Secretary has relied, in significant part, on the fact that Red River failed to note in the on-shift examination book the four accumulation conditions in the loadout facilities. However, the Secretary was not required to note these conditions in the on-shift examination book, as the loadout facilities were not active working areas or active surface installations.

⁶ While I have given the Secretary the benefit of the doubt with respect to the fact of the violation, I am not unmindful that the Secretary has failed to proffer the relevant on-shift examination books to demonstrate the sufficiency, or lack thereof, of the subject examinations.

⁷ Although *Enlow Fork* and *Buck Creek* concerned pre-shift examinations, the same considerations with regard to ensuring a safe working environment also apply to on-shift examinations.

Notwithstanding the accumulation conditions in the loadout facilities, the unwarrantable failure designations originally in Citation Nos. 8189008 and 8202323, also relied upon by the Secretary as evidence of an inadequate examination, were deleted pursuant to the parties' settlement terms, which have been approved of in this proceeding. The only remaining condition attributable to an unwarrantable failure is the unsafe walkway condition cited in Order No. 8207981.

The defective walkway, in addition to the other non-loadout facility citations relied upon by the Secretary, are insufficient to demonstrate that the on-shift examinations were attributable to more than moderate negligence. In this regard, the majority of the remaining unaddressed conditions were either vacated or attributable to low degrees of negligence and gravity by virtue of the imposition of nominal civil penalties. Consequently, the Secretary has failed to demonstrate that Red River engaged in more than ordinary negligence, thus requiring modification of 104(d)(2) Order No. 8189011 to a 104(a) citation, reflecting that the cited violation was not attributable to an unwarrantable failure.

iv. Civil Penalty

The Secretary has proposed a civil penalty of \$10,700.00. However, in support of the inadequate on-shift examination violation, the Secretary's civil penalty proposal was based, *inter alia*, on one citation that was vacated, two citations wherein the Secretary has agreed to delete the unwarrantable failure designations, and four cited loadout facility conditions for which an on-shift examination was not required by section 77.1713(a). In the final analysis, the on-shift examination violation it is attributable to no more than a "moderate" degree of negligence. As such, the subject violation is significantly less egregious than alleged by the Secretary. Consequently, **a civil penalty of \$1,200.00 shall be assessed for Citation No. 8189011.**

e. Order No. 8199116 (Accident Reporting Violation)

i. Findings of Fact

During the evening shift on November 1, 2013, miners Wayne Powers and Rick Boyd were performing repairs to a magnetic separator machine at the Red River No. 1 Prep Plant. Tr.2 at 211. As part of these repairs, Boyd removed the bolts from the drive shaft end cap in preparation for cutting the bearing off the magnetic separator drive shaft with an acetylene torch in an effort to access the inside of the separator drum. Tr.2 at 211-13. As Boyd cut through the bearing, the pressurized end cap became a projectile that ricocheted off a water pipe and struck Powers in the head. Tr. at 213. The end cap was described as an approximately 50 pound metal disc that is 30 inches in diameter. Tr.2 at 214-15; Gov. Ex. 14, p. 31. When Powers was struck, he was standing about six to eight feet from the magnetic separator machine. Tr.2 at 217.

Immediately following the incident, Red River maintenance shop foreman Billy Mays, a certified EMT, was called to the scene. Tr.2 at 239. Mays performed an assessment of Powers' condition by checking his vital signs and evaluating the extent of his injuries. Tr.2 at 241. Mays applied a dressing to a laceration on Powers' forehead. *Id.* The laceration resulted in a "minor blood loss." Tr.2 at 248. However, Mays concluded that the injuries to Powers' face required

immediate surgery. *Id.* Mays further concluded that there was no evidence of internal bleeding. Tr.2 at 242. While Mays testified that Powers never lost consciousness, hospital records do report “an apparent loss of consciousness.” *Compare* Tr.2 at 240, *with* Gov. Ex. 16, p. 2.

Following Mays’ evaluation of Powers’ condition, Mays telephoned Red River Safety Director Eddie Clapp, who was not present at the mine site, to convey that he did not believe Powers’ injuries were “immediately reportable” under 30 C.F.R. § 50.10(b),⁸ as Powers’ vital signs were stable. Tr.2 at 255-56. Nevertheless, as a result of Mays’ concern about potential facial fractures, Powers was transported via Medivac helicopter to a trauma center in Kingsport, Tennessee. Tr.2 at 249. Mays opined that facial fractures can often lead to a permanent loss of sight if not immediately addressed. *Id.*

Powers was hospitalized for five days. Gov. Ex. 16, p. 2. He was diagnosed as having suffered “subtle” subarachnoid hemorrhaging and multiple facial fractures. *Id.* Following surgery to repair his nasal cavity, Powers was discharged on November 6, 2013. *Id.* Powers subsequently missed approximately three months of work and returned to work under six months of restricted activity due to ongoing vertigo. Tr.2 at 259.

On November 8, 2013, the Norton, Virginia, MSHA field office was notified that an accident had occurred at the Red River facility the previous week. Tr.2 at 210. Shortly thereafter, MSHA Inspector Thomas Bower was immediately dispatched to the Red River No. 1 Prep Plant to investigate the circumstances of Powers’ accident. *Id.* Bower determined that Red River had failed to report the November 1 accident to MSHA. After interviewing Mays and Clapp, Bower issued 104(d)(2) Order No. 8199116, which alleges a failure to report an accident to MSHA within 15 minutes, in violation of 30 C.F.R. § 50.10.

Specifically, Order No. 8199116 provides:

The Operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll free number 1-800-746-1553 once the operator knows or should know that an accident has occurred involving an injury of an individual at the mine which has a reasonable potential to cause death. The miner received blunt force injuries to the face and forehead at this Preparation Plant on 11/01/2013 at approximately 10:45 p.m. The miner was struck in the face and forehead by an end cap off of a magnetic separator. The miner was standing in the area of the Magnetic Separator while a bearing was being cut off in order to remove the End Cap in order to make repairs. The miner was Med-Flighted via

⁸ 30 C.F.R. § 50.10 provides, in pertinent part:

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine; (b) An injury of an individual at the mine which has a reasonable potential to cause death

helicopter to Holson Valley Medical Center in Kingsport, TN for treatment. The Mine Operator has engaged in aggravated conduct constituting more than ordinary negligence by not reporting this accident which had a reasonable potential to cause death. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov. Ex. 12. Bower characterized the cited violation as non-S&S and attributable to “high” negligence constituting an unwarrantable failure. The Secretary has proposed a \$5,000.00 civil penalty Order No. 8199116, the statutory minimum for violations of section 50.10. *See* 30 U.S.C. § 110(a)(2). Red River reported the accident following the issuance of the order, thus abating the violation.

ii. Fact of the Violation

Section 50.10 requires an operator to “immediately contact MSHA at once without delay and within 15 minutes ... once the operator knows or should know that an accident has occurred involving ... an injury ... which has a reasonable potential to cause death.” 30 C.F.R. § 50.10(b). Prompt reporting is essential to the purpose of the reporting requirement in section 50.10, and requires a prompt determination as to whether an accident has occurred. *Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989). Given the demands in section 50.10 for a prompt determination that an injury has “the reasonable potential to cause death,” the Commission has held that “readily available information, such as the nature of the accident, is highly relevant in determining whether an injury is reportable, while permitting operators to wait for a medical or clinical opinion would ‘frustrate the immediate reporting of near fatal accidents.’” *Signal Peak Energy*, 37 FMSHRC 470, 476 (Mar. 2015) (quoting *Cougar Coal Co.*, 25 FMSHRC 513, 520-21 (Sept. 2003)). The Commission declined to further define the operative term “reasonable potential to cause death” in *Signal Peak*, apparently concluding that a common sense approach was adequate.

As discussed below, in situations as in the current case where rescue efforts are not a concern, the timely reporting requirement in section 50.10 acts as a condition precedent to preservation of an accident scene. Preservation of an accident scene “facilitate[s] MSHA’s ability to investigate and remedy the cause of the accident” to ensure that similar accidents do not occur. *Id.* at 480. Thus, the Commission has unequivocally held that operators “must resolve any reasonable doubt in favor of notification.” *Id.* at 477.

During the operative 15 minutes, Powers’ condition was evaluated by Red River’s on-site EMT, Mays, who reported the victim’s vital signs as stable. Tr.2 at 241. Red River nevertheless acknowledged the potential severity of the blunt force trauma Powers sustained to the head and face by arranging for Powers to be transported to a local trauma center by helicopter. Tr.2 at 249. While Mays expressed concern that Powers’ facial fractures potentially jeopardized his eyesight if not immediately treated, Mays did not believe that his injuries were potentially fatal. Tr.2 at 241, 249.

It is undisputed that Powers sustained a severe blow to the head when he was struck by the bearing cap — essentially a 50 pound projectile. Blunt force trauma to the head, even in

circumstances where a miner demonstrates stable vital signs and minimal blood loss, must be considered potentially fatal. For it is common knowledge that potential swelling or bleeding in the cranial cavity poses a significant risk of death. Notably, the preamble to the final rule for section 50.10 includes concussions and major upper body blunt force trauma as types of injuries that must be immediately reported. 71 Fed. Reg. 71,430, 71,434 (Dec. 8, 2006). Accordingly, Red River's failure to timely report the November 1, 2013, accident within 15 minutes, constitutes a violation of section 50.10.

iii. S&S

The Secretary has designated the failure to timely report Powers' accident cited in Order No. 8199116 as non-S&S. As an initial matter, the Commission, consistent with a remand from the D.C. Circuit Court of Appeals, had determined that, unlike violations of mandatory safety standards, Part 50 reporting requirements were regulations not subject to S&S designations. *Cyprus Emerald Res. Corp.*, 22 FMSHRC 285 (Mar. 2000), *on remand from, Cyprus Emerald Res. Corp.*, 195 F.3d 42, 44 (D.C. Cir. 1999). The requirements in section 50.10 were subsequently modified by rulemaking in 2006, elevating the status of reporting requirements to mandatory standards. *Signal Peak*, 37 FMSHRC at 479 (citations omitted). Consequently, the Commission has determined that S&S designations for violations of section 50.10 are now applicable. *Id.*

It is clear, absent extraordinary circumstances not present here, that the failure to report potentially fatal accidents constitutes an S&S violation, as it precludes MSHA's investigatory role. *Id.* at 479-81. Thus, I would ordinarily be inclined to modify Order No. 8199116 to reflect that Red River's failure to report Powers' accident was S&S in nature. However, I am precluded from doing so. *See Mechanicsville Concrete Inc. t/a Materials Delivery*, 18 FMSHRC 877 (June 1996) (holding that an ALJ lacks the authority to charge an operator with violations and is thus precluded from raising a designation from non-S&S to S&S on his own initiative). Consequently, the Secretary's non-S&S designation of the reporting violation shall be affirmed.

iv. Unwarrantable Failure

Inspector Bower concluded that Red River's failure to timely report the accident to MSHA was an unwarrantable failure to comply with section 50.10. As a general proposition, an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (1987). The focus of this analysis is on whether a reasonably prudent person familiar with the purpose of the reporting requirements of section 50.10 should have concluded that immediate notification was necessary.

Section 50.10 requires a mine operator to notify MSHA within 15 minutes of an accident that has a reasonable potential to cause death. While it is true that Mays was an EMT, the decision whether or not to immediately notify MSHA cannot be made within a matter of minutes after a serious accident "upon the basis of clinical or hyper-technical opinions as to a miner's chance of survival." *Cougar Coal Co.*, 25 FMSHRC 513, 521 (Sept. 2003). This is particularly true in this instance where Red River knew that Powers had sustained blunt force trauma to the head, resulting in serious facial injuries. I do not doubt the sincerity of Mays' initial conclusions

that Powers' injuries were survivable. However, hasty conclusions that minimize the degree of severity of head injuries, without the benefit of an MRI, x-ray, or other diagnostic studies, constitute an abuse of discretion.

Clapp credibly testified that given the benefit of hindsight, he regretted his reliance on the information provided to him via telephone by Mays regarding Powers' condition and the circumstances of the accident. Tr.2 at 260-61. However, in the final analysis, Clapp's misplaced reliance on this information interfered with any meaningful MSHA investigation aimed at preventing the reoccurrence of a similar accident. Thus, Clapp's misplaced reliance cannot be considered a mitigating factor. Consequently, the reporting violation is attributable to "high" negligence, which supports the unwarrantable failure designation.

v. Civil Penalty

The Secretary proposes the statutory minimum of \$5,000.00, provided in 30 U.S.C. § 110(a)(2) for violations of section 50.10. Clapp's reliance on Mays' medical opinion as a certified EMT is understandable and is a mitigating factor that precludes increasing the civil penalty in excess of the statutory minimum. Consequently, **a civil penalty of \$5,000.00 shall be imposed for Order No. 8199116.**

f. Citation No. 8199117 (Preservation of Accident Scene)

i. Findings of Fact

During his November 6, 2013, inspection, it was clear to Bower that Red River had resumed mining activities following Powers' November 1, 2013, accident, which prevented MSHA from exercising its investigative authority. Tr.2 at 231. Consequently, Bower issued 104(a) Citation No. 8199117, alleging a violation of 30 C.F.R. § 50.12.⁹ Specifically, Citation No. 8199117 provides:

The mine operator failed to report the accident that occurred at this Facility on 11/01/2013 at approximately 10:45 p.m. A miner received blunt force injuries to the face and forehead. The Mine Operator repaired the Magnetic Separator that was involved with the accident and put it back into service. This action altered the accident site and prevented an accident investigation to begin promptly.

Gov. Ex. 13. Bower characterized the cited violation as non-S&S. Although Bower characterized Red River's degree of negligence as "high," he did not attribute the violation to an

⁹ 30 C.F.R. § 50.12 provides:

Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

unwarrantable failure. The Secretary has proposed a \$2,000.00 civil penalty for Citation No. 8199117. This violation was abated by Red River on November 11, 2013, by providing relevant personnel with refresher training on sections 50.10 and 50.12

ii. Fact of Violation and Negligence

As discussed above, the November 1 incident at issue is properly characterized as an “accident” under Part 50. *See* 30 C.F.R. § 50.2(h)(2). Section 50.12 prohibits operators from altering an accident site until all investigations pertaining to the accident are completed by MSHA. 30 C.F.R. § 50.12.

Red River’s failure to timely report the subject accident precluded MSHA’s investigation. In its defense, Red River argues that section 50.12 is inapplicable because it presupposes that a report has been made and that MSHA has designated the area as an accident scene. *Resp. Br.* at 28. Thus, in an attempt to place the proverbial cart before the horse, Red River posits that no violation of section 50.12 occurred as no “accident scene” was established by MSHA. *Id.*

However, the Commission has held that “it is the *occurrence* of an accident that is the condition precedent to the application of section 50.12, not the *reporting* of one.” *Black Beauty Coal Co.*, 37 FMSHRC 687, 690 (Apr. 2015) (emphasis in original). As such, despite Red River’s failure to report the accident, it is the accident that prohibited Red River from resuming normal mining operations at the scene prior to the initiation of MSHA’s relevant investigation. Consequently, it is clear that Red River’s disturbance of the accident scene constituted a violation of section 50.12, as well as an interference with MSHA’s investigative responsibility. Such conduct is reflective of a “high” degree of negligence, as asserted by the Secretary.

iii. S&S

As previously noted, I lack the authority to disturb the Secretary’s non-S&S designation. *See Mechanicsville Concrete*, 18 FMSHRC 877.

iv. Civil Penalty.

The Secretary proposes a \$2,000.00 civil penalty. Although I have affirmed the Secretary’s characterization of Red River’s conduct as “high” negligence, it is significant that the Secretary has not attributed the violation to an unwarrantable failure. As discussed above, although not exculpatory, Clapp’s failure to ensure the integrity of the accident scene was based on his reliance, albeit misplaced, on a certified EMT. I view this as a mitigating circumstance. However, this mitigation does not provide an adequate basis for reducing the Secretary’s proposed \$2,000.00 civil penalty. Consequently, **a civil penalty of \$2,000.00 shall be imposed for Citation No. 8199117.**

V. Settlement of Docket No. VA 2014-237

Prior to the hearing, the parties advised that the three orders at issue in Docket No. VA 2014-237 had settled. The record at the hearing was left open for the parties to submit their written settlement terms, which were filed on October 13, 2016.

Regarding the three settled orders in Docket No. VA 2014-237, the parties' settlement terms include reducing the total civil penalty from \$12,000.00 to \$5,000.00. Specifically, the settlement terms provide for modifying Order No. 8199078, which cites an alleged failure to perform an adequate on-shift examination in violation of 30 C.F.R. § 77.1713(c), from a 104(d)(2) order to a 104(a) citation, thus removing the unwarrantable failure designation, with a corresponding penalty reduction from \$4,000.00 to \$1,800.00. In support of this modification and penalty reduction, the Respondent represents that while the day-shift foreman failed to record the results of the subject on-shift examination, the examination did occur and the results of the examination were verbally presented to the shift foreman.

Regarding Order No. 8202323, which cites a violation of 30 C.F.R. § 77.200 that requires all mine structures to be maintained in good repair to prevent injuries to miners, the parties agree to modify the violation from a 104(d)(2) order to a 104(d)(1) citation, with a corresponding penalty reduction from \$4,000.00 to \$2,000.00. In support of this modification and penalty reduction, the Respondent represents that the cited rusted and sharp edges on an escapeway tunnel were not severe enough to have caused lacerations or bruises to someone crawling through the tunnel. Furthermore, the Secretary represents that the underlying 104(d)(1) order that supported this 104(d)(2) order was modified to a 104(a) citation in a separate proceeding.

Additionally, regarding Order No. 8189008, which cites dry weeds, leaves, and underbrush in close proximity to a fuel storage tank in violation of 30 C.F.R. § 77.1103(d), the parties agree to modify the violation from a 104(d)(2) order to a 104(a) citation, thus removing the unwarrantable failure designation, and to reduce the degree of negligence attributable to the cited condition from "high" to "moderate," with a corresponding penalty reduction from \$4,000.00 to \$1,200.00. In support of these modifications and penalty reduction, the Respondent represents that the cited fuel tank was storing diesel fuel, rather than gasoline, and thus presented less of a combustion hazard.

I have considered the representations submitted in this matter and I conclude that the proffered settlement agreement is appropriate under the criteria set forth in section 110(i) of the Mine Act. The settlement terms reduce the total civil penalty from \$12,000.00 to \$5,000.00 for the three settled orders in Docket No. VA 2014-237, two of which have been modified to section 104(a) citations.

ORDER

In view of the above, with respect to Docket No. VA 2014-236, **IT IS ORDERED** that Order No. 8199116 (accident report) **IS AFFIRMED**. Accordingly, **IT IS ORDERED** that Red River Coal Co., Inc. **SHALL PAY** a penalty of \$5,000.00 in satisfaction of Order No. 8199116, the single order at issue in Docket No. VA 2014-236.

With respect to Docket No. VA 2014-239, **IT IS FURTHER ORDERED** that Order No. 8207981 (walkway) and Citation No. 8199117 (accident scene) **ARE AFFIRMED**. Accordingly, **IT IS ORDERED** that Red River Coal Co., Inc. **SHALL PAY** a penalty of \$9,100.00 in satisfaction of Order No. 8207981 and \$2,000.00 in satisfaction of Citation No. 8199117.

With respect to Docket No. VA 2014-239, **IT IS FURTHER ORDERED** that Order Nos. 8189011 (on-shift examination), 8202324 (vent pipe), 8202325 (top loadout tunnel), 8202326 (bottom loadout tunnel), and 8202327 (distribution building) **ARE MODIFIED** from section 104(d)(2) orders to section 104(a) citations, thus deleting the unwarrantable failure designations. **IT IS FURTHER ORDERED** that Citation No. 8202324 **IS MODIFIED** to non-S&S. Accordingly, **IT IS FURTHER ORDERED** that Red River Coal Co., Inc. **SHALL PAY** a penalty of \$1,400.00 each in satisfaction of Citation Nos. 8202325, 8202326, and 8202327, \$1,200.00 in satisfaction of Citation No. 8189011, and \$100.00 in satisfaction of Citation No. 8202324. In sum, **IT IS ORDERED** that Red River Coal Co., Inc. **SHALL PAY** a total civil penalty of \$16,600.00 in satisfaction of the seven citations and orders in Docket No. VA 2014-239.

With respect to Docket No. VA 2014-237, **IT IS FURTHER ORDERED** that consistent with the parties' settlement terms approved of in this Decision, Red River Coal Co., Inc. **SHALL PAY** a total civil penalty of \$5,000.00 in satisfaction of Order Nos. 8199078, 8202323, and 8189008.

In view of the above, **IT IS ORDERED** that Red River Coal Co., Inc., pay, within 40 days of the date of this Decision, **a total civil penalty of \$26,600.00**, consisting of a total civil penalty of \$21,600.00 for the eight citations and orders adjudicated in this proceeding, in addition to \$5,000.00 for the three settled orders.¹⁰

IT IS FURTHER ORDERED that upon timely receipt of the total \$26,600.00 payment, the civil penalty proceedings in Docket Nos. VA 2014-236, VA 2014-237, and VA 2014-239 **ARE DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

¹⁰ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

Distribution: (Electronic and Certified Mail)

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

February 2, 2017

JONES BROS., INC.,
Contestant,

v.

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

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

v.

JONES BROTHERS INC.,
Respondent.

CONTEST PROCEEDINGS

Docket No. SE 2016-218
Citation No. 8817595; 04/06/2016

Docket No. SE 2016-219
Citation No. 8817596; 04/06/2016

Mine: S.R. 141 Project, DeKalb Co.
Mine ID: 40-03454

CIVIL PENALTY PROCEEDING

Docket No. SE 2016-246
A.C. No. 40-03454-410595

Mine: Jones Brothers Mine

ORDER DENYING MOTION FOR SUMMARY DECISION

Before: Judge Miller

This case is before me upon notices of contest and 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). At issue is a rock pit used by Jones Brothers, Inc., to provide fill material for an adjacent roadway. Jones Brothers has filed a Motion for Summary Decision on the basis of a lack of jurisdiction under the Mine Act. For the reasons that follow, I deny the motion.

I. FACTUAL BACKGROUND

In early 2015, Jones Brothers contracted with the Tennessee Department of Transportation (“TDOT”) to repair a portion of roadway in DeKalb County, Tennessee. A. Williams Dep. 13-14. In August 2015, the company began preparing a pit adjacent to the road repair site to supply rock for use as fill material for the road. A. Williams Dep. 13-14, 20-21. TDOT agreed to pay the company \$14.25 per ton for 68,615 tons of rock. Hinson Dep. 22-24. The company first removed overburden from the site, then excavated rock from the pit through drilling and blasting. A. Williams Dep. 21-22; Hinson Dep. 32, 34-35. The rock was then

loaded onto trucks using a slotted bucket to remove any dirt and transported to the road site. A. Williams Dep. 33. A hoe ram was used to break up rock that was too large to fit into the bucket, but the rock was otherwise transported to the road site in the form in which it was excavated. Hinson Dep. 50-51; D. Williams Dep. 77-78. There was no rock crusher on site. D. Williams Dep. 69. Workers were on site up to six days a week. Hinson Dep. 44.

TDOT required that the excavated material meet the standard of “graded solid rock” in order to be used as fill for the roadway. Hinson Dep. 21. The material was required to be of sufficient hardness and not “thin [and] slabby.” Hinson Dep. 33; McCullough Dep. 20; Sec’y Ex. B (TDOT Specifications for Graded Solid Rock). There were also size requirements: at least 50 percent of the rock had to be between one and three feet in diameter, and no more than 10 percent could be less than two inches in diameter. Sec’y Ex. B (TDOT Specifications for Graded Solid Rock). Prior to beginning excavation, the company provided a core sample to TDOT to ensure that the rock would meet its standards. A. Williams Dep. 14-16; Hinson Dep. 42. Once production began, TDOT personnel visited the site to conduct visual inspections of the material. A. Williams Dep. 16-17; Hinson Dep. 32-33; McCullough Dep. 23.

On April 5, 2016, MSHA Inspector Danny Williams visited the pit after noticing it near his home. D. Williams Dep. 92. He discussed the operation with employees on site, then returned to the MSHA office to discuss MSHA’s jurisdiction over the pit with his field office supervisor. D. Williams Dep. 54-55. The issue was also referred to the MSHA district office in Birmingham, and MSHA decided that it had jurisdiction over the pit. *Id.* Williams conducted an inspection of the pit on April 6, 2016, and issued the nine citations and orders at issue in this docket. Jones Brothers obtained a mine identification number from MSHA as part of its abatement of the citations and orders. The company completed work at the pit in the summer of 2016. A. Williams Dep. 37-38.

II. SUMMARY DECISION STANDARD

Commission Rule 67 provides:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material facts; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

In reviewing the record on summary decision, the judge must consider the record “in the light most favorable to ... the party opposing the motion.” *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). The judge should not rely solely on the parties’ claims, but must conduct an independent review of the record. *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016). Inferences drawn from the facts in the record must also be viewed in the light most

favorable to the party opposing the motion. *Id.* (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. DISCUSSION

Jones Brothers argues that MSHA had no jurisdiction to issue citations to the Jones Brothers operation because the operation was a “borrow pit” as defined in the MSHA/OSHA Interagency Agreement of 1979, and therefore subject to OSHA rather than MSHA jurisdiction. The Secretary argues that MSHA had jurisdiction. I find that there is no dispute as to the material facts and the issue is a question of law.

The Mine Act provides that “Each coal or other mine, the products of which enter commerce ... shall be subject to the provisions of this Act.” 30 U.S.C. § 803. The definition of “coal or other mine” includes “an area of land from which minerals are extracted in nonliquid form.” 30 U.S.C. § 802(h)(1)(A). However, an Interagency Agreement allocating responsibility between MSHA and OSHA accords OSHA jurisdiction over “borrow pits.” MSHA & OSHA Interagency Agreement, 44 Fed. Reg. 22,827, 22,828 (Apr. 17, 1979). A borrow pit is defined as:

an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

Id.

The legislative history of the Act makes clear that Congress wished that “what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 95-181, at 14 (1977). Consistent with this, past decisions from the Commission and its ALJs have applied a strict interpretation of the term “borrow pit.” *See, e.g., Drillex, Inc.*, 16 FMSHRC 2391, 2396 (Dec. 1994); *Kerr Enterprises, Inc.*, 26 FMSHRC 953, 957 (Dec. 2004) (ALJ); *N.Y. State Dep’t of Transp.*, 2 FMSHRC 1749, 1761 (July 1980) (ALJ). For instance, in *New York State Department of Transportation*, the New York Department of Transportation owned and operated a shaker screen that only allowed material one quarter inch or less to pass through. 2 FMSHRC at 1755. The department stockpiled the sand at a gravel quarry for highway ice control during the winter. *Id.* The judge determined that the sand was not being used as “fill” merely for its bulk, but rather that the department used the shaker screen to select sand of a particular size for its “intrinsic qualities.” *Id.* at 1759. Thus, the judge found that the department did not operate a “borrow pit” within the meaning of the MSHA-OSHA Interagency Agreement. *Id.* at 1758-59.

The Commission has clarified that any processing other than the removal of large rocks, wood, and trash, disqualifies an operation as a borrow pit. *See Alaska, Dep't of Transp.*, 36 FMSHRC 2642, 2649 (Oct. 2014) (finding that operation was not a borrow pit where a screening process was used to sort materials by size and type); *Drillex, Inc.*, 16 FMSHRC 2391, 2396 (Dec. 1994) (finding that operation was not a borrow pit where stone was crushed into smaller particles). The timing of the operation is also a factor: in *Drillex, Inc.*, the Commission excluded an operation from the borrow pit exception in part because it engaged in extraction three times a week, which did not qualify as “intermittently.” 16 FMSRHC at 2396.

Further, locations where drilling and blasting are used to extract materials do not meet the definition of borrow pits. *See Drillex, Inc.*, 16 FMSHRC at 2396 (finding that location where blasting occurred was not a borrow pit). The Interagency Agreement states that the materials that may be removed from a borrow pit are “unconsolidated rock, glacial debris, [and] other earth material overlying bedrock.” 44 Fed. Reg. at 22,828. Unconsolidated rock and glacial debris are both materials that can be removed without blasting, and “other earth material” should thus be interpreted to refer to materials sharing that characteristic. This interpretation is consistent with the example used to illustrate a borrow pit in MSHA’s program policy manual, an operation using a loader to move bank run material to fill potholes. I MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Sect. 4, at 4 (2013) (“PPM”).

The Jones Brothers operation involved drilling and blasting rock, then breaking the large pieces up with a hoe ram. Next, the material was removed with a bucket and trucks to a nearby roadwork site where the rock was used as fill. The company emphasizes that it did not crush or size the rock before using it, but rather transported it to the road site where it was used in the form in which it was excavated. However, the drilling and blasting, along with the use of the hoe ram, did break up the material. While the company insists that any sizing was only done to fit the rocks into the bucket, the TDOT regulations also contained minimum and maximum size restrictions for the fill material.

Further, the Interagency Agreement limits borrow pits to those where work is done “on a one-time only basis or only intermittently as need occurs.” 44 Fed. Reg. at 22,828. Work was done at the Jones Brothers operation up to six days a week for approximately a year and therefore the work does not qualify as intermittent or one-time-only work. *Cf. Drillex, Inc.*, 16 FMSRHC at 2396 (finding that work done three days a week was not “intermittent”).

The company also insists that it used the rock “more for its bulk than its intrinsic qualities,” as described in the Interagency Agreement. 44 Fed. Reg. at 22,828. However, Jones Brothers admits that TDOT required rock, not dirt, as fill material. The company submitted a sample of the material to the department for testing because TDOT required rock of a certain hardness. It is thus clear from the record that the intrinsic properties of the material were important to the company. *See also Drillex, Inc.*, 16 FMSHRC at 2396 (finding that operation was not a borrow pit where “the stone was not used for its bulk alone but was sized for its intended use as fill”). The company’s reliance in its motion on the case *State of Alaska, Department of Transportation* involving a similar material test is misplaced because that ALJ decision was reversed by the Commission. *Alaska, Dept. of Transp.*, 34 FMSHRC 179 (Jan. 2012) (ALJ), *rev'd*, 36 FMSHRC 2642 (Oct. 2014). The Commission’s decision in that case

emphasized that where an operation “did more than ‘scalp’ away large rocks, wood, and trash from the material it was extracting,” it was not a borrow pit. *Alaska, Dept. of Transp.*, 36 FMSHRC at 2649. Here, like the *Alaska* case, a certain kind of rock was better suited for the job and the material was tested to be certain it met the requirements for that particular construction.

Finally, the company argues that its operation was limited to the removal of overburden. The Interagency Agreement defines borrow pits as operations where “overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface.” 44 Fed. Reg. at 22,828. However, the record indicates that the company had to remove trees and dirt and then blast in order to remove the desired material. The language of the Interagency Agreement suggests that a borrow pit is limited to an area where material can be easily removed by a loader or similar machinery. *See* 44 Fed. Reg. at 22,828; I PPM, Sect. 4 at 4. In contrast, the Jones Brothers operation involved removing a layer of materials, the overburden, then extracting a separate layer through blasting and drilling. The drilling and blasting of a layer of material is not consistent with the definition of a borrow pit.

Based on these considerations, I find that the pit was not a borrow pit for purposes of the Interagency Agreement. Because the pit was “an area of land from which minerals are extracted in nonliquid form,” it qualifies as a mine and thus is subject to MSHA jurisdiction.

IV. ORDER

Based on my review of the relevant law and facts, I find that MSHA properly asserted jurisdiction over the Jones Brothers pit. While there is no question of material fact on the issue, the company is not entitled to summary decision as a matter of law. Respondent’s Motion for Summary Decision is **DENIED**. The case will proceed to hearing on February 15, 2017, as previously scheduled.

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

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February 2, 2017

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

v.

ARJ CONSTRUCTION COMPANY INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. YORK 2016-7
A.C. No. 18-00748-391227

Mine: Taylor # 1

ORDER OF DEFAULT AND ORDER TO PAY

This case is before me upon a petition for assessment of civil penalties under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c).

This docket involves two alleged violations and total proposed penalties of \$32,100.00. The Petition was filed on November 10, 2015. Counsel for Respondent filed an Answer on his client’s behalf December 16, 2015. When this docket was assigned to me on December 29, 2015, I issued a prehearing order directing the parties to engage in settlement discussions to determine whether a hearing would be necessary. The parties were further advised that failure to comply with the terms of the order could result in an order to show cause and a finding of default.

On September 2, 2016, after the case had been outstanding for nine months without apparent progress toward settlement, my law clerk requested the parties’ availability for a conference call with me to discuss scheduling a hearing. In response, Respondent’s counsel requested additional time to look into the case and discuss his client’s position with the Solicitor. However, after several months, the Solicitor advised that Respondent’s counsel still had not been in contact with him.

I held a conference call on December 6, 2016 to discuss scheduling a hearing for this case. Respondent’s counsel failed to appear despite having received two emails stating the date and time for the call, including one that was sent to him the day before the call in response to an email from his office asking what time the call would be held. Shortly after missing the call, Respondent’s counsel phoned my law clerk, explained that his office had confused the time for the call, and requested copies of the citations. My clerk told him that a hearing needed to be scheduled and emailed him a copy of the Petition.

The conference call was rescheduled for the afternoon of December 9, 2016. My office sent an email to both parties ordering them to appear. Counsel for Respondent again failed to appear. He did not contact my office afterward to explain his failure to appear.

On December 13, 2016, I issued an Order to Show Cause summarizing the procedural history of the case and directing Respondent to explain why an order of default should not be issued against it given its failure to comply with my order to engage in settlement discussions and failure to appear on conference calls. My office did not receive any response.

On January 9, 2017, I issued a Final Order to Show Cause again directing Respondent to explain why an order of default should not be entered. Respondent was warned that if an explanation was not filed within ten days of its receipt of the order, no further notices would be issued, Respondent would be in default, its notice of contest and request for hearing would be dismissed, and it would be ordered to pay the full amount of the proposed penalties. The certified mail receipt shows that Respondent received the Final Order to Show Cause on January 17, 2017. My office has not received any response.

Respondent has failed to defend its case and to comply with my orders and instructions, including my two Orders to Show Cause and my instructions to engage in settlement discussions with the Secretary, to provide its availability for hearing, and to attend conference calls. The Federal Rules of Civil Procedure require entry of default against a defendant who fails to plead or otherwise defend his case. Fed. R. Civ. Pro. 55. The Commission's procedural rules also permit a finding of default and summary disposition of a case after issuance of a show cause order when a party has failed to comply with a judge's orders. 29 C.F.R. § 2700.66.

WHEREFORE, I find Respondent to be **IN DEFAULT**.

Respondent's notice of contest and request for hearing are **DISMISSED**. Respondent is hereby **ORDERED** to pay a total penalty of \$32,100.00 within thirty (30) days of the date of this Order.¹

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

¹ Checks or money orders should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, P.O. Box 790390, St. Louis, MO 63179-0390.

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February 6, 2017

GENE ESTELLA,
Complainant,

v.

NEWMONT USA LIMITED,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-0031-DM
WE-MD-15-17

Mine: Phoenix Mine
Mine ID: 26-00550

FINAL ORDER

Before: Judge Moran

This case is before the Court upon a complaint of discrimination under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (“the Act”). The Court issued a decision after hearing in this matter on December 22, 2016, and retained jurisdiction until such time as specific relief and any monetary damages could be awarded. In the decision, the Court ordered that the Respondent permanently reinstate the Complainant, award any back pay, overtime, interest, and benefits due, and remove all references to Mr. Estella’s termination and the reasons asserted therein from his personnel file. The Court further ordered the Respondent to post the decision at Phoenix Mine along with a notice to employees, and ordered that a copy of the decision be sent to the relevant Regional Solicitor’s office pursuant to Commission Rule 44(b).

Finally, the Court instructed the parties to submit either an agreement on specific and monetary damages or, if an agreement could not be reached, their positions on specific issues (back pay, overtime, interest, attorney’s fees, non-covered medical expenses, and other applicable damages) within 30 days of its decision. Newmont filed a Petition for Discretionary Review with the Commission on January 23, 2017, which was rejected on January 26, 2017 because this Court had not yet awarded all relief due to the Complainant, and the decision was therefore not yet final and appealable. *Sec’y of Labor obo Shemwell v. Armstrong Coal Co.*, 35 FMSHRC 2056, 2057 (July 2013).

Both parties submitted their respective positions around this time as well, and the Court held a conference call on January 27, 2017 to discuss the position statements. Following this, on January 31, 2017 the parties submitted a joint, final position statement signed by both Counsel and addressing all topics relevant to Mr. Estella’s full compensation.

Pursuant to the parties' submission, the Court hereby **ORDERS** the following:

1. Complainant Gene Estella is entitled to back pay (including interest) in the amount of \$81,076.51 for the period between June 29, 2015 and January 30, 2017.
2. Estella is entitled to 401(k) plan contributions in the amount of \$36,474.01 for the same period.
3. Estella is entitled to compensation for medical expenses in the amount of \$1,281.50.
4. Estella is entitled to attorney's fees and costs in the amount of \$56,458.27.

This brings the total award amount to \$175,290.29. Although Estella was entitled to reinstatement pursuant to 30 C.F.R. § 805(c), he has waived this option: he confirmed through his attorney's e-mail to the Court, dated January 29, 2017, that he is "not interested in reinstatement with Newmont." The parties also agreed that neither will appeal the Court's final decision in this matter.

The Court reminds the Respondent that it was ordered to expunge all reference to Mr. Estella's discharge and the circumstances surrounding it from his personnel file and from company records. Upon inquiry from any prospective employer, there is to be no reference whatsoever to Mr. Estella's discharge, its circumstances, nor to his filing a discrimination complaint against the Respondent.

Counsel for Respondent has informed the Court that a copy of the Court's December 22, 2016 Decision and Order has been posted, along with a visible notice, on a bulletin board at the mine that is accessible to each and every employee, explaining that Newmont has been found to have discriminated against an employee, that such discrimination will be remedied, and that it will not reoccur in the future. The notice shall also inform all employees of their rights in the event they believe they have been discriminated against. That information is to remain posted for a period of 60 (sixty) consecutive days from the issuance of this Final Order.

A copy of this Final Decision and Order shall be sent to the Regional Solicitor having responsibility for the area in which Newmont's Phoenix Mine is located so that the Secretary may take the actions required by Commission Rule 44(b). 29 C.F.R. §2700.44(b).

The Respondent is **ORDERED** to pay the sums as listed above and to comply with all aforementioned requirements within 30 days of the issuance of this Final Order. Upon timely compliance, this matter is **DISMISSED**.

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

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February 16, 2017

VICKIE R. ARLINE,
Complainant

v.

ARCILLA MINING & LAND LLC,
Respondent

DISCRIMINATION PROCEEDING

Docket No. SE 2016-0196-DM
SE-MD-16-07

Mine ID: 09-1077
Sheppard Mine

ORDER OF DISMISSAL

Before: Judge Miller

This case is before me upon a complaint of discrimination under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3), filed by Vickie R. Arline against Arcilla Mining and Land, LLC. Arline’s complaint concerns an accident involving a truck at the mine in which Arline was injured in June 2014. She alleges that she contacted an attorney regarding her injuries after the accident and was laid off as a result. Arline was offered her job back after several months on light duty, but she refused because of her lingering injuries. Both parties are unrepresented in this case. Because Arline’s complaint had a number of substantive and procedural defects, several conference calls were held with the parties and Arline was given the opportunity to supplement her complaint. An Order to Show Cause was issued on January 9, 2017, and while Arline responded to the order, I do not find that the defects have been resolved. As explained below, I find that Arline’s complaint fails to state a cause of action, and I therefore dismiss this case.

I. BACKGROUND

On January 5, 2016, complainant Vickie Arline submitted a complaint to the Mine Safety and Health Administration (“MSHA”) regarding her discharge from her position with Arcilla Mining and Land, LLC (“Arcilla”) in August 2014. MSHA notified Arline on February 26, 2016, that it would not be pursuing her case, noting the 30-day deadline for filing with the Commission. Arline filed a complaint with the Commission on April 19, 2016, but failed to provide proof of service to Respondent. Accordingly, Chief Judge Lesnick sent a letter to Arline on April 21, 2016, notifying her of the proof of service requirement and giving her 30 days to provide such proof. Arline failed to provide proof of service within that time period. The Chief Judge then issued an Order to Show Cause on July 22, 2016, giving Arline 30 more days to provide proof of service.

The case was assigned to this office on November 15, 2016. As of that date, Arline had not yet provided proof of service. This office contacted Arline to explain the proof of service requirement. Arline submitted a second copy of her complaint, but still failed to provide proof of service. Because the Commission has directed its judges to exercise leniency in handling cases with pro se parties, her case was not dismissed at that point, but instead this office provided Arcilla with a copy of the complaint. A conference call with the parties was held on December 7, 2016. Arcilla admitted that it had received Arline's complaint, and the company was directed to file an answer, which it did shortly after the conference call.

Arline's initial complaint alleges that she was laid off after being injured in an accident with another truck driver on the job. Compl. to MSHA (Jan. 4, 2016); Compl. to Comm'n (Apr. 19, 2016). She believes she was laid off because she contacted an attorney after the accident about her workers' compensation claim, and seeks compensation for her time off work and retraining for another job. Compl. to MSHA; Compl. to Comm'n. In the company's answer, it asserts that it twice offered Arline to return to work, but she refused. Ans. (Dec. 7, 2017). The company also states that Arline received workers' compensation for the time she was off work due to her injury. *Id.*

Arline's complaints failed to address several issues, including her delay in filing with MSHA and what protected activity she alleges. In a December 7, 2016 conference call with the parties, the necessary elements of a discrimination claim were explained to Arline, including what constitutes protected activity. She was granted leave to amend her complaint to explain in writing why she had not timely filed her complaint and provide further information about a protected activity.

Arline filed an amendment on December 9, 2016, but still failed to adequately address the issues of protected activity and delayed filing. An Order to Show Cause was issued on January 9, 2017, explaining these issues and giving her an opportunity to respond. Arline filed a response on January 30, 2017. In her response Arline alleges that the truck driver who hit her was not adequately trained, but she made no complaint about it until she contacted MSHA in January 2016, long after she was terminated. She presented no other allegation of protected activity. A final call was held with the parties on February 6, 2017, to clarify Arline's allegations. Arline again described the truck accident that caused her injuries, emphasizing that she was hit from behind by a new truck driver who had not been adequately trained. Compl. Amdt. (Jan. 30, 2017); Tr. at 4-5. Arline's brother reported the accident to mine management. Tr. at 18. Arline worked the rest of the day after the accident, but began to feel bad when she returned home. Tr. at 5. She went to the emergency room the next day, and was then sent to a workers' compensation doctor, Dr. Smith. Tr. at 6. The doctor informed her that she had a bad case of whiplash and gave her some medication. Tr. at 6. She returned to work the next day doing light duty, which was mostly paperwork. Tr. at 6.

After the accident, Arline spoke with Heath Claxton, a mine manager, and told him that the truck driver who hit her had not been properly trained. Tr. at 18. Claxton agreed and said the accident was not her fault. *Id.* Prior to the accident, Arline had never had any problems at the mine or made any safety complaints. Tr. at 12.

Arline continued to work light duty for the mine in June and July 2014. Tr. at 9. She continued to receive medical treatment from Dr. Smith as well as from an orthopedic doctor, Dr. Richardson. Tr. at 7. Dr. Richardson cleared her to return to full duty on July 24, 2014, and her medical benefits from workers' compensation ended around that time. Tr. at 7, 14. However, she refused to return to full duty because she was still in pain and felt she had not recovered from her knee injury that was related to the accident, which Dr. Smith but not Dr. Richardson had been treating. Tr. at 9, 14. When her medical benefits were no longer paid, she contacted an attorney for help with her claim. She was laid off shortly thereafter. Tr. at 10.

Arline believes she was laid off because she hired an attorney to assist her when she stopped receiving assistance from workers' compensation for her medical expenses. Tr. at 19. She states that someone at the company told her that they would have been able to help her if she hadn't hired an attorney. Tr. at 9. Arcilla insists that Arline was only laid off because there was no work for her if she could not drive a truck, and that it allowed her to draw unemployment when she left. Tr. at 14. The company reports that it received notice of Arline's injury rating for workers' compensation in November 2014, and that it paid her the required amount for temporary disability, \$2,766.00. Tr. at 14. The parties resolved Arline's remaining workers' compensation claims through mediation in July 2016 and as a result Arline received a lump sum settlement from the company. Tr. at 17.

Arline's contact with MSHA began in January 2016, when she first called to report that she had been injured in an accident. Tr. at 11. She states that she is still unable to drive a truck at this time. Tr. at 12. She asks that the company assist her in being retrained for another job and compensate her for the time she has not been working, from August 2014 to the present. Tr. at 21.

II. DISCUSSION

A. Late Filing

Section 105(c)(2) of the Act provides that a miner may make a complaint of discrimination to MSHA "within 60 days after such violation occurs." 30 U.S.C. § 815(c)(2). If MSHA determines that there was no violation, the miner "shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission." 30 U.S.C. § 815(c)(3).

The Commission has clarified that the Mine Act's 60-day time limit should not be construed strictly in cases where late filing is due to "justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1921-22 (1996). Similarly, the legislative history of the Act states that late filing should be excused "where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act." S. Rep. No. 95-181, at 36 (1977). Nevertheless, "[e]ven if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal." *Perry*, 18 FMSHRC at 1922. Underlying the 60-day time limit is a concern for the accuracy of the proceedings. In a decision dismissing a

discrimination complaint filed three years after the employee's termination, a Commission ALJ observed that "it is highly questionable whether the other employees who might have had some knowledge of the events surrounding the termination would have a present recollection of those events." *Sinnott v. Jim Walter Res., Inc.*, 16 FMSHRC 2445, 2448 (Dec. 1994) (ALJ); *see also Hacking v. Staker & Parson Cos.*, 38 FMSHRC 851, 857-58 (Apr. 2016) (ALJ) (dismissing discrimination complaint filed two years and nine months after termination).

Arline began working for Arcilla mining in October 2013, after working as a truck driver for other mining companies for approximately fifteen years. Tr. at 2, 15. She was discharged from Arcilla in July or August 2014. Tr. at 10, 15. She filed her complaint with MSHA on January 5, 2016, a year and a half after her discharge. She received her notice of determination from MSHA on February 26, 2016, and filed her complaint with the Commission on April 19, 2016, several weeks after the 30-day deadline. In this court's Order to Show Cause on January 9, 2017, Arline was given the opportunity to explain her delay in filing her initial complaint with MSHA. She stated in her response that she was not aware of her rights under the Mine Act at the time of her discharge. Compl. Amdt. (Jan. 30, 2017). At some undisclosed time, Arline asked her attorney about filing with MSHA, but he was not familiar with MSHA and said it did not apply to her case. *Id.* Arline did not follow up until her complaint in January 2016. In addition, Arline failed to meet the deadline for filing a complaint with the Commission after receiving her denial from MSHA, and failed to provide proof of service to the mine after being given multiple chances. Finally, Arline worked in the mining industry about fifteen years prior to working with Arcilla. Tr. at 15. When she started her employment with Arcilla, she was shown an MSHA video that described her rights under that Act. Tr. at 15. According to Arcilla, her personnel file contains a signed acknowledgement concerning her training and the MSHA video. Tr. at 16.

Arline retained an attorney before she was laid off from the mine, and contends that it was the hiring of the workers' compensation attorney that led the mine to terminate her employment. She worked as a truck driver in the mining industry for many years, and when she began her employment with Arcilla in October 2013, she was again advised of her rights under the Mine Act. She agrees that she had some information about MSHA but did not follow through, nor did her attorney. Instead, Arline chose to pursue other remedies in a workers' compensation proceeding. She reached a settlement of those claims with Arcilla in July 2016. I find that Arline has provided no persuasive reason why her late filings should be excused. Nevertheless, because both parties are pro se, and there are a number of deficiencies in this case, this dismissal is based primarily on the failure to state a claim as outlined below.

B. Sufficiency of the Complaint

Arline's original complaint did not clearly allege any protected activity or adverse motive by the mine. These subjects were raised with Arline in several conference calls and in the January 9, 2017, Order to Show Cause. I accept Arline's allegations as true for the purpose of this order, but find that she has failed to allege any protected activity giving rise to a claim under the Mine Act.

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss an action when the complaint fails to state a claim upon which relief can be granted. To survive a motion to dismiss

under Rule 12(b)(6), “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 Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A court may order dismissal sua sponte “when it is patently obvious the plaintiff could not prevail based on the facts alleged in the complaint.” *Smith v. Boyd*, 945 F.2d 1041, 1043 (8th Cir. 1991); *see also McKinney v. Okl., Dep’t of Human Servs.*, 925 F.2d 363, 365 (10th Cir. 1991); *Baker v. Dir., U.S. Parole Comm’n*, 916 F.2d 725, 726 (D.C. Cir. 1990).

The Mine Act’s discrimination provision provides for relief when a miner is discharged or otherwise discriminated against because he has filed or made a complaint under the Mine Act, instituted a proceeding under the Act, or exercised any other statutory right under the Act. 30 U.S.C. § 815(c)(1). In Arline’s MSHA Complaint and first Complaint to the Commission, it was unclear what protected activity she was alleging. She was notified of the protected activity requirement in a conference call between the parties and the Judge on December 7, 2016. She was given the opportunity to amend her complaint, which she did on December 9, 2016. In her submission, Arline states that she contacted MSHA to notify them of the tractor trailer accident and that she provided information to an inspector in his investigation of the accident. Compl. Amdt. (Dec. 9, 2016). However, in follow-up calls, it became clear that her only contact with MSHA occurred after she was laid off. A conference call was held on February 6, 2017, to clarify the allegations, and the protected activity requirement was explained to her again. Tr. at 17. While she was given multiple opportunities to name a protected activity, none of the events or activities she described would qualify as a protected activity under the Mine Act.

Arline’s December 9, 2016, filing alleges that she contacted MSHA at some point to provide information about the truck accident. Compl. Amdt. However, Arline explained in the February 6, 2017, conference call that she did not contact MSHA until January 2016, well after her termination. Tr. at 11. Arline also indicated that she learned from MSHA that the truck driver who injured her was not properly trained and that the truck had mechanical issues. Compl. Amdt. (Dec. 9, 2016). However, she admits that she did not make any complaints to MSHA or management prior to her termination. Tr. at 12. It is therefore impossible to conclude that communications with MSHA were the cause of her termination.

Arline further alleges that she complained to her employer about her injuries after the accident and refused to operate a truck when asked because she was still injured and unable to operate the truck safely. Compl. Amdt. (Jan. 26, 2017); Tr. at 9, 19. The Commission has recognized that a miner’s refusal to work in unsafe conditions is protected activity under the Act. *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec’y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786 (Oct. 1980). However, the Commission has limited the right to refuse to work to situations in which the miner has a “good faith, reasonable belief in a hazardous condition.” *Robinette*, 3 FMSHRC at 813; *see also* S. Rep. No. 95-181, at 35 (1977) (stating that protected activity includes “the refusal to work in conditions which are believed to be unsafe or unhealthful”). The Commission’s language requires that the basis for a protected work refusal must be a “condition” in the work

environment, and not the miner's own physical impairment. *See Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ). As one Commission ALJ has observed,

[I]t is clear that [Congress's] intent was to protect against "conditions" inherent in the work process and not to provide continuing compensation or disability benefits for individuals who, because of certain physical impairments or injuries would find working most jobs in the mining industry impossible. While it is truly unfortunate that persons such as [the complainant] may not, because of such injuries, be able to perform work in the industry[,] it is not the purpose of the Act to remedy such problems. To hold a mine operator responsible under such circumstances would effectively make him a guarantor of compensation. It is clearly not the purpose of the Act, but rather worker's compensation, social security disability and other similar laws to provide loss of income protection under these circumstances.

Id. at 1126; *see also Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129, 133 (Mar. 2003) (ALJ) (finding that miner's refusal to lift heavy bags because it would aggravate a back injury he sustained at work was not protected activity); *Collier v. Great W. Coal, Inc.*, 12 FMSHRC 35 (Jan. 1990) (ALJ) (dismissing case where complainant was discharged for inability to perform his job duties, even though his injuries were due in part to defective equipment at work).

Finally, Arline's allegations that she was laid off for contacting an attorney do not fall within the scope of protected activity. *See* Compl. to MSHA (Jan. 4, 2016). Arline states that she contacted an attorney for assistance in obtaining compensation for her medical expenses in dealing with her injuries after being released to return to work in August, 2015. Tr. at 20. She believes that the call to the attorney resulted in her lay off. However, the Act protects only those miners who make a complaint "under or related to the Act." 30 U.S.C. § 815(c)(1). Arline has not alleged that her contact with the attorney related to any safety issues at the mine or to any right guaranteed under the Act. *Cf. Brannon v. Panther Mining, LLC*, 31 FMSHRC 1533, 1536 (Nov. 2009) (ALJ) (finding that filing a civil lawsuit in state court could constitute protected activity if it furthered rights guaranteed by the Act). In fact, when questioned about her contact with an attorney, Arline repeatedly asserted that she contacted him (later she refers to her attorney as "her") because she needed help collecting medical payments under her worker's compensation claim. She does mention in one pleading asking an attorney about filing a complaint with MSHA but it is unclear when that occurred. Given that it went no farther than questioning her attorney, it cannot be said that the mine knew of the contact or in any way acted upon it.

Both parties in this case were given ample opportunity to present evidence and documents, both in writing and in conferences.¹ On a number of occasions the parties were instructed as to procedure and as to the elements of a discrimination case. Arline was given a number of opportunities to explain what protected activity she alleges in her complaint and why

¹ Following the final conference call, Arline faxed medical records to this office, which added nothing to the record, and were returned to her for privacy reasons.

she believes she was unfairly terminated. Each time, her responses related to her injury, to the mine taking care of her as a result of the injury, and to thinking that she would get a more favorable worker's compensation award from them. The mine asserts that Arline was twice offered to return to work as a truck driver and they had no other positions for her to fill. She is eligible for re-hire as a truck driver if she chooses to return to work at any time. Tr. at 22. The mine indicated that they believed that all of the issues related to Arline were workers' compensation issues, that she never made a complaint during her employment and that she was a good employee and driver. They learned nothing about MSHA until an inspector brought the accident to their attention a year and a half after the accident, long after Arline had been laid off.

Given the evidence in the file presented by both parties, and the fact that both parties have nothing further to present, I find that Arline has failed to state a claim pursuant to Section 105(c) of the Mine Act.

III. ORDER

Based on the above findings and conclusions of law, I find that Complainant has failed to state a claim upon which relief may be granted. Accordingly, the case is hereby **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 17, 2017

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

v.

CACTUS CANYON QUARRIES, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2016-410
A.C. No. 41-00009-410862

Mine: Fairland Plant & QYS

ORDER OF CONTINUANCE

Before: Judge Feldman

This single citation proceeding is before me based on a petition for assessment of civil penalties filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Mine Act”), 30 U.S.C. § 815(d), against the Respondent, Cactus Canyon Quarries, Inc. (“Cactus Canyon”). The subject mandatory safety standard in 30 C.F.R. § 56.14207 requires that unattended mobile equipment must be placed in the parked position with the parking brake set, and when parked on a grade, the wheels must either be chocked or turned into a bank. Citation No. 8864556 alleges that Cactus Canyon committed a non-significant and substantial violation of section 56.14207 when it failed to engage the parking brake and chock the wheels of a pickup truck parked on an incline. The Secretary seeks to impose a penalty of \$100.00 for Citation No. 8864556. An evidentiary hearing is currently scheduled for March 7, 2017.

Commission Rule 67 provides that a party may move for summary decision, at least 25 days before a scheduled hearing, accompanied by an affidavit supporting the grounds upon which the party seeks summary decision. 29 C.F.R. § 2700.67(a), (c). On February 16, 2017, 19 days before the scheduled hearing, the Secretary filed a Motion for Summary Decision supported by the issuing inspector’s affidavit, which provides in pertinent part, that the cited vehicle was observed parked on an incline without the parking brake set or wheels chocked. *Sec’y Mot. for Sum. Dec.*, Ex.1 at 2 (Feb. 16, 2017).

Immediately thereafter, on February 16, 2017, counsel for Cactus Canyon, via email, objected to the Secretary’s motion as untimely, and expressed a desire to proceed with the scheduled hearing.

The 25 day deadline provided in Rule 67(a) for filing motions for summary decision in advance of a scheduled hearing is not jurisdictional. Rather, Commission Rule 55 authorizes its judges to render decisions that are required to regulate the course of proceedings. 29 C.F.R. §

2700.55. Disposition by summary decision, if appropriate, will promote judicial efficiency and preserve the limited resources of this Commission.

In order to determine if summary decision is appropriate, Cactus Canyon may avail itself of the provisions of Rule 67(d), which provide that oppositions to motions for summary decision must be supported by affidavits identifying genuine issues of disputed material facts that necessitate a hearing. If an opposition is filed, the undersigned will consider the affidavits relied upon in support of the parties' positions and take actions in furtherance of these proceedings. 29 C.F.R. § 2700.67(f).

ORDER

In view of the above, **IT IS ORDERED** that the scheduled March 7, 2017, hearing **IS CONTINUED** without date to allow for consideration of the Secretary's Motion for Summary Decision. **IT IS FURTHER ORDERED** that any opposition to the Secretary's motion should be filed by Cactus Canyon **on or before March 10, 2017**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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February 22, 2017

BING MATERIALS

Contestant,

v.

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

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

v.

BING MATERIALS,
Respondent.

CONTEST PROCEEDINGS

Docket No. WEST 2016-514-RM
Order No. 8989250; 05/11/16

Docket No. WEST 2016-515-RM
Order No. 8989249; 05/11/16

Docket No. WEST 2016-516-RM
Order No. 8989248; 05/10/16

Docket No. WEST 2016-517-RM
Citation No. 8989247; 05/10/16

Mine: Bing Materials
Mine ID: 26-00430

CIVIL PENALTY PROCEEDING

Docket No. WEST 2017-0068
A.C. No. 26-00430-422508

Mine: Bing Materials

ORDER DENYING MOTION TO COMPEL

Before: Judge Moran

On January 30, 2017, Respondent Bing Materials (hereinafter “Bing” or “Respondent”) filed a Motion to Compel the Secretary to answer the Respondent’s First Set of Interrogatories (“First Interrogatories”) in this matter. On February 6, 2017 the Secretary filed a response in opposition. For the reasons that follow, as Respondent’s First Interrogatories makes 42 inquiries, not the presumptive 25, the Respondent’s motion is **DENIED**.

Background

For context, the Court briefly summarizes the four matters at issue in this litigation. Each matter involved the same mine, “Bing Materials,” and each was issued by the same MSHA Inspector, Kimberly Hakala. In sequence, they began with a section 104(d)(1) citation issued on May 10, 2016, Citation No. 8989247, involving numerous alleged safety defects on a crane, in violation of 30 C.F.R. §56.14100(b). Next was a section (d)(1) order, No. 8989248 issued the same day, shortly after the aforementioned citation. That Order alleged a failure to provide new task training for the operator of the same crane identified in the (d)(1) citation, in violation of 30 C.F.R. §46.7(a). The following day, May 11, 2016, Bing was issued another (d)(1) order, No. 8989249, alleging a violation of the standard prohibiting intoxicating beverages in or around the mine’s office, in violation of 30 C.F.R. §56.20001. Later that same day, a third (d)(1) order was issued to the mine, Order No. 8989250, alleging that the mine owner had not received required new miner training, per 30 C.F.R. §46.5(a).

Respondent served the Secretary with its First Interrogatories regarding Penalty Docket No. WEST 2017-0068 on December 5, 2016.¹ The First Interrogatories presents 42 questions.² The Secretary indicated that it did not intend to answer more than 25 interrogatories on the

¹ This Order only addresses the “First Interrogatories,” which were filed in connection with WEST 2017-0068. On January 7, 2017, the Respondent then separately served the Secretary with its First Set of Interrogatories *for each of the associated contest proceedings*; 18 interrogatories for Contest Docket No. WEST 2016-0514-RM; 19 interrogatories for Contest Docket No. WEST 2016-0515-RM; 12 interrogatories for Contest Docket No. WEST 2016-0516-RM; and 19 interrogatories WEST 2016-0517-RM. The four contests involve the same citation and orders set forth in the civil penalty proceeding and the contest interrogatories appear to be essentially redundant to those presented in the “First Interrogatories” for the civil penalty proceeding addressed in this Order, WEST 2017-0068. On January 18, 2017, the Secretary filed a Motion to Consolidate the four contest proceedings and the civil penalty proceeding, as set forth in the caption. An Order, granting consolidation, was issued by the Court on February 3, 2017.

² A few of the 42 interrogatories have subparts. In calculating the limit of 25 written interrogatories, discrete subparts are counted as separate questions. The term “discrete subparts” has been interpreted “as meaning that ‘interrogatory subparts are to be counted as one interrogatory ... if they are logically or factually subsumed within and necessarily related to the primary question.’” *Safeco of America*, 181 F.R.D. 441 (1998) quoting *Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684, at 685 (D.Nev.1997) (“*Kendall*”), in turn quoting *Ginn v. Gemini, Inc.* 137 F.R.D. 320, 322 (D.Nev.1991). Another expression of the test is “to examine whether the first question is primary and subsequent questions are secondary to the primary question. Or, can the subsequent question stand alone? Is it independent of the first question?” *Kendall* at 685.

grounds that parties before the Commission are presumptively limited to serving 25 interrogatories upon an opposing party by Rule 33(a)(1) of the Federal Rules of Civil Procedure.³ Although the parties attempted to resolve their discovery dispute through a discussion on January 6, 2017, they have not been able to reach an agreement on this matter. The Secretary has objected to each of Bing's interrogatories, employing identical language in summarizing its dispute – that parties are limited to 25 interrogatories, absent the opposing party's agreement to answer more than that number or upon leave of the Court allowing additional interrogatories, neither of which has occurred in this litigation.

As noted by both parties, the Commission's Procedural Rules do not directly address the issue of if and when a party may serve its opponent with more than 25 interrogatories. Absent clear direction from the Procedural Rules, the Court is "guided so far as practicable by the Federal Rules of Civil Procedure." 29 C.F.R. § 2700.1(b). As the Respondent acknowledges, Procedural Rule 1(b) affords the Commission discretion to decide the extent to which it will be guided by the Federal Rules of Civil Procedure. Respondent's Motion at 4, citing *Rushton Mining Co.*, 11 FMSHRC 759, 765 (May 1989). In its Order in *Kirk Fenoff*, this Court addressed a similar motion from a party seeking to compel a response to more than 25 interrogatories. *Kirk Fenoff & Son Excavating*, 36 FMSHRC 3339 (Dec. 2014) (ALJ Moran). In that instance, the Court found that the moving party must present "a particularized need for each additional interrogatory beyond the permitted maximum of 25." *Id.* at 3343. This showing is required to balance the moving party's interest in broad disclosure against the countervailing considerations of undue burden, expense, or delay.

Bing alleges that *all* 42 interrogatories are "warranted" on the basis that the citations and orders at issue were designated by MSHA as S&S, high negligence, and reasonably likely to lead to a fatal injury, making these "not run-of-the-mill enforcement actions." Respondent's Motion to Compel at 5-6. The Court is not persuaded by Bing's attempt to differentiate the circumstances in *Kirk Fenoff* from those at issue here.⁴ The designations it refers to are not unusual in citations or orders issued under the Mine Act. The Respondent may not gain a "blanket" approval of some 17 additional interrogatory questions with vague and generalized assertions of necessity.

³ F.R.C.P. Rule 33, "Interrogatories to Parties," provides in relevant part, "Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2)."

⁴ As the Secretary correctly points out and, as the summary above notes, the four alleged violations at issue in these consolidated cases are not all factually independent from one another. Although they do allege violations of different standards under the Mine Act, the Secretary has asserted that there will likely be common issues of fact because the alleged violations concern the same mine, the same management, and a single inspection that took place during two consecutive days in May 2016. There is no basis, if Respondent is suggesting it, that 25 interrogatories may be propounded for each citation or order.

On the topic of burden, Bing alleged that the Secretary will not face an undue burden if required to respond to its interrogatories — because the Secretary has had notice of Bing’s intention to contest the four citations and orders at issue for several months. The Secretary replied that answering all of the interrogatories will require a duplicative effort on the part of MSHA Investigator Hakala, who will soon be deposed on the same subject matter at issue in the interrogatories. Secretary’s Response to Bing Materials’ Motion to Compel at 9. Further, *the extent of time that has elapsed since the Secretary had notice of the Respondent’s intention to contest the enforcement actions at issue* is not a recognized basis for an exception to the presumptive 25 interrogatory limit.

The procedure to be employed is for the Respondent to identify its 25 questions by interrogatory and then await the responses to those. Thereafter, upon evaluating the responses, if the Respondent believes it is warranted, it may seek leave to propound additional interrogatories. In that event the Secretary will then have an opportunity to respond to such requests and the Court will then rule upon those issues.

Accordingly, for the reasons stated, the Respondent’s Motion is **DENIED**.

So **ORDERED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 22, 2017

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

v.

CONSOLIDATION COAL COMPANY,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2015-509
A.C. No. 46-01968-374332

Docket No. WEVA 2015-632
A.C. No. 46-01968-377533

Mine: Blacksville No. 2

ORDER

Before: Judge Feldman

The captioned matters are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”), 30 U.S.C. § 815(d). A hearing is scheduled for March 7, 2017, in the vicinity of Morgantown, West Virginia.

These matters concern two 104(d)(2) orders. Order No. 8059209 in Docket No. WEVA 2015-632 alleges extensive accumulations of loose coal and coal fines, many of which were in contact with turning rollers, in violation of the mandatory standard in 30 C.F.R. § 75.400. The Secretary has designated Order No. 8059209 as a repeated flagrant violation under section 110(b)(2) of the Mine Act.¹ Additionally, Order No. 8059212, which has not been designated as flagrant, alleges that the Respondent failed to conduct an adequate pre-shift examination relevant to the accumulations cited in Order No. 8059209.

¹ Section 110(b)(2) provides:

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

30 U.S.C. § 820(b)(2) (emphasis added).

The Secretary relies on three alleged predicate 104(d) orders contained in Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, in support of his repeated flagrant designation in Order No. 8059209. However, the Secretary does not assert that these alleged predicate violations are themselves flagrant in nature.

On May 3, 2016, I issued a decision in *Oak Grove Resources, LLC*, 38 FMSHRC 957 (May 2016) (ALJ), which held, given the Secretary's acknowledgment that a violation cannot be elevated to a flagrant designation based solely on a history of violations, that alleged predicate violations, alone, are not dispositive of the question of whether a cited condition is properly designated as flagrant. *Id.* at 960-64. Consequently, on June 14, 2016, Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, were severed from the captioned proceedings in order to focus on whether Order No. 8059209 satisfies the statutory requirements for a flagrant designation.²

The Commission subsequently identified separate "narrow" and "broad" analyses for evaluating repeated flagrant designations. *The American Coal Co.*, 38 FMSHRC 2062 (Aug. 2016). Although the Commission addressed the criteria for establishing a repeated flagrant designation under its "narrow" approach, the Commission declined to specify the criteria relevant to its "broad" approach with respect to a history of violations. *Id.* at 2066, 2082.

During a February 21, 2017, conference call, the parties were advised that the scheduled March 7 hearing would continue to be limited to the "narrow" analysis outlined by the Commission in *American Coal*. In response, the Secretary's counsel expressed concern that this limitation would preclude her from introducing evidence regarding the Commission's alternative "broad" approach analysis.

² Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473 are currently stayed pending disposition of the captioned proceedings.

ORDER

IT IS ORDERED that the scheduled March 7, 2017, hearing will be limited to evidence relevant to the “narrow” analysis. However, **IT IS FURTHER ORDERED** that the parties will be provided the opportunity to address in their post-hearing briefs whether Consolidation Coal Company’s relevant history of section 75.400 violations supports the alleged repeated flagrant designation under the “broad” approach.³

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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³ Specifically, the parties will be requested to address whether the 147 citations and orders issued for violations of section 75.400 at the Blacksville No. 2 Mine in the two years preceding the July 30, 2014, issuance of Order No. 8059209, including 15 citations and orders issued within 90 days prior to July 30, 2014, satisfy the Secretary’s repeated flagrant designation under the “broad” approach.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 22, 2017

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

v.

ARJ CONSTRUCTION COMPANY INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. YORK 2016-103
A.C. No. 18-00748-409912

Mine: Taylor # 1

ORDER OF DEFAULT AND ORDER TO PAY

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

At issue in this docket is one citation with a total proposed penalty of \$154.00. The Petition was filed on July 27, 2016. On August 10, 2016, the docket was assigned to me and designated for simplified proceedings under the Commission’s procedural rules at 29 C.F.R. Part 2700, Subpart J. Pursuant to the procedural rules, within 45 days after a case has been designated for simplified proceedings, the parties must exchange any information and materials which may be used to support their claims or defenses and must “engage in a discussion to explore the possibility of settlement” before a prehearing conference is held by the judge. 29 C.F.R. § 2700.105, § 2700.106(a). Between October and December 2016, the Solicitor provided several status updates stating that she had duly provided disclosures to Respondent’s counsel but had never heard back from him.

I held a prescheduled conference call on December 6, 2016 in an attempt to discuss the status of this case and schedule a hearing, if necessary. Counsel for the Respondent failed to appear despite having received two emails stating the date and time for the call and directing him to appear. After missing the call, counsel for the Respondent phoned my law clerk and stated that his client was willing to pay the \$154.00 penalty for the one citation at issue in this docket. My clerk told Respondent’s counsel that he needed to contact opposing counsel to confirm the settlement. However, he never contacted opposing counsel.

A last attempt was provided to Respondent’s counsel to comply with my previous orders by scheduling a conference call on February 3, 2017, at which time he again failed to appear.

On February 6, 2017, I issued an Order to Show Cause ordering Respondent to explain in writing within ten days why an order of default should not be issued against it due to its failure to comply with the procedural rules and with my previous orders to appear on conference calls. Respondent’s counsel signed for receipt of the show cause order on February 9, 2017. However, he has failed to submit a written response.

The Commission's procedural rules permit a finding of default and summary disposition of a case after issuance of a show cause order when a party has failed to comply with a judge's orders. 29 C.F.R. § 2700.66.

WHEREFORE, I find Respondent to be **IN DEFAULT**.

Respondent's notice of contest and request for hearing are **DISMISSED**. Respondent is hereby **ORDERED** to pay a total penalty of \$154.00 within thirty (30) days of the date of this Order.¹

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

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¹ Checks or money orders should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

February 23, 2017

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

v.

ARMSTRONG COAL COMPANY INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. KENT 2016-44
A.C. No. 15-19217-390945

Mine: Midway

ORDER CONTINUING STAY

Before: Judge Feldman

The captioned civil penalty proceeding is before me upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 815(d). The Secretary of Labor seeks to impose a civil penalty of \$8,893.00 for 104(d)(1) Citation No. 9042468, the single citation at issue, which alleges that Armstrong Coal Company Inc. (“Armstrong”) violated the mandatory standard in 30 C.F.R. § 77.405(b). This mandatory standard prohibits the performance of work under raised equipment that has not been securely blocked into position. Citation No. 9042468 was issued on February 20, 2015, after the Mine Safety and Health Administration (“MSHA”) determined that a hoisted dragline walking shoe bull gear was not secured during repairs.

In the interest of judicial economy and the Commission’s limited resources, the captioned matters were stayed on March 9, 2016, based on the parties’ representation that the Secretary had initiated an investigation to determine whether to initiate a personal liability case pursuant to the provisions of section 110(c) of the Mine Act. The stay was to be lifted upon completion of the Secretary’s investigation.

Given the Secretary’s failure to complete his section 110(c) investigation during the six months following the issuance of the stay, on September 14, 2016, an order was issued requiring the Secretary to advise, on or before November 10, 2016, whether he had initiated a 110(c) proceeding for consolidation with the captioned civil penalty matter, or alternatively, whether he had declined to bring any relevant 110(c) actions.

In response to the September 14 order, on November 7, 2016, the Secretary reported that he had yet to decide whether to initiate a relevant section 110(c) proceeding. The Secretary's response was construed as a request to schedule the captioned civil penalty case for hearing without regard to whether a relevant 110(c) case would ultimately be filed.¹

On January 30, 2017, Armstrong, citing judicial economy, sought continuation of the stay, arguing that "the same issues will be required to be tried multiple times" if a 110(c) action is brought subsequent to the scheduled hearing. *Mot. to Stay*, at 1 (Jan. 30, 2017).

The reasonable time period for filing a section 110(c) action has been previously addressed in a Commission proceeding:

Section 105(a) of the Act provides that "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator ... of the civil penalty proposed to be assessed ... for the violation cited" Section 110(c) is silent regarding when an individual respondent must be notified of a proposed penalty assessment. However, since penalty assessments against individuals brought under § 110(c) arise from the same inspections as penalty assessments against operators, it would logically follow that the reasonable time requirement [referred to in] § 105(a) should apply to penalty assessments brought under § 110(c).

Brinson, et al., employed by Kentucky-Tennessee Clay Co., 35 FMSHRC 1463, 1465 (May 2013) (ALJ Tureck) (citations omitted). Thus, it has been held that the provisions of section 105(a), and its apparent applicability to section 110(c) cases, require the Secretary to file a petition for assessment of civil penalty within a "reasonable time" *after termination of an investigation*. However, the Secretary has identified 18 months as the operative reasonable time period for filing civil penalty petitions in 110(c) cases, computed from the date of the subject citation or order, rather than the date of the completion of the 110(c) investigation. *See* I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, § 110(c) (2012).

Specifically, MSHA's Program Policy Manual provides:

Investigative timeframes have been established to help ensure the timely assessment of civil penalties against corporate directors, officers, and agents. Normally, such assessments will be issued *within 18 months from the date of issuance of the subject citation or order*. However, if the 18 month timeframe is exceeded, TCIO will review the case and decide whether to refer it to the Office of Special Assessments for penalty proposal. In such cases, the referral

¹ This Order supersedes the November 14, 2016, Order Lifting Stay and Notice of Hearing.

memorandum to the Office of Special Assessments will be signed by the Administrator.

Id. (emphasis added). Clearly, the Secretary cannot escape the adverse effects of laches if he unreasonably delays completion of an investigation for an exceptionally inordinate period of time.

Two years have now elapsed since the underlying citation was issued. I await the Secretary's determination as to whether an agent(s) of the corporate mine operator "knowingly authorized, ordered, or carried out" a violation of section 77.405(b) by permitting maintenance to be performed on raised equipment without it being properly secured. *See* 30 U.S.C. § 820(c). The Secretary has had ample time to arrive at this rather straightforward determination. Any significant further delay compromises the due process rights of potential 110(c) respondents given the potential unavailability and fading memories of witnesses.

The D.C. Circuit Court of Appeals addressed the consequences of the Secretary's delay in filing civil penalty petitions in *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005). The court determined that the "reasonable time" provision for filing petitions for civil penalty in the Mine Act is intended to "spur the Secretary to action," rather than to routinely confer rights on litigants that will limit the scope of the Secretary's authority. *Id.* at 261.

"Spur the Secretary to action." That is what I am seeking to accomplish. The Secretary's discretion in timely completing his investigation is not unfettered. The Commission long ago recognized that its "limited resources should [not] be squandered on separate proceedings involving common parties and to a great extent common facts and issues." *Energy Fuels Corp.*, 1 FMSRHC 299, 319 (May 1979) (dissenting opinion).² Consequently, during a February 16, 2017, conference call with the parties, I ordered that the Secretary must advise **on or before May 24, 2017** (27 months after the issuance of the underlying citation) whether he has *initiated* a relevant 110(c) proceeding, or that he has declined to do so. To ensure the efficient expenditure of the Commission's resources, during the telephone conference, I advised the parties that,

² *Energy Fuels* concerned a mine operator's right to contest a violation prior to issuance of a petition for civil penalty. In such instance, the doctrine of *res judicata* would apply to a subsequent civil penalty proceeding, thus eliminating any duplication of efforts. Here, the principle of collateral estoppel would not preclude a 110(c) litigant's right to a *de novo* 110(c) hearing despite a prior adjudication of the civil penalty proceeding brought against the mine operator.

should the Secretary fail to meet this deadline, I will reluctantly entertain a motion to dismiss the *captioned proceeding* against Armstrong for failure to prosecute.

In view of the above, **IT IS ORDERED** that Armstrong's motion to stay **IS GRANTED** and that the hearing in the captioned proceeding **IS CONTINUED** without date.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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